

USALSA Report

United States Army Legal Services Agency

Litigation Division Notes

Litigation Update

On 21 November 1997, the United States Court of Appeals for the Second Circuit vacated and remanded a judgment of the District Court for the Southern District of New York that had barred the enforcement of the Military Honor and Decency Act of 1996¹ (MHDA). The case, *General Media Communications, Inc. v. Cohen*,² was the first to challenge the MHDA's constitutionality, and the appellate court's decision affirmed the long-standing practice of judicial deference to Congress and the military when regulating official military conduct.

The district court, in granting injunctive relief for General Media,³ found that the MHDA violated General Media's First Amendment right to free speech⁴ and Fifth Amendment right to equal protection.⁵ The district court further concluded that the MHDA was unconstitutionally vague.⁶ In reaching its decision, the court determined that it did not need to determine whether military exchanges were public or nonpublic forums, a central issue in First Amendment jurisprudence.⁷ The court determined that "[e]ven in a nonpublic forum, statutory restrictions on nonobscene speech must be based on a legitimate government interest The First Amendment prevents the govern-

ment from banning material solely because it is offensive."⁸ Applying the strict scrutiny standard, the district court also determined that the MHDA violated the equal protection clause because "the Act's classifications do not further a permissible, let alone compelling, state interest and because the means the government has chosen to further that interest are not narrowly tailored."⁹ The district court found no evidence to support the alleged goal of maintaining "the appearance of honor, propriety, and professionalism and promoting core values" in the military.¹⁰ As the court stated, "[g]iven the tremendous popularity of *Penthouse* and *Playboy* among military personnel, nothing indicates that the Act will reduce the presence of sexually explicit material on military property."¹¹ Finally, the district court determined that the MHDA is unconstitutionally vague and impermissibly chills speech because it contains a subjective element that "created the real danger of ad hoc, arbitrary interpretation and application of the law" when it comes to determining what is "patently offensive."¹²

The Second Circuit disagreed with the district court and determined that: military exchanges are not public forums that deserved special protection under the First Amendment;¹³ the MHDA does not discriminate on viewpoint, but rather is content-oriented,¹⁴ and the restrictions the MHDA placed on the sale of magazines were reasonable in light of the purpose of the

1. 10 U.S.C.A. § 2489a (West 1997). The Military Honor and Decency Act (MHDA) became effective on 22 December 1996. The district court summarized the MHDA's prohibitions as "banning only the sale or rental of sexually explicit material on military property . . . [the MHDA] does not restrict the possession of such material on military property, nor does it prohibit military personnel from sharing such material with their colleagues." *General Media Communications, Inc. v. Perry*, 952 F. Supp. 1072, 1075 (S.D.N.Y. 1997). The district court further determined that "military personnel may buy sexually explicit material off military property or order it through the mail." *Id.*

2. No. 97-6029, 1997 U.S. App. LEXIS 33869 (2nd Cir. Nov. 21, 1997).

3. General Media Communications, Inc. publishes various periodicals, including *Penthouse* magazine. The MHDA would ban the sale of *Penthouse* at military exchanges. "The other plaintiffs are various trade associations whose members are engaged in the wholesale and retail distribution, sale, and manufacture of periodicals, books, sound recordings, and home videos throughout the nation." See *General Media*, 952 F. Supp. at 1075. Court papers filed with the district court alleged that *Penthouse* is the third most popular magazine sold by the Army and Air Force Exchange Service, with sales of 19,000 copies per month. *Id.* In an amicus brief, *Playboy Enterprises, Inc.* alleged that it sold 25,000 copies per month in military exchanges. *Id.*

4. *Id.* at 1081.

5. *Id.* at 1081-82.

6. *Id.* at 1084.

7. See, e.g., *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788 (1985); *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

8. *General Media*, 952 F. Supp. at 1080.

9. *Id.* at 1082.

10. *Id.*

11. *Id.*

12. *Id.* at 1083.

forum.¹⁵ In deferring to congressional authority to regulate the military, the appellate court found that military exchanges were not “public street corners” and “are not available for everyone to ‘speak’ from their shelves.”¹⁶ They are “nonpublic forums” where speech may be restricted, so long as the restrictions are reasonable and are not based on any particular viewpoints.¹⁷ The MHDA is a “reasonable way for Congress to uphold the military’s image and core values of honor, professionalism, and discipline,” by preventing the appearance that the military endorses sexually explicit material.¹⁸

As to the Fifth Amendment issue, the Second Circuit disagreed with the district court’s conclusion that the MHDA’s disparate treatment of material violated the Constitutional guarantee of equal protection.¹⁹ The appellate court determined that “the Act’s distinction between written and visual forms of expression, and its ban on lascivious expression contained in audio, video, and periodical materials, but not in books, are rationally related to a legitimate governmental interest.”²⁰

Finally, the Second Circuit determined that the MHDA was not unconstitutionally vague and found that the district court was “insufficiently sensitive to the particular context presented—namely, the specialized and strictly-regulated community of the armed forces.”²¹ The court noted that the military requires substantial judicial deference and that the MHDA complied with the requirements of the Due Process Clause of the Fifth Amendment, even if it fell “short of absolute linguistic precision.”²²

In dissent, Judge Parker asserted that the MHDA involved viewpoint discrimination which should be subjected to strict scrutiny.²³ He found the government’s justifications lacking under either strict or intermediate scrutiny.²⁴ Major Mickle.

Litigation Concerning Health Care for Military Retirees

Three recent federal district court cases challenge the way the military provides health care to its retirees. The suits are apparently motivated by policy and regulatory decisions which have reduced the number of retirees who are treated at military medical facilities and by implementation of the TRICARE program, for which retirees must pay an annual premium in order to enjoy health care benefits comparable to active duty family members. The Department of Defense has assigned the Army to litigate these cases, which have generated numerous inquiries from retirees. This note summarizes these cases and provides an overview of the statutory and regulatory authority for retiree eligibility for medical care.

The first case to challenge the military’s health care program for retirees is *Schism v. United States*.²⁵ In this case, the plaintiffs filed a class action suit in the United States District Court for the Northern District of Florida, broadly alleging that the government breached their enlistment contracts, violated Fifth Amendment due process and equal protection, and engaged in impermissible age discrimination by “revoking or limiting access to military hospitals, in-patient and out-patient care, and medicine.”²⁶ On 11 June 1997, the court granted the Army’s motion to dismiss for lack of jurisdiction with respect to the plaintiffs’ age discrimination claims, but denied the motion with respect to the Fifth Amendment due process and Little Tucker Act claims as to plaintiffs whose retirement rights vested prior to 1956.²⁷ The United States filed a motion for summary judgment in September 1997 and argued that the plaintiffs had no legal entitlement to free medical care prior to

13. *General Media, Inc. v. Cohen*, No. 97-6029, 1997 U.S. App. LEXIS 33869, at *21 (2nd Cir. Nov. 21, 1997).

14. *Id.* at *21-*27.

15. *Id.* at *27-*35.

16. *Id.*

17. *Id.* at *4.

18. *Id.* at *5.

19. *Id.* at *35-*38.

20. *Id.* at *37.

21. *Id.* at *39.

22. *Id.* at *41.

23. *Id.* at *59-*60.

24. *Id.* at *64.

25. 972 F. Supp. 1398 (N.D. Fla. 1997).

26. *Id.*

1956, when the current governing statute passed.²⁸ A decision is pending in that case.

The second case, *Coalition of Retired Military Veterans v. United States*,²⁹ alleges a violation of the Fifth Amendment due process clause. The plaintiffs are members of a nonprofit military retirees' group which filed a complaint in the District of South Carolina in December 1996 and alleged deprivation of free lifetime medical care. The plaintiffs claimed that lifetime medical care was promised to them when they decided to pursue military careers. The government moved to dismiss and argued that the plaintiffs' benefits are governed by a statute³⁰ which does not provide a protected property interest in free medical care. The motion was argued in July 1997, and a decision is pending.³¹

The third case is *McGinley v. United States*,³² in which the plaintiffs seek to certify a class action and have limited their recovery to \$10,000 per class member. They also seek injunctive relief to stop Medicare B deductions from their retirement pay. Both of the named plaintiffs entered the service prior to 1956 and served continuously until retirement. The Litigation Division filed a dispositive motion in November 1997.

The government's primary argument in all of these cases is that there has never been a statutory or regulatory entitlement for military retirees to have unlimited health care on demand. The availability of health care for retirees is best explained in the *Military Compensation Background Papers*.³³ The papers explain that there was no legislative or administrative authority for medical care to be provided to military retirees and their

dependents prior to World War I.³⁴ At that time, administrative directives established that "supernumeraries" might be admitted to military hospitals under certain circumstances; the term "supernumeraries" was construed to include retired personnel.³⁵ During World War II, the military placed severe restrictions on the provision of care to retirees in military medical facilities. These restrictions affected all consumers of military medical care other than active-duty members.

With the adoption of the Dependents' Medical Care Act,³⁶ military retirees and their dependents were given a contingent right to care in military medical and dental facilities based upon the "availability of space and facilities and the capabilities of the medical and dental staff."³⁷ Since 1956, the statute that governs the provision of health care to retired members of the armed forces at military hospitals has been 10 U.S.C. § 1074(b). This statute provided that: "a member or former member of a uniformed service who is entitled to retired or retainer pay . . . may, upon request, be given medical . . . care in any facility of any uniformed service, *subject to the availability of space and facilities and the capabilities of the medical . . . staff.*"³⁸

Military retirees are not entitled to the extensive, no-cost medical care which the plaintiffs in these actions seek. Although some of the services' recruiting literature and unofficial publications have made imprudent references to such benefits over the years, there has never been a basis in law or regulation for any claim that military retirees are entitled to free medical care for life. Major Mickle.

27. *Id.*

28. See Dependents' Medical Care Act, Pub. L. No. 84-569, §§ 301(b), 301(c), 70 Stat. 250, 253 (1956).

29. Civ No. 2:96-3822-23 (D.S.C. Dec. 1996).

30. 10 U.S.C.A. § 1074 (West 1997).

31. Just prior to this note going to the press for printing, a decision was issued in *Coalition of Retired Military Veterans*. The United States District Court for South Carolina dismissed the claim by the plaintiffs in that case. See *Coalition of Retired Military Veterans v. United States*, Civ. No. 2:96-3822-23 (D.S.C. Dec. 10, 1997). The court decided "with genuine regret" that it could not review the claim because it challenged a decision as to the allocation of resources which were in the DOD's discretion. *Id.* The court also decided that health care, an entitlement created by statute, is not a constitutionally protected property interest, and any promises to provide lifetime care would be "invalid." *Id.* The plaintiffs have filed a motion to amend or to alter the decision.

32. No. 97-1140 (M.D. Fla. Sept. 19, 1997).

33. See U.S. DEP'T OF DEFENSE, *THE MILITARY COMPENSATION BACKGROUND PAPERS: COMPENSATION ELEMENTS AND RELATED MANPOWER COST ITEMS, THEIR PURPOSES, AND LEGISLATIVE BACKGROUNDS* (5th ed. 1996) [hereinafter *BACKGROUND PAPERS*] (containing the legislative and regulatory history of the various elements of military compensation and related manpower cost items).

34. *Id.*

35. *Id.*

36. Pub. L. No. 84-569, §§301(b), 301(c), 70 Stat. 250, 253 (1956).

37. *BACKGROUND PAPERS*, *supra* note 33, at 609. See 10 U.S.C. § 1074(b) (1994) (pertaining to retirees); *id.* § 1076(b) (pertaining to dependents or survivors of retired members).

38. 10 U.S.C. § 1074(b) (emphasis added). Military retirees also may be treated at a hospital operated by the Department of Veterans Affairs. *Id.*