

RELIGION

Request for Religious Accommodation

We have reviewed the attached case file and recommend action on SSgt Alpha's request for religious accommodation from compliance with Air Force grooming standards be deferred pending his imminent transfer of duty stations. Pursuant to DoDI 1300.17, *Accommodation of Religious Practices Within the Military Services*, 10 February 2009, Incorporating Change 1, Effective January 22, 2014, paragraph 4.j., new requests for accommodation are necessary upon new assignment, transfer of duty stations, or other significant changes in circumstances. SSgt Alpha has an imminent report no later than date to Base X. Should SSgt Alpha renew his request following a change in his current circumstances, including his location, such request will again be carefully assessed.

Background

SSgt Alpha is assigned to Base Y, as a dental technician. He submitted a "Request for Religious Accommodation for Grooming Standards." Specifically, he requested an exemption from the prohibition of wearing beards for non-medical reasons contained in AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel*, 18 July 2011, *Incorporating Through Change 4*, 28 May 2015. In support of his request, he stated he is as an active participant in the Islamic faith, the tenets of which restrict him from shaving his facial hair. He relied on various hadith passages, a major source of guidance for Muslims, reflecting the importance of the beard in the Islamic faith. For example, his memorandum states, "The Prophet (PBUH) says: 'Trim closely the moustache, and let the beard flow (Grow).'" He also provided a memorandum from the Chief of Dental Services who stated, "if all precautions and recommendations provided by [the Infection Control, Occupational Health and Safety Consultant for the Air Force Dental Services] are followed, I see no reason why SSgt [Alpha] cannot be permitted to maintain a beard while performing his duties from a dental standpoint." Attached to this memorandum is an e-mail from the Aerospace Medicine Flight Commander, which states:

As a military member, SSgt [Alpha] may be required to wear a[n] M-50 gas mask during a CBRE [Chemical, Biological, Radiological and Explosive] event. The M-50 gas mask is a tight-fitting respirator that requires a fit test and a minimum fit factor of 2,000. If SSgt [Alpha] has facial hair that interferes with the sealing surface of the facepiece, it will likely compromise the protection provided by the PPE [personal protection equipment]. It is unlikely that he would have a fit factor above 2,000, which is the level determined to provide 'adequate' protection IAW AFI 48-137, Attachment 10.

The Wing Chaplain concurred with the request, explaining SSgt Alpha has actively participated in Mosque activities since childhood and is "passionate about his convictions" which restrict him from shaving facial hair. SSgt Alpha's squadron, group, and wing commanders also concurred with the request. The MAJCOM/A1 Director, then recommended approval of SSgt Alpha's request.

Subsequently, SSgt Alpha signed a memorandum entitled, “Acceptance of Risks Associated with Facial Hair Growth and Gas Mask Integrity,” wherein he acknowledged the risk that facial hair may lead to an improper seal of the M-50 gas mask. His squadron, and wing commanders, likewise acknowledged this risk.

Authorities

Air Force Instruction

With respect to facial hair, the below paragraphs of AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel*, provide:

3.1.2.3. Beards. Beards are not authorized (exception in paragraph 3.1.2.3.1) unless for medical reasons, when authorized by a commander on the advice of a medical official. If commander authorizes, members will keep all facial hair trimmed not to exceed ¼ inch in length. Individuals granted a shaving waiver will not shave or trim any facial hair in such a manner as to give a sculptured appearance. Commanders and supervisors will monitor progress in treatment to control these waivers. If necessary for medical reasons, facial hair will be kept neat and conservative (moderate, being within required limits (not more than ¼ inch); not excessive or extreme), as defined by the local commander.

3.1.2.3.1. During tours of less than 30 days, Air Force Reserve (AFR) and Air National Guard (ANG) chaplains not on extended active duty may request a beard waiver for religious observance when consistent with their faith. For AFR waiver processing instructions see AFMAN 36-8001, *Participation and Training Procedures*. For ANG waiver process instructions contact ANG/HC.

DoDI 1300.17

DoDI 1300.17 prescribes policy, procedures, and responsibilities for the accommodation of religious practices in the military services. This Instruction provides that the Military Departments will accommodate individual expressions of sincerely held beliefs (conscience, moral principles, or religious beliefs) “unless doing so could have an adverse impact on military readiness, unit cohesion, good order and discipline, health and safety, or any other military requirement.” See paragraphs 4.b, and 4.e.

When accommodation would adversely affect the mission, the standard applied turns on whether the service member’s exercise of religion is substantially burdened by the military policy or practice. A substantial burden is one that significantly interferes with the exercise of religion. Paragraph 3.e. If it is not substantially burdened, the needs of the requesting service member are balanced against the needs of mission accomplishment. If the member’s exercise of religion is substantially burdened, the request for religious accommodation may be denied only when the military policy, practice, or duty furthers a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. Paragraph 4.e.1.

In resolving requests for accommodation of religious practices, careful consideration of the effect, if any, of approval or disapproval on any compelling governmental interest is essential. DoDI 1300.17 provides that the Military Departments have “a compelling government interest in mission accomplishment, including the elements of mission accomplishment such as military readiness, unit cohesion, good order, discipline, health, and safety, on both the individual and unit levels.” An essential part of unit cohesion is establishing and maintaining uniform military grooming and appearance standards.” Paragraph 4.h.

Requests for religious accommodations must be assessed on a case-by-case basis, considering the unique facts; the nature of the requested religious accommodation; the effect of approval or denial on the Service member’s exercise of religion; and the effect of approval or denial on mission accomplishment, including unit cohesion. Paragraph 4.i.

Grooming practices are subject to consideration for accommodation when the request is based on religious beliefs. Paragraph 4.f.(1).(b). Factors to consider include whether approving the accommodation would impair the safe and effective operation of weapons, military equipment, or machinery; pose a health or safety hazard; interfere with the wear or proper function of special or protective clothing or equipment; otherwise impair discipline, morale, unit cohesion, or accomplishment of the unit mission. DoDI 1300.17, Enclosure, paragraph 10.(a) – (d). The factors with respect to religious apparel are similar but specifically identify for consideration whether the item interferes with the proper function of “gas protective masks.” Enclosure, paragraph 5.c.

Holt v. Hobbs

The analysis in DoDI 1300.17 above mirrors the standard under examination in *Holt v. Hobbs*, 135 S. Ct. 853; 190 L. Ed. 2d 747 (2015). In that case, Gregory Holt was an inmate of the Arkansas Department of Corrections and a practicing Salafi Muslim. He sought an injunction and temporary relief from the enforcement of the Arkansas Department of Corrections’ grooming policy, which allowed trimmed mustaches and quarter-inch beards for diagnosed dermatological problems but otherwise no facial hair. Holt argued that growing a beard was a dictate of his religious faith, that the grooming policy significantly burdened his ability to do so without justification, and that the grooming policy was therefore a violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 114 Stat. 8, 42 U.S.C. § 2000cc *et seq.* Holt was willing to limit his beard to a length of one-half inch as a form of compromise with the policy. Prison officials did not dispute that growing a beard was “a dictate of [the petitioner’s] religious faith,” and the Court found that the prison grooming policy substantially burdened Holt’s religious exercise. *Id.* at 862. Nevertheless, the prison officials contended that the grooming policy was the least restrictive means of furthering a compelling interest in “prison safety and security,” because it prevented prisoners from concealing contraband in their beards and from disguising their identities. *Id.* at 863-64. Citing the deference traditionally accorded to the judgments of prison officials, the District Court and the Eighth Circuit agreed. *Id.* at 861.

The Supreme Court reversed the courts below. The Supreme Court first discussed the history behind Congress’ enactment of RLUIPA and its sister statute, the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. §2000bb *et seq.* The two statutes mirror each other and provide that the government shall not substantially burden a person’s exercise of religion

unless the government demonstrates that imposition of the burden on that person is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that compelling governmental interest. *Id.* at 860. The Department of Defense incorporated this standard into DoDI 1300.17, discussed above.

The Court began its analysis of the prison policy by noting first that the prison officials had asserted a “broadly formulated interest,” but that “RLUIPA, like RFRA, contemplates a ‘more focused’ inquiry.” *Id.* at 863, quoting *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 at 2779. The two statutes require the government, “to demonstrate that the compelling interest test is satisfied through application of the challenged law to . . . the particular claimant whose sincere exercise of religion is being substantially burdened.” *Id.*, quoting *Hobby Lobby*, 134 S. Ct. at 2779. Thus, the *Holt* Court reiterated that under RLUIPA and RFRA, a court must “scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants’ and . . . ‘look to the marginal interest in enforcing’ the challenged government action in that particular context.” *Id.*, quoting *Hobby Lobby*, 134 S. Ct. at 2779 (alteration in original). In accordance with that test, the Department of Corrections needed to show that the grooming policy, as applied specifically to the petitioner, furthered its compelling interests in the least restrictive way. *Id.*

The Court first determined that Holt’s request to grow a beard was sincerely based on his religious belief that doing so was a dictate of his faith, and that the grooming policy substantially burdened his religious exercise. *Id.* at 862. While it acknowledged the need to “respect [the] expertise” of prison officials, the Court concluded that it could not find “that denying petitioner a 1/2-inch beard actually furthers the Department’s interest in rooting out contraband” without according the prison officials “a degree of deference that is tantamount to unquestioning acceptance.” *Id.* at 864. The Supreme Court underscored that RLUIPA “does not permit such unquestioning deference,” and that, like RFRA, it “‘makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.’” *Id.*, quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434, 163 L. Ed. 2d 1017 (2006). Observing that “the least-restrictive means standard is exceptionally demanding,” the Court then determined that even if the prison officials could show that the beard policy furthered an interest in curtailing the circulation of contraband, they had “offered no sound reason why hair, clothing, and [medically-authorized] 1/4-inch beards can be searched but 1/2-inch beards cannot.” *Id.*

The *Holt* Court also found that, assuming the grooming policy advanced the compelling interest in “the quick and reliable identification of prisoners,” it “still violate[d] RLUIPA as applied in the circumstances present[ed]” because there were less restrictive means available. *Id.* at 864–65. The Court agreed with the petitioner that the Department of Corrections could require that inmates be photographed both with and without their beards so that guards could use both images when making an identification. *Id.* at 865. It also noted that the Department of Corrections “already ha[d] a policy of photographing a prisoner both when he enters an institution and when his appearance changes at any time during his incarceration.” *Id.* (citation and internal quotation marks omitted)

In addition, the Court observed that the Department of Corrections had failed to explain adequately why its grooming policy was “substantially underinclusive.” *Id.* at 865. The Court noted that “[a]lthough the Department [of Corrections] denied petitioner’s request to grow a 1/2-inch beard, it permits prisoners with a dermatological condition to grow 1/4-inch beards . . . even though both

beards pose similar risks,” and it found that this issue bore on the RLUIPA analysis. *Id.* at 865-66.

Finally, the Court emphasized that the courts below had incorrectly “deferred to these prison officials’ mere say-so that they could not accommodate petitioner’s request,” and that RLUIPA “demands much more.” *Id.* at 866. “Courts must hold prisons to their statutory burden, and they must not ‘assume a plausible, less restrictive alternative would be ineffective.’” *Id.*, quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 824, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000). The Court concluded by noting that while enforcement of RLUIPA “provides substantial protection for the religious exercise of institutionalized persons,” it still “affords prison officials ample ability to maintain security.” *Id.*

Military Deference

There is longstanding precedent involving judicial deference to military authorities charged with the management of military affairs. The Supreme Court has made it clear that “[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian,” *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953), and “[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments.” *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

Indeed, in enacting RFRA, Congress specifically acknowledged the importance of maintaining order and discipline within the military ranks, and it noted its expectation that courts would adhere to the tradition of judicial deference in matters involving both prisons and the armed forces. See S. Rep. No. 103-111, at 10, 12.

Analysis

For purpose of this accommodation request analysis, SSgt Alpha’s request for a religious accommodation, like the petitioner’s in *Holt*, appears grounded in a sincerely held religious belief. SSgt Alpha believes growing a beard is a dictate of his religious faith, which is confirmed by the Wing Chaplain who wrote that SSgt Alpha is passionate about his convictions, which restrict him from shaving facial hair. Because Air Force dress and appearance standards require him to shave, his religious exercise is substantially burdened.

However, with respect to the remaining analysis, this case is distinguishable from the result in *Holt*. Unlike the broadly formulated interests identified in that case, the Air Force has a concise and compelling interest in ensuring the health and safety of SSgt Alpha, which interest is furthered in the least restrictive manner by requiring compliance with grooming standards. See generally, DoDI 1300.17, paragraph 4.h. With respect to grooming practices, the Air Force is specifically charged with the obligation to carefully consider whether an accommodation would interfere with the wear or proper function of special or protective clothing or equipment. DoDI 1300.17, Enclosure, paragraph 10.(a) – (d). Factors concerning religious apparel exemptions specifically require a determination as to whether the accommodation would interfere with the proper function of “gas protective masks.” Enclosure, paragraph 5.c.

Here, the Aerospace Medicine Flight Commander concluded that facial hair that interferes with the M-50 gas mask will likely compromise the protection below that deemed adequate protection

by Air Force standards. However, this does not necessarily end the analysis; the Air Force must demonstrate that its interest in insisting on adherence to protective gear standards would be compromised by granting the accommodation.

Unlike *Holt*, which concluded that denying the waiver failed to further its interest in stemming contraband, there is a direct relationship between maintaining a proper gas mask fit and preserving SSgt Alpha's health and safety. SSgt Alpha is serving in a location designated by the Under Secretary of Defense as an imminent danger area due to the threat of physical harm or imminent danger because of civil insurrection, civil war, terrorism, or wartime conditions. SSgt Alpha's current duty station is located within a reasonable proximity to the intense fighting taking place against Islamic State militants. Following reports that U.S. officials determined ISIS were making crude chemical weapons in Syria, the Islamic State recently launched mustard gas attacks in Syria and Iraq. Moreover, multiple media outlets report that ISIS used mustard gas, delivered by mortar shells, in Marea, Syria this past August, injuring more than 120 people and likely killing a child.¹

Mustard gas, the production of which militants appear to have mastered, is a chemical warfare agent that causes painful skin blisters, irritates the eyes, and causes temporarily blindness. Internal and external hemorrhaging can then destroy the lungs. The Joint Service General Purpose Mask (JSGPM) M-50, is a lightweight, protective mask system incorporating state-of-the-art technology to protect US Joint forces from actual or anticipated threats. The JSGPM provides above-the-neck protection from agents and radioactive particles; and head-eye-respiratory protection against chemical, biological, radiological, and nuclear (CBRN) threats (including toxic industrial materials).

There is potential that SSgt Alpha could encounter a real tactical situation in which a protective mask is required for his safety. Consequently, he may face an actual need to wear the protective mask. Unlike other Air Force locations, military members stationed at SSgt Alpha's current duty station, are issued a protective gas mask. The certification of this base as an imminent danger area, the use of chemical agents in its vicinity, and the fact that the effectiveness of the M-50 gas mask is compromised by facial hair, demonstrates that adherence to grooming standards furthers the Air Force's compelling interest in safety.

Additionally, requiring SSgt Alpha to remain within grooming standards, is the least restrictive means of furthering the Air Force's interest. The M-50 protective mask is the most effective life-saving protective measure against CBRN threats. While other masks may exist capable of providing protection to individuals with facial hair, such masks are not Air Force issue. Given that the Air Force trains and operates on a premise of interchangeable parts with respect to gas mask protection, it is not feasible to provide SSgt Alpha a special protective mask without undermining the Air Force's need for flexibility to meet operational contingencies.

¹ <http://www.theguardian.com/world/2015/nov/06/un-watchdog-confirms-mustard-gas-attack-in-syria>;
<http://www.nytimes.com/2015/08/25/world/middleeast/isis-suspected-of-chemical-attack-in-syria.html? r=0>

Military Readiness

Maintaining discipline in our armed forces is a governmental interest of the highest order that is reflected in DoDI 1300.17, paragraph 4.c., which provides:

DoD has a compelling government interest in mission accomplishment, including the elements of mission accomplishment such as military readiness, unit cohesion, good order, discipline, health, and safety, on both the individual and unit levels. An essential part of unit cohesion is establishing and maintaining uniform military grooming and appearance standards.

Granting SSgt Alpha's waiver could have an adverse impact on unit cohesion, and good order and discipline, ultimately impacting military readiness. Good order and discipline are the essentials of an effective and cohesive fighting force. One of the ways of preserving good order is through the enforcement of uniform grooming standards. Such enforcement instills the self-discipline necessary for the military member to perform effectively, and enhances teamwork motivation and discipline. Grooming standards and clothing contributes significantly to an Airman's willingness to submit his individuality to the larger organization.

Additionally, uniformity promotes cohesive bonds by instilling a common identity, provides visual evidence of mutual experience, reinforces a sense of tradition, and increases morale. Uniformity is a readily available means of instilling the practice of compliance, which sharpens Airmen and leaders. Finally, uniformity instills a code of professional conduct to which Airmen will adhere in combat.

Unlike the broadly formulated interest in *Holt*, grooming standards, as applied in the unique circumstances of this case, directly contribute to unit cohesion, and good order and discipline, in conducting direct operations against Islamic State militants.

The number of troops assigned to SSgt Alpha's current duty location has increased recently, due directly to the expansion of Islamic State militants. According to open source reports, the Air Force is currently conducting round the clock operations in Iraq and bordering area of Syria from SSgt Alpha's current duty station. As Defense Secretary Carter told Airmen there on a recent visit, "[t]his is a very important location on the tip of the spear."² Consequently, the threat is serious. Maintaining uniformity is necessary to ensure overall capability and readiness remains high. Instituting an exception to appearance standards at this time, and in this location, runs a serious risk to the unit cohesion required to carry out operations cohesively and effectively.

Pending Permanent Change of Station (PCS)

According to personnel records, SSgt Alpha has a pending PCS to a new duty location. Pursuant to DoDI 1300.17, paragraph 4.j., new requests for accommodation are necessary upon new assignment, transfer of duty stations, or other significant changes in circumstances. Because his transfer is imminent, any decision will require re-evaluation of the circumstances, as well as

² <http://www.militarytimes.com/story/military/pentagon/2015/12/15/us-footprint-expands-turkeys-incirlik-air-base/77362216/>

command recommendations, at the new duty location. A decision to defer action on his request, given his upcoming PCS date, is prudent given that any action on his current request would expire in short order.

Potential COAs:

1. Defer final decision pending SSgt Alpha's imminent PCS and a renewed religious accommodation request.
2. Approve in part. SSgt Alpha could be permitted to grow his beard to the extent that it will not compromise the gas mask fit. For example, if a satisfactory seal can be obtained with a one-half inch beard, SSgt Alpha's shaving waiver could be accommodated to that extent. SSgt Alpha will be required to submit a new request upon transfer to his new duty location.
3. Approve SSgt Alpha's request to grow an unshorn beard in full. A lengthy beard would obviously compromise the integrity of the gas mask. SSgt Alpha's accommodation request, therefore, could be granted, subject to an order to shave from his command in the event of a CBRN threat, to ensure a proper gas mask fit. SSgt Alpha will be required to submit a new request upon transfer to his new duty location.
4. Deny SSgt Alpha's request in its entirety.

Conclusion and Recommendation

We believe it may ultimately be feasible to both accommodate SSgt Alpha's sincerely held belief, and ensure military readiness, which includes his safety, without undermining the Air Force's need for flexibility to meet operational contingencies, while complying with the law. However, after careful consideration of the present facts, we recommend you defer final decision pending a renewed request upon SSgt Alpha's arrival at his new duty location. We have prepared an interim decision memorandum, which places him on notice of the requirement to submit a renewed request and that his current request will be forwarded to his gaining command. As requests for religious accommodations must be assessed on a case-by-case basis considering the unique facts presented, this will provide SSgt Alpha's gaining unit the opportunity to properly assess the request and provide a recommendation. Depending on the facts, your office will retain the full range of available options.

As discussed above, the Air Force must meet a high burden in justifying denial of religious accommodation requests. However, we believe a present decision to defer final resolution pending SSgt Alpha's transfer of stations merits appropriate deference.