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UNITED STATES DISTRICT COURTS OFFICE  
DISTRICT OF MASSACHUSETTS  
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Civil Action No.  
U.S. DISTRICT COURT  
DISTRICT OF MASS.

\_\_\_\_\_  
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.  
\_\_\_\_\_

06 - 11434 NG

PETITIONER'S MEMORANDUM IN SUPPORT OF  
PETITIONER'S MOTION FOR A TEMPORARY RESTRAINING ORDER

Petitioner more than meets the legal standard for the granting of a temporary restraining order.

I. Legal Standard

The purpose of a temporary restraining order is to prevent a threatened wrong or injury until merits of the complaint can be addressed. A petitioner must satisfy four criteria in order to be entitled to injunctive relief: (1) that petitioner will suffer irreparable injury if the injunction is not granted, (2) that such injury outweighs any harm which

granting injunctive relief would inflict on the respondent; (3) that petitioner has exhibited a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by the granting of the injunction. Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006, 1009 (1<sup>st</sup> Cir. 1981) quoting, Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542, 544 (D. Me. 1979); Garcia v. I.N.S., 2002 WL 1889172 (D.R.I. 2002).

Petitioner's entitlement to recognition of her status as a Conscientious Objector is well established by federal law, an implicit recognition of the importance of a Conscientious Objector's freedom of expression and freedom of religion under the First Amendment. In discussing conscientious objection, the United States Supreme Court observed in United States v. Seeger:

Chief Justice Hughes ... enunciated the rationale behind the long recognition of conscientious objection to participation in war accorded by Congress in our various conscription laws when he declared that "in the forum of conscience, duty to a moral power higher than the State has always been maintained." In a similar vein Harlan Fiske Stone, later Chief Justice, drew from the Nation's past when he declared that "both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process.

380 U.S. 163, 169 (citations omitted).

respondents' ordering of petitioner to active duty in bad faith rather than having expeditiously processed her claim for discharge as required under Army regulation 600-43, threatens her "significant" and "vital" Conscientious Objector rights, and this Court should grant appropriate relief to preserve those rights and protect petitioner from unlawful retaliation and unlawful orders.

1. Petitioner will Suffer Immediate, Irreparable Injury If This Temporary Restraining Order is Not Granted.

If the temporary restraining order is not granted, irreparable harm will result to her. If petitioner is required to report for active duty, it is inevitable that she will be given military orders that conflict with her conscientious objector beliefs. Based upon her strongly held religious beliefs, petitioner cannot participate in war in any form. As a result, she will be subjected to disobeying orders resulting in almost certain severe criminal penalties. Each disobedience of a direct order subjects a service member to a potential penalty of five years in prison and a federal felony conviction. Thus, she will be persecuted for her conscientious objector beliefs.

The injury that petitioner will suffer is also irreparable because without injunctive relief petitioner will begin 48 months of active Army service immediately, and if her involuntary military service is ultimately found to have been improper, she will have no claim for damages. Patton v. Dole, 806 F.2d 24, 28 (2<sup>nd</sup> Cir. 1986) (injunctive relief granted against Navy and other officials where induction to active duty for 24 months constituted irreparable harm; finding that military personnel cannot sue for monetary or other damages).

Furthermore, petitioner's claims under the Fifth Amendment satisfy the requirement of irreparable harm. A showing of a possible violation of constitutional

rights constitutes irreparable harm justifying a preliminary injunction. The Supreme Court held that when reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being impaired or threatened, a finding of irreparable injury is mandated. Elrod v. Burns, 427 U.S. 347, 373 (1976). See also American Civil Liberties Union of Kentucky v. McCreary County, 354 F.3d 438 (6<sup>th</sup> Cir. 2003); Able v. United States, 847 F. Supp. 1038 (E.D. N.Y. 1994).

Finally, petitioner contends she is being ordered to active duty, contrary to Army Regulations and contrary to the recommendation of the Investigating Officer that she be designated a conscientious objector and discharged from military service (1-0 status), as a result of bad faith and in retaliation for having exercised her First Amendment right to petition the government for Conscientious Objector status. This constitutes retaliation in derogation of First Amendment rights. Rankin v. McPherson, 483 U.S. 378 (1987). It is well settled that the burdening of First Amendment rights is *per se* irreparable injury. A finding of irreparable harm is presumed if First Amendment rights are threatened or impaired. Elrod v. Burns, 427 U.S. 347, 373 (1976).

2. The Balance of Any Harm Weighs in Favor of Petitioner.

Harm to the respondents from granting a temporary restraining order will be miniscule, if any, while the harm to petitioner is massive, as explained above. This petitioner is a classic, pacifist CO, and if required to report for duty there are services she cannot perform for the military. Therefore, her presence on active duty will not confer any benefit upon the military and instead would confer an administrative and legal liability to the armed forces. The military is better off without petitioner, a conscientious

objector, in the ranks. See Dougherty v. Hildalgo, 539 F. Supp. 4,8 (D.C. Pa. 1981) (finding that there would be “no harm to anyone by granting a preliminary injunction” against military authorities ordering a Naval midshipman to immediately begin three years of active duty in the Navy).

3. Petitioner Has Shown a Likelihood of Success on the Merits.

The Investigating Officer, after hearing during which he extensively questioned petitioner, found her to be sincere, and recommended petitioner’s discharge from the Armed Forces as a conscientious objector (1-0). Appx. 1-4. Thus, Petitioner enjoys a substantial likelihood of success on the merits of her Petition for Writ of Habeas Corpus.

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). Here, there exists no basis in fact to deny petitioner’s claim for discharge; to the contrary, the Hearing Officer, who was an attorney selected by Army officials and appointed by a lieutenant colonel at Fort Devens, Massachusetts, Appx. 12, found that petitioner had demonstrated that she is a conscientious objector and

meets all criteria for discharge from the armed forces as a conscientious objector (1-0 status). Appx. 1-4.

In addition, petitioner enjoys the likelihood of success on her other claims. There is considerable evidence in this case that the military has violated its own regulations and that military officials have intentionally and in bad faith delayed the processing of petitioner's claim for discharge.

4. The Public Interest Will Not be Adversely Affected By the Granting of an Injunction.

The public interest will not be adversely affected by the granting of an injunction. To the contrary, an injunction is in the public interest. An injunction will allow the status quo to be maintained while this litigation, in which petitioner enjoys a substantial likelihood of success, can be resolved. Further, an injunction will serve to prevent irreparable harm to petitioner, while avoiding disruption in the armed forces.

II. The Equities Are Strongly in Favor of Petitioner

In addition to petitioner meeting the standard for the granting of a temporary restraining order, the equities weigh strongly in her favor. Here, the Army has intentionally and in bad faith delayed the processing of petitioner's conscientious objector claim for more than eight months, while expediting petitioner's orders to active duty. Thus the Army's hands are unclean.

WHEREFORE, for the above-stated reasons, and for any other reasons determined by the Court after hearing on this matter, petitioner moves that a temporary restraining order issue forthwith.

Respectfully submitted,

MARY HANNA, M.D.

By her attorney,

*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 a copy of the within Petitioner's Memorandum in Support of Motion for Temporary Restraining Order was served upon the Office of the United States Attorney, John Joseph Moakley U.S. Courthouse, Suite 9200, 1 Courthouse Way, Boston, Massachusetts 02210 by hand on the 14 day of August 2006.

*Louis P. Font*