

USALSA Report
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A View from the Bench

Deferring and Waiving Forfeitures: Help the Government Help Your Client
*Lieutenant Colonel Christopher T. Fredrikson**

Introduction

Assume for a moment you are a defense counsel. You have just finished the presentencing phase of a court-martial against your client, Sergeant John P. Smith. You are confident your argument has engendered some mercy from the panel, particularly with respect to the economic impact your client's conviction will have on his wife and three children. Now, as the panel returns from deliberations, you wonder: Did your argument have an impact on the panel's sentence determination?

“Defense counsel and accused please rise. COL Jones, please announce the sentence.”

“Sergeant John Preston Smith, this court sentences you:

to be reduced to the grade of E-1;
to forfeit all pay and allowances;
to be confined for 18 months; and
to be discharged from the service with a bad conduct discharge.”

“Please be seated.”

The court adjourns and you hear Mrs. Smith sobbing in the gallery. Sergeant Smith turns to you and asks, “How is my family going to survive while I'm in prison? Is there anything I can do now? Will they have any financial support at all? Help me.”

In the recent case of *United States v. Moralez*,¹ the Army Court of Criminal Appeals (ACCA) published an opinion solely “to highlight a common and recurring problem in the Army: misinterpretation of the rules governing deferment and waiver of forfeitures . . . [and] to reinforce military justice practitioners' professional responsibility to recognize and properly apply Congressionally-created deferment and waiver rules on a case-by-case basis.”² The court believed it was necessary to write this opinion despite the practical guidance³ and case law⁴ already published regarding this admittedly complicated topic.

It should be noted, however, that the published guidance and case law, including *Moralez*, focuses primarily on the Government's processing of deferment and waiver requests. This brief article, on the other hand, gives some practical guidance to defense counsel and starts with the assumption that the accused desires to provide maximum monetary support to his family while in confinement. Although the ACCA emphasized applying the deferment rules on a case-by-case basis,⁵ Sergeant Smith's hypothetical case can be used to provide an example of how to apply the guidance to most cases.

* Judge Advocate, U.S. Army. Presently assigned as a Military Judge, Fifth Judicial Circuit, Heidelberg, F.R.G.

¹ 65 M.J. 665 (A. Ct. Crim. App. 2007).

² *Id.* at 666.

³ See, e.g., Captain Joel A. Novak, *Forfeitures, Recommendations, and Actions; Discretion to Insure Justice and Clemency Warranted by the Circumstances and Appropriate for the Accused*, ARMY LAW., Mar. 2000, at 16, 16–20; Lieutenant Colonel Timothy C. MacDonnell, *Tending the Garden: A Post-Trial Primer for Chiefs of Criminal Law*, ARMY LAW., Oct. 2007, at 1, 11–13.

⁴ The seminal case discussing forfeitures is *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002). Every defense counsel should read this case and keep a copy available when preparing deferment and waiver requests.

⁵ *Moralez*, 65 M.J. 665.

Adjudged versus Automatic Forfeitures: What's the Difference?

Before requesting deferment or waiver of forfeitures, defense counsel should read and understand the specific provisions governing forfeitures: Articles 57 and 58b, Uniform Code of Military Justice (UCMJ),⁶ and Rule for Courts-Martial (RCM) 1101.⁷ Under these provisions, there are two types of forfeitures that can result from a court-martial: (1) *adjudged forfeitures*, which are included as part of the sentence announced in court; and (2) *automatic forfeitures*, which take effect only by operation of law during a servicemember's confinement or parole, if the adjudged sentence⁸ includes confinement for more than six months or a punitive discharge in conjunction with any amount of confinement.⁹

The effective date for both types of forfeitures is fourteen days after a sentence is adjudged.¹⁰ However, upon application of the accused, the convening authority has the discretion¹¹ to *defer* both types of forfeitures up to, but not beyond, the date of action, which can be several weeks, if not months, later.¹² Furthermore, at any time before action or at action, the convening authority has the personal discretion to *waive* automatic forfeitures and *direct payment* of the waived automatic forfeitures to the accused's dependents for a total of six months.¹³ This waiver option is not available for adjudged forfeitures and is also not available if the accused is not otherwise entitled to pay and allowances; for example, after adjudged total forfeitures go into effect or after the accused reaches his expiration term of service (ETS) date.

Before advising their clients on the submission of deferment or waiver requests, defense counsel must understand the following distinctions between adjudged and automatic forfeitures: (1) a convening authority may defer both adjudged and automatic forfeitures only upon application by the accused, but he or she may waive automatic forfeitures *sua sponte*; (2) only automatic forfeitures may be waived; (3) deferment of forfeitures ceases at the date of action, whereas waiver of automatic forfeitures can extend up to six months after action; and (4) a convening authority may not direct deferred forfeitures to be paid to dependents,¹⁴ but a convening authority must direct that waived automatic forfeitures be paid to dependents.¹⁵

Finally, any reduction in rank will obviously impact the amount of pay to which an accused is entitled and will consequently impact the amount of any deferred or waived forfeitures. Therefore, defense counsel must understand that Article 57, UCMJ, and RCM 1101 also apply to adjudged reductions in grade. Like adjudged forfeitures, any adjudged reduction in grade is effective fourteen days after the sentence is adjudged and may be deferred until action. However, unlike automatic forfeitures, an automatic reduction in grade under Article 58a, UCMJ,¹⁶ is not effective until action and cannot be waived.

⁶ Note that in Subchapter VIII of the UCMJ (Sentences), there are actually eight distinct articles: Articles 55, 56, 56a, 57, 57a, 58, 58a, and 58b. Forfeitures are addressed in just two of these articles: Articles 57 and 58b. Beware, many practitioners sometimes reference Article 58(b), a separate paragraph addressing hard labor, instead of referencing Article 58b, the article addressing automatic forfeitures.

⁷ Defense counsel should also read *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002), in conjunction with the forfeiture chart in the Appendix to this article.

⁸ If the portion of the adjudged sentence that includes confinement for more than six months or a punitive discharge in conjunction with any amount of confinement is not approved by the convening authority at action, the Government must pay back the forfeitures. UCMJ art. 58b(c) (2008).

⁹ As the Court of Appeals for the Armed Forces (CAAF) pointed out in *United States v. Emminizer*, prior to the addition of Article 58b to the UCMJ in the National Defense Authorization Act for Fiscal Year 1996, unless forfeitures were part of the approved sentence, servicemembers continued to receive pay and allowances in confinement, even while serving extended sentences. 56 M.J. at 443.

¹⁰ Or upon action, if by some extremely unusual circumstance the convening authority takes action within fourteen days of an adjudged sentence. UCMJ arts. 57 and 58b.

¹¹ The convening authority has complete discretion and the accused has "the burden of showing that the interests of the accused and the community in deferral outweigh the community's interests in imposition of the punishment and its effective date." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1101(c)(3) (2008) [hereinafter MCM].

¹² UCMJ arts. 57 and 58b, and MCM, *supra* note 11, R.C.M. 1101(c). Note that any forfeitures (either adjudged or automatic) deferred belong to the accused.

¹³ *Id.*

¹⁴ Any deferred forfeitures (either adjudged or automatic) belong to the accused.

¹⁵ After all, provision for the family, not the accused, is the only reason Congress provided for this waiver authority.

¹⁶ Article 58a, UCMJ, provides that an approved sentence that includes a punitive discharge, confinement, or hard labor without confinement results automatically in a reduction to E-1, effective at action. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-29(e) (16 Nov. 2005).

Requesting Deferment and Waiver of Forfeitures

So, back to your client, Sergeant Smith, who has just been sentenced to reduction to E-1, forfeiture of all pay and allowances, eighteen months confinement, and a bad conduct discharge. What can you do to effectively represent your client and meet his goal of providing financial support to his family? The process can be summed up in three steps.

Step 1: (Pretrial) Advise, Coordinate, and Prepare

Let's go back in time; your first and most important step in effectively representing your client occurs during pretrial preparation. Before trial, you should discuss with Sergeant Smith the ramifications of possible punishments in his case and whether, in the event of adjudged or automatic forfeitures (and/or an adjudged reduction in grade), he would like to pursue a course of action that would provide his family with the most financial support.¹⁷ Since Sergeant Smith desires to provide maximum financial support to his family, you should notify the Government¹⁸ that, depending on the outcome of the court-martial, Sergeant Smith intends to immediately submit a request for deferment of forfeitures and deferment of reduction in grade.

Before trial, you must dedicate time to preparing a persuasive deferment request.¹⁹ You should specifically reference adjudged forfeitures, automatic forfeitures, and an adjudged reduction in grade.²⁰ You should also advocate for deferment utilizing the RCM 1101(c)(3) factors,²¹ placing the most emphasis on Sergeant Smith's family situation. Because the convening authority cannot direct deferred forfeitures (either adjudged or automatic) to be paid to dependents, he may not be inclined to approve a deferment request without substantial documentation showing that (1) the dependents need such support; and (2) the dependents will actually receive the support. You can substantiate need by providing documentary evidence such as an itemized list of expenditures and income, copies of bank records and credit reports, leases or mortgage statements, medical records if there are family medical problems, pay stubs, etc. Sergeant Smith can demonstrate his intent to provide his pay and allowances to his family by filling out an allotment form directing pay to his wife's bank account or by providing a sworn statement from his wife assuring the convening authority that she has access to the bank account where his direct pay is deposited.²²

Step 2: (Date Sentence Is Adjudged) Request Deferment of Adjudged and Automatic Forfeitures

Now you are back in the office with Sergeant Smith, and his escorts are waiting to take him to the confinement facility. Since forfeitures have been adjudged and the other aspects of the sentence will result in forfeitures automatically by operation of law, you should have Sergeant Smith sign the deferment request specifically requesting deferment of the adjudged forfeitures, the automatic forfeitures, and the reduction in grade. Give the entire packet to the Government immediately, so they can prepare it for submission to the convening authority for action within the next fourteen days.²³

¹⁷ All this should be done early in trial preparation and should be part of your post-trial appellate rights advisement. Also make sure to check your client's ETS date, because if the accused's ETS date arrives during confinement, he is no longer entitled to pay and allowances and, therefore, neither the deferment nor the waiver option are possible courses of action.

¹⁸ Since trial counsel do not normally participate in the post-trial process, I recommend you notify both trial counsel and the chief of military justice via e-mail.

¹⁹ Just as you advocate orally in front of the panel during the presentencing case, you must advocate in writing to the convening authority.

²⁰ Because all three types of punishments may not be applicable, be prepared to adjust the content of the request based on the final adjudged sentence.

²¹ Rule for Court-Martial 1101(c)(3) provides,

Factors that the authority acting on a deferment request may consider in determining whether to grant the deferment request include, where applicable: the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; the accused's character, mental condition, family situation, and service record.

MCM, *supra* note 11, R.C.M. 1101(c)(3). These deferment factors apply to adjudged forfeitures, automatic forfeitures, and adjudged reductions in grade.

²² Make sure to advise your client that the convening authority can rescind any deferment should the dependents stop receiving the deferred forfeitures. *Id.*

²³ If the deferment request is granted, your next submission will be RCM 1105/1106 matters. *Id.* R.C.M. 1105, 1106. If the deferment request is denied, however, you should immediately submit a request to waive automatic forfeitures and defer the adjudged forfeitures and reduction in grade.

Step 3: (Post-Trial Submissions) Request Disapproval/Suspension/Mitigation²⁴ of Adjudged Forfeitures and Waiver of Automatic Forfeitures

In Sergeant Smith's post-trial submissions, you must specifically address both the adjudged forfeitures and the automatic forfeitures. As previously discussed, a convening authority can waive the automatic forfeiture of pay and allowances only if the accused is otherwise entitled to such pay and allowances. Therefore, in order for waiver and payment to Mrs. Smith to occur, Sergeant Smith's adjudged total forfeitures must not be in effect. Consequently, you must first request that the convening authority disapprove, suspend, or mitigate the adjudged forfeitures. Finally, you should request that the convening authority waive the automatic forfeitures and direct payment to Mrs. Smith for six months after action.

Like the deferment request, this request must also be persuasive and supported by documentary evidence. However, the waiver request is entirely distinct from the deferment request you submitted earlier. You cannot simply use the deferment request and replace the word "defer" with "waive." Unlike the deferment request, the request for waiver should only refer to automatic forfeitures. Also, the convening authority may consider different factors; therefore, this time you should advocate using the "waiver" factors set forth in RCM 1101(d)(2),²⁵ rather than the "deferment" factors.

Conclusion

In Sergeant Smith's case, if the convening authority approves the deferment request prior to action and the waiver request at action, you will have effectively obtained financial support for Sergeant Smith's family for at least eight to ten months.²⁶ By following these three simple steps and submitting clear, concise, and legally accurate requests supported by family circumstances, you have helped the Government help your client's family.

²⁴ Mitigation and commutation are synonymous. Some courts use the term commutation, whereas the RCM uses the term mitigation.

²⁵ Rule for Court-Martial 1101(d)(2) provides,

Factors that may be considered by the convening authority in determining the amount of forfeitures, if any, to be waived include, but are not limited to, the length of the accused's confinement, the number and age(s) of the accused's family members, whether the accused requested waiver, any debts owed by the accused, the ability of the accused's family members to find employment, and the availability of transitional compensation for abused dependents permitted under 10 U.S.C. 1059.

Id. R.C.M. 1101(d)(2).

²⁶ Since forfeitures were deferred until action, which normally takes at least two to three months, the deferment and the waiver add up to at least eight to ten months of financial support to the family. Note that if the convening authority had simply "waived" forfeitures from Day 14, the family would have only received six months total of relief.

Waiver and Deferment of Adjudged and Automatic Forfeitures

Type of Forfeitures	14 Days after trial	14 Days after trial until Initial Action	Initial Action
<p>Adjudged Forfeitures</p> <p>(1) Adjudged by MJ or Panel</p> <p>(2) Maximum amount:</p> <p>(a) GCM: all pay and allowances</p> <p>(b) SPCM: 2/3ds pay only</p> <p>(3) Effective Date: 14 days after sentence is adjudged.</p>	<p>No forfeitures in effect until 14 days after trial.</p>	<p>Defer²⁸</p> <p>(1) Only valid until Action or if rescinded earlier</p> <p>(2) Money goes to the accused</p> <p>(3) No sua sponte deferments</p>	<p>Disapprove, Mitigate,* or Suspend²⁹</p> <p>* i.e., change duration or amount of forfeiture provided that total forfeiture amount is not increased</p>
<p>Automatic Forfeitures</p> <p>(1) Applies by operation of law if:</p> <p>(a) Confinement > 6 months; or</p> <p>(b) Discharge & Confinement</p> <p>(2) Maximum amount:</p> <p>(a) GCM: all pay and allowances</p> <p>(b) SPCM: 2/3ds pay only</p> <p>(3) Effective Date: 14 days after sentence is adjudged.</p>	<p>No forfeitures in effect until 14 days after trial.</p>	<p>Defer³⁰</p> <p>(1) Only valid until Action or if rescinded earlier</p> <p>(2) Money goes to the accused</p> <p>(3) No sua sponte deferments</p> <p>Waive³¹</p> <p>(1) Goes to dependents only</p> <p>(2) Valid for up to 6 months, duration of confinement, or ETS, whichever comes first</p> <p>(3) CA can waive sua sponte</p>	<p>Waive³²</p> <p>(1) Goes to dependents only</p> <p>(2) Valid for up to 6 months, duration of confinement, or ETS, whichever comes first</p> <p>(3) CA can waive sua sponte</p>

²⁷ This chart is a handout of the TJAGLCS Military Justice Managers' Course. CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, POST-TRIAL PROCEDURES DESKBOOK (24 July 2009). It should be read in conjunction with *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002).

²⁸ UCMJ art. 57(a)(2); MCM, *supra* note 11, R.C.M. 1101(c).

²⁹ MCM, *supra* note 11, R.C.M. 1107(d) & 1108.

³⁰ UCMJ arts. 57(a)(2) & 58b(a)(1); MCM, *supra* note 11, R.C.M. 1101(c).

³¹ UCMJ art. 58b(b); MCM, *supra* note 11, R.C.M. 1101(d).

³² UCMJ art. 58b(b); MCM, *supra* note 11, R.C.M. 1101(d).