

NAVY-MARINE CORPS TRIAL JUDICIARY  
WESTERN JUDICIAL CIRCUIT

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U N I T E D S T A T E S	)	GENERAL COURT-MARTIAL
	)	
v.	)	JUDICIAL ORDER:
	)	(FACT-FINDING AND LEGAL BRIEFS
CALEB HOHMAN	)	ORDERED REGARDING CAPTAIN
XXX XX 6203	)	ROBERT F. MUTH'S
SERGEANT	)	REPRESENTATION OF THE ACCUSED)
U.S. MARINE CORPS	)	
	)	21 July 2010

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1. Background: On 9 July 2010 an Article 39a, UCMJ hearing was held in accordance with an earlier Judicial Order issued in this case on 5 June 2010. The purpose of the 9 July Article 39a session was to develop further facts regarding the scope of the accused's right to have Captain Muth, USMCR, the accused's detailed defense counsel, present for trial. Captain Muth had been properly detailed to this case and had participated substantially in the defense's case development, but subsequently departed active duty. Applying the guidance issued by our appellate court in *United States v. Hutchins*, 68 MJ 623 (N.M.Ct.Crim.App.2010), the 9 July 39a session sought to determine whether Captain Muth could be ordered to return to active duty; and if not, whether these proceedings must be abated or whether the facts in this case can be sufficiently distinguished from those in *Hutchins* to allow the case to proceed without him.

2. At the 9 July 39a session, the government proffered that a significant amount of time had been spent researching possible ways of returning Captain Muth to active duty, and that the ultimate conclusion was that Captain Muth could only be returned to active duty as a defense counsel in this case if he voluntarily accepted orders. While the defense submitted a brief on the issue and the government made proffers, no evidence was presented on why the Marine Corps did not grant then Captain Muth's second request for an extension on active duty made on 23 November 2009. Captain Muth did not appear at the 9 July 2010 hearing, and neither the government nor any of the defense counsel were successful in contacting him prior to the hearing to determine whether he would be willing to accept orders returning him to active duty. The government indicated that it had placed two calls the day prior to the hearing, and the defense had made none.

3. During the week following the 9 July hearing, Captain Muth sent an email to the military judge (copied to counsel) detailing

his position. Captain Muth provided that he is now engaged in the practice of law as a civilian attorney, and a return to active duty would be intolerably disruptive to his livelihood and civilian practice, and would interfere with his representation of civilian clientele. Captain Muth stated essentially that he does not desire to return to active duty to represent Sergeant Hohman, though he would represent him in his civilian capacity as long as the government pays him his current hourly rate of \$300.00 per hour. Captain Muth took exception to the fact that the government, after denying his second request to extend on active duty to continue his representation of Sergeant Hohman, now expects him to abandon his current civilian clients and return to active duty.

4. Although there are some facts on the record indicating the options with this case going forward, there is no evidence in the record indicating why Headquarters, U.S. Marine Corps denied Captain Muth's second extension request and whether that reason amounted to good cause for excusal of defense counsel. As the Hutchins court stated, "...good cause must be assessed on a sliding scale which considers the contextual impact of the severance on the client... Excusal for good cause by the military judge should...be authorized only in cases where there exists truly extraordinary circumstances rendering virtually impossible the continuation of the established relationship." The record is also lacking regarding Captain Muth's significance to this case between 17 April and 1 December 2009. Was his involvement similar to that of Captain Bass in Hutchins, i.e., dismissal on the eve of trial nearly a year after working on the case, or was it closer to the denied IMC request in United States v. Allred, 50 MJ 795 (N.M.Ct.Crim.App.1999)? Lastly, as Captain Muth's post-39a session email indicates, the record does not currently have all relevant information developed regarding counsel's involvement, history, and desires regarding return to active duty.

5. At this point, the court therefore finds that the facts are not sufficiently developed to make a ruling on this issue. Given the fact that this ruling could amount to a case dispositive decision, the following actions are hereby ordered:

- a) Both sides shall submit written briefs to the court by 2 August 2010 addressing whether the circumstances in this case support excusal of Captain Muth for good cause shown under R.C.M. 506(c) and Hutchins; and if not, the proper remedy.
- b) An article 39a session will be held on 6, 7, or 9 August to further develop the facts surrounding the reasons for the denial of Captain Muth's second request to remain on active

duty in this case, the scope of his involvement in the case, whether the facts support a finding of excusal for good cause, and if not, the proper remedy. I will give counsel a chance to select a mutually agreeable date among the three dates offered, and if that fails, I will order a date.

- c) Captain Muth shall appear in person, by telephone, or by video teleconference. I expect counsel to fully develop his involvement with the case, and his desires regarding return to active duty at this point.
- d) Evidence shall be presented as to the reasons the Marine Corps denied Captain Muth's second request for extension on active duty.
- e) Additional evidence is also invited as to the government's ability to involuntarily recall Captain Muth to active duty.
- f) Counsel are hereby cautioned that this order does not in any way release them from the currently ordered trial milestones and dates. The court does not view this issue as raising any grounds which might necessitate a continuance.

So ordered,

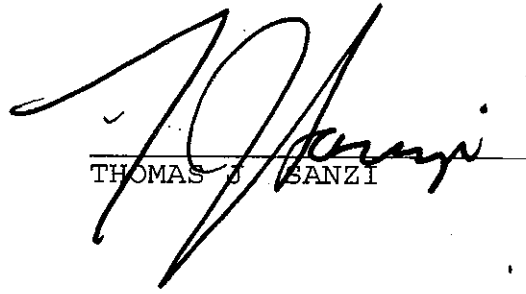
Date:

/s/

\_\_\_\_\_  
THOMAS J. SANZI

So ordered,

Date: 21 July 2020



THOMAS J. SANZI

## Kunce Capt Lucas Tyree

---

**From:** Joseph M. Preis [jpreis@gaplegal.com]  
**Sent:** Tuesday, August 03, 2010 7:37 PM  
**To:** Sanzi LtCol Thomas J  
**Cc:** Gannon Maj Nicholas L; jhlowIV@aol.com; joseph@jhllaw.com; Kunce Capt Lucas Tyree; warlawyer@aol.com  
**Subject:** Sgt Hohman  
**Attachments:** image001.png



image001.png (15 KB)

LtCol Sanzi and Counsel,

Although Mr. Robert Muth has been incredibly reasonable, accessible and willing to spend his personal time addressing the Government's concerns with respect to the Sgt Hohman matter, the Government today returned the favor by accusing Mr. Muth of criminal conduct, which he categorically denies. As a result, the Government has unfortunately and necessarily injected 5th Amendment privilege considerations into any discussion of Mr. Muth's testimony, in addition to the attorney-client privilege issues that already existed. To that end, as a result of the Government's accusations; Mr. Muth is now necessarily represented by counsel and all future communication with Mr. Muth must go through me from this point forward.

In addition to the numerous issues that have unfortunately been created by the Hutchins opinion and the Government's interpretation thereof, kindly help me understand what is really trying to be achieved here. From my reading of the relevant email traffic, it would appear as though the Government is trying to compel Mr. Muth to testify under oath about communications with and/or about his former client which, as we are all aware, are absolutely privileged. Before we go any further down this path, please immediately furnish a waiver signed and dated by Sgt. Hohman and both of his current counsel. If such a waiver exists, I will evaluate it and determine whether or not I need to cross-examine Sgt. Hohman concerning his understanding of the waiver and whether or not it was signed voluntarily. Until both of those things happen, my client will be unable to testify about any protected communications he may or may not have had with or about Sgt. Hohman.

With respect to the Court's Order dated July 21, 2010, I would respectfully submit that the resolution of the two questions contained in paragraph 5 c) do not require Mr. Muth's testimony. First, counsel will not be able to fully develop Mr. Muth's "involvement with the case" absent a satisfactory waiver from Sgt Hohman. Second, despite the Government's strong arm tactics, Mr. Muth is not interested in voluntarily returning to active duty and does not "desire" to return to active duty involuntarily which we assume would have happened by now if at all possible.

Of perhaps more pressing concern is what appears to be an orchestrated pattern of harassment and defamation by the Government against Mr. Muth. To be sure, by its communications, accusations and veiled threats to date, the Government appears to be more interested in destroying Mr. Muth than it is in resolving the situation that it created by denying my client's multiple extension requests while on active duty. Giving the Government the benefit of the doubt and assuming that a very junior lawyer researched and drafted the Motion filed today, I would invite the Government to review the facts, review the law and more importantly, reevaluate the accusations of criminal misconduct against my

client as 18 USC 203 does not even remotely apply to the facts here. On behalf of Mr. Muth, I would ask the Government to withdraw its accusations of criminal misconduct, refile an amended motion and move forward with the matter at hand with its ethical and legal responsibilities in mind.

Joseph M. Preis

Attorney at Law

Godes & Preis, LLP

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-----Original Message-----

From: Gannon Maj Nicholas L [mailto:[nicholas.gannon@usmc.mil](mailto:nicholas.gannon@usmc.mil)]

Sent: Friday, July 16, 2010 10:12 AM

To: [thomas.sanzi@navy.mil](mailto:thomas.sanzi@navy.mil)

Cc: Sanzi LtCol Thomas J; Kunce Capt Lucas Tyree; Robert F. Muth; [jhlowIV@aol.com](mailto:jhlowIV@aol.com); [joseph@jhllaw.com](mailto:joseph@jhllaw.com)

Subject: FW: Sgt Hohman Matter

Sir,

APPELLATE EXHIBIT   xxxvi    
PAGE   2   OF   6

I just received a message that you were trying to contact me to ensure that you received all email from Mr. Muth. The message I received indicated that you were looking for an email that was sent out last night. I did not receive any traffic from Mr. Muth last night, but I did receive the below email on Wednesday, 14 July 2010. I believe that Mr. Muth sent this before you went to Bremerton, but if not Sir, it is forwarded for your information.

I responded that same day that we were researching the feasibility of Mr. Muth's proposal.

Also Sir, I am no longer at LSST-E; the best number to reach me at is my blackberry: 760-208-7090. Please don't hesitate to contact me if you need any additional information Sir.

Very respectfully,

Maj Gannon

-----Original Message-----

From: Robert F. Muth [mailto:rmuth@gaplegal.com]

Sent: Wednesday, July 14, 2010 16:27

To: Sanzi LtCol Thomas J

Cc: Gannon Maj Nicholas L; jhlowIV@aol.com; joseph@jhllaw.com; Kunce Capt Lucas Tyree

Subject: Sgt Hohman Matter

Good Afternoon LtCol Sanzi,

I am writing in response to Maj Gannon's email of this date which I was not copied on, but which was ultimately forwarded to me by defense counsel. Maj Gannon and I did speak yesterday during which I asked him a very specific question concerning my ECC/EOS date and explained that upon receiving the answer, I would consider the issue and get back to him. This email is intended to convey a proposed solution to the problem created solely by the Government when HQMC refused to extend my active service beyond 1 Dec 2010, and compounded by the recent Hutchins opinion.

As you may recall, I repeatedly requested to extend my active service in order to complete my representation of clients, including Sgt Hohman, that I had remaining at the time of my EAS. I note that during my remaining months on active duty the Government saw fit to activate numerous Reserve Marine Officers to prosecute service members that I was representing, however, they were unwilling to extend my active service beyond 1 December 2009 to defend Marine clients. My requests to extend beyond 1 December 2009 were denied

outright without explanation. I therefore returned to civilian life and began my civilian practice in earnest.

I am now more than seven months removed from my EAS. I have moved with my family to a new home almost 100 miles away and am gainfully employed with the law firm of Godes & Preis, LLP. I have new clients to whom I am ethically obligated to represent to the best of my abilities. I am also now less than one month from the end of my EOS and I have already submitted my request to resign my commission. In reaction to the Hutchins opinion, which this Court has already drawn a distinction between my actions and those of the defense counsel in that case, the Government is now asking me to abandon my current clients and practice in order to rectify a situation wholly of its own creation when it forced me to sever the ACR with Sgt Hohman. By voluntarily returning to active duty at this time, I would necessarily be abandoning my current clients, which is unacceptable.

Notwithstanding, there is a scenario under which I could represent Sgt Hohman without abandoning my civilian clients. That is, rather than going on active duty to represent a single client at a tremendous cost to the Government, and to the detriment of my civilian clients, I am willing to represent Sgt Hohman just like any other current client, and would only bill the Government for time actually spent in doing so. My hourly rate is \$300.00 which is far less than it would cost the Government to return me to active duty. If the Government is willing to pay for this representation (similar to how many public defenders are paid in the civilian legal world) I would be able to represent Sgt Hohman. While I appreciate the fact that this might be an unusual scenario, it is a good faith attempt on my part to facilitate a solution to this Government caused problem. I assume that if the Government were capable of involuntarily recalling me, it would have done so already.

I look forward to a response.

Semper Fidelis,

Robert F. Muth



Robert F. Muth

Attorney at Law

Godes & Preis, LLP

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UNITED STATES MARINE CORPS  
LEGAL SERVICES SUPPORT TEAM "C"  
U.S. MARINE CORPS FORCES CENTRAL COMMAND  
BOX 555607  
CAMP PENDLETON, CALIFORNIA 92055

IN REPLY REFER TO:  
5811  
LSST-C  
29 Jul 10

From: Capt Jessica G. Van Norman, U.S. Marine Corps  
To: Mr. Robert F. Muth

SUBJ: FEDERAL SUBPOENA TO APPEAR AS A WITNESS IN THE CASE OF UNITED STATES V. SERGEANT CALEB P. HOHMAN, U.S. MARINE CORPS

Dear Mr. Muth:

Enclosed is a Federal Subpoena (DD Form 453) requiring you to appear as a witness in the Article 39(a) session of U.S. v. Sergeant Caleb P. Hohman, U.S. Marine Corps. This subpoena requires you to appear and testify at the John F. Blanche Memorial Court Room (JBM), Building 22161, Second Floor, Marine Corps Base, Camp Pendleton, California, at 10:30 a.m. on 21 August 2010.

Please contact me at 760-725-8775 if you have any questions.

Sincerely,

*Jessica Van Norman*

J. G. VAN NORMAN

Encl: (1) Subpoena (DD Form 453)  
(2) Limited ACR Waiver

Copy to:  
File

SUBPOENA

The President of the United States, to Mr. Robert F. Muth  
(Name and Title of Person being Subpoenaed)

You are hereby summoned and required to appear on the 21 day of August, 2010, at 1030

o'clock A.M., at MCB Camp Pendleton, (before Lieutenant Colonel Thomas Sanzi  
(Place of Proceeding) (Name and Title of Deposition Officer)

designated to take your deposition) (a Article 39(a) session court-martial of the United States) (a court of inquiry),

appointed by General Courts Martial Convening Authority #01-06 MajGen Waldhauser, dated 2 October 2006,  
(Identification of Convening Order or Convening Authority)

, to testify as a witness in the matter of United States v. Sergeant Caleb Hohman  
(Name of Case)

(and bring with you \_\_\_\_\_).  
(Specific Identification of Documents or Other Evidence)

Failure to appear and testify is punishable by a fine of not more than \$500 or imprisonment for a period not more than six months, or both. (10 U.S.C. §847). Failure to appear may also result in your being taken into custody and brought before the court-martial ( U.S. v. C. P. Hohman ) under a Warrant of Attachment (DD Form 454).

Manual for Courts-Martial R.C.M. 703(e)(2)(G).

Bring this subpoena with you and do not depart from the proceeding without proper permission.

Subscribed at MCB Camp Pendleton this 29 day of July, 2010.

N. L. Gannon  
(Signature (See R.C.M. 703 (e)(2)(C)))

The witness is requested to sign one copy of this subpoena and to return the signed copy to the person serving the subpoena.

I hereby accept service of the above subpoena. \_\_\_\_\_  
Signature of Witness

NOTE: If the witness does not sign, complete the following:

Personally appeared before me, the undersigned authority, \_\_\_\_\_,

who, being first duly sworn according to law, deposes and says that at \_\_\_\_\_,

\_\_\_\_\_ he personally delivered to \_\_\_\_\_ in person a duplicate of this subpoena.

\_\_\_\_\_  
Grade Signature

Subscribed and sworn to before me at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_

\_\_\_\_\_  
Grade

\_\_\_\_\_  
Official Status Signature

APPELLATE EXHIBIT XXXVII  
PAGE 2 OF 11

GENERAL COURT-MARTIAL  
UNITED STATES MARINE CORPS  
WESTERN JUDICIAL CIRCUIT

UNITED STATES )

v. )

CALEB P. HOHMAN )

Sergeant )

XXX XX 6203 )

U.S. Marine Corps )

Limited Waiver of the  
Attorney Client Privilege

1. I, Sergeant Caleb P. Hohman USMC, after consultation with my detailed defense counsel, Captain Lucas T. Kunce USMC, with full knowledge of the consequences of doing so, hereby knowingly, consciously, and voluntarily waive my Military Rule of Evidence 502 attorney-client privilege with respect to my communications with Mr. Robert F. Muth, to examine the facts and circumstances surrounding the individual roles, duties, and assignments of Mr. Muth prior to his departure from my defense team and the United States Marine Corps Active Duty service on or about 1 December 2009 and the issues/questions stated by the Military Judge, Lieutenant Colonel Thomas J. Sanzi in his order dated 21 July 2010. This waiver of my attorney client privilege relates to any discussion, guidance or advice regarding my representation, in addition to the impact of Mr. Muth's departure from my defense team to include the individual roles, duties, and assignments of civilian defense counsel and detailed military defense counsel. By signing this limited waiver of privileged attorney client communications, I am authorizing Mr. Muth to testify under oath about his actions and efforts in contributing to my defense. This waiver extends to any conversations between Mr. Robert F. Muth, Capt Lucas Kunce USMC, and Mr. Joseph Low, as well as the Regional Defense Counsel-West, Lieutenant Colonel Patricio A. Tafoya USMC, regarding the issues/questions stated by the Judicial Order dated 21 July 2010.

2. The purpose of my limited waiver of the attorney-client privilege is to allow my detailed defense counsel, civilian counsel, the trial counsel, and/or military judge to question Mr. Muth regarding his role in representing me, in order to conduct the fact finding hearing ordered by the Military Judge on 21 July 2010.

\_\_\_\_\_  
C. P. HOHMAN

\_\_\_\_\_  
Date

\_\_\_\_\_  
R. F. MUTH  
Counsel

\_\_\_\_\_  
Date

APPELLATE EXHIBIT ~~XXVII~~  
PAGE 3 OF 11

ENCLOSURE (2)

**From** Please print and press hard  
**Date** 29 July 2010 **Sender's FedEx Account Number** 249 09741  
**Sender's Name** Capt Van Norman **Phone** (760) 725 8715  
**Company** LSSS, Legal Team Charlie  
**Address** Attn: Bldg 22185, 2nd Floor, Rm 215  
**City** Camp Pendleton **State** CA **ZIP** 92655

**Your Internal Billing References**  
 Rest 24 characters will appear on invoice. OPTIONAL

**To**  
**Recipient's Name** Robert Muth **Phone** (949) 682 6560  
**Company** Rodas & Preis, LLP  
**Recipient's Address** 800 Irvine Center Dr.  
 We cannot deliver to P.O. boxes or P.O. ZIP codes.  
**Address** Suite 1040  
 To request a package be held at a specific FedEx location, print FedEx address here.  
**City** Irvine **State** CA **ZIP** 92618



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 **FedEx First Overnight**  
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 Second business day. Thursday shipments will be delivered on Monday unless SATURDAY Delivery is selected.  
 **FedEx Express Saver**  
 Third business day. Saturday Delivery NOT available.  
 \* To most locations.

**4b Express Freight Service**  
 **FedEx 1Day Freight**  
 Next business day. Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.  
 **FedEx 2Day Freight**  
 Second business day. Thursday shipments will be delivered on Monday unless SATURDAY Delivery is selected.  
 **FedEx 3Day Freight**  
 Third business day. Saturday Delivery NOT available.  
 \* To most locations.

**5 Packaging**  
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 **FedEx Pak\***  
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 **FedEx Box**  
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 \* Declared value limit \$500.

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 **HOLD Saturday at FedEx Location**  
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**520**



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<p>Shipment Dates</p> <p>Destination</p> <p>IRV</p> <p>Signature Proof of Delivery ☺</p>		<p>Destination</p> <p>IRV</p> <p>Signature Proof of Delivery ☺</p>	
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APPELLATE EXHIBIT XXXVII  
 PAGE 5 OF 11



DEPARTMENT OF THE NAVY  
HEADQUARTERS UNITED STATES MARINE CORPS  
WASHINGTON, DC 20380-0001

MCO 1000.8  
MPC-44  
12 JUL 1994

\*\*NOTE: MCO 5300.3G was reidentified as MCO 1000.8  
by MCBUL 5215 of 30 Mar 00. Additionally, PCN was  
changed from 10207730000 to PCN 10200010200\*\*

MARINE CORPS ORDER 1000.8

From: Commandant of the Marine Corps  
To: Distribution List

Subj: FLEET ASSISTANCE PROGRAM (FAP)

Ref: (a) MCO P3000.13B, SORTS  
(b) MCO P5320.5E, PRCM  
(c) MCO 1001R.57  
(d) MCO 1001.55A  
(e) MCO 1510.39  
(f) MCO 1001R.56  
(g) MCO P1553.3, USMC UNIT TRNG MGT  
(h) MCO P1040.31G  
(i) MCO P1000.6F, ACTS MAN  
(j) MCO 1130.53L  
(k) MCO 1130.57F  
(l) MCO 1130.60E  
(m) MCO 7220.24M  
(n) MCO P3000.15A, MPR UDP SOP  
(o) JFTR, Vol. 1  
(p) MCO P1080.35H, PRIM

1. Purpose. To publish policy and guidance On the FAP to commanders at Marine Corps bases and stations that host tenant FMF units.

2. Cancellation. MCO 5300.3F.

3. Background. The FAP is a method by which the tenant FMF commanders and the host supporting installation commander agree to personnel requirements beyond the personnel capabilities of the host command. It is intended to provide the host command with sufficient manpower resources to accomplish current, new, or increased workload to support the tenant FMF commands. The agreement will stipulate those host manpower requirements that will be borne by the tenant FMF commands.

4. Information

a. The primary objective of the FAP is to augment the manpower resources of the host activity so that it may provide adequate support to its tenant FMF units without degrading the FMF's combat readiness.

b. A secondary objective of the FAP is to provide enhanced training opportunities for FMF Marines whose MOS could be put to better use in a garrison situation by the host commander. To facilitate accomplishment of this objective, FAP billets will be categorized as follows:



(1) Category 1. Billet requires specific MOS. Operational and training opportunities for individual MOS skill maintenance and improvement are found predominantly at the host command, with only limited opportunities at the tenant command. Tenant FMF units should support these identified FAP requirements to 100 percent of their assigned onboard strength in that MOS when the situation permits. Examples of billets in this category may include those in law enforcement, fire and rescue, weather forecasting, and air traffic control.

(2) Category 2. Billet requires specific MOS. Operational and training opportunities for individual MOS skill maintenance and improvement are equally available at both the host and tenant commands. Tenant FMF units should support the identified FAP billet requirements in proportion to their assigned onboard strength in that MOS when the situation permits. Examples of billets in this category may include those in motor transport, communications, and postal.

(3) Category 3. Any billet not in Category 1 or 2. Tenant FMF units should support these billets in proportion to their overall onboard strength when the situation permits. Examples of billets in this category may include those in range, recreation, and other support staff functions.

#### 5. Policy

a. The FAP will not alter the established mission of either the tenant FMF unit or the host supporting installation.

b. Combat readiness of FMF units remains the primary consideration.

c. Personnel provided to the host supporting installation will remain an integral part of their FMF unit, available for recall and immediate deployment with their FMF unit. For the purpose of this Order, deployment is considered to be associated with operational contingencies, major exercises, and the unit deployment program (UDP) - Commanders of both supported and supporting organizations must remain aware that certain support functions will be required while portions of the FMF unit are deployed. The manpower requirements to support this remaining workload should be taken into consideration and negotiated accordingly. Tenant FMF unit commanders will report and account for all FAP personnel in the Marine Corps Status of Resources and Training System (SORTS) per reference (a).

d. The host supporting installation commander will determine the total number of personnel and specific grade/MOS skills needed to perform the assigned mission using standards provided in reference (b) as a guide. Negotiations between the appropriate tenant FMF commander and the host supporting installation commander

\*\*NOTE: Formerly MCO 5300.3G, PCN 10207730000 - redesignated per SECNAVINST 5212.5D

will then identify the specific billets to be filled by FAP personnel. Negotiations will include the categorization and preparation of position descriptions, to include grade/skill and other required qualifications. The host supporting installation commander and the major tenant FMF commanders will mutually agree to each billet to which a Marine is assigned through FAP. A Marine assigned to a FAP billet will not be reassigned without approval from the parent tenant unit.

e. Host installation commanders should anticipate the disruption and associated manpower shortages that will occur when contingencies require the recall of FAP personnel back to their parent FMF units. Depending on its scope and immediacy, a recall can have little to severe impact on the host installation. To mitigate the impact, host installation commanders should establish and maintain plans that identify and provide for manning critical FAP billets when a recall does occur. Possible resources may include, but are not limited to:

(1) Internal Resources/Reorganization. Host installation commanders should consider their organic resources first. This may require a temporary reorganization in some cases; however, it is probably one of the most reliable and efficient means to meet a contingency.

(2) Temporary Service Contracts. Funding for contracts to temporarily utilize private sector resources is sparse and not readily available. This should not be considered a primary resource. For information concerning policy, procedures, and funding availability, contact the CMC (RFB).

(3) Individual Mobilization Augmentee (IMA) Program. Marines in the IMA Program are a source of trained and qualified individuals to fill a time sensitive portion of the Active Component wartime structure. IMA's are members of the SMCR, and are subject to involuntary recall under Title 10 U.S.C. Sections 672d, 673, and 673b. Under certain conditions, IMA's may be voluntarily ordered to active duty in support of their operational sponsor under the Active Duty for Special Work (ADSW) (Category IV) Program. Marines in the IMA Program are authorized 48 drills and from 12 to 30 days of Annual Training (AT) per fiscal year in their critical mobilization billet. Base/station commanders should identify those billets where assignment of IMA's is required and ensure they have been properly coded on the appropriate T/O's. Reference (c) establishes the IMA Program and provides guidance in its implementation. Reference (d) provides specific guidance on the ADSW (Category IV) Program.

(4) Preassigned Reservists and Retirees. Marines in the IRR and those who have retired (including the FMCR) are preassigned to supporting establishment T/O's which require additional manpower upon mobilization. These preassigned Marines will fall in on some

billets currently filled by active duty Marines who are returned to their parent unit for deployment. Base/station commanders should identify those billets where preassignment of IRR's and retirees is required and ensure they are properly coded on the appropriate T/O's.

f. The CG MCRSC assigns IMA's to critical mobilization billets and preassigns IRR's and retirees to other mobilization billets. These assignments will only be made to valid T/O's found in the T/MR. Orders may be issued as follows:

(1) During peacetime, IMA's or preassigned IRR Marines are authorized training via drills/AT (IMA's only), ADSW (Reserve Component), or the Reserve Counterpart Training (RCT) Program administered by the CMC (RA) - References (e) and (f) refer. Retirees may be voluntarily returned to active duty using the Voluntary Recall Program which is administered by the CMC (MM).

(2) During a contingency short of mobilization, or in direct support of the Active Component, IMA's and/or IRR's may be authorized voluntary active duty under the ADSW (Category IV) Program once requested by the base/station commander. Requests should be forwarded to the CMC (MPP-60) - Retirees may be voluntarily returned to active duty using the Voluntary Recall Program which is administered by the CMC (MM).

(3) During Presidential Selected Reserve Call-up, IMA's may be involuntarily recalled to active duty under Title 10 U.S.C. Section 673b. IRR's may be authorized voluntary active duty under the ADSW (Category IV) Program once requested by the base/station commander. Requests should be forwarded to the CMC (MPP-60). Retirees may be voluntarily returned to active duty using the Voluntary Recall Program which is administered by the CMC (MM).

(4) Upon mobilization, the CMC (MPP-60) may issue to Reserve and retired Marines mailgram orders involuntarily returning them to active duty.

(5) Marines who are preassigned can be tracked using the Marine Corps Preassignment System (MCPS). The MCPS shows the T/O, the T/O line number, and the billet vacancies. Access can be obtained by contacting the CG MCRSC, Systems Management Division (SMD) at 1-800-255-5082.

g. When a major FMF command deploys and retains an extensive rear element, FAP personnel will still be required by the installation proportionate to the level of support required by the rear element. This Order does not preclude any additional cooperative arrangements between FMF and installation commanders.

h. The tenant FMF unit commander and host installation commander should refer any unresolved disagreements through the appropriate chain of command to the common commander for resolution.

i. Formal FAP agreements should be revalidated annually by the host and tenant FMF unit commanders.

#### 6. Administrative Instructions

a. The host supporting installation commander and the tenant FMF unit commanders will enter into a formal agreement to determine the billets to be filled by MOS, category, and other qualifications. A position description should be prepared for each billet. The host installation command does not have the authority to move FMF personnel to billets other than those originally assigned without the express consent of the tenant FMF unit commander.

b. FAP billets will not be counted in the summaries of personnel chargeable to the installation.

c. Responsibility for training FAP personnel per reference (g) will reside with the appropriate host installation commander for the duration of the FAP assignment.

d. Installation commanders will decide billeting and subsisting arrangements for FAP personnel.

e. Both tenant FMF and host commands will formalize local procedures to make sure that career planning responsibilities contained in reference (h) are met.

f. This Order prohibits assignment of FAP personnel exclusively to food service attendant duty for more than 30 days per year or 15 days per 6-month period.

g. In assigning Marines to fill FAP billets, Chapter 3, Section 3 of reference (i) guides the tenant FMF commander. Tenant FMF commanders should screen and select qualified Marines for specific billets.

h. Commanders must not assign Marines to FAP billets when guarantees in their enlistment agreement preclude it. References (j), (k), and (l) outline these enlistment guarantees. An exception would be assignment to those FAP billets that require an MOS consistent with the Marine's guarantee.

i. Per reference (m), Marines who reenlisted for a bonus may be assigned to a FAP billet only if that billet requires use of the bonus skill.

j. Units participating in the UDP will not be overstaffed to offset FAP requirements.

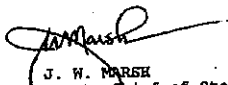
k. Instructions covering per diem entitlement for Marines assigned to FAP and performing duties away from the UDP unit or site of operations are outlined in reference (n).

l. FAP personnel will normally not be assigned duty at any physical location other than their permanent duty station, as defined in reference (o). If such assignments must be made, consider establishing an administrative detachment at the site where the individual is ultimately assigned. Otherwise, properly make such assignments as: temporary additional duty, permanent change of station, or permanent reassignment. References (n) and (o) outline payment of travel or other allowances to include per diem.

m. The standard period for a Category 2 or 3 FAP assignment will be 6 months. To maximize the installation's investment in training the Marine, all assignments should be for a minimum of 6 months. To protect the Marine's career development, assignments to Category 3 billets should be no more than 12 months.

n. Marines assigned to fill FAP billets will be counted on the tenant FMF unit's morning report as in a FAP status. The unit to which the Marine is assigned in a FAP status is administratively responsible per reference (p).

7. Additional Information. Assistance to field commanders in determining manpower requirements is available upon request to the CMC (MPC-40).

  
J. W. MARSH  
Deputy Chief of Staff for  
Manpower and Reserve Affairs  
Acting

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DEPARTMENT OF THE NAVY  
HEADQUARTERS UNITED STATES MARINE CORPS  
3000 MARINE CORPS PENTAGON  
WASHINGTON, DC 20350-3000

MCO 1001.45J  
MPP-30  
JUL 09 2008

MARINE CORPS ORDER 1001.45J

From: Commandant of the Marine Corps  
To: Distribution List

Subj: CAREER DESIGNATION, RETENTION, AND RETURN TO ACTIVE DUTY,  
REDESIGNATION OF RESTRICTED OFFICERS TO UNRESTRICTED STATUS, AND  
INTERSERVICE TRANSFER OF OFFICERS INTO THE MARINE CORPS

Ref: (a) 10 U.S.C.  
(b) 10 U.S.C. 647  
(c) DSD Memorandum, Implementing Guidance: Transition of the Active  
Duty List (ADL) Officer Force to All-Regular Status of 29 Jan  
2005 (NOTAL)  
(d) DSD Memorandum Appointment Authority for Certain Regular and  
Reserve Component (RC) Officers of 2 May 2005 (NOTAL)  
(e) DOD Instruction 1332.29, "Eligibility of Regular and Reserve  
Personnel for Separation Pay," June 20, 1991  
(f) MCO 1610.11C  
(g) MCO P1070.12K  
(h) DOD Instruction 1300.04, "Interservice Transfer of Commissioned  
Officers," December 27, 2006  
(i) MCO P1100.73B

Encl: (1) Eligibility Criteria and Administrative Instructions for  
Nominations for The Basic School (TBS) Career Designation Program.  
(2) Eligibility Criteria and Administrative Instructions for the  
General Career Designation Program.  
(3) Eligibility Criteria for Officers for the Return to Active  
Duty (RAD) Program.  
(4) Eligibility Criteria and Administrative Guidance for  
Interservice Transfer (IST) to the Marine Corps.  
(5) Eligibility Criteria and Application Instructions for  
Redesignation.  
(6) **Eligibility Criteria and Administrative Instructions for officers  
for the Extended Active Duty (EAD), Standard Written Agreement  
(SWAG), and the Active Reserve Program.**

1. Situation. To provide policy and procedural guidance governing: (1) the  
career designation of active component (AC) officers for retention on the  
Active Duty List (ADL) per references (a) through (g); (2) the redesignation  
of limited duty officers (LDOs) to unrestricted status; (3) the interservice  
transfer of active duty officers to the regular Marine Corps per references  
(h) and (i); and (4) the return to active duty of reserve component (RC)  
officers to the active component of the Marine Corps per reference (a).

DISTRIBUTION STATEMENT A: Approved for public release; distribution is  
unlimited.

2. Cancellation. MCO 1001.45H.

3. Mission. This Order provides policy for the career designation of active component (AC) officers, the redesignation of limited duty officers (LDOs) to unrestricted status; the interservice transfer of active duty officers to the regular Marine Corps and the return to active duty of reserve component (RC) officers to the active component of the Marine Corps.

4. Execution

a. Commander's Intent. Career Designation - Career designation is the process used to manage the AC officer population. Career designation accomplishes the objectives of retaining the best qualified officers on active duty and maintaining the AC officer population in each year of commissioned service (YCS) at a level that supports the promotion timing and opportunity guidelines to Major established by section 619 of reference (a).

(1) Reference (b) allows for the separation of AC officers for the purpose of force shaping through their fifth year of active commissioned service. Therefore, the officer retention board (ORB) per the instructions contained in this Order may consider all officers who desire to remain on active duty.

(2) Reference (b) requires that all officers on the ADL be AC officers by 1 May 2006. Any officer who does not qualify under section 532 of reference (a) will not be considered for career designation.

(3) Career designation selection under the programs referred to in paragraphs 4b(1) and 4b(2) is a competitive process based on an officer's official record. Therefore, officers are responsible for ensuring their official records are complete and accurate as set forth in reference (g). The ORB uses the Master Brief Sheet (MBS) and the Official Military Personnel File (OMPF) to evaluate officers considered for career designation, EAD, or RAD. The MBS summarizes the performance evaluation markings in the officer's record. Performance evaluations appearing on the MBS should also appear in the OMPF. The MBS and OMPF may be obtained by writing to the CMC (MMSB-10), Headquarters, U.S. Marine Corps, 2008 Elliott Road, Quantico, VA 22134-5130, by email at smb.manpower.mmsb@usmc.mil, or by fax at Commercial 703-784-3900 (MMSB); 703-784-5792 (MMSB-10); 703-784-5682 (MMSB-20); 703-784-3783 (MMSB-30). Officers should ensure that Professional Military Education (PME) certificates, undergraduate and postgraduate degrees, and award citations are also included in the OMPF. Officers eligible for career designation who discover discrepancies in their OMPF should submit certified copies of documents missing from the OMPF to CMC (MMSB) for consideration by the ORB.

(4) Officers selected for career designation by the ORB will incur a 2-year active duty obligation of service from the date specified in the announcement MARADMIN. Officers will be required to notify CMC (MMOA) of their intent to accept career designation within 45 days after release of the ORB results. Officers who either fail to respond or decline career designation after the 45-day window has elapsed will be separated at their

End of active service (EAS) per references (e) and (f). Officers who fail to be selected for career designation will normally be separated at their EAS (per initial service obligation). Officers who either fail to be selected for or decline career designation will not be eligible for reconsideration for career designation without CMC (MMOA-3) approval.

b. Concept of Operations

(1) Career Designation Programs

(a) TBS Career Designation Program. The Commanding General, Marine Corps Combat Development Command, Quantico, VA is authorized to nominate the top 5 percent of officers graduating from each Basic School class. Enclosure (1) contains the eligibility criteria and administrative instructions for this program. Nominees who meet the eligibility criteria in enclosure (1) will be submitted to the ORB for recommendation to the CMC (MMOA-3).

(b) The General Career Designation Program. This program is the primary program for selecting officers for retention on the ADL. The ORB will review the official records of all officers who meet the eligibility requirements prescribed by this Order. The ORB will recommend the best-qualified officers for career designation to meet the number of vacancies allocated. Enclosure (2) contains the eligibility criteria and administrative instructions for this program.

1. AC officers on the ADL serving their initial tour of active duty will be provided at least one opportunity to be considered for general career designation before reaching their EAS. Officers who do not meet the eligibility requirements before reaching their EAS may request an administrative extension of their EAS from CMC (MMOA-3) in order to have at least one consideration opportunity. Officers eligible for career designation who requested not to be considered by the ORB, and officers selected for career designation by the ORB who declined to accept an offer of career designation, will not be granted an administrative extension in order to receive additional career designation opportunities. Those officers not selected for career designation will have their names forwarded for reappointment to the RASL in accordance with reference (d).

2. Force shaping requirements affect the competitiveness of the career designation program; during extremely competitive periods, it may be desirable to select alternates for career designation. Career designation alternates may be selected based upon overall performance. Alternates selected for EAD must accept the EAD to remain a career designation alternate. The ORB will provide a lineal ranking of alternates to the CMC (MMOA-3) based on "best and fully qualified" for retention. Career designation alternates may only fill vacancies that become available if a primary career designation selectee declines career designation or is removed from the selection list. CMC (MMOA-3) will fill career designation vacancies with alternates as vacancies become available.



3. Reserve chief warrant officers (CWOs) may also apply for general career designation. The warrant officer population is managed to meet the technical officer requirements of the Marine Corps. The Marine Corps bulletin that announces the ORB will solicit applications only from CWOs in skills that are critically short and are not expected to be filled in the foreseeable future through new warrant officer accessions. Applications from CWOs in unsolicited MOSs will not be considered.

(2) Other Active Duty Retention Programs for RC Officers

(a) Retention of Officers on the Active Duty List

1. The purpose of retaining AC officers on the ADL beyond their initial active duty obligation or obligated service is to provide these officers additional time to demonstrate their qualifications for career designation and to sustain the company grade population. Officers eligible but not selected for career designation may request consideration for an EAD.

2. A request for an EAD up to 1 year is an administrative action that will be submitted via the chain of command to CMC (MMOA-3). Requests for administrative EADs that extend an officer's EAS beyond the 6th YCS will not normally be considered.

3. Approval of an administrative EAD request, where career potential is not the primary issue, may be granted under the following circumstances:

a. The extension of an officer is critical to meet a specific operational commitment.

b. An overseas assignment from TBS that requires a minimum tour length of 36 months or more.

c. Humanitarian reasons (including pregnancy).

d. An officer is selected for the Field Flight Training Accession Program.

e. An officer is dropped from Naval Aviator (NA)/Naval Flight Officer (NFO) Training (except by reason of academic failure or dropped on request) where additional obligated service is necessary to qualify for formal school attendance and/or submission of an application for career designation.

4. Officers whose separation is involuntary as a result of having twice failed selection for promotion are not eligible to extend under the provisions of this paragraph.

5. Second lieutenants found not qualified for promotion are not eligible to extend under the provisions of this paragraph.

(b) Standard Written Agreement (SWAG). Officers requesting career designation may be offered a SWAG based upon their record and the needs of the Marine Corps. Such agreements should provide for at least 3 years of

active duty and will not provide an EAS beyond YCS 8. Enclosure (6) contains eligibility criteria and administrative instructions for requesting a SWAG.

(c) Active Reserve. Eligible officers desiring consideration for the AR program should be forwarded to CMC (RA).

(d) Return to Active Duty (RAD). Eligible RC officers requesting RAD need to apply per enclosure (3).

(3) Interservice Transfer (IST) into the Marine Corps. Officers applying for IST should submit applications in accordance with reference (h) and enclosure (4) of this Order.

(4) Officer Retention Boards (ORB) are held to recommend applicants for Career Designation, Return to Active Duty or Interservice Transfer.

(a) DC, M&RA may direct that the career designation ORB be held in conjunction with the annual Captain Selection Board (CSB). ORBs may be held quarterly.

(b) Career designation of AC Marine Corps officers, Return to Active Duty and interservice transfer of officers into the AC of the Marine Corps shall be made only in accordance with the approved reports of an ORB. The ORB shall be composed of at least five commissioned officers serving in grades above major in the AC of the Marine Corps appointed by precept of the Deputy Commandant for Manpower and Reserve Affairs.

(c) Each member of an ORB shall swear or affirm that he/she will perform his/her duties as a member of the board without prejudice or partiality and having in view both the special fitness of officers and the efficiency of the Marine Corps.

(d) The board shall be furnished with the names and records of all officers eligible for career designation and, as appropriate, the applications of all interservice transfer applicants. The board shall carefully consider the case of every officer whose name is so furnished.

(e) Each board will recommend for career designation or interservice transfer, as appropriate, eligible officers in numbers not in excess of the appropriate numbers provided for each year commissioned service and/or skill by DC, M&RA (MP).

(f) The selection of eligible officers for career designation or interservice transfer, as appropriate, shall be based upon their mental, moral, and professional qualifications as demonstrated by their official records, including completed application for interservice transfer, as appropriate.

(g) The ORB shall submit at least one written report to CMC signed by all of the acting members and the recorder(s). Each report shall certify that the board has complied with all instructions and directions contained in the precept and that, in the opinion of at least a majority of

the acting members of the board, the officers recommended are fully qualified for career designation or interservice transfer into the AC of the Marine Corps and are the best qualified of all eligible officers and applicants.

(h) Each report shall be submitted to CMC for approval or disapproval, in whole or in part, via the Staff Judge Advocate to the CMC for legal review, and the Deputy Commandant for Manpower and Reserve Affairs.

(i) The proceedings of the board shall not be divulged by any member of the board or by the recorders to anyone except the Secretary of the Navy, the Commandant of the Marine Corps, or their authorized representatives. The recommendations of the board shall not be disclosed until approved by CMC or this designee except as authorized by CMC.

(j) CMC may remove the name of any officer from a list of officers recommended for career designation; CMC may recommend that the Secretary of the Navy or his designee remove the name of any officer selected for return to active duty or interservice transfer into the Marine Corps under this instruction.

(k) Those officers selected for RAD or IST into the Marine Corps, who are approved by CMC for regular appointment in the Marine Corps, shall be appointed in accordance with sections 531 or 647 of reference (a), as appropriate.

(5) Separation Pay Criteria

(a) Under section 642 of reference (a) and paragraph 3 of reference (e), officers on the ADL who have completed 6 or more, but less than 20 years of active service, may be entitled to separation pay if they unconditionally volunteered for retention on active duty but were not accepted. An officer who volunteers for a period of active duty contingent upon assignment to a certain type of duty or location, or a specific type of contract, is not considered to have unconditionally volunteered. Requests for career designation, and EAD are considered unconditional.

(b) Officers who are eligible for separation pay upon release from active duty at the completion of their active duty obligation, but who are retained on active duty for medical reasons under reference (h), or who request to remain on active duty under paragraph 2(a)3 of this Order, will retain their eligibility for separation pay upon release from active duty at the end of the extension period.

(c) Officers may not become eligible for separation pay while serving on active duty under paragraph 2(a)4 of this Order unless the following conditions are met:

1. A request for unconditional retention is submitted within 15 months of the officer's EAS per enclosure (2) of this Order and such request is disapproved; and,

2. Completion of 6 or more, but less than 20 years of active service immediately before release from active duty.

(d) Officers on active duty who became eligible for separation pay prior to the publication of this Order will retain their separation pay eligibility.

5. Administration and Logistics

a. Redesignation. Eligibility criteria and administrative instructions for LDOs who wish to apply for redesignation to unrestricted status are contained in enclosure (5).

b. Commanding officers will ensure this Order is brought to the attention of all officers eligible for consideration under its provisions. In addition, the Commander, Marine Forces Reserve will ensure that eligible officers in the Ready Reserve are informed of their opportunity to apply for return to active duty.

c. Commanding officers should not discourage eligible officers from applying for retention on active duty, but should record their concerns, if any, about an officer's qualifications in their endorsements.

6. Command and Signal

a. Command. This Order is applicable to the Marine Corps Total Force.

b. Signal. This Order is effective the date signed.



R. S. COLEMAN  
Deputy Commandant for  
Manpower and Reserve Affairs

DISTRIBUTION: PCN 10200953400

ELIGIBILITY CRITERIA AND ADMINISTRATIVE  
INSTRUCTIONS FOR NOMINATIONS FOR THE  
BASIC SCHOOL CAREER DESIGNATION PROGRAM

1. Eligibility Criteria

- a. Citizenship. Must be a citizen of the United States.
  - b. Age. Must be able to complete 20 years of active commissioned service before attainment of age 62. In computing service, a fractional year of 6 months or more shall count as a whole year.
  - c. Education. Must possess a baccalaureate degree or higher from an accredited institution.
  - d. Physical. Must be certified as medically qualified by the Commanding Officer TBS.
  - e. TBS Standing. Nominees must have completed TBS in the top 5 percent of the class.
2. Administrative Instructions. Administrative instructions have been forwarded to the Commanding General, Marine Corps Combat and Development Command by the CMC under separate correspondence.

ELIGIBILITY CRITERIA AND ADMINISTRATIVE  
GUIDANCE FOR OFFICERS FOR THE GENERAL  
CAREER DESIGNATION PROGRAM

1. Application Procedures. Amplifying guidance will be provided annually by the MARADMIN prior to the convening of the ORB.

2. Eligibility Criteria

a. Citizenship. Must be a citizen of the United States.

b. Age. Must be able to complete 20 years of active commissioned service before attainment of age 62. In computing time of service, a fractional year of 6 months or more shall count as a whole year.

c. Company Grade Officers. May be on active duty or in the Ready Reserve, but must have less than 9 years of total commissioned service.

d. Education. Must possess a baccalaureate degree or higher from an accredited institution.

e. Fitness Reports (For General Career Designation Only). Commands may verify the amount of time covered by observed performance evaluations on any officers in question by contacting either MMSB or by checking the MMSB web-page.

(1) Officers who have served continuously on active duty since appointment as a second lieutenant must have a minimum of 540 days of observed performance only in years when career designation is conducted separately from selection to captain. Observed time begins with the first observed performance evaluation after graduation from the primary military occupational specialty (PMOS) school. For aviators, performance evaluations received while in fleet replacement squadrons (FRS) are counted as observed time only when marked other than not observed.

(2) Officers selected for the Aviation Field Accession Program who are in a student naval aviator status are ineligible for consideration for general career designation until they have 540 days observed time as a designated pilot/Naval Flight Officer (NFO) only in years when career designation is conducted separately from selection to captain. Once these officers graduate and are designated NAs/NFOs, they will be given a contract obligation that provides sufficient opportunity to apply for general career designation as a pilot/NFO. Officers who fail to complete flight training, and have not had a previous opportunity to apply to an ORB, will be returned to their primary MOS and will be extended to allow at least one career designation opportunity.

(3) Officers on active duty who have not served continuously on active duty since appointment as a second lieutenant must have at least 540 days observed performance since return to active duty. The amount of time covered by observed fitness reports can be verified by contacting CMC (MMSB) or by checking the CMC (MMSB) web-page.

f. EAD (Applies to general career designation only). To allow sufficient time for transition from the Marine Corps if not selected for retention, all officers on active duty, regardless of category, must have at least 4 months of active duty time remaining after the ORB convening date. Specific cut-off dates will be prescribed in the announcing MARADMIN.

3. Separation Pay Provisions

a. Officers not selected for career designation or EAD will be entitled to separation pay if otherwise eligible per section 642 of reference (a) and paragraph 3 of reference (e).

b. Those officers not selected for Career Designation will have their names forwarded for reappointment to the RASL in accordance with reference (d).

ELIGIBILITY CRITERIA FOR OFFICERS FOR THE  
RETURN TO ACTIVE DUTY (RAD) PROGRAMS

1. Eligibility Criteria. It is the policy of the Marine Corps in accordance with section 531 of reference (a) to allow the transfer of RC lieutenants, captains and majors to the AC who have demonstrated the potential for full careers as military officers in order to sustain the quality and effectiveness of the AC officer force. The following outlines the eligibility criteria and requisites for approval of a RAD applicant.

- a. All applicants must comply with section 531 of reference (a).
- b. All applicants will apply via an Administrative Action (AA) Form (NAVMC 10274) or naval letter via their chain of command to CMC (MMOA-3).
- c. All applicants are required to be physically qualified as determined by the Commander, Naval Medical Command and include a copy of their DD-2807 (Report of Medical history).
- d. All applicants must be eligible to obtain a secret security clearance.

2. Reserve Component Lieutenants & Captains (Return to Active Duty)

a. All RC lieutenants and captains are eligible to apply to the ORB for RAD. The officers selected will be appointed as AC officers. Reserve lieutenants and captains with a primary military occupational specialty (PMOS) in a "short" MOS should be given primary consideration for career designation to the AC. However, additional selections may also be authorized for qualified RC officers in other PMOSs who have competitive records and who, upon return to active duty, would be an asset to the AC of the Marine Corps.

b. Eligible officers will only be selected if the officer can demonstrate unique qualifications that will clearly benefit the Marine Corps. Such qualifications and any supporting documentation and letters of recommendation should be included with the officer's official record.

c. When evaluating the qualifications of RC Lieutenants and Captains for return to active duty, it must be considered that, upon approval, these officers will normally be assigned to duty within their primary MOS in the operating forces. RC captains who are returned to active duty must be prepared to assume management and leadership responsibilities within their primary MOS commensurate with their rank, both in combat and peacetime operations or exercises. Accordingly, the records of these officers must unequivocally establish their qualifications and abilities to competently perform the duties of that MOS, for the grade of captain, in the operational forces. Consideration should also be given to competitive officers who have communicated willingness to lateral move to MOSs with relatively short training periods such as 0180, in which the board members believe the officer would excel.



d. During review of the applicants in this category, the following must be considered:

(1) Previous Operational Experience. Ideally, the applicant should have successfully completed at least one tour in his/her primary MOS while on active duty. Although this is not a required prerequisite for return to active duty, it does impact upon assignment and training requirements for the officers in this category.

(2) Currency of Skills. RC lieutenants and captains recommended for RAD are expected to have primary MOS proficiency commensurate to their active duty contemporaries. However, most assignments in the RC limit amount of experience an officer can obtain/maintain with their primary MOS. Appropriate consideration should be given to those officers who, through their own initiative, maintained and developed MOS proficiency through the Marine Corps Institute (MCI) or other military/civilian education opportunities. Other skill-related training includes assignment opportunities in the RC and AC, outside normal drill requirements for which the officer volunteered.

(3) Promotion Timing. An applicant's status with regard to promotion to the next higher grade will be considered in the RAD process. While all Reserve lieutenants and captains are eligible to apply for RAD, those who will complete at least one year active duty prior to the convening of the next promotion board will be viewed more favorably, all other criteria (qualifications) being equal.

e. RC captains who have twice been passed for promotion in either the RC or AC to the next higher grade are not eligible for consideration for return to active duty.

### 3. Reserve Component Majors (Return to Active Duty)

a. All RC majors are eligible to apply to the ORB for RAD. All Reserve majors selected will be appointed as AC officers. Reserve majors with a primary MOS in "short" MOSs should be given primary consideration for career designation to the AC. However, additional selections may also be authorized for qualified RC majors in other PMOSs who have competitive records and who, upon return to active duty, would be an asset to the AC.

b. Eligible officers will only be selected if the officer can demonstrate unique qualifications that will clearly benefit the Marine Corps. Such qualifications and any supporting documentation and letters of recommendation should be included with the officer's official record.

c. When evaluating the qualifications of RC majors for RAD, it must be considered that, upon approval, these officers will normally be assigned to duty within their PMOS in the operating forces. RC majors who are returned to active duty must be prepared to assume management and leadership responsibilities within their PMOS, both in combat and peacetime operations or exercises. Accordingly, the records of these officers must unequivocally establish their qualifications and abilities to competently perform the duties of that MOS, for the grade of major, in the operational forces.

d. During review of the applicants in this category, the following must be considered during deliberations:

(1) Previous Operational Experience. Ideally, the applicant should have successfully completed at least two tours in his/her primary MOS while on active duty. Although this is not a required prerequisite for return to active duty, it does impact upon assignment and training requirements for the officers in this category.

(2) Currency of Skills. RC majors recommended for RAD are expected to have primary MOS proficiency commensurate with their active duty contemporaries. However, most assignments in the RC limit the amount of experience an officer can obtain/maintain with their primary MOS. Appropriate consideration should be given to those officers who, through their own initiative, maintained and developed MOS proficiency through the Marine Corps Institute (MCI) or other military/civilian education opportunities. Other skill-related training includes assignment opportunities in the RC and AC, outside normal drill requirements, for which the officer volunteered.

(3) Promotion Timing. An applicant's status with regard to promotion to the next higher grade will be considered in the RAD process. While all RC majors are eligible to apply for RAD, those who will complete at least one-year active duty prior to the convening of the next promotion board will be viewed more favorably, all other criteria (qualifications) being equal.

e. RC majors who have twice been passed for promotion in either the RC or AC to the next higher grade are not eligible for consideration for return to active duty.

4. Reserve Component Lieutenant Colonels & Colonels. Senior RC officers are not considered for the RAD program.

a. There are existing mechanisms for senior RC officers to apply for active duty and be considered, on a case by case basis, according to the needs of the Marine Corps. Senior RC officers wishing to return on AD can apply for Active Duty Operational Support (ADOS)/sanctuary through DC, M&RA (MP).

5. Physical. Applicants must be certified as medically qualified by their Commanding Officer or by the Commanding General, Marine Corps Mobilization Command in the case of RC officers in the Individual Ready Reserve (IRR), or in an Selected Marine Corps Reserve (SMCR) status under the administrative control of the Commanding General, Marine Corps Mobilization Command. When an application/nomination is initiated, the commanding officer will direct that a review of the health record be made by local medical authority. In the forwarding endorsement, the commanding officer will indicate if the nominee is medically qualified based on this review. No physical examination is necessary. If the applicant/nominee is serving in a medically restricted status, or is in any other way considered physically unfit for duty, the nomination with supporting medical information will be submitted to CMC (MMOA-3) via the Commander, Naval Medical Command.

6. RAD Approval Process. RAD applications will be submitted via an administrative action form to CMC (MMOA-3). Prior to appointment as an AC

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officer on the ADL, CMC (SJA) and CMC (IG) will screen an approved applicant. At a minimum, the application will consist of the administrative action request, endorsements from chain of command, a current digital photograph, and the officer's OMPF.

7. Appointments and Assignment of Position on Active-Duty List of Selected Applicants. Appointment of Marine Corps RC officers recommended and approved for transfer to the AC of the Marine Corps under the RAD program shall be accomplished in accordance with references (b) and (d). Each Marine Corps RC officer recommended and approved for transfer to the Regular Marine Corps shall be appointed as an AC officer in the same grade and with the same date of rank as the grade and date of rank that the officer would have held had the officer been serving on the active duty list as an AC officer on the date of regular appointment.

8. Amplifying guidance will be published annually via MARADMIN.

ELIGIBILITY CRITERIA AND ADMINISTRATIVE GUIDANCE  
FOR INTERSERVICE TRANSFER (IST) TO THE MARINE CORPS

1. Eligibility for Transfer to the Marine Corps. All officers from other Services are eligible to transfer to the Marine Corps as outlined by reference (h).

2. Application Procedures. Officers applying for IST should submit applications in accordance with references (h) and (i) as follows:

a. Transfer to the Marine Corps. Officers on the ADL of another uniformed Service may make application to the Marine Corps. Applications shall arrive at CMC (MMOA-3) no later than 30 days prior to the convening date of an ORB for the purpose of selecting officers for career designation, and no later than nine months before the requested detachment (transfer) date, per reference (h).

(1) All requests for IST to the Marine Corps are subject to the following appropriate directives of the respective Service:

- (a) Air Force Instruction 36-2004.
- (b) Army Regulation 614-120.
- (c) Navy - MILPERSMAN, Par 3830140 and reference (a).
- (d) U.S.C.G. COMDTINST M1000.6A, Article 12A3.
- (e) NOAA - reference (h).
- (f) Public Health Service - reference (h).

(2) Applications shall contain the information and comply with the format prescribed by the parent-uniformed Service.

b. Applicants shall submit a cover letter that includes the statement of understanding in references (h) and (i) under the procedural guide for active duty transfers (page 5, paragraph 5).

c. Applications should be forwarded through the appropriate chain of command for screening and endorsements. Endorsements are required for all IST applicants. The appropriate commanding officer or his/her designated representative will provide endorsements. Forwarding endorsements shall include one of the following recommendations: recommended with enthusiasm; recommended with confidence; recommended with reservation; or not recommended. Endorsements other than recommended with enthusiasm will include amplifying comments about the officer's qualifications and reason for the endorsement.

d. Applicants shall ensure their packages include all items prescribed in references (h) and (i) under procedural guide for active duty transfers (page 1, paragraph 1C, D, and paragraph 2B) as well as the following:

(1) Certified true copies of all fitness reports via paper copies, microfiche, or CD.

(2) Conditional release from parent Service.

(3) Statement that the officer has neither been deferred from promotion nor failed selection for promotion in present grade.

(4) Source of commission.

(5) Original and duplicate copy of report of medical examination (Standard Form 88).

(6) Original and duplicate copy of current report of medical history (Standard Form 93).

(7) Résumé of flying experience, when applicable, including date member entered training for original aeronautical rating, rating held, and date it was awarded, total flying time, and flight time breakdown by type aircraft.

(8) A verified statement of service.

(9) Results of a Marine Corps physical fitness test (PFT) administered and certified by a Marine representative above the rank of the applicant. The PFT must be completed within six months prior to the ORB convening date.

(10) A recent photograph, in the service equivalent of the Marine Corps Service "C" uniform, full length, uncovered front view, left shoulder forward. Include on the photo the individual's name, SSN, MOS, height, weight, and date of picture.

(11) The applicant shall be interviewed by two AC or Active Reserve Marine Corps officers above the member's current rank, and the applicant shall include, as part of the application, these officers' written observation and recommendations, with justification.

3. Processing Applications from Individual Officers. The parent Service should send applications (original and one copy) to CMC (MMOA-3) for review and evaluation under references (h) and (i):

a. CMC (MMOA-3) will review applications for eligibility and forward them to the appropriate occupational field sponsor. Additionally, CMC (MMOA-3) will answer inquiries concerning IST.

b. Occupational field (OccField) sponsors will screen interservice applications to validate transferable skills from other Service and will recommend Marine Corps unique schooling as required.

c. CMC (MMOA-3) will consolidate validated packages for presentation to the ORB.

d. The ORB will select IST applicants based solely on the needs of the Marine Corps and with due regard to Marine officers competing for the same

retention slots. MMOA-3 will recommend appropriate level school as required (i.e., TBS for lieutenants, EWS for captains, Command and Staff for majors).

e. Officers selected for IST will automatically be career designated.

f. CMC (MMOA-1 or MMOA-2) will schedule, as required, attendance at appropriate Marine Corps formal schools.

g. If the transfer is approved by both the parent and gaining Services, CMC (MMOA-3) will prepare active duty orders, obtain appointment documents from CMC (MCRC-OA), and coordinate the transfer with the parent Service.

4. Appointment of selected and approved IST applicants in the AC Marine Corps shall be accomplished in accordance with section 531 of reference (a) and reference (d). Appointment shall be at the grade and date of rank as determined in accordance with reference (h) and applicable instructions cited therein.

ELIGIBILITY CRITERIA AND ADMINISTRATIVE  
INSTRUCTIONS FOR REDESIGNATION

1. LDOs must meet the following requirements to be eligible to apply for redesignation as Regular unrestricted officers:

a. Be qualified to hold a Category I (unrestricted) MOS that is in the same occupational field (OccFld) as the applicant's primary MOS. This requirement may be waived for LDOs whose OccFld identified by their primary MOS does not contain a Category I MOS, provided they can demonstrate qualifications to hold a Category I MOS as a primary MOS.

b. Have a baccalaureate degree from a regionally accredited college or university. This requirement may be waived only in exceptional cases. The applicant's commanding officer must recommend such a waiver and indicate the progress made by the applicant toward completion of the degree. Applicants shall include all official college transcripts in their application.

c. Have, served at least 2 years in their current LDO grade by the convening date of the ORB.

d. Not be on a promotion list.

e. Be able to complete 20 years of active commissioned service before reaching age 62. Commissioned service begins upon promotion to CWO-2.

f. Be recommended for redesignation by the commanding officer/commanding general.

g. Have sufficient remaining service (before mandatory retirement) to be considered by the ORB and approved by the Secretary of the Navy.

2. Redesignation Selection Process

a. Upon receipt by the CMC (MMA), the application is referred to the appropriate OccFld sponsor for comment on the officer's qualifications in the Category I MOS in which the officer desires to serve as an unrestricted officer, and on the officer's qualifications in the primary MOS held as an LDO and to CMC (MPP-30) for comment on the status of the restricted and unrestricted MOSs concerned.

b. The ORB will review the officer's application along with CMC (MPP-30) and OccFld sponsor's comments in addition to the OMPF. The ORB will recommend for redesignation only those for whom redesignation is in the best interests of the Marine Corps. The ORB will consider not only the officer's performance and educational background, but also overall career characteristics (previous assignments, competitiveness for promotion as an unrestricted officer, etc.) that may render the individual better suited to unrestricted officer status than to LDO status. The names of officers recommended for redesignation by the ORB will be included in the board report to the Secretary of the Navy.

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c. An officer designated for limited duty may not be considered for redesignation more than twice in the same commissioned grade. When a limited duty officer is assigned as an unrestricted officer, their status as a limited duty officer is permanently terminated.

3. Each Regular permanent LDO recommended and approved for redesignation will be assigned to unrestricted performance of duty status. The officer's grade, date of rank, and position on the active duty list shall remain the same.

4. Physical. Applicants shall be certified as medically qualified by their commanding officer.

5. Application Procedures. Applications for redesignation shall be submitted to CMC (MMOA-3) when solicited and will follow the format provided in Appendix A to this enclosure.

6. Commanding officer endorsements shall include one of the following recommendations: recommend with enthusiasm; recommend with confidence; recommend with reservations; or not recommended. Endorsements other than recommended with enthusiasm, shall include amplifying comments about this officer's qualifications and reason for the endorsement. Additionally, commanding officer endorsements shall include information related to the following:

a. The applicant's potential for service as an unrestricted officer.

b. The applicant's qualifications in the Category I MOS in which the officer is requesting redesignation.

c. The progress toward completion of a baccalaureate degree if the applicant does not have such a degree and whether a waiver of the degree requirement should be considered by the ORB.



SAMPLE APPLICATION FOR REDESIGNATION  
UNIT HEADING

From: Grade, Name, SSN  
To: Commandant of the Marine Corps (MMOA-3)  
Via: Chain of Command

Subj: REQUEST FOR REDESIGNATION AS A REGULAR UNRESTRICTED OFFICER

Ref: (a) 10 U.S.C.  
(b) MCO 1001.45\_  
(c) MCO P1070.12\_

Encl: (1) Official college transcripts and proof of degree  
(2) Photograph

1. In accordance with references (a) and (b), I request that my status as a limited duty officer be terminated and I be redesignated as an unrestricted officer in MOS XXXX.

2. The following information is submitted:

- a. Current primary and additional MOS's.
- b. Date of birth: YYYYMMDD
- c. Date promoted to CWO-2: YYYYMMDD
- d. Date appointed LDO: YYYYMMDD

3. Enclosure (1) is proof of my baccalaureate degree or of all college work completed.

4. Enclosure (2) is a current photograph submitted in accordance with paragraph 2002 of reference (c).

5. I understand that if selected for redesignation as an unrestricted officer, I will be subject to the laws governing promotion, tenure, and retirement for Regular unrestricted officers.

Signature  
Initials, Last Name  
Appendix A to

ELIGIBILITY CRITERIA AND ADMINISTRATIVE INSTRUCTIONS FOR  
OFFICERS FOR THE EXTENSIONS ON ACTIVE DUTY, STANDARD WRITTEN AGREEMENTS  
AND ACTIVE RESERVE PROGRAMS

1. Application Procedures. Applications for retention will be solicited by ALMAR, via MCBul in the 1040 series. Enclosure (3) contains the format for applications.

2. Eligibility Criteria

a. Citizenship. Must be a citizen of the United States.

b. Age. Must be able to complete 20 years of active commissioned service before attainment of age 55. In computing service, a fractional year of 6 months or more shall count as a whole year.

c. Status

(1) Extended Active Duty. Must be on the active-duty list with no more than 18 months, or no less than 4 months before their EAS.

(2) Standard Written Agreement. Must be in the Ready Reserve (except AR program), not on active duty, and have less than 6 years of total commissioned service. This requirement may be waived for applicants requesting assignment to active duty under special programs to meet the needs of the Marine Corps for officers in specific skills.

(3) Active Reserve. Must be on the active-duty list with less than 6 months before their EAS at the time the ORB convenes. Specific EAS cut-off dates for AR Program eligibility will be prescribed in the MCBul soliciting applications.

d. Education. Must possess a baccalaureate degree or higher from an accredited institution. If the applicant/nominee does not possess such a degree, commanding officers shall include a specific statement recommending a waiver of this requirement in their nominations, as well as indicating what progress, if any, the applicant/nominee has made toward attaining a baccalaureate degree. Further, commanding officers will indicate whether the applicant has submitted an application for the College Degree Program and provide a copy of that application as an enclosure to their endorsement.

e. Physical. Must be certified as medically qualified by their commanding officer or by the Director, Marine Corps Reserve Support Center in the case of RC officers in the IRR, or in a SMCR status under the administrative control of the Director, Marine Corps Reserve Support Center. The procedures stated below will be followed:

(1) When an application/nomination is initiated, the commanding officer will direct that a review of the health record be made by local medical authority. In the forwarding endorsement, the commanding officer will indicate if the nominee is medically qualified based on this review. No physical examination is necessary. If the applicant/nominee is serving in a medically restricted status, or is in any other way considered physically

unfit for duty, the nomination with supporting medical information will be submitted to the CMC (MMOA-3) via the Commander, Naval Medical Command.

(2) Officers exceeding the authorized height/weight standards are required to include a certified true copy of an authorized waiver with the application. The waiver will be accepted only if it is authorized by the command to which the officer is currently assigned.

(3) After confirmation by the Senate, appointments will be forwarded to officers selected for career designation via their commanding officers. Each appointment will contain the following statement: "This appointment may not be tendered until the officer concerned has been determined to be medically qualified for appointment by competent medical authority at the local command level."

(4) Upon receipt of the appointment, the commanding officer will have the health record reviewed again. A physical examination will be required unless one has been conducted within the past 12 months. Officers will not be considered medically qualified for appointment if they are in any of the categories listed below:

- (a) Qualified for limited duty only (medically restricted status).
- (b) Undergoing hospitalization.
- (c) On sick leave.
- (d) Awaiting appearance before a physical evaluation board.
- (e) Awaiting final action on the recommended findings of a physical evaluation board or a medical board.

(5) If the applicant/nominee is determined to be medically qualified, the commanding officer will tender the appointment. If the applicant/nominee is found to be not medically qualified or no determination can be made, the commanding officer will:

(a) Hold the appointment in abeyance.

(b) Notify the Marine Corps Recruiting Command, Officer Assignments section (MCRC-OA) in writing and include a report of Medical Examination and Report of Medical History (SF's 88 and 93). MCRC-OA will then request the Commander, Naval Medical Command to make a final determination regarding physical qualifications. The commanding officer will be notified of the results by MCRC-OA.

### 3. Separation Pay Provisions

a. The separation pay statement is a request to remain on active duty unconditionally and it should be submitted only if an officer fully intends to accept either career designation, EAD, or AR. Submission of a separation pay statement legally binds an officer to accept career designation, EAD, or

AR if selected by the ORB. An officer who submits the separation pay statement but then refuses to accept an offer for career designation or EAD may, at the discretion of the Marine Corps, be obligated to serve an additional period of active duty.

b. If no separation pay statement is included as a separate enclosure to the application, it will be presumed the applicant desires to be considered for career designation only. However, an officer who is not selected for career designation, or having been offered retention refuses to accept it, will be released from active duty upon EAS. The release will be considered voluntary, and the officer will be ineligible for separation pay.

c. Officers who previously applied but were not selected for retention must apply for retention at least once (and include the statement in paragraph 3a on page 6-2 of this Order) to qualify for separation pay if within 15 months of their EAS.

APPENDIX A

DEFINITIONS

Purpose. This appendix provides a list of definitions referred to in this Order.

a. Active Commissioned Service. Service on active duty as a commissioned officer or commissioned warrant officer.

b. Active Duty. Full-time duty in the active military service of the United States. It includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or the Secretary of the Navy.

c. Active Duty List (ADL). A single list of all officers on active duty in the Marine Corps, except those officers excluded in section 641 of reference (a) (e.g., RC officers on active duty for training, on active duty to pursue special work, or the Active Reserve Program).

d. Active Status. A RC or AC commissioned officer or RC warrant officer who is on active duty, a member of the Ready Reserve, or on the active status list of the Standby Reserve.

e. Applicant. An officer who applies to the Officer Retention Board (ORB) for career designation, retention on active duty, interservice transfer, or redesignation under the provisions of this Order, or an officer who applies to CMC (MMA-3) for return to active duty under the provisions of this Order.

g. Career Designation. The selection of an AC officer for retention and continued service on the ADL.

h. Distinguished Basic School Graduates. Officers who graduate in the top 5 percent of their Basic School class.

i. Extended Active Duty (EAD). Active duty that is performed by an AC officer on the ADL for a specified period beyond the officer's initial active duty obligation or obligated service.

j. Officer Retention Board (ORB). A board of commissioned officers appointed by CMC (M&RA) for the purpose of recommending AC officers for retention on the ADL through career designation (CD), recommending reserve officers for return to active duty (RAD), recommending other service officers for transfer into the Marine Corps (IST), and for the redesignation of limited duty officers (LDO) to unrestricted status. ORBs are authorized to be held quarterly and may consist of any or all of the aforementioned programs.

k. Original appointment. Appointment as an active duty commissioned officer in the grade of second lieutenant through captain in the AC of the

Marine Corps, by the President alone, unless otherwise delegated. Appointment in the grade of major through colonel, in the AC of the Marine Corps, made by the President with the advice and consent of the Senate.

l. Ready Reserve. Constituted by the Selected Marine Corps Reserve (SMCR) and Individual Ready Reserve (IRR).

m. Active Component (AC) Officer. An officer in the AC of the Marine Corps on the ADL serving under a permanent appointment in a grade above Chief Warrant Officer, W5 (CWO-5).

n. Reserve Active Status List (RASL). A single list of all officers in an active status in the Marine Corps Reserve, above the grade of CWO-5.

o. Reserve component (RC) Officer. An officer in the Marine Corps Reserve on the RASL who holds a permanent appointment in a grade above CWO-5.

p. Return to Active Duty (RAD). The appointment of a RC Officer (SMCR, IRR) to the AC of the Marine Corps for active duty and assignment to the ADL.

q. Unrestricted Officer. An officer in the grade of second lieutenant or above not designated for limited duty.

r. Years of Commissioned Service (YCS). The number of whole years from the date commissioned a second lieutenant until the first day of the month when the ORB convenes, plus one. For example, an officer commissioned on 1 October 1992 would be in YCS 6 for an ORB convening on 15 November 1997; an officer commissioned on 1 December 1992 would be in YCS 5. Officers in the Judge Advocate category, who entered active duty in MOS 4401, will calculate their YCS by adding the number of whole years of unobserved time before starting The Basic School (TBS) to their date of commission. For example, a Judge Advocate with a commissioning date of 1 October 1992 and 2 years unobserved time before starting TBS will have a calculated date of 1 October 1994 and would be in YCS 4.

s. Standard Written Agreement (SWAG). A contract executed under section 12311 of reference (a) between a RC officer or a RC warrant officer and the Secretary of the Navy or his representative for that officer to serve an additional period of active duty of 1 to 5 years.

**Sanzi LtCol Thomas J**

---

**From:** Joseph M. Preis [jpreis@gaplegal.com]  
**Sent:** Friday, August 20, 2010 4:35 PM  
**To:** Sanzi LtCol Thomas J; Gannon Maj Nicholas L  
**Cc:** jhlowIV@aol.com; joseph@jhllaw.com; Kunce Capt Lucas Tyree; warlawyer@aol.com  
**Subject:** Robert Muth

**Importance:** High

**Attachments:** image001.png



image001.png (11 KB)

LtCol Sanzi and Counsel,

I understand that there will be a hearing tomorrow and that my client Mr. Muth is expected to appear and testify. Unfortunately, the Government failed to properly serve Mr. Muth with a subpoena compelling his attendance and/or testimony. As the Government surely knows, sending a subpoena via FedEx to a witness' place of employment is neither proper nor legally binding as Mr. Muth did not waive personal service. In addition, the FedEx copy did not include a travel voucher or a guarantee of travel fees as required by the R.C.M.

Further and more importantly, given the absence of any response to my email below, I assume that there has been no waiver of the attorney client privilege and therefore, there is a dispute as to whether, when, and at whose behest the attorney client relationship between Mr. Muth and Sgt. Hohman has been severed. To that end, my client will be unable to testify as to any of the issues that the Court addressed in its July 21st Order.

Notwithstanding the foregoing, in deference to LtCol Sanzi's time, my client is willing to voluntarily appear by telephone tomorrow (as permitted under the Court's June 21st Order) provided that the Government provides me with a phone number and call-in time no later than 6:00 p.m. (1800) tonight.

Semper Fi

Joseph M. Preis

Attorney at Law

Godes & Preis, LLP

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Irvine, California 92618

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APPELLATE EXHIBIT ~~XXXIX~~  
PAGE 1 OF 7

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From: Joseph M. Preis  
Sent: Tuesday, August 03, 2010 7:37 PM  
To: 'thomas.sanzi@usmc.mil'  
Cc: 'nicholas.gannon@usmc.mil'; 'jhlwIV@aol.com'; 'joseph@jhllaw.com';  
'lucas.kunce@usmc.mil'; 'warlawyer@aol.com'  
Subject: Sgt Hohman

LtCol Sanzi and Counsel,

Although Mr. Robert Muth has been incredibly reasonable, accessible and willing to spend his personal time addressing the Government's concerns with respect to the Sgt Hohman matter, the Government today returned the favor by accusing Mr. Muth of criminal conduct, which he categorically denies. As a result, the Government has unfortunately and necessarily injected 5th Amendment privilege considerations into any discussion of Mr. Muth's testimony, in addition to the attorney-client privilege issues that already existed. To that end, as a result of the Government's accusations, Mr. Muth is now necessarily represented by counsel and all future communication with Mr. Muth must go through me from this point forward.

In addition to the numerous issues that have unfortunately been created by the Hutchins opinion and the Government's interpretation thereof, kindly help me understand what is really trying to be achieved here. From my reading of the relevant email traffic, it would appear as though the Government is trying to compel Mr. Muth to testify under oath about communications with and/or about his former client which, as we are all aware, are absolutely privileged. Before we go any further down this path, please immediately furnish a waiver signed and dated by Sgt. Hohman and both of his current counsel. If such a waiver exists, I will evaluate it and determine whether or not I need to cross-examine Sgt Hohman concerning his understanding of the waiver and whether or not it was signed voluntarily. Until both of those things happen, my client will be unable to testify about any protected communications he may or may not have had with or about Sgt. Hohman.

With respect to the Court's Order dated July 21, 2010, I would respectfully submit that the resolution of the two questions contained in paragraph 5 c) do not require Mr. Muth's testimony. First, counsel will not be able to fully develop Mr. Muth's "involvement with



the case" absent a satisfactory waiver from Sgt Hohman. Second, despite the Government's strong arm tactics, Mr. Muth is not interested in voluntarily returning to active duty and does not "desire" to return to active duty involuntarily which we assume would have happened by now if at all possible.

Of perhaps more pressing concern is what appears to be an orchestrated pattern of harassment and defamation by the Government against Mr. Muth. To be sure, by its communications, accusations and veiled threats to date, the Government appears to be more interested in destroying Mr. Muth than it is in resolving the situation that it created by denying my client's multiple extension requests while on active duty. Giving the Government the benefit of the doubt and assuming that a very junior lawyer researched and drafted the Motion filed today, I would invite the Government to review the facts, review the law and more importantly, reevaluate the accusations of criminal misconduct against my client as 18 USC 203 does not even remotely apply to the facts here. On behalf of Mr. Muth, I would ask the Government to withdraw its accusations of criminal misconduct, refile an amended motion and move forward with the matter at hand with its ethical and legal responsibilities in mind.

Joseph M. Preis

Attorney at Law

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-----Original Message-----

From: Gannon Maj Nicholas L [mailto:[nicholas.gannon@usmc.mil](mailto:nicholas.gannon@usmc.mil)]

Sent: Friday, July 16, 2010 10:12 AM

To: thomas.sanzi@navy.mil

Cc: Sanzi LtCol Thomas J; Kunce Capt Lucas Tyree; Robert F. Muth; jhlowIV@aol.com; joseph@jhllaw.com

Subject: FW: Sgt Hohman Matter

Sir,

I just received a message that you were trying to contact me to ensure that you received all email from Mr. Muth. The message I received indicated that you were looking for an email that was sent out last night. I did not receive any traffic from Mr. Muth last night, but I did receive the below email on Wednesday, 14 July 2010. I believe that Mr. Muth sent this before you went to Bremerton, but if not Sir, it is forwarded for your information.

I responded that same day that we were researching the feasibility of Mr. Muth's proposal.

Also Sir, I am no longer at LSST-E; the best number to reach me at is my blackberry: 760-208-7090. Please don't hesitate to contact me if you need any additional information Sir.

Very respectfully,

Maj Gannon

-----Original Message-----

From: Robert F. Muth [mailto:rmuth@gaplegal.com]

Sent: Wednesday, July 14, 2010 16:27

To: Sanzi LtCol Thomas J

Cc: Gannon Maj Nicholas L; jhlowIV@aol.com; joseph@jhllaw.com; Kunce Capt Lucas Tyree

Subject: Sgt Hohman Matter

Good Afternoon LtCol Sanzi,

I am writing in response to Maj Gannon's email of this date which I was not copied on, but which was ultimately forwarded to me by defense counsel. Maj Gannon and I did speak yesterday during which I asked him a very specific question concerning my ECC/EOS date and explained that upon receiving the answer, I would consider the issue and get back to him. This email is intended to convey a proposed solution to the problem created solely

by the Government when HQMC refused to extend my active service beyond 1 Dec 2010, and compounded by the recent Hutchins opinion.

As you may recall, I repeatedly requested to extend my active service in order to complete my representation of clients, including Sgt Hohman, that I had remaining at the time of my EAS. I note that during my remaining months on active duty the Government saw fit to activate numerous Reserve Marine Officers to prosecute service members that I was representing, however, they were unwilling to extend my active service beyond 1 December 2009 to defend Marine clients. My requests to extend beyond 1 December 2009 were denied outright without explanation. I therefore returned to civilian life and began my civilian practice in earnest.

I am now more than seven months removed from my EAS. I have moved with my family to a new home almost 100 miles away and am gainfully employed with the law firm of Godes & Preis, LLP. I have new clients to whom I am ethically obligated to represent to the best of my abilities. I am also now less than one month from the end of my EOS and I have already submitted my request to resign my commission. In reaction to the Hutchins opinion, which this Court has already drawn a distinction between my actions and those of the defense counsel in that case, the Government is now asking me to abandon my current clients and practice in order to rectify a situation wholly of its own creation when it forced me to sever the ACR with Sgt Hohman. By voluntarily returning to active duty at this time, I would necessarily be abandoning my current clients, which is unacceptable.

Notwithstanding, there is a scenario under which I could represent Sgt Hohman without abandoning my civilian clients. That is, rather than going on active duty to represent a single client at a tremendous cost to the Government, and to the detriment of my civilian clients, I am willing to represent Sgt Hohman just like any other current client, and would only bill the Government for time actually spent in doing so. My hourly rate is \$300.00 which is far less than it would cost the Government to return me to active duty. If the Government is willing to pay for this representation (similar to how many public defenders are paid in the civilian legal world) I would be able to represent Sgt Hohman. While I appreciate the fact that this might be an unusual scenario, it is a good faith attempt on my part to facilitate a solution to this Government caused problem. I assume that if the Government were capable of involuntarily recalling me, it would have done so already.

I look forward to a response.

Semper Fidelis,

Robert F. Muth

Robert F. Muth

Attorney at Law

Godes & Preis, LLP

8001 Irvine Center Drive, Suite 1040

Irvine, California 92618

949.682.6560 m

949.385.6184 t

949.872.2281 f

www.gaplegal.com <<http://www.gaplegal.com>>

cid:image001.png@01CA9AB5.9B4F3D20

The information contained and/or attached to this e-mail message is intended for the CONFIDENTIAL use of the addressee only. The information is subject to the attorney-client privilege and/or may be attorney work-product. Recipients should not file copies of this e-mail with publicly accessible records. If YOU are not an addressee or an authorized agent responsible for delivering this e-mail to a designated addressee, you have received this e-mail in error, and any further review, dissemination, distribution, copying or forwarding of this e-mail is strictly prohibited. If you received this e-mail in error, please notify us immediately by telephoning the sender at (949) 468-0051. Thank you.



UNITED STATES MARINE CORPS  
1ST MARINE LOGISTICS GROUP  
BOX 555606  
CAMP PENDLETON, CALIFORNIA 92055-5606

IN REPLY REFER TO:  
1330  
G-1/Adj/TL  
15 SEP 2009

FOURTH ENDORSEMENT on Capt Muth's AA Form 1000 of 26 Aug 09

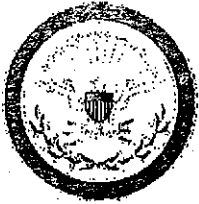
From: Commanding General, 1st Marine Logistics Group  
To: Commandant of the Marine Corps, (MMA-1), Attn: Captain  
James D'Elia USMC

Subj: REQUEST FOR EXTENSION OF END OF ACTIVE SERVICE IN CASE OF  
CAPTAIN ROBERT F. MUTH 3590/4402 USMC

1. Forwarded, recommending approval.

  
J. P. RETHWISCH  
By direction

← 21 Sep 09



UNITED STATES MARINE CORPS

COMBAT LOGISTICS REGIMENT-17  
1ST MARINE LOGISTICS GROUP  
BOX 555607  
CAMP PENDLETON, CALIFORNIA 92056-5607

IN REPLY REFER TO

1160

S-1

SEP 14 2009

THIRD ENDORSEMENT on Capt Muth's AA form 1000 of 26 Aug 09

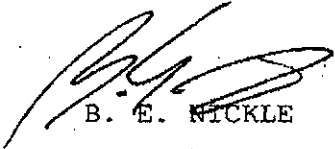
From: Commanding Officer

To: Commandant of the Marine Corps (MMA-1), Attn: Captain  
James D'Elia USMC

Via: Commanding General, 1st Marine Logistics Group

Subj: REQUEST FOR EXTENSION OF END OF ACTIVE SERVICE IN CASE OF  
CAPTAIN ROBERT F. MUTH 3590/4402

1. Forwarded, recommending approval.

  
B. E. NICKLE



UNITED STATES MARINE CORPS  
SERVICE COMPANY  
COMBAT LOGISTICS REGIMENT-17  
1ST MARINE LOGISTICS GROUP  
BOX 555607  
CAMP PENDLETON, CALIFORNIA 92055-5607

IN REPLY REFER TO  
1160  
SVC  
11 Sep 09

SECOND ENDORSEMENT on Capt Muth's AA form 1000 of 26 Aug 09

From: Commanding Officer  
To: Commandant of the Marine Corps (MCOA-1), Attn: Captain  
James D'Elia USMC  
Via: (1) Commanding Officer, Combat Logistics Regiment-17, 1st  
Marine Logistics Group  
(2) Commanding General, 1st Marine Logistics Group  
Subj: REQUEST FOR EXTENSION OF END OF ACTIVE SERVICE IN THE  
CASE OF CAPTAIN ROBERT F. MUTH 3590/4402 USMC

1. Forwarded, recommending approval.

T. R. POST





UNITED STATES MARINE CORPS  
LEGAL SERVICES SUPPORT SECTION  
1st MARINE LOGISTICS GROUP, MARFORPAC  
BOX 555607  
CAMP PENDLETON, CA 92055-5607

IN REPLY REFER TO:  
1000  
OIC  
31 Aug 09

FIRST ENDORSEMENT on Capt Muth's AA Form 1000 of 26 Aug 09

From: Officer-in-Charge, Legal Services Support Section, 1st Marine Logistics Group  
To: Commandant of the Marine Corps (MMAA-1), Attn: Captain James D'Elia USMC  
Via: (1) Commanding Officer, Service Company, Combat Logistics Regiment-17, 1st Marine Logistics Group  
(2) Commanding Officer, Combat Logistics Regiment-17, 1st Marine Logistics Group  
(3) Commanding General, 1st Marine Logistics Group  
Subj: REQUEST FOR EXTENSION OF END OF ACTIVE SERVICE IN THE CASE OF CAPTAIN ROBERT F. MUTH USMC 3590/4402  
Ref: (a) JAGINST 5803.1C

1. Forwarded recommending approval. Approval of Captain Muth's request for a three-month extension to his End of Active Service (EAS) will promote the accomplishment of the Legal Services Support Section (LSSS), 1st Marine Logistics Group (1st MLG) mission and minimize the additional expenditure of government time and resources on the detailing of new defense counsel and on potential post-trial issues.
2. Defense counsel detailed to represent servicemembers form an attorney-client relationship with their client under reference (a). During the course of their representation, defense counsel devote a considerable amount of time and resources investigating and preparing for trial. Captain Muth was detailed to each of these complex cases, which are described in the basic correspondence, because of his unique skills and extensive experience as a defense counsel. He has spent a period of months preparing for trial in each of these cases and for one post-trial hearing.
3. Three of the four court-martial cases and the one post-trial hearing in which Captain Muth has been detailed as a defense counsel are scheduled to be completed by 31 December 2009. Any denial of Captain Muth's request for extension of his EAS would have a direct adverse operational impact on the mission of the LSSS, 1st MLG, which is to provide effective and expeditious trial services support. Specifically, Captain Muth would be

Subj: REQUEST FOR EXTENSION OF END OF ACTIVE SERVICE IN THE  
CASE OF CAPTAIN ROBERT F. MUTH USMC 3590/4402

excused as defense counsel as a result of his EAS and a new defense counsel would have to be detailed to each of these complex cases. This would result in considerable delay so that the new defense counsel could be provided with adequate time to investigate and prepare for trial. Furthermore, this excusal could create the potential for future post-trial issues arising over the accused receiving adequate representation. A timely and relevant example is the current post-trial *Dubay* hearing ordered by the appellate courts in the case of *U.S. v. Hutchins* to address the issue of proper excusal of a defense counsel as a result of his EAS.

4. If you wish to contact me with questions concerning this recommendation, I can be reached telephonically at (760) 725-9700 or by e-mail at [Keith.Forkin@usmc.mil](mailto:Keith.Forkin@usmc.mil).



KEITH A. FORKIN

**ADMINISTRATIVE ACTION (5216)**

NAVMC 102.74 (REV. 3.86)

Previous editions will be used

SN: 00000-00-003-0904 U/I: PADS OF 100

1. ACTION NO.

2. SSIC/FILE NO.

1000

3.

DATE: 26 AUG 09

4. FROM (Grade, Name, SSN, MOS, or CO, Pers. O, etc.)

CAPT MUTH, ROBERT F. XXX-XX-3590/4402,  
USMC

5. ORGANIZATION AND STATION (Complete Address)

Legal Services Support Team-Echo  
Legal Services Support Section  
Box 555607  
Camp Pendleton, California 92055

6. VIA (As required)

- (1) OIC, LSSS
- (2) CO, Svc Co
- (3) CO, CLR-17
- (4) CG, 1st MLG

7.

Commandant of the Marine Corps  
(MMA-1)  
3280 Russell Road  
Quantico, VA 22134-5103

TO:

8. NATURE OF ACTION/SUBJECT

Request for extension of EAS  
date.9. COPY TO  
(1) FILE

10. REFERENCE OR AUTHORITY (If Applicable)

11. ENCLOSURES (If Any)

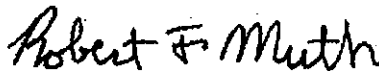
(1). Description of pending cases.

12. SUPPLEMENTAL INFORMATION (Reduce to minimum wording - type name of originator and sign 3 line below text)

1. I respectfully request an extension of my active duty service in order to have sufficient time to complete my work as a defense counsel on pending General Courts-Martial cases and one complicated DuBay Hearing.

2. My End of Active Service (EAS) date is currently 1 October 2009. I respectfully request that the date be changed to 31 December 2009. This change would provide sufficient time for me to complete the pending cases I am serving on as defense counsel. This will prevent the significant prejudice to my clients that will result from being forced to involuntarily withdraw my representation of those Marines I currently represent.

3. An explanation of current pending cases that serve as the basis of this request is provided in Encl (1).



R. F. MUTH

APPELLATE EXHIBIT X6  
PAGE 6 OF 9

13. PROCESSING ACTION. (Complete processing action in item 12 or on reverse. Endorse by rubber stamp where practicable.)

STATEMENT OF CASES

The following information is provided on each pending case as justification for this request to extend the EAS of Capt R. F. Muth, XXX-XX-3590/4402, USMC:

(a) *United States v. Watson* - Private First Class (PFC) Watson is charged with two specifications of attempted rape and murder, one specification of attempted kidnapping, one specification of possession of child pornography and various other charges related to state weapons charges, communicating threats, indecent language with minors, and unauthorized absence. PFC Watson has been in pretrial confinement since 11 March 2009 and I was detailed to represent him later that month. I have represented PFC Watson for his initial Article 32 hearing and again when his Article 32 hearing was recently reopened. Referral of charges is imminent in this case. This case deals with a number of complex issues and voluminous discovery. The Accused has filed a demand for speedy trial in this case. My withdrawal from representing PFC Watson would cause great prejudice to his case and further the already extensive pre-trial confinement time he has already been subjected to at this point. Trial dates in this case have not been set as charges have not been referred, however, I anticipate this case will be completed before my requested new EAS date of 31 December 2009.

(b) *United States v. Scaglione* - GySgt Scaglione is charged at General Courts-Martial with two specifications of rape, two specifications of forcible sodomy, two specifications of adultery and numerous violations of various General Orders. I am the Individual Military Counsel (IMC) in GySgt Scaglione's case. The case currently has trial dates set for 26-30 October 2009. This complicated case was originally preferred by the government on 6 October 2008. On the eve of trial the Convening Authority unilaterally pulled out of a signed Pre-Trial Agreement in order to allow the government to investigate allegations of other misconduct. Involuntarily ending my representation of GySgt Scaglione a few weeks before his trial dates will likely dramatically delay the adjudication of his case.

(c) *United States v. Pagan* - This case has been classified as a National Security Case. Master Sergeant (MSgt) Pagan is charged for his alleged involvement in what

ENCLOSURE (1)

APPELLATE EXHIBIT XL  
PAGE 7 OF 9

the government has claimed to be one of the largest mishandling of classified information in the history of the United States. I am the IMC on this case and there is no other military counsel representing MSgt Pagan. He is also facing charges relating to the alleged theft of an M16A2 lower receiver. This case currently has trial dates set for 21-25 September 2009. It is conceivable that the dates could be continued due to the complexity and numerous issues involved in the case. This case involves thousands of pages of discovery and dozens of witnesses. To date, fourteen motions have already been litigated in this case. I fully expect that even if the case were to be continued that it would be completed prior to my requested new EAS date of 31 December 2009.

(d) *United States v. Hohman* - This case involves a Sergeant charged with manslaughter in the death of another Marine in a training accident. This case has been pending for over two years at this point and the delay is due to the Navy Safety Center's Safety Investigation in the case. A Safety Investigation has been completed and the Safety Center has refused, per their standard policy, to release the results of their findings. The case is indefinitely on hold until the Secretary of the Navy makes a determination of whether the Safety Center will release their report. No new trial dates have been set in this case and it is unexpected that this case will be resolved, if ever at courts-martial, by the requested new EAS date of 31 December 2009.

(e) *United States v. Mancillas* - This case is a DuBay hearing into issues raised to the Court of Appeals for the Armed Forces (CAAF). This extraordinarily complicated DuBay hearing relates to a General Courts-Martial that took place over six years ago. The case involved a number of issues related to the mental capacity of the accused and the purported ineffective assistance of counsel at the trial level. The case involves extensive discovery including thousands of pages of trial transcript, medical records and appellate briefs and extensive case law research. The DuBay hearing has been set for 14-15 October. This case will likely be completed by the requested new EAS date of 31 December 2009, however, it will not be completed by my current 1 October 2009 EAS date.



UNITED STATES MARINE CORPS

COMBAT LOGISTICS REGIMENT-17  
1ST MARINE LOGISTICS GROUP  
BOX 555607  
CAMP PENDLETON, CALIFORNIA 92055-5607

PERSONAL ACTION REQUEST (PAR)

DATE: 090911  
MEMBER'S COMPANY: SVC Co  
WORK PHONE: 725 8778 ALT PHONE # \_\_\_\_\_  
RANK, FULL NAME: Capt Muth, Robert  
SSN (Full): 3590

Ext. Pkg TYPE OF REQUEST:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

ROUTING LIST

Title	Print	Signature	Date
Company Gunnery	<u>HANSTON A.L.</u>	<u>Antonio Hamilton</u>	<u>090911</u>
Company 1st Sgt			
Company CO	<u>POST TR</u>	<u>[Signature]</u>	<u>090911</u>

REGIMENT S-1

Date: 090911  
Received by: Sgt LANE  
Sign: [Signature]  
Action taken: ENDD DRAFTED, FORWARDED FOR SIGNATURES  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



DEPARTMENT OF THE NAVY  
HEADQUARTERS UNITED STATES MARINE CORPS  
3280 RUSSELL ROAD  
QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:  
1400  
MMAA-3  
NOV 27 2009

From: Commandant of the Marine Corps (MMAA-3)  
To: Captain Robert F. Muth XXX-XX-3590/4402  
Via: (1) Commanding General, 1st Marine Logistics Group  
(2) Commanding Officer, Combat Logistics Regiment-17  
(3) Company Commander, Service Company, Combat Logistics Regiment-17  
(4) Officer-in-Charge, Legal Services Support Section, 1st Marine Logistics Group

Subj: REQUEST FOR EAD ICO CAPTAIN ROBERT F. MUTH XXX XX  
3590/4402

Ref: (a) Captain's AA form of 26 Aug 09

1. Per response to reference (a) Captain Muth's request for extension on active duty has been carefully considered but disapproved.
2. Captain Muth's End of Active Service (EAS) date was previously extended to 1 December 2009 on 16 September 2009.
3. The point of contact for further questions is Second Lieutenant S. L. Snyder at (703) 784-9284.

  
D. J. Davis  
By direction

Copy to:  
Captain Muth  
MMAA-2



UNITED STATES MARINE CORPS  
1ST MARINE LOGISTICS GROUP  
BOX 555607  
CAMP PENDLETON, CALIFORNIA 92055-5607

IN REPLY REFER TO  
1160  
G-1  
23 Nov 09

FOURTH ENDORSEMENT on Capt Muth's AA Form 1000 of 23 Nov 09

From: Commanding General

To: Commandant of the Marine Corps (MMA-3)

Subj: REQUEST FOR SECOND EXTENSION OF END OF ACTIVE SERVICE IN  
THE CASE OF CAPTAIN ROBERT F. MUTH 3590/4402 USMC

1. Forwarded, recommending approval.

  
S. B. ARMSTRONG  
By direction





UNITED STATES MARINE CORPS  
COMBAT LOGISTICS REGIMENT-17  
1ST MARINE LOGISTICS GROUP  
BOX 555607  
CAMP PENDLETON, CALIFORNIA 92055-5607

ON REPLY SLIP ONLY  
1160  
S-1  
23 Nov 09

THIRD ENDORSEMENT on Capt Muth's AA Form 1000 of 23 Nov 09


From: Commanding Officer

To: Commandant of the Marine Corps (MMAA-3)

Via: (1) Commanding General, 1st Marine Logistics Group

Subj: REQUEST FOR SECOND EXTENSION OF END OF ACTIVE SERVICE IN  
THE CASE OF CAPTAIN ROBERT F. MUTH 3590/4402 USMC

1. Forwarded, recommending approval.

  
T. J. GALVIN  
By direction



UNITED STATES MARINE CORPS  
SERVICE COMPANY  
COMBAT LOGISTICS REGIMENT-17  
1ST MARINE LOGISTICS GROUP  
BOX 555607  
CAMP PENDLETON, CALIFORNIA 92055-5607

IN ARMY SERVICE OF  
1160  
SVC  
23 Nov 09

SECOND ENDORSEMENT on Capt Muth's AA Form 1000 of 23 Nov 09

From: Commanding Officer  
To: Commandant of the Marine Corps (MMA-3)  
Via: (1) Commanding Officer, Combat Logistics Regiment-17, 1st  
Marine Logistics Group  
(2) Commanding General, 1st Marine Logistics Group

Subj: REQUEST FOR SECOND EXTENSION OF END OF ACTIVE SERVICE IN  
THE CASE OF CAPTAIN ROBERT F. MUTH 3590/4402 USMC

1. Forwarded, recommending approval.

  
T. R. POST



UNITED STATES MARINE CORPS  
LEGAL SERVICES SUPPORT SECTION  
1st MARINE LOGISTICS GROUP, MARFORPAC  
BOX 554607  
CAMP PENDLETON, CA 92055 5607

REPLY TO  
1000  
OIC  
23 Nov 09

FIRST ENDORSEMENT on Capt Muth's AA Form 1000 of 23 Nov 09

From: Officer-in-Charge, Legal Services Support Section, 1st  
Marine Logistics Group  
To: Commandant of the Marine Corps (MMA-3)  
Via: (1) Commanding Officer, Service Company, Combat Logistics  
Regiment-17, 1st Marine Logistics Group  
(2) Commanding Officer, Combat Logistics Regiment-17, 1st  
Marine Logistics Group  
(3) Commanding General, 1st Marine Logistics Group  
Subj: REQUEST FOR SECOND EXTENSION OF END OF ACTIVE SERVICE IN  
THE CASE OF CAPTAIN ROBERT F. MUTH 3590/4402 USMC  
Ref: (a) JAGINST 5803.1C

1. Forwarded recommending approval. Approval of Captain Muth's request for a three-month extension to his End of Active Service (EAS) will promote the accomplishment of the Legal Services Support Section (LSSS), 1st Marine Logistics Group (1st MLG) mission and minimize the additional expenditure of government time and resources in potential further delay of the cases and on potential post-trial issues.
2. Defense counsel detailed to represent servicemembers form an attorney-client relationship with their client under reference (a). During the course of their representation, defense counsel devote a considerable amount of time and resources investigating and preparing for trial. Captain Muth was detailed to each of these two complex cases, which are described in the basic correspondence, because of his unique skills and extensive experience as a defense counsel. He has spent a period of months preparing for trial in each of these cases.
3. One of the two court-martial cases in which Captain Muth has been detailed, U.S. v. Watson, is scheduled to be completed by 1 February 2010. Any denial of Captain Muth's request for extension of his EAS may have a direct adverse operational impact on the mission of the LSSS, 1st MLG, which is to provide effective and expeditious trial services support. Specifically,

Subj: REQUEST FOR SECOND EXTENSION OF END OF ACTIVE SERVICE IN  
THE CASE OF CAPTAIN ROBERT F. MUTH 3590/4402 USMC

Captain Muth would be excused as detailed defense counsel as a result of his EAS on 1 December 2009 and the second detailed defense counsel, Captain Sameit, could potentially need additional time to adequately prepare for trial. Furthermore, this excusal could create the potential for future post-trial issues arising over whether the accused received adequate legal representation.

4. If you wish to contact me with questions concerning this recommendation, I can be reached telephonically at (760) 725-9700 or by e-mail at [Keith.Forkin@usmc.mil](mailto:Keith.Forkin@usmc.mil).

  
KEITH A. FORKIN

**ADMINISTRATIVE ACTION (5216)**

NAVMC 102.74 (REV. 3.86)

Previous editions will be used

SN: 00000-00-003-0904 U/I: PADS OF 100

1. ACTION NO.	2. SSIC/FILE NO. 1000
3. DATE: 23 NOV 09	

4. FROM (Grade, Name, ESN, MOS, or CO, Pers O, etc.)  
 CAPT MUTH, ROBERT F. XXX-XX-3590/4402,  
 USMC

5. ORGANIZATION AND STATION (Complete Address)  
 Legal Services Support Team-Echo  
 Legal Services Support Section  
 Box 555607  
 Camp Pendleton, California 92055

6. VIA (As required)
- (1) OIC, LSSS
  - (2) CO, Svc Co
  - (3) CO, CLR-17
  - (4) CG, 1st MLG

7.  
 Commandant of the Marine Corps  
 (MCOA-1)  
 3225 Russell Road  
 Quantico, VA 22134-5103

8. NATURE OF ACTION/SUBJECT  
 Request for extension of EAS  
 date.

9. COPY TO  
 (1) FILE

10. REFERENCE OR AUTHORITY (if Applicable)

11. ENCLOSURES (if Any)  
 (1) Description of pending cases

12. SUPPLEMENTAL INFORMATION (Reduce to minimum wording - type name of originator and sign 3 line below text)

1. I respectfully request an extension of my active duty service in order to have sufficient time to complete my work as a defense counsel on pending General Courts Martial cases and one complicated BuBay Hearing.
2. My End of Active Service (EAS) date is currently 1 December 2009. I respectfully request that the date be changed to 1 March 2010. This change would provide sufficient time for me to complete the pending cases I am serving on as defense counsel. This will prevent the significant prejudice to my clients that will result from being forced to involuntarily withdraw my representation of those Marines I currently represent.
3. An explanation of current pending cases that serve as the basis of this request is provided in Encl (1).

*Robert F Muth*  
 R. F. MUTH

APPELLATE EXHIBIT XIT  
 PAGE 7 OF 9

13. PROCESSING ACTION. (Complete processing action in item 12 or on reverse. Endorse by rubber stamp where practicable.)

STATEMENT OF CASES

The following information is provided on each pending case as justification for this request to extend the EAS of Capt R. F. Muth, XXX-XX-3590/4402, USMC:

(a) *United States v. Watson* - Private First Class (PFC) Watson is charged with two specifications of attempted rape and premeditated murder, one specification of attempted kidnapping, two specifications of possession of child pornography and various other charges related to state weapons charges, communicating threats, indecent language with minors, and unauthorized absence. PFC Watson has been in pretrial confinement since 11 March 2009 and I was detailed to represent him later that month. I have represented PFC Watson for his initial Article 32 hearing and again for his two subsequent Article 32 hearings. PFC Watson has made numerous requests for speedy trial. His charges were finally referred on 28 October 2009. He was arraigned on 3 November 2009 having waived the five day waiting period. At the arraignment PFC Watson requested to have his case heard prior to my 1 December 2009 scheduled EAS. The military judge indicated he would not schedule the trial dates that quickly due to the complexity of the case. PFC Watson's trial is currently scheduled for 19-28 January 2010. This case deals with a number of complex issues and voluminous discovery. My withdrawal from representing PFC Watson would cause great prejudice to his case and further the already extensive pre-trial confinement time he has already been subjected to at this point in order to allow for another defense counsel to prepare for his trial.

(b) *United States v. Hohman* - This case involves a Sergeant charged with manslaughter in the death of another Marine in a training accident. This case has been pending for over three years at this point and the delay is due to the Navy Safety Center's Safety Investigation in the case. A Safety Investigation has been completed and the Safety Center had refused, per their standard policy, to release the results of their findings. The case was on hold indefinitely while awaiting the Secretary of the Navy's determination of whether the Safety Center will release their report. On 16 November 2009, the government approved allowing the safety center investigator to testify and an in camera review was conducted regarding his investigation. The military judge is currently reviewing motions and

documents from this hearing and as a result, no new trial dates have been set in this case.

(c) *United States v. Mancillas* - This case is a DuBay hearing into issues raised to the Court of Appeals for the Armed Forces (CAAF). This extraordinarily complicated DuBay hearing relates to a General Courts-Martial that took place over six years ago. The case involved a number of issues related to the mental capacity of the accused and the purported ineffective assistance of counsel at the trial level. The case involves extensive discovery including thousands of pages of trial transcript, medical records and appellate briefs and extensive case law research. The client has been variously committed to the mental health department at the Beaumont Army Medical Center at Fort Bliss, Texas. The DuBay hearing was conducted on 14-15 October. While the hearing is complete, the military judge did not close the hearing and left open the possibility that she might require another session of court depending upon her review of the record. Due to the difficulty of this case and the client's unstable mental condition, it would be extremely prejudicial to his case to have a substitute defense counsel appointed at this point if the military judge decided to take further testimony prior to closing the hearing.

**Sanzi LtCol Thomas J'**

---

**From:** Gannon Maj Nicholas L  
**Sent:** Thursday, July 01, 2010 11:35 AM  
**To:** Sanzi LtCol Thomas J; Megan Tankersly; Kunce Capt Lucas Tyree  
**Subject:** RE: ICO SGT HOHMAN

Your Honor,

In response to the Court's question: Capt Muth is not on orders at this time. However, I believe that the Court's order will result in Capt Muth being offered orders in the near future.

I respectfully request that the government be granted an additional three weeks to comply with the Court's order Sir.

Thank you for you patience Sir.

Very respectfully,  
Maj Gannon

-----Original Message-----

**From:** Sanzi LtCol Thomas J  
**Sent:** Thursday, July 01, 2010 9:01  
**To:** Gannon Maj Nicholas L; 'Megan Tankersly'; Kunce Capt Lucas Tyree  
**Subject:** RE: ICO SGT HOHMAN

Capt Gannon,

Can you spare me the suspense and tell me where Muth is?

r/s,  
TS

-----Original Message-----

**From:** Gannon Maj Nicholas L  
**Sent:** Wednesday, June 30, 2010 16:52  
**To:** Megan Tankersly; Kunce Capt Lucas Tyree; Sanzi LtCol Thomas J  
**Subject:** RE: ICO SGT HOHMAN

Your Honor, Megan and Capt Kunce,

We do not have an Article 39a session scheduled for tomorrow. However, I believe it may be a good idea for the parties to schedule an 802 conference for sometime next week. I am not sure of Mr. Low's availability, or the Court's availability, but I propose 1000 on 6 July 2010 for our 802.

Very respectfully,  
Maj Gannon

-----Original Message-----

**From:** Megan Tankersly [mailto:megant@jhllaw.com]  
**Sent:** Wednesday, June 30, 2010 16:11  
**To:** Kunce Capt Lucas Tyree; Gannon Maj Nicholas L; Sanzi LtCol Thomas J  
**Subject:** ICO SGT HOHMAN  
**Importance:** High

All,

This email is from Mr. Low, who asked me to send it out. He is on the road and cannot write an email at the moment.



Mr. Low remembers discussion about a court appearance on July 1, 2010, to get an update on the status of Capt. Muth being brought back to the Marine Corps. We have looked up the docket and do not see the Hohman case scheduled anywhere. As we understand it, there is not a hearing tomorrow, therefore we will not be appearing unless we hear otherwise. Mr. Low has left a message on Judge Sanzi's voice mail and I have sent an email and left messages for Capt. Kunce, who is in trial, and Maj. Gannon.

Mr. Low can be reached on his cell phone or via email at [jhlowiv@aol.com](mailto:jhlowiv@aol.com).

Thank you,

Megan

\*\*\*\*\*

Sincerely,

Megan Tankersley, B.A., Legal Case Manager

THE LAW FIRM OF JOSEPH H. LOW IV

One World Trade Center, Suite 2320

Long Beach, CA 90831

Tele: 562/901-0840 \* Fax: 562/901-0841

Email: [MeganT@JHLLaw.com](mailto:MeganT@JHLLaw.com) <blocked::mailto:MeganT@JHLLaw.com>

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APPELLATE EXHIBIT XLII  
PAGE 2 OF 2

**Sanzi LtCol Thomas J**

---

**From:** Gannon Maj Nicholas L  
**Sent:** Wednesday, July 14, 2010 4:00 PM  
**To:** Sanzi LtCol Thomas J  
**Cc:** Kunce Capt Lucas Tyree; joseph@jhlaw.com; 'jhlowIV@aol.com'  
**Subject:** Contact with Mr. Muth

Your Honor,

Since my last email to the Court, I have not heard from Mr. Muth. I anticipate that he will give us a final answer once he socializes the issue with his ethics advisors.

I would request that the Court not take any action until we hear from Mr. Muth. When I spoke with Mr. Muth, it sounded like he was giving serious consideration to taking the orders, but he was non-committal until he consulted with his employer and the ethics folks. I would assume that he will respond in the very near future. He was briefed on the deadline, but we only spoke on Tuesday afternoon.

Very respectfully submitted,  
Major Gannon

**Sanzi LtCol Thomas J'**

---

**From:** Gannon Maj Nicholas L  
**Sent:** Wednesday, July 14, 2010 12:23 PM  
**To:** Sanzi LtCol Thomas J  
**Cc:** Kunce Capt Lucas Tyree; 'jhlowIV@aol.com'; joseph@jhllaw.com; Van Norman Capt Jessica G  
**Subject:** Contact with Mr. Muth

Your Honor,

Good afternoon Sir.

I spoke with Mr. Muth yesterday and briefed him on the details of returning to active duty to represent Sgt Hohman.

Mr. Muth brought one administrative issue to our attention, which necessitated some additional research, but in the end, will not effect his eligibility to return to active duty to represent the Accused.

Mr. Muth indicated that he was going to speak with the ethics attorneys at his firm, make a final decision, and get back to me as soon as possible.

We are still waiting for a final decision from Mr. Muth, and I anticipate that he will get back to me in the very near future.

As soon as Mr. Muth informs the government of his decision, I will advise the Court.

Very respectfully,  
Maj Gannon

APPELLATE EXHIBIT XLIV  
PAGE 1 OF 1

## Sanzi LtCol Thomas J

**From:** Robert F. Muth [rmuth@gaplegal.com]  
**Sent:** Wednesday, July 14, 2010 4:27 PM  
**To:** Sanzi LtCol Thomas J  
**Cc:** Gannon Maj Nicholas L; jhlowIV@aol.com; joseph@jhllaw.com; Kunce Capt Lucas Tyree  
**Subject:** Sgt Hohman Matter

**Attachments:** image001.png



image001.png (11 KB)

Good Afternoon LtCol Sanzi,

I am writing in response to Maj Gannon's email of this date which I was not copied on, but which was ultimately forwarded to me by defense counsel. Maj Gannon and I did speak yesterday during which I asked him a very specific question concerning my ECC/EOS date and explained that upon receiving the answer, I would consider the issue and get back to him. This email is intended to convey a proposed solution to the problem created solely by the Government when HQMC refused to extend my active service beyond 1 Dec 2010, and compounded by the recent Hutchins opinion.

As you may recall, I repeatedly requested to extend my active service in order to complete my representation of clients, including Sgt Hohman, that I had remaining at the time of my EAS. I note that during my remaining months on active duty the Government saw fit to activate numerous Reserve Marine Officers to prosecute service members that I was representing, however, they were unwilling to extend my active service beyond 1 December 2009 to defend Marine clients. My requests to extend beyond 1 December 2009 were denied outright without explanation. I therefore returned to civilian life and began my civilian practice in earnest.

I am now more than seven months removed from my EAS. I have moved with my family to a new home almost 100 miles away and am gainfully employed with the law firm of Godes & Preis, LLP. I have new clients to whom I am ethically obligated to represent to the best of my abilities. I am also now less than one month from the end of my EOS and I have already submitted my request to resign my commission. In reaction to the Hutchins opinion, which this Court has already drawn a distinction between my actions and those of the defense counsel in that case, the Government is now asking me to abandon my current clients and practice in order to rectify a situation wholly of its own creation when it forced me to sever the ACR with Sgt Hohman. By voluntarily returning to active duty at this time, I would necessarily be abandoning my current clients, which is unacceptable.

Notwithstanding, there is a scenario under which I could represent Sgt Hohman without abandoning my civilian clients. That is, rather than going on active duty to represent a single client at a tremendous cost to the Government, and to the detriment of my civilian clients, I am willing to represent Sgt Hohman just like any other current client, and would only bill the Government for time actually spent in doing so. My hourly rate is \$300.00 which is far less than it would cost the Government to return me to active duty. If the Government is willing to pay for this representation (similar to how many public defenders are paid in the civilian legal world) I would be able to represent Sgt Hohman. While I appreciate the fact that this might be an unusual scenario, it is a good faith attempt on my part to facilitate a solution to this Government caused problem. I assume that if the Government were capable of involuntarily recalling me, it would have done so

already.

I look forward to a response.

Semper Fidelis,

Robert F. Muth

Robert F. Muth

Attorney at Law

Godes & Preis, LLP

8001 Irvine Center Drive, Suite 1040

Irvine, California 92618

949.682.6560 m

949.385.6184 t

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cid:image001.png@01CA9AB5.9B4F3D20

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**Sanzi LtCol Thomas J'**

**From:** Joseph M. Preis [jpreis@gaplegal.com]  
**Sent:** Thursday, September 02, 2010 5:27 PM  
**To:** Gannon Maj Nicholas L  
**Cc:** Kunce Capt Lucas Tyree; jhlowIV@aol.com; Sanzi LtCol Thomas J; warlawyer@aol.com  
**Subject:** RE: Interrogatories for Mr. Muth

Maj Gannon:

While Mr. Muth would be willing to review and consider any properly served and formatted interrogatories, without a valid ACR waiver from Sgt Hohman, I can't imagine that we have anything further to discuss.

Joseph M. Preis  
Attorney at Law  
Godes & Preis, LLP  
8001 Irvine Center Drive, Suite 1040  
Irvine, California 92618

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-----Original Message-----

**From:** Gannon Maj Nicholas L [mailto:nicholas.gannon@usmc.mil]  
**Sent:** Wednesday, September 01, 2010 2:11 PM  
**To:** Joseph M. Preis  
**Subject:** RE: Interrogatories for Mr. Muth

Mr. Preis,

Is Mr. Muth willing to answer the questions we sent you? Please advise I would like to inform the Military Judge as soon as possible as to whether Mr. Muth is even willing to entertain answering the questions we provided your office.

In response to your question below about the ACR waiver: Sgt Hohman has not executed any ACR waiver to my knowledge.

Maj Gannon

-----Original Message-----

**From:** Joseph M. Preis [mailto:jpreis@gaplegal.com]  
**Sent:** Friday, August 27, 2010 11:13  
**To:** Gannon Maj Nicholas L  
**Cc:** Kunce Capt Lucas Tyree; joseph@jhllaw.com; jhlowIV@aol.com; Sanzi LtCol Thomas J; WarLawyer@aol.com  
**Subject:** Interrogatories for Mr. Muth

Maj Gannon-

Thank you for your email. Before I review or consider the "Interrogatories for Mr. Muth", please correct the document to reflect dates which have not yet passed. For example, although I received these from you for the first time today (27 Aug 10) via email, the document provides that "[t]hese may be answered orally at the 21 August 39(a) session or in writing before the 21 August 2010 session", which, based on my receipt today, is clearly impossible. In addition, please ensure that these are served in accordance with the MCM and that the certificate of service is signed and accurately reflects the date of proper service.

In addition, while I appreciate your email today, you have yet to respond to any of my prior communications. To that end, please respond to this communication as to the status of Sgt. Hohman's waiver of the attorney client privilege. From an outside educated position, it appears as though the Government is improperly trying to force Sgt Hohman to choose between his right to counsel and his right to maintain the attorney client privilege. I cannot imagine that this course of action will narrow the issues on appeal and instead appears to expand the unintended consequences of the Hutchins Opinion. I look forward to hearing from you.

Best,

Joseph M. Preis  
Attorney at Law  
Godes & Preis, LLP  
8001 Irvine Center Drive, Suite 1040  
Irvine, California 92618

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-----Original Message-----

From: Gannon Maj Nicholas L [mailto:[nicholas.gannon@usmc.mil](mailto:nicholas.gannon@usmc.mil)]  
Sent: Friday, August 27, 2010 8:20 AM  
To: Joseph M. Preis  
Subject: Interrogatories for Mr. Muth

Mr. Preis,

On 21 Aug 2010, the Military Judge ICO U.S. v. Hohman directed that I send these interrogatories to you for your review and consideration.

R,  
Maj Gannon

Nick Gannon  
Major, U.S. Marine Corps  
Trial Counsel  
Camp Pendleton, CA  
[Nicholas.gannon@usmc.mil](mailto:Nicholas.gannon@usmc.mil)  
760-208-7090

**WESTERN JUDICIAL CIRCUIT  
NAVY-MARINE CORPS TRIAL JUDICIARY**

---

UNITED STATES	)	GENERAL COURT-MARTIAL
	)	
v.	)	GOVERNMENT INTERROGATORIES
	)	FOR MR. MUTH
CALEB P. HOHMAN	)	
XXX XXX 6203	)	
Sergeant	)	
U.S. Marine Corps	)	12 Aug 2010

---

The following are the interrogatories for Mr. Muth. These may be answered orally at the 21 August 39(a) session or in writing before the 21 August 2010 session;

1. When were you detailed as Sergeant Hohman's defense counsel?
2. By whom were you detailed?
3. Who did you replace as detailed defense counsel?
4. Describe the steps that you took in preparation for trial.
5. Did you draft any pleadings in this case?
6. Did you interview any witnesses?
7. How many witnesses did you contact?
8. Describe any specific areas of responsibility you were assigned.
9. In addition to yourself, were there any other counsel assigned?
10. Who was the lead counsel?
11. What action did you take if any with respect to your remaining military clients once you knew your end of active service would be on 1 December 2009?

\_\_\_\_\_  
N. L. GANNON  
Maj, U.S. Marine Corps  
Trial Counsel

\*\*\*\*\*

**Certificate of Service**

I hereby attest that a true copy of the foregoing motion was served on the court and opposing counsel on 12 August 2010.

\_\_\_\_\_  
N. L. GANNON



WESTERN JUDICIAL CIRCUIT  
NAVY-MARINE CORPS TRIAL JUDICIARY

UNITED STATES

GENERAL COURT-MARTIAL

v.

CALEB P. HOHMAN  
XXX XX 6203  
SERGEANT  
U.S. MARINE CORPS

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND DECISION ON WHETHER THE  
ACCUSED'S ATTORNEY-CLIENT  
RELATIONSHIP WITH DETAILED  
DEFENSE COUNSEL WAS TERMINATED  
FOR GOOD CAUSE

STATEMENT OF THE CASE

The accused is charged with Involuntary Manslaughter in violation of UCMJ Article 119 for allegedly shooting a fellow Marine on 30 October 2006 during a training exercise in which he allegedly loaded his weapon with live rounds instead of blank rounds. He is also charged with two violations of UCMJ Article 92 (violation of a general order and dereliction of duty) for failing to ensure his magazines were loaded with blank ammunition. Charges were preferred on 18 April 2007 and on 19 March 2008 the convening authority referred the charges to a General Court-Martial for trial.

The major issue litigated in this case during the period from the initial court session on 5 May 2008 until January 2010 was whether the government could be compelled to release documents

1 about the alleged training incident that were retained by the  
2 Naval Safety Center. In January 2010, the court, after  
3 inspecting the documents and holding hearings on the issue,  
4 ruled that the Naval Safety Center Documents did not have to be  
5 turned over to the defense as the statements were never adopted  
6 by the witnesses and, in any event, the statements were  
7 identical to statements already possessed by the defense. This  
8 cleared the way for the case to continue through the motions  
9 phase.

10  
11 On 22 April 2010, however, the United States Navy-Marine Corps  
12 Court of Criminal Appeals issued its decision in United States  
13 v. Hutchins, 68 M.J. 623 (N.M.Ct.Crim.App., 2010). The court  
14 held, among other things, that where the military judge severed  
15 an attorney-client relationship (ACR) because the detailed  
16 defense counsel had to leave active duty because he reached his  
17 End of Active Service (EAS) date, such severance was not for  
18 good cause. Based on that conclusion, the Hutchins court set  
19 aside the findings and sentence in that case.

20  
21 On 23 April 2010, the court in this case directed the parties  
22 to read the Hutchins opinion and be ready to discuss how that  
23 decision affected the current case. The reason for the concern  
24 was that in December 2009, this court severed the ACR involving  
25 the detailed defense counsel, Captain Muth, because he reached

1 his EAS and the Marine Corps refused to grant his second  
2 extension request to allow him to remain on active duty in the  
3 Marine Corps and to continue his representation of the accused.  
4 Based on an R.C.M. 802 conference held on 27 April 2010, the  
5 court ordered a UCMJ Article 39a session be held on 25 May 2010  
6 to establish the facts surrounding Captain Muth's departure from  
7 active duty and to determine whether it would be possible to  
8 return him to active duty.

9  
10 The hearing was held as scheduled, and as a result, on 5 June  
11 2010 the court ordered the government to return Mr. Muth to the  
12 defense team and further ordered that if he were not returned to  
13 the defense team by 1 July 2010, the court would hold a second  
14 Article 39a session to determine whether the proceedings must be  
15 abated in accordance with the Hutchins decision or whether the  
16 facts in this case could be sufficiently distinguished from  
17 those in Hutchins to allow the case to proceed without Mr. Muth.

18  
19 The government did not return Mr. Muth to the defense team by  
20 1 July 2010, but instead requested three more weeks to allow the  
21 government to comply with the court's order. The trial counsel  
22 was optimistic that if given more time, the government would  
23 offer orders to Mr. Muth returning him temporarily to active  
24 duty. Rather than rely on an e-mail to grant the three week  
25 extension, the court ordered a 39a session to be held on 9 July

1 2010 to require the trial counsel to state on the record what  
2 actions the government was taking to return Mr. Muth to the  
3 defense team. At the hearing, the trial counsel represented  
4 that Mr. Muth could be returned to active duty within twenty-  
5 four hours if he would accept the orders. He could not,  
6 however, be ordered back to active duty involuntarily.<sup>1</sup>

7  
8 On 14 July 2010, Mr. Muth sent an e-mail to the court and  
9 counsel assigned to the case. He made the following pertinent  
10 representations:

11  
12 a) Since leaving active duty in the Marine  
13 Corps, he was hired at a law firm in Orange  
14 County, California and moved his family 100  
15 miles from his original home near Camp  
16 Pendleton, California. He currently represents  
17 clients through his firm.

18 b) Mr. Muth does not wish to voluntarily return  
19 to active duty to represent the accused in this  
20 case because doing so would compromise his  
21 ability to represent his current clients for an  
22 issue wholly caused by the Government.

23 c) Mr. Muth would gladly represent the accused,  
24 in his civilian capacity, if the government  
25 would pay for the representation at a rate of  
\$300.00 per hour.<sup>2</sup>

---

23 <sup>1</sup> According to the trial counsel, the only option for involuntary orders would be  
24 if Captain Muth were called up and deployed in the war effort. In any event,  
the court never considered an involuntary return to active duty to complete this  
case.

25 <sup>2</sup> No sooner did Mr. Muth suggest that he be retained at \$300/hr than Mr. Low,  
the original retained Civilian Defense Counsel, informed the court that he would  
now bill the government for his services. This issue never developed further.

1  
2       Until receiving this email, the court was under the impression  
3 that it was just a matter of time until the administrative  
4 wheels were set in motion and that Mr. Muth would be offered  
5 orders and temporarily return to the Marine Corps to complete  
6 this case. After receiving Mr. Muth's e-mail, however, it  
7 became clear that Mr. Muth would not voluntarily return unless  
8 he were retained as a civilian counsel at government expense.  
9 The court surmised the government would not agree to pay for his  
10 services.

11  
12       The court issued an order on 21 July 2010 to hold a final 39a  
13 session to develop the record on two points: 1) The reason for  
14 the government's disapproval of Captain Muth's second extension  
15 request; and 2) The extent of Captain Muth's involvement in the  
16 case. Although the court ordered that the hearing be held on 6,  
17 7, or 9 August 2010 to issue a ruling as soon as possible, the  
18 civilian defense counsel was scheduled for another trial during  
19 the first two weeks of August and the military judge was  
20 scheduled for trial out of state from 10 through 20 August 2010.  
21 Therefore, a hearing was held on the earliest date available to  
22 all parties - Saturday, 21 August 2010. In the 21 July Order,  
23 the court directed both parties to submit briefs on the two  
24 issues presented and develop the record accordingly. On 3  
25 August 2010 the government submitted their brief. In it they

1 indicated that there was no way to return Mr. Muth to the  
2 defense team as a contract attorney. In fact, according to the  
3 government, doing so would violate Rule 1.5(c) of Judge Advocate  
4 General Instruction 5803.1B as well as 18 U.S.C. § 203.

5  
6 Mr. Muth must have interpreted this assertion as an accusation  
7 of criminal conduct because he retained counsel and never  
8 appeared before the court on this matter or answered any  
9 questions, but rather dealt with the through his civilian  
10 counsel whose efforts prevented any development of the issue of  
11 Mr. Muth's involvement in the case. The final hearing on this  
12 matter was held on 21 August 2010.

13  
14 ISSUE

15  
16 Where an attorney client relationship is severed because the  
17 attorney has reached the end of his active service date and the  
18 government refuses to extend his EAS date, is such severance for  
19 good cause?

20  
21 FINDINGS OF FACT

22  
23 1. Mr. Joseph Low III was retained by the accused in this case  
24 in November 2006 and filed his notice of appearance on 17 April  
25 2007.

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2. Captain Muth was detailed to this case on 17 April 2009.<sup>3</sup> His EAS was 1 October 2009. On 25 August 2009 he requested an extension of his EAS date until 31 December 2009. On 16 September 2009 his request was partially approved by the Deputy Commandant, Manpower and Reserve Affairs, Manpower Management Officer Assignments Branch (MMOA-3) in that his EAS was extended to 1 December 2009.

3. On 23 November 2009, Captain Muth requested a second extension to his EAS in order to continue his representation of the accused. This request was strongly supported by the Officer in Charge, Legal Services Support Section. In fact, the OIC, LSSS personally called MMOA-3 to argue for approval of Captain Muth's EAD request.

4. On 27 November 2009, without stating a reason, MMOA-3 denied Captain Muth's request for EAD.

5. On 1 December 2009 Captain Muth left active duty.

---

<sup>3</sup> Other military counsel were detailed and released by the accused both before and after referral of charges. Those counsel, and the reasons for their release, are not relevant to this ruling.

1 6. From 17 April 2009 through 1 December 2009, Captain Muth  
2 represented his client in court sessions litigating the Naval  
3 Safety Center portion of the case.<sup>4</sup>

4  
5 7. The accused stated on the record that he objected to Captain  
6 Muth being removed from his case.

7  
8 8. After Captain Muth left active duty, the court determined  
9 that the attorney client relationship between Captain Muth and  
10 the accused had been severed, that the severance was without the  
11 accused's consent, and that the severance was made for good  
12 cause, i.e., Captain Muth had reached his EAS.

13  
14 9. On 3 December 2009, Captain Kunce, USMC was detailed as  
15 defense counsel in this case.

16  
17 10. Prior to requesting his first EAD, Captain Muth had denied  
18 Career Designation. Acceptance of Career Designation would have  
19 given Captain Muth a Regular Commission in the USMC and an  
20 Indefinite EAS date. By denying Career Designation, Captain

21  
22  
23 <sup>4</sup> While he may have participated in more than just the Naval Safety Center  
24 portion of the litigation, the defense impeded development of facts in this  
25 area. Mr. Muth was served a subpoena to appear at the 39a session, but his  
attorney claimed the service was improper. The government also sent a list  
of eleven interrogatories to Mr. Muth, but through counsel, he did not  
answer. The court will not surmise what additional work Captain Muth may  
have completed on behalf of his client.



1 Muth retained a definite EAS date and signaled that he planned  
2 on leaving active duty.<sup>5</sup>

3

4 11. Although Marine Corps policy does not favor granting EADs  
5 to officers who have denied Career Designation, waivers may be  
6 granted to allow EADs. The decision whether to grant or deny  
7 EADs is made by the Deputy Commandant, Manpower and Reserve  
8 Affairs (DC, M&RA). That decision has apparently been delegated  
9 to the Officer Assignments Section of the Manpower Management  
10 Section of M&RA.

11

12 12. At a UCMJ Article 39a session, MMOA-3 gave two reasons for  
13 denial of Captain Muth's second extension request: 1) Marine  
14 Corps policy does not favor waiver of the extension policy for  
15 officers who have denied Career Designation; and 2) Force  
16 management concerns.

17

18 13. One of the criteria for granting an extension to an officer  
19 who has denied Career Designation is "The extension of an  
20 officer is critical to meet a specific operational commitment."<sup>6</sup>

21

22 <sup>5</sup> While Denial of Career Designation pertains solely to active duty service, and  
23 an officer who denies Career Designation may still pursue a Reserve career, Mr.  
24 Muth suggested he did not want to incur further obligation in the Individual  
25 Ready Reserve (IRR). Returning to active duty may have extended Mr. Muth's IRR  
date. In effect, Mr. Muth wanted to cut all ties - active and reserve - to the  
Marine Corps as early possible.

<sup>6</sup> Paragraph 4(b)(2)(a)(3)(a) of MCO 1001.45J of 9 July 2008, Career  
Designation, Retention, and Return to Active Duty...of Officers into the  
Marine Corps and ROT at UCMJ Article 39a session of 21 August 2010.

1  
2 14. No federal statute denies the Commandant of the Marine  
3 Corps the discretion to grant an EAD to an officer who has  
4 denied Career Designation.<sup>7</sup>  
5

6 15. While the military departments must be cognizant of active  
7 duty officer strength limits prescribed by statute and by the  
8 Secretary of Defense, the distribution of officers by Military  
9 Occupational Specialty (MOS) is left to the discretion of the  
10 military departments. The Marine Corps could choose to retain  
11 more officers in one MOS than another.  
12

13 16. The Officer Assignments Section of M&RA, MMOA-3, was free  
14 to exercise, and did exercise, considerable discretion in  
15 granting Captain Muth's first extension request and denying his  
16 second. MMOA-3 provided no reason, other than policy and  
17 planning concerns, for having denied Captain Muth's extension  
18 request. If MMOA-3 had approved the extension, the only  
19 consequence of that administrative action would be that one  
20 Marine captain would have been extended for some months on  
21 active duty. MMOA-3 could point to no additional actions that  
22 would have had to have been taken to compensate for an approval  
23 of Captain Muth's extension request.  
24

25 <sup>7</sup> ROT at UCMJ Article 39a session of 21 August 2010: MJ questions to LtCol  
Davis, formerly of MMOA-3.

1  
2 17. On 3 August 2010, Mr. Muth's civilian attorney contacted  
3 the court by email to inform that all correspondence would have  
4 to be sent through him. From that date forward, Mr. Muth never  
5 personally communicated with the court or trial counsel again.  
6

7 18. Mr. Muth was served with interrogatories in August 2010.  
8 These interrogatories were prepared in an effort to develop the  
9 record on the issue of Mr. Muth's participation on the case.  
10 The trial counsel prepared them in a way that would provide  
11 general information to the court, but not invade the attorney-  
12 client privilege. On 2 September 2010, Mr. Muth's civilian  
13 attorney stated, in effect, that his client would not answer the  
14 interrogatories.<sup>8</sup>  
15

16 STATEMENT OF THE LAW  
17

18 1. Rule for Court-Martial 505 states in pertinent part:

19 **Rule 505. Changes of members, military judge, and**  
20 **counsel**

21 ...

22 (d) *Changes of detailed counsel.*  
23

24 <sup>8</sup> I say, "in effect", because although Mr. Muth's attorney used different  
25 words than mine, his emails, which are attached to this ruling, on the whole,  
can be fairly be read as an attempt to impede development of the record on  
this issue.

1 (1) *Trial counsel.* An authority competent to  
2 detail trial counsel may change the trial counsel  
and any assistant trial counsel at any time  
without showing cause.

3 (2) *Defense counsel.*

4 (A) *Before formation of attorney - client*  
5 *relationship.* Before an attorney-client  
6 relationship has been formed between the accused  
and detailed defense counsel or associate or  
7 assistant defense counsel, an authority competent  
to detail defense counsel may excuse or change  
8 such counsel without showing cause.

9 (B) *After formation of attorney-client*  
10 *relationship.* After an attorney-client  
11 relationship has been formed between the accused  
and detailed defense counsel or associate or  
12 assistant defense counsel, an authority competent  
to detail such counsel may excuse or change such  
counsel only:

13 (i) Under R.C.M. 506(b)(3);

14 (ii) Upon request of the accused or application  
for withdrawal by such counsel under R.C.M.  
506(c); or

15 (iii) For other good cause shown  
16 on the record.

17 ...

18  
19 2. Rule for Courts-Martial 506 states in pertinent part:

20 **Rule 506. Accused's rights to counsel**

21 (a) *In general.* The accused has the right to be  
22 represented before a general or special court-  
23 martial by civilian counsel if provided at no  
24 expense to the Government, and either by the  
25 military counsel detailed under Article 27 or

1 military counsel of the accused's own selection,  
2 if reasonably available. The accused is not  
3 entitled to be represented by more than one  
4 military counsel.

5  
6 ...

7 (c) *Excusal or withdrawal.* Except as otherwise  
8 provided in R.C.M. 505(d)(2) and subsection  
9 (b)(3) of this rule, defense counsel may be  
10 excused only with the express consent of the  
11 accused, or by the military judge upon  
12 application for withdrawal by the defense counsel  
13 for good cause shown.

14 ...

15 3. The Uniform Code of Military Justice provides an accused  
16 with rights to counsel that exceed Constitutional standards. The  
17 President has gone further to require-in very direct and  
18 extraordinary terms not found elsewhere in the Manual for  
19 Courts-Martial-that release of a defense counsel in situations  
20 such as this occur only with the approval of the military judge  
21 for good cause, or with the "express consent" of the accused.  
22 Hutchins at 628.

23 4. In the absence of the accused's consent or an approved  
24 application for withdrawal by the defense counsel, severance of  
25 the relationship can only be proper when good cause is shown on  
the record. Allred, 50 M.J. at 799-800. Convenience of the

1 Government is not a sufficient basis to establish good cause,  
2 Id. at 800 (citing United States v. Murray, 42 C.M.R. 253, 254  
3 (C.M.A.1970)). Good cause must be based on a "truly  
4 extraordinary circumstance rendering virtually impossible the  
5 continuation of the established relationship." United States v.  
6 Iverson, 5 M.J. 440, 442-43 (C.M.A.1978) (footnote omitted). Id.

7  
8 5. "Good cause" is defined to include, "physical disability,  
9 military exigency, and other extraordinary circumstances which  
10 render the ... counsel ... unable to proceed with \*629 the  
11 court-martial within a reasonable time. 'Good cause' does not  
12 include temporary inconveniences which are incident to normal  
13 conditions of military life." RULE FOR COURTS-MARTIAL 505(f),  
14 MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).<sup>FN9</sup> See also  
15 United States v. Morgan, 62 M.J. 631

16 (N.M.Ct.Crim.App.2006) (finding error in the severance of the  
17 trial defense counsel from taking part in the post-trial  
18 processing due to counsel's change of commands). We distinguish  
19 Allred based on the underlying context of the severance.

20 FN9. While this standard is actually applicable to excusal for  
21 good cause by the authority who detailed the counsel to the  
22 case, and the proper standard for good cause excusal is the  
23 R.C.M. 506 standard as explained in Iverson, infra, our  
24 conclusion is the same under either standard of good cause. Id.  
25 at 628-29.

1  
2 6. "Good cause" must be assessed on a sliding scale which  
3 considers the contextual impact of the severance on the client.  
4 Severance of an attorney/client relationship early in a case  
5 will have significantly less impact on an accused's  
6 representation rights than severance after work has been done on  
7 the defense case. *Id.* at 629.

8  
9 7. It is error for a military judge to allow proceedings to  
10 continue after a detailed defense counsel ceases representation  
11 of the accused without either the accused's knowing release or a  
12 finding of good cause by the military judge. *Id.* at 624

13  
14 **ANALYSIS**

15  
16 The court in this case severed the attorney-client  
17 relationship ostensibly for good cause because Captain Muth had  
18 passed his EAS date and the Marine Corps denied his request to  
19 extend on active duty. The court reasoned that Captain Muth's  
20 end of active duty contractual service obligation constituted  
21 good cause to terminate the relationship. After the United  
22 States Navy-Marine Corps Court of Criminal Appeals (NMCCA)  
23 decision in *United States v. Hutchins*, the court realized that  
24 EAS might not have amounted to good cause. The court  
25 immediately attempted to facilitate Mr. Muth's return to the

1 case. During the first months after the Hutchins decision, and  
2 under the direction of the court, the trial counsel spent  
3 considerable time in legal research and administrative  
4 maneuvering in attempting to return Mr. Muth to active duty.  
5 When the trial counsel finally reached the point where Mr. Muth  
6 would be offered orders to temporarily return to active duty to  
7 complete his representation of the accused in the case, Mr. Muth  
8 indicated he did not desire to return to active duty, but  
9 rather, would agree to represent the accused in his civilian  
10 capacity at \$300 per hour at government expense. Since the  
11 government refused that arrangement, the court focused on two  
12 issues: 1) Was the Marine Corps compelled to deny Captain Muth's  
13 second extension request?; and 2) Notwithstanding the reason for  
14 the Marine Corps' decision, did Captain Muth's involvement in  
15 the case distinguish this case from Hutchins?, i.e. was Captain  
16 Muth involved so minimally on the "sliding scale" and would his  
17 severance have minimal impact on the client when considered in  
18 the entire context of the case?

19 Addressing the good cause issue first, the Officer  
20 Assignments Section (MMOA) of Manpower and Reserve Affairs  
21 exercised considerable discretion in granting the first  
22 extension and in denying the second. The action officer who  
23 testified at the final UCMJ Article 39a session, a Lieutenant  
24 Colonel who had served at MMOA-3 during this period, indicated  
25 there was no statutory authority that denied a second extension.



1 When pressed on the reason for denying the extension request, he  
2 cited *policy concerns* of permitting an officer who denied Career  
3 Designation to extend his EAS date and *planning concerns* in not  
4 retaining too many officers on active duty and in "messing up"  
5 the grade pyramids of the officer ranks. While these concerns  
6 are real in the manpower management arena, they do not amount to  
7 a "truly extraordinary circumstance rendering virtually  
8 impossible the continuation of the established relationship."  
9 Neither do they amount to "physical disability ... [or] military  
10 exigency." MMOA could have easily granted the extension request  
11 and there would not have been any adverse consequences to that  
12 decision. In effect, MMOA could have approved Captain Muth's  
13 extension request without taking any extraordinary actions or  
14 suffering any extraordinary consequences.<sup>9</sup> Had there existed a  
15 federal statute that prohibited approval of Captain Muth's  
16 extension or operational issues that limited the ability to  
17 extend Captain Muth, those facts may have constituted "good  
18 cause" to terminate the attorney-client relationship. The  
19 policy concerns present in this case do not rise to the level of  
20 good cause as defined in the Hutchins decision.

21  
22 Moving next to assessing the impact to the accused of the  
23 severance, the NMCCA directed that "good cause must be assessed

24  
25 <sup>9</sup> As NMCCA stated in Hutchins, "EAS standing alone, cannot be used as a basis  
to sever an existing attorney client relationship in this case after nearly a  
year of preparatory work and mere weeks before commencement of a general  
court-martial for murder." Id. at 629.

1 on a sliding scale which considers the textual impact of the  
2 severance on the client." "Severance of an ACR early in a case  
3 will have significantly less impact on an accused's  
4 representation rights than severance after work has been done on  
5 the defense case." This formula may leave an out where,  
6 although good cause did not exist for severance of an ACR, the  
7 contextual impact to the accused of the severance was slight.<sup>10</sup>  
8 In the present case the court attempted to completely develop  
9 the record in this area to preclude the necessity for a Dubay  
10 hearing at a later date.<sup>11</sup> Perhaps Captain Muth was so minimally  
11 involved in the case that it could be argued that his removal  
12 would have minimal impact on the accused's representation  
13 rights. In this case though, Captain Muth, the only military  
14 counsel detailed at the time, had been assigned to the case for  
15 nine months and had argued the Naval Safety Center issue during  
16 multiple court sessions. Unlike the detailed defense counsel in  
17 Hutchins, Captain Muth fought to remain on active duty and  
18 continue his representation of his client. Also, the accused  
19 clearly stated that he objected to losing Captain Muth.  
20

21  
22 <sup>10</sup> This language sounds like another means of assessing prejudice, an undertaking  
23 the NMCCA refused in Hutchins and has previously held would not be assessed  
24 unless the error in severing the ACR resided with the defense or appellant. In  
25 cases where an improper severance resides with the government, the NMCCA  
requires reversal. Hutchins at 630 citing U.S. v. Dickinson, 65 M.J. 562, 566  
(N.M.Ct.Crim.App. 2006). Nevertheless, I have attempted to follow the court's  
mandate in assessing good cause in the entire context of the case.

<sup>11</sup> As already indicated, due to Mr. Muth's stance on this issue, the only  
facts available regarding his participation in this case, must be gathered  
solely from reading the ROT covering his appearances on the record in 2009.

1 Conversely, in Hutchins, the detailed defense counsel was one of  
2 three counsel assigned to the case. After that counsel's  
3 motions dealing with the constitutionality of mandatory minimum  
4 sentences were denied, his role was relegated to pre-sentencing  
5 preparation. After he left the case, the accused still had the  
6 benefit of two military counsel and his civilian counsel. The  
7 two military counsel who were left on the case in Hutchins were  
8 far more experienced in terms of total years of practice, as  
9 well as in complex criminal litigation and in capital litigation  
10 than the counsel whose representation was terminated. Even on  
11 those facts, the NMCCA in Hutchins ruled that good cause did not  
12 exist to terminate that relationship. There are only two areas  
13 in which the present case may be distinguished from Hutchins.  
14 First, the civilian defense counsel in this case, whose  
15 extremely tight trial calendar made him the long pole in the  
16 tent when attempting to order trial dates, had indicated he  
17 could go to trial in June 2010, whereas the improper severance  
18 in Hutchins occurred on the "eve of trial."<sup>12</sup> Second, one might  
19 argue that Mr. Muth dealt only with a procedural issue in this  
20 case, whereas the counsel at issue in Hutchins argued  
21 substantive motions. The breadth and clarity of the language in  
22 the Hutchins decision, however direct otherwise. On these  
23  
24

---

25 <sup>12</sup> Even so, the Hutchins case was ultimately tried after that counsel's EAS date.

1 facts, analogizing to Hutchins, Sergeant Hohman's  
2 representational rights can only be considered greater.

3 Severance of Sergeant Hohman's representational rights this late  
4 in the case and nine months into the ACR, impact his rights in  
5 more than a minimal way.

6  
7 CONCLUSIONS OF LAW

8 1. Where an attorney-client relationship, involving a defense  
9 counsel who is detailed to an involuntary manslaughter case for  
10 nine months and made court appearances on behalf of his client,  
11 is severed because the government, citing mere policy concerns  
12 that were subject to discretionary interpretation, denied the  
13 attorney's request to extend his EAS date to continue the  
14 representation, such severance is not based on good cause.

15  
16  
17 2. The accused's representational rights in this case, when  
18 assessed in the entire context of the case, have been impacted  
19 in more than a minimal way.

20  
21 3. This court has no judicial remedies available to return Mr.  
22 Muth, either as a civilian or as a Marine, to the case.


23  
24 4. While allowing the accused to avoid trial altogether for  
25 serious allegations of misconduct involving the death of another

1 Marine could be considered an injustice, the current state of  
2 the case law clearly directs it would be error to allow this  
3 case to proceed after Captain Muth ceased representation of the  
4 accused.

5  
6 ORDER

7  
8 The proceedings in this case shall be abated until Mr. Muth is  
9 returned to the defense team.

10  
11  
12 SO ORDERED, this 15th day of September.

13  
14   
15 Thomas J. Sanzi  
16 LtCol, U.S. Marine Corps  
17 Military Judge

WESTERN JUDICIAL CIRCUIT  
NAVY-MARINE CORPS TRIAL JUDICIARY

UNITED STATES )  
 )  
 v. ) COURT-MARTIAL NOTICE  
 ) OF APPEARANCE  
SGT CALEB HOHMAN )

1. I, JOSEPH H. LOW IV, admitted to practice law, currently in good standing before the bar of the highest court of the State(s) of Supreme Court of the State of California, United States District Court-Southern District of California, United States District Court-Central District of California, United States District Court-Eastern District of California, United States District Court-Northern District of California, District of Connecticut, Eastern District of Texas, United States Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States of America, and, having appeared as counsel in United States military courts-martial on approximately 50 occasions during my legal career, military or civilian, hereby enter appearance as attorney on behalf of the accused in the above captioned court-martial to do all that is necessary in connection therewith. I certify that I am not now de-certified or suspended from practice in Navy-Marine Corps courts-martial by the Judge Advocate General of the Navy.

2. I hereby certify that I have obtained a copy and agree to abide by: (1) the Rules for Courts-Martial and the Military Rules of Evidence set forth in the current editions of the Manual Courts-Martial; (2) United States, JAG INSTRUCTION 5803.1 series (Professional Conduct of Attorneys Practicing Under the Supervision of the Judge Advocate General); (3) NAVMARCORTRIJUDAC INSTRUCTION 5810.5B (Uniform Rules of Practice Before Navy-Marine Corps Courts-Martial); (4) WESTERNJUDCIRINST 5810.1 (Western Judicial Circuit Rules of Court); and, (5) if published, the local District Rules of Practice for the Judicial District within which the above-captioned is currently pending. I further certify and agree to provide, upon request by the Circuit Military Judge or designee, a copy of the professional responsibility rules applicable to the Bar of the State in which I am licensed to practice law.

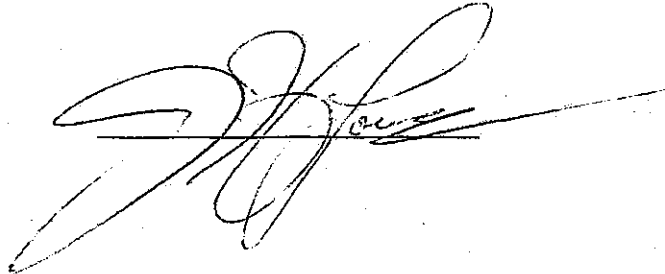
3. Unless indicated otherwise by the accused, all post-trial matters, including the staff judge advocates or legal officer's recommendation and the accused's copy of the record of trial should be served on the undersigned. For purposes of this trial and all subsequent review matters, notice to and service upon the undersigned may be affected at the address listed below.

Subj: NOTICE OF APPEARANCE ICO US V.SGT.CALEB HOHMAN

4. Under penalty of perjury, I swear or affirm all information on this notice of appearance is true, correct and complete.

Signed this date, April 17, 2008

Signature



JOSEPH H. LOW IV

Printed full name under which licensed to practice law

CALIFORNIA, DISTRICT OF CONNECTICUT, EASTERN DISTRICT OF TEXAS  
State(s) admitted to practice law

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NAVY-MARINE CORPS TRIAL JUDICIARY  
WESTERN JUDICIAL CIRCUIT

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UNITED STATES	)	GENERAL COURT-MARTIAL
	)	
v.	)	JUDICIAL ORDER:
	)	(RETURN TO ACTIVE DUTY OF MR.
CALEB HOHMAN	)	ROBERT F. MUTH FOR PURPOSES OF
XXX XX 6203	)	REPRESENTATION OF THE ACCUSED AT
SERGEANT	)	COURT MARTIAL)
U.S. MARINE CORPS	)	5 June 2010

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1. The purpose of this JUDICIAL ORDER is to return Captain Robert F. Muth, USMCR to his role as defense counsel in this case.

2. Prior to the Navy-Marine Corps Court of Criminal Appeals decision in U.S. v Hutchins, NMCCA 200800393, it was a widely held belief that severance of an attorney/client relationship based on a defense counsel's end of active service (EAS) date, was a severance made for good cause. The Hutchins court held that the military judge improperly severed the attorney/client relationship and prejudice would be presumed even where the following facts existed:

- the detailed defense counsel planned his departure from active duty seven months before the original trial date;
- the defense counsel made no attempt to extend his EAS date to appear at trial;
- the defense counsel did not tell his client, or defense team, that he was leaving active duty until two months prior to trial and weeks before he began terminal leave;
- the Regional Defense Counsel (RDC), who knew of procedures for requesting extensions on active duty to complete defense representations of clients, did not inform the government or the detailed counsel, to make such a request to extend his EAS; and
- the detailed defense counsel, on the eve of trial, left town on terminal leave without requesting leave of the court to terminate his representation of his client.

The court, on these facts, concluded that "...counsel were at all times acting with the best of intentions based on a misunderstanding of the facts and the law."

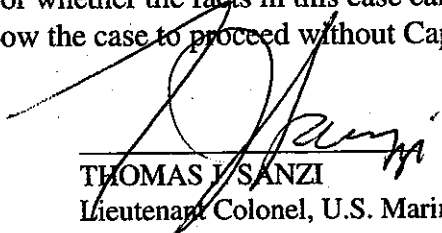
3. Unlike the defense counsel in Hutchins, who planned his transition to civilian law practice with his family's firm months prior to trial and delayed informing all parties of his imminent departure, the defense counsel in this case, Captain Robert Muth, USMCR specifically and repeatedly requested to extend his EAS date in order to carry out his duties in defense of Sergeant Hohman. The last of his requests was denied by Headquarters, U.S. Marine Corps on 27 November 2009 and so he was forced to leave the service on 1 December 2009.

4. In light of the Hutchins decision, the government is ordered to return Captain Muth to the defense team. If Captain Muth is not returned by 1 July 2010 to represent his client, I will order a UCMJ, Article 39a session to develop further facts in this area to allow me to determine



whether these proceedings must be abated or whether the facts in this case can be sufficiently distinguished from those in Hutchins to allow the case to proceed without Captain Muth.

Date:



THOMAS J. SANZI  
Lieutenant Colonel, U.S. Marine Corps  
Military Judge