

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MARY HANNA, M.D.,)
Captain, U.S. Army Reserve,)
Petitioner,)
)
v.) Civ. Action #06-11434-NG
)
SECRETARY OF THE U.S.)
ARMY, and COMMANDER,)
94th Regional Readiness)
Command, Fort Devens,)
Massachusetts,)
Respondents.)

GERTNER, D.J.

MEMORANDUM AND ORDER RE: PETITION FOR HABEAS CORPUS

October 6, 2006

Captain Mary Hanna ("Hanna") brings this petition for writ of habeas corpus against the Secretary of the United States Army ("the Secretary," "Army" or "Respondents"), asking this Court to overturn the Army's denial of her application to be discharged as a conscientious objector. The case was brought on an emergency basis to prevent her immediate posting to Ft. Bliss, Texas. I entered a Temporary Restraining Order, enjoining the Army from requiring Hanna to report for duty, and then extended the Order for ten days. I consolidated the motion for a preliminary injunction with a motion for summary judgment and held that hearing on October 5, 2006.¹

¹ While there is no formal motion for summary judgment on the record brought by either party, at a hearing on Hanna's preliminary injunction motion, held September 25, 2006, I proposed that the preliminary injunction hearing be consolidated with a summary judgment hearing, and that both the hearing and the briefing schedule be expedited. See Order dated 9/25/2006.

On October 4, 2006, the Secretary moved for an order rejecting Hanna's petition for habeas corpus relief (document #20). That motion is **DENIED**.

Hanna, an Army anaesthesiologist, filed for discharge as a 1-0 conscientious objector claiming that she "objects to participation of any kind in war in any form."² While she had joined the Army in 1997 and represented that she was willing to serve at the time, in December 2005, she submitted her application for conscientious objector ("CO") status. Army regulations permit a soldier to apply at any time, in effect recognizing that an applicant's views about service may well change. Moreover, while the Army paid for the cost of Hanna's medical education in exchange for her service, Hanna made it clear that she would repay that amount with interest. See A.R. at 34.

In order to qualify for conscientious objector status, Hanna bears the burden of proving that she is "conscientiously opposed to war in any form," that this opposition is "based upon religious training and belief," and that "this objection is sincere." Hager v. Secretary of the Air Force, 938 F.2d 1449, 1454 (1st Cir. 1991). The Army then reviews the application in a

² Army Regulation 600-43, Glossary, Section II. The Army also provides for 1-A-0 conscientious objector status for those individuals who wish to remain in the Army in noncombatant positions. (This opinion uses Army Regulation 600-43 as it was presented to us by the Army [document # 20-2]. I have just determined that a new version was released in August, which, while it does not change the substance, does change some of the numbering.)

process spelled out in its regulations, culminating in a final decision of the Department of the Army Conscientious Objector Review Board ("DACORB") based on the administrative record created in the review process. See Army Regulation 600-43.

I am obliged to review the final decision to determine whether there is a "basis in fact" for the Army's decision as that standard has been articulated by a number of First Circuit decisions. See Lobis v. Secretary of the United States Air Force, 519 F. 2d 304, 306 (1st Cir. 1975) ("the applicable standard for reviewing in-service conscientious objector claims is . . . 'basis in fact'"), Hager, 938 F. 2d at 1454 ("although this standard of review is a narrow one, it is not toothless").

The Army filed a certified copy of the administrative record on which the Army's final decision had been based.³ I have reviewed that record to determine whether there is a "basis in fact" for the Army's decision. I conclude that there is not. The Investigating Officer conducted an impressively thorough investigation, and concluded in the strongest of terms that Hanna is sincere in her beliefs. The chaplain's conclusions -- on the supposed pro-military doctrine of the Coptic Orthodox Church, on the relationship between abortion and conscientious objector

³ Plaintiff disputes portions of the record as omitting critical materials - tapes of the hearing, emails that had been sent to the Army Chaplain who interviewed Hanna, Colonel Wismer ("Wismer"), and to the psychiatrist who interviewed Hanna, Major Dessain. Since this is a summary judgment proceeding, I cannot supplement the administrative record based on an argument in plaintiff's counsel's brief, not embodied in an affidavit, or otherwise admissible in this proceeding.

("CO") status, on Hanna's lifestyle -- range from irrelevant to impermissible to unsubstantiated. Moreover, by the time the application reached the DACORB, the evidence in the record was overwhelmingly clear that the "underpinnings" for the chaplain's conclusions "evaporated." See Hager, 938 F.2d at 1462. Since, the DACORB relied on the chaplain to a considerable degree, and since there was no other "basis in fact" for its conclusions in the administrative record, I find that the Army improperly denied Hanna's application for CO status.

I. BACKGROUND

Captain Hanna is a doctor with training in anaesthesiology from Beth Israel Hospital. In 1997, as an undergraduate at UCLA, she joined the Army and received an Army-funded scholarship to attend medical school. In return, she agreed to serve on active duty in the Army for four years, followed by another four years in the Army Reserves. Captain Hanna finished medical school and was granted a four-year delay of her active duty date so that she could complete a residency in anaesthesiology. On October 20, 2005, Captain Hanna received a letter informing her that upon completion of her residency, she would be required to report for active duty in August 2006.

A. Captain Hanna's Application

In December 2005, Captain Hanna submitted her application for discharge as a conscientious objector. In that application, Captain Hanna stated:

Christ teaches unconditional love for both friend and enemy. He holds Christians to a new divine standard, and encourages them to strive for this integrity, wholeness; he basically instructs them to emulate their Maker. . . . I believe that I am incapable of attaining these qualities if I participate in war and killing. . . . I believe that it is my responsibility as a Christian to always strive to make this community a reality, in which people are bound by love, unity, and peace. I believe that I betray these moral and religious principles by participating in war in any way.

A.R. at 77.

Captain Hanna explained that her conscientious objector beliefs "became incompatible with military service in October 2005." A.R. at 80. Hanna was raised as an active member of the Coptic Orthodox Church ("COC"). While she questioned her faith during college, the turning point for her was in 2003, when her father died. She wrote in her CO application:

The mourning period surrounding [my father's] funeral and the ensuing 40 days brought together our entire family from Egypt, Canada, Australia, New York, and New Jersey, as well as loved ones from all over the globe. This sense of community, of one consciousness, united in prayer, rekindled my faith. . . . I had lived both without God and with him, and I liked myself immensely more when striving to emulate his nature, his mercy, his love, his generosity, his forgiveness."

A.R. at 79.

In addition to rekindling her faith, her father's death allowed her to finally feel free to "consider the contradiction in her religious beliefs and the Army mission." A.R. at 6. See also A.R. at 10. Hanna's father had served in the Egyptian military and was very proud of Hanna's decision to join the armed services. Hanna explained that her father called her "Captain" until his death, and would have been devastated to know that she had filed a CO application. See A.R. at 33-34.

Captain Hanna first wrestled with what her faith meant in her medical practice when she decided she could not participate in abortion procedures. Then, over the next few months, she began to come to terms with what her beliefs meant for her relationship to war. "I realized then the full implication of the path I had chosen years earlier and the incompatibility of war and violence with Christ's teachings. I knew that to live the rest of my life with integrity in harmony with God's nature of love and compassion, I could not participate in military service." A.R. at 79.⁴

B. Application Processing

⁴ As part of this process, she watched several documentaries and attended a large protest against war in D.C. in September 2005. "[G]rowingly [I] began to view all war from a Christian perspective. . . . I realized that I was no longer able to play a role in propagating violence." A.R. at 79. Then, in October of that year, her beliefs became fixed. She saw a man on television discussing the Beatitudes. At that moment, she explains, something clicked.

Captain Hanna's CO application was processed according to Army regulations. She was interviewed by an Army chaplain, and then by a psychiatrist, each of whom prepared reports that are part of the record. An Investigating Officer ("IO") held a hearing on her case, during which Captain Hanna and several other witnesses testified. The IO reviewed the record before him, which included the chaplain's and psychiatrist's reports, and recommended that Captain Hanna's application be approved. The IO's recommendation was then sent up the chain of command, and was approved at each step. On September 15, 2006, the DACORB denied Captain Hanna's application by a 2-1 vote. See A.R. at 3.

1. Chaplain

Chaplain Wismer concluded that Captain Hanna was not sincere in her beliefs. He did so on three bases: First he concluded that Hanna's faith, the Coptic Orthodox Church ("COC"), endorses military service. Therefore, it is not supportive of her conscientious objector claims. He based his conclusion on the content of COC doctrine on telephone calls with two unnamed priests. Second, he concluded that Captain Hanna was insincere because she did not "remove herself from a hospital that destroys defenseless fetuses." A.R. at 31. Finally, he trivialized the changes in her lifestyle, noting that "[t]hese are lifestyle changes that one would expect from any individual engaged in the helping professions." A.R. at 32.

2. The Psychiatrist

Under the Army regulations, the purpose of the psychiatrist's evaluation is to determine whether the applicant is mentally fit to participate in the CO process. The psychiatrist is not supposed to make a recommendation for approval or disapproval of the application. Major Dessain, the psychiatrist who interviewed Captain Hanna, went beyond these instructions. Instead of simply filling out the usual form, Major Dessain wrote a report in which he concluded that Captain Hanna was not sincere. See A.R. at 33-35.⁵

3. The Hearing Officer

The Investigating Officer, Major Coakley, conducted a hearing in which he heard testimony from four witnesses: Captain Hanna, Major Dessain (the psychiatrist), Father Angelos Bishara of the COC, and Father Antonius Henein of the COC. Major Coakley also reviewed written materials including Hanna's CO application, Chaplain Wismer's report, Major Dessain's report, documents from the Office of the Surgeon General, and letters submitted in support of Hanna's application.

Major Coakley found Hanna "to be sincere and her beliefs to be sincerely held." A.R. at 21. He was "impressed by [her] interaction with Father Bishara (in person) and Father Henein (by

⁵ Petitioner raised the issue of whether emails sent to Major Dessain before he interviewed Captain Hanna prejudiced his evaluation. In Hanna's rebuttal statement, her attorney wrote "[t]he psychiatrist who interviewed Dr. Hanna, Major Eric Dessain, testified at the hearing that he received emails from Army officials prior to his interview of Dr. Hanna." A.R. at 16. Major Coakley, the Investigating Officer, did not mention these emails in his hearing report.

telephone) at the hearing and was left with the impression that she was a truly devout member of the COC and sincerely held the beliefs she professed in her CO application." A.R. at 21.

Major Coakley discounted Chaplain Wismer's conclusions on both COC doctrine and the relevance of Hanna's stance on abortion. Coakley credited the hearing testimony of Fathers Bishara and Henein, who explained that the church supports both conscientious objectors and those who serve in the armed services. "Two COC priests indicated . . . that there is no uniform COC position on conscientious objection and that the church is supportive of . . . CO applicants This testimony was consistent with materials provided to the IO by Captain Hanna" A.R. at 19.⁶ Major Coakley also pointed to Army Regulation 600-43, which states "affiliation with a church group that does not teach conscientious objection does not necessarily rule out adherence to conscientious objection beliefs. . . . The personal convictions of each person will dominate so long as they derive from the persons's moral, ethical, or religious beliefs." A.R. at 19.

With respect to Chaplain Wismer's comments on abortion, Major Coakley concluded "[t]he subject of Captain Hanna's

⁶ "Father Bishara was asked if he agreed with a statement in the chaplain's report that many of the COC saints were 'warriors.' Father Bishara disagreed with that statement and indicated that the military service by such saints occurred prior to their religious phase. He also testified that there are different attitudes toward military service among COC adherents. It is an individual decision." A.R. at 22.

participation in abortions (while Captain Hanna works at a medical facility that performs abortions, she has asked not to be assigned to elective abortions at her hospital and indicated that, in the future, she would ask not to participate in a medically necessary abortion of a viable child), according to my interpretation of AR 600-43, is not material to her application." A.R. at 19.

Major Coakley also addressed the psychiatric report. Major Dessain testified at the hearing that the assertion in his report that Hanna's CO application "is not based on any religious convictions" was incorrect. He testified that he meant that her beliefs "were a product of her personal faith system." A.R. at 20. Major Coakley further noted that Major Dessain's interview of Hanna may have been negatively influenced by a memorandum he had received from Colonel Powers of the Office of the Surgeon General.

Colonel Powers commented disparagingly in his memorandum on Captain Hanna's choice of lawyer, and the fact that he had represented other CO applicants.⁷ Major Coakley found that an adverse inference cannot be drawn "from a person securing legal counsel who is experienced in the subject matter of representation. In fact, a prudent person (particularly a highly educated professional) would not retain an attorney and pay the

⁷ Major Coakley wrote, "Hanna testified that she did not know these other applicants. I credit this testimony." A.R. at 20.

attorney's fees from her own pocket unless she were convinced that such person had the requisite experience to undertake the representation in an effective manner." A.R. at 20.

Major Coakley concluded,

This reference in the Surgeon General's application may have had the unintended effect of prompting MAJ Dessain to engage in an unnecessarily involved discussion of the issue with CPT Hanna during his psychiatric evaluation of her. This exchange put CPT Hanna on the defensive and, possibly, impacted the substance of the interview. Major Dessain referred to Captain Hanna as tense, geared up, and guarded. I found her to be open, cooperative, courteous, and sincere during the hearing.

A.R. at 20.

4. The Chain of Command

Major Coakley's report, along with all of the other materials in the record, was forwarded through the appropriate command channels. Captain Hanna's application was recommended for approval by every official.

First, Captain Duncan, a lawyer in the office of the Command Judge Advocate (legal counsel to the Commander, Human Resources Command), wrote a memorandum recommending that Hanna's application be approved, which was ratified by his superiors.

[T]he IO found that CPT Hanna holds a fixed and sincere objection to participation of any kind in war in any form or the bearing of arms because of her religious beliefs. In support of this finding, the IO relies on CPT Hanna's assertions that she has a long and devoted relationship with the Coptic Orthodox Church (COC). This is reinforced by several

statements from priests within the COC who support her claims. As an active member of the COC, the IO found CPT Hanna's beliefs that assisting or participating in war in any form is in opposition to her personal faith and the Church's doctrine that its members should emulate the peaceful teachings of Christ.

A.R. at 9.

Then, Colonel Marsh, Commander of the Human Resources Command, recommended that Hanna's application be approved.

The documentation and evidence Captain Hanna provided in her application clearly articulate her sincere opposition to participation in war in any form based on her religious, moral, and ethical beliefs. . . . Her lifelong church involvement does not appear to be a recent effort to avoid military service. . . . The strength and intensity of her evolving convictions against war and violence, beginning with the death of her father in May 2003 and becoming firm by October 2005, are reflective of sincere belief and are supported by clear and convincing evidence.

A.R. at 7.

Likewise, Brigadier General Semonite recommended that the Army approve Hanna's request.⁸ "My conclusion is based primarily on the investigating officer's credibility determination, CPT Hanna's testimony, and the opinions of the leaders of her church. The solemnity of her convictions is clear throughout the

⁸ "The record of the case will then be forwarded through command channels, for recommendations as to the disposition of the case (based on fact and not conjecture), to the GCMCA [General Court-Martial Convening Authority] who will review the case for administrative correctness. The GCMCA review will insure that all of the regulatory requirements have been expeditiously and properly completed in the required number of copies. . . ." Army Regulation 600-43(2-6)(c).

investigation and they do not appear to have been born of a desire to avoid service." A.R. at 4.

Lastly, Staff Judge Advocate ("SJA") Linn recommended that the Army approve Hanna's request to be discharged as a 1-0 CO.⁹ He based his recommendation on the IO's findings. "The investigating officer conducted a thorough inquiry into her convictions. Numerous witnesses were called on her behalf. It is his considered opinion, supported by lower echelon commanders, that: 1) she objects to war in any form, 2) her objection is based on religious beliefs that developed after she entered the military; and 3) she has demonstrated that her beliefs are sincerely held." A.R. at 6.

5. DACORB

The DACORB was composed of three members: a chaplain, a Staff Judge Advocate ("SJA"), and the DACORB president. On September 15, 2006, the board denied Captain Hanna's application by a 2-1 vote.

In voting to approve her application, the SJA wrote: "Applicant has shown by a preponderance of the evidence that she

⁹ "After the administrative review, the case record will be forwarded to the SJA of the GCMCA. The SJA will review the case for sufficiency in law and fact. The SJA will insure that the applicant has been afforded the procedural safeguards of this regulation. The SJA will make a recommendation for disposition of this case supported by reasons. The use of only the term 'legally sufficient' does not fulfill this requirement. Comments by judge advocates below the GCMCA level are gratuitous but, if made, will be addressed by higher headquarters when a conflicting recommendation is made." Army Regulation 600-43(2-6)(d).

has a firm, fixed, and sincere objection to participation in war in any form, considering all evidence in the packet." A.R. at 3.

In voting against her application, the DACORB chaplain wrote: "The statements by the priest that the COC does not teach pacifism leads me to believe that there is more to CPT Hannah's position than merely religious conviction. Also, her timing is too convenient with the completion of her schooling and her entry on AD." A.R. at 3.

Finally, the President of the DACORB wrote, "Applicant has shown that she is a devout Coptic Christian but has failed to show that she sincerely meets the CO criteria. Her statements are logical but lack passion and sincerity. They appear as repetitious rather than personally held beliefs." A.R. at 3.

Captain Hanna argues that the DACORB's conclusion has no basis in fact.

II. ANALYSIS

A. Standard of Review

The standard of review in this case is whether there is a "basis in fact" for the Army's decision to deny conscientious objector status. See Lobis v. Secretary of the United States Air Force, 519 F.2d 304, 306 (1st Cir. 1975); Hager v. Secretary of the Air Force, 938 F.2d 1449, 1454 (1st Cir. 1991).¹⁰ The

¹⁰ As noted above, Hanna bears the burden of proving, by clear and convincing evidence, that she is "conscientiously opposed to war in any form," that her opposition was "based upon religious training and belief," and that this objection is sincere." Hager, 938 F. 2d at 1454.

question, of course, is what "basis in fact" review means. It is not the kind of review one sees under the Administrative Procedure Act, 5 U.S.C. § 706, which includes, for example, a searching determination of whether agency action is supported by "substantial evidence." Nor is it the kind of review that authorizes the court to make its own "credibility determinations from a cold record." Goldstein v. Middendorf, 535 F.2d 1339, 1341 (1st Cir. 1976). As Chief Judge Breyer noted in his concurrence in Hager, "military authorities, not the courts, are to make determinations of credibility. Hager, 938 F.2d at 1462.

At the same time, the First Circuit both in the language it used to describe the review standard and in its actual application made it clear that "basis in fact" was not a "toothless" standard, Hager, 938 F.2d at 1454, that conclusions based upon nothing more than "a mere suspicion," Goldstein, 535 F.2d 1339, 1344 (1st Cir. 1976), will not be sustained.

A basis in fact will not find support in mere disbelief or surmise as to the applicant's motivation. Rather, the government must show some hard, reliable, provable facts which would provide a basis for disbelieving the applicant's sincerity, or it must show something concrete in the record which

We note that the SJA on the DACORB described the standard for CO status as a fair preponderance, which was an error. The matter was not addressed in the papers. I have no way of knowing whether it was an error of law or just a typographical error. All that is before me is whether the Secretary's denial had a basis in fact, which I concluded it did not. Moreover, under Judge Breyer's analysis, at the very least on this record it is clear that Hanna has made out a prima facie case of the exemption and that dismissal of the claim was solely on the basis of "suspicion and speculation."

substantially blurs the picture painted by the applicant.

Hager, 938 F.2d at 1454 (quoting Smith v. Laird, 486 F.2d 307, 310 (10th Cir. 1973)).

Or, as Judge Breyer noted, quoting Dickinson v. United States, "when the uncontroverted evidence supporting" the conscientious objector's claim puts the applicant "*prima facie* within the . . . exemption, dismissal of the claim solely on the basis of suspicion and speculation," is not proper. Hager, 938 F.2d at 1462 (citing Dickinson v. United States, 346 U.S. 389, 396-97 (1953)).

It is instructive then to review how the Court approached its role in Hager for parallels to the case at bar: Hager was a physician who applied for conscientious objector status after he had finished his medical education, and before he was called to active duty. As in this case, the Chaplain concluded that Hager's opposition to war was not based upon "religious conviction or upon moral or ethical beliefs which have been developed systematically or concretely." Hager, 938 F.2d at 1453. Unlike Hanna, the chaplain's position was sustained by the investigating officer who independently rejected Hager's claim. The Secretary then, after reviewing the record, concluded that the applicant had not established that his beliefs were sincere and deeply held. He had no "coherent belief system which could be described as firm, fixed and deeply held," nor were his

beliefs "the primary controlling force in [his] life." Hager, 938 F. 2d 1454.

The First Circuit, with then-Chief Judge Breyer concurring, reversed the Secretary's decision. It noted that the Secretary's conclusions were "boilerplate," just a recitation of the statutory criteria. The Court held that it should look behind those conclusions if the basis for them were reasonably discoverable from the record, namely from the opinions and recommendations of the Secretary's subordinates. Hager, 938 F.2d at 1455.

The Court rejected the chaplain's views to the extent that they were based on the timing of Hager's application. The timing of Hager's views, after medical school, and before active service, the Court held, was not dispositive: "It is universally the law . . . that late crystallization of conscientious objector convictions is not a sufficient basis in fact to reject the claim." Hager, 938 F.2d at 1455 (citing Lobis, 519 F.2d at 304). Although accorded some weight, timing cannot alone be the basis for denying conscientious objector status. Hager, 938 F.2d at 1456.

The Court also rejected the chaplain's critique of how Hager's views had crystallized. The Chaplain discounted Hager's position that his beliefs crystallized specifically when he visited a military hospital and realized that its purpose was to return soldiers to battle. The Court concluded that the

Chaplain's perception of this event was hardly an objective basis on which to determine that Hager's beliefs were not sincere.

Finally, the Court rejected the Chaplain's views of how Hager's lifestyle had changed. As a general matter, the Court minimized the significance of lifestyle changes with physicians. Hager, 938 F.2d at 1457. A medical career is already oriented to public service; dramatic lifestyle changes should not be expected in this context. In any event, the Court found that the chaplain had inappropriately discounted the changes that had taken place, namely Hager's practice of meditation and contemplation, because the chaplain was unfamiliar with Eastern religious tradition. Finally, the Court noted that the chaplain misstated the evidence. Hager, 938 F.2d at 1458. The chaplain stated that Hager mentioned only walking away from a rewarding military career opportunity as evidence of the depth of his beliefs, when in fact Hager also mentioned his anxiety over abandoning his family tradition of military service, and, as here, his willingness to reimburse the military for the money spent on his education.

The Court also rejected the Investigating Officer's report. The IO did not question Hager's sincerity, only the depth of conviction. The Court found that there is no "depth of conviction" test. Even a belief, "shallow in a theological context" can qualify. Indeed, measuring "depth" is an impermissible "subjective look into his heart and soul." Hager,

938 F.2d at 1459. The Court examined the answers which the investigating officer had found to be "troubling," concluding the IO's position came "perilously close to a subjective judgment by an investigating officer of what Dr. Hager's belief system requires . . ." based on the assumption that his own views were the correct ones. Hager, 938 F.2d at 1460.

The Court used the same approach, with the same result, in Lobis -- on facts strikingly similar to the case at bar. Lobis was an Air Force Reserve physician who applied for conscientious objector discharge shortly before active duty. As in Hager, the Court concluded that the timing, while apparently suspicious, was not dispositive. Something more tangible was necessary which it did not find. Indeed, in Lobis as in Hanna, the record was even stronger for the petitioner than the Hager record; the investigating officer had found in Lobis' favor.

In short, what is significant about the court's approach in these cases is that it looked below summary conclusions to the actual evidence on which those conclusions were based to find whether there were "hard, reliable, provable facts." Hager, 938 F.2d at 1454. "Basis in fact" did not mean that the court's role was nothing more than finding someone, somewhere, in the record who agreed with the Secretary's conclusions, as the Army suggests. Hager, 938 F.2d at 1459. Rather, the court would look to the following: whether some of the reasons given by the Army, like timing, were given undue weight; whether the evidence was

misstated or overlooked; whether the examiners did no more than substitute their own subjective beliefs for an objective basis.

B. Application to Hanna

The DACORB rejected Hanna's application by a 2-1 vote after a review of the entire administrative record, which, but for the chaplain's and psychiatrist's reports, had been overwhelmingly favorable. As such, the starting point for this analysis is the reasons given by the two Board Members who voted against Hanna. However, because the Army maintains that "basis in fact" review means that it can cite to any fact in the record to support its denial of CO status, whether or not mentioned by the DACORB, I will address these facts as well.

The chaplain on the DACORB rejected Hanna's petition noting, first, that "[t]he statements by the priest that the COC (Coptic Orthodox Church) does not teach pacifism leads me to believe there is more to Cpt. Hannah's [sic] position than merely religious conviction." Second, the chaplain noted that "[Hanna's] timing is too convenient with the completion of her schooling and her entry on AD." A.R. at 3. The President of DACORB, who had never met Hanna personally, concluded that the "[a]pplicant has shown that she is a devout Coptic Christian but has failed to show that she sincerely meets the CO criteria. Her statements are logical but lack passion and sincerity. They appear as repetitious rather than personally held beliefs." A.R. at 3.

1. Timing

The chaplain of DACORB, and to a degree, the President, on the DACORB, base their decision to a considerable extent on the timing of Hanna's application.¹¹ As noted above, the timing of a CO application does not constitute a basis in fact for denying the application. Hager, 938 F.2d at 1455 (citing Lobis, 519 F.2d at 304); see also Shaffer v. Schlesinger, 531 F.2d 124, 130 (3d Cir. 1976) ("cases are legion which hold that the timing of an application for conscientious objector status is not a sufficient basis in fact to support a finding of insincerity"). In Lobis, the First Circuit reasoned, "it is clear that a sincere conscientious objector is entitled to release from his service obligations whether his views crystalize late or early. . . . If decisive weight could be given to timing, there would be nothing to prevent the services from indulging an absolute presumption against late crystalizers." Lobis, 519 F.2d 307.

The Army emphasizes that when Hanna applied for CO status, she "had already reaped the benefits of her service connection." Resp. Mot. at 9. Significantly, this is true of the petitioners in both Lobis and Hager. And, as the First Circuit recognized in Lobis, this position proves too much.

¹¹ The government so conceded: "In summary, the DACORB's decision is supported in the record by late crystallization of Cpt. Hanna's asserted CO belief." Respondent's Motion for Order Denying Petition for Habeas Corpus ("Resp. Mot.") at 19.

Something more tangible than suspicion is needed to support a finding of insincerity. Otherwise it would be but a short step to denying CO status to all Berry Plan enrollees, sincere or insincere. So long as we accept the possibility that conscientious scruples may flower at any time, and that once arising they take precedence even over contractual commitments, it is not easy to justify giving dispositive weight either to questionable timing or to such factors as a prior Berry Plan commitment."

Lobis, 519 F.2d at 307.

Hanna, like the petitioners in Lobis and Hager, "provided a plausible explanation of how [her] conscientious objections came to crystalize." Lobis, 519 F.2d at 307. The death of her father, six years after she enrolled in the Army, was a turning point in her life. He had been a military officer; while he was alive she could not envision challenging the choice she had made to enter military service. At his death, she began the journey toward conscientious objection, culminating two years later. As she noted: "It took some time for me to make the connection between this newly rekindled faith and its incompatibility with certain aspects of my life." A.R. at 79.

The Army argues that because Captain Hanna was not drafted, it is entitled to give more weight to the timing of her CO application. This position is not supported by the cases. It is settled First Circuit law that the "applicable standard for reviewing in-service conscientious objector claims is the same as that applied to the review of similar decisions by the Selective

Service System" Lobis, 519 F.2d at 306. Moreover, that court held that the "yardstick applicable to" reservist physicians "is the same as that applicable to other servicemen." Lobis, 519 F.2d at 307.

The Army further argues that "[s]ince Captain Hanna's religious beliefs predated her entry into the service, she is not entitled to prevail on CO status on the basis that they crystalized in October, 2005." Resp. Mot. at 9-10. In effect, the government is arguing that if her religious beliefs did not include conscientious objector beliefs at her entry into the service, she cannot claim that her beliefs evolved from that source later. Essentially, this is another way of casting aspersions at the timing of her beliefs, and giving that timing a significance belied in Hager and Lobis. Alternatively, the government is suggesting some kind of waiver argument -- if you voluntarily assumed military obligations at one point you cannot take a different position later.¹² As the court noted in Hager, "[i]t is long since settled that voluntary assumption of military obligations does not provide a basis in fact for a finding of insincerity." Hager, 938 F.2d at 1456 (quoting Shaffer, 531 F.2d at 129).

¹² The Army cites a 2006 District of D.C. case holding "A true conscientious objector who hides his beliefs to obtain the benefits of military service is not allowed to then claim CO status when called to serve." Aguayo v. Harvey, 2006 U.S. Dist. Lexis 59490, *9 (D.D.C. 2006). But Aguayo assumes a conclusion not applicable here -- that Hanna "hid" her beliefs to get a medical education paid for by the Army. There is no basis whatsoever for that conclusion; indeed, the Army does not suggest any such pretext.

Or, this argument is yet another version of the argument made by Colonel Wismer, the chaplain who had interviewed Hanna (not the individual who was part of the DACORB), that conscientious objector status is somehow inconsistent with Coptic Orthodox Church membership.¹³ Since Hanna was a devout Coptic at her entry into the service, and was not a conscientious objector, so the argument goes, she cannot now claim that conscientious objector status flowed from her religion thereafter. As described below, Coptic Christianity is not inconsistent with CO status; indeed, just the opposite. In any event, her beliefs need not derive directly from an organized religion so long as they are religious in some way.¹⁴

2. The Coptic Orthodox Church and Pacifism

The chaplain on the DACORB pointed to "statements by the priest" that the Coptic Orthodox Church does not teach pacifism and seems to conclude from this that Hanna is not sincere. In

¹³ The Army points to the fact that at the time she applied to the Army, Captain Hanna was a Sunday School teacher and member of the UCLA Coptic Society. "Thus, Captain Hanna avowed that she was not a conscientious objector while she was a devoted church member and participant, so that her later conversion to conscientious objection cannot be explained by her devotion to her church." Resp. Mot. at 10-11.

¹⁴ The Army also points to Hanna's statement in her CO application that during college she "questioned everything" and "turned to atheism for several months, followed by agnosticism." A.R. at 78. In fact, Hanna's wavering when she was in college, in a life the government concedes was otherwise devout and observant, only buttresses the IO's finding that her religious trajectory evolved over time. "That [her] views developed to the point of crystallization around the time of [her] application is no bar to finding sincerity." Hager, 938 F.2d at 1456.

effect, he concluded that Hanna's beliefs cannot stem from her Church when Church teaching is otherwise. See A.R. at 3.

First, the DACORB chaplain apparently relies on the unnamed priest that Colonel Wismer had telephoned before he interviewed Hanna. Colonel Wismer reported: "I even spoke with a priest of her congregation in preparation for the interview and learned that Coptic Orthodox Christians believe it is their responsibility to serve in the military when called upon by their country." A.R. at 30. Colonel Wismer took the words of this priest, coupled apparently with his own research, to conclude that rather than opposing military service, the Coptic Church "endorses military service through the example of their Saints and religious leaders." A.R. at 31. Wismer is not an expert in the Coptic Orthodox Church. He does not base his conclusion on his interview with Hanna.¹⁵ He does not disclose his sources. It is, in short, his personal, subjective view and, based on the record, wrong.

The IO reached the opposite conclusion based on Hanna's CO application, her testimony, the documents concerning the beliefs and traditions of the Eastern Orthodox Church, which she furnished, the testimony of two Coptic Christian priests, and letters from two others. He concluded that there "is no uniform COC position on conscientious objection and that the church is

¹⁵ "The interviewing chaplain will submit a detailed report of the interview to the commander." Army Regulation 600-43(2-3)(a)(2).

supportive of both CO applicants and COC members that serve in the military." A.R. at 19.

In any case, even if Colonel Wismer's conclusions were substantiated by the record, they do not provide a basis for disbelieving the sincerity of Hanna's beliefs. "[A]ffiliation with a church group that does not teach conscientious objection does not necessarily rule out adherence to conscientious objection beliefs." Army Regulation 600-43(1-7)(b). See also 32 C.F.R. § 75.5(c)(2)(iii)(c). Where an applicant is a member of a church, religious organization or religious sect, and where her claim of conscientious objection is related to such membership

inquiry may be made as to their membership, the teaching of the church, religious organization, or sect, as well as their religious activity. However, the fact that these persons may disagree with, or not subscribe to, some of the tenets of their church does not necessarily discredit their claim. The personal convictions of each person will dominate so long as they derive from the person's moral, ethical, or religious beliefs."

Army Regulation 600-43(1-7)(b). See also 32 C.F.R. § 75.5(c)(2)(iii)(d).

As the Supreme Court held in Clay v. United States, the military "must be concerned with the registrant as an individual, not with its own interpretation of the dogma of the religious sect, if any, to which he may belong." Clay v. United States, 403 U.S. 698, 700 (1971) (citing United States v. Seeger, 380 U.S. 163 (1965), Gillette v. United States, 401 U.S. 437 (1971)).

The Army concedes that the Secretary may use facts in the record to support its decision, only "as long as they are relevant."

Resp. Mot. at 8.

The chaplain's conclusions about Hanna's *church*, therefore, even if they were correct, are not a basis in fact for conclusions about Hanna's *individual* beliefs. While the chaplain stopped at his conclusion that the COC was not a pacifist church, the IO went on to examine Captain Hanna's personal religious beliefs,¹⁶ as mandated by the regulations and case law.¹⁷

3. Lack of Change in Lifestyle

While not mentioned in the DACORB report, the Army also points to Chaplain Wismer's conclusion that Hanna's lifestyle changes did not "in any way set her apart from any individual engaged . . . in the helping professions." Resp. Mot. at 13-14 (citing A.R. at 32). This assertion does not provide a basis in fact. See Hager, 938 F.2d at 1457. The Army concedes as much ("It is true that major lifestyle changes are not necessary for demonstrating sincere CO status." Resp. Mot. at 14). As noted above, the First Circuit has concluded time and again, that particularly with respect to physicians, lifestyle changes are not to be expected because a physician's career is already geared

¹⁶ Colonel Wismer's position harkens back to an earlier time when CO status was reserved only for those whose church required it, like Quakers. Modern case law plainly recognizes that CO beliefs can evolve, and derive from a given religious tradition, even if the religion does not mandate pacifism.

¹⁷ See Section I.B.3., supra.

toward healing and public service. See Hager, 938 F.2d at 1457 (lack of lifestyle change in physician cases "seems of minor significance at best"); Goldstein, 535 F.2d at 1343 n.6 (same); Lobis, 519 F.2d at 307 n.2 (same).

The chaplain's comments only reinforce that view, noting that Hanna's lifestyle is consistent with those "in the helping profession." Specifically, the chaplain notes that she seeks reconciliation with others, tithes her income,¹⁸ and plans to devote her medical career to working with the poor. The question

¹⁸ The Army argues that Captain Hanna's statements on tithing are inconsistent. Resp. Mot. at 14, 19. The Army cites Witmer v. United States, 348 U.S. 375 (1955) for the proposition that "inconsistencies in the record are adequate to support denial of conscientious objector status." Resp. Mot. at 6. An examination of Witmer, however, shows that the statements on Hanna's commencement of tithing are not the sort of "inconsistencies" the Witmer court was referring to. In Witmer, the applicant applied for military exemption under multiple classifications -- as a farmer, as a minister, and as a conscientious objector. "Furthermore, although he asserted his conscientious objector belief in his first exemption claim, in the same set of papers he promised to increase his farm production and 'contribute a satisfactory amount for the war effort.' Subsequently, he announced 'the boy who makes the snow balls is just as responsible as the boy who throws them.' These inconsistent statements in themselves cast considerable doubt on the sincerity of petitioner's claim. This is not merely a case of a registrant's claiming three separate classifications; it goes to his sincerity and honesty in claiming conscientious objection to participation in war." Witmer, 348 U.S. at 382-83. In Witmer, therefore, the court was referring to flatly contradictory statements made by the applicant, in his application, as to whether he supported the war effort or not; those sorts of statements go to the heart of the conscientious objector claim, and therefore are evidence of insincerity. Hanna's statements about commencement of tithing are not only different in kind, they are trivial. See generally Goldstein, 535 F.2d at 1342-43. Furthermore, it is not at all evident that Hanna made inconsistent statements as to her tithing practices. In her CO application, Captain Hanna wrote, "Beginning with my first income, I have contributed 10% of my income every year to tithes. The past three years, I have routed these tithes to the poor." A.R. at 80. She wrote this in response to the question of what demonstrates the "consistency and depth of her beliefs." In the chaplain's report, he notes that Hanna tithes her income as a result of her "spiritual reawakening." See A.R. at 31. The Army in its Motion for Order Denying Habeas Petition characterizes this as a change that Hanna asserts took place after the crystallization of her CO beliefs. There is no indication, however, that Hanna made two different representations as to the start of her tithing practice.

to this Court is whether those practice are *incompatible* with Hanna's claims about her CO beliefs. See Hager, 938 F.2d at 1457; Goldstein, 535 F.2d at 1343 n.6. Clearly they are not. While they may provide only some support for her application, they do not at all undermine it.

4. Abortion

Although the DACORB did not specifically cite to Colonel Wismer's conclusions on Hanna's views on abortion, the Chaplain on the DACORB placed great weight on Wismer's approach. Moreover, the Army offers it as a further basis in fact for the DACORB's conclusions. See Resp. Mot. at 13.¹⁹ Chaplain Wismer said:

I then challenged her that armies fight against armed forces, but that new fetuses have no guns to protect themselves. She then stated that she would have to give more serious consideration to her medical training. I find CPT Hanna [sic] medical education at an institution that conducts abortions and her abhorrence to military service to be in direct contradiction of each other. I might be convinced of her sincerity and depth of conviction if her opposition to killing included more than asking to be removed from abortion rotations. I do not believe that CPT Hanna provides a convincing argument that she is a conscious [sic] objector when her conscious [sic] does not demand she remove herself from a hospital that destroys defenseless fetuses.

¹⁹ Chaplain Wismer discusses Hanna's views on abortion in a section of his report titled "Sincerity and Depth or Lack of Conviction." See A.R. at 31.

A.R. at 31.²⁰

The most plausible interpretation of the Chaplain's comments is that he believes it is inconsistent to be a conscientious objector and "not demand [to be removed] from a hospital that destroys defenseless fetuses."²¹ On this interpretation, the Chaplain's conclusions run afoul of the Army's regulations. "Care must be exercised not to deny the existence of beliefs simply because those beliefs are incompatible with one's own." Army Regulation 600-43(1-7)(b). See also 32 C.F.R. § 75.5(c)(2)(iii). This point has been clearly established by the First Circuit. In Goldstein, the hearing officer concluded that a physician-applicant for CO status was insincere because of his beliefs on abortion and euthanasia. Although the applicant refused to perform abortions himself, he testified that he "approved of them only to the extent that he agreed with the Supreme Court's conclusion that, during the first two trimesters of a pregnancy, whether an abortion should be performed should be

²⁰ Hanna's response to Chaplain Wismer that she needed to give more serious thought to his questions indicates reflectiveness, not insincerity.

²¹ It is not immediately clear how Chaplain Wismer reasoned from this incongruence to the conclusion that Captain Hanna is "insincere." In the one situation, she was able to compromise; in the other, she was not. This is not a contradiction in Hanna's behavior, but rather a difference in institutional practices. The hospital allowed her to abstain from any work that supported, directly or indirectly, a procedure to which she is opposed. Such compromise is not possible in the Army; the only way for Hanna to avoid lending her support to war is to remain outside of the military altogether. This is not an inconsistency on Captain Hanna's part. The chaplain must have meant, therefore, that he finds Hanna lacking in sincerity and depth of conviction because she has not demonstrated a strong enough opposition to abortion to satisfy the chaplain's "own beliefs." See Army Regulation 600-43(1-7)(b). See also 32 C.F.R. § 75.5(c)(2)(iii).

a matter between a physician and the pregnant woman." Goldstein, 535 F.2d at 1344. "Such views, the hearing officer asserted, were 'incongruous' for a conscientious objector and 'manifestly incompatible' with appellant's avowed abhorrence for the intentional killing of another human being." Goldstein, 535 F.2d at 1344. The Court concluded that the hearing officer, "contrary to the governing regulations, reached his conclusion based on the assumption that his own views on two very delicate and controversial moral issues were the correct ones." Goldstein, 535 F.2d at 1344. The Court found the hearing officer's conclusions so out of line that in addition to concluding that basing a finding of insincerity on the abortion issue was illegitimate, the Court further concluded, "under the circumstances of this case we believe that the presence of highly questionable and clearly impermissible grounds created a taint on the other credibility findings" Goldstein, 535 F.2d at 1344-45.

There is a second way, however, to interpret Chaplain Wismer's comments on abortion. The Army argues that the "chaplain questioned her on the subject [of abortion] in order to probe the depth of her understanding of her stated beliefs." Resp. Mot. at 13 n.11. His conclusion that "Hanna['s] medical education at an institution that conducts abortions and her abhorrence to military service [are] in direct contradiction with each other," A.R. at 31, could be based on analogy, not the

chaplain's own moral convictions. In other words, the chaplain might have been saying that just as Hanna is willing to work in a hospital that performs abortions, while refusing to perform them herself, she should be willing to work as a member of the military in a non-combat position. And it was the incongruity between her two positions that pointed to insincerity.

Nonetheless, even under this interpretation, the chaplain's conclusions do not find a basis in fact. The evidence in the record does not show Hanna to be inconsistent or insincere in her beliefs; the analogy plainly fails. Employment in a private hospital is categorically different than serving in the Armed Services. At a private hospital, doctors have the control over their work to say, as Hanna has, that they refuse to be involved with certain medical procedures or categories of cases. As a member of the military on active duty, Hanna relinquishes control. She is at the mercy of her commanders' orders. Although the Army asserted in the preliminary injunction hearing that there are no "plans" to send Hanna into a combat zone, those plans could change at any time. Once Hanna is denied CO status and put on active duty, she has no protections from being ordered to take actions that violate her conscience. Moreover, it is clear from the evidence in the record that the act of serving in the Army violates Hanna's conscience. "By treating soldiers, she would be repleting the force and assisting it waging war." A.R. at 24.

C. Logical but Lacking Passion and Sincerity

The President of the DACORB based his position on the fact that Hanna, a devout Coptic Christian, failed to show sincerity because her statements, while "logical," lacked "passion and sincerity." He adds: "They appear as repetitious rather than personally held beliefs." A.R. at 3.

Significantly, the President of DACORB did not see Hanna or hear her testimony. The IO, who did, concluded otherwise. See Lobis, 519 F.2d at 308. Moreover, apart from observing her demeanor, the President offers no basis for the conclusion of "lack of sincerity." Indeed, his position resonates more like the "depth of conviction" comments rejected in Hager. See Hager, 938 F.2d at 1459.

D. The Psychiatrist's Report

While the DACORB did not expressly rely on the psychiatrist's report, the report was part of the record before it. Since the President of DACORB did not disclose the basis for his conclusions, it is at least arguable that the psychiatric report was considered.

The psychiatrist, Major Dessain, "reviewed the recommendation by the Office of the Surgeon General concerning CPT Hanna's application and references therein to CPT Hanna's attorney representing other CO applicants." A.R. at 23. That memorandum noted that it was "troubling" that Hanna consulted the same attorney as had other anaesthesiologists applying for CO

status. The IO explicitly rejected this reference. He noted that an adverse inference cannot be drawn "from a person securing legal counsel who is experienced in the subject matter of representation. In fact, a prudent person (particularly a highly educated professional) would not retain an attorney . . . unless she were convinced that such person had the requisite experience to undertake the representation in an effective manner." A.R. at 20. Moreover, Goldstein holds that this is an impermissible ground on which to base denial of a CO application. See Goldstein, 535 F.2d at 1344 ("An applicant . . . is clearly entitled to be represented by counsel in C.O. proceedings, and we think it is impermissible to allow any negative inference about an applicant's sincerity to be drawn from his attempts to procure legal advice from whatever source. That the hearing officer drew this inference not only suggests his ignorance but also casts further doubt on his impartiality and objectivity.") (internal citation omitted).

Moreover, as the IO found, Major Dessain "appeared to indicate that he was prompted to ask CPT Hanna about her attorney by reading COL Power's memorandum." A.R. at 23. The IO concluded that "[t]his exchange put CPT Hanna on the defensive and, possibly, impacted the substance of the interview." A.R. at 20. "CPT Hanna testified that MAJ [Dessain] told her that, during her interview, that her judgment was in question. She

felt he had preconceived notions as to her application." A.R. at 24.

Furthermore, Major Dessain acknowledged several errors in the report, including references to Hanna's weight, and the speed with which she walked into the interview. A.R. at 23. And while Dessain was only to determine Hanna's competence to participate in the CO process, in fact his findings went further, that her CO status was a product of her "personal faith" system, a finding inconsistent with the IO and the reviewing officers.

Significantly, after hearing the Major Dessain's testimony, noting its errors, the IO, like the other officers up the chain of command concluded:

In addition to her involvement with the COC, CPT Hanna made reference to her personal research into Christian philosophy and the development of her own, individual beliefs as to God and morality and her personal moral belief system. I find in the case of CPT Hanna, her opposition to war in all forms is derived from moral, ethical and religious beliefs and that her beliefs are sincerely held."

A.R. at 19.

III. CONCLUSION

Accordingly, for all the reasons described above, I find that there was no "basis in fact" for the DACORB's conclusion that Hanna failed to qualify for CO status. The Army is **PERMANENTLY ENJOINED** from ordering petitioner to active duty.

It is hereby further **ORDERED**: Petitioner's Motion for Temporary Restraining Order (document #4) is **GRANTED**, Petitioner's Motion for Discovery (document #6) is **DENIED**, Petitioner's Second Motion for Temporary Restraining Order (document #8) is **GRANTED**, and Petitioner's Emergency Motion for Preliminary Injunction (document #10) is **MOOT**. Respondent's Motion for Order to Denying Petition for Habeas Corpus (document #20) is **DENIED**.

The parties are to submit an appropriate form of order by October 13, 2006, addressing the language of the final injunction and petitioner's discharge from the military.

SO ORDERED.

Date: October 6, 2006

/s/ Nancy Gertner

NANCY GERTNER, U.S.D.C.