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Not For Motion Practice or Pleadings

5 April 2018

Via Email Only

Rear Admiral Paul D. Pearigen, U.S.N.
Commanding Officer, Navy Medicine West
4170 Norman Scott Road, Ste. 5
San Diego, CA 92136-5521

SUBJECT: Formal Complaint – U.S. Naval Hospital, Okinawa, Japan.

Ref: (a) DoDD 1020.02E (2016)
(b) DoDD 1350.2 (2015)
(c) DoDI 1300.17 (2014)
(d) SECNAVINST 1730.81 (2012)
(e) OPNAVINST 5354.1G (2017)

Dear Admiral Pearigen:

I represent the *Military Religious Freedom Foundation* [MRFF]. MRFF is an IRS 501(c)(3), not-for-profit corporation, chartered in Washington, DC, and headquartered in Albuquerque, NM. It is dedicated to ensuring that all members of the United States Armed Forces receive the Constitutional guarantee of religious freedom to which they and all Americans are entitled by virtue of the First Amendment.

To date, over 55,000 active duty, veteran, and civilian personnel of the United States Armed Forces have come to the MRFF for redress and assistance in resolving or alerting the public to their civil rights grievances. MRFF recognizes that military life requires individual adherence to shared patriotic principles. MRFF also recognizes the need for military personnel to at times temporarily relinquish some Constitutionally granted personal freedoms for the sake of military discipline and objectives.

MRFF currently has numerous U.S. military and DoD civilian family clients at the Marine Corps Base Camp Butler, Okinawa, Japan area. MRFF brings this Formal Complaint on behalf of 26 of those clients – many of whom are in mortal fear of retaliation should they be personally

Rear Admiral Pearigen, Letter, 2.

identified in this matter, something that MRFF suggests is an equally troublesome issue. Thus, MRFF respectfully requests your expeditious intervention and resolution of this matter consistent with references (a) – (e) above, as well as the provisions of the First Amendment to the U.S. Constitution.

NATURE OF THE COMPLAINT

There are two components to MRFF's Formal Complaint on behalf of its active duty military and DoD civilian clients in Okinawa.

I. In the public Galley area of the Naval Hospital, Okinawa, a "POW/MIA" memorial table display was recently set up. A photograph of this exhibit is reproduced as Appendix "A" for your information. The numerous complaints that MRFF received over this and the substance of MRFF's Formal Complaint, is the inclusion in this highly visible memorial, of a prominently displayed Christian Bible. Let me be clear: MRFF actively supports any and all non-religious efforts honoring the men and women of our Armed Forces who have sacrificed as POWs/MIAs. Nor does MRFF hold any animus towards those service members who, as Christians, personally believe that the Bible is indeed holy. Indeed, and please carefully note, the vast majority of MRFF's 26 clients here, self-identify as Christians. But, those beliefs belong in the Chapel or in their personal residences or otherwise practiced in accordance with the time, place and manner restrictions attendant to Constitutional mandates, relevant U.S. Supreme Court and related Federal Court decisions as well as all DoD and Department of the Navy (DON) directives instructions and regulations.

The issue here is that by including a Bible as part of the POW/MIA Display in the public Galley, it signifies two things. First, that this is an official, command-endorsed Display. Second, that the command is endorsing *Christianity* (versus other major religions or non-religious beliefs) as expressed in the Christian Bible to the total exclusion of any other belief systems or non-belief traditions.

II. The second component of MRFF's Formal Complaint is contained in the purported "explanatory" bi-lingual placard (plainly visible in the photograph at Appendix A) on the table behind the Bible and other objects. That states in relevant part in both English and Japanese:

"The Bible represents the strength gained through faith to sustain
those lost from our country, founded one nation under God."

Anyone with a modicum knowledge of American history should know that this is false – the very purpose of the Establishment Clause in the First Amendment was to make it clear, to any and all, that the United States was conceived as religiously *neutral*, viz., that there was absolutely no religious component to our Founding. Nowhere in our Constitution does the word "God" appear even once.

Specifically, this was to clarify what was already in the body of the Constitution, in Article VI, § 3, which in relevant part states: "no religious test shall ever be required as a qualification to any office or public trust under the United States." Furthermore, if there was any doubt, in 1797, the U.S. Senate ratified the "Treaty of Peace and Friendship between the United States of America and the

Rear Admiral Pearigen, Letter, 3.

Bey and Subjects of Tripoli of Barbary.” Article 11, of that treaty reads in full:

As the government of the United States of America is not in any sense founded on the Christian Religion, -as it has in itself no character of enmity against the laws, religion or tranquility of Musselmen, -and as the said States never have entered into any war or act of hostility against any Mehomitan nation, it is declared by the parties that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries. [Emphasis added].¹

The statement on the Exhibit’s placard is nothing more than an illegal, unconstitutional proselytization from an extremist, fundamentalist Christian sect. It ignores all followers of other religions and totally ignores all those who subscribe to no religion – all in blatant violation of DoD and DON regulations. This is as unacceptable as it is unconstitutional – especially when it is demonstrably historically false. But, it is a slap in the face to every non-Christian (American or Japanese) person who enters the Galley and is confronted with this illicit Display of fundamentalist, Christian exceptionalism, domination and supremacy.

ATTEMPT AT INFORMAL RESOLUTION

Earlier this week, Mr. Mikey Weinstein, Esq., the President and Founder of MRFF, attempted to resolve this matter via telephonic communication with the JAG assigned to the USN Hospital, Okinawa, a LT Liu. The LT told Mr. Weinstein that he would discuss MRFF’s concerns with the Hospital Commander. When queried as to when that might occur, the LT advised Mr. Weinstein that he could not say since the Commander was TDY possibly for another month! Surely in this era of virtually instantaneous digital communications, he could have at least emailed her. Certainly the Navy expects *some* initiative from its officers. In view of that non-responsive answer, and after consultation with the undersigned, a decision was made to file this Formal Complaint.

LEGAL ISSUES

A. First Amendment Issues.

The Supreme Court of the United States has held:

Our cases have long recognized a distinction between the freedom of individual *belief*, which is absolute, and the freedom of individual *conduct*, which is not absolute. [emphasis added].²

Setting forth a display in a public area onboard the USN Hospital here, is conduct – conduct that must comply with the Constitution. Furthermore, in another more poignant case, that Court held:

¹ Available at: http://avalon.law.yale.edu/18th_century/bar1796t.asp [Last accessed: 5 April 2018].

² *Bolden v. Roy*, 476 U.S. 693, 699 (1986).

Rear Admiral Pearigen, Letter, 4.

Can a man excuse his practices to the contrary [of the law] because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.³

The U.S. Supreme Court in a *military* First Amendment case, *Parker v. Levy*,⁴ the Court reiterated three important (and relevant) principles. *First*, “This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society.”⁵ *Second*, “[The UCMJ] and the various versions of the Articles of War which have preceded it, regulate aspects of the *conduct* of members of the military which in the civilian sphere are left unregulated.”⁶ *Third*,

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.⁷

B. DoDD 1020.02E (2016).

This Directive mandates “Equal Opportunity” within the DoD. It also establishes the DoD Military Equal Opportunity Program [MEOP], which ensures, *inter alia*, that: “All service members are afforded equal opportunity in an environment free from . . . unlawful discrimination on the basis of . . . religion” By using a Bible on the POW display, that unlawfully discriminated against anyone who subscribes to a non-Christian religion, or no religion at all [¶ 2.b.1].

C. DoDD 1350.2 (2015).

This Directive further delineates the DoD MEOP. It states that:

4. It is DoD policy to . . . [¶ 4.2] Promote an environment free from personal, social or institutional barriers Unlawful discrimination against persons . . . based upon . . . religion . . . is contrary to good order and discipline and is counterproductive to combat readiness and mission accomplishment. ***Unlawful discrimination shall not be condoned.*** [Emphasis added].

How does a Jew, a Muslim, a Buddhist, a Shintoist (the traditional religion of Japan), a

³ *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878).

⁴ 417 U.S. 733 (1974).

⁵ 417 U.S. at 743.

⁶ *Id.* at 749 [emphasis added].

⁷ *Id.* at 758.

Rear Admiral Pearigen, Letter, 5.

Mormon, a Wiccan, an atheist, etc., feel when they enter the Galley in a U.S. military hospital and see the Bible so prominently displayed? How about Japanese locals employed at the hospital? Did anyone consider whether or not this violates any Japanese laws made applicable by the Japanese-American *Status of Forces Agreement* [SOFA], or Japanese workplace regulations? It was sufficiently disturbing that MRFF got 26 separate complaints about it.

D. DoDI 1300.17 (2014).

This gets to the crux of the issue here:

The DoD places a high value on the rights of members of the Military Services to observe the tenets of their respective religions *or to observe no religion at all*. It protects the civil liberties of its personnel and the public to the greatest extent possible. [¶ 4.a; emphasis added].

That certainly is *not* the case here.

E. SECNAVINST 1730.8B, CH-1 (2012).

Paragraph 1 of the underlying Instruction clearly states: “It is DON policy to foster mutual respect for diverse religious expressions” This display is the antithesis of that policy. Indeed, and equally as important as MRFF’s Formal Complaint here, it demeans the many American POW’s/MIAs throughout our history who were of non-Christian or no faiths, and this simply cannot be tolerated.

CONCLUSION

It is not MRFF’s nor the undersigned’s purpose to tell you or anyone else in the DON how to do their jobs. Both Mr. Weinstein and myself are former JAGs and we know better. But, when MRFF, an internationally recognized civil rights organization has 26 military and civilian clients from the Marine Corps Base Camp Butler area over this, we all know that there is a problem and a simple review of the applicable DoD and DON regulations confirms that. Since we were unable to *timely* resolve this informally, MRFF is making this Formal Complaint.

Lastly, while not directly related to MRFF’s Formal Complaint here, anyone who follows international politics, knows and should be concerned about further antagonizing the local population on the prefecture of Okinawa, Japan – something MRFF suggests that the U.S. military *should* worry about.⁸ For all anyone knows, the local civilian employees working at the Naval Hospital there, may very well be grossly offended by this Display – but like MRFF’s 26 clients, too intimidated to say or do anything.

The relief MRFF seeks on behalf of its client is simple:

⁸ See, *Japan’s Problematic Prefecture – Okinawa and the US-Japan Relationship*, available at: <https://apjjf.org/2016/17/McCormack.html> [Last accessed: 5 April 2018].

Rear Admiral Pearigen, Letter, 6.

1. Remove the Bible from the Display;
2. Remove the language from the placard about the Bible and “one nation under God;” and
3. An outside, independent investigation as to how this discriminatory display was allowed to be placed in a public Galley, onboard a Marine Corps Base, inside of a Naval Hospital; who (if anyone) authorized it; and appropriate disciplinary measures administered to those responsible.

Respectfully submitted,

/s/ Donald G. Rehkopf, Jr.

DONALD G. REHKOPF, JR.

Attorney at Law

cc: Client (Weinstein)
DGR/1

Rear Admiral Pearigen, Letter, 7.



POW/MIA Exhibit, USN Hospital Okinawa, 29 March 2018

APPENDIX “A”