



Michael J. Murphy
Medical Center Director
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 Director Murphy,

Four months ago, our client, Mr. Martin Colburn, was unlawfully prevented from accessing the Oscar G. Johnson VA Medical Center (“Hospital”) to visit individual patients who asked him to come and read the Bible to them and pray with them. This denial of access was initiated by the Hospital’s Chief of Voluntary Services and continued at his direction for two months until the Alliance Defense Fund (“ADF”) and Congressman Steve Kagen (WI, 8th District) intervened on Mr. Colburn’s behalf. On April 28, Mr. Colburn was allowed to resume coming to see patients who requested his visits. Unfortunately, pursuant to his letter of June 9, the Chief of Voluntary Services is once again preventing Mr. Colburn from meeting with patients who have asked him to visit. This revocation of access violates Mr. Colburn’s First Amendment rights to freedom of speech and of religion, has no basis in VA Handbook policies, and runs contrary to the Hospital’s posted clergy visitation policies. Further, barring Mr. Colburn’s access to patients who have requested his visitations violates those patients’ right to freedom of religion. Accordingly, in the interests of upholding the rights of Mr. Colburn and your patients, we urge you to reverse the Hospital’s denial of access to Mr. Colburn and to direct Hospital employees to abide by the Hospital’s posted clergy visitation policies.

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 is not an official representative of the Hospital in any way. 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 more than 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 patients who wanted to talk.

Due to a variety of reasons, including the Hospital's recent treatment of him, Mr. Colburn is no longer involved in any volunteer activities in conjunction with the Hospital. Instead, he only visits patients in his capacity as a chaplain for the American Legion and the Disabled American Veterans. Mr. Colburn never proselytizes or provides group prayers but instead meets with individual patients who have specifically requested ahead of time that he come and read the Bible with them—generally from Psalms—and pray. His visits are with patients who identify themselves as Christians, and he always gets permission from each patient before reading Scripture or praying with them. Many patients who Mr. Colburn visits have expressed that his readings and prayer provide comfort to them and have asked him to return on a regular basis.

In a letter dated February 13, 2009, Gregory Weiss, the Hospital's Chief of Voluntary Services, revoked Mr. Colburn's access to veterans at the Hospital. Mr. Weiss specifically identified the religious content of Mr. Colburn's activities, such as the reading of Scripture to patients, as a basis for preventing Mr. Colburn's continued visits. The Alliance Defense Fund ("ADF"), on behalf of Mr. Colburn, provided a letter to Mr. Weiss on April 1 that explained how his actions were inappropriate and respectfully requested that he rescind them. On April 22, Congressman Steve Kagen also provided a letter, directed to your attention, requesting that the Hospital resolve the situation to protect Mr. Colburn's rights. On April 28, Mr. Weiss wrote Mr. Colburn a letter reinstating his access to the Hospital and outlining the different ways in which Mr. Colburn could serve at the Hospital. On May 7, Mr. Colburn responded with a letter that thanked Mr. Weiss for the reinstatement, asked that he be treated as Visiting Clergy under the Hospital's posted clergy visitation policy, and set a date to resume patient visitation of May 21.

As scheduled, Mr. Colburn resumed visiting patients on May 21 and continued visiting patients, each of whom specifically requested his visit ahead of time and scheduled an appointment, through June 9. Shortly after June 9, Mr. Colburn received a letter from Mr. Weiss denying him continued access to the Hospital. Mr. Weiss stated in his letter that Mr. Colburn, under the Visiting Clergy policy, can only visit patients who are members of his local congregation and only after scheduling the visit with the Chaplain Service office. The letter also suggested that the Hospital will have to evaluate Mr. Colburn's religious credentials to determine whether he is qualified to provide religious services.

A wide variety of community groups are allowed to serve patients at the Hospital, such as the American Legion and the Boy Scouts, and private citizens have access to patients for visitation purposes as well. To Mr. Colburn's knowledge, as well as the knowledge of American Legion Post 66 Commander Dave Haase, none of these groups or individuals face limitations similar to those imposed on Mr. Colburn. The Hospital's "Visiting Hours and Policies" webpage does not list any restrictions on visitor access approaching those that Mr. Weiss is attempting to enforce against clergy. See <http://www.ironmountain.va.gov/visitors/visiting.asp>.

RELEVANT LAW

Constitutional Violations

The Supreme Court has consistently said that targeting religious groups or individuals for unfavorable treatment is viewpoint discrimination that 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 secular purposes. This discrimination is blatantly unconstitutional. A government facility cannot limit religious activities, like reading the Bible, simply because those activities are religious.

Further, the Hospital's action to ban Mr. Colburn from serving Hospital patients by reading the Bible to them and praying with 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 religious conduct for disparate treatment. And while the Hospital certainly has an interest in protecting its patients from undesired proselytization, that interest is in no way served by

banning Mr. Colburn from reading the Bible and praying with patients who request it. Thus, the Hospital's actions violate Mr. Colburn's First Amendment right to free exercise of religion and are unconstitutional.

Also, Mr. Weiss' suggestion that the Hospital will have to evaluate Mr. Colburn's religious credentials to determine whether or not he can adequately provide religious services is disturbingly unconstitutional. Courts have repeatedly rejected attempts by government officials to engage in such activities. *See, e.g., HEB Ministries v. Texas Higher Educ. Coordinating Board*, 235 S.W.3d 627, 643 (Tex. 2007) (noting that government "lacks not only authority but also competence" when it comes to evaluating the content of religious belief and education); *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (2008) (stating that the Establishment Clause prohibits the "excessive entanglement" into religion by government officials and "protects religious institutions from governmental monitoring or second guessing.").

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.

Hospital Policy

Mr. Weiss has cited VHA Handbook 1111.02(15) as the basis upon which Mr. Colburn's access to patients can be restricted. However, the Handbook's language runs completely contrary to Mr. Weiss' use of it. Instead of being a limit on Mr. Colburn's access to patients, or a limit on patients' ability to request his visits, the Handbook limits the ways in which Hospital officials can interfere with patient choice. The Handbook states:

At each facility, the overall responsibility for spiritual and pastoral care rests with the assigned chaplain. However, as a matter of respect and courtesy, arrangements need to be made, with the patient's consent, to allow community clergy to visit members of their church (or parish, congregation, synagogue, temple, mosque, etc.). A facility chaplain must obtain and

document the patient's permission before contacting community clergy on behalf of the patient....

VHA Handbook 1111.02(15). Significantly, *no* provision of this passage says that clergy can only visit patients who are a part of the clergy's local church. Instead, this provision does two things: Ensure that no hindrances are placed between a patient and his church, and ensure that the Chaplain Service office does not attempt to recruit clergy visitations for a patient without that patient's consent. It says nothing about individuals like Mr. Colburn, who are visiting patients of a similar religious faith—upon *personal request* by those patients—to read religious scripture and pray together.

The Hospital has a clear and reasonable clergy visitation policy—which has been posted on its website since at least September 28, 2008—that provides guidance for clergy like Mr. Colburn. See <http://www.ironmountain.va.gov/visitors/visiting.asp>. This policy states that “[m]embers of the clergy are welcome to visit patients who are members of their particular religious group at any time at the discretion of the unit physicians or nurses.” This policy allows clergy to visit any members of their religious faith and not “only members of their local congregation,” as Mr. Weiss stated in his June 9 letter. The policy outlined by Mr. Weiss' letter would effectively bar clergy, or Mr. Colburn, from meeting with fellow believers except those who happen to attend the same local church as they do. Given that many of the patients who share Mr. Colburn's faith are from a variety of non-local cities and do not have a nearby local congregation from whom clergy could visit, the Hospital's posted policy is much more reasonable and accommodating to their needs than Mr. Weiss' interpretation of the Handbook. Also, as noted above, if the Hospital attempts to construe its visitation policy in a way that places more of a burden on visiting clergy than on any other type of visitors, the Hospital will violate the Free Speech and Free Exercise clauses of the First Amendment.

Mr. Weiss also misunderstands the Handbook when he suggests that Mr. Colburn's religious credentials must be evaluated by Hospital officials. The relevant Handbook passage cited by Mr. Weiss states:

When no chaplain staff member represents the specified faith group of a patient, with the patient's consent, every effort must be made to canvass the community or draw from organized resources to provide the appropriate clergy...to meet the patient's specific requests or needs. Attention must be given to ensure the community clergy...has the appropriate credentials of the religious faith community to provide the religious service desired by the patient.

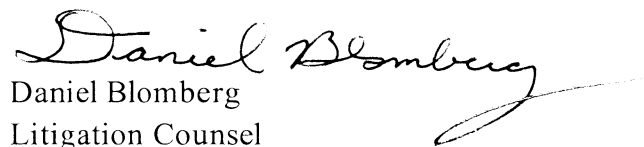
Thus, the only time the Hospital has to look at a clergy member's religious qualifications is when the Hospital is seeking out that clergy member to provide religious services that no Hospital chaplain can provide. But the Handbook says nothing that requires a clergy member who is simply responding to personal requests for visitations by patients to subject himself to government scrutiny of his religious training and beliefs. Nor, as outlined above, could the Handbook make such demands without violating the First Amendment.

CONCLUSION

The actions taken by Mr. Weiss on behalf of the Hospital clearly constitute religious discrimination against Mr. Colburn, violating both his and Hospital patients' constitutional rights. The Hospital's apparent hostility toward religion is both surprising and disappointing given the VHA Handbook's emphasis on supporting the free exercise rights of its patients and stated appreciation of volunteer service. *See* VHA Handbook 1111.02(4)(a)(2) (noting VA chaplains have a duty to "ensure that...patients' constitutional right to free exercise of religion is protected) *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 by July 1, 2009 to avoid continued violations of First Amendment rights.

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

Sincerely,



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