

October 5, 2017

Via E-mail

Mark S. Teskey
Director, Air Force Review Boards Agency
SAF/MRB
1500 W. Perimeter Road
Joint Base Andrews, MD 20762

Subj: Appeal on behalf of Colonel Leland B.H. Bohannon, USAF

Dear Mr. Teskey:

First Liberty Institute represents Colonel Leland B.H. Bohannon, USAF, in this matter. On behalf of Col Bohannon, this letter constitutes our appeal of Brig Gen Paul Tibbets' August 31, 2017 decision on Complaint FC-17-001.

As you are undoubtedly aware, Col Bohannon has devoted more than two decades to the military service of his country. In that time he has flown over 3,300 flight hours, including combat missions in Iraq and Afghanistan. Col Bohannon's service has been exemplary, as evidenced by his many awards and decorations, including the Bronze Star, the Defense Meritorious Service Medal, and the Air Medal. Among Col Bohannon's recent Officer Performance Reports (OPR), Brig Gen Kristen Goodwin ranked him her number one of eleven wing O-6s, and Lt Gen Gregory Biscione ranked him number one of thirty O-6s. In his most recent OPR—just five weeks prior to the incident in question—Lt Gen Anthony Rock ranked Col Bohannon in the top two percent of O-6s over his 35 years of service. And that was while Col Bohannon was serving as Commander of the Air Force Inspection Agency, where his duties included oversight of our nation's Nuclear Surety Inspection program. In short, Col Bohannon has consistently been one of the Air Force's top performers throughout his career.

Factual Background

The Formal EO Complaint

In May 2017, while assigned as the Commander, Air Force Inspection Agency, Kirtland AFB, New Mexico, one of Col Bohannon's senior non-commissioned officers, a Master Sergeant, retired. Four duty days prior to the MSgt's retirement, Col Bohannon was handed several awards and certificates to sign that would be presented to the MSgt at the retirement ceremony. Col Bohannon signed all of the awards and certificates except a certificate of spouse appreciation for the MSgt's same-sex spouse. He was unable to sign because to do so would have caused him to affirm a definition of marriage contrary to his sincerely held religious beliefs.

The absence of clear DOD or USAF guidance to commanders on this issue created a moral and legal dilemma for Col Bohannon. He was unsure of how to balance his legal right to freely exercise his religious beliefs with a request to sign an optional document. Faced with this dilemma, Col Bohannon sought advice and counsel from both his Staff Judge Advocate and his Command Chaplain. The chaplain advised that Col Bohannon should request a religious accommodation excusing him from signing the spouse certificate. Pursuant to this advice, Col Bohannon submitted a religious accommodation request to his superior, Lt Gen Rock. His request was returned six weeks later "without action."

While pursuing the religious accommodation, Col Bohannon simultaneously collaborated with Maj Gen Sami Said, the Air Force Deputy IG, to sign the spouse certificate in his place. In other words, Col Bohannon accommodated his Airman's needs while adhering to his own sincerely held religious beliefs. But upon learning that Col Bohannon did not personally sign the spouse certificate due to his sincerely held religious beliefs, the MSgt filed a formal Equal Opportunity complaint. In his complaint, the MSgt alleged that Col Bohannon unlawfully discriminated against him on the basis of his sexual orientation.

The EO Investigation

The EO investigator concluded the allegations were substantiated, and that Col Bohannon violated AF regulations. Specifically, the EO investigator stated Col Bohannon violated AFI 36-2706, the *Air Force Equal Opportunity Program*, and unlawfully discriminated against the MSgt based on sexual orientation. The EO investigator acknowledged that Col Bohannon sought a religious accommodation, but the investigator stated that *even had the accommodation been granted*, Col Bohannon would nonetheless be guilty of unlawful discrimination.

As a result of the substantiated finding, Lt Gen Rock suspended Col Bohannon from command, withheld his decoration, and submitted a letter to the Air Force Brigadier General promotion board—the rank for which Col Bohannon is eligible—recommending that Col Bohannon not be promoted.

Legal Discrepancies with the EO Investigation

The Defective EO Investigation

The EO investigation is defective for numerous reasons. It is unsupported by law, and the resulting adverse action taken against Col Bohannon should be rescinded and removed from Col Bohannon's record.

First, there is no *legal* right to a spouse certificate of appreciation. AFI 36-3203, *Service Retirements*, paragraph 6.3, states that a spouse certificate “*may* be issued.” Thus, there is no requirement that a commander issue a spouse certificate. Moreover, the Instruction does not require the commander to personally sign a certificate, should one be issued. Neither the MSgt nor his spouse was entitled to receive a spouse certificate. Yet Col Bohannon nevertheless conscientiously worked with his superiors to provide a signed spouse certificate bearing the signature of a two-star general, far superior than one signed by Col Bohannon. In essence, the MSgt's complaint is that the person of his choosing did not sign the certificate, even though the certificate presented was in fact superior as a result of Col Bohannon's efforts to balance his sincerely held religious beliefs with the need to serve all airmen regardless of their beliefs.

Second, the EO complaint itself is defective because it does not comply with the requirements of AFI 36-2706, paragraph 3.15, which requires that “to file a complaint, an individual must be the subject of the alleged unlawful discrimination.” The MSgt is not a proper complainant under this requirement because he was not the subject of the alleged discrimination. As the retiring service member, rather than the spouse of a retiring member, the MSgt is not the intended recipient of a spouse certificate. Accordingly, the complaint should have been dismissed as improper.

Air Force Policy is Contrary to Law

Third, even assuming that the complaint was proper and that the MSgt's spouse was entitled to a certificate, Col Bohannon's actions do not amount to unlawful discrimination. The EO investigator stated that Col Bohannon violated Air Force policy as provided in AFI 36-2706, paragraph 1.1.1: “It is against Air Force policy for any Airman, military or civilian, to unlawfully discriminate against . . . another Airman on the basis of race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age, disability, reprisal, or genetic information.” The Instruction defines “discrimination” as “any unlawfully [sic] action that denies equal opportunity to persons or groups based on their race, color, sex, national origin, or religion.” The Instruction further defines “equal opportunity” as “the right of all Airmen, military or civilian, to equal opportunity in employment, free from discrimination as defined above.”

The United States Air Force's policy that the term “sex” includes sexual orientation is unsupported by law. Congress has repeatedly declined to incorporate sexual orientation into the definition of “sex.” The Air Force policy also stands in stark contrast to the stated position of the United States. In *Zarda v. Altitude Express*, a case currently pending before the United States Court of Appeals for the

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Second Circuit, the United States submitted an amicus curiae brief stating “discrimination because of sexual orientation is not discrimination because of sex.” In other words, the Air Force adopted a dubious policy that is both unsupported by law, and is directly contrary to the positions adopted by Congress and the Executive Branch. The adoption of such a policy would be remarkable in itself, but the fact that the Air Force is now using it to punish a decorated officer is stunning.

Air Force Actions Violate the Constitution, Federal Law, and DOD Regulations

Finally, federal law, and DOD regulations protect Col Bohannon’s right to the free exercise of his religious beliefs. The U.S. Constitution, the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1, and Department of Defense Instruction (DODI) 1300.17 protect service members’ rights of religious expression, including Col Bohannon’s right to express his sincerely held religious beliefs. DODI 1300.17, Accommodation of Religious Practices Within the Military Services, states:

Unless it could have an adverse impact on military readiness, unit cohesion, and good order and discipline, the Military Departments *will* accommodate individual expressions of sincerely held religious beliefs of Service members.

In accordance with this Instruction, Lt Gen Rock should have granted Col Bohannon’s religious accommodation request rather than returning it “without action.” Returning a religious accommodation request “without action” is not one of the options provided by DODI 1300.17.

Moreover, the EO investigator’s statement that “even if [a religious accommodation] were granted, excusing [Col Bohannon] from signing a spouse certificate for same sex marriages, it would not apply in this case” defies comprehension. Such a position renders religious accommodations meaningless. The primary purpose of a religious accommodation is to provide a legal justification for engaging, or refusing to engage, in particular conduct that is motivated by sincerely held religious beliefs. Religious accommodations exist to avoid placing service members in the religious and moral dilemma of having to violate their religious convictions in order to serve.

There is a significant difference between an officer who invokes religious liberty to avoid taking a particular action and one who has a religious objection, but nevertheless endeavors to accomplish the mission in a way that results in a superior outcome for all involved. Forcing Col Bohannon to sign a spouse certificate when his religious beliefs prohibit him from doing so violates federal law and DOD regulations. Refusing to grant Col Bohannon’s request for religious accommodation violates DOD and Air Force regulations. Worse, the adverse actions Col Bohannon has suffered as a result of free exercise violate the Constitution, federal law, and established DOD policy.

Conclusion

For the foregoing reasons, we respectfully request you reverse the substantiated EO complaint and remove any unfavorable materials from Col Bohannon’s service record. We also request the Air Force provide adequate training to commanders on how to deal with these kinds of situations so they are knowledgeable of their rights and better prepared to serve their Airmen. Our desire is to resolve this amicably, and I am willing to discuss this matter in person, if necessary. Should you deny this request, however, we are prepared to take the necessary legal action to vindicate Col Bohannon’s legal rights. I may be reached via e-mail at mberry@firstliberty.org.

Sincerely,



Michael Berry

Deputy General Counsel & Director of Military Affairs