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United States District Court, D. Massachusetts.
Matthew R. REYNOLDS, Petitioner,
v.
S.E. WIDNALL, Secretary of the Air Force, Frank P.
Cyr, Col. Commander, HQARPC, Respondents.
No. C.A. 96-12631-MEL.

March 26, 1997.

James H. Feldman, Jr., Peter Goldberger, Ardmore, PA, Louis P. Font, Font & Glazer, Brookline, MA, for Petitioner.

Julie S. Schragar, Asst. U.S. Atty., Boston, MA, for Respondents.

MORRIS E. LASKER, District Judge.

*1 Matthew R. Reynolds petitions for a Writ of Habeas Corpus, under 28 U.S.C. § 2241(c), challenging military custody on the grounds that his application for discharge as a conscientious objector has been wrongly denied. The responding Secretary of the Air Force moves to dismiss the petition on the ground that there was an adequate basis in fact for denying Reynolds' application for conscientious objector status. The motion is denied, and the petition is allowed.^{FN1}

FN1. Prior to the Secretary's filing of the present motion, Reynolds moved for preliminary injunctive relief. No action was taken on that motion because I concluded that, since no factual dispute existed, the petition was ripe for final action.

I.

Reynolds is a Commissioned Officer in the United States Air Force Reserve. On March 10, 1992, he signed an Armed Forces Health Provisions Scholarship and Financial Assistance Contract with the Air Force and thereafter accepted a commission as a Second Lieutenant in the Air Force Medical Services Corp. The contract specified that the Air Force would pay for Reynolds' medical education in exchange for his performing military service upon the completion of his training. Reynolds commenced medical studies

at the University of Pennsylvania School of Medicine in August 1992. In the spring of 1993, he requested permission to resign his commission and to be released from the program. The reasons he gave were a concern with the loss of personal and professional freedom, the lack of research opportunities in the military and his view that "sexism and homophobia persisted as problems in the military culture." He did not, at that time, seek discharge as a conscientious objector because, as alleged in his petition, his beliefs had not yet developed to the point where he would have been eligible for such a discharge. The 1993 application was processed through the regular stages of review and was denied on May 11, 1994.

Thereafter, according to the petition, "following a period of study and intense reflection, the petitioner's deeply held moral and ethical belief that all human life is sacred and precious reached a point where he could no longer in good conscience remain a member of the armed forces." Accordingly, on February 27, 1995, Reynolds submitted an application for discharge as a conscientious objector. The Air Force appointed Lt. Col. P. Michael Cunningham to investigate Reynolds' claim. Reynolds, and the witnesses supporting his petition, Helen C. Davies, Ph.D, Professor of Microbiology at the University of Pennsylvania School of Medicine, Rachel V. Sabbag, his very close girlfriend, and Elizabeth R. Layton, Reynolds' mother, testified at a hearing before Lt. Col. Cunningham on July 6, 1995.

Reynolds was also interviewed by an Air Force chaplain, Lt. Col. Larence R. Cusick, who submitted a written report on May 18, 1995, in which he concluded that Reynolds "is definitely sincere about not wanting to serve in the military, and to do so would violate his conscience." On July 18, 1995, after having concluded his investigation, Col. Cunningham issued a report stating in relevant part, "I conclude that Lt. Reynolds is sincere in his beliefs."

Cunningham asserted that his conclusion was

*2 based on my personal evaluation of Lt. Reynolds' credibility, that of both Ch. Lt. Col. Cusick, Capt. Brown, and the assessments of several people who, while perhaps biased by personal association with him, have the better insight into his character. There is, simply, nothing to suggest other than that he is being absolutely truthful in his statement of beliefs

and personal convictions. Additionally, there are several things indicative of his credibility. When he first contemplated exiting the Air Force medical scholarship program, it was suggested to him that he use the CO route. He did not do that because, at that time, he was not personally convinced that the development and strength of his convictions met the criteria and he would not prevaricate simply to support an application. Also, he has spent considerable time-which is limited to begin with-carefully studying the military and the ramifications of officership, before submitting his application. Finally, his personal involvement in several community activities substantiates his claim that he values human life, abhors violence in any form, will work to eliminate violence, and wants to carry out his medical professional obligations in an environment consistent with his personal beliefs. (Record at 55).

On September 22, 1995, the Air Force returned Reynolds' application to Lt. Col. Cunningham "to develop more fully a record of information on which to base both recommendations and final decision" and for the purpose of considering the significance of Reynolds' 1993 "self-initiated elimination (SIE)" application, which had not been based on allegations of conscientious objection, and which had not been referred to in Cunningham's July 18 report. (*See* Record at 96, 265).

Thereafter, Lt. Col. Cunningham reconvened the hearing on October 24, 1995, in which sworn testimony was heard from Col. Robert Parke, USAF, Commander of the 436th Airlift Wing Medical Group, a second Chaplain, Lt. Col. Theodore A. Henderson, USAF, Major Meade Primsler, USAF, who supervised Reynolds during his internship at a USAF Medical Center, and Reynolds. On December 2, 1995, Lt. Col. Cunningham issued a second investigation report and again recommended that Reynolds' application for CO be approved. On March 11, 1996, Cunningham supplemented his December 2, 1995 report to include discussion of Reynolds' 1993 SIE discharge request. In the report, Lt. Col. Cunningham pointed out that he himself "was made well aware of 2Lt Reynolds SIE application very early in the investigation" (*see* Testimony of 2Lt Reynolds, 12 July 95, Record at 274), but nevertheless concluded that "2Lt Reynolds has a strong moral and ethical spirit and he was unwilling to 'perjure' himself by filing a CO application in Spring 1993, that he

was not personally convinced to be sincere." (Record at 343). Lt. Col. Cunningham did "not believe the proximity of his graduation and the possible assignment to a specialty not necessarily of his choice, or to a location less than desirable, are considerations in this application." Lt. Col. Cunningham concluded his supplemental report by reaffirming his previously stated opinion that petitioner's conscientious objector beliefs were sincerely held.

*3 Lt. Col. Cunningham's second report was forwarded to Headquarters 436th Airlift Wing for review, and on March 29, 1996, Brigadier General Robert J. Boots, the Wing Commander, recommended that Reynolds' application be denied on the ground that Reynolds had not proven by clear and convincing evidence that he was a conscientious objector as defined by AFI 36-3204.

General Boots' action was apparently taken on the recommendation of Col. Thomas L. Strand, Staff Judge Advocate, dated March 25, 1996, who questioned Reynolds' sincerity, pointing out that the reasons stated in his 1993 SIE application and in his testimony in July 1995 "could be" the basis for his conscientious objector application; that Reynolds' objection to war indicated opposition only to certain types of modern warfare and not to "war in any form"; that as a medical officer, Reynolds would be a non-combatant and, pursuant to the Geneva Convention, would bear arms in self-defense only or in defense of the sick and wounded, and that there was a question whether Reynolds had established that his conscientious objector beliefs were a "controlling force in his life," noting that he had made few changes in his lifestyle to indicate their significance. (Record at 352-356).

On August 5, 1996, the Secretary of the Air Force, to whom the file had been forwarded for final action, denied Reynolds' application for discharge as a conscientious objector, stating that Reynolds had not "established by clear and convincing evidence that he is conscientiously opposed to war in any form, or that his opposition to war is deeply held and based on religious training and belief or a moral and ethical belief held with the strength and devotion of a traditional religious belief." The secretary concluded that "the reasons for denial include, but are not limited to, the timing of the application, respondent's failure to establish that he is opposed to participation in war in

any form and his inability to demonstrate that the beliefs upon which his application is based have become the primary controlling force in his life.” (Record at 501).

II.

On this motion, the Secretary stresses the timing of Reynolds' application as a reason for disbelieving his sincerity. The Secretary argues that, because Reynolds filed a self-initiated elimination application (SIE) in 1993 and did not apply at that time to be discharged as a conscientious objector but, rather, laid emphasis on the limitation of educational and professional opportunities as well as geographic options imposed by military service, there was reason to believe that Reynolds' sole interest was to avoid military service. The Secretary comments on the fact that Reynolds' own conscientious objection application discusses a number of experiences which contributed to his ultimate views but which actually occurred in 1993 or 1994, and concludes that delay in filing a conscientious objector application based on those views casts doubt on Reynolds' sincerity.

*4 The Secretary's brief on this motion also contains bases for questioning Reynolds' sincerity which were not included in any of the reports prior to the Secretary's determination of April 1996 or in that determination itself. For example, the Secretary presently asserts, for the first time, that Reynolds' sincerity may be questioned on account of his failure to offer to serve the United States in a non-military capacity. However, even if such a theory had been articulated in the earlier proceedings, it would be insufficient since, although an offer to perform such service may support an applicant's sincerity, the law does not require an applicant to make such an offer in order to establish his sincerity. *See, e.g., Hager v. Secretary of the Air Force*, 938 F.2d 1449, 1462 (1st Cir.1991) (Breyer, J. concurring) (citing petitioner's offer to perform alternative civil service as evidence of sincerity).

In answer to the Secretary's argument, Reynolds points out that the officer assigned by the Air Force to investigate his case was fully aware of the earlier SIE application and indeed explained at length why he believed that Reynolds' SIE application cast no doubt on his sincerity. Thus, Lt. Col. Cunningham stated in his March 11, 1996, report:

While it could be contended that 2Lt Reynolds is merely forum shopping-i.e., his SIE application was denied, so he'll try the CO route-this IO felt otherwise. It might appear that 2Lt Reynolds is attempting “two bites” of the same apple but, his CO application is predicated on a moral objection to both “war in all forms and the bearing of arms” that was not part of his SIE application because he genuinely did not feel that way in 1953. It is my opinion that 2LT Reynolds has a strong moral and ethical spirit and he was unwilling to “perjure” himself by filing a CO application in Spring 1993, that he was not personally convinced to be sincere. However, in the ensuing time, with much greater reflection, contemplation and study, his personal beliefs crystallized to the point where he could, in May 1995, honestly file a CO application. I do not believe that the proximity of his graduation and the possible assignment to a specialty not necessarily of his choice, or to a location less than desirable, are considerations in this application. My opinion of his sincerity has been stated in the 2 Dec 95 ROI, and remains unchanged. (Record at 343).

III.

To qualify as a conscientious objector, Reynolds must establish that he is conscientiously opposed to war “in any form,” that his opposition is based upon religious training and belief, and that his objection is sincere. *Hager*, 938 F.2d at 1454. Proof must be by clear and convincing evidence. 32 C.F.R. § 75.5. As the *Hager* Court pointed out, “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.” 938 F.2d at 1454 (citations omitted).

*5 As the Court commented, “although this standard of review is a narrow one, it is not toothless.” *Id.* Accordingly, the *Hager* Court adopted a formula articulated by the 10th Circuit to review such petitions:

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.

As the Secretary's brief asserts, quoting *Witmer v. United States*, "[t]he ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participate in war in any form," which is purely a "subjective question." 348 U.S. at 381.

The decision in this case is controlled by the opinions of the First Circuit in *Lobis v. Secretary of the Air Force*, 519 F.2d 304 (1975) and *Hager v. Secretary of the Air Force*, 938 F.2d 1449 (1991). In *Lobis*, the Court of Appeals reversed the Air Force's conclusion that the petitioner was insincere because he had applied for discharge after the Air Force had paid for his medical education. In that case, as here, the interviewing officer found the petitioner to be truthful and sincere. The Court's analysis in *Lobis* is applicable to the case at hand:

The Investigating Officer's favorable assessment was, at worst, ignored and, at best, taken as a statement that nothing unfavorable to Captain Lobis was determined at the personal interview. Under either approach, demeanor evidence was relegated to an inconclusive role; no matter how truthful and impressive Captain Lobis' manifestations of sincerity, they could not have outweighed the circumstantial evidence relied on, since the decision makers would have had no way to know whether Captain Lobis was a very compelling witness or only a marginally credible one.

We mention this fact not by way of impugning the Secretary's procedures, which are not in issue. It is clear, however, that the Secretary's ultimate decision focused not upon a personalized assessment of Captain Lobis' truthfulness but upon what might seem to be a presumption that a Berry Plan enrollee who crystallizes only after securing the benefits of deferment must necessarily be insincere. We think such a flat rule goes too far, and does not provide a basis-in-fact for a determination of insincerity.

Id. at 308.

Similarly, in the case at hand, the Investigating Officer's assessments, both on the original and remanded hearings, appear to have been ignored, without any significant determination by the reviewing authorities of Reynolds' actual credibility. Moreover, in *Hager*, rejection of the petitioner's application for classifica-

tion as a conscientious objector was made in precisely the same words as the Secretary used in the instant case, which the Secretary's own brief on this motion characterizes as "boiler plate." Referring to the Secretary's decision, the *Hager* Court commented:

*6 The Secretary's final decision, set forth above, consists of conclusory reasons in language tracking that of the regulations. See AFR 35-24 ¶ 1a ("firm, fixed and sincere objection by reason of religious training and belief to ... participation in war in any form"); AFR 35-24 ¶ 21a ("the belief on which conscientious objection is based must be the primary controlling force in the applicant's life.") The reasons given for denying a conscientious objector application must be logical; "[t]his is a meaningful requirement, and one that cannot meaningfully be satisfied by a bare recitation by the [Secretary] of the ultimate statutory criteria...." *Checkman*, 469 F.2d at 787. The use of "boilerplate" language by The Secretary, however, is not improper so long as the reasons relied upon are reasonably discoverable from the record. *Sanger v. Seaman's*, 507 F.2d 814, 818 (9th Cir.1974). Because the Secretary necessarily relies on the opinions and recommendations of his subordinates, it is the reports of the chaplain and the investigating officer to which we must look for a basis in fact to uphold the decision. See *Goldstein*, 535 F.2d at 1341 (reviewing underlying findings of investigating officer that had been "subsequently ratified by the Secretary"). *Hager*, 938 F.2d at 1454-55.

Applying the rationale and findings of *Hager* and *Lobis*, I conclude that the record contains no basis in fact justifying the denial of Reynolds' application. Rather, the rejection appears to be based on impermissible "suspicion and speculation," *Hager*, 983 F.2d at 1462-63 (Breyer, J., concurring); *Bates v. Commander*, 413 F.2d 475, 478 (1st Cir.1969) ("doubt as to sincerity cannot be predicated on mere speculation"). To begin, the record does not support the contention that Reynolds' beliefs were insincere because of the alleged delay in submitting his application. To the contrary, his lengthy, detailed application, objectively construed, clearly establishes that his views on the grave and serious subject of conscientious objection had not, in 1993, matured to a point which would have justified an earlier petition based on conscientious objector grounds. Lt. Col. Cunningham concluded not that Reynolds' filing in 1995 was

unduly delayed but that his waiting until then to file was a sign of his carefulness in submitting an application until he was sure of his own views on the awesome subject involved.

As a final point, the Secretary contends that the emphasis placed in Reynolds' application on his "disagreements with the techniques of modern warfare and the level of violence in modern society" justifies the conclusion that Reynolds is not opposed to "war in any form." The argument is unpersuasive both because it is evident that Dr. Reynolds referred to "modern warfare" because, for all practical purposes, that is the only kind of war fought today or in which Reynolds would be expected to fight, but also because other portions of Reynolds' application make it clear that he opposed all war. For example, Reynolds states:

*7 War in all circumstances entails the deliberate and systematic taking of human life through violent means in order to achieve political objectives. Irrespective of the political context, the violence involved in modern warfare is invariably excessive, displaying a wanton disrespect for the value of human life. (Record at 4).

As summarized above (*see* pp. 5-6), the Staff Judge Advocate who recommended denial of Reynolds' conscientious objector petition listed several reasons for his decision. The Secretary's motion to dismiss discusses only two of those factors. It is not clear why the Secretary fails to discuss those additional factors as purportedly establishing a basis in fact to deny Reynolds' petition. In any event, I have reviewed the other factors enunciated by the Staff Judge Advocate and conclude that they do not establish such a basis. For the reasons the *Lobis* Court articulated, I am unpersuaded by the challenge to Reynolds' sincerity based on a lack of change in his lifestyle since the development of his conscientious objector beliefs:

alleged failure to manifest his newfound convictions in a changed life-style ... seems of minor significance at best. Captain Lobis' medical career was of a nature commonly supposed to be oriented towards public service ... no evidence, before or after crystallization, of habits or life-style incompatible with sincerely held [conscientious objector] beliefs.

519 F.2d at 307, n. 2.

In addition, the Staff Judge Advocate's conclusions as to Reynolds' beliefs that acts of violence are morally wrong and that serving as a physician in the military would violate his understanding of the Hippocratic Oath seem speculative at best and are in dramatic contradiction to the Investigating Officer's conclusion as to Reynolds' sincerity.

* * * * *

In sum, I conclude that the Secretary has failed to establish a basis in fact for rejecting Reynolds' application for designation as a conscientious objector.

The Secretary's motion to dismiss is denied and the petition is granted.^{FN2}

FN2. The Secretary's motion requests that, in the event the motion to dismiss is denied, the case be remanded for the purpose of conducting further proceedings to correct any defect in the record. That motion is also denied because there is no basis for further proceedings. The case has been investigated twice and reviewed by every level of the Air Force. The facts are not in dispute; no procedural defect is claimed. A remand would serve no useful purpose.

It is so ordered.

D.Mass.,1997.
Reynolds v. Windall
Not Reported in F.Supp., 1997 WL 258605
(D.Mass.)

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