

07 May 2018

Via Certified Mail and E-Mail

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The Pentagon
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[REDACTED]

Chaplain, Brigadier General J. Steven Chisolm
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Chaplain, Colonel Randy A. Marshall
Command Chaplain
Air Force Reserve Command
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Chaplain, Colonel Charlie Sattgast
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Civil Air Patrol Chaplain Corps
United States Air Force Auxiliary
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Subj: Unlawful Religious Discrimination Against Chaplain Montanari

Dear Chaplains Costin, Chisolm, Marshall, and Sattgast:

Chaplain, Captain Jeffrey A. Montanari retained First Liberty Institute to represent him in this matter. Please direct all correspondence related to this matter to First Liberty Institute at the contact information provided below. On behalf of Chaplain Montanari, First Liberty Institute respectfully requests that the United States Air Force, Air Force Reserve, Air National Guard, and the Civil Air Patrol immediately address the unlawful and discriminatory actions taken against our client because of his conversion to Orthodox Judaism.

Chaplain Montanari is a decorated Air Force officer and Chaplain, devoted to serving the spiritual needs of men and women who serve this country. As a result of his desire to convert to Orthodox Judaism, he experienced multiple acts of unlawful discrimination. Superiors demeaned his character, refused to grant him a religious accommodation, segregated him from the rest of the chaplain staff, and excluded him from chaplain meetings — effectively driving him out of his Air Force unit — because of his change in religious affiliation. Two years later, after completing his conversion to Orthodox Judaism and receiving appropriate ecclesiastical endorsement, Chaplain Montanari re-applied as a Jewish chaplain. Although the only substantive change in his application was his ecclesiastical endorsement, the application was improperly denied without explanation. Discriminating against an individual because of his religious affiliation violates DOD and Air Force policies, the Religious Freedom Restoration Act, and the First and Fourteenth Amendments to the United States Constitution.

On behalf of Chaplain Montanari, we request that you respond to our request for relief by no later than 1000 PDT on 21 May 2018. Should you fail to respond or deny our request for relief, we are prepared to pursue all available legal options.

Factual Background

Chaplain Montanari's Service Record

Chaplain Montanari's record of military service exemplifies integrity, service before self, and excellence. During his time in the Air Force, his exemplary accomplishments were recognized through several awards and distinctions, including being nominated Headquarters Airman of the Year in 2014.

In 2010, Chaplain Montanari graduated Air Force officer training and chaplain school. Ordained by the International Church of the Foursquare Gospel [hereinafter Foursquare], he subsequently began serving as a chaplain in the Air Force Reserve. In 2012, Chaplain Montanari transferred to a chaplain position in the California Air National Guard. Subsequently, he was also appointed as an Air Guard Technician full time from mid-2013 through 2015. And in 2014, he began concurrently serving as a chaplain in the Civil Air Patrol.

In each position, Chaplain Montanari distinguished himself through his exemplary service to others. For example, he supported the greater March Air Reserve Base with frequent unit visitations, articles in base newspapers, and assistance with critical Chapel programs. In addition to facilitating numerous religious ceremonies, he helped to coordinate a Wing-wide Military Appreciation Day, Yellow Ribbon and Strong Bonds Marriage Retreats, and high-profile Wing-related events in conjunction with the Blue Eagle's Total Force Honor Guard. He was appointed as the flight chaplain for the local Daedalians squadron at March. In addition to Chaplain Montanari's work supporting the community, he demonstrated professional excellence by obtaining a Top Secret clearance with access to Sensitive Compartmented Information (TS-SCI) necessary to conduct operations supporting the 163d Predator mission.

Chaplain Montanari also provided invaluable pastoral care to the flight crew of an Army National Guard, UH-60 Blackhawk helicopter that crashed at Ramona Airport in San Diego County, as well as pastoral care in response to a suicide at the 144th at Fresno and Security Forces Squadron at Nellis Air Force Base. He also performed an emergency response to the sudden death of the March Air Reserve Base tower control manager.

Chaplain Montanari further distinguished himself by his desire to serve the Jewish community at March Air Reserve Base. This outreach led him to provide the first ever Messianic Jewish Seder presentation in support of the Jewish High Holy Day of Passover. He also devoted his time to helping Jewish men and women at the base with their kosher dietary requests and other requests for religious accommodations – a largely unmet need at the time.

Chaplain Montanari's exemplary service is further evidenced by his impressive array of awards and decorations: Air Force Commendation Medal; Air Force Achievement Medal with 1 bronze leaf; Military Outstanding Volunteer Service Medal with 1 bronze star; National Defense Service Medal; Global War on Terrorism Service Medal; Air Force Training Ribbon with 1 bronze star; and Air Force Good Conduct Medal.

Illegal Religious Discrimination

Through Chaplain Montanari's outreach to the Jewish community and his newly-discovered Jewish heritage, he began to explore the Jewish faith more deeply. As a consequence, he began to develop a strong interest in Judaism, which continued to grow stronger in time.

In 2015, Chaplain Montanari was assigned to a position with the California Air National Guard in the Office of the Inspector General at March Air Reserve Base, California. Colonel Douglas Weskamp, Wing Vice Commander at the time, selected him for an Indefinite Technician GS-12 IGI position on 30 March 2015. While waiting for the paperwork to be processed changing his designation from a chaplain to a line officer, Chaplain Montanari began serving in the position. During the time he was assigned to work in the Office of the Inspector General, he began the process of changing his religious affiliation to Judaism.

However, shortly after a new Wing Vice Commander, Colonel Keith Y. Ward, assumed command of the unit, Chaplain Montanari began to face religious discrimination.

Col. Ward directed and approved the orders for Chaplain Montanari to complete the Air Force Inspector General Training Course at Scott Air Force Base, which he did on 13 August 2015. However, immediately after the training, Col. Ward called Chaplain Montanari into his office and ordered him back into the chaplaincy. Chaplain Montanari explained that he had been studying Judaism and was in the process of changing religious affiliations. He further clarified that, because of his changed beliefs, he could no longer work as a Christian chaplain in good faith.

Col. Ward was not pleased with the news of Chaplain Montanari's change in religious affiliation. He asked Chaplain Montanari whether he still held an ecclesiastical endorsement, to which Chaplain Montanari responded in the affirmative. Col. Ward then ordered Chaplain Montanari to resume chaplain duties, even though he was aware that Chaplain Montanari could no longer in good faith represent Foursquare or the Christian religion. Due to this religious conflict, Chaplain Montanari asked Col. Ward to allow him to continue to serve in his Inspector General position or to transfer to a non-chaplain position, which Col. Ward refused. Instead, Col. Ward re-iterated his directive that Chaplain Montanari serve as a Christian chaplain, representing Foursquare, despite Chaplain Montanari's conflict.

Upon returning to the chaplaincy, pursuant to Col. Ward's order, Chaplain Montanari was demoted to Temporary Technician GS-11. When Chaplain Montanari expressed concerns over his religious conflict, Col. Ward responded, "God told me that you are not the person for the [Indefinite Inspector General] job, and I am at peace with that." Col. Ward later admitted that the choice of words he used was not optimal. A superior officer counseled Col. Ward for his statement to Chaplain Montanari.

Chaplain, Major David Sarmiento stated that he could no longer work with Chaplain Montanari because of his change in religious beliefs. Specifically, he told Chaplain Montanari that he could not work with him because he "did not profess Jesus Christ as his Lord and Savior," and therefore they were no longer "equally yoked." He also made statements such as, "I can't be involved in the same things he's involved in" and "he's not the same person" because he had left the Christian faith. Col. Ward responded only by stating that the two chaplains would have to "make it work."

Based upon such incidents, Chaplain Montanari submitted an Inspector General and a Military Equal Opportunity complaint explaining that Major Sarmiento pressured him to adhere to the Christian religion, rather than pursue Judaism, in order to be a chaplain on his staff in good standing.

For over three months in the chaplain's office, Chaplain Montanari was subjected to additional harassment and discrimination by his superiors due to his decision to pursue Judaism. He was segregated from the other Chaplains, they did not notify him of chaplain meetings, and no one talked to him or gave him assignments. This treatment caused him to experience high levels of stress and anxiety.

Eventually, because of these substantial burdens on his religious beliefs and Col. Ward's refusal to provide a religious accommodation, Chaplain Montanari perceived no other option but to not renew his commission at the end of 2015. Chaplain Montanari's only alternative, as dictated by Col. Ward, was to continue to serve as a Christian chaplain despite the fact that Chaplain Montanari was no longer a Christian.

Shortly thereafter, Foursquare filed a 2088 form indicating its intention to withdraw its ecclesiastical endorsement. Chaplain Montanari was not informed that the form was filed or that he no longer held an ecclesiastical endorsement.

Conversion to Orthodox Judaism and Chaplaincy Application

Chaplain Montanari's conversion to Orthodox Judaism was long and difficult. Unlike many other faiths, conversions to Orthodox Judaism generally take at least two years because of the intense study and commitment required. Nevertheless, Chaplain Montanari successfully completed his studies at Yeshiva Pirchei Shoshanim under Rabbi F.J. Todd, and now holds an ecclesiastical endorsement as an Orthodox Jewish rabbi.

Desiring to return to serving the spiritual needs of the men and women in the Air Force, Chaplain Montanari sought to become a Jewish Chaplain in the Air Force Reserve and the Civil Air Patrol. In November 2017, Rabbi Todd submitted the required form stating that Chaplain Montanari had changed ecclesiastical endorsement from Foursquare to Pirchei Shoshanim. But neither Foursquare, the Air Force, nor the Civil Air Patrol officially notified Chaplain Montanari that Foursquare had withdrawn its endorsement approximately two years earlier. It was not until Chaplain Montanari underwent the application process in January 2018 that he learned, for the first time, that Foursquare had withdrawn his endorsement two years earlier.¹ Chaplain Montanari never received official notification from the Air Force regarding the withdrawal.

Because neither the Air Force nor the Civil Air Patrol had timely notified him of the withdrawal of Foursquare's endorsement, as is required by Air Force regulation, Chaplain Montanari had neither notice nor the opportunity to seek to change endorsing agencies within the 10-day period required by the Air Force or the 90-day period required by the Civil Air Patrol to make such a change. Consequently, he was required to submit a new application rather than seek reappointment.

In January 2018, the Air Force Reserve denied Chaplain Montanari's application to return to service as a chaplain. His application materials were substantially the same as his previously accepted application, with the exceptions being his changed religious affiliation and endorsing agency and his additional years of exemplary service. Jewish military chaplains are in high demand, especially when compared with the relative abundance of Christian chaplains. However, during his in-person interview, Chaplain Montanari endured hostile and lengthy questions about his conversion and his previous unit's superiors' reactions to his changed beliefs. After completing the application process, he was notified in writing by Chaplain, Colonel Randy A. Marshall, dated 31 January 2018, that he was not accepted but without providing an official reason for the denial. Air Force Chaplain, Captain Sarah Schechter told Chaplain Montanari by phone that he would not be reappointed. When asked the reason behind the decision, she refused to give any official reason, but oddly she stated it was not because of Chaplain Montanari's conversion or religious beliefs. Chaplain Schechter later provided a denial letter dated 13 February 2018 that likewise provided no reason for the denial.

Similarly, Chaplain Montanari submitted an application for reinstatement in the Civil Air Patrol program. CAP initially approved his application, appointing him as a

¹ Additionally, this 2088 form is invalid because the signatory, Chaplain, Colonel Daniel A. Miller, U.S. Army, had retired as an endorsing agent at the time the document was signed on 26 January 2016.

chaplain on 23 January 2018. However, on 31 January 2018, HQ CAP Director Susan P. Parker emailed Chaplain Montanari informing him that her office erroneously processed his appointment and that the appointment would be removed pending the chaplain appointment review process. CAP initiated an investigation regarding the error. Shortly thereafter, a Functional Review Panel rejected Chaplain Montanari's request for reinstatement as a chaplain in the Civil Air Patrol. Chaplain Montanari received a letter from Chaplain, Colonel Charlie Sattgast informing him of the decision on February 22, 2018. In a text to Chaplain Montanari, Col. Sattgast advised him not to pursue further applications because "re-application for chaplaincy is not an option."

After Rabbi Todd of Pirchei Shoshanim asked Chaplain Sattgast about the status of the application, Chaplain Sattgast responded that the application had been denied. The email spontaneously and without prompting added, "Let me assure you this action has nothing whatsoever to do with Rabbi Montanari's decision to change from the Christian faith to Torah Judaism."

Legal Analysis

Failure to Timely Inform of Ecclesiastical Endorsement Withdrawal

Under the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq., agencies are bound by their own regulations, and an agency's failure to follow its own regulations is reviewable by a federal court. *See Webster v. Doe*, 486 U.S. 592, 602 n.7 (1988). This also applies within the military context. *See Murphy v. United States*, 993 F.2d 871, 873 (Fed. Cir. 1993); *Adkins v. United States*, 68 F.3d 1317, 1323 (Fed. Cir. 1995); *Augustus v. McHugh*, 825 F. Supp. 2d 245, 250 (D.D.C. 2011).

Under U.S. DEP'T OF DEFENSE, INSTR. 1304.28, GUIDANCE FOR THE APPOINTMENT OF CHAPLAINS FOR THE MILITARY DEPARTMENTS para. 6.5 (11 June 2004) (C1, 20 Mar. 2014) [hereinafter DODI 1304.28]: "If a chaplain loses ecclesiastical authority to function as an RMP or has ecclesiastical endorsement to serve as a chaplain withdrawn, the appropriate religious organization shall provide written notification to the Military Department concerned. Processing for separation in accordance with section 643 of Reference (b) shall be initiated immediately upon such notification."

The section continues, "[w]hen a separation action is initiated under this Instruction, the chaplain shall be notified in writing" that he has "lost ecclesiastical endorsement." *Id.* paras. 6.5.1, 6.5.1.2. He shall also be notified of his "right to consult with military counsel or with civilian counsel obtained at no expense to the Government, and to submit statements in response to the notice." *Id.* para. 6.5.1.1. Finally, the notice must include the information that the officer may seek another ecclesiastical endorsement within the allotted time frame or apply for non-chaplain duties. *Id.* at paras. 6.5.1.3.1, 6.5.1.3.2.

According to U.S. DEP'T OF AIR FORCE, INSTR. 52-102V1, CHAPLAIN PROFESSIONAL DEVELOPMENT para. 7.1.2 (19 Aug. 2013) [hereinafter AFI 52-102V1], a change of ecclesiastical endorsements must take place within 10 days.

Under CIVIL AIR PATROL REGULATION 265-1, THE CIVIL AIR PATROL CHAPLAIN CORPS Section B.6.b (3 Apr. 2015) [hereinafter CAP Reg. 265-1], “Chaplains who change denominational affiliation must obtain a new endorsement. If a new endorsement or renewal is not obtained within 90 days, their chaplain status will be withdrawn.”

Foursquare withdrew Chaplain Montanari’s ecclesiastical endorsement on or around 26 January 2016. Chaplain Montanari was not informed of the withdrawal until January 2018, and only after he sought to change endorsing agencies to be appointed as a Jewish Chaplain. He never received the notice required by paragraph 6.5 of DODI 1304.28. This failure made it impossible for Chaplain Montanari to properly change ecclesiastical endorsers, seek an alternate position, or seek a waiver within the 10-day or 90-day time frames.

Moreover, the 10-day or 90-day time frames in which to change ecclesiastical endorsers has a disparate impact on chaplains seeking to convert to faiths which require more than 90 days for conversions, such as Orthodox Judaism. As explained above, the process to convert to Orthodox Judaism is lengthy, taking as much as two years, or longer. This disparate impact upon a particular religious faith likely constitutes a violation of the Religious Freedom Restoration Act or the First Amendment or Fourteenth Amendments of the United States Constitution.

Religious Discrimination and Failure to Accommodate

While serving in the Air Force, Chaplain Montanari endured multiple unlawful acts of religious discrimination and a refusal to accommodate his changed religious beliefs.

The First Amendment fully protects the religious rights of individuals who convert from one religion to another. According to the Supreme Court of the United States, “[t]he First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired.” *Hobbie v. Unemployment Appeals Com.*, 480 U.S. 136, 144 (1987); *see also id.* 144 n.9 (“If judicial inquiry into the truth of one’s religious beliefs would violate the free exercise clause, an inquiry into one’s reasons for adopting those beliefs is similarly intrusive. So long as one’s faith is religiously based at the time it is asserted, it should not matter, for constitutional purposes, whether that faith derived from revelation, study, upbringing, gradual evolution, or some source that appears entirely incomprehensible.”) (quoting *Callahan v. Woods*, 658 F.2d 679, 687 (9th Cir. 1981) (citation omitted); *Malik v. Brown*, 16 F3d 330, 333 (9th Cir. 1994) (“The Supreme Court has indicated, however, that religious claims that have developed over time are protected to the same extent as those that occur in a moment.”)).

Additionally, the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. 2000bb *et seq.*, protects individuals from government-imposed substantial burdens on their religious beliefs, when the government is unable to show a substantial interest narrowly tailored to be the least restrictive means.

Implementing these fundamental principles, the Department of Defense, the Air Force, and the Civil Air Patrol have implemented policies designed to respect religious freedom in the military, including DODI 1304.28, paras. 5.2.1-5.2.2; U.S. DEP'T OF DEFENSE, INSTR. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES (10 Feb. 2009) (Change 1, 22 Jan. 2014) [hereinafter DODI 1300.17]; U.S. DEP'T OF AIR FORCE, DIR. 52-2, ACCOMMODATION OF RELIGIOUS PRACTICES IN THE AIR FORCE paras. 1.4, 1.6 (17 Feb. 2016).

After Chaplain Montanari informed Col. Ward of his change in religious beliefs and need for an accommodation, he was not permitted to continue in his Inspector General position or another non-chaplain position. Instead, he was ordered into a religious position that was in direct tension with his sincerely held religious beliefs. Moreover, while in that position, he was subjected to multiple acts of discrimination based solely upon his change in religious affiliation, such as disparagement of his character, lack of communication, and segregation from other chaplains. Col. Ward's refusal to grant Chaplain Montanari's requested accommodation substantially burdened Chaplain Montanari's religious exercise.

These discriminatory acts violate DOD and USAF policies, the Religious Freedom Restoration Act, and the First and Fourteenth Amendments to the United States Constitution.

Failure to Appoint Due to Religious Discrimination

Chaplain Montanari's recent applications to be re-appointed as a Chaplain would have been approved but for his change in religious affiliation. His recent applications are substantially similar to his original successful applications, with only a few exceptions. The recent applications now reflect his additional years of exemplary service, and the recent applications would fill a much-needed demand. Jewish chaplains are a high-demand, low-density position within the Air Force. Thus, it appears that the only basis for Chaplain Montanari's rejected application is his change in religious affiliation. The hostility to Chaplain Montanari's conversion was made all the more clear during his re-appointment interview, when the interviewer questioned Chaplain Montanari at length about his conversion to Orthodox Judaism. This raises yet more questions about the Air Force's commitment to religious diversity and pluralism within its chaplain corps.

Another disturbing event was Chaplain Sattgast's email to Rabbi Todd, further suggesting that Chaplain Montanari's conversion was a factor that weighed in CAP's evaluation of his re-appointment application. Because Chaplain Sattgast's statement about Chaplain Montanari's conversion was included without any obvious purpose or prompting, it raises the question of why Chaplain Sattgast felt the need to preemptively deny that the conversion was the true reason for the rejection.

Discrimination based on a religious conversion is unlawful religious discrimination. Such actions violate DOD, AF, and CAP policies, the Religious Freedom Restoration Act, and the First and Fourteenth Amendments to the United States Constitution.

Legal Claims

First, the Department violated Department of Defense Instruction 1304.28, paragraph 6.5, by failing to timely inform Chaplain Montanari that his ecclesiastical endorsement had been withdrawn. DODI 1304.28, para. 6.5. He never received a formal notification of the withdrawal, and he was not even made aware of the withdrawal until January 2018 — two years after it took effect. This failure made it impossible for Chaplain Montanari to properly change ecclesiastical endorsers, seek an alternate position, or seek a waiver within the 10-day time frame required by the Air Force or the 90-day time frame required by the Civil Air Patrol. AFI 52-102V1, para. 7.1.2; CAP Reg. 265-1, Section B.6.b. Moreover, the short time frame in which to change ecclesiastical endorsers has a disparate impact on chaplains seeking to convert to faiths that require more than 90 days for conversions, such as Orthodox Judaism.

Second, after informing Wing Vice Commander Colonel Keith Y. Ward of his change in religious affiliation and his desire to continue in his present non-chaplain position rather than return as a Christian chaplain, Chaplain Montanari was subjected to multiple acts of religious discrimination. Col. Ward and other superiors demeaned his character, refused to allow him to work as in the Office of the Inspector General, required him to return to the chaplain's office while refusing to work with him, segregated him from the rest of the staff, and refused to invite him to chaplain meetings — all because of his change in religious affiliation. These actions violate DODI 1304.28, paras. 5.2.1-5.2.2; DODI 1300.17; AF Dir. 52-2, paras. 1.4, 1.6; the Religious Freedom Restoration Act; and the First and Fourteenth Amendments to the United States Constitution.

Finally, after completing his conversion to Orthodox Judaism and receiving appropriate ecclesiastical endorsement from Yeshiva Pirchei Shoshanim, Chaplain Montanari applied to the Air Force Reserve and Civil Air Patrol chaplaincies. Although Chaplain Montanari maintained an untarnished service record and the only substantive change in this application was his change in endorsers and his religious affiliation, the application was denied without explanation. Discriminating against an individual because of a change in religious affiliation violates DOD and Air Force policies, the Religious Freedom Restoration Act, and the First and Fourteenth Amendments to the United States Constitution.

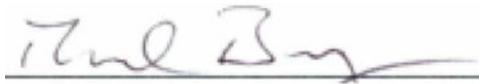
Conclusion

For the reasons provided herein, we respectfully request you take the following actions to remedy the situation:

- (1) Acceptance of ecclesiastical endorsement and appointment as a Jewish Chaplain in the Air Force Reserves (IMA status);
- (2) Acceptance of ecclesiastical endorsement and appointment as a Jewish Chaplain in the Civil Air Patrol;
- (3) A written admission of error in failing to properly notify Chaplain Montanari of the withdrawal of Foursquare's ecclesiastical endorsement;
- (4) A written assurance that, henceforth, Chaplain Montanari will not be subjected to discriminatory treatment based upon his religious conversion.

As stated above, we require a response by no later than 1000 PDT on 21 May 2018. Our desire is to resolve this amicably, and I am willing to discuss this matter in person, if necessary. Should you deny this request, however, we are prepared to take the necessary legal action to vindicate Chaplain Montanari's legal rights. I am the point of contact for this matter and may be contacted via e-mail at [REDACTED].

Sincerely,



Michael Berry
Deputy General Counsel &
Director of Military Affairs

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