

**MEMORANDUM**

Date: 14 July 2009

From: Naureen Mohammad, Summer Law Clerk

To: Alan Mendelsohn, Deputy Counsel, N00L

Via: Cara Conlin, N00L

Subj: ACCOMMODATION OF THE RELIGIOUS NEEDS OF CIVIL SERVICE MARINERS ONBOARD MSC VESSELS.

Ref: (a) COMSCINST 1730.4B

Issue: Whether Military Sealift Command (MSC) can facilitate religious services for civil servant mariners onboard its ships.

Short Answer: MSC can facilitate private religious exercise by accommodating civil servant mariners who want to attend military lay leader training, conduct religious services or share religious materials while off-duty. MSC's accommodation of private religious exercise should be on a non-discriminatory basis and cannot equate to endorsement of religion. MSC cannot formally appoint civil service mariners as lay leaders.

1. Background

- (a) MSC has two active-duty chaplains in Norfolk and Singapore to serve all of the Command's military and civilian personnel (Reference a). Mariners who serve on long-term deployments do not have access to chaplains or private religious services.
- (b) The Navy Office of the Chief of Chaplains has determined that only members of the military can serve as lay leaders because expanding the program to civilian volunteers could violate the First Amendment prohibition on establishment of religion.<sup>1</sup>

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<sup>1</sup> Captain Robert Williams, Director of Plans, Policy & Operations at the Office of the Chief of Navy Chaplains, stated that his office had determined that allowing civilians to become lay leaders would raise

- (c) The First Amendment states that "Congress shall make no law respecting an establishment of religion."<sup>2</sup> Congress will also make no law "prohibiting the free exercise (of religion)."<sup>3</sup>

## 2. Discussion

- (a) MSC can accommodate the training of off-duty civilian employees who want to learn how to conduct private religious services on MSC ships. Where there are no chaplains available, MSC appoints military lay leaders to provide religious services, but cannot extend the lay leader program to civilians without raising First Amendment concerns.<sup>4</sup> However, the federal government can accommodate civilian employees who want to engage in private religious exercise.<sup>5</sup> In order to learn how to conduct private religious services, some civilians may desire to attend MSC training for military lay leaders. As long as the lay leader training has been organized for the purpose of training members of the military, MSC chaplains can accommodate private religious exercise by permitting off-duty civil servants to attend as well on a space available basis.
- (b) In order for civilians to attend, there cannot be any financial or professional benefits or penalties attached to lay leader training. The federal government cannot take any actions that a reasonable observer would interpret as endorsement of a particular religion, or religion in general.<sup>6</sup> A reasonable observer might assume that the government was endorsing religion if civil servants were paid for time spent in religious training, or if such training reflected positively in their job evaluations. Moreover, an employer is practicing religious discrimination if he or she makes religious

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establishment clause questions and therefore the lay leader program would be restricted to members of the military at this time.

<sup>2</sup> U.S. Const. Amend. 1. This clause is called the Establishment Clause.

<sup>3</sup> *Id.* This clause is commonly referred to as the Free Exercise Clause.

<sup>4</sup> Captain Robert Williams, *supra* note 1.

<sup>5</sup> 3 ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION: RACE, RELIGION AND NATIONAL ORIGIN §92.22(b) (Times Mirror 1988).

<sup>6</sup> See The White House, Guidelines on Religious Exercise and Religious Expression in the Federal Workplace (1997) (available at <http://clinton2.nara.gov/WH/New/html/19970819-3275.html>).

worship a condition for employment or advancement.<sup>7</sup> MSC is not permitted to pay employees for time spent in private religious exercise, or to reward civil servants by providing them with benefits such as promotions or pay increases because they choose to attend lay leader training.

- (c) MSC should accommodate reasonable requests from employees for space and time for conducting religious exercises.<sup>8</sup> A religious accommodation is "reasonable" unless it poses an "undue hardship" to an employer.<sup>9</sup> An employer has an undue hardship if accommodating an employee would result in lost efficiency, additional costs, or denying the shift and job preferences and contractual rights of other employees.<sup>10</sup> Accommodations could include rescheduling work shifts or allowing groups to use certain public areas on MSC ships to conduct religious services.<sup>11</sup> The Command would have an undue hardship if making accommodations interfered with the working of the ship, forced MSC to pay additional wages for another employee, or inconvenienced other employees. While MSC should make religious accommodations for religious exercise by its civilian employees, it is not bound to do so if the accommodations put an undue hardship on the Command.
- (d) MSC should make all accommodations without discriminating between different religious groups. Employment law prohibits the "disparate treatment against an employee . . . because of the religion of the employee."<sup>12</sup> Disparate treatment occurs when an employer "simply treats some people less favorably than others because of their . . . religion."<sup>13</sup> MSC could be accused of disparate treatment if the

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<sup>7</sup> LARSON & LARSON, *supra* note 5 at § 91.44 (Times Mirror 1988). See also *Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985).

<sup>8</sup> *Id.*, § 92.00.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* See also *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

<sup>11</sup> *Id.*

<sup>12</sup> BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 242 (2nd Ed. 1983).

<sup>13</sup> *Id.* at 1286. See also *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring) ("The statute [impermissibly] singles out Sabbath observers for special . . . protection without according similar accommodation to ethical and religious beliefs and practices of other private employees.").

Command gave privileges to members of certain religious groups and not others; for example in rescheduling work hours and assigning areas for religious exercise for certain religious groups and not others. MSC should ensure that it is not accused of disparate treatment.

- (e) MSC chaplains can also supply ships with lay leader instructions that employees can read outside of work hours (Reference a). MSC chaplains supply ships with devotional literature (*Id.*). This can include the instruction manuals that military lay leaders use when conducting religious services. Civilians onboard MSC ships are also free to read such materials in their own time, and can use them to organize unofficial religious services.
- (f) Civilian mariners must practice their religious beliefs privately and not in any official capacity. The federal government is not permitted to officially endorse any one religion, or religion in general.<sup>14</sup> If religious groups are permitted to use official channels of communication in order to organize and conduct religious services, a reasonable observer may assume that MSC is impermissibly endorsing that religious group. Therefore, civil servant mariners should not be permitted to use official channels of communication.
- (g) Finally, while MSC can facilitate private religious exercise, the Command cannot formally appoint civil servant mariners to be lay leaders. The Supreme Court allows the federal government to accommodate private religious exercise, but prohibits the government from determining the content of private religious exercise.<sup>15</sup> In the lay leader program, government chaplains train members of the military to perform religious rituals and conduct religious services. This would normally be an impermissible example of the government determining the content of religious exercise. However, the military has special exemptions from the First Amendment because courts have determined that providing religious services to

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<sup>14</sup> The White House, Guidelines on Religious Exercise and Religious Expression in the Federal Workplace (1997) (available at <http://clinton2.nara.gov/WH/New/html/19970819-3275.html>).

<sup>15</sup> Wallace v. Jaffee, 472 U.S. 38, 76-79 (1985).

servicemen and women is necessary to achieving legitimate military ends.<sup>16</sup> Civilian employees are not given the same exemptions and MSC cannot provide civil servant mariners with the same religious services that the Command provides members of the military. MSC therefore cannot appoint civilians to be lay leaders.

### 3. Conclusion

- (a) The federal government is permitted to facilitate private religious exercise for its civilian employees by allowing off-duty civilians to attend training for military lay leaders on a space available basis, but cannot provide any financial or professional benefits to the civilians who choose to attend. MSC may also accommodate requests from civil servant mariners for space and time for religious exercise, as long as such requests do not pose an undue burden on the government. Moreover, MSC chaplains can facilitate private religious exercise by providing ships with religious literature for civilians to utilize while off-duty.
- (b) However, any facilitation or accommodation of religion cannot favor certain religious groups over others because anti-discrimination laws prohibit the disparate treatment of employees based on their religious beliefs. MSC also cannot allow civilian religious groups to use official channels of communication as such actions may imply that MSC is impermissibly endorsing religion. Finally, MSC cannot officially create a civilian lay leader program. Although the military is allowed to set the content of religious exercise through the chaplaincy and lay leader programs, this privilege is limited to members of the military. MSC cannot extend these exceptions to civil servants and therefore cannot create a civilian lay leader program.

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<sup>16</sup> Katcoff v. Marsh, 755 F.2d 223, 232 (2nd Cir. 1985).