



March 9, 2015

Via Certified Mail RRR

Captain Jon R. Fahs, USN
Commanding Officer, Navy Nuclear Power Training Command
101 NNPTC Circle
Goose Creek, SC 29445-6324

**Re: Response to Detachment for Cause ICO LCDR Wesley J. Modder, USN,
for Substandard Performance of Duty**

Dear Captain Fahs:

Lieutenant Commander (LCDR) Wesley "Wes" Modder, CHC, USN, retained the Liberty Institute to represent him in this matter. Accordingly, please direct all correspondence pertaining to this matter to Liberty Institute Senior Counsel, Michael Berry.

As you no doubt are aware, throughout Chaplain Modder's fifteen-year Navy career, he has distinguished himself as "the best of the best," and earned your designation as an "Early Promote," the highest rating possible. His assignments include tours with the 11th Marine Expeditionary Unit, and assignment as the Force Chaplain for Naval Special Warfare Command, during which he deployed in support of Naval Special Warfare Development Group (DEVGRU). A "consummate professional leader," Chaplain Modder also holds a Doctorate in Military Ministry from Fuller Theological Seminary. Chaplain Modder's doctoral thesis focused on his work with Navy SEALs. As recently as 10 Dec 2014, CAPT Keith Davids, Commanding Officer, Naval Special Warfare Center, wrote Chaplain Modder a glowing letter of recommendation. Despite these accolades, it appears you desire to end Chaplain Modder's career by requesting that he be sent to a Board of Inquiry, detached for cause, and removed from the promotion list.

This letter constitutes Chaplain Modder's response to your Detachment for Cause request, Ser LEGAL/047, that he received on February 17, 2015. This letter also constitutes Chaplain Modder's request for religious accommodation, which is discussed further below.

Response to Detachment for Cause

You directed a Command Investigation, which was completed on January 27, 2015. During the course of the Command Investigation, the investigating officer (IO) obtained statements from several complaining witnesses. The IO's Findings of

Fact, Opinions, and Recommendations fail to accurately capture and convey the context and private, personal nature of Chaplain Modder's interactions with sailors at the Naval Nuclear Power Training Command. As any chaplain would do, Chaplain Modder cared for the spiritual well-being and needs of all sailors. Indeed, he is compelled to do so by his sincerely held religious beliefs and his duty as a Navy chaplain. Nevertheless, the IO failed to take Chaplain Modder's role and his responsibilities to his denominational endorser into account during his investigation.

Chaplain Modder's more-than nineteen years of total service to our nation—which includes his time as a United States Marine—have been outstanding, as demonstrated by the multiple letters of recommendation he received in support of his promotion to Commander. The Commander, Naval Special Warfare Center, wrote that Chaplain Modder exhibits “*charismatic leadership and sound judgment*,” and that “*the Navy has the best of the best in Chaplain Modder*.” The then-Executive Officer, now-Commanding Officer of the U.S.S. Boxer (LHD-4) describes Chaplain Modder as a “*national asset, mission critical, mission essential officer to any command*.” CAPT Ruth also states that Chaplain Modder “*demonstrates the appropriate confidence and diplomacy to speak to the entire chain of command*.” And Chaplain Modder's former commander, Colonel Trollinger, Commanding Officer, 11th Marine Expeditionary Unit, revised Chaplain Modder's already-glowing fitness report from “Must Promote” to “Early Promote,” the highest rating possible. These letters of recommendation and fitness reports are enclosed with this letter.

Despite these accolades and accomplishments, your Detachment for Cause request accuses Chaplain Modder of “substandard performance.” Yet in Chaplain Modder's most recent fitness report, which you authored on October 31, 2014, you describe Chaplain Modder as a “*consummate professional leader*,” and “*sought out for his expertise on . . . the most sensitive issues encountered*.” You conclude by proclaiming Chaplain Modder as “*the best of the best*,” and you also rated him as an “Early Promote.” As with all good officers, Chaplain Modder developed his professionalism and expertise over the course of his military career. He did not earn his reputation overnight. Thus, it is inconceivable that Chaplain Modder could substantially depart from the high standards he established over nineteen-plus years, in multiple commands, both afloat and ashore, within a matter of weeks. Simply put, Chaplain Modder remains the same professional, ethical, moral, and spiritual leader that he has been since he was commissioned as a Navy chaplain.

It is often said that the role of the Navy chaplain is to “bring God to sailors, and sailors to God.” Chaplain Modder is called and compelled to accomplish this in every aspect of his duties as a Navy chaplain, particularly with respect to his pastoral care and pastoral counseling duties. His sincerely held religious beliefs demand that he cares for the spiritual well being of every sailor with whom he comes into contact. This is especially true of those sailors who seek him out to discuss issues of faith, marriage, and family, regardless of their faith background, or lack thereof. Therefore, every time Chaplain Modder conducts such counseling sessions—as he has done numerous times in his Navy career—he is compelled by

his sincerely held religious beliefs to offer encouragement and hope from a Biblical perspective. At all times throughout Chaplain Modder's fifteen-year Navy career, he conducts pastoral care and counseling in accordance with Navy regulations, as explained below. That is what he is trained to do by the Navy, and by his endorsing church, the Assemblies of God. Chaplain Modder's sincerely held religious beliefs are such that he believes it is his religious duty to offer counseling from a Biblical perspective. That is why Chaplain Modder explains to each person who seeks his pastoral counseling that he is an ordained minister, and his role is to offer counsel from a Biblical perspective.

Chaplain Modder's philosophy of ministry is to care for all people, regardless of their faith, or if they have no faith at all. Within the context of Chaplain Modder's pastoral care and counseling, his philosophy is that every human being is entitled to dignity and respect, regardless of their belief or conduct. This philosophy has served Chaplain Modder well throughout his Naval career, as evidenced by his service record and the aforementioned endorsements he received. In fact, Chaplain Modder believes that anything less than his philosophy would be a disservice to the sailors and Marines with which he is entrusted, and would render him ineffective as a chaplain.

Chaplain Modder is nevertheless compelled by his sincerely held beliefs to speak truth, in love, to sailors and Marines. When he conducts pastoral care and counseling sessions, Chaplain Modder's practice is to ask those with whom he is meeting if they understand that he is an ordained minister. If they do not understand that, he explains to them that when he conducts counseling, his role is to listen to the individual, and should they ask questions, he is compelled by his faith to answer from a biblical worldview, consistent with the tenets of his endorsing denomination. Chaplain Modder also explains that all pastoral care and counseling sessions are private and confidential. But as an ordained minister, Chaplain Modder does not—indeed, he cannot—hide the fact that he must answer questions from a biblical worldview.

That the Navy would use Chaplain Modder's private, religious expression against him is a betrayal of the trust and confidence that is supposed to exist between the chaplain and the service member during pastoral counseling sessions. Worse, the allegations against Chaplain Modder are simply untrue or are gross mischaracterizations of what actually occurred. Chaplain Modder categorically denies that he initiated conversations about marriage or human sexuality. As described above, his practice is always to listen, and to allow the individual to bring up topics they wish to discuss. Please see the enclosed document for Chaplain Modder's specific denials and refutations to the Investigating Officer's Findings of Fact.

Chaplain Modder also specifically denies your accusations against him in your Detachment for Cause request. He specifically denies using inappropriate language or gestures. In fact, such conduct is contrary to Chaplain Modder's philosophy of ministry.

To be clear, Chaplain Modder does not dispute that during private, one-on-one pastoral care and counseling sessions, he answered questions honestly and from a biblical worldview. On occasion, and only when asked, he expressed his sincerely held religious belief that:

Sexual acts outside of marriage are contrary to biblical teaching; and

Homosexual *conduct* is contrary to biblical teaching; and

Homosexual *orientation or temptation*, as distinct from conduct, is *NOT* sin.

Chaplain Modder's religious beliefs are consistent with the doctrinal tenets of his endorsing denomination, the Assemblies of God. See *Enclosed "Homosexuality, Marriage, and Sexual Identity,"* Assemblies of God Position Paper 4181. In fact, Chaplain Modder is required to hold these sincerely held beliefs by his endorsing denomination.

As stated above, Chaplain Modder's sincerely held religious beliefs are consistent with the doctrinal tenets of his endorser, the Assemblies of God. In fact, pursuant to Department of Defense Instruction (DODI) 1304.28, Chaplain Modder *must* adhere to the doctrinal tenets of the Assemblies of God or risk losing his endorsement, and thereby forfeiting his status as a chaplain. The Assemblies of God's position on sexual activity outside of marriage and homosexual conduct is not unique. For example, the two endorsing agencies that comprise the greatest percentage of military chaplains—the Archdiocese for the Military Services (Catholic), and the North American Mission Board (Southern Baptist)—both maintain similar positions on these issues.¹ In other words, a majority of military chaplains hold sincerely held religious beliefs that are in accord with Chaplain Modder's. Punishing or censoring Chaplain Modder because of his beliefs would send a dangerous message that other chaplains who share his beliefs—which is the vast majority of military chaplains—may also be punished or censored.

Chaplain Modder's religious expression is therefore consistent with—indeed, it's *protected*—federal law and military regulations. Any adverse action, including Detachment for Cause, a Board of Inquiry, or removal from the promotion list, which results from a service member's sincerely held religious beliefs violates those laws and regulations.

Section 533(b) of the Fiscal Year (FY) 2013 National Defense Authorization Act (NDAA), Pub. L. No. 112-239, is entitled "Protection of Chaplain Decisions Relating to Conscience, Moral Principles, or Religious Beliefs." It states "No member of the Armed Forces may:

¹ See, e.g., *Renewed Fidelity in Favor of Evangelization*, Most Reverend Timothy P. Broglio, Archbishop for Military Services, dated September 18, 2013; *Southern Baptist Endorsed Chaplains/Counselors in Ministry Guidelines in Response to the June 26, 2013, Supreme Court Ruling on the Defense of Marriage Act (DOMA)*, North American Mission Board, dated August 29, 2013.

(1) Require a chaplain to perform any rite, ritual, or ceremony that is contrary to the conscience, moral principles, or religious beliefs of the chaplain; or

(2) Discriminate or take any **adverse personnel action** against a chaplain, **including denial of promotion**, schooling, training, or assignment, on the basis of the refusal by the chaplain to comply with a requirement prohibited by paragraph (1).” [Emphasis added]

Department of Defense Instruction (DODI) 1300.17, Paragraph 4d, also states that “a Service member’s expression of sincerely held beliefs may not be used as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment.” Clearly, granting your request that Chaplain Modder be detached for cause, removed from the promotion board, and subjected to a Board of Inquiry, are adverse personnel actions, and therefore prohibited by federal law and military regulation. Case law also forbids the DOD from censoring chaplains.

Moreover, case law forbids the DOD from censoring chaplains. In 1997, the United States District Court for the District of Columbia rejected attempts by the military to censor chaplains’ religious expression. See *Rigdon v. Perry*, 962 F.Supp. 150 (D.D.C. 1997). In the context of conducting worship services and sermons, the court stated that chaplains are acting “in a religious capacity, and therefore, it is wholly appropriate for them to advance their religious beliefs in that context.” *Id.* at 160-61. Likewise, when Chaplain Modder conducts counseling sessions with individual service members, he acts in a religious capacity, and it is wholly appropriate for him to advance his religious beliefs.

A Detachment for Cause, Board of Inquiry, and removal from the promotion list would constitute adverse action that violates the aforementioned statutes, regulations, and case law. Your request is therefore unwarranted and we respectfully request you withdraw and rescind it. Similarly, adverse action may occur by assigning Chaplain Modder to duties or billets typically reserved for junior, less-experienced chaplains. Thus, we also request that Chaplain Modder be permitted to continue serving as a Navy chaplain in billets for which his experience and expertise are best suited.

Request for Religious Accommodation

Chaplain Modder’s sincerely held religious beliefs compel him to discuss matters of faith, marriage, family, and human sexuality from a Biblical perspective when the issue is relevant to pastoral counseling. In accordance with DODI 1300.17, and Secretary of the Navy Instruction (SECNAVINST) 1730.8b, this letter constitutes Chaplain Modder’s request for religious accommodation to do so.

Chaplain Modder’s request is consistent with DOD and Navy regulations. The Department of Defense revised DODI 1300.17 in January 2014 to implement

changes Congress directed under Section 533 of the FY13 NDAA and Section 532 of the FY14 NDAA. DODI 1300.17, Paragraph 4b provides “unless it could have an adverse impact on military readiness, unit cohesion, and good order and discipline, the Military Departments *will* accommodate individual expressions of sincerely held beliefs . . .” [emphasis added]. DODI 1300.17 further directs each service branch to implement service-specific regulations consistent with it.

DODI 1300.17 is implemented in the Navy via Secretary of the Navy Instruction (SECNAVINST) 1730.8B. Although it has yet to be revised in accordance with DODI 1300.17, Paragraph 5 of the SECNAVINST states that Navy policy is to “accommodate the doctrinal or traditional observances of the religious faith practiced by individual members when those doctrines or observances will not have an adverse impact on military readiness, individual or unit readiness, unit cohesion, safety, discipline, or mission accomplishment.” As explained above, Chaplain Modder’s religious expression is consistent with his endorser’s doctrine. Accordingly, the Navy must accommodate his expression unless it can demonstrate a compelling governmental interest that is implemented by the least restrictive means. But because there is no compelling interest in censoring a chaplain’s religious expression, the Navy must accommodate.

Even if the complaining sailors alleged that Chaplain Modder’s religious expression offended them, it would not be a compelling interest. Perceived offense is irrelevant. Instead, the critical inquiry is whether there is religious coercion, which the Establishment Clause of the First Amendment forbids. In the context of the Establishment Clause, the United States Supreme Court has repeatedly, and recently, stated that, offense does not equal coercion. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 44 (2004). Moreover, in *United States v. Wilcox*, 66 M.J. 442 (C.A.A.F. 2008), the Court of Appeals for the Armed Forces stated that even racist or supremacist speech is not always punishable under the Uniform Code of Military Justice (UCMJ), because it is protected by the First Amendment. If the First Amendment protects racist or supremacist speech, then it certainly protects religious speech.

Censoring a chaplain’s religious expression constitutes unconstitutional and unlawful religious discrimination. Under the Constitution, federal law, DODI 1300.17, Navy regulations, Navy Equal Opportunity policy, and military case law, religious discrimination in the Navy is unlawful. Office of Chief of Naval Operations Instruction (OPNAVINST) 5354.1F CH-1, states that Navy policy is to “prohibit unlawful discrimination against persons or groups based on race, color, national origin, sex, or religion.” Your request does not constitute fair treatment for Chaplain Modder’s religious beliefs and constitutes unlawful religious discrimination.

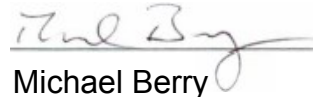
Denial of Chaplain Modder’s request without a compelling governmental interest that is furthered by the least restrictive means also violates the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb – 2000bb-4. Like DODI 1300.17, RFRA prohibits the Navy from substantially burdening Chaplain Modder’s sincerely held religious beliefs without a compelling interest. Clearly,

there is no compelling government interest that weighs against allowing Chaplain Modder to express his sincerely held religious beliefs during pastoral counseling sessions. Should you elect to deny Chaplain Modder's request, we will not hesitate to take necessary legal action to enforce his rights. Therefore, prior to taking any action, we respectfully request an in-person meeting with you to discuss this matter in detail.

Captain, your request will needlessly and prematurely terminate Chaplain Modder's career, which has been stellar and free from blemish for more than nineteen years. Chaplain Modder served combat Marines and Navy SEALs with steadfast devotion to duty that is in keeping with the very best of Navy tradition. Importantly, you correctly point out that "disciplinary action would not be appropriate." Nevertheless, the actions you requested will most certainly have a disciplinary effect. Please reconsider, and withdraw and rescind your requests.

Please let me know a time and place that is convenient for you to meet. My sincere hope is that we can resolve this without the need for further escalation. In accordance with SECNAVINST 1730.8B, we request the courtesy of a response by no later than March 16, 2015. I may be reached via e-mail at mberry@libertyinstitute.org, or directly by phone at [972-941-4445](tel:972-941-4445).

Respectfully,



Michael Berry
Senior Counsel
LIBERTY INSTITUTE

Copy to:

Lieutenant Jean-Marc Chanoine, JAGC, USN
Staff Judge Advocate, Navy Nuclear Power Training Command
101 NNPTC Circle
Goose Creek, SC 29445-6324

Enclosures:

- (1) Chaplain Modder's Specific Denials of Findings of Fact
- (2) Chaplain Modder's Letters of Recommendation
- (3) Chaplain Modder's Fitness Reports
- (4) Assemblies of God Position Paper 4181