



April 1, 2009

Gregory C. Weiss
Chief of Voluntary Services
Oscar G. Johnson VA Medical Center
325 East H Street
Iron Mountain, MI 49801

VIA Facsimile (906-779-3188) and UPS (Guaranteed for Next Day Delivery)

RE: Unconstitutional action against Martin Colburn

Dear Mr. Weiss,

You informed our client, Mr. Martin Colburn, in a letter dated February 13, 2009, that he may no longer have access to the Oscar G. Johnson VA Medical Hospital ("Hospital") because of the voluntary individualized religious services he was providing to patients. This revocation of access violates Mr. Colburn's First Amendment rights to freedom of speech and of religion, and has no basis in VA Handbook policies. Further, barring Mr. Colburn's access to patients who have requested his religious services violates those patients' right to freedom of religion. Accordingly, we are writing to urge you to reverse your determination in the interests of upholding the rights of Mr. Colburn and those of your patients.

By way of introduction, the Alliance Defense Fund ("ADF") is a non-profit legal and educational organization that seeks to educate government officials and others on the subject of constitutional rights, particularly under the First Amendment. When necessary, we do proceed to litigation to protect First Amendment rights.

RELEVANT FACTS

Mr. Colburn is a veteran who serves both as an assistant chaplain for Post 66 of the American Legion and as a chaplain for Chapter 45 for Disabled American Veterans of Oconto County, WI. He has never served as an official representative of the Hospital. As a part of his duties as a chaplain for the American Legion, Mr. Colburn has been volunteering his services at the Hospital on a weekly basis for over four years, commuting over a hundred miles round trip each time. Mr. Colburn has interacted with patients in a number of ways throughout that time, from organizing bingo events to simply listening to a patient talk. Another service Mr. Colburn provides is that he offers to pray with and read the Bible to individual Hospital patients. Mr.

Colburn never provides group prayers or preaches to Hospital patients, but instead approaches them on an individual basis and only prays for or reads to them if the patients provide permission. Since Mr. Colburn is particularly interested in serving those who cannot come to the congregational areas of the Hospital, he would often visit patients' rooms to pray for or read to them. Many patients who Mr. Colburn visited asked him to return on a regular basis.

It was in an attempt to reach one of these patients that Mr. Colburn was required to leave the hospital and has since been banned from returning. Mr. Colburn had visited the room-bound patient a week earlier and the patient, after listening to Mr. Colburn read to him from the Psalms, asked Mr. Colburn to return the following week. When Mr. Colburn attempted to do so, he was confronted in a Hospital hallway by a Hospital staff member. The staff member, who Mr. Colburn recalls to be the Activities Director, attacked him for carrying a Bible in the Hospital and stated "You and that Bible are out of this hospital now." When Mr. Colburn called the patient from his home to inform the patient that he would not be able to visit, the patient was shocked and disappointed, emphasizing that he had requested Mr. Colburn to visit him.

Shortly afterwards, Mr. Colburn received a letter from you, Mr. Weiss, identifying Mr. Colburn's use of a Bible in the Hospital as a violation of hospital policy and barring him from accessing the hospital for any reason other than to receive medical care.

A wide variety of community groups are allowed to serve the patients at the Hospital, such as the American Legion and the Boy Scouts, and private citizens have access to patients as well. To Mr. Colburn's knowledge, as well as the knowledge of American Legion Post 66 Commander Dave Haase, none of these groups are prevented from providing literature to or conversing with patients.

RELEVANT LAW

Your letter to Mr. Colburn charges him with various violations of Hospital policy. But none of the cited policies support the Hospital's action against Mr. Colburn. As noted above, Mr. Colburn always received permission from patients before praying or reading the Bible with them. Thus, the "private choice" to "free exercise of religion" properly noted as paramount in VHA Handbook 1111.2(1) and (4) was protected. Further, Mr. Colburn was not acting as a "volunteer chaplain" on behalf of the Hospital, but rather as a private citizen providing his time on behalf of his voluntary organizational affiliations. Surely it is not the position of the Hospital that only "authorized" individuals are allowed to engage in prayer or religious discussion with patients—such a position would be even more constitutionally infirm than the actions it has already taken. Finally, the Bible cannot be categorized as "offensive material" without undermining VHA Handbook 1111.02(26) itself, since the Handbook expressly allows for religious literature to be provided to patients. The Bible is, of course, the quintessential example

of religious literature; banning it would necessarily mean that little else could be allowed, and thus the “offensive literature” exception to the “religious literature” rule would swallow the rule. Such an interpretation is clearly unreasonable.

Ultimately, though, regardless of the purported policy bases for its action, the Hospital’s choice to ban Mr. Colburn is constitutionally impermissible as a violation of both the free speech and free exercise protections of the First Amendment.

The Supreme Court has consistently said that targeting religious groups or individuals for unfavorable treatment is viewpoint discrimination violates the right to free speech under the First Amendment. *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 112 (2001). *Good News Club* is a recent example of this rule. There, a school district’s community use policy allowed community groups to use school facilities for any number of secular purposes, but the policy prohibited use “by any individual or organization for religious purposes.” *Id.* at 103. As a result, the school district denied a religious group’s request to have weekly after-school meetings. *Id.* at 104. The Supreme Court said it was “quite clear that [the school district] engaged in viewpoint discrimination when it excluded the Club from the afterschool forum” and declared the policy unconstitutional. *Id.* at 109. Similarly, the Hospital’s action against Mr. Colburn specifically discriminates against him because of his religious activity, and does this while allowing access to Hospital patients by others for unregulated secular conversation or reading. This is blatantly unconstitutional. Simply put, a government facility cannot ban reading of the Bible simply because it is the Bible.

Further, the Hospital’s action to ban Mr. Colburn from serving Hospital patients by reading the Bible to them violates his right to free exercise of religion under the First Amendment. Governmental action that discriminates on the basis of religion is presumptively invalid. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). The government may not impose “special disabilities on the basis of religious views or religious status.” *Id.* at 877. Government may only justify actions that burden the free exercise of religion without a compelling government interest when the policy is neutral and generally applicable. *Id.* But the Hospital’s action against Mr. Colburn is neither neutral nor generally applicable, since it singled out his reading of the Bible for disparate treatment. Further, while the Hospital certainly has a compelling interest to protect its patients, that interest is in no way served by banning Mr. Colburn from reading the Bible to patients who request it. Thus, the Hospital’s actions violate Mr. Colburn’s First Amendment right to free exercise of religion and are unconstitutional.

Finally, the Hospital is required to support the free exercise of religion for its patients, especially those patients who are unable to leave the Hospital. *See* 38 C.F.R. § 17.342(b)(7) (“The opportunity for religious worship shall be made available to each patient who desires such opportunity.”). Failure to do so runs the risk of violating both the Establishment Clause and the

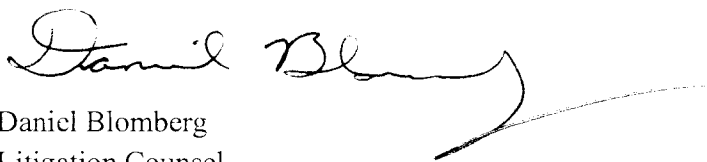
Free Exercise Clause of the First Amendment. *Katcoff v. Marsh*, 755 F.2d 223, 234 (2nd Cir. 1985) (noting the military has an affirmative duty “to make religion available to soldiers” who, because of their military service, are unable to access religious services of their choice). Here, the Hospital has expressly denied its patients access to a religious service of their choice. This action violates the VHA Handbook’s command that the Hospital respect patient’s rights to free exercise and “inhibit[s] religion” in violation of the Constitution. *See* VHA Handbook 1111.02(4)(a)(2); *Katcoff*, 755 F.2d at 232.

CONCLUSION

The Hospital’s religiously discriminatory action against Mr. Colburn is clearly unconstitutional, violating both his and Hospital patients’ rights. The Hospital’s demonstrated hostility toward religion is both surprising and disappointing given the VHA Handbook’s significant appreciation of volunteer service and emphasis on supporting the free exercise rights of its patients. *See* VHA Handbook 1111.02(4)(a)(2) and 1620.1(1) (“Volunteers are a priceless asset to these veterans and to VA.”). It is deeply disturbing that the Hospital is denying Mr. Colburn and its patients the very constitutionally guaranteed freedoms they sacrificed to protect for our country. We hope that the Hospital will recognize this problem and fix it immediately to avoid any further violation of First Amendment rights.

Should you have any questions regarding the foregoing, please do not hesitate to contact me.

Sincerely,



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