

Military Law—Army Denies Conscientious-Objector Status Without Basis in Fact—*Hanna v. Secretary of the Army*, 513 F.3d 4 (1st Cir. 2008)

A 1962 Department of Defense (DOD) directive authorizes the discharge from service of military members with religiously based conscientious objections to war.¹ A conscientious objection is “a firm, fixed and sincere objection to participation in war in any form . . . because of religious training and belief.”² In *Hanna v. Secretary of the Army*,³ the First Circuit considered whether the Army had a “basis in fact” for denying the applicant conscientious-objector status.⁴ The court held that the decision of the Department of the Army Conscientious Objector Review Board (Board) was without a basis in fact because the Board lacked hard, reliable, articulable facts for denying the claim.⁵

In 1997, Mary Hanna voluntarily joined the Army’s Health Professional Scholarship Program (HPSP).⁶ The Army agreed to pay for Hanna’s medical school tuition, provided that she enroll in active duty for four years and serve four additional years in the Army Reserve.⁷ In October 2005, near the completion of her residency in anesthesiology at Beth Israel Deaconess Medical Center, the Army notified her that she would be deployed to El Paso, Texas.⁸ In response, Hanna requested discharge from the Army as a class 1-0 conscientious objector in December 2005.⁹

1. See William D. Palmer, *Time to Exorcise Another Ghost from the Vietnam War: Restructuring the In-Service Conscientious Objector Program*, 140 MIL. L. REV. 179, 186 (1993) (tracing history of in-service conscientious objector).

2. DEP’T OF DEF., INSTRUCTION NUMBER 1300.06 § 3.1 (2007), available at http://www.fas.org/irp/doddir/dod/i1300_06.pdf (defining conscientious objection); see also MULFORD Q. SIBLEY & PHILIP E. JACOB, CONSCRIPTION OF CONSCIENCE 1 (1952) (tracing history of the term “conscientious objection”). The term “conscientious objection” indicates ethical objections against various things, but eventually developed to refer only to individuals whose scruples prevent them from assisting in war efforts. See *id.*

3. 513 F.3d 4 (1st Cir. 2008).

4. See *id.* at 7 (setting forth issue of whether basis in fact exists).

5. See *id.* at 12 (discussing standard to establish basis in fact).

6. See *id.* at 6-7 (detailing Hanna’s voluntary enlistment in Army).

7. See 513 F.3d at 6 (setting forth Hanna’s obligations after accepting Army funding).

8. See *id.* at 6 (detailing timing of events leading up to conscientious-objector application). After Hanna’s completion of medical school at Tufts University, the Army granted her a four-year delay of her active-duty commitment to allow her to complete a residency in anesthesiology. *Id.*

9. See *Hanna v. Sec’y of the U.S. Army*, No. 06-11434-NG, slip op. at 1 (D. Mass. Oct. 6, 2006), *aff’d*, 513 F.3d 4 (1st Cir. 2008) (describing Hanna’s conscientious-objector application). A class 1-0 conscientious objector seeks complete discharge from the service, while a 1-A-0 conscientious objector remains in service, but in noncombatant positions. See DEP’T OF THE ARMY, ARMY REGULATION 600-43, CONSCIENTIOUS OBJECTION 16 (1998), available at http://ivaw.org/files/Army_CO_regs_1_.pdf. Upon asking for a discharge, Hanna stated she would return all the money she received for her medical education with interest. See *Hanna v. Sec’y of the U.S. Army*, No. 06-11434-NG, slip op. at 1 (D. Mass. Oct. 6, 2006), *aff’d*, 513 F.3d 4 (1st Cir.

Hanna grew up as an active member of the Coptic Orthodox Church (COC), serving as a hymn teacher in high school and a Sunday-school teacher while an undergraduate at the University of California, Los Angeles.¹⁰ Despite this upbringing, Hanna began to question her faith in her senior year at UCLA in 1997.¹¹ In April 1997, Hanna submitted her application for the HPSP scholarship, stating affirmatively that she was not a conscientious objector.¹² Six years later, when her father died in 2003, however, Hanna renewed her faith in religion.¹³ Fueled by her rekindled belief in the sanctity of human life, Hanna no longer participated in abortion procedures at the hospital and began observing and attending anti-war events.¹⁴ Hanna's opposition to war in any form crystallized in October 2005.¹⁵

Colonel John Powers, the Director of Medical Education in the Office of the Surgeon General, along with a military chaplain and a psychiatrist initially reviewed Hanna's application for conscientious-objector status.¹⁶ All three noted potential defects in the application: Powers citing inconsistencies in her mental state when enlisting, the chaplain mentioning discrepancies between Hanna's view on pacifism and that of the COC, and the psychiatrist finding the application "a convenient, if not opportunistic choice."¹⁷ An Investigating Officer (IO) reviewed the reports and—despite the concerns raised—recommended Hanna be classified as a conscientious objector, concluding that her religious, moral, and ethical beliefs made her "opposed to war in any

2008). Hanna received a total of \$184,050.45 from the Army. Brief of the Respondents-Appellants at 11, *Hanna v. Sec'y of the U.S. Army*, 513 F.3d 4 (1st Cir. 2008) (No. 07-1090); see also Brian MacQuarrie, *Army-Financed Doctor Granted Objector Status*, BOSTON GLOBE, Oct. 7, 2006, at A1 (reviewing facts of case and district court's decision); Shelley Murphy, *Court Upholds Conscientious Objector's Status*, BOSTON GLOBE, Jan. 10, 2008, at 2B (reviewing First Circuit's decision).

10. See 513 F.3d at 6 (discussing Hanna's religious background). Hanna attended church weekly while growing up, and her parents were "deeply involved" in the COC; her father had plans of becoming a monk and her mother a nun until they met and decided to marry. *Id.* Hanna also participated in the Coptic Club at UCLA. *Id.*

11. See *id.* at 6-7 (discussing Hanna's religious beliefs). During this time, Hanna turned to both atheism and agnosticism. *Id.*

12. See Brief of the Respondent-Appellants at 10-11, *Hanna v. Sec'y of the U.S. Army*, 513 F.3d 4 (1st Cir. 2008) (No. 07-1090) (discussing Hanna's conscientious-objector application).

13. See 513 F.3d at 7 (explaining reason for Hanna's return to faith). Hanna asserted that mourning her father's death brought her entire family together and the "sense of community . . . united in prayer, rekindled [her] faith." *Hanna v. Sec'y of the U.S. Army*, No. 06-11434-NG, slip op. at 2 (D. Mass. Oct. 6, 2006), *aff'd*, 513 F.3d 4 (1st Cir. 2008).

14. See 513 F.3d at 6-7 (tracing evolution of Hanna's beliefs).

15. See *Hanna v. Sec'y of the U.S. Army*, No. 06-11434-NG, slip op. at 2 n.4, (D. Mass. Oct. 6, 2006), *aff'd*, 513 F.3d 4 (1st Cir. 2008) (pointing to Hanna's full comprehension of anti-war beliefs after watching a PBS program discussing the Beatitudes). In Hanna's conscientious-objector application, Hanna claimed, "I realized then the full implications of the path I had chosen years earlier and the incompatibility of war and violence with Christ's teachings." *Id.* at 2.

16. See 513 F.3d at 7-8 (describing review process). In support of her conscientious-objector application, Hanna submitted letters from four Coptic Orthodox priests and two supervisors in her residency program. See *id.* at 7.

17. See *id.* at 8 (observing criticisms of initial reviewers).

form.”¹⁸ Ultimately, after three higher-ranking officers affirmed the IO’s decision, the Board denied her conscientious-objector application by a vote of 2-1.¹⁹ In response to this decision, Hanna filed a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts and sought an injunction to enjoin the Army from ordering her to active duty.²⁰ The court granted both requests, and on appeal, the First Circuit affirmed the district court’s decision that there was no “basis in fact” for the Board’s denial and that the Army wrongly denied Hanna conscientious-objector status.²¹

In-service members’ right to declare a conscientious objection to participation in war is not derived from an act of Congress or the Constitution, but rather a DOD executive order.²² Nonetheless, the Supreme Court of the United States has decided that the same rights Congress conferred through the Selective Service Act’s conscientious-objection exemption apply to in-service members.²³ Thus, in order to qualify as a conscientious objector, the applicant must prove by clear and convincing evidence that he or she is “conscientiously opposed to war in any form,” that his or her “opposition is grounded in religious training and beliefs,” and that his or her “position is firm, fixed, sincere, and deeply held.”²⁴ Courts must give great deference to military decisions and will only overturn the Army’s decision that the applicant does not meet the standard for a conscientious objector if the decision has no basis in fact.²⁵

18. See *id.* at 8-11 (reviewing rationale of IO decision). The IO held a hearing at which Hanna, the psychiatrist, and two COC priests presented testimony. *Id.* at 8. The testimony discredited the concerns from the previous reports, and the IO concluded that Hanna was an “honest and sincere person” and that she was a “devout member of the COC and sincerely held the beliefs professed in her CO application.” *Id.* at 9.

19. See *id.* at 11 (reviewing application-review process).

20. See *Hanna v. Sec’y of the U.S. Army*, No. 06-11434-NG, slip op. at 1 (D. Mass. Oct. 6, 2006), *aff’d*, *Hanna v. Sec’y of the U.S. Army*, 513 F.3d 4 (1st Cir. 2008).

21. See 513 F.3d at 6 (holding no basis in fact for board decision).

22. See *Sheldon v. O’Malley*, 420 F.2d 1344, 1348 (D.C. Cir. 1969) (confirming DOD 1300.6 confers congressionally established conscientious-objector discharge rights on in-service members); Palmer, *supra* note 1, at 187 (describing history of in-service conscientious-objector program).

23. See *Gillette v. United States*, 401 U.S. 437, 442 (1971) (determining same test for in-service objectors as pre-induction objectors); *Armstrong v. Laird*, 456 F.2d 521, 523 (1st Cir. 1972) (applying standards from Selective Service Act conscientious-objector cases to in-service member’s conscientious-objector case); Palmer, *supra* note 1, at 186-87 (reiterating approach taken in conscientious-objector cases with in-service members).

24. See DEP’T OF DEF., INSTRUCTION NUMBER 1300.06 § 5.1 (2007), available at http://www.fas.org/irp/doddir/dod/i1300_06.pdf (setting forth conscientious-objector approval criterion); DEP’T OF THE ARMY, ARMY REGULATION 600-43, CONSCIENTIOUS OBJECTION 1 (1998), available at http://ivaw.org/files/Army_CO_regs_1.pdf (imposing clear-and-convincing-evidence standard); see also *Armstrong v. Laird*, 456 F.2d 521, 522 (1st Cir. 1972) (listing three requirements for discharge as conscientious objector).

25. See *Estep v. United States*, 327 U.S. 114, 122 (1946) (deciding courts may give limited review of administrative boards). The Supreme Court highlighted this deferential standard in *Orloff v. Willoughby*: “[J]udges are not given the task of running the Army Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.” 345 U.S. 83, 93-94 (1953). Until *Estep*, decisions of draft boards regarding conscientious-objector status were “final” and judicial review was unavailable. See *Estep v. United States*, 327 U.S. 114,

Accordingly, courts must not weigh the evidence examined by the military board, but merely ensure that the decision reached had a basis in fact.²⁶ Basis-in-fact review, although narrow and deferential, is not a toothless rubberstamp.²⁷ Rather, the Board must show hard, reliable facts, and its reasoning must be grounded in logic, not just sheer suspicion.²⁸

The courts have consistently held that the timing of the conscientious-objector application itself can never be enough to give the Army a basis in fact for denying an applicant's claim.²⁹ It can, however, legitimately raise suspicions regarding the sincerity of the applicant's beliefs.³⁰ Additionally, the applicant's religious beliefs need not coincide with that of her religion; in fact, the applicant could belong to no religion at all.³¹ Ultimately, the Board may deny a claim if there is some indication that the applicant acted insincerely or in bad faith.³²

In *Hanna*, the First Circuit affirmed the district court's decision overturning the Army's denial of Hanna's conscientious-objector claim.³³ In doing so, the

121-22; see also SIBLEY & JACOB, *supra* note 2, at 422-23 (discussing differences in court's scope of review of Board decisions); Robert E. Montgomery, Jr., Comment, *God, The Army, and Judicial Review: The In-Service Conscientious Objector*, 56 CAL. L. REV. 379, 379-82 (1968) (reviewing courts' "hands off" approach to military decisions).

26. See *Dickinson v. United States*, 346 U.S. 389, 400 (1953) (Jackson, J., dissenting) (scolding majority for weighing factual determinations); *Estep v. United States*, 327 U.S. 114, 122 (1946) (determining limited judicial review allowed to ensure basis in fact for decision of board); *Lobis v. Sec'y of the U.S. Air Force*, 519 F.2d 304, 306 (1st Cir. 1975) (discussing basis-in-fact of review for in-service conscientious-objector claims); *Bates v. Commander, First Coast Guard Dist.*, 413 F.2d 475, 477 (1st Cir. 1969) (citing basis-in-fact standard). The courts have struggled to determine exactly how to apply the basis-in-fact standard. See *Lobis v. Sec'y of the U.S. Air Force*, 519 F.2d 304, 306 (1st Cir. 1975) (describing elusiveness of standard dependent upon subjective sincerity); *Smith v. Laird*, 486 F.2d 307, 310 (10th Cir. 1973) (articulating difficulty in standard because review dependent on determining applicant's subjective sincerity); *Rothfuss v. Resor*, 443 F.2d 554, 558 (5th Cir. 1971) (acknowledging difficulty in applying principles of basis-in-fact standard); see also Montgomery, *supra* note 25, at 382 (highlighting judicial uncertainty in reviewing in-service conscientious objectors).

27. See *Hager v. Sec'y of the Air Force*, 938 F.2d 1449, 1454 (1st Cir. 1991) (articulating standard of review for basis-in-fact review).

28. See *Hager v. Sec'y of the Air Force*, 938 F.2d 1449, 1454 (1st Cir. 1991) (discussing standard of basis-in-fact review).

29. See, e.g., *Ehlert v. United States*, 402 U.S. 99, 103-04 (1971) (asserting deprivation of applicant's review on merits due to questionable timing is unacceptable); *Aguayo v. Harvey*, 476 F.3d 971, 981 (D.C. Cir. 2007) (acknowledging timing of conscientious-objector application relevant but never conclusive); *Hager v. Sec'y of the Air Force*, 938 F.2d 1449, 1455 (1st Cir. 1991) (reiterating clear principle regarding timing of conscientious-objector application); *Lobis v. Sec'y of the U.S. Air Force*, 519 F.2d 304, 307 (1st Cir. 1975) (holding questionable timing alone cannot make conscientious-objector claim insincere).

30. See *Lobis v. Sec'y of the U.S. Air Force*, 519 F.2d 304, 307 (1st Cir. 1975) (acknowledging convenient timing of application deserves some evidentiary weight).

31. See *United States v. Seeger*, 380 U.S. 163, 183-84 (1965) (interpreting scope of phrase "religious training and belief"). The *Seeger* Court decided the issue by answering, "[D]oes the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?" *Id.* at 184.

32. See *Witmer v. United States*, 348 U.S. 375, 382 (1955) (resolving applicable standard for basis in fact).

33. See 513 F.3d at 6 (holding Board's decision without basis in fact).

court recognized its deferential standard of review.³⁴ Notwithstanding this standard, the First Circuit felt justified to use its teeth in reviewing the Board's decision to ensure the decision was "grounded in logic."³⁵

The First Circuit found nothing in the record to smear Hanna's assertions and thus held the Board's decision was without a basis in fact.³⁶ Aside from the questionable timing of Hanna's decision, the court suggested that any claims of insincerity were speculative at best.³⁷ The court found no reason for the Board to ignore the IO's report, which had been approved up the chain of command.³⁸ Lastly, the court recognized that Hanna's beliefs need not coincide with those of her church and may be based on her own personal convictions.³⁹

Perhaps sympathizing with Hanna, the First Circuit allowed her to cut ties with the military because of her newfound religious beliefs.⁴⁰ Whether that decision was the correct interpretation of existing law, however, is not as clear because the standard of judicial review for Board decisions is highly deferential, and the First Circuit appears to take an aggressive stance on review.⁴¹ Given courts' inconsistent application of the basis-in-fact standard and the difficulty in determining the sincerity of a conscientious-objector claim, significant reform of the antiquated system is needed.⁴²

The lip service the First Circuit is forced to pay toward judicial deference of legitimate Army matters is troubling.⁴³ Courts must weigh the entire evidence to review accurately subjective Board decisions; however, courts are forbidden from doing so.⁴⁴ Thus, in order to reach its desired result, the First Circuit

34. *See id.* at 12 (noting narrow standard of review).

35. *See id.* (asserting review not "toothless" standard).

36. *See id.* at 13 (holding arguments of insincerity speculative).

37. *See* 513 F.3d at 13 (explaining timing alone insufficient to reject conscientious-objector claim).

38. *See id.* at 14 (claiming Board "blotted out" IO's findings).

39. *See id.* at 15 (discussing requisite religious beliefs of conscientious-objector applicant); *see also* *United States v. Seeger*, 380 U.S. 163, 184-85 (setting standard to establish religious belief of conscientious-objector applicant).

40. *See* 513 F.3d at 17, 20 (Boudin, C.J., dissenting) (identifying possible legal effect as more important than outcome of Hanna's case). Chief Justice Boudin intimated that this may have been a case of the court doing what it felt reached the "right" result. *Id.* at 20.

41. *See id.* at 20 (asserting law favored decision in Army's favor); *supra* notes 26, 35 and accompanying text (discussing standard of review); *see also* SIBLEY & JACOB, *supra* note 2, at 423 (claiming Supreme Court leaves Board relatively free from judicial control).

42. *See* Palmer, *supra* note 1, at 195-98 (admitting unfairness in determining sincerity and proposing changes). Palmer believes that the in-service conscientious-objector program, the standards of which were designed and molded during times of conscription, is outdated and in need of improvements. *See id.* at 243. One suggestion would require alternate service to the conscientious objector who has benefited from a military-funded education. *Id.* at 241-43; *see also* Montgomery, *supra* note 25, at 445 (calling for more judicial review of conscientious-objector applicants).

43. *See* *Dickinson v. United States*, 346 U.S. 389, 399-400 (1953) (Jackson, J., dissenting) (condemning Court for not acknowledging inconsistency in standard).

44. *See* *Estep v. United States*, 327 U.S. 114, 122 (1946) (holding courts must not weigh evidence to determine if military decision justified); *see also* *Dickinson v. United States*, 346 U.S. 389, 399-400 (1953)

stresses that the basis-in-fact standard is not a toothless review, yet does so with little Supreme Court precedent.⁴⁵ This aggressive review usurps power from the Board, which is expected to make the final decision on the applicant's sincerity.⁴⁶

The Supreme Court should acknowledge that the current standard delivers inconsistent results and that the lower courts continue to disregard military decisions despite attempts to curtail the review.⁴⁷ More importantly, the Court needs to assess whether heightened judicial inquiry is a good thing.⁴⁸ Indeed, limiting judges from reviewing conscientious-objector claims might not make good sense considering their expertise in evidence analysis and regulatory and statutory interpretation.⁴⁹ In addition, given the lack of military expertise on conscientious objection and the substantial difference between these claims and other military decisions, such as promotions or honorable discharges, there is a strong argument for more judicial intervention.⁵⁰

In *Hanna v. Secretary of the Army*, the First Circuit considered whether the Army Board had a basis in fact for denying an applicant's conscientious-objector claim. The court held that there was no basis in fact for the Board's decision, potentially overreaching the narrow scope of its review. The court appeared more concerned with getting a just result than with the deference it was supposed to pay to the Board decision. Although the First Circuit overreached for its holding, the review standard in conscientious-objection cases ought to reflect this less deferential approach. The Supreme Court or Congress should recognize that experienced, neutral judges should not have such a limited role in evaluating the denial of a conscientious-objector's claim from the Army Board. Until that time, courts will continue to produce

(Jackson, J., dissenting) (criticizing majority for ignoring standards and weighing evidence).

45. Compare *Estep v. United States*, 327 U.S. 114, 122 (1946) (declaring Board decisions final even if erroneous), with *Hager v. Sec'y of the Air Force*, 938 F.2d 1449, 1454 (1st Cir. 1991) (recognizing narrow review but declaring it not toothless).

46. See 513 F.3d at 19 (Boudin, C.J., dissenting) (explaining Board has final decision on applicant's sincerity); see also *Aguayo v. Harvey*, 476 F.3d 971, 981 (D.C. Cir. 2007) (recognizing close case but giving benefit to Board); *Hager v. Sec'y of the Air Force*, 938 F.2d 1449, 1462 (1st Cir. 1991) (Breyer, C.J., concurring) (emphasizing military authorities are free to make determinations of credibility).

47. See, e.g., *Hager v. Sec'y of the Air Force*, 938 F.2d 1449, 1457-58 (1st Cir. 1991) (rejecting military's arguments for denying conscientious-objector claim); *Lobis v. Sec'y of the U.S. Air Force*, 519 F.2d 304, 309 (1st Cir. 1975) (overturning military's rejection of conscientious-objector claim because of insufficient evidence); *Bates v. Commander, First Coast Guard Dist.*, 413 F.2d 475, 479-80 (1st Cir. 1969) (dismissing subjective beliefs of military administrator who decided applicant's beliefs were social, not religious); see also *Montgomery*, *supra* note 25, at 381-82, 391 (addressing confusion among courts in conscientious-objector cases).

48. See *Montgomery*, *supra* note 25, at 445-46 (recommending more judicial involvement in conscientious-objector cases).

49. See *Palmer*, *supra* note 1, at 239 (advocating involvement of judge advocate in assessing conscientious-objector claim).

50. See *Montgomery*, *supra* note 25, at 445-46 (distinguishing conscientious-objector claims from other military decisions).

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inconsistent results, as some judges apply the highly deferential standard, while others, recognizing the potential for injustice, use the standard of review's teeth to reach a decision they feel is just.

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