

TOPIC

Waiver from the grooming standards for facial hair for a religious accommodation request

TEXT OF THE DECISION

This opinion is in response to an inquiry regarding religious accommodation request for a waiver from the grooming standards for facial hair. Applicant would like to grow a beard in accordance with his Islamic faith. We reviewed the religious accommodation 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

In early April 2017, Applicant requested a religious accommodation through his Wing Chaplain to wear a beard while in uniform. On 24 April 2017, a wing-level Chaplain conducted an in-depth interview with Applicant, which the Chaplain later memorialized in a memo dated 2 May 2017. The Chaplain explains in the memo: "[I] believe his request to sport a beard is in line with his sincerely held beliefs and practices of his Islamic faith." Explaining Applicant's beliefs, the Chaplain states: "[h]e is devout in his faith through personal prayers, readings of Islamic scriptures, and congregational worship. He strongly desires to be faithful to the Islamic teachings for men to practice modesty, humility and righteousness." The Chaplain "[has] no doubt as to the depth and sincerity of [Applicant's] beliefs and motivations to serve God and Country."

Applicant's specific military duties include: sustaining day to day operations for three munitions operating sections by supplying weekly work orders to breakout, warehouse, restore, inventory, and secure a \$350M munitions stockpile used to ensure qualifications and combat readiness. Additionally, he will maintain the Master Storage Plan to provide oversight and organization of 62 explosive structures within the Munitions Storage Area.

In November 2017, Applicant's Commander received notice of Applicant's request for religious accommodation. In January 2018, the commander personally met with Applicant to discuss the religious accommodation. Two months later, on 28 March 2018, the commander signed a memo recommending approval of Applicant's religious accommodation request. The commander determined the impact of the granting the accommodation would be minimal. He noted some in the unit may consider it unfair but that, ultimately, there would be no adverse impact on the unit mission and a beard would not present a safety concern for Applicant in his current position. The commander caveated his approval recommendation as follows: "[t]his accommodation is being considered for in-garrison wear only. If [Applicant] is tasked for deployment, he will need to submit a new request for accommodation."

On 17 April 2018, Applicant reduced his request to writing and submitted it to the wing commander again. The memo provides additional detail about the nature of Applicant's beliefs.

Applicant believes that wear of the beard is an expression of one's personal devotion to Islam. Applicant states: "if this accommodation is granted, I will maintain it within the standards set forth for medical beard waivers – it will not be kept greater than ¼ inch in length while I am in uniform." He understands that "[i]f I am deployed, or if I am required to wear a gas mask for operational purposes, I will agree to shave the beard IAW dress and appearance standards."

The recommendation was endorsed for approval by Applicant's Group Commander, wing commander and the installation commander. The MAJCOM/CC recommended approval by a separate memo dated 26 April 2018. The package was then forwarded to AF/A1S in accordance with AFI 36-2903, paragraph 9.12.5.1.

GUIDANCE

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 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 requirement."² The DoDI recognizes that "DoD has a compelling government interest in mission accomplishment...on both the individual and unit levels."³

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 interest⁴, and (2) is the least restrictive means of furthering that compelling governmental interest.⁵

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."⁶ If the needs of the requesting member are outweighed by the needs of mission accomplishment, the request may be denied.

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

² Paragraph 4.e.

³ Paragraph 4.c.

⁴ See paragraph 4.h: "In resolving requests for accommodation of religious practices, careful consideration of the effect, if any, of approval or disapproval on any compelling government interest is essential. Because the military is a specialized community within the United States, governed by a discipline separate from that of the rest of society, the importance of uniformity and adhering to standards, of putting unit before self, is more significant and needs to be carefully evaluated when considering each request for accommodation...."

⁵ Paragraph 4.e.(1) of DoDI 1300.17 incorporates the *Religious Freedom Restoration Act (RFRA)*, 42 U.S.C. §2000bb. Congress intended RFRA to apply to the military. See Hr'g Tr. at 35; *see also* S. Rep. No. 103-111, at 12 (1993) ("Under the unitary standard set forth in [RFRA], courts will review the free exercise claims of military personnel under the compelling governmental interest test."); H.R. Rep. No. 103-88 (1993) ("Pursuant to the Religious Freedom Restoration Act, the courts must review the claims of prisoners and military personnel under the compelling governmental interest test."). *See also* Executive Order 13798 (4 May 2017).

⁶ Paragraph 4.e.(2).

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; otherwise impair discipline, morale, unit cohesion, or accomplishment of the unit mission.⁷

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.⁸

If the request is for a waiver of service grooming policy, the waiver "will be forwarded to the Secretary...concerned" for approval or disapproval. The Secretary of the Air Force (SecAF) may delegate waiver authority to [in the case of the Air Force] the Deputy Chief of Staff for Manpower, Personnel, and Services (AF/A1).

"Service members whose requests for accommodation of religious practices are approved will be informed of the specific elements of that approval. Specific elements will include that such approval does not apply for their entire military service commitment and that, **at the discretion of the Secretary concerned**, new requests for the same accommodation are necessary upon new assignment, transfer of duty stations, or other significant change in circumstances, including deployment (emphasis added)."⁹

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."¹⁰

An Airmen 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."

⁷ Enclosure, paragraph 10.(a) – (d).

⁸ Paragraph 4.i.

⁹ Paragraph 4.j.

¹⁰ AFI 36-2903, paragraph 3.1.2.3 goes on to detail the requirements for a beard authorized by medical waiver: "If commander authorizes, members will keep all facial hair trimmed not to exceed 1/4" 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 1/4"); not excessive or extreme), as defined by the local commander."

Case Law

In 2015, the U.S. Supreme Court held in *Holt v. Hobbs*¹¹ that the Arkansas Department of Correction's (Department) grooming policy¹² 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 ½-inch 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 belief¹³ 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 how difficult it is to hide contraband in a ½" 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 couldn't 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*,¹⁴ 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 the Religious Freedom Restoration Act (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

¹¹ 135 S.Ct. 853; 190 L. Ed. 2d 747 (2015)

¹² The Department's grooming policy allowed trimmed mustaches and, for inmates who had diagnosed dermatological problems, a 1/4" beard. The policy otherwise forbade facial hair.

¹³ 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)).

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

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 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).¹⁵ 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 and assigned weapon, military equipment, or machinery.

(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.

The Air Force has adopted most of the Army's military standard for beard waivers due to religious accommodation in the form of decisions made by AF/A1 in individual cases.

Deference to Military Authorities

The 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,"¹⁶ 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."¹⁷ 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

¹⁵ 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."

¹⁶ *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953).

¹⁷ *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

clear understanding that RFRA's heightened standard of review of religious accommodation determinations made by federal agencies would also apply to the military.¹⁸

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 stet to grow a beard for religious reasons until he obtains approval from AF/A1. Applicant's request is in the proper format and includes supportive indorsements from his squadron commander, the chaplain, the group commander, the installation commander and the MAJCOM/A1 in accordance with the requirements of AFI 36-2903, paragraph 9.12.5.1.

We recommend 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; (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) 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; and, (6) the accommodation extend to subsequent permanent duty assignment locations and TDY locations.

We recommend caveat (2) and (3) – which states Applicant's beard may not exceed two inches in length and that he may roll and tie the beard to ensure it does not exceed two inches in length – to make approval of Applicant's request consistent with other prior approvals by AF/AI. We make this recommendation in light of Applicant's request to grow his beard no longer than 1/4 inch. Much like the Army has already done, we also strongly recommend having a consistent military standard. 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 a uniform grooming standard for beards. We recommend that much like the Army has done this uniform standard for beards be incorporated into future versions of AFI 36-2903.

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 CBRN. 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.¹⁹ With respect to grooming practices, the Air Force is specifically charged with the obligation to carefully consider whether an

¹⁸ 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.

¹⁹ See generally, DoDI 1300.17, paragraph 4.h.

accommodation would interfere with the wear or proper function of special or protective clothing or equipment²⁰ such as gas protective masks.²¹ We have noted this interest in previous cases through a memo provided by the commander of the Bioenvironmental Engineering Flight (633 AMDS/ SGPB), which clearly identifies the operational reasons why beard-waiver Applicants need to shave their beards in a deployed environment where CBRN is a threat.

Furthermore, we recommend caveat (6) as the current version of AFI 36-2903 would require Applicant to seek a new accommodation approval for TDYs and subsequent assignments. This restriction was originally drafted into AFI 36-2903 because at the time it was drafted, the Secretary of the Air Force required “new requests for the same accommodation upon new assignment, transfer of duty stations, or other significant change in circumstances, including deployments.”²² The current Secretary of the Air Force has since approved allowing religious accommodations to carryover to subsequent assignments and TDYs, unless the member’s gaining commander has a mission-related reason the accommodation should be suspended and petitions AF/A1 to make the change. Although AFI 36-2903 has not been changed to reflect this new policy, several prior AF/A1 approval memos waive this requirement, and there is an effort underway to eliminate/modify this restriction in AFI 36-2903.

Options:

Option 1: Approve Applicant’s waiver request in full and without limitation.

Option 2: Approve Applicant’s waiver request subject to the above-mentioned limitations.

Option 3: Deny Applicant’s waiver request. [**Note:** Prior to exercise of this option, substantial additional fact-finding would be required to determine if sufficient evidence exists of compelling interests to support denial of the applicant’s request under RFRA. The current state of this file is not legally sufficient to support this COA.]

CONCLUSION

We recommend *Option 2*. *Option 2* is legally supportable and consistent with our prior recommendations for beard waiver requests based on religious beliefs. We believe it is feasible to accommodate Applicant while otherwise preserving Air Force interests. We do not recommend *Option 1* as blanket approval of Applicant’s request would not align well with Air Force standards. In addition, without more data to support a compelling interest to deny applicant his request under DoDI 1300.17 and case law, we believe *Option 3* is not legally supportable.

OpJAGAF 2018/29 9 August 2018

²⁰ DoDI 1300.17, Enclosure, paragraph 10.(a) – (d).

²¹ Enclosure, paragraph 5.c.

²² DoDI 1300.17, paragraph 4.j.