

## **PREPARATION & PROCESSING OF CO CLAIMS**

This Outline was prepared for a workshop presented in April 2008 by MLTF attorneys Peter Goldberger (Ardmore, PA) and Stephen Collier (San Francisco, CA) for hotline counselors of the GI Rights Network. It attempts to cover the basics of a claim for discharge as a Conscientious Objector (or for reassignment to non-combatant duty as a I-AO objector), including the nature of a qualifying religious or moral objection to participating in war in all forms, how to develop a claim for objection based on non-traditional moral and ethical beliefs, and developing a strong record. The goal of the soldier/sailor/Marine/airman and counselor is to develop a claim that is not only most likely to be approved within the military process, but also will, if denied there, stand the best chance of withstanding "basis in fact" review in Federal Court.

### **1. Introductions**

- a. It important to look both to achieving the discharge administratively and to building a record for habeas relief from the start. The applicant is working to satisfy a burden of proof by "clear and convincing evidence" to win a discharge while simultaneously looking forward to habeas review, which is governed by the "basis in fact" test.

Understanding this fundamental point can be tricky. In the application process, the member-applicant has the burden to prove his/her eligibility for the discharge by showing that s/he is sincere in professing qualifying beliefs that are fixed and deeply held. If the Secretary of the service branch denies the application for discharge, the military must give reasons. Those reasons are often expressed in rather general and conclusory terms. If the applicant then challenges the denial in court by filing a habeas corpus petition, s/he will have to show the court that the information presented to the military made a prima facie showing (that is, sufficient on its face) that s/he is opposed to participation in all real-world wars, that his/her stated opposition is based on religious or moral principles which crystallized after enlisted and have since become firm and fixed. If the petitioner meets this burden of going forward, the military bears the ultimate burden in court of demonstrating a "basis in fact" (found in the existing record) for one or more legally sufficient reasons given by the military branch in denying the application. *Witmer v. United States*, 348 U.S. 375, 381 (1955); *Dickinson v. United*

*States*, 346 U.S. 389, 396 (1953); *Estep v. United States*, 327 U.S. 114, 122 (1946); *Roby v. U.S. Dep't of Navy*, 76 F.3d 1052, 1058 (9<sup>th</sup> Cir.1996); *Taylor v. Claytor*, 601 F.2d 1102, 1103 (9<sup>th</sup> Cir. 1979).

The basis-in-fact test "means more than suspicion and speculation." *United States v. Kember*, 437 F.2d 534, 535 n. 1 (9th Cir.1970). The military is not free merely to say they disbelieved the applicant. A mere suspicion or surmise as to an applicant's motivation or sincerity is not a basis in fact. *Dickinson v. United States*, 346 U.S. 389, 397 (1953); *Helwick v. Laird*, 438 F.2d 959, 963 (5th Cir. 1971); *Hager v. Sec'y of Air Force*, 938 F.2d 1449, 1463 (1st Cir. 1991) (Breyer, J., concurring). It requires that the Army or other branch demonstrate "some proof that is incompatible with the applicant's claim." *Roby, supra*, 76 F.3d at 1058. The Secretary "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." *Smith v. Laird*, 486 F.2d 307, 310 (10<sup>th</sup> Cir. 1973); *Shaffer v. Schlesinger*, 531 F.2d 124, 128 (3<sup>rd</sup> Cir. 1976). The "basis in fact" to which the military points must be *incompatible* with the claim.

## **2. Brief history of military CO.**

- a. The Supreme Court has never recognized a constitutional right to a conscientious objection discharge or draft exemption. *Gillette v. United States*, 401 U.S. 437, 462 (1971).
- b. Nevertheless, conscientious objectors have always been protected to some extent by draft laws as they had been from compulsory militia service. As stated in the Selective Service (draft) law, *see* 50 U.S.C. Appx. § 456(j):

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological,

or philosophical views, or a merely personal moral code.

- c. In 1962, the DoD adopted Directive 1300.6 (August 21, 1962), which, for the first time, authorized discharges based on conscientious objection:

No vested right exists for any individual to be discharged from military service at his own request before the expiration of his term of service, whether he is serving voluntarily or involuntarily. \* \* \* The fact of conscientious objection does not exempt men from the draft; however, the Congress has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces. \* \* \* Consistent with this national policy, bona fide conscientious objection by persons who are members of the Armed Forces will be recognized to the extent practicable and equitable. \* \* \* [A] request for discharge after entering military service, based solely on conscientious objection which existed but was not claimed prior to induction or enlistment, cannot be entertained.

DOD Directive 1300.6, Part III (1962). Later revisions of that Directive appeared in 1968 and 1971. That version remained in effect until May 2007, when it was replaced with DoD Instruction 1300.06. At the same time, the formal publication of this Directive in the Code of Federal Regulations (former title 32, C.F.R., part 75) was rescinded.

- d. Each of the military services had adopted its own version of DOD Directive 1300.6. The DOD Instruction and any of the branches' implementing regulations can be downloaded as a PDF file from:

<http://www.girightshotline.org/discharges/index.shtml>. Another formerly trusted source is unfortunately no longer complete or current: <http://www.objector.org/helpingout/discharge-regulations.html#anchor241919>

- i. Army: AR 600-43 (latest rev. is 2006)
- ii. Air Force: AFI 36-3204 (1994)
- iii. Navy: MILPERSMAN 1900-020 (2002)

- iv. Marine Corps: MCO 1306.16 (1986)
- v. Coast Guard: COMDTINST 1900.8 (Although released in 1990 when the Coast Guard was within the Dept. of Transportation, this CG Commandant Instruction remains effective under the aegis of the Dept. of Homeland Security.)
- e. At this time, the only statutory basis for the CO discharge is the Defense Department's general authority to establish the criteria for discharges. The "right" thus lacks not only constitutional but also legislative security. Potential statutory support for military conscientious objector:
  - i. Religious Freedom Restoration Act. 42 U.S.C. § 2000bb *et seq.*
  - ii. Military CO Act (HR 5060, 102d Cong, 1992).

**3. The "right" to discharge; pre-enlistment beliefs:**

- a. Contrary to common belief, even under the administrative scheme there is no solid "right" to the discharge:

Administrative discharge due to conscientious objection prior to the completion of an obligated term of service is discretionary with the Military Department concerned, based on a judgment of the facts and circumstances in the case. However, insofar as may be consistent with the effectiveness and efficiency of the Military Services, a request for classification as a conscientious objector and relief from or restriction of military duties in consequence thereof will be approved to the extent practicable and equitable ....

DoD Instruction 1300.06, ¶ 4.1 The Instruction goes on to explain:

Because of the personal and subjective nature of conscientious objection, the existence, honesty, and sincerity of asserted conscientious objection beliefs cannot be ascertained by applying inflexible objective

standards and measurements on an ‘across-the-board’ basis. Requests for discharge or assignment to non-combatant training or service based on conscientious objection will, therefore, be handled on an individual basis with the final determination made at the Headquarters of the Military Department concerned in accordance with the facts and circumstances of the particular case and the policy and procedures set forth herein.”

¶ 4.2.

- b. Stated as a “limitation” on this qualified “right” is the caveat that the objector must not have possessed qualifying beliefs at the time of enlistment, that is, the beliefs must have developed, or at least “crystallized” later. This disqualification, oddly enough, continues to be stated in the Instruction by reference to Selective Service law: “[N]o member of the Armed Forces who possessed conscientious objection beliefs before entering military service is eligible for classification as a Conscientious Objector if such beliefs satisfied the requirements for classification as a Conscientious Objector pursuant to title 50 United States Code (U.S.C.) App. 456(j) ... and other provisions of law.” ¶ 4.1.1.

(Refer to pt. 2.b. above for the definition of conscientious objection as found in the Selective Service Act which is incorporated here.)

#### **4. Definition of conscientious objection:**

“A firm, fixed and sincere objection to participation in war in any form or the bearing of arms, by reason of religious training and/or belief.” ¶ 3.1

**5. The regulation recognizes two types of COs, named after the corresponding Selective Service (draft) classifications:**

a. I-O CO (opposed to “participation in war”):

“A member, who by reason of conscientious objection, sincerely objects to participation in military service of any kind in war in any form.” ¶ 3.1.1.

b. I-A-O CO (opposed to “the bearing of arms”).

“A member who, by reason of conscientious objection, sincerely objects to participation as a combatant in war in any form, but whose convictions are such as to permit military service in a non-combatant status.” ¶ 3.1.2.

**6. The regulation provides that CO applications "may be approved (subject to the limitations of ¶ 4.1)," ¶ 5.1, if the applicant demonstrates three things:**

a. The applicant "is conscientiously opposed to participation in war in any form." ¶5.1.1. "Conscientious" opposition apparently means an objection to participation in war in any form for reasons of conscience (not merely, in other words, “conscientious” in the sense of scrupulous). The regulation defines "war in any form" as an "objection to all wars rather than a specific war." ¶ 3.5.1. "A belief in a theocratic or spiritual war between the powers of good and evil does not constitute a willingness to participate in 'war' within the meaning of this Instruction." ¶ 3.5.2.

b. The "opposition is founded on religious training and/or belief." ¶ 5.1.2. (The 2007 revision changed “training and belief” to “training and/or belief.” Whether this seeming broadening of the criteria will prove meaningful in practice remains to be seen.) The term "religious training and/or belief is defined in ¶ 5.2. Interestingly, the discussion of "religious training and/or belief" actually includes nothing separate about “religious training.” (Training, under judicial precedent, seems to mean nothing beyond whatever process led up to the adoption of the beliefs.) The Instruction defines the concept entirely in terms of “belief,” as follows:

*“Religious training and/or belief.* Belief in an external power or “being” or deeply held moral or ethical belief, to which all else is subordinate or upon which all else is ultimately dependent, and which has the power or force to affect moral well-being. The external power or “being” need not be one that has found expression in either religious or societal tradition. However, it should sincerely occupy a place of equal or greater value in the life of its possessor. Deeply held moral or ethical beliefs should be valued with the strength and devotion of traditional religious conviction. The term “religious training and/or belief” may include solely moral or ethical beliefs even though the applicant may not characterize these beliefs as “religious” in the traditional sense, or may expressly characterize them as not religious. The term “religious training and/or belief” does not include a belief that rests solely upon considerations of policy, pragmatism, expediency, or political views.” ¶ 3.2.

If an applicant's beliefs are "moral and ethical," but not traditionally religious, there is an added requirement. Such applicants must show that they hold their beliefs "with the strength of traditional religious convictions," and that the beliefs "have directed the applicant's life in the way traditional religious convictions of equal strength, depth, and duration have directed the lives" of people with traditional religious convictions. "In other words, the belief ... must be the primary controlling force in the applicant's life." ¶ 5.2. 1.

- c. The applicant's "position is firm, fixed, sincere and deeply held." ¶ 5.1.3. Although the "deeply held" nature of a belief is not part of the definition, it is one of the criteria used to judge claims. To judge sincerity, the regulation directs the people evaluating claims to look to the person's “thinking and living in its totality.” If the claim is non-religious in nature, the military looks to "whether ethical or moral convictions were gained through training, study, contemplation, or other activity comparable in rigor and dedication to the processes by which traditional religious convictions are formulated." ¶ 5.2.2.2.

DODI 1300.06, ¶5.2.2.2. Other relevant factors include: training in the home and church; general demeanor and pattern of conduct; participation in religious activities; credibility of the applicant; and credibility of persons supporting the claim.

This paragraph is essentially repeated in each service's regulations. In you will find the factors that you should explore to develop a strong claim. Start here and explore the soldier's history and beliefs as expressed through these factors.

**7. Overview of the conscientious objector process.** The burden is on the applicant to explain and demonstrate both the nature of the belief and its sincerity and depth by "clear and convincing evidence." ¶ 5.3. The applicant's own testimony and submissions, however, may alone meet this standard. ¶ 5.2.2.

**8. Procedural steps.** After a member submits an application (the contents of which are discussed under pt. 12 below):

- a. Applicant notified that s/he will not receive veterans benefits if s/he refuses to wear the uniform or obey orders. ¶ 7.2; 38 U.S.C. § 3103. (This disqualification has been upheld by the Supreme Court, by the way. See *Johnson v. Robinson*, 415 U.S. 361 (1974)).
- b. Applicant will be interviewed by a chaplain, who will prepare a report concerning "the nature and basis of the applicant's claim, and as to the applicant's sincerity and depth of conviction." ¶ 7.3.
- c. Applicant will be interviewed by a psychiatrist or medical officer (if no psychiatrist is available). The purpose of this interview is to determine whether there are reasons to discharge the applicant medically. ¶ 7.3. Note that unlike the chaplain, the psychiatrist is *not* invited to judge sincerity or to analyze the applicant's motivation.
- d. The applicant's commanding officer (generally not the immediate commanding officer – the DoD leaves it up to each Service Branch to decide) appoints an investigating officer to investigate the application. ¶ 7.4. The IO then conducts an investigation, which includes a hearing at which the applicant is given the opportunity to present

evidence. An applicant's refusal to submit to questioning under oath or affirmation may be used against him/her. ¶ 7.4.2. Applicants have the right to "legal counsel" (at their own expense). ¶ 7.4.2. The hearings are informal. ¶ 7.4.2.2. The military will not provide a verbatim record, but an applicant may make such a record at his/her own expense (such as by bringing a tape recorder). ¶ 7.4.2.4; ¶ E2.5.

- e. At the end of the investigation, the IO must prepare a written report, which must include summaries of the testimony, ¶ 7.4.3.3, the IO's understanding of the basis for the claim, ¶ 7.4.3.4, whether and why the IO thinks the applicant is sincere, *id.*, and the IO's recommendation for disposition of the application. ¶ 7.4.3.5.
- f. After the applicant receives the IO's report, he may submit a "rebuttal." Each Military Branch has its own time limits. ¶ 7.4.3.6.
- g. Next, the record is reviewed for legal sufficiency by the headquarters of the officer who appointed the IO. ¶ 7.5. If necessary, the claim may be returned to the IO for further investigation. *Id.*
- h. Once the record is complete, the record is given to the officer who appointed the IO. That officer will then make a personal recommendation and pass the claim through the chain of command to the headquarters of the military branch concerned. ¶ 7.6. (The Secretary of the branch can delegate authority to approve CO applications, but not to deny them, to commanders at the general court martial level.) During this process, if any new information adverse to the applicant is added to the record (such as a new negative recommendation), the applicant must be given an opportunity to rebut that before a final decision is made. ¶ 7.7.
- i. The final decision is made by the headquarters of the applicable military branch. ¶ 7.7. Where the applicant has applied for 1-O status (*i.e.*, requested discharge), the military branch is not permitted to grant 1-A-O status as a compromise. ¶ 5.5.

- j. The DoD Instruction contains no deadlines, time limits or even time frames for action. Some of the service branch implementing regulations do impose promptness rules.

**9. Duty assignments while application is pending.** The regulation provides:

“To the extent practicable under the circumstances, during the period applications are being processed and until a decision is made, every effort will be made to assign applicants to duties which will conflict as little as possible with their asserted beliefs.” ¶ 7.9.

This limited protection does not generally excuse an applicant from activation or deployment. *Id.* The applicant also is not generally excused from the duty to obey orders, and remains subject to the UCMJ. *Id.*

**10. How a change of duty station affects where application is to be submitted.** The former regulation provided:

[M]embers desiring to file application who are on orders for reassignment may be required by the military service concerned to submit applications at their next permanent duty station.

32 C.F.R. § 75.6(h). This provision does not appear to have been carried forward in the revised DoD Instruction.

**11. What if the applicant goes AWOL or UA, or charges are brought against an applicant while a CO claim is pending?** The

regulation provides that the processing of the application "can be suspended." ¶ 7.8. This can result in the application's becoming moot by virtue of a discharge. Moreover, if processing is not suspended and the application is granted, the applicant will not be discharged as a CO "until all disciplinary action has been resolved." *Id.* However, if the court martial or other discipline is not unrelated to the applicant's conscientious objection, the adverse action should be abated or reversed. See *Parisi v. Davidson*, 405 U.S. 34, 46 n.15 (1972).

## 12. What information must an applicant provide?

- a. General information. ¶ E2.1. Name, prior addresses, schools, jobs, etc. Go through to make sure of two things: First, that there is nothing inconsistent with narrative parts of the application. Second to see if there is anything that needs to be discussed in the narrative sections. For example, if the applicant was in Junior ROTC in high school, or his his/her father was career military, s/he should discuss what impact that had on his beliefs.
- b. Questions concerning "training and belief." ¶ E2.2
  - i. "A description of the nature of the belief ...." ¶ E2.2.1. Should be short, if possible. The applicant should not attempt to argue that the belief is rational or right. S/he should simply state the belief. The answer to this question is best begun with the words "I believe that ...." Example: I believe that God has commanded me to love my enemies, not to kill them or to help other people kill them.
  - ii. "An explanation as to how his beliefs changed or developed, to include an explanation as to what factors ... caused the change in or development of conscientious objection beliefs." ¶ E2.2.2. A chronological explanation usually works best. The applicant should start with what s/he believed at the time of enlistment as well as a brief discussion of pertinent religious/ethical training as a child. Then describe each step that brought him/her to where s/he is today.
  - iii. "An explanation as to when these beliefs became incompatible with military service and why." ¶ E2.2.3. If the applicant can pinpoint a date when the beliefs became "fixed," this is the place to put it.
  - iv. "An explanation as to the circumstances, if any, under which the applicant believes in the use of force, and to what extent, under any foreseeable circumstances." ¶ E2.2.4.
  - v. "An explanation as to how the applicant's daily lifestyle has changed as a result of his beliefs and what future

actions he plans to continue to support his beliefs."  
¶ E2.2.5.

- vi. "An explanation as to what in applicant's opinion most conspicuously demonstrates the consistency and depth of his beliefs which gave rise to his claim." ¶ E2.2.6.
- vii. The application also calls for information about the applicant's prior participation in military organizations (¶ E2.3.1), in religious organizations (¶ E2.3.2), and in any and all other organizations other than political and labor groups (¶ E2.3.3).

### **13. Letters of support**

Supporting material is covered in ¶ E2.4. Some kinds of letters are better than others. Consult an experienced counselor.

### **14. The Counseling Process**

- a. Role of the counselor/attorney is:
  - i. To help the applicant clarify his/her beliefs.
  - ii. Spot possible inconsistencies in the claim so that the applicant can either omit unnecessary information that may seem to conflict with something else the applicant wrote, or else to clarify it in a way that resolves the conflict. Point out thoughts that require elaboration to make them understandable to those who will read and evaluate the application.
  - iii. Help the applicant identify and explain crystallizing experiences and corroborating actions and other evidence. Help think of supporting witnesses.
  - iv. Facilitate the preparation of the application. For example, some COs find it very difficult to write. A counselor can help by tape recording the CO's answers, which can then be transcribed and edited. See "Counseling Conscientious Objectors: Combating the Stereotypes," by Kathleen Gilbert. (A copy of this article is available through the National Lawyers Guild Military Law Task Force website: <http://www.nlgmltf.org>).
  - v. Review letters of support.

- b. Things a counselor should not do:
  - i. Encourage, advise, or assist an applicant to violate any civilian or military law.
  - ii. Help the applicant prepare a claim that misrepresents the applicant's true beliefs.
  - iii. Compose the application for the applicant.
  - iv. Give legal advice, if the counselor is not a lawyer.

### **15. The IO hearing.**

Create a record [notes, tape, court reporter]

### **16. Rebuttals.**

The applicant has a right of rebuttal at every stage at which new potentially adverse information is added to the packet. The counselor can and should assist the applicant in taking best advantage of this important right.

### **17. Recommendations up the chain of command and final decision.**

The authority to make a final decision on the application lies with “the Secretary” of the particular service branch (not the Secretary of Defense, in other words, but the Secretary of the Navy, for example). In each branch this authority is delegated to a Board (in the Army it’s a rotating, Pentagon-based, three-member “Conscientious Objector Review Board”) or specified official, as provided in the service branch regulations cited above. The decision, particularly if unfavorable, is rendered with “reasons” (sometimes a different reason from each voting member) of varying specificity and validity.

### **18. Action and choices after an adverse decisions**

- a. Going along and getting along.
- b. Alternate grounds for discharge.
- c. Refusing orders and/or going AWOL.
- d. Second applications. (Not accepted if premised “on the same grounds.” ¶ 6.2.3.2.)
- e. Filing habeas corpus petition in federal district court, 28 U.S.C. § 2241. (See separate training outline.)