

UNCLASSIFIED

INFORMATION PAPER

DACH-SPR
01 October 2023

SUBJECT: Religious Accommodation (RA)/Religious Liberty (RL) Frequently Asked Questions

Purpose. To provide RA/RL answers to requested questions

Q1: Beards are ruining the Army. Can my commander simply deny all RA requests?

A1a: WHAT: Only if you desire to gain congressional attention because you violated the law.

A1b: WHY: RFRA is clear that the government must accommodate sincerely held religious beliefs unless there is a compelling interest to deny, and then only after considering the least restrictive means to further the government's compelling interest. We must consider each case individually.

A1c: HOW: However, per AR 600-20, 5-6e(2), commanders should consider:

- 1) The importance of military requirements in terms of mission accomplishment, including military readiness, unit cohesion, good order, discipline, health, and safety.
- 2) The religious importance of the accommodation to the requestor.
- 3) The cumulative impact of repeated accommodations of a similar nature.
- 4) The measurable effect, if any, of granting the single accommodation requested, to include whether it results in the sanctioned discrimination of other Soldiers.
- 5) Alternative means available to meet the requested accommodation.
- 6) Previous treatment of the same or similar requests, including treatment of similar requests if made for other than religious reasons.

Q2: How many beards have the Army approved?

A2: Disclaimer: DAG1 is the Army's proponent for uniform and grooming and is the only staff section to officially maintain stats. All other stats by any other DA organization are unofficial.

1) Unofficially, the Army has approved over 2000 religious accommodation requests, almost all of them for beards. Also, unofficially, the Army has disapproved wolf tails, teeth modifications (fangs), and requests to wear axes and katana swords with the duty uniform.

2) This total quantity of approved requests has grown from +/- 450 approved requests in the summer of 2020. Unofficially, the current quantity approximates to over 1500 AD, 300 ARNG, 200 USAR, 50 inmate, and 200 recruiting/cadet approved requests.

3) There are slightly more Muslims' approved religious accommodations than Nordic Pagans. These compose the two largest demographics. There are approximately double the Sikh approved accommodations as Jewish requests. In 2020, the Army's accommodations included four religious preferences: Muslim, Sikh, Jewish, and Nordic Pagan. Since then, requests from other religious adherents, to include Christians and Rastafarians, now account for about 5%.

Please remember, there are also many RA request packets at various stages of the process yet to be decided. The numbers above only include approximations of the approved packets. More to the point, OCCH's review workload has nearly tripled since 2021. To wit, OCCH reviewed 500 packets in FY23, Quarter 4 alone.

Q3: My commander's driver told me he is a Rastafarian. However, I do not find this on the DOD Faith and Belief codes. Is he allowed to hold this religion?

A3: The DOD Faith and Belief Codes are descriptive and not prescriptive. This means it simply contains the predominance of reported beliefs that Military Members hold. The list is not a "religious litmus test." Moreover, there are beliefs listed that are not religious.

Q4: How can I even determine if another person's belief is religious and sincere?

A4a: RFRA, DODI 1300.17, and AR 600-20 require the requestor to demonstrate religious basis and sincerity of belief. However, law and policy authorize neither the command team nor the SJA to determine religion.

1) The Supreme Court asserts that the legal apparatus is not the agent to determine religious orthodoxy. *Burwell vs. Hobby Lobby* (2014) notes:

- "The federal courts have no business addressing whether the religious belief asserted in a RFRA case is reasonable"
- "Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim"
- "This Court, however, held that it is not for us to say that the line he drew [his religion] was an unreasonable one."

2) Instead, AR 600-20 properly assigns the role to determine religious basis and sincerity of belief to the chaplain apparatus. AR 600-20, a(4) directs that a religious accommodation request requires an "exercise of religion." Further, the Army nests a description of religion in DA PAM 165-19, 2-3c & FM 7-22, 10-7, namely, that a religion is, a) transcendent (i.e., the Dao, the Kami, the Universe) or divine (i.e., Jesus, Allah, Odin), b) consists of a set of beliefs, and c) typified by devotion and ritual with a moral code.

4) *Sossamon v. Lone Star State of Texas* (2011) further opines, "While religious practices include individual expressions of religious beliefs, whether or not compelled by, or central to, the religion concerned, an applicant must have a subjectively honest belief that the practice is important to his free exercise of religion." Therefore, it is inappropriate to disapprove a religious accommodation request because it is not compelled by, or a central tenet of the religion concerned.

5) However, in providing expert analysis on religious sincerity, and in concert with law and regulation, OCCH considers that when the belief occurs within the claimed religion (externally recognizable), then that belief more fully demonstrates a connection with a comprehensive religious belief system, and more clearly provides evidence to the fundamental and ultimate question of sincerity.

6) DODI 1300.17 and AR 600-20 further reflect that an applicant still must articulate a *sincerely* held belief that the accommodation sought is a *religious* exercise.

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A4b: Military policy is sufficient to determine what is religion in the military context. The court case *Heap vs. Carter* (2015) involved a secular humanist and his representing atheist organization who sued the Navy for refusing his request to be a military chaplain on the basis that his request, by definition, is not religious. The Navy won the case, and the court ruled that military policy is authoritative in the military context.

A4c: Sincerity evaluation. The law supports factual sincerity assessment.

1) Courts conduct meaningful reviews of sincerity, which look into an applicant's *demeanor, motivations, and actions*. United States v. Sterling, 75 MJ 407 (CAAF 2016).

2) "*Neither the Government nor a court has to accept a defendant's mere say-so.*" Id. at 415.

3) While religious practices include individual expressions of religious beliefs, an applicant must have a subjectively honest belief that the practice is important to his free exercise of religion. Sossamon v. Lone Star State of Tex., 560 F.3d 316 (5th Cir. 2009).

4) Determining sincerity is a factual inquiry and an individual's "sincerity in espousing [a] practice is largely a *matter of individual credibility.*" Tagore v. United States, 735 F.3d 324, 328 (5th Cir. 2013).

5) The RA interview questionnaire aids the requestor to flesh out their beliefs. The questionnaire also helps chaplains steer the interview. Finally, the questionnaire supports the interviewing chaplain in memo writing. OTJAG approved this product as a best practice. However, AR 600-20 does not mandate its use, therefore neither may chaplains nor commanders. One may find the RA Interview Questionnaire at the US Army Religious Leader Academy (USARLA) resource site <https://usarlatraining.army.mil/world-religions>.

Q5: How do I advise my command team members if they can share their personal religious faith to help build Soldiers' spiritual readiness?

A5a: Commanders may certainly share their faith! Please see the USARLA link to the Free Exercise of Religion special publication that OCCH constructed in concert with The Judge Advocate General's Legal Center and School (TJAGLCS) (<https://usarlatraining.army.mil/special-publications>). The intent of the document is to train commanders regarding sharing their faith IOT increase Soldier spiritual readiness.

A5b: Moreover, our office created separate products writing toward historically addressing religion that could be helpful in the wake of the *Kennedy vs. Bremerton School Board* Supreme Court ruling. The Supreme Court in *Kennedy* abolished the *Lemon* religion test in favor of a historical view of religion. The Free Exercise of Religion special publication informs the background for our Historically Addressing Religion products. Please see these products and more at the USARLA resource website <https://usarlatraining.army.mil/world-religions>.

A5c: Finally, here are a few additional talking points for your command:

1) Commanders are responsible for both religious support and spiritual readiness (emphasize these are two separate, although related concepts).

2) Religious support is critical for our personnel's free exercise rights, while recognizing the diverse religious needs of our personnel supports the establishment clause. Religious support also

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strengthens the spiritual readiness of our religious personnel. Commanders can endorse religion (thanks to *Kennedy*) as long as it is not coercive (use of force or threat of punishment).

3) Spiritual readiness is about core values (see FM 7-22 definitions). Most of our personnel are religious, so their core religious values inform their spirituality. However, our non-religious personnel can (and should) develop spiritual readiness by understanding/embracing their core philosophical/human values. Commanders should understand that spiritual readiness training does not have to be optional, as long as it is not religious readiness disguised as spiritual readiness.

4) Some lawyers are still objecting to the idea of commanders directing (or even encouraging) Soldiers in crisis to see the chaplain. The basis of this objection is a misinformed view that chaplains are only religious professionals, failing to understand that chaplains are also staff officers and non-clinical counseling resources for the command. It also assumes the commander is directing Soldiers to see the chaplain because they represent a specific religion and not because they are a unit resource able to provide confidential counseling for all personnel. It is an unfortunate misunderstanding, one that we need to push back on because it is killing our Soldiers. Our suicide prevention programs and policies should utilize all resources available, not limit them because of perceived or potential endorsement clause concerns (which is a result of *Lemon*).

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