LAW OFFICES
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MAIN 5-1240

MEMORANDUM TO ATTORNEYS
CONCERNING OMISSION OF HEARING OFFICER'S REPORT

Before long the government will renew its pending prosecutions for trial in the district courts in many parts of the United States. Many, if not all, of these prosecutions will involve appeals that have been determined by the appeal boards throughout the country since June 18, 1952. Since that date it has been the practice of the Department of Justice not to include the report of the hearing officer of the Department of Justice in the files of conscientious objector cases.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 83) provides for the reference of conscientious objector cases to the Department of Justice for an investigation, advisory hearing and a recommendation about the general nature and character of the conscientious objector claim made.

Before June 18, 1952, there was a regulation in effect that required that the hearing officer's report be forwarded, along with the recommendation of the Department of Justice, to the appeal board. (See Section 1626.25(d) (32 C. F. R. [1951 Rev.]).) This regulation was mandatory. Failure to include the report of the hearing officer, along with the recommendation of the Department of Justice, was a violation of the law. This regulation had been in effect for over ten years. It was first promulgated after the passage of the 1940 act. When the Selective Service Act of 1948 was passed this regulation was still in effect and was readopted under the 1948 law. When the Universal Military Training and Service Act was passed the regulation was still in full force and effect.

After these two re-enactments of the original law and while the old regulation was still in full force and effect, the President of the United States, on June 18, 1952, changed the regulations. This was by Executive Order No. 10,363, Vol. 17, F. R. 119, June 18, 1952. This amendment to the regulations discontinued the practice of including the report of the hearing officer of the Department of Justice in the registrant's file. It provided only for the appeal board to place in the cover sheet the "recommendation of the Department of Justice."

I am convinced that the present procedure and this new regulation are invalid. It seems clear to me, also, that every case involving the conscientious objector claim that has been adversely decided by the appeal board under this procedure is defective.

Procedural due process of law, required by the statute as originally enacted and then re-enacted, has been denied. Therefore, the thing to do if you have a case involving the I-A-O or I-A classification given by the appeal board, thereby denying the full conscientious objector status, is to check the draft board file. Make sure the hearing officer's report is not included. You can be certain that it is not included in cases where the recommendation was made after June 18, 1952. Then where you find such omission you will have clear and unquestionable grounds for a motion for judgment of acquittal.

The grounds of the motion should be: (1) The Department of Justice and the appeal board denied the defendant procedural due process of law, contrary to Section 6(j) of the act, by not including in the draft board file the complete record of the Department of Justice proceedings —the report of the hearing officer as well as the recommendation of the Department of Justice. The report of the hearing officer was forwarded to the Department of Justice in Washington, D. C., and made a part of the record of the proceedings, but such report has been omitted from the file of the registrant by the Department of Justice and the appeal board, contrary to the act. (2) Executive Order No. 10,363, Vol. 17, F. R. 119, June 18, 1952, is void, because it is in conflict with the act in so far that it provides that the report of the hearing officer of the Department

of Justice is not to be included in the file. The recommendation and report must be included in the registrant's file pursuant to Section 6(j) as interpreted by 32 C. F. R. 1626.25(c), which was in effect and adopted by Congress as the law of the land under the 1948 Selective Service Act as well as the 1951 Universal Military Training and Service Act.

As a sure basis for this motion all you will need is the opinion in *Sterrett* v. *United States*, 9th Cir., 216 F. 2d 659. In that case an innovation similar to this one was introduced by the same Executive Order but it was declared to be invalid. In another part of that order the President directed that no longer would there be a Department of Justice investigation and hearing where the local board classified the registrant in Class I-O and the registrant appealed from such conscientious objector status for another classification, such as Class IV-D. This new section of the regulations was declared to be invalid for the same reason that the above-mentioned change in the regulations requiring that the report of the hearing officer be omitted from the file is contended to be illegal.

In the *Sterrett* opinion the Court said:

> "Such had been the interpretation of this provision of the Act of Congress for a period of approximately twelve years. Such interpretations by those charged with the Act's administration are entitled to persuasive weight. *Billings* v. *Truesdell*, 321 U. S. 542, 552; *United States* v. *Alabama Railroad Co.*, 142 U. S. 615, 621; *Luchenbach SS. Co.* v. *United States*, 280 U. S. 173, 181; *Louisville & N. R. Co.* v. *U. S.*, 282 U. S. 740, 757. In other words, the construction of the Act for which the appellants here argue is the same construction which the officers charged with its administration had placed upon it for this considerable period of time.
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> "There is a further reason why we think we must thus construe the Act. When Congress substantially reenacted the provisions of the 1940 Act, the Administrative Regulations thus interpreting and construing the Act and long continued without substantial change will be deemed to have received Congressional approval. It has been said that in similar cases the Regulations have the effect of law. *Helvering* v. *Winmill*, 305 U. S. 79, 83; *United States* v. *Zazove*, 334 U. S. 602, 623; *Hartley* v. *Commissioner*, 295 U. S. 216, 220.
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> "In each of these cases the Department's refusal to hold a hearing preceded the June 18 amendment of the Regulations. The fact that in each case the appeal board made its classifications subsequent to the amendment of the Regulation does not aid the Government's case. In view of what we here hold not only was the Department of Justice in error in refusing to hold a hearing but so much of the Regulation as would purport to deny such a hearing to these registrants was itself unauthorized by the statute."

Also argue that Section 6(j) of the statute guarantees an oral hearing. The report of the hearing officer is the only record of that hearing where new oral evidence in favor of the registrant is given. The Department of Justice procedure is for the benefit of the registrant. (*White* v. *United States*, 9th Cir., 215 F. 2d 782; pending on petition for certiorari, No. 390, October Term, 1954; *Tomlinson* v. *United States*, 9th Cir., 216 F. 2d 12; pending on petition for certiorari, No. 391, October Term, 1954) This means that a record of the favorable evidence given by the registrant must be passed on to the appeal board. Failure to include the report of the hearing officer of the Department of Justice in the draft board file denies procedural due process of law.

If you have a case where this point is involved please let me know what the results are. I am glad to be of assistance to you at any time.

Sincerely,

HAYDEN C. COVINGTON
General Counsel for
Jehovah's Witnesses

February, 1955.

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VENUE MEMORANDUM FOR JEHOVAH'S WITNESSES

Are you facing prosecution for failing to perform civilian work at a hospital? If you are, then the first thing for you to find out is whether the hospital is located in the same federal court district where your local board is situated. The way to find out is to notice whether the hospital is located in a state different from the state where the board is located. If it is, then obviously it is located in a different district. Should the hospital be located in the same state where the board is, then you will have to telephone the clerk of the local board and the clerk of the United States District Court where your local board is located and ask someone in that office whether the place where the hospital is located is in that federal judicial district. If it is said not to be located there, then ask what district the hospital is in.

A motion to dismiss the prosecution for want of jurisdiction and venue should be made immediately upon your discovery of such difference in the districts where the board and hospital are located. You will need a lawyer to make the motion to dismiss for improper venue. The law guarantees you the right to be tried in the district where the offense is committed. Two district courts have held that the place of prosecution must be the place where the local board is located. One of these courts was reversed by the Court of Appeals. This case is being taken to the Supreme Court of the United States. Unless and until the Supreme Court holds that the proper place of prosecution is in the district where the hospital is located you should have your lawyer make a motion to dismiss the prosecution. And this must be made before you enter a plea of not guilty. If you have entered such a plea, then your lawyer should ask the judge for permission to withdraw the plea and make a motion to dismiss for want of jurisdiction because of a lack of venue for the offense charged.

The moment you learn of the difference in the districts where the board and hospital are located then you should immediately write me for the material to give to your lawyer to support the motion for a dismissal. It is hoped that this will help your lawyer assist the court in determining whether proper venue exists in your case.

Sincerely,

HAYDEN C. COVINGTON
General Counsel for
Jehovah's Witnesses

February, 1956

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MEMORANDUM CONCERNING CITIZENSHIP APPLICATIONS

Dear Brother:

Your letter of recent date asking about your rights to obtain United States citizenship has been considered.

You realize, of course, that whether to apply for citizenship or not is entirely your own personal decision and not that of anyone else. It is not for the Society or for me or anyone else to say what you should do. I may merely tell you what your rights are under the law.

Before December 24, 1952, several of Jehovah's Witnesses obtained citizenship in different parts of the country. On that date the new "McCarran Act" went into effect. It had new provisions for the naturalization oath. Its restrictive and difficult provisions take the place of the old law. Before the present law went into effect it was necessary for an individual only to prove that he was a conscientious objector to military service and then take an unobjectionable alternate oath.

Under the present law, however, it is necessary for an applicant to take a much broader oath. He must swear either to (1) bear arms for the United States when required to do so by law, (2) perform noncombatant service in the armed forces of the United States when required to do so by law, or, if he objects to either of these two types of military service, he must perform, instead of military service, civilian work of national importance under government direction, which is usually in a state mental institution. The requirements of the Act conform to the present draft law that covers the duty of men of military age. If a person becomes a citizen he will have to swear that he is willing to perform one of the three above-mentioned duties. There is no alternate oath for citizenship that can be taken which exempts one from all governmental service.

Whether one wants to and can (in view of his dedication to Jehovah) agree to any of the provisions of the oath is a matter for decision only by the person involved. To aid you in deciding the question, I suggest that you consider Chapter 20 of *"Let God Be True"*, 2d edition, especially pages 236 and 237, and *The Watchtower* of February 1, 1951, at pages 70, 77 and 78 (paragraphs 12 to 14 in particular).

Remember, it is not necessary to be a citizen in order to preach the good news of the Kingdom. The Constitution of the United States guarantees freedom of press, speech, assembly and worship to all persons, including aliens. These are rights of aliens as well as of citizens. The only things citizens have that aliens do not have are privileges granted by the government, such as that of being a doctor or a lawyer, holding public office, voting, operating a taxi or similar business that requires a license from the state.

It should always be remembered that regardless of what nation Jehovah's Witnesses are citizens of, or in what part of the earth they happen to live, Jehovah is capable and willing to protect all those who serve him. Jehovah gives everlasting life and salvation to men of all kinds, regardless of their citizenship of the nations of this world, as long as they keep their dedication vows to him and do not violate their covenant obligations.

It will do no good to apply for citizenship because you will be denied it if you say you cannot take the oath. If you apply and are refused citizenship, no appeal to the courts or further action should be taken. Drop the matter and leave it in the hands of Jehovah to provide for and protect you in the future.

I sincerely hope that the above information will be of some aid to you in solving your problem.

Your brother,

HAYDEN C. COVINGTON

General Counsel for
Jehovah's Witnesses

March, 1956.

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SPECIAL VENUE MEMORANDUM

The Supreme Court of the United States on May 21, 1956, in *Johnston* v. *United States*, 76 S. Ct. 739, held that a registrant who reports at the local board to inform the board of his intention not to do hospital work places himself in a position so he can be prosecuted in the district where the hospital is located. This is usually very far away from the place where the board is located.

A registrant who plans on doing hospital work should report to the local board. But any registrant who claims classification as a minister of religion and desires to obtain judicial review of the denial of the exemption need not report to the local board in order to exhaust his remedies. If he does report to the local board for the purpose of informing the local board he will not proceed to the hospital, he should keep in mind that in doing so he will be prosecuted at a far-distant place, which will be very much more burdensome and expensive for him.

Some local boards are following the policy of ordering persons to do hospital work hundreds and even thousands of miles away from the place where the local board is located. This is an extreme hardship, and the only way that it can be avoided is by not reporting to the local board in response to the final order to do civilian work.

In order to avoid getting into this trap of having to stand trial in some strange and distant place it is necessary that the registrant classified as I-O, upon receipt of the final order to report for hospital work, should not report to the local board. This is only in the event it is his intention not to do the hospital work.

This memorandum is intended only for persons who do not intend to report and who desire to defend their cases in the federal district courts so as to establish their legal rights to the ministerial exemption in defense to a prosecution for failure to do civilian work. It does not apply to anyone who intends to go to a hospital and perform civilian work.

Sincerely,

HAYDEN C. COVINGTON

General Counsel for
Jehovah's Witnesses

November, 1956.