DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

MAR 27 2018

Office of the Assistant Secretary

LELAND B. H. BOHANNON	:	
COLONEL, USAF	:	
Appellant	:	
v.	:	Agency Docket No. MO-2017-00003
	:	Other Docket No. FC-17-001
HEATHER WILSON	:	
SECRETARY	:	
DEPARTMENT OF THE AIR FORCE	:	
Agency	:	

FINAL AGENCY DECISION

Pursuant to Air Force Instruction (AFI) 36-2706, *Equal Opportunity Program: Military and Civilian* (October 5, 2010, Incorporating Change 1, October 5, 2011, and February 9, 2017, Guidance Memorandum changes),[1] paragraphs 3.38.1 and 3.38.1.2, the appellant, Colonel (Col) B, an Active Duty member formerly assigned to the Air Force Inspection Agency (AFIA), Kirtland Air Force Base, New Mexico, appeals the decision of the Vice Commander, Air Force Global Strike Command (AFGSC/CV), who concurred with the lower-level Military Equal Opportunity (MEO) appeal of the decision by the Commander, 377th Air Base Wing (377 ABW/CC), to affirm the substantiated finding of MEO Complaint No. FC-17-001 regarding one allegation of discrimination based on sexual orientation.

BACKGROUND

On May 22, 2017, Master Sergeant (MSgt) P filed a formal MEO complaint with the 377th ABW Equal Opportunity Office (377 ABW/EO) against the appellant, the Commander, AFIA. MSgt P alleged that the appellant unlawfully discriminated against him based on his sexual orientation when he failed to sign the spouse certificate for his same sex spouse upon his (MSgt P's) May 9, 2017, retirement from the Air Force. On the same date (May 22, 2017), 377 ABW/EO initiated a complaint clarification, pursuant to which it interviewed the appellant and the following five witnesses: Major (Maj) F, the appellant's Executive Officer; Chief Master Sergeant (CMSgt) H, the Chief Enlisted Manager (CEM); Colonel (Col) H, the Vice Commander, AFIA (AFIA/CV); Col K, the AFIA Staff Judge Advocate (AFIA/JA); and Ms. C, the appellant's Administrative Assistant. On June 6, 2017, 377 ABW/EO issued a complaint clarification report substantiating MSgt P's allegation of discrimination based on sexual orientation by a preponderance of the evidence. On June 9, 2017, the 377th ABW Legal Office (377 ABW/JA), reviewed the complaint clarification report and concluded that it was legally sufficient. It is inferred the appellant was briefed

[1] AFI 36-2706 may be viewed in its entirety at http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-2706/afi36-2706.pdf

on the finding of the MEO complaint sometime between June 9, 2017, the date of the 377 ABW/JA Legal Review, and June 27, 2017, when he initiated his first-level appeal of that finding.

On June 27, 2017, the appellant submitted a first-level appeal of the substantiated finding of the MEO complaint to the Secretary of the Air Force Inspector General (SAF/IG), who was not the correct deciding authority for this appeal. Therefore, on the same date, 377 ABW/EO forwarded the first-level appeal to the correct deciding authority, 377 ABW/CC. On June 30, 2017, the EO Director advised the 377 ABW/CC that he had reviewed the complaint clarification report and concurred with the initial finding of substantiated unlawful discrimination based on sexual orientation. On July 6, 2017, 377 ABW/JA reviewed the complaint clarification, the appellant's appeal and all relevant laws, regulations and instructions and recommended that the appeal be denied and that the complaint remain substantiated. On July 13, 2017, 377 ABW/CC denied the appellant's appeal and sustained the findings of the complaint clarification. On July 14, 2017, the appellant submitted a second-level appeal to the AFGSC/CV. On August 31, 2017, the Deputy Commander, AFGSC (AFGSC/CD), issued a memorandum concurring with the substantiated finding of the complaint. On October 5, 2017, the appellant, through his counsel, submitted his third-level appeal to the Air Force Review Boards Agency (SAF/MRB).

TIMELINESS OF THE APPEAL

AFI 36-2706, subparagraph 3.38.1.3. states, "Complainants and offenders must submit appeals through the EO office within 30 calendar days after notification of the result of the case. The installation/center commander (director) may approve the processing of an appeal submitted more than 30 calendar days after notification." Subparagraph 3.38.1.9 of the AFI states, in relevant part, "Members dissatisfied with the action on their appeal have 30 calendar days from receipt of an appeal determination to appeal to the next higher level ... Appellants will submit their appeals to the next higher level through the local EO office. The appellate authority may waive the 30-calendar-day time limit for good cause based on a memorandum with sufficient justification provided by the member and submitted through the EO office..."

The appellant's first-level appeal was submitted and routed to the official with deciding authority, 377 ABW/CC, within thirty days of the appellant's having been briefed as to finding of the MEO complaint. His second-level appeal was submitted to the AFGSC/CD within thirty days of his receipt of the first-level appeal decision by the 377 ABW/CC. The appellant received AFGSC/CD's August 31, 2017, decision on his second-level appeal on September 6, 2017, and requested an extension of time to file on October 2, 2017, but nevertheless timely filed his third-level appeal on October 5, 2017. Therefore, all of the appellant's appeals were timely filed.

STANDARD OF REVIEW

Air Force Instruction 36-2706, *Equal Opportunity Program - Military and Civilian* (5 October 2010, Incorporating Change 1, 5 October 2011), states in the first paragraph on page 2, "For military personnel, this instruction establishes requirements for unlawful

discrimination complaints based on race, color, religion, national origin or sex (including sexual harassment;…" According to AFI 36-2706, paragraph 1.1, "It is the policy of the United States Government, the Department of the Defense, and the Air Force, not to condone or tolerate unlawful discrimination…of any kind."

AFI 36-2706 defines "discrimination" in the Military EO context as "any unlawfully [sic] action that denies equal opportunity to persons or groups based on their race, color, sex, national origin or religion." The Secretary of the Air Force's Equal Opportunity (EO) and Non-Discrimination Policy Memorandum, dated January 8, 2016, added "sexual orientation" to the protected bases in that definition.

AFI 36-2706 provides the standard of proof for finding an allegation to be substantiated. Specifically, Chapter 3, paragraph 3.20.9 states that if a complaint clarification results in a determination that the preponderance of credible evidence indicates that an EO violation occurred, then the complaint is substantiated. AFI 36-2706 defines "preponderance of evidence" as "evidence which is of greater weight or which is more credible and convincing to the mind than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." According to AFI 36-2706, "A substantiated finding occurs when a preponderance of the evidence supports (more likely to have occurred than not occurred) the complainant's allegation of a violation of law, regulation or Air Force policy or standards. The documented facts indicate that a violation occurred."

ALLEGATION APPEALED BY APPELLANT

"On 9 May 17, [appellant] did not sign [MSgt P's] same-sex spouse's certificate based on [MSgt P's] sexual orientation. [Appellant] said openly, he would not sign the certificate due to his religious beliefs."

ANALYSIS

On May 4, 2017, MSgt P's retirement certificates were submitted to his commander, the appellant, for his signature, in advance of MSgt P's May 9, 2017, retirement ceremony. Among the certificates was a *Certificate of Appreciation for Spouse of Retiring Member,* to be issued to MSgt P's same-sex spouse, Mr. D. The appellant signed all of the certificates except the certificate for Mr. D. On May 9, 2017, the appellant sent the Inspector General of the Air Force (SAF/IG) a request for a religious accommodation exempting him from signing Mr. D's certificate. The appellant asserted that he needed the accommodation to avoid betraying his moral and religious convictions through an endorsement or official affirmation of MSgt P's homosexual marriage. He explained that the language on Mr. D's certificate specifically referenced the marriage relationship and that "signing, endorsing or otherwise affirming this kind of relationship between two men would cause me to violate the integrity of which I believe the Scriptures teach." The appellant acknowledged that "[his] position can be perceived to be at odds with stated Air Force policy but [he] think[s] it agrees with language in the 2016 NDAA [National Defense Authorization Act] that recognizes the value of 'diverse backgrounds and religious traditions … that contribute to the strength of the Armed Forces.'"

On the same date, May 9, 2017, at MSgt P's retirement ceremony, retirement awards and certificates were issued to both MSgt P and Mr. D, although Mr. D's certificate remained unsigned. During a meeting with the EO Office on May 17, 2017, MSgt P expressed concern over his spouse's receipt of an unsigned certificate. He explained that during the rehearsal for his retirement ceremony, he had noticed that the appellant had not signed his spouse's certificate. He stated that at the time, he was told that the appellant was on temporary duty (TDY) and that the certificate would be signed by Major General (Maj Gen) S, the Air Force Deputy Inspector General. However, MSgt P advised that his spouse's certificate was still unsigned at the time of his retirement ceremony and that the appellant later informed him that he would not sign the certificate because it violated his religious convictions.[2]

On June 22, 2017, Lieutenant General (Lt Gen) R (male), the SAF/IG, advised the appellant that he was returning his May 9, 2017, request for religious accommodation without action. Lt Gen R explained that his request to be relieved from performing duties, practices or military policies which might require him "to endorse or otherwise officially affirm the status of a homosexual spouse" married to a military member was overly broad. Lt Gen R advised the appellant that the breadth of his request prevented him from assessing its effect on mission accomplishment. Moreover, he noted that he was also responsible for assessing the impact of the requested accomodation on future duties and that "[g]iven your current temporary assignment, I do not foresee that circumstances like you describe will arise."

First-Level Appeal

In his first-level appeal of the complaint clarification report's substantiated finding, the appellant argued that the report's finding was premature, as it failed to consider his First Amendment right to the free exercise of religion, failed to make "sufficient provision for the real diversity of thought and belief" existing within the Air Force, and failed to consider whether his motivation had justified his actions.

With respect to his first argument regarding the free exercise of religion, the appellant contended that the 2011 repeal of the former "Don't Ask Don't Tell" [DADT] policy had created a conflict between religious and personal freedoms which had yet to be fully considered or resolved by the courts. He asserted that the Secretary of the Air Force's January 8, 2016, policy memorandum prohibiting unlawful discrimination had to be balanced against the religious freedom of servicemembers and restricted to ensure that it did not impinge on this religious freedom. He averred that the "DADT Repeal guidance had attempted to do this by assuring that there would be 'no change to Service member exercise of religious beliefs.'" However, the appellant asserted that the complaint clarification report had rendered the DADT Repeal's assurance "inadequate" and "disingenuous" for

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[2] In his complaint, MSgt P indicated that only his spouse's certificate had remained unsigned at his retirement ceremony, notwithstanding his reference to unsigned "certificates." However, taken together, the appellant's and other witness statements appear to indicate that while all of the certificates except the spousal certificate had been signed in advance of the rehearsal ceremony, none of the signed certificates was issued during the retirement ceremony. Instead, the certificates were reaccomplished for Maj Gen S's signature and signed by Maj Gen S sometime after the retirement ceremony.

"commanders like me" who held a biblical understanding of marriage. He argued that if the right to free exercise of religion was to be limited in this way, the restrictions on "belief and associated speech" needed to be more clearly defined. The appellant asserted that President Trump had sought to avoid "this sort of conflict of individual rights" when he issued his May 4, 2017, "Executive Order Promoting Free Speech and Religious Liberty," which referenced the "Founders'" vision of a country where the exercise of religious freedom "without fear of discrimination or retaliation by the Federal Government" was possible.

The appellant asserted that the Air Force had created the religious accommodation process, found in Air Force Policy Directive 52-2, *Religious Accommodation of Religious Practices in the Air Force* (Feb. 17, 2016),[3] to address the tension existing between religious freedom and the obligations of military members to comply with directives, instructions and lawful orders. He noted that this process was designed to weigh the requested accommodation against "the compelling government interest of military readiness, unit cohesion, good order, discipline, health and safety or mission accomplishment." However, the appellant alleged that the EO Office had treated his accommodation request as "irrelevant" by substantiating the allegation of discrimination against him before his accommodation request had been resolved.

Finally, the appellant maintained that he had always treated his subordinates in general, and MSgt P in particular, with dignity and respect, and averred that their disagreement over religion had not affected his and MSgt P's professional relationship. He denied any intent to discriminate against MSgt P because of his sexual orientation, explaining that his action had not been motivated by prejudice or malice or designed to discriminate. The appellant pointed out that he had had no qualms about signing MSgt P's own retirement certificate, notwithstanding his sexual orientation. He explained that in declining to sign the spouse certificate, he had only been acting in accordance with his own religious convictions "in keeping with the constitutionally protected right to free exercise." The appellant stated that, due to time constraints, it had been "administratively impossible" for him to obtain a signed certificate for Mr. D prior to the retirement ceremony, but that he had subsequently obtained "an alternate legitimate signature" for the certificate. He maintained that he had done everything possible to ensure that the mission was accomplished and that the contributions of Mr. D and MSgt P were respected while acting in accordance with his own moral values. He stated that in this way, despite insufficient policy guidance, he had sought to accommodate his own "sincerely held" religious beliefs while safeguarding the right of servicemembers to serve regardless of sexual orientation.

On June 30, 2017, the Director, 377 ABW/EO, issued a review of the appellant's appeal to 377 ABW/CC. In his review, he noted that AFI 36-2706, para. 1.1.1 had been amended to include sexual orientation as a protected category and that EO case law established that members of an organization must be given all rights and privileges of that organization. The Director explained that to deny a member any of these rights and privileges based on an "EO factor (sexual orientation)" was "tantamount to unlawful discrimination." He asserted that therefore, a failure to sign a spousal certificate constituted

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[3] AF PD 52-2 may be viewed in its entirety at http://static.e-publishing.af.mil/production/1/af_hc/publication/afpd52-2/afpd52-2.pdf

unlawful discrimination if it was based on a member's sexual orientation. The Director noted that in this case, the appellant acknowledged that he had treated Mr. D differently [from spouses of retiring service members in heterosexual couples] because of Mr. D's sexual orientation when he chose not to personally sign Mr. D's certificate. Moreover, he explained that the appellant's denial of any malicious intent or intent to discriminate was "believable but irrelevant," as neither malice nor intent were required to establish unlawful discrimination.

In response to the appellant's assertion that the complaint clarification report should have been postponed until he had received a response to his request for religious accommodation, the Director noted that under AFI 1-1, *Air Force Standards* (August 7, 2012, Incorporating Change 1, November 12, 2014),[4] the appellant was required to comply with the Air Force's policies and instructions until the requested accommodation had been granted by his commander. The Director declined to address the appellant's argument that Air Force EO policies and regulations conflicted with his right to the free exercise of religion as protected under the First Amendment, the Religious Freedom Restoration Act (RFRA), NDAA 16 and the President's Executive Order. He explained that this was outside the purview of his office and that any changes to Air Force policy would have to be addressed by "SAF/MRQ & SAF/MR." The Director concluded that, based on his review, he believes the initial finding of substantiated unlawful discrimination is correct.

<u>Second-Level Appeal</u>

In his second-level appeal, the appellant repeated the same arguments made in his first-level appeal but also included, as an attachment, a legal memorandum from his military and civilian defense counsel in support of his appeal. The appellant's counsel argued that the EO complaint clarification report had failed to consider the appellant's Constitutional First Amendment right to the free exercise of religion, as protected under the RFRA, DoD Instruction 1300.17 and Air Force regulations. They asserted that the Air Force had to demonstrate that it had a compelling governmental interest before it could limit any constitutional right, and that "any limitation must be by the least restrictive means necessary." The appellant's counsel noted that the EO clarification complaint had not considered the appellant's religious accommodation request and argued that if he was freely exercising his religion, then he was not unlawfully discriminating. While acknowledging that the appellant's free exercise of religion had been "undoubtedly complicated by the position of command," they noted that he had requested religious accommodation in order to "be clear about his lawful motivation for taking the action he took." The appellant's counsel maintained that the appellant had not needed a religious accommodation in this case because issuance of the spousal recognition certificate was purely discretionary. Moreover, they explained that even if it had not been, there was no entitlement to "a specific signature" on the certificate.

The appellant's counsel acknowledged that in some cases, refusing to sign the certificate could be considered unlawful discrimination. However, they asserted that it could

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[4] AFI 1-1 may be viewed in its entirety at http://static.e-publishing.af.mil/production/1/af_cc/publication/afi1-1/afi1-1.pdf

not be so considered in this case because the appellant had signed MSgt P's certificate knowing his sexual orientation, and only declined to sign the certificate which "his religion forbade him from signing." The appellant's counsel also noted that the appellant had taken steps to ensure that the certificate was signed by a Major General, a "desireable upgrade," thereby ensuring that the certificate was signed without compromising his own religious beliefs. While they acknowledged that "[i]t would have been ideal" to have the spousal certificate signed in time for the retirement ceremony, they averred that the fact that it was not did not make the appellant's actions unlawful, as Mr. D had been recognized at the ceremony and had been told that a Major General would be signing the certificate. Finally, the appellant's counsel questioned whether MSgt P had standing to file the EO complaint, as Mr. D, rather than he, had been the subject of the discriminatory action.

Third-Level Appeal

In the third-level appeal, the appellant, through his counsel, argued that: 1) both the MEO investigation and the MEO complaint were defective, 2) that the Air Force policy against discrimination based on sexual orientation was "unsupported by law," and 3) that the failure to act on his request for religious accommodation had violated both Department of Defense (DoD) and Air Force regulations.

Argument 1a. Concerning defects in the MEO investigation, the appellant first asserted that under the governing regulation, AFI 36-3203, *Service Retirements* (September 18, 2015, incorporating Change 1, August 30, 2017)[5], the issuance of spouse certificates of appreciation was permissive, rather than mandatory, and that therefore, there was no legal right to such a certificate. Moreover, he argued that when issuing these certificates, there was no requirement under the AFI that they be signed by the commander. The appellant asserted that even though neither MSgt P nor Mr. D were entitled to receive a spouse certificate, he had ensured that Mr. D was issued one signed by a two-star general, which was "far superior" to a certificate signed by him. He explained that he had taken these actions in order to balance his sincerely held religious beliefs against the need to serve all airmen, regardless of their beliefs.

A review of AFI 36-3203 confirms that the issuance of a *Certificate of Appreciation for Spouse of Retiring Member* is not mandatory. Specifically, para. 6.1.3.3.7 states that the unit presents the certificate at the retirement ceremony, "if appropriate," while para 6.3 states that, if appropriate, a spouse of a retiring service member "may be issued the certificate." Moreover, the AFI does not direct that the certificate be signed by the retiring service member's commander or any other official. However, during the investigation of the complaint clarification, Ms. C, the appellant's Administrative Assistant, advised the Investigator that it was standard practice for commanders to sign the spouse certificates. Moreover, Maj F advised that the appellant had signed every certificate for all retirements held since July 3, 2014, when she became his Executive Officer.

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[5] AFI 36-3203 may be viewed in its entirety at http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-3203/afi36-3203_.pdf

Air Force regulations and policy prohibit the discriminatory treatment of Air Force personnel based on sexual orientation. AFI 36-2706 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." In a January 8, 2016, Equal Opportunity (EO) and Non-Discrimination Policy Memorandum, the Secretary of the Air Force stated, "In the military EO context, discrimination is any unlawful action that denies equal opportunity to persons or groups based on their race, color, sex, national origin, religion, or sexual orientation. Commanders at all organizational levels will be held accountable for creating a workplace free of unlawful discrimination ..." As noted on page 3 of this Decision, AFI 36-2706, para. 1.1.1 identifies sexual orientation as a sub-category of the protected class of "sex."

Based on the foregoing, it is concluded that the appellant correctly asserted that MSgt P had no legal right to a spousal certificate of appreciation and that even if he had, there was no requirement that he sign the certificate. However, according to witness statements, the appellant had routinely signed off on all such certificates prior to MSgt P's retirement. Moreover, the appellant acknowledged that he "could not" sign Mr D's certificate due to his religious convictions, specifically, that if he signed the certificate in question he would be endorsing or officially affirming same-sex marriage in direct conflict with his religious beliefs concerning marriage.

Argument 1b. The appellant also argued that the EO complaint was defective because AFI 36-2706, para. 3.15 required that the individual filing the complaint be the subject of the unlawful discrimination. He argued that MSgt P was not entitled to file an MEO complaint alleging discrimination because the spouse certificate had been issued to his spouse, Mr. D, rather than to him. According to the appellant, because MSgt P was not the individual discriminated against, the complaint "should have been dismissed as improper." A review of para. 3.15, "Proper Complainants," confirms that, "to file a complaint, an individual must be the subject of the alleged unlawful discrimination ..." However, a review of AFI 36-3203 makes clear that MSgt P was the subject of the alleged unlawful discrimination. Specifically, AFI 36-3203, para. 6.3.2, states that spousal certificates are awarded "regardless of whether the member has a retirement ceremony or whether the spouse is present." Moreover, certificates are not awarded to spouses of service members who are retiring in lieu of demotion or discharge (para. 6.3.1.1.) or whose service was marred by punishment, reprimands, or mediocre performance (para. 6.3.1.2.), irrespective of the spouse's own accomplishments. Thus, the certificate of appreciation awarded to the spouse of a retiring service member is based on the service member's service and is intended to honor the service member through his or her spouse.

Argument 2. The appellant argued next that even if the complaint had been properly filed, his actions did not amount to unlawful discrimination because Air Force policy prohibiting discrimination based on sexual orientation was unsupported by law. He asserted that the federal government's position on this issue was reflected in the *amicus curiae* brief that it submitted in a case currently pending before the United States Court of Appeals for the Second Circuit. The appellant explained that the government's position in that case was that "discrimination because of sexual orientation is not discrimination because of sex." However, he did not explain how an *amicus curiae* brief was reflective of current law or was

otherwise sufficiently dispositive of U.S. law to render moot established Air Force policy on discrimination based on sexual orientation. Moreover, the 377 ABW/JA's legal review of the appellant's first-level appeal cited the holdings in two recent Supreme Court cases which, while not dispositive with respect to the current issue, nevertheless appear to support the Air Force policy on sexual orientation. The first case, Obergefell v. Hodges, 135 S. Ct. 2584 (2015), recognized same-sex marriage as a fundamental right under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. More recently, in Pavan v. Smith, 582 U.S. ____ (2017), the Court held that refusing to list both same-sex spouses on a birth certificate "expressly denied the 'rights, benefits, and responsibilities' to which same-sex couples were entitled."

It is noted that the Air Force policy incorporating sexual orientation as a sub-category of the protected class of "sex" was recently memorialized in a February 9, 2017, Air Force Guidance Memorandum (AFGM) to AFI 36-2706. The AFGM superseded both the September 20, 2011, AFI 36-2706 AFGM1 and the June 7, 2012, policy guidance issued by the Air Force Equal Opportunity Office (AF/A1Q). Therefore, it is assumed that prior to promulgating the new guidance, consideration was given to weighing the competing interests described by the appellant in his appeal. It is further assumed that the guidance was in compliance with all applicable federal law at the time of its issuance. The appellant's assertion that the Air Force policy is "unsupported by law" is therefore meritless, as he has failed to identify any federal law which the policy contravenes or with which it otherwise conflicts.

Argument 3. The appellant's final argument is that MSgt P's allegation should have been unsubstantiated because the U.S. Constitution, federal law and DoD regulations protect his right to religious freedom and thus, his right to express his sincere religious beliefs. He noted that DoD Instruction (DODI) 1300.17, *Accommodation of Religious Practices Within the Military Services*,[6] states, "Unless it could have an adverse impact on military readiness, unit cohesion and good order and discipline, the Military Departments *will* accommodate the individual expressions of sincerely held religious beliefs of Service members." The appellant opined that based on this, SAF/IG should have granted his religious accommodation request, as returning it "without action" was not one of the options under DoDI 1300.17. He noted that the purpose of a religious accommodation was to provide legal justification for any action, or failure to act, motivated by religious belief in order to avoid placing service members in the position of having to violate their religious convictions through their military service. The appellant asserted that failing to act on his accommodation request violated both DoD and Air Force regulations.

The EO Director of 377 ABW/EO wrote in paragraph 4 of his review of the first-level MEO appeal, addressed to the deciding official, the Commander of the 377 ABW,

> "Appellant states in his appeal that Air Force EO Policy and AFI 36-2706 are in conflict with the Religious Freedoms Act (sic), the free exercise of religion clause of the First Amendment, NDAA 16 and the recent Executive Order from President Trump. The above external documents should have been considered when changes

[6] http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130017p.pdf

to AF EO policy and AFI 36-2706 were made. These are questions for SAF/MRQ and SAF/MR to address. EO staff are not at liberty to discount AF Policy or AFI 36-2706 definitions which outline standards for deciding if an allegation of discrimination should be substantiated."

These questions will now be addressed in this FAD as the deciding authority for third-level MEO appeals rests with the Director of SAF/MRB, as redelegated from the Assistant Secretary of the Air Force for Manpower and Reserve Affairs, and they are relevant to the matter at issue.

Federal Legal Protections for Free Exercise of Religion

The Founding Fathers through the First Amendment to the U.S. Constitution, Congress through the Religious Freedom Restoration Act of 1993, and several National Defense Authorization Acts, the current President through Executive Order No 13798 § 4, Fed Reg 21675 (May 4, 2017), and the U.S. Attorney General through his October 6, 2017 Memorandum on Federal Law Protections for Religious Liberty [hereinafter Guidance Memorandum][7] have made it very clear that the free exercise of sincerely held religious beliefs deserves the highest protection, including protection from discrimination. The Guidance Memorandum succinctly described Congress' support of the constitutional protection: "The considered judgment of the United States is that we are stronger through accommodation of religion than segregation or isolation of it." See Appendix to Guidance Memorandum, at Statutory Protections. These principles of religious liberty have been implemented by the Department of Defense (DOD) in Instruction 1300.17. In particular, paragraph 4(d), states, "In so far as practicable, a Service member's expression of sincerely held belief (conscience, moral principles, or religious beliefs) may not be used as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), and cases referenced within it provide additional context for applying these principles to this case.

Case law, federal policy, and DOD policy stress the need to analyze free exercise of religion issues on a case-by-case basis. The Guidance Memorandum provides helpful direction to all Executive Departments and Agencies at Principle 14:

> **"Only those interests of the highest order can outweigh legitimate claims to the free exercise of religion, and such interests must be evaluated not in broad generalities but as applied to the particular adherent. Even if the federal government could show the necessary interest, it would also have to show that its chosen restriction on free exercise is the least restrictive means of achieving that interest. That analysis requires the government to show that it cannot accommodate the religious adherent while achieving its interest through a viable alternative..."**

The Religious Freedom Restoration Act and DODI 1300.17 subparagraphs 4(d) and 4(e), combine to establish the standard that the Air Force would need to meet in order to

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[7] The U.S. Attorney General's Guidance Memorandum may be viewed in its entirety at https://www.justice.gov/opa/press-release/file/1001891/download?utm_medium=email&utm_source=govdelivery

justify taking an adverse personnel action under the facts of this case. See Guidance Memorandum at 10, and the Appendix to [the] Guidance Memorandum, at Statutory Protections, A.

1. Sincerely held religious belief? The appellant's statements during the clarification process and argument on his behalf during the appeal process support a finding that his religious beliefs regarding marriage are sincerely held and significant to him. The Supreme Court looks for honest conviction and the Justices do not see it as their role to determine whether religious beliefs are mistaken or insubstantial.

The U.S. Supreme Court has found a similar belief to be reasonable enough to hear a case to decide whether a state law violates the First Amendment as applied to an individual who declined to design and create a custom wedding cake for a same-sex wedding celebration because it violated his sincerely held religious beliefs, Masterpiece Cakeshop, Ltd. Et al v. Colorado Civil Rights Commission, No. 16-111. The U.S. Department of Justice also found the belief to be reasonable because it filed an *amicus curiae* brief supporting the wedding cake designer.

2. What was the Nature of the Act Requested? As discussed on page 8 of this FAD, the issuance of a certificate of appreciation for the spouse of a retiring Service member is discretionary. AFI 36-3203, paragraph 6.3, does not specify who is to sign the certificate or when; timing is not linked to a ceremony or other event. Although the complaint clarification process, in effect, found and imposed a duty on the appellant to sign the certificate, it is found that there was no such duty in this case.

3. Would compliance have substantially burdened the appellant's rights? DODI 1300.17, paragraph 3(e) defines a "substantial burden" as a military policy, practice or duty that "[i]n general, significantly interfer[es] with the exercise of religion as opposed to minimally interfer[es] with the exercise of religion." Reviews at other levels have questioned whether signing a certificate of appreciation would have substantially burdened the appellant, generally because his signing would not have been interpreted as an endorsement of the marriage, e.g., the signature simply represents the larger institution's appreciation. However, the government is ill-suited to substitute its judgment about whether a matter significantly or minimally interferes with a person's exercise of religion. On this point, the Guidance Memorandum referenced above states at Principle 13,

> **"A government action substantially burdens an exercise of religion [under the Religious Freedom Restoration Act] if it bans an aspect of an adherent's religious observance or practice, compels an act inconsistent with that observance or practice, or substantially pressures the adherent to modify such observance or practice."**

Principle 13 of the Guidance Memorandum goes on to observe that, "[b]ecause the government cannot second-guess the reasonableness of a religious belief or the adherent's assessment of the religious connection between the government mandate and the underlying religious belief, the substantial burden test focuses on the extent of governmental compulsion involved." As explained above, there was no "government mandate" in AFI 36-3203 that

required the appellant to sign the certificate; but it is found that, at the time, the advice he received reasonably led him to believe that he was required to sign absent an approved religious accommodation.

The appellant's counsel argued on appeal that his client was substantially burdened by the adverse consequences of the equal opportunity determination when he was suspended from command, his assignment was canceled, and he received a "Do Not Promote" promotion recommendation following the equal opportunity determination that he discriminated. The Clarification Report also reflects that he was advised that he could be subject to disciplinary or administrative action, and concerns about his judgment as a commander could be triggered, if he did not sign the certificate. Therefore we are satisfied that a substantial burden on the appellant's religious practice existed.

4. What was (and is) the Government's compelling interest? The compelling interest, one that is essential to mission accomplishment, is clear: all Airmen are to be treated fairly regardless of their race, color, sex, national origin, religion, or sexual orientation. The facts of this case are unique and involve a very narrow aspect of a commander's responsibilities. While AFI 36-3203 did not require a spouse appreciation certificate, the appellant's past actions (in signing spouse certificates for heterosexual couples) and fairness required the Air Force to provide one.

5. Least Restrictive Alternative

The Staff Judge Advocate's July 6, 2017 legal review on the complaint clarification and appeal concluded the Air Force had multiple compelling government interests and there was no least restrictive means that would prevent discrimination and disparate treatment in this case. We find the overall argument unpersuasive and conclude a less restrictive means of achieving the compelling government interest existed, and was used in this case.

The evidence indicates that Headquarters Air Force lawyers from the Office of the Judge Advocate General and SAF/IG were aware of the appellant's religious objection to signing the spouse appreciation certificate prior to MSgt P's retirement ceremony. The evidence indicates that Maj Gen S made the decision to sign the certificate before the ceremony, and MSgt P learned before the ceremony that Maj Gen S would be signing the certificate, MSgt P's spouse was recognized at the retirement ceremony and an announcement was made that Maj Gen S would be signing the certificate in question, and the clarification report indicates MSgt P picked up the signed spouse certificate within a week of the ceremony. Maj Gen S did exactly what Congress expected government leaders to do when someone's free exercise of religion is being substantially burdened: he found a viable alternative that furthered the Air Force's compelling government interest of making sure that MSgt P and his spouse were treated fairly.

CONCLUSION

Based on the foregoing, it is determined that a preponderance of the evidence establishes that the appellant admittedly declined to personally sign the spouse certificate of

MSgt P's same-sex spouse, issued at the time of MSgt P's retirement from the Air Force, and gave as his reason for not signing the certificate as the appellant's sincerely held religious belief that marriage between same-sex individuals is not marriage, and that for him to sign the certificate would violate the appellant's Constitutionally protected right to the free exercise of religion. It is also determined that the appellant correctly asserted that MSgt P had no legal right to a spousal certificate of appreciation and that even if he had, there was no requirement that he sign the certificate. It is further determined that another, higher-ranking officer signed the certificate in question, therefore there was no denial of equal opportunity, and no unlawful discrimination. Therefore, it is finally determined that the finding of the Complaint Clarification Report is not substantiated, and the original decision is reversed.

DECISION

Based on a thorough review of the events, the evidence in the case file, to include the original decision and the two higher-level appeal decisions, and pertinent federal laws, Executive Order, DOD and Air Force policy and regulations, and the U.S. Attorney General's guidance, it is the Air Force decision to grant the appellant's appeal and to reverse the finding of discrimination based on sexual orientation.

The Director of the Air Force Review Boards Agency (AFRBA)'s redelegated authority to issue Final Agency Decisions on appeals of the findings of MEO complaints, includes the authority to make related collateral determinations. See Memorandum for AFRBA et al, from Assistant Secretary of the Air Force (Manpower and Reserve Affairs), Re-delegation of Authority for Individual Personnel Action, (April 12, 2010), Attachment 2, Direction and Authority for Individual Personnel Actions, paragraphs 1, 5(a), and 8(s). Accordingly, it is directed that the following actions be taken to make the appellant whole: 1) the previous substantiated finding of discrimination in the Complaint Clarification Report be reversed, 2) the appellant's official records be expunged of all references to the previous finding of discrimination, 3) any adverse actions taken against the appellant as a result of the previous substantiated finding of discrimination be reversed and expunged from his official records, 4) the Evaluation Reports Appeal Board expedite correction or removal consideration of the appellant's promotion recommendation form and any other records within the Board's purview impacted by the preceding directed actions, 5) the appellant's corrected promotion record receive consideration by a Special Selection Board for promotion to Brigadier General (O-7).

FOR THE DEPARTMENT OF THE AIR FORCE

John A. Fedrigo

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Director
Air Force Review Boards Agency