

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 06-11434 NG

_____	)
MARY HANNA, M.D.,	)
Captain, U.S. Army Reserve,	)
	)
Petitioner	)
	)
V.	)
	)
SECRETARY OF THE	)
ARMY, and COMMANDER,	)
94 <sup>th</sup> Regional Readiness	)
Command, Fort Devens,	)
Massachusetts	)
	)
Respondents.	)
_____	)

PETITIONER’S RESPONSE TO RESPONDENTS’ OPPOSITION  
TO PETITION FOR WRIT OF HABEAS CORPUS

Now comes Mary Hanna, M.D., the petitioner in the above-referenced case, and respectfully moves that this Court grant a writ of habeas corpus. The government has no legally sufficient basis in fact to deny her claim for discharge as a conscientious objector and therefore her petition for a writ of habeas corpus should be granted.

STATEMENT OF FACTS

Petitioner is an inactive reservist residing in Massachusetts who applied for discharge as a conscientious objector on December 22, 2005. Her residency training did not end until July 31, 2006. She received orders to report for duty with a reporting date of August 14, 2006.

Petitioner’s application was recommended for approval by the Investigating

Officer in her case. The Investigating Officer reviewed the chaplain's report, reviewed the psychiatrist's report, heard the testimony of the psychiatrist under oath, heard sworn testimony of two priests of petitioner's faith who have known petitioner for years and are experts on the Coptic Orthodox Church, reviewed the letters of support and other documents submitted by petitioner, and heard the testimony of petitioner and subjected her to cross-examination under oath. The Investigating Officer is an attorney selected by the Army.

Thereafter Dr. Hanna's application was recommended for approval by Brigadier General Todd T. Semonite, Commanding General at Fort Leonard Wood, Missouri. He stated he had "thoroughly reviewed the application" before making his recommendation for approval and set forth his reasons as follows [AR 4<sup>1</sup>]:

I recommend approval of her request.

I find, based on the record, that CPT Hanna's asserted moral and religious objections are sincerely held. 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 investigation and they do not appear to have been born of a desire to avoid service. She has put forth clear and convincing evidence that she is opposed to participation in war in any form based on her religious, moral and ethical beliefs.

According to Colonel Jerry Linn, Staff Judge Advocate and main legal advisor to the Commanding General, Fort Leonard Wood, Missouri, writing to his Commanding General [AR 6]:

... The command ... recommends that you approve the request [for discharge as a conscientious objector].

... The investigating officer found that CPT Hanna holds a fixed and sincere objection, based on religious beliefs, to participation

---

<sup>1</sup> References to "AR \_\_\_" are to pages in the Administrative Record submitted by the government.

in war or the bearing of arms. Statements from priests within her church support her assertion. The [investigating officer] IO found that CPT Hanna's beliefs became fixed after the death of her father, an Egyptian military officer, in May 2003. According to CPT Hanna, her father was very proud of her decision to join the Army. After his death she felt free to consider the contradiction in her religious beliefs and the Army mission. The IO also found that CPT Hanna's commitment to the peaceful resolution of conflict within her daily life constitutes clear and convincing evidence that she lives a lifestyle consistent with her religious beliefs. He further found that her application is not a means to avoid her military commitment.

... The evidence supports the findings of the investigating officer. The conclusions and recommendations of the investigating officer are consistent with the findings.

... I recommend that you approve CPT Hanna's application for conscientious objector status (1-0). 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.

The record also contains the analysis of the Human Resources Command at St. Louis, Missouri. Captain Kent E. Duncan, a Judge Advocate, in the office of the Command Judge Advocate (legal counsel to the Commander, Human Resources Command) wrote a two-page memorandum for the Deputy Command Judge Advocate and for the Command Judge Advocate. According to Captain Duncan:

In the present case, the investigating officer (IO) concluded that CPT Hanna provided clear and convincing evidence that she is opposed to participation in war in any form, that her beliefs manifested after she entered the military, and that her objections are sincere and deeply held. Specifically, the 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 teaching of Christ. As to when her beliefs became fixed, statements provided by CPT Hanna and others indicate that following the May 2003 death of her father, a former Egyptian military officer immensely proud of her decision to enter the US Army, CPT Hanna finally felt free to more fully explore her evolving religious beliefs and came to the realization that she opposes violence and war in any form. The IO further found that CPT Hanna's devotion to the COC and her commitment to the peaceful resolution of issues in her daily life constitute clear and convincing evidence that she lives a lifestyle consistent with her religious beliefs. Finally, the IO opined that CPT Hanna is seeking conscientious objector status and discharge as a means to manifest her stated moral opposition to violence and war in any form, and not as a means to avoid her military commitment.

Captain Duncan provided his military attorney superiors with recommendation memoranda which they endorsed. AR 9-10.

Colonel Robert Marsh, commander of the Human Resources Command, St. Louis, Missouri, recommended approval of CPT Hanna's CO application for reasons stated in a detailed two-page memorandum. AR 7-8. According to Colonel Marsh, "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." He also found that "CPT Hanna has provided clear and convincing evidence supporting her request for conscientious objector (CO) status and discharge. The documentation and evidence CPT 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."

However, on September 15, 2006 by a vote of 2 to 1 the Conscientious Objector

Review Board (hereinafter the “CORB”) voted to deny petitioner’s conscientious objector application. The Staff Judge Advocate (attorney) on the Board voted in favor of approving Petitioner’s application for discharge.

Petitioner’s request for habeas corpus relief should be granted because the Respondents have no legally sufficient basis in fact for denial of petitioner’s conscientious objector claim.

#### THE LEGAL STANDARD

The basis in fact standard is not without teeth. As stated by the U.S. Court of Appeals for the First Circuit in Hager v. Secretary of the Air Force, 938 F. 2d 1449, 1454 (1<sup>st</sup> Cir. 1991):

The Secretary’s denial of the application must be supported by a statement of reasons ... and will be upheld on review if there is a “basis in fact” for the decision. ... [A]lthough this standard of review is a narrow one, it is not toothless. 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 substantially blurs the picture painted by the applicant. [Emphasis added] [Citations omitted]

Furthermore, a legally sufficient basis in fact must be “honest and rational”, Goldstein v. Middendorf, 535 F. 2d 1339, at 1344, citing Corliss v. United States, 280 F.2d 808 (2d Cir.), cert. denied, 364 U.S. 884 (1960). In addition, if a military official rules against a claimant on impermissible grounds, and thereby “display[s] . . . ignorance of the permissible bases for denying a C.O. claim”, that use of impermissible grounds can “strongly suggest that many of his conclusions were unreliable because they were either infected with bias or based upon ignorance.” Middendorf v. Goldstein, 535 F. 2d 1339, 1344 (1<sup>st</sup> Cir. 1976).

Although the federal courts have afforded ordinary military personnel decisions substantial deference, conscientious objector cases are different, because they involve questions of religious belief rather than the exercise of military judgment. The U.S. Court of Appeals for the First Circuit has therefore never hesitated to reverse denials of writs of habeas corpus when the administrative record contains no basis in fact to support the reasons for the military's denial of conscientious objector status. In each of the following cases the First Circuit reversed the military's denial of conscientious objector status: Hager v. Secretary of the Air Force, 938 F.2d 1449 (1<sup>st</sup> Cir. 1991); Lobis v. Secretary of the United States Air Force, 519 F.2d. 304 (1st Cir. 1975); Walshe v. Toole, 663 F.2d 320 (1st Cir. 1981); Goldstein v. Middendorf, 535 F.2d 1339 (1st Cir. 1976); Armstrong v. Laird, 456 F. 2d 521 (1st Cir. 1972), and Bates v. Commander, First Coast Guard District, 413 F.2d 475 (1<sup>st</sup> Cir. 1969). Indeed, of the First Circuit's seven published cases ruling on the merits of a challenge to the military's denial of conscientious objector status, only one affirms a district court's denial of a writ of habeas corpus. Rosenfeld v. Rumble, 515 F.2d 498 (1<sup>st</sup> Cir. 1975). The other six cases, cited above, each reverse the denial of the writ of habeas corpus by the district court.

#### THE STATE OF THE ADMINISTRATIVE RECORD

This Court issued an order seeking clarification from the parties in the form of answering specific questions concerning the administrative record in this case. Petitioner submitted responses to each of the Court's specific questions, but the Respondents did not do so. Instead, the respondents filed a record which is incomplete and which they call the "official administrative record". However, there are additional records considered by the CORB which were not provided to the Court by respondents. These records include

the paperwork generated by the 99th Regional Readiness Command, Fort Devens, Massachusetts, the tape recording of the hearing before the Investigating Officer, and the emails sent by Army officials to the psychiatrist and chaplain, which petitioner believes, with good cause, indicate bias by Army officials against petitioner. The respondents' certification of the administrative record provided is not signed by a personnel specialist, and is instead signed by an attorney, and fails to state that the pages provided are all the pages reviewed by the CORB and constitute a complete record. This Honorable Court should compel the respondents to produce a complete record and not allow the government to provide to the Court an incomplete record that omits the material specified above by petitioner, and including testimony of the hearing highly favorable to Petitioner.

#### ARGUMENT

Petitioner has met the long-established test for conscientious objector status. Petitioner has shown that she is conscientiously opposed to war in any form; that her opposition is based upon religious training and belief; and that her objection is sincere. Hager v. Secretary of the Air Force, 938 F.2d 1449, 1454 (1<sup>st</sup> Cir. 1991); Lobis v. Secretary of the United States Air Force, 519 F.2d. 304 (1st Cir. 1975); Walshe v. Toole, 663 F.2d 320 (1st Cir. 1981); Goldstein v. Middendorf, 535 F.2d 1339 (1st Cir. 1976); Armstrong v. Laird, 456 F. 2d 521, 522 (1st Cir. 1972); Borkenhagen v. Laird, 392 F. Supp. 637 (D. Mass. 1975); Solomon v. Seamans, 331 F. Supp. 1099 (D. Ma. 1971); Reinhold v. Schlesinger, 379 F. Supp. 638 (D. Ma. 1974); Silverman v. Laird, 339 F. Supp. 876, 878 (D. Ma. 1972).

Because petitioner has established a prima facie case of conscientious objection to participation in war in any form, the respondents must show a legally sufficient basis in

fact in order to deny her conscientious objector claim. The respondents have shown no such basis in fact.

A. The chaplain's report and the psychiatrist's report do not constitute a basis in fact for denial.

Neither the chaplain's report nor the psychiatrist's report states a basis in fact for denial. The chaplain's evaluation of insincerity is biased against petitioner, is accompanied by explicit reliance upon facts that are, at best, irrelevant, and at worst indicative of bias, and gives an inaccurate portrayal of the Coptic Orthodox Church<sup>2</sup>. The chaplain's evaluation of sincerity surrounded by "such indicia of unreliability" must not be viewed as furnishing a basis-in-fact. Goldstein v. Middendorf, 535 F. 2d 1339, 1341 (1<sup>st</sup> Cir. 1976). Furthermore, the psychiatrist's report also does not provide a legally sufficient basis in fact because the report was biased against petitioner, and highly inaccurate as found by the Investigating Officer.

The Impact of the Colonel John Powers Memorandum Upon the Chaplain's Report and the Psychiatrist Report

Prior to interviewing Petitioner, the chaplain and the psychiatrist were provided with a copy of the Colonel John Powers memorandum, AR 36-67; Appx. 19-50. That memorandum is four pages in length, and with attachments is 31 pages in length. That memorandum is highly biased against petitioner, and raises issues that are irrelevant and indicative of bias. The memorandum states "The Army is under strength in anesthesiologists", AR 36. This is a factor irrelevant to determining whether petitioner is

---

<sup>2</sup> Although petitioner requested the attendance of the chaplain at the CO hearing, that was denied as the chaplain was en route to Kuwait at that time. Thus petitioner was unable to cross-examine the chaplain and instead offered persuasive contrary evidence at the conscientious objector hearing concerning the position of the Coptic Orthodox Church with respect to conscientious objection.

or is not a conscientious objector and indicates to the military reader that for the good of the Army the petitioner's conscientious objector application should be denied. The memorandum questions the sincerity of petitioner because of her choice of legal counsel, although petitioner is entitled to seek legal advice from an attorney of her selection and her choice of counsel is a matter not relevant to a conscientious objector determination. Goldstein v. Middendorf, 535 F.2d 1339, 1342 (1<sup>st</sup> Cir. 1976) (“...we think it is impermissible for any negative inference about an applicant's sincerity to be drawn from his attempts to procure legal advice from whatever source.”). The Colonel Powers memorandum contains many pages about the Army financing of petitioner's medical school education (1997-2001), including photocopies of checks to Tufts Medical School from military officials to pay for Dr. Hanna's medical education, even though the amount of money that she received is not a legitimate factor to be considered in determining conscientious objector status. It is impermissible that the Colonel Powers memorandum raised these issues, and the effect of the Colonel Powers memorandum was devastating in this case. It led to a grossly distorted conscientious objector process in this case, and more particularly to manifest bias and hostility toward petitioner by the chaplain and the psychiatrist. Petitioner was subjected to extremely hostile interviews by these two persons. The psychiatrist testified at the hearing that it was “unfortunate” that he had read the Colonel Powers memorandum prior to interviewing petitioner. He also admitted that his report was inaccurate, and the Investigating Officer so found.

In addition, the psychiatrist's report violates Army Regulation 600-43. The psychiatrist in this case was required by regulation to determine the petitioner's mental status, not to make a determination on her sincerity. To conduct a mental status

examination in a conscientious objector case, an Army psychiatrist typically fills out a mental status form provided by the Army. This form is referred to in this case on a checklist found at AR 14, listing 9 e, namely, DA Form 3822-R (Report of Mental Status Evaluation). A blank DA Form 3822-R is attached hereto as an Exhibit (2 pages). Here, however, the psychiatrist did not fill out the mental status form and instead, having been adversely influenced and infected with bias against petitioner by Colonel Powers' 31 pages of memorandum and attachments, AR 36-67, Appx. 19-50, wrote a lengthy, derogatory and inaccurate report about petitioner, which he later largely retracted at the Investigating Officer's hearing. The psychiatrist irrationally believed petitioner to be insincere because petitioner stated to him that she is willing and wants to repay the Army for her education. The psychiatrist writes of petitioner's desire to repay the government as follows, with an exclamation mark and internal quotations supplied by him: "She also claims to choose the route of "repay her debt with interest" now that she has inalienably become a fully and permanently licensed physician!" This statement by the psychiatrist is factually inaccurate, however. Petitioner was not "inalienably" a "fully licensed" or "permanently licensed" physician. He makes other factual errors in his report which he admitted to at the hearing and which the Investigating Officer refers to in his report. The psychiatrist wrongly stated that petitioner will finish her residency training in early July 2006, that she has 50 cousins, and that she suffers from a "disorder", which is not accurate and such information was not obtained from petitioner. He testified that the word "rage" in his report was his interpretation and not what Dr. Hanna said. He admitted that petitioner did not suffer from an ovarian "disorder" but from a disease. He backed off at the hearing from his written statement that Dr. Hanna was overweight and

walked slow. He admitted at the hearing that Dr. Hanna never said that she had a “chief complaint” and never said that her complaint was “I am unable to function in the military because of my faith”, even though the psychiatrist put that in quotation marks in his report as being her “chief complaint”. Appx. 16. He admitted at the hearing that Dr. Hanna had not said that her beliefs were based upon personal convictions rather than religious beliefs, and admitted that what she said was that her religious beliefs were her own and not those followed by every member of her religion.

The chaplain was also adversely influenced by the Colonel Powers memorandum. The chaplain embarked upon a quest to find information with which to deny petitioner’s claim, rather than interviewing petitioner as required under regulation. AR 600-43 does not authorize the chaplain to perform an investigation, but here the chaplain claims to have talked to two priests at petitioner’s church. He told petitioner that he had done so by telephone. He does not identify these priests by name (thus making it impossible for petitioner to contact these individuals), and what he claimed to have learned from them is in fact incorrect with respect to what the teaching of the Church are. The chaplain claims that the Christian Orthodox Church does not “teach pacifism” but the COC religion is based upon the teachings of Jesus Christ and the Church, as testified to at the CO hearing by two priests, supports those who become conscientious objectors. Many saints of the Church were warriors first and later became saints (like St. Thomas Aquinas of the Catholic Church). The two priests testified at the hearing that Dr. Hanna was correct in her interpretation of religious faith, and that her Church and its teachings support those whose conscience calls them to conscientiously object to participation in war in any form. Each of these priests testified that Dr. Hanna is sincere and a conscientious objector. Dr.

Hanna also presented documentary evidence at the hearing to support her view of the church. Thus, the CORB member's reliance upon "the [anonymous] priest" contacted by the chaplain to provide a basis in fact for denial, is misplaced because such reliance is based upon the chaplain's report which is unreliable and biased, and is contrary to the evidence of record concerning the Christian Coptic Church. The chaplain's report also is based upon ignorance of what is required to be a conscientious objector. There is no requirement that to be a conscientious objector one must be a member of a church that "teaches pacifism"; however, the chaplain erroneously believed this is a requirement.

Other considerations pertaining to the chaplain's report

Furthermore, the chaplain's report is based upon irrelevant considerations, at best, and at worst, considerations indicative of bias, in stating the following:

I find CPT Hanna's 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.

Here the chaplain impermissibly substitutes his own views on abortion for those of petitioner, and makes his views of what he believes petitioner should do concerning abortion a key reason to find her insincere. In Middendorf v. Goldstein, the hearing officer ruled against the conscientious objector applicant finding that the applicant's views on abortion and euthanasia were "incongruous" for a conscientious objector and "manifestly incompatible" with the applicant's avowed conscientious objector beliefs. The First Circuit found that the hearing officer's view was flawed because "it appears

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 issues were the correct ones.” The chaplain’s report in Dr. Hanna’s case is similarly flawed, and should be rejected by this Court. Moreover, the chaplain distorts Dr. Hanna’s views<sup>3</sup>. She was questioned closely by the Investigating Officer at the hearing on this matter, and the Investigating Officer found her testimony credible and not in any way inconsistent with being a conscientious objector.

B. The Respondent Secretary’s reasons advanced by the CORB do not constitute a basis in fact for denial and are the only basis in fact that should be litigated before this Court.

The Respondent Secretary is bound by the reasons given by the CORB for denial of petitioner’s conscientious objector application. A court may only review the record for a basis in fact to support the reasons the Army gave for denying the petitioner’s application for conscientious objector status; it cannot supply such a reason itself. A clear understanding of the Army’s actual reasons for denying petitioner’s application is essential, because this Court’s task – and ultimately its only authority in a case such as this – is to determine whether those reasons are supported by a “basis in fact.” Every decision of the First Circuit on the burden of proof in military habeas petitions challenging the decision of a service branch to deny a CO application has implicitly followed this rule. In none of the First Circuit cases did the Court proceed to search the record for evidence that could have supported the Secretary’s denial in those cases. Instead, the Court limited its review in each case to evaluating whether there were facts to support the specific reasons given by the Secretary for denying conscientious objector

---

<sup>3</sup> The chaplain also misconstrues Dr. Hanna’s statements about tithing. AR 32. In her CO claim Dr. Hanna mentioned changes in her lifestyle and did not claim she had only begun to tithe after she became a CO. AR 80.

status.

Other circuits have also followed this approach, making explicit that it is legally correct. See Sanger v. Seamans, 507 F.2d 814,817 (9<sup>th</sup> Cir. 1974) (“the reviewing court must know the reasons for the adverse decision in order adequately to review the Secretary’s decision within the narrow scope permitted). As the Fourth Circuit has explained, the reason for denial “must be made manifest in the decision itself. It will not do to leave the point in a state of ambiguity until some future day when government lawyers may devise an explanatory dissertation for inclusion in a defensive brief.” Pecket v. Lutz, 451 F. 2d 366, 370 (4<sup>th</sup> Cir. 1971).

In the instant case, the reasons for the Secretary’s denial are found only in the statements by two members of the CORB. The statements of reasons in the record by the two members of the CORB who voted against petitioner do not provide a basis in fact for denial.

1. The chaplain member’s reasons for denial do not constitute a basis in fact.

The chaplain member of the Conscientious Objector Review Board wrote as his reasons for denial:

The statements of 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. Also, here timing is too convenient with completion of her schooling and her entrance on AD [active duty].

These reasons do not constitute a basis in fact for denial, they demonstrate ignorance of requirements for conscientious objector status, and these reasons are contrary to the facts of record.

Under law, a person does not have to be a member of a church that teaches

pacifism in order to qualify for discharge as a conscientious objector. Welsh v United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965). Furthermore, petitioner nowhere in the record asserts that she belongs to a church that “teaches pacifism.” Thus both the chaplain member of the CORB and the chaplain who interviewed petitioner wrongly, arbitrarily and capriciously distort the record and substitute their own mistaken view of the law and the facts of this case for what is required to qualify for conscientious objection under AR 600-43. A person need not be a member of a pacifist religious body in order to qualify for discharge as a conscientious objector. The chaplain member of the CORB’s reason for denial therefore shows ignorance, is irrational, and is arbitrary, capricious, not based upon law or regulation, and does not rise to the level of basis in fact for denial.

Furthermore, the record shows that “the priest” relied upon by the CORB member is evidently the anonymous priest mentioned in the chaplain’s report with whom the chaplain spoke by telephone prior to the chaplain interviewing petitioner. It is highly irregular and unusual for a chaplain to engage in such an investigation, because that is the province of the Investigating Officer under AR 600-43. But this chaplain had reviewed Colonel John Powers’ memorandum, which obviously affected his manner of conducting his assessment of petitioner, to include engaging in pre-interview investigative phone calls. The resulting chaplain’s report is so replete with bias against petitioner, that nothing set forth in that report rises to the level of basis in fact for denial. Middendorf v. Goldstein, 535 F. 2d 1339 (1<sup>st</sup> Cir. 1976). Thus, the CORB Chaplain member’s reliance upon “the priest” does not rise to the level of a basis in fact for denial.

In addition, the reference to “the priest” is contrary to the evidence of record

introduced at the CO hearing and therefore subject to questioning and analysis by the Investigating Officer. As stated by Colonel Jerry Linn, “Statements from priests within her church support her assertion.” (AR 6). Brigadier General Todd T. Semonite recommended approval of petitioner’s CO claim, explaining that his conclusion is based on “... the opinions of the leaders of her church.” (AR 4). Captain Kent E. Duncan, Judge Advocate, found that Dr. Hanna’s conscientious objector beliefs were consistent with “the Church’s doctrine that its members should emulate the peaceful teachings of Christ.” AR 9.

Furthermore, the “leads me to believe” statement above by the chaplain member of the CORB is sheer conjecture, speculation, suspicion and surmise and not a basis in fact. The added statement “merely religious conviction” tends to diminish the importance of the First Amendment and religious conviction.

The statement as to timing by the CORB member is not based upon fact and is contrary to the evidence of record. Dr. Hanna filed her application for discharge early rather than late. She filed for discharge on December 22, 2006, and she was not required to report for duty until her residency ended on July 31, 2006. Thus Dr. Hanna filed for discharge more than eight months before she would be required to report for active duty. In other cases the First Circuit has found that persons facing more imminent orders nonetheless offered plausible explanation for the crystallization of beliefs. In Hager v. Secretary the applicant filed for discharge only two months before being called to active duty. The First Circuit found that Dr. Hager was not insincere because he had plausible explanation for the timing of his application:

We can only conclude that the chaplain’s doubts about Dr. Hager’s sincerity are based on the timing of the crystallization of

his conscientious objector beliefs. It is universally the law, however, that late crystallization of conscientious beliefs convictions is not a sufficient basis in fact to reject the claim.

938 F.2d 1449, at 1455, citing Lobis v. Secretary of the United States Air Force, 519 F.2d at 304, Shaffer v. Schlesinger, 531 F.2d 130 (“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”); and United States v. Turcoste, 487 F.2d 417, 42121 (5<sup>th</sup> Cir. 1971) (same); Smith v. Laird, 486 F.2d at 311 (same).

Dr. Hanna explained the timing of her request for discharge and her explanations, including the impact of her father’s death in 2003, were found to be credible by the Investigating Officer and by others including General Semonite and Colonel March.

In addition, the letter relied upon by the Army in claiming that the timing indicates insincerity is dated October 20, 2005, and the Army has no information whatsoever to prove that Dr. Hanna’s conscientious objector beliefs crystallized after receipt of that letter as opposed to before the letter was received by her. The matter of timing, therefore, is speculation and surmise on the part of respondents, particularly where here the Investigating Officer evaluated Dr. Hanna’s responses to his questions over a period of hours and found that the timing of her application was not a basis to find her insincere. The record is replete with analysis that timing in this case is not a basis for a finding of insincerity.

As to when her beliefs became fixed, statements provided by CPT Hanna and others indicate that following the May 2003 death of her father, a former Egyptian military officer immensely proud of her decision to enter the U.S. Army, CPT Hanna finally felt free to more fully explore her evolving religious beliefs and came to the realization that she opposes violence and war in any form.

AR 9-10, Captain Duncan, Assistant Command Judge Advocate.

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.

AR 7, Colonel Robert T. Marsh, Commander, U.S. Army Human Resources Command

The recommendations to the Board were unanimous in finding that CPT Hanna “is seeking conscientious objector status and discharge as a means to manifest her stated moral opposition to violence and war in any form, and not as a means to avoid her military commitment.” [emphasis added.]

Thus the Secretary’s reasons, as stated by the chaplain member of the CORB, are arbitrary, capricious, not based upon provable objective fact, and do not provide legally sufficient basis in fact for denial.

2. The president of the CORB’s reasons for denial do not constitute a basis in fact.

The second and last vote for denial was from the president of the CORB, who states his reasons as follows:

Applicant has shown that she is a devout Coptic Christian but has failed to show that she sincerely meets the CO criterion. Her statements are logical but lack passion and sincerity. They appear as repetitious rather than personally held beliefs.

This statement contains no provable, hard facts that rebut the prima facie case established by petitioner. This statement is conjecture, surmise, and opinion, with no supporting factual basis. This statement should be rejected by this Court, because the rationale does not rise to the level of a basis in fact for denial. Furthermore, this unfounded statement is contrary to the evidence of record. As stated by Colonel Jerry Linn, Staff Judge Advocate: “The investigating officer conducted a thorough inquiry into [petitioner’s]

convictions.” AR 6. And the Investigating Officer stated in his report, “I found CPT Hanna to be sincere and very credible.” AR19, He further explained: “I was impressed by CPT Hanna’s sincere expressions of her beliefs and here interaction with Father Bishara (in person) and Father Henein (by telephone) at the hearing.” AR 19.

Furthermore, there is no legal requirement that a CO applicant hold beliefs with “passion” and use of this criterion renders the rationale flawed. Also, the use of the word “appear” shows that the President of the CORB was rendering a subjective opinion not based on objective, provable facts. AR 3. The President of the CORB did not interview and observe Dr. Hanna. He never saw her interaction with priests of her religious faith. The rationale articulated by the President of the CORB for voting to deny petitioner CO status is arbitrary, capricious and indicative of bias for it is contrary to the evidence before the CORB that petitioner sincerely meets all requirements of the Army’s conscientious objector regulation and that she meets the standard by clear and convincing evidence. Nowhere in their brief in opposition do the respondents provide any proof that Dr. Hanna’s statements are “repetitious rather than personally held beliefs” and there is none.

Other than the two short explanations of reasons quoted above, the Secretary has put forward no other reasons to deny petitioner’s claim for discharge. None of the CORB members’ reasons provide a legally sufficient basis in fact for denial, and thus the petitioner should be granted conscientious objector status.

C. The additional reasons advanced by Respondents’ attorneys in their opposition were not reasons for denial by the Secretary of the Army and should therefore be rejected by this Court. In any event, the reasons devised by the government’s attorneys after the CORB’s decision do not constitute a basis in fact for denial either.

The respondents claim in their Opposition that there are other alleged bases in fact

for denial. These are not reasons stated by the CORB. The additional alleged bases in fact are merely government lawyers devising, after the submission of the Secretary of his reasons, “an explanatory dissertation for inclusion in a defensive brief.” Pecket v. Lutz, 451 F. 2d 366, 370 (4<sup>th</sup> Cir. 1971).

In any event, it is not a basis in fact for denial that petitioner said she was not a conscientious objector when she signed the Health Professions Scholarship Program agreement in 1997. Nor is it a basis in fact for denial that petitioner has been religious most of her life. Nor did the petitioner make contradictory statements as alleged by the government’s attorneys. To the contrary, the hearing officer carefully went over all matters raised by the Colonel Powers memorandum, and now addressed in the government’s opposition, and rejected each of them for good cause. At the hearing, Dr. Hanna addressed each of those issues on the record and under oath. Furthermore, in the First Circuit an applicant’s change in lifestyle is the least important factor in determining conscientious objector status, and change in lifestyle for physicians is addressed in Hager v. Secretary of the Air Force as being “of minor significance at best”. 938 F.2d 1449, at 1457. Here, as in Hager, Dr. Hanna does not have a lifestyle incompatible with sincerely held CO beliefs.

#### CONCLUSION

Because petitioner has demonstrated that she is sincerely a conscientious objector to participation in war in any form, and because the respondents have failed to show a legally sufficient basis in fact for denial, the Petitioner’s petition for a writ of habeas corpus should be granted.

Respectfully submitted,

MARY HANNA, M.D.

By her attorney,

s/Louis P. Font  
LOUIS P. FONT  
BBO No. 173940  
FONT & GLAZER  
62 Harvard Street  
Suite 100  
Brookline, MA. 02445  
(617) 739-2300 (office)  
(617) 739-6196 (fax)

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), on this 5<sup>th</sup> day of October 2006.

s/Louis P. Font  
LOUIS P. FONT