

TOPIC

Exception to policy religious accommodation request from the grooming standards for facial hair in accordance with moral, conscience, or religious belief; specifically, Norse Heathenism.

TEXT OF THE DECISION

This opinion is in response to an inquiry regarding a religious accommodation request for a waiver from the grooming standards for facial hair. Applicant would like to grow a beard in accordance with his Heathen beliefs. We reviewed the request and concur with the recommendation of Applicant's chain of command to approve the accommodation. However, we recommend approval of this religious accommodation consistent with past beard-waiver religious accommodation approvals granted by AF/A1.

BACKGROUND

Applicant is assigned to a security forces squadron (SFS). He formally requested a religious accommodation to wear a beard while in uniform. He states beards "are an essential and fundamental defining feature of the Æsir (more commonly known as the Norse gods) as well as any Nordmaor (Norsemen), Vikings, or Heathens, and ultimately, their warrior identity. He states he understands there would be limitations on the length and appearance, and that when tasked for deployment his request must be re-evaluated by his chain of command.

As part of Applicant's formal request, he submitted a memorandum from the Group Chaplain. The memorandum states "It is my professional opinion that [Applicant] is making this request sincerely and without any alternative agenda." The Wing Chaplain also indorsed Applicant's request. The Wing Chaplain states Applicant indicated he has been practicing the Norse form of Heathenism for eight years, predating his military commitment. However, over time the further formulation of his beliefs and desire to live up to this practice is now creating a conscious struggle within. Furthermore, "his inability to grow a beard commonly challenges norms of practice, resulting in being ostracized from group affiliation by other adherents who perceive him as insincere in his commitment to the faith."

The SFS/CC recommended disapproval of Applicant's waiver request. The SFS/CC states: "[Applicant's] specific skill set as a Security Forces Defender makes him susceptible to deploy on short notice taskings to austere locations due to rising tensions. North Korea specifically has active and sophisticated nuclear weapons and is believed to possess chemical and biological weapon capability. If [Applicant] were to need his gas mask in-garrison or deployed, his beard would interfere with the proper seal on the gas mask making him vulnerable."

However, the Wing Commander recommended approval of Applicant's request with the following caveats: (1) While performing assigned or routine, non-hazardous duties, Applicant may wear a neat, conservative beard that presents a professional, well-groomed military appearance; (2) Applicant's beard may not exceed two inches in length when measured from the bottom of the

chin; (3) Applicant may roll and tie the beard to meet the two-inch length requirement; (4) Applicant must comply with all safety and sanitary requirements; (5) If Applicant is assigned or directed to perform hazardous duty or operate in a hazardous environment, continuation of the accommodation must be re-evaluated by his chain of command; and (6) Applicant will shave his beard for a proper seal of a gas mask for necessary mission readiness requirements. The Wing Commander also recommended the accommodation extend to subsequent permanent duty assignment locations and TDY locations. The MAJCOM/A1 concurred with this recommendation.

GUIDANCE

Department of Defense Instruction (DoDI) 1300.17, Accommodation of Religious Practices Within the Military Services¹

DoDI 1300.17 prescribes policy, procedures, and responsibilities for the accommodation of religious practices in the military services. DoDI 1300.17, paragraph 4.b, states “[r]equests for religious accommodation will be resolved in a timely manner and will be approved when accommodation would not adversely impact mission accomplishment, including military readiness, unit cohesion, good order, discipline, health and safety, or any other military requirement.” The DoDI recognizes that “DoD has a compelling government interest in mission accomplishment...on both the individual and unit levels.”

In the event a “military policy, practice or duty...substantially burdens a Service member’s exercise of religion,” a request for accommodation may only be denied when the military policy practice or duty: (1) furthers a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest.

If the military policy, practice or duty does not substantially burden a Service member’s exercise of religion, the accommodation request should be evaluated by balancing the “needs of the requesting Service member” against “the needs of mission accomplishment.” Only if the needs of the requesting member are outweighed by the needs of mission accomplishment, the request may be denied.

Service members may seek a religious accommodation waiver of service grooming standards. When evaluating a waiver of grooming standards, 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; or otherwise impair discipline, morale, unit cohesion, or accomplishment of the unit mission.

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. If the request is for a waiver of service grooming policy, the waiver “will be forwarded to the Secretary...concerned” for approval or disapproval.

¹ 10 February 2009, Incorporating Change 1, Effective January 22, 2014.

The Secretary of the Air Force (SecAF) has delegated waiver authority to the Deputy Chief of Staff for Manpower, Personnel, and Services (AF/A1). AFI 36-2903, paragraph 2.3.²

Air Force Instruction 36-2903, Dress and Personal Appearance of Air Force Personnel

The Air Force outlines dress and appearance standards in AFI 36-2903. Paragraph 3.1.2.3 addresses the Air Force grooming standard for beards: “[b]eards are not authorized...unless for medical reasons, when authorized by a commander on the advice of a medical official.” An Airman who requests an accommodation waiver to grow a beard for religious reasons must follow paragraph 9.12.5, which states: “Religious [requests]...impacting grooming standards and/or personal appearance (e.g., hair length and style, tattoos, ‘body art’) require endorsement from the unit commander, installation chaplain, appropriate installation commander, and the MAJCOM, FOA, or DRU A1.”

Case Law

It does not matter whether a religious belief itself is central to the religion, but only that “the adherent [] have an honest belief that the practice is important to his free exercise of religion.”³ The Religious Freedom Restoration Act (RFRA) defines “religious exercise” as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”⁴ A “religious exercise” under RFRA “involves ‘not only belief and profession but the performance of (or abstention from) physical acts’ that are ‘engaged in for religious reasons.’”⁵ However, conduct that is claimed to be an “exercise of religion” within the meaning of RFRA must be based on a religious belief rather than a philosophy or way of life, and the belief must be sincerely held by the applicants.⁶

Questions of religious sincerity are an “intensely fact-based inquiry,” and a claim for religious accommodation for a sincerely-held religious belief is not per se fraudulent simply because the claim is not raised at the outset of the process.⁷ It is not for courts to say one’s religious beliefs are mistaken or insubstantial.⁸ However, “[n]either the government nor the court has to accept the defendant’s mere say-so.”⁹ Determining sincerity is a factual inquiry within a trial court’s authority and competence, and “the [claimant’s] ‘sincerity’ in espousing that practice is largely a matter of individual credibility.”¹⁰ “Repeatedly and in many different contexts, [the Supreme

² Air Force Instruction 36-2903, *Dress and Personal Appearance of Air Force Personnel*, 18 July 2011, Incorporating Through Change 4, 28 May 2015, and updated through AFGM2018-03, 28 September 2018.

³ *Sossamon v. Lone Star State of Tex.*, 560 F.3d 315, 322 (5th Cir. 2009), *aff’d sub nom. Sossamon v. Texas*, 131 S. Ct. 1651 (2011). See also *Sample v. Lappin*, 424 F. Supp. 2d 187, 193 (D.D.C. 2006) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of a particular inmate’s interpretation of those creeds;” the court’s inquiry is limited to “whether an inmate sincerely holds a particular belief and whether the belief is religious in nature.”).

⁴ 42 U.S.C. § 2000bb-2(4) (*emphasis added*) (*cross-referencing* 42 U.S.C. § 2000cc-5(7)(A)).

⁵ *Hobby Lobby*, 134 S. Ct. at 2770 (*quoting Smith*, 494 U.S., at 877).

⁶ *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996).

⁷ See *United States v. Sterling*, 75 M.J. 407, 416 (CAAF 2016).

⁸ *Hobby Lobby*, 134 S. Ct., at 2779.

⁹ *United States v. Bauer*, 84 F.3d 1549, 1559 (9th Cir. 1996); see also *Int’l Society for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981) (“[A]n adherent’s belief would not be ‘sincere’ if he acts in a manner inconsistent with that belief ... or if there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine.”) (*internal citations omitted*).

¹⁰ *Sterling*, 75 M.J., at 461 (*citing Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013)).

Court has] warned that courts must not presume to determine ... the plausibility of a religious claim.”¹¹ “To be certain, in evaluating sincerity a court may not question ‘whether the petitioner ... correctly perceived the commands of [his or her] faith.’”¹² Nor does a court “differentiate among bona fide faiths.”¹³ Instead, the “‘narrow function ... in this context is to determine’ whether the line drawn reflects ‘an honest conviction.’”¹⁴

Generally, “[a] substantial burden exists when government action puts ‘substantial pressure on an adherent to modify his behavior and to violate his beliefs.’”¹⁵ In considering whether the procedures for obtaining a religious accommodation are themselves burdens on the free exercise rights, courts have looked to the precise nature of the procedures imposed. Mere inconveniences, inconsequential or *de minimis* government actions that burden religious exercise do not suffice to qualify as a “substantial burden.”¹⁶

In 2015, the U.S. Supreme Court held in *Holt v. Hobbs*¹⁷ that the Arkansas Department of Correction’s (Department) grooming policy¹⁸ violated the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) insofar as it prevented inmate, Gregory Holt, a devout Salafi Muslim, from growing a one-half inch beard in accordance with his religious beliefs. The Court reversed the lower court finding that Inmate Holt failed to prove that his religious exercise was grounded in a sincerely held religious belief¹⁹ and that the Department’s policy substantially burdened his right to exercise his religious beliefs.

In addition, the Court reversed the lower court finding that the Department used the least restrictive means to further a compelling governmental interest. Prison officials argued 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. Typically, the judiciary grants great deference to the assertions of prison officials when it comes to safety and security. However, in this case, the Court closely scrutinized the prison officials’ assertions that Holt’s request presented a safety or security issue. On the issue of using a beard to conceal contraband, the Court deferred to evidence which showed

¹¹ *Hobby Lobby*, 134 S. Ct., at 2778 (quoting *Smith*, 494 U.S., at 887) (see also *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Presbyterian Church in United States v. Mary Elizabeth Hull Memorial Presbyterian Church*, 393 U.S. 440, 450 (1969)).

¹² *Sterling*, 75 M.J. at 416 (citing *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981)).

¹³ See *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005).

¹⁴ *Id.* (citing *Thomas*, 450 U.S., at 716 (1981)).

¹⁵ *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229, 246 (D.C. Cir. 2014) (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008)); see also *Eternal Word TV Network, Inc. v. Sec’y of the United States HHS*, 818 F.3d 1122, 1144 (11th Cir. 2016) (quoting *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) (“A law is substantially burdensome when it places ‘significant pressure’ on an adherent to act contrary to her religious beliefs, meaning that it “directly coerces the religious adherent to conform ... her behavior. Thus, the government imposes a substantial burden when it places ‘pressure that tends to force adherents to forego religious precepts.’”))

¹⁶ See *Priests for Life*, 772 F.3d, at 246 (“A burden does not rise to the level of being substantial when it places ‘[a]n inconsequential or *de minimis* burden’ on an adherent’s religious exercise.” (quoting *Kaemmerling*, 553 F.3d, at 678)).

¹⁷ *Holt v. Hobbs*, 135 S. Ct. 853; 190 L. Ed. 2d 747 (2015)

¹⁸ The Department’s grooming policy allowed trimmed mustaches and, for inmates who had diagnosed dermatological problems, a one-quarter inch beard. The policy otherwise forbade facial hair.

¹⁹ The Department asserted that the grooming policy was not burdensome because Applicant, by his own testimony, stated that the Department provided alternative means to observe his faith (e.g., prayer rug, allowed to correspond with a religious advisor, etc.). As for the beard, the Department relied on Applicant’s concession in his testimony that not all Muslim men believe that men must grow beards. The Court found that Applicant’s conviction alone supported the sincerity of his beliefs and “that the protection of RLUIPA...is ‘not limited to beliefs which are shared by all members of a religious sect.’” *Holt* at 862 (quoting *Thomas v. Review Bd. Of Indiana Employment Security Div.*, 450 U.S. 707, 715-716 (1981)).

how difficult it is to hide contraband in a one-half inch beard and the lack of a policy regulating hair on an inmate's head which could more easily be used to hide contraband, to find that the Department had not met its burden of demonstrating why it could not employ these lesser means to further the compelling interest than the current policy. On the issue of properly identifying inmates, the Court found that the Department could photograph inmates with and without beards and periodically thereafter, as a lesser alternative to the beard prohibition.

In 2015, the District Court for the District of Columbia, in *Singh v. McHugh*,²⁰ ruled against the U.S. Army's denial of a religious accommodation requested by an observant Sikh, who was enrolled in a U.S. Army ROTC program, who asserted his religious conviction that he should not cut his hair or beard, and that he must wear a turban. The court granted relief under RFRA. In *Singh*, the Army argued that granting a grooming and/or headgear waiver, under these circumstances, would erode unit cohesion. The court observed, "[w]here a regulation already provides an exception from the law for a particular group, the government will have a higher burden in showing that the law, as applied, furthers the compelling interest." (Internal citations omitted). Because there was evidence that other Army members are permitted to maintain beards (shaving profiles), wear religious headgear (yarmulkes), and the Army had allowed several other Sikhs to serve with accommodations for their turbans, beards, and unshorn hair, the Army failed to meet its burden. The court found the Army did not prove that permitting Singh's unshorn beard would undermine the Army's compelling interests in unit cohesion, good order and discipline, and safety, any more than the medically-based beard waivers approved by the Army. The court also noted that the Army did not provide evidence to show that any of the soldiers and officers who have served with beards have been less disciplined, less credible, less socially integrated, or less well-trained than their clean-shaven colleagues.

The Army changed its religious accommodation policy after *Singh v. McHugh* through Army Directive 2017-03 (3 January 2017).²¹ On 25 May 2017, the Army incorporated the new guidance from AD 2017-03 into Army Regulation 670-1, *Wear and Appearance of Army Uniforms and Insignia*, paragraph 3-16, "Religious Accommodations":

b. *Beard*

- (1) Beards (which include facial and neck hair) must be maintained to a length not to exceed 2 inches when measured from the bottom of the chin. Beard hair longer than 2 inches must be rolled and/or tied to achieve the required length. Beards must be worn in a neat and conservative manner that presents a professional appearance. Soldiers may use styling products to groom or hold the beard in place, but may not use petroleum-based products if wearing a protective mask during training. The bulk of a Soldier's beard may not impair the ability to operate an assigned weapon, military equipment, or machinery.

²⁰ Civil Action No. 14-1906 (ABJ), 2015 U.S. Dist. Lexis 76526 (D.D.C. 2015).

²¹ Paragraph 3: "Since 2009, religious accommodation requests requiring a waiver for uniform wear and grooming have largely fallen into one of three faith practices: the wear of a hijab; the wear of a beard; and the wear of a turban or under-turban/patka, with uncut beard and uncut hair. Based on the successful examples of Soldiers currently serving with these accommodations, I have determined that brigade-level commanders may approve requests for these accommodations, and I direct that the wear and appearance standards established in paragraph 4 of the enclosure to this directive be incorporated into AR 670-1."

- (2) A mustache worn with a beard may extend sideways beyond the corners of the mouth to connect with the beard, but must be trimmed or groomed to not cover the upper lip.

Although the recent updates to AFI 36-2903 have not addressed religious accommodation for beards, the Air Force has adopted most of the Army's military standard for beard waivers based on religious accommodation in the form of decisions made by AF/A1 in individual cases.

Deference to Military Authorities

The United States Supreme Court has traditionally deferred to the professional decisions made by military authorities on issues of order and discipline in the military: “[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian,”²² 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.”²³ Indeed, when Congress enacted RFRA, it specifically acknowledged the importance of maintaining order and discipline within the military ranks, and it noted the expectation that courts would adhere to the tradition of judicial deference in matters involving both prisons and the armed forces. However, it also expressed its clear understanding that RFRA's heightened standard of review of religious accommodation determinations made by federal agencies would also apply to the military.²⁴

DISCUSSION

Applicant asserts in his request that his religious convictions require him to grow a beard. Current Air Force policy, as outlined in AFI 36-2903, does not allow him to grow a beard without obtaining approval from AF/A1. Applicant's request is in the proper format and includes supportive indorsements from the installation chaplain, the installation commander, and the MAJCOM/A1 in accordance with the requirements of AFI 36-2903, paragraph 9.12.5.1.

The Chaplains determined his request is based on a sincerely-held religious belief. As to whether requiring him to continue to shave in light of his request creates a substantial burden, we conclude the dress and appearance standard does create such a burden. In Applicant's case, he has a choice: (1) continue to shave his beard, in contradiction to his religious belief; or (2) submit this request and hope it is granted. If the request is denied, he must then choose between (1) continuing to shave, in contradiction to his religious beliefs; or (2) disobeying an order and rendering himself susceptible to administrative actions, discipline, and potential separation. This places a substantial burden on his sincerely-held beliefs. Although there is a disagreement between the squadron commander and the wing commander on whether to grant the request, we concur with the wing commander. The squadron commander does propose a compelling interest in his recommendation

²² *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953).

²³ *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

²⁴ H.R. Rep. No. 103-88: “Pursuant to [RFRA], the courts must review the claims of...military personnel under the compelling governmental interest test. Seemingly reasonable regulations based upon speculation, exaggerated fears or thoughtless policies cannot stand. Officials must show that the relevant regulations are the least restrictive means of protecting a compelling governmental interest. However, examination of such regulations in light of a higher standard does not mean the expertise and authority of military...officials will be necessarily undermined. The Committee recognizes that religious liberty claims in the context of...the military present far different problems for the operation of those institutions than they do in civilian settings... maintaining discipline in our armed forces [has] been recognized as [a] governmental interest[] of the highest order.” *See also* S. Rep. No. 103-111, at 10.

to deny the request. However, we concur with the wing commander that there are less restrictive means to further the Air Force's compelling interest, and the wing commander's proposed limitations align with other prior requests and AF/A1 approvals.

It is important to remember this analysis is extremely fact-based and should be performed on a case-by-case basis. Furthermore, RFRA does not require the Applicant to believe in Islam or Judaism, nor does it require the requested accommodation to be an enumerated tenant of the applicant's faith. It is likewise important to remember the Supreme Court in *Holt* rejected the prison's argument that if an exception were made for one inmate, the exception would have to be made for all inmates. The Court stressed it has never accepted this argument and rejected it once again in *Holt*.²⁵

Consistent with other such requests approved by AF/A1, we recommend that Applicant's request be granted subject to the following limitations: (1) while assigned or performing routine, non-hazardous duties, Applicant may wear a neat, conservative beard that presents a professional, well-groomed military appearance; (2) Applicant's beard may not exceed two inches in length when measured from the bottom of the chin; (3) Applicant may roll and tie the beard to meet the two-inch bulk requirement, (4) Applicant must comply with all safety and sanitary requirements; and (5) should Applicant be assigned or directed to perform hazardous duty or operate in a hazardous environment, continuation of the accommodation must be re-evaluated by Applicant's chain of command.

We recommend caveats that Applicant's beard may not exceed two inches in length when measured from the bottom of the chin and that he may roll and tie the beard to ensure it does not exceed the two inch requirement – to make approval of Applicant's request consistent with other prior approvals. We make this recommendation in light of Applicant's request to grow his beard without specifying a length. Much like the Army has already done, we strongly recommend having a consistent military standard for beard approval. Having a consistent military standard associated with beard waivers allows for individual members to freely exercise their religious convictions and allows the Air Force to maintain uniform grooming standard for beards. In analyzing requests for religious accommodations for beards the Air Force has been consistent in permitting a beard up to two inches in length when measured from the bottom of the chin.²⁶

Additionally, we recommend caveat (5) due to the heightened nature of the Air Force's compelling governmental interest in ensuring the readiness of all Airmen for contingency operations that may involve exposure to chemical, biological, radiological, or nuclear (CBRN) agents. The Air Force has a compelling interest in ensuring the health and safety of Applicant, which interest, under some circumstances, is furthered in the least restrictive manner by requiring compliance with grooming standards.²⁷ 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 equipment²⁸ such as protective gas masks.²⁹

²⁵ See *Holt*, 135 S. Ct., at 867, citing *O'Centro*, 546 U.S., at 436; *Sherbert*, 374 U.S., at 407.

²⁶ Previous approval memos have used the phrase "two inches in length," but as the intent was length from the chin, it is easier and less confusing to instead use "bulk."

²⁷ See generally, DoDI 1300.17, paragraph 4.h.

²⁸ DoDI 1300.17, Enclosure, paragraph 10.(a) – (d).

²⁹ Enclosure, paragraph 5.c.

We have noted this interest in previous cases through a memo provided by a commander of a bioenvironmental engineering flight, which clearly identifies the operational reasons why beard-waiver Applicants need to shave their beards in a deployed environment where CBRN is a threat. This memo states:

As a military member, Applicant may be required to wear an M-50 gas mask during a CRBN event. A fit test is required to ensure a wearer can achieve an acceptable fit and adequate protection. In accordance with AFI 48-137, *Respiratory Protection Program*, 12 September 2018, an adequate fit for a tight-fitting CRBN mask like the M-50 is defined by achieving a fit factor of 2,000 during the fit test. As provided in Title 29, Code of Federal Regulations, Section 1910.134, *Respiratory Protection*, paragraph (f) (3), employers “shall not permit respirators with tight-fitting facepieces to be worn by employees who have facial hair that comes between the sealing surface of the facepiece and the face or interferes with valve function.” Facial hair is prohibited because it interferes with mask fit. If Applicant has facial hair that interferes with the sealing surface of the M-50 face piece, it will likely compromise the protection provided by the tight-fitting mask. Even if an adequate fit could be obtained during a fit test, the varying nature of facial hair (e.g., length, texture, density) causes unreliable respirator fit, higher potential for leakage, and degrades confidence in the member’s ability to achieve an adequate fit in the field.

CONCLUSION

We recommend approving Applicant’s request subject to the above-mentioned limitations. We believe it is feasible to accommodate Applicant while otherwise preserving Air Force interests. We do not recommend approving Applicant’s request in full and without limitations, as blanket approval of Applicant’s request would not align well with Air Force Standards, and it is not what Applicant requested. In addition, without more data to support a compelling interest to deny Applicant his request under DoDI 1300.17 and case law, we believe denying the request is not legally supportable.

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