

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

**KHALID SHAIKH MOHAMMAD;
WALID MUHAMMAD SALIH
MUBARAK BIN 'ATTASH;
RAMZI BINALSHIBH;
ALI ABDUL AZIZ ALI;
MUSTAFA AHMED AL HAWSAWI**

AE 095A

Government Response

To Defense Emergency Motion Seeking Adequate, Safe Workspaces or, in the Alternative, to Delay Future Hearings Until Unsafe Conditions of Workspaces Are Properly Assessed and Remediated Based on New Information of Serious and Imminent Health Risk

16 October 2012

1. Timeliness

This Response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c(1).

2. Relief Sought

The defense request to delay future hearings and compel funding for an expert consultant in Industrial Hygiene should be denied, though the Commission should consider any future motions for reconsideration or revised relief based on confirmable new information pertaining to conditions.

3. Overview.

On 5 October 2012 and 10 October 2012, following thorough investigations into defense team concerns, reports by the Industrial Hygiene Department certified the assessment that normal work operations can continue in the defense team spaces in building AV-29 and AV-34, respectively. *See* AE 095, Attachment G & Attachment H. In addition, a room-by-room examination by JTF Preventive Medicine Department into concerns surrounding rodents in building AV-34 concluded that the associated health risk posed by working in building AV-34 is negligible. *See* AE 095, Attachment I. The assessments were performed by qualified industrial

hygienists in line with defense counsel's requested relief. This Commission has already based a ruling on this issue "upon professional assessments as to the safety of AV 29... and AV 34..." See AE 082H. The only new information presented by defense counsel essentially breaks down to phone and email contact with a purported industrial hygienist in Chicago regarding AV-34 and use of a "do-it-yourself kit" in AV-29. Because defense counsel's initial request for relief was rectified based on professional assessments of the Industrial Hygiene Department, defense counsel have not met their burden as to why this Commission should reconsider its 11 October 2012 Order. Similarly, defense counsel also has failed to demonstrate why an expert consultant in Industrial Hygiene is needed to travel to Guantanamo Bay to perform a similar function to what already has been conducted by the Industrial Hygiene Department. As such, the prosecution respectfully requests that this Commission deny the defense motion in its entirety.

4. Burden of proof

As the moving party, the defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

5. Facts

On 3 October 2012, counsel for Mr. Mohammad requested that this Commission delay these proceedings until the government performs the necessary assessment and remediation to render the spaces habitable according to qualified industrial hygienists. See AE 082. On 5 October 2012, the prosecution submitted an affidavit from the Chief of Operations, Office of Military Commissions, describing the alternative workspace in the Expeditionary Legal Complex (hereinafter ELC), to include square footage, work stations, and sound retro-fitting. *Id.* On 9 October 2012, the prosecution also submitted a report from qualified industrial hygienists, in accordance with the defense request for relief, certifying the assessment that normal work operations can begin in the defense team spaces in building AV-29. See AE 082E, Attachment B.

On 9 October 2012, counsel for Mr. Bin ‘Attash, Mr. Binalshibh, and Mr. Hawsawi requested that this Commission delay these proceedings until after necessary assessment and remediation renders the spaces habitable according to qualified industrial hygienists. *See* AE 082D (originally filed as AE 091). On 10 October 2012, qualified industrial hygienists certified in a report titled, “Indoor Air Quality Survey/Mold Investigation AV 34,” that normal work operations can continue in building AV-34. *See* AE 095, Attachment H. On 9 October 2012, the JTF Preventive Medicine Department also conducted a rodent survey of building AV-34. *See* AE 095, Attachment I. On 10 October 2012, the Officer-in-Charge of JTF Preventive Medicine certified that “[b]ased on the observations from this survey, I do not believe there is a currently active rodent infestation of [building AV-34] and therefore the associated health risk posed by working in this facility is negligible.” *See* AE 095, Attachment I, p. 1. The JTF Preventive Medicine Department also certified that it will continue to provide pest-management-related-oversight and surveillance of building AV-34. *See* AE 095, Attachment I, p. 3.

On 10 October 2012, an assessment of the ELC defense spaces was conducted by the Industrial Hygiene Department. These qualified industrial hygienists certified that no health hazard was noted in the ELC spaces either. *See* AE 082F, Attachment D.

On 11 October 2012, this Commission denied the defense counsel motion regarding building AV-29 and AV-34. *See* AE 082H. The Order was “based upon professional assessments as to the safety of AV 29... and AV 34...” *Id.* On 15 October 2012, counsel for Mr. Mohammad and Mr. Bin ‘Attash filed what can best be described as a motion to reconsider the 11 October Order, as well as a motion to compel funding for an outside industrial hygienist at a cost of \$400 per hour, plus travel expenses.

6. Law and Argument

I. Defense Counsel Do Not Meet The Burden For Reconsideration of the Military Judge’s 11 October 2012 Order

The government agrees that adequate and habitable accommodations for counsel representing accused before these military commissions are essential. Nevertheless, defense

counsel do not meet the very reasonable burden for reconsideration of the Military Judge's 11 October 2012 order. On 3 October and 9 October, counsel for Mr. Mohammad and Mr. Bin 'Attash respectively moved that this Commission specifically delay these proceedings until "after the government performs the necessary assessment and remediation to render the spaces habitable according to qualified industrial hygienists..." See AE 082, AE 082D. In response to defense counsel concerns, an assessment on building AV-29 and AV-34 was performed by qualified industrial hygienists from the Industrial Hygiene Department of the U.S. Naval Hospital. In addition, the JTF Preventive Medicine Department also conducted a rodent survey of each room in building AV-34. Each assessment certified that building AV-29 and AV-34 were habitable and that normal work operations can safely continue.

This Commission denied the defense counsel motion regarding building AV-29 and AV-34 "based upon professional assessments as to the safety of AV 29... and AV 34..." The reports were performed by the Industrial Hygiene Department, which was in line with defense counsels' specific request for relief. Now, defense counsel has stated their opinion that the industrial hygienists from the Industrial Hygiene Department are somehow not qualified to perform their duties. As proof, defense counsel relies on telephone and email contact with an individual in Chicago. This person purportedly provided defense counsel with an opinion regarding AV-34. However, the fact remains that members of the Industrial Hygiene Department performed a thorough physical inspection of AV-34, per defense counsel's request.

Defense Counsel's assertions regarding AV-29 also do not meet the burden for reconsideration of the Commission's Order. For that facility, counsel relies upon opinions of laypersons instead of the Industrial Hygiene Department, as well as employment of a "Do It Yourself Kit." See AE 095, p. 4. However, the Industrial Hygiene Department performed an assessment and remediation project that allowed for normal work operations to continue.

In both cases, the qualified industrial hygienist reports indicated that additional work is expected to continue on AV-29 and AV-34. Continued monitoring of the buildings also was

acknowledged. But according to the reports, both facilities have been certified for normal and safe work operations.

II. Defense Counsel Fails To Demonstrate That An Expert Consultant Is Needed In This Case

Among the many protections provided to accused facing trial by military commission is the right to obtain expert witnesses. The Military Commissions Act of 2009 (hereinafter MCA) provides the accused a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense. *See* to U.S.C. § 949j. The Secretary of Defense, in turn, promulgated the Manual for Military Commissions (hereinafter "the Manual"), which contains the Rules for Military Commissions (hereinafter R.M.C.). The procedures contained in the Manual are based upon the procedures for trial by general courts martial under chapter 47 of title 10 (the Uniform Code of Military Justice). *See* R.M.C. 102(b). R.M.C. 703 (Production of witnesses and evidence) is among the rules issued by the Secretary of Defense in the Manual.

In this instance, counsel for Mr. Mohammad and Mr. Bin ‘Attash are requesting an expert consultant. Under R.M.C. 703(d), requested experts must be “relevant and necessary.” To demonstrate necessity, counsel for the accused must show there is a reasonable probability—indeed, more than a mere possibility—that the requested expert would be of assistance and that the denial of such an expert would result in a fundamentally unfair trial. *See, e.g., United States v. Freeman*, 65 M.J.451, 458 (C.A.A.F. 2008); *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994), *citing Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir. 1987), *cert. denied*, 481 U.S. 1054 (1987). To establish that an expert would be of assistance, the requesting party has the burden of establishing: 1) why the expert assistance is needed; 2) what the expert assistance would accomplish for the accused; and 3) why the defense counsel were unable to gather and present evidence that the expert assistance would be able to develop. *See Freeman*, 65 MJ. at 458, *quoting United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005); *see also United*

Assistant Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

