

Understanding the U.S. Army's Religious Accommodation Policy and Procedures

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“While the members of the military are not excluded from the protection granted by the First Amendment...the fundamental necessity for obedience, the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside of it.”¹

I. Introduction

“You cannot miss training at the range to go to some church service, right?” It is 1600 on a Friday and you are the trial counsel for a brigade combat team. You look across your desk at a frustrated company commander and ask him to start from the beginning. Captain (CPT) Jones tells you that one of his Soldiers, Private (PVT) David Adelman, came to his office and requested two religious accommodations.² First, PVT Adelman, an Orthodox Jew, requested an exception to the Army grooming standards that prohibit him from growing out his hair and beard.³ Second, PVT Adelman requested an excusal from all training exercises on Saturdays so that he can observe the Sabbath.⁴ Captain Jones informs you that his company is going to the range next Saturday and he wants every Soldier to be there, including PVT Adelman. Captain Jones has never dealt with a religious accommodation before and is seeking your legal advice. You promptly tell CPT Jones you will research the Army's religious

accommodation policy and have an answer for him as soon as possible.

Department of Defense Instruction (DoDI) 1300.17 provides the regulatory framework for religious accommodation in the military.⁵ The Army implements DoDI 1300.17 through Army Regulation (AR) 600-20, chapter 5-6.⁶ While the provisions of chapter 5-6 appear to be straightforward, in practice, commanders have had challenges complying with the regulation's procedural requirements, which vary depending upon the nature of a Soldier's religious accommodation request.⁷

In a 2015 Department of Defense Inspector General (DoDIG) report, the DoDIG highlighted two of the Army's challenges in implementing its religious accommodation policy.⁸ First, the DoDIG found that in 2014 the Army completed only one in four religious accommodation requests within the thirty-day statutory time frame.⁹ On average, it

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¹ Parker v. Levy, 417 U.S. 733, 758 (1974).

² U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (18 Mar. 2008) (RAR 22 Oct. 2014) [hereinafter AR 600-20].

³ AR 600-20, *supra* note 2, para. 5-6.h.(5) (authorizing Soldiers to request an exception to the grooming standards of U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA (10 Apr. 2015) [hereinafter AR 670-1], for religious purposes).

⁴ *Sabbath*, BBC, <http://www.bbc.co.uk/religion/religions/judaism/holydays/sabbath.shtml> (last visited Sept. 20, 2016). Sabbath is the Jewish holy day. *Id.* It “starts a few minutes before sunset on Friday and runs until an hour after sunset on Saturday.” *Id.*; see also AR 600-20, *supra* note 2, para. 5-6.h.(1) (authorizing Soldiers to be excused from duty in order to attend worship services).

⁵ U.S. DEP'T OF DEF., INSTR. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES para. 4.a. (10 Feb. 2009) (C1, 22 Jan. 2014) [hereinafter DoDI 1300.17].

⁶ AR 600-20, *supra* note 2, para. 5-6.

⁷ U.S. DEP'T OF ARMY PAM. 10-1, ORGANIZATION OF THE UNITED STATES ARMY appx. I (14 June 1994) [hereinafter DA PAM 10-1]. (“A company is the smallest element of the Army to be given a designation and an affiliation with higher headquarters at battalion and brigade level. . . . This designation of an alpha/numeric and a branch cause an ‘element’ to become a ‘unit’.”) A company is generally commanded by a Captain and consist of 62-190 Soldiers. *Id.* A battalion is generally commanded by a Lieutenant Colonel and consists of 300-1000 Soldiers. *Id.* A brigade is generally commanded by a Colonel and consists of 3,000-5000 Soldiers. *Id.* A Division is commanded by a Major General and consists of 10,000-15,000 Soldiers. *Id.*

⁸ Inspector Gen., U.S. Dep't of Def., No. DoDIG-2015-148, Rights of Conscience Protections for Armed Forces Services 1 (22 July 2015) [hereinafter DoDIG-2015-148]. The National Defense Authorization Act for Fiscal Year 2014 required the Department of Defense Inspector General (DoDIG) to submit a report to the congressional defense committees that outlined the results of an investigation into the military department's compliance with religious accommodation policies and regulations. *Id.* at i. The DoDIG interviewed personnel in the Office of Diversity Management and Equal Opportunity, Defense Privacy and Civil Liberties Division, Armed Forces Chaplains Board, and Chaplain Schools of the military departments. *Id.* at 7. The DoDIG also conducted panel discussions on religious accommodations with commanders, chaplains, and noncommissioned officers assigned to units inside and outside of the continental United States. *Id.* Finally, the DoDIG received input from twenty-seven religious interest and advocacy groups. *Id.*

⁹ *Id.* at 13; AR 600-20, *supra* note 2, para. 5-6.i.(11) (“Appeals to denials of accommodation will reach the DCS, G-1 within 30 days after the Soldier submits the appeal (60 days OCONUS).”). DoDI 1300.17, *supra* note 5, para. 5.b.(2) (“Final review will take place within 30 days for cases arising

took the Army sixty-nine days to process a religious accommodation request.¹⁰

Second, the DoDIG found that noncommissioned officers, without authority, issued decisions on religious accommodation requests, to include Soldiers' requests for adjustments to duty hours to attend religious services.¹¹ In accordance with Army Regulation 600-20, Chapter 5-6, unit commanders—not noncommissioned officers—have authority to approve or disapprove such requests for religious accommodations.¹² These issues suggest that commanders and their servicing judge advocates may not fully understand the Army's religious accommodation policy.

This article will provide an overview of the Army's religious accommodation policy, regulations, and procedures. Section II will discuss the case law and statutory developments that led to the Department of Defense's and the Army's current religious accommodation policies. Section III will examine the Army's religious accommodation policy and regulations as set forth in AR 600-20, Chapter 5, including the principal categories of religious accommodation requests, the approval authorities for such requests, and appeal procedures.¹³ Finally, section IV will provide some practical tips for how commanders and judge advocates can ensure that they are implementing the Army's religious accommodation policy in a consistent, timely, and equitable manner. These practical tips will assist commanders and judge advocates in striking the appropriate balance between the Army's competing policy goals of promoting the free exercise of religion and maintaining military readiness, good order, and discipline.¹⁴

II. Recent Case Law and Statutory Developments in Religious Accommodation

The Army's policy on religious accommodation today is derived from changes in federal legislation and Supreme Court precedent. The Supreme Court's decisions and

Congressional legislation are all driven by the Constitution.¹⁵ Understanding the history of religious accommodation is essential to understand the Army's current policies and practices on religious accommodation.

A. The Constitutional Foundation of Religious Accommodation

The U.S. Constitution establishes the basis for religious accommodations. The First Amendment provides that Congress shall make no law "prohibiting the free exercise" of religion.¹⁶ However, the Department of Defense is a unique federal agency where the free exercise of religion cannot be always guaranteed.¹⁷ As one study of religious accommodation in the military found, in practice a conflict often arises "between the commander's responsibility to accomplish the mission and the Soldier's need for accommodation of religious practices."¹⁸ The military's religious accommodation policy has evolved as Congress and the federal courts have likewise grappled over the competing values of state interests and individual freedom of religious expression.

B. The Compelling Interest Test of *Sherbert v. Verner*

In 1963, the Supreme Court decided *Sherbert v. Verner*, one of the first modern cases involving a citizen's challenge of a state law on the grounds that it violated the Free Exercise Clause of the First Amendment.¹⁹ In *Verner*, the Court held that state unemployment benefits could not be denied to a Seventh-day Adventist who refused to work on Saturday because of her religious beliefs.²⁰ The Court established a two-part balancing test, the "*Sherbert* test," to determine if a state's interference with an individual's religious expression violates the First Amendment.²¹ Under the *Sherbert* test, "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."²² Applying the *Sherbert* test, the Court ruled that

within the United States and within 60 days for all other cases, with strict limitations on exceptions for exigent circumstances.").

¹⁰ DoDIG-2015-148, *supra* note 8, at 13.

¹¹ *Id.* at 21.

¹² AR 600-20, *supra* note 2, para. 5-6.g.

¹³ *Id.* para. 5-6.

¹⁴ *Id.* para. 5-6.a ("The Army will approve requests for accommodation of religious practices unless accommodation will have an adverse impact on unit readiness, individual readiness, unit cohesion, morale, good order, discipline, safety, and/or health.").

¹⁵ U.S. CONST. amend. I.

¹⁶ *Id.*

¹⁷ *Parker v. Levy*, 417 U.S. 733, 758 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections."); *see*

also *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) ("Review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.").

¹⁸ Colonel Richard Goellen, Colonel Gaylord Gunhus, Colonel Gaylord Hatler, & Colonel Jerry Reynolds, *A Study of the Accommodation of Religious Practices in the United States Army*, U.S. ARMY WAR C. (Mar. 31, 1989), <http://dtic.mil/dtic/tr/fulltext/u2/a208000.pdf>. (providing the opinion of the authors based on their research conducted on religious accommodation practices in the Army).

¹⁹ *Sherbert v. Verner*, 374 U.S. 398 (1963).

²⁰ *Sherbert*, 374 U.S. at 399-402.

²¹ *Id.* at 403 (referring to the two-part balancing test as the *Sherbert* test); *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1492-93 (7th ed. 2004) [hereinafter ROTUNDA].

²² *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 883 (1990) (citing *Sherbert* 374 U.S. at 402-03).

the state lacked a compelling interest to deny the unemployment benefits to the Seventh-day Adventist.²³

The Court applied the *Sherbert* test nine years later in *Wisconsin v. Yoder*.²⁴ In *Yoder*, a group of Amish parents did not want to send their children to school once they reached a certain age because of the parent's religious beliefs.²⁵ The Court, applying the *Sherbert* test, found the state's interest in compulsory education did not outweigh the religious rights and parental rights of the Amish parents.²⁶ The Court held that a state could not require members of the Amish church to send their children to public school after the eighth grade.²⁷ Despite this established precedent, in *Employment Division v. Smith*, the Supreme Court created another test for deciding free exercise cases that would serve as the catalyst for significant changes in free exercise jurisprudence and legislation.²⁸

In *Smith*, the Court applied a different test for determining if a state's burden on an individual's religious expression violated the First Amendment.²⁹ In *Smith*, the Oregon Employment Division terminated two Native Americans from their jobs and denied them unemployment compensation because they used peyote as part of their religion.³⁰ The Court found in favor of the state holding, a valid and neutral law of general applicability did not violate the First Amendment's free exercise clause in this case.³¹ In its decision, the Court stated, "[W]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."³² In effect, the Court moved from applying the compelling interest test in a religious freedom case, to applying a rational-basis test.³³ Under the rational-basis test, "[L]egislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally

related to a legitimate state interest."³⁴ However, the lower standard of scrutiny used by the Court in *Smith* concerned some members of Congress that the Court was eroding religious freedom.³⁵

C. The Religious Freedom Restoration Act of 1993 (RFRA)

Following *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA)³⁶ "[I]n order to provide very broad protection for religious liberty."³⁷ The Religious Freedom Restoration Act "restore[d] the compelling interest test set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*" and "guarantee[d] its application in all cases where free exercise of religion is substantially burdened."³⁸ Accordingly, the RFRA permits the government to substantially burden a person's exercise of religion only if it demonstrates that the burden furthers a compelling government interest and is the least restrictive means of furthering the government's interest.³⁹

"The RFRA was amended in 2000 upon passage of the Religious Land Use and Institutionalized Persons Act (RLUIPA)⁴⁰ to change the understanding of the term exercise of religion."⁴¹ Before RLUIPA, the RFRA defined the exercise of religion as "the exercise of religion under the First Amendment."⁴² The RLUIPA defined exercise of religion as, "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."⁴³ Congress amended the RFRA to use the RLUIPA's broader definition of exercise of religion.⁴⁴ "Congress mandated that this concept be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."⁴⁵ Congress also intended that the broad protections in the RFRA apply to the military.⁴⁶

²³ *Sherbert*, 374 U.S. at 403-08.

²⁴ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

²⁵ *Id.*

²⁶ *Id.* at 215-31.

²⁷ *Id.* at 234.

²⁸ *Employment Div., Dep't of Human Res. Of Oregon v. Smith*, 494 U.S. 872 (1990).

²⁹ *Id.*

³⁰ *Id.* at 872-73.

³¹ *Id.* at 878-79.

³² *Id.*

³³ *Id.* at 882-85.

³⁴ *City of Cleburne Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *see also* *Vance v. Bradley*, 440 U.S. 93 (1979); *Schweiker v. Wilson*, 450 U.S. 221 (1981).

³⁵ H.R. REP. NO. 103-88, at 5 (1993). The House of Representatives Committee on the Judiciary found "the *Smith* decision created a climate in which free exercise of religion is continually in jeopardy." *Id.*

³⁶ Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 [hereinafter RFRA].

³⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014).

³⁸ RFRA § 2, 107 Stat. at 1488.

³⁹ *Id.* § 3, 107 Stat. at 1488-89.

⁴⁰ Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000 (2000).

⁴¹ Jason Gubi, *The Religious Freedom Restoration Act and Protection of Native American Religious Practices*, MOD. AM., Fall 2008, at 78.

⁴² *Hobby Lobby*, 134 S. Ct. at 2761-62.

⁴³ RLUIPA § 2000cc-5(7)(A).

⁴⁴ *See Hobby Lobby*, 134 S. Ct. at 2754.

⁴⁵ *Id.* at 2761-62.

⁴⁶ H.R. REP. NO. 103-88, at 8 (1993). Pursuant to the Religious Freedom Restoration Act (RFRA), "the courts must review the claims of prisoners and military personnel under the compelling governmental interest test."

III. The Department of Defense's and the Army's Religious Accommodation Policy

The Army's policies on religious accommodations incorporate the directives promulgated in DoDI 1300.17.⁴⁷ The Army policy outlines the different types of religious accommodations, who the approval authority is for each type of accommodation, and how a Soldier can appeal a denial of a religious accommodation.⁴⁸ Department of Defense Instruction 1300.17 is promulgated by the Department of Defense (DoD) and gives general instructions on religious accommodations to all of the services.⁴⁹ Department of Defense Instruction 1300.17 is periodically updated as legislation is changed.⁵⁰

A. Department of Defense Instruction 1300.17: Accommodation of Religious Practices in the Military

In 2014, the DoD amended DoDI 1300.17 to, among other things, incorporate the RFRA's standard for determining when the military can burden a servicemember's religious expression.⁵¹ Specifically, DoDI 1300.17 states that the military cannot deny a servicemember's request for a religious accommodation from a policy, practice, or duty that substantially burdens a servicemember's exercise of religion unless, the restriction "[f]urther[s] a compelling governmental interest" and "[i]s the least restrictive means of furthering that governmental interest."⁵²

In applying this legal standard, DoDI 1300.17 withholds to Service Secretaries or their designees the authority to approve or deny requests for religious accommodation from grooming and uniform standards.⁵³ For all other requests for

religious accommodations, DoDI 1300.17 grants approval authority to the immediate commander.⁵⁴

When deciding whether to approve or deny a religious accommodation, the immediate commander must determine if the military duty substantially burdens⁵⁵ the servicemember's exercise of religion.⁵⁶ If the duty does not substantially burden the servicemember's exercise of religion, the commander must balance the needs of Soldier against the needs of mission accomplishment.⁵⁷ However, if the commander determines the duty is a substantial burden to the servicemember's exercise of religion, the commander can deny the accommodation only if the duty furthers a compelling government interest,⁵⁸ and the duty is the least restrictive means of furthering that compelling government interest.⁵⁹ A commander has ten working days to respond informally (verbally) or formally (in writing) to a request for a religious accommodation.⁶⁰

Department of Defense Instruction 1300.17 also provides five factors military commanders should consider in determining whether to grant or deny an accommodation. Commanders should consider: (1) the importance of mission accomplishment, (2) the religious importance of the accommodation to the Soldier requesting the accommodation, (3) the impact of repeated accommodations of a similar nature, (4) any alternate means to meet the needs of the Soldier requesting the accommodation, and (5) treatment of similar requests made for non-religious reasons.⁶¹ These five factors are not exclusive and commanders are encouraged to consider any other factors deemed appropriate to assist in their decision making process.⁶² Finally, DoDI 1300.17 directs all of the services to promulgate regulations to implement DoD policy.⁶³

Id.; S. REP. NO. 103-111, at 12 (1993). Under the "unitary standard set forth in the act, courts will review the free exercise claims of military personnel under the compelling governmental interest test." *Id.*; see also *Rigdon v. Perry*, 962 F.Supp. 150, 161 (D.D.C. 1997) (stating Soldiers are entitled to protection under the RFRA.); *Singh v. McHugh*, 109 F.Supp.3d 72 (D.D.C. 2015) (applying RFRA to the U.S. Army regarding a Reserve Officer Training Candidate's request for a religious accommodation for commissioning into active duty).

⁴⁷ AR 600-20, *supra* note 2, para. 5-6.

⁴⁸ *Id.*

⁴⁹ DoDI 1300.17, *supra* note 5, para. 1.

⁵⁰ *Id.* para. 4.

⁵¹ *Id.*

⁵² *Id.* para. 4.e.(1), (2) ("Requests for religious accommodation from a military policy, practice, or duty that does *not* substantially burden a Service member's exercise of religion should not be evaluated under the standard established in paragraph 4.e.(1) Under these circumstances, the needs of the requesting Service member are balanced against the needs of mission accomplishment.)

⁵³ *Id.* paras. 3.b., 4.f.(2) ("Religious apparel: articles of clothing worn as part of the doctrinal or traditional observance of the religious faith."); *Id.* para. 3.c. ("Grooming and appearance: grooming and appearance practices,

including hair, required or observed by religious groups."); *Id.* para. 3.d. ("Religious body art: temporary or permanent tattoos, piercings through the skin or body part, or other modifications to the body that are of a religious nature.")

⁵⁴ *Id.* para. 4.f.(1).

⁵⁵ *Id.* para. 3.e. (defining substantially burden as significantly interfering with the exercise of religion as opposed to minimally interfering with the exercise of religion).

⁵⁶ *Id.* para. 4.e.(1).

⁵⁷ *Id.* para. 4.e.(2).

⁵⁸ *Id.* para. 3.g. (defining compelling government interest as a military requirement that is essential to accomplishment of the military mission).

⁵⁹ *Id.* para. 4.e.(1).

⁶⁰ AR 600-20, *supra* note 2, para. 5-6.i.(2).

⁶¹ DoDI 1300.17, *supra* note 5, encl. 1.

⁶² *Id.*

⁶³ *Id.* para. 5.b.

B. Army Regulation 600-20, Chapter 5: Accommodating Religious Practices in the Army

Incorporating DoDI 1300.17, Army Regulation (AR) 600-20, Chapter 5-6, sets forth the Army's religious accommodation policy and procedures for active duty and reserve component Army personnel.⁶⁴ The Army places a high value on servicemembers' rights to exercise their religious beliefs.⁶⁵ Accordingly, it is Army policy to "approve requests for accommodation of religious practices unless accommodation will have an adverse impact on unit readiness, individual readiness, unit cohesion, morale, good order, discipline, safety and/or health."⁶⁶

The Army classifies requests for religious accommodation into five major areas: worship practices, dietary practices, medical practices, wear and appearance of uniform, and grooming practices.⁶⁷ A worship practice is typically a request to "attend worship services, to participate in faith-based events or relief from attendance at events conflicting with sincerely held beliefs."⁶⁸ A dietary practice is usually a request for separate rations or faith-based foods such as kosher or halal.⁶⁹

In accordance with DoDI 1300.17, the Secretary of the Army delegated approval and denial authority to the Army G1 for religious accommodations that require a waiver to grooming and uniform standards.⁷⁰ Immediate commanders have approval and denial authority over worship practices, dietary practices, medical practices, and uniform/grooming practices that do not require a waiver of Army policy.⁷¹ Examples of practices that require a waiver to the uniform and grooming standard include wearing a turban or growing a beard.⁷² In contrast, wearing a yarmulke would not require a waiver.⁷³ It is incumbent on the immediate commander to know what to do with a religious accommodation request once he receives it.

⁶⁴ AR 600-20, *supra* note 2, at I (Army personnel for purposes of this regulation include Soldiers in the Active Army, Army National Guard, and U.S. Army Reserve).

⁶⁵ *Id.* para. 5-6.a.

⁶⁶ *Id.*

⁶⁷ *Id.* paras. 5-6.h.(1)(2)(3)(4) & (5).

⁶⁸ DoDIG-2015-148, *supra* note 8, at 4.

⁶⁹ *Id.*

⁷⁰ DoDI 1300.17, *supra* note 5, para. i.

⁷¹ AR 600-20, *supra* note 2, para. 5-6.g; *see also* AR 670-1, *supra* note 3, para. 3.

⁷² AR 670-1, *supra* note 3, para. 3-2.

C. Religious Accommodation Requests Approved by the Immediate Commander

Once the commander has received the religious accommodation request and determines he is the approval authority for the accommodation, he needs to determine if the military duty substantially burdens the Soldier's exercise of religion. If the military duty does cause a substantial burden on the Soldier exercising his religion, the commander can determine his next course of action depending on what area the accommodation falls under.

1. *Worship Practices*

Army regulation requires that worship accommodations be granted except when precluded by military necessity.⁷⁴ The Army regulation provides commanders with various options they can take to accommodate worship practices.⁷⁵ Commanders can grant the Soldier ordinary leave so the Soldier can attend worship service.⁷⁶ The commander can excuse the Soldier from duty provided the Soldier serves duty at an alternate time.⁷⁷ Another option the Commander has is to authorize the Soldier to attend the worship service without taking leave.⁷⁸

2. *Dietary Practices*

If the accommodation request is for a dietary practice and the commander wants to approve the request, the commander has two options. The commander can ration separately for the Soldier.⁷⁹ Alternatively, the commander can allow the Soldier to bring his own rations to eat.⁸⁰

3. *Medical Practices*

If the accommodation request is for a medical practice the commander needs to determine if the practice falls into one of three sub-categories: (1) emergency, (2) non-emergency, and (3) immunization.⁸¹ In a medical emergency situation, "the military treatment facility (MTF) may order, or

⁷³ DoDI 1300.17, *supra* note 5, encl. 1.

⁷⁴ AR 600-20, *supra* note 2, para. 5-6.h.(1).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* para. 5-6.h.(2).

⁸⁰ *Id.*

⁸¹ *Id.* para. 5-5.h.(3). In some situations, like an emergency, the commander will not be available to make the decision. In these cases, the appropriate authority present at the scene should make the decision on whether to deny or approve the accommodation.

the physician may take, immediate steps to save the Soldier's life, regardless of their religious practices or objections."⁸²

In a non-emergency situation, a Soldier whose religious beliefs involve self-care can request accommodation for non-emergency illness or injury.⁸³ An example to self-care would be a Soldier that is diagnosed with cancer and believes praying to God will cure him, as opposed to receiving chemotherapy. In this case, medical treatment can be deferred until a decision is made on whether or not an accommodation will be granted.⁸⁴ If the Soldier refuses to submit to medical treatment that is recommended to him because of a religious objection, the Soldier's religious accommodation request will be referred to an ad hoc committee established by the medical commander.⁸⁵ All of the ad hoc committee members must be officers or full time employees of the Federal Government, the committee must include a chaplain, and the committee must be chaired by a medical corps officer.⁸⁶ Beside these mandates, the composition and procedures used by the committee are at the discretion of the medical commander.⁸⁷ After the ad hoc committee makes a decision and determines medical care is necessary,⁸⁸ the Soldier must be provided notice of the decision and given a chance to accept the prescribed care.⁸⁹ If the Soldier refuses to accept medical care, the medical commander will forward the committee recommendations to the Surgeon General.⁹⁰ The Surgeon General will either approve or disapprove the committee's recommendations.⁹¹ The Surgeon General sends his decision back to the medical commander and sends a copy to the Army G1.⁹² If the Surgeon General approves the committee recommendation, the Soldier is given another opportunity to comply with the recommendation.⁹³ If the Soldier still refuses treatment, the matter is referred to the Soldier's special court-martial convening authority who takes whatever action he deems appropriate.⁹⁴

The final medical accommodation subcategory is immunization. Soldiers can request a religious accommodation from immunization requirements⁹⁵ by forwarding a request through the chain of command to the Surgeon General.⁹⁶ Each commander in the Soldier's chain of command recommends whether the accommodation should be granted or denied.⁹⁷ Prior to forwarding the request to the Surgeon General, the Soldier must be counseled by a chaplain, a physician, and his commander about the implications of not complying with immunization requirements.⁹⁸

D. Appealing an Immediate Commander's Denial of a Religious Accommodation

If the immediate commander denies any religious accommodation he must inform the Soldier of the denial and give the Soldier an opportunity to appeal the decision.⁹⁹ The Soldier appeals the decision through a memorandum that is routed through each level of command, including commanders of Army Commands, Army service component commands, and direct reporting units, to the Army G1.¹⁰⁰ In addition to the memorandum from the Soldier, a memorandum from the chaplain and a legal review from a judge advocate must be forwarded to the G1.¹⁰¹ The judge advocate should review the accommodation request for legal sufficiency and make a recommendation on whether it should be approved or denied.¹⁰² The legal review will also state if the accommodation request packet is complete in accordance with AR 600-20, Chapter 5-6.¹⁰³ Army regulation mandates that the appeal be forwarded to the Army G1 within thirty days.¹⁰⁴ The Soldier should receive a reply from the Army G1 thirty days after G1 receives the appeal.¹⁰⁵

⁸² *Id.* para. 5-6.h.(9).

⁸³ *Id.* para. 5-6.h.(3)(b).

⁸⁴ *Id.*

⁸⁵ *Id.* para. 5-6.h.(3)(c).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* paras. 5-6.h.(3)(d)(1-4). The committee report includes: proposed treatment required, show a need for medical care, reasonableness of Soldier to refuse treatment, evidence the Soldier was given opportunity to appear before committee, submit written statement, and submit statements from members of his faith group. *Id.* If a Soldier cannot appear in person or refuses to, that will be noted in the report. *Id.*

⁸⁹ *Id.* para. 5-6.h.(3)(d)(6).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* para. 5-6.h.(3)(d)(7).

⁹³ *Id.* para. 5-6.h.(3)(d)(8).

⁹⁴ *Id.*

⁹⁵ U.S. DEP'T OF ARMY, REG. 40-562, IMMUNIZATIONS AND CHEMOPROPHYLAXIS FOR THE PREVENTION OF INFECTIOUS DISEASES (7 Oct. 2013) [hereinafter AR 40-562].

⁹⁶ AR 600-20, *supra* note 2, para. 5-6.h.(3)(e).

⁹⁷ *Id.* para. 5-6.h.(3)(e)(4).

⁹⁸ *Id.* paras. 5-6h(3)(e)(2-4).

⁹⁹ *Id.* para. 5-6.i.(5).

¹⁰⁰ *Id.* The memorandum must include the name, rank, social, unit, and military occupational specialty of Soldier; the accommodation requested; the religious basis for the request; and commander endorsements. *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* para. 5-6.i.(7).

¹⁰³ *Id.*

¹⁰⁴ *Id.* para. 5-6.i.(11).

¹⁰⁵ *Id.*

E. Religious Accommodations that Require Service Secretary Approval

If the commander receives an accommodation request that requires a waiver to the uniform or grooming standard, he must forward the request to the Army G1.¹⁰⁶ Each commander in the Soldier's chain of command makes a recommendation as to whether the accommodation request should be approved or denied.¹⁰⁷ The chain of command recommendations, along with the Soldier's request, are forwarded to the Army G1.¹⁰⁸ Commanders should inform the Soldier that while the request is pending a decision by the Army G1, the Soldier must continue to comply with the uniform and grooming standards set forth in AR 670-1.¹⁰⁹

If the Army G1 denies a Soldier's request for an accommodation, the Soldier can submit a second formal application to their commander.¹¹⁰ The commander and Soldier should ensure the request: (1) is "not based on substantially the same grounds," (2) is "not substantially supported by the same evidence as the previously disapproved application," and (3) the application is sent to the Soldiers Special Court-Martial Convening Authority, who is required to obtain a legal review to determine if the application is substantially the same application that was previously denied.¹¹¹ If it is determined the application is the same, it will be returned to the Soldier without action.¹¹² If the application is substantially different it will be forwarded to G1.¹¹³

The Soldier can either comply with the uniform or grooming standard or he can request administrative separation from the Army under AR 635-200¹¹⁴ or AR 600-8-24¹¹⁵ if the second appeal is denied.¹¹⁶ If the Soldier elects administrative separation, he can be subject to recoupment of Federal funds.¹¹⁷

IV. Practice Tips for Commanders and Judge Advocates

A. Reduce Approvals for Accommodation Requests to Writing

Army Regulation 600-20, Chapter 5-6, does not require commanders to approve religious accommodation requests in

writing. However, commanders should always try to memorialize any religious accommodation decision in writing. Having the decision reduced to writing provides tangible proof that the commander made a decision and how the commander reached that decision.

Writing down all of the approvals is helpful if the Soldier changes units and the Soldier has to show there was previously an accommodation in place. Having the religious accommodation request, along with the commander's decision, in writing is also helpful if a higher echelon of command needs the number or type of religious accommodation requests a unit has. When a commander changes command, having the religious accommodation requests, along with the previous commander's decision, in writing makes it easier for the follow-on commander to see why an accommodation is in place, how it impacts unit readiness, and why he should continue to approve or deny it. One of the factors DoDI 1300.17 states a commander should consider when evaluating accommodation requests is the "previous treatment of similar request."¹¹⁸ Keeping written records ensures commanders can comply with the DoDI.

The judge advocate should also maintain written records of religious accommodation requests processed. Doing so enables the judge advocate to track religious accommodation requests in the unit and advise commanders on issues the judge advocate could be identifying. Keeping written records also enables follow on judge advocates to review the unit's history on how it granted accommodation request and who it granted them to. In the event a Soldier ever takes his denial of a religious accommodation to federal court, it would be very beneficial for a judge advocate to have a written record they can provide to litigation division when they ask for assistance or more information. Finally, reducing decisions to writing can help if a unit elects to develop a standardized religious accommodation packet. Having a standardized packet is beneficial for a number of reasons.

A standardized packet provides the Soldier requesting an accommodation predictability on what is expected for him to submit and how his request is processed. Additionally, having a standardized packet can facilitate a more uniform application of accommodation regulations within the unit. Finally, a standardized packet can help a commander's case if his decision is being scrutinized by a higher echelon of

¹⁰⁶ *Id.* para. 5-6.i.(1).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* para. 5-6.i.(12).

¹¹¹ *Id.* paras. 5-6.i.(12)(a-c).

¹¹² *Id.* para. 5-6.i.(12).

¹¹³ *Id.*

¹¹⁴ U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 June 2005) (RAR 6 Sept. 2011) [hereinafter AR 635-200].

¹¹⁵ U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006) (RAR 13 Sept. 2011) [hereinafter AR 600-8-24].

¹¹⁶ AR 600-20, *supra* note 2, para. 5-6.i.(13).

¹¹⁷ *Id.*

¹¹⁸ DoDI 1300.17, *supra* note 5, encl. 1, para. 1.e.

command, the Army G1, or a federal court. The commander can use the packet to demonstrate that his decision was not made arbitrarily. It will also assist both commanders and Soldiers when it comes to appealing a denial of an accommodation request.

B. Inform Soldiers of their Right to Appeal in Writing

Army Regulation 600-20, Chapter 5-6, does not require the commander to inform the Soldier in writing of their right to appeal.¹¹⁹ The regulation only requires that upon denial, the Soldier be given an opportunity to appeal the decision.¹²⁰ As a matter of practice, commanders should inform their Soldiers in writing of their right to appeal. Informing Soldiers of their right to appeal ensures the Soldier is actually put on notice of their right to appeal. Giving notice of a right to appeal in writing also facilitates maintain a complete record of the commander's decision about the accommodation. Having a complete record can prove to be beneficial if the Soldier were ever to take the denial of the accommodation to federal court.

C. Be Prepared for Litigation

If a commander at any level is going to deny a religious accommodation request, he should be prepared to have a compelling government interest for denying the request. In a recent case, *Singh v. McHugh*, a Sikh reserve officer training candidate (ROTC) brought a federal lawsuit against the Army after his religious accommodation request was denied.¹²¹ The ROTC cadet's accommodation was denied because granting the accommodation would adversely impact unit cohesion, morale, good order, discipline, individual unit readiness, and safety.¹²² The Court rejected this claim on two main grounds. First, the Court stated previous exemptions of a similar nature have been granted by the Army that did not adversely impact Army interests. Second, the Army did not carry its burden to show that "the compelling interest test is satisfied through its application of the challenged law to the person."¹²³

In another case, *United States v. Sterling*, a former servicemember was discharged from service for failure to obey an order (and other offenses) after she refused to remove bible verses from her work area.¹²⁴ Ms. Sterling alleges that her religious rights under the RFRA were violated when she was punished for not removing the bible verses.¹²⁵ The Navy-

Marine Corps Court of Criminal Appeals (NMCCA) upheld the conviction.¹²⁶ However, the Court of Appeals for the Armed Forces has granted review of that decision, calling into question the decision by the NMCCA.¹²⁷

What this means for commanders is denying an accommodation request based on general principles that an accommodation is detrimental to good order and discipline is not sufficient grounds to deny an accommodation. Commanders should determine how their Soldiers accommodation will impact the mission directly. When reviewing command decisions to deny religious accommodations its incumbent on the judge advocate to ensure a commander's actions are furthering a compelling government interest in the least restrictive means possible.

V. Conclusion

Navigating through the sea of religious accommodation regulations, policies, and procedures can be a challenging task for commanders and judge advocates alike. Commanders have a variety of considerations to take into account when making religious accommodation decisions. This article set out to provide commanders and judge advocates with the tools necessary to work through a religious accommodation case. Applying the policies and procedures presented in this article, the Commander from the introductory hypothetical could grant his Soldier excusal from duty on Saturday so he could observe Shabbat.¹²⁸ However, the Soldier will need to forward a religious accommodation request packet through the chain of command to the Army G1 to request a waiver to the grooming standards.¹²⁹ The commander will need to forward his recommendation to approve or deny the request to the Army G1.¹³⁰ With this firm understanding of the religious accommodation policy and process, the Commander along with the judge advocate, can ensure religious accommodation request are processed in a timely and equitable manner.

¹¹⁹ AR 600-20, *supra* note 2, para. 5-6.i.(5).

¹²⁰ *Id.*

¹²¹ *Singh v. McHugh*, 109 F.Supp.3d 72 (2015).

¹²² *Id.* at 82-84.

¹²³ *Id.* at 97.

¹²⁴ *United States v. Sterling*, No. 201400150, 2015, WL 832587 (N. M. Ct. Crim. App. Feb. 26, 2015)

¹²⁵ *Id.* at 1.

¹²⁶ *Id.* at 10.

¹²⁷ Zachary D. Spillman, *CAAF Grants (on Specified Issues) in Sterling*, NIMJ BLOG-CAAFLOG (Oct. 28, 2015), <http://www.caaflog.com/?s=US+v+STerling>.

¹²⁸ AR 600-20, *supra* note 2, para. 5-6.h.(1).

¹²⁹ *Id.* para. 5-6.i.(1).

¹³⁰ *Id.*

Appendix A. Religious Accommodation Flow Chart

