

LAW REVIEW 13100

July 2013

When Challenging Non-Selection for Promotion, You Must First Exhaust your Administrative Remedies

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9.0--Miscellaneous

Harkness v. United States, 2013 U.S. App. LEXIS 13999 (6th Cir. July 11, 2013).¹

Furniss B. Harkness is a Commander (O-5) in the Navy Reserve Chaplain Corps and a member of ROA. In 2007, he was considered by a selection board for promotion to Captain (O-6), but he was not selected. In this suit, he challenges the non-selection. This is not the first federal lawsuit that Chaplain Harkness has brought to challenge the policies and procedures of the Navy Chaplain Corps.

Congress has provided for chaplains in our armed forces since the Revolutionary War. The principal mission of the Navy Chaplain Corps is to accommodate the religious needs of Navy, Marine Corps, and Coast Guard service members. Chaplains also offer advice and instruction on ethical and moral matters to commanding officers when called upon.

Each chaplain (Active Component or Reserve Component) serves “as clergy or a professional of a particular religious denomination.” *In re England*, 375 F.3d 1169, 1171 (D.C. Cir. 2004). A particular denomination must nominate or endorse an individual clergy member if he or she is to serve as a chaplain in the Navy, Army, or Air Force.²

The services make an effort to make the denominational breakdown of the service’s chaplain corps mirror, at least in general terms, the denominational breakdown of the service as a whole. There are scores of Protestant denominations, but the Navy categorizes chaplains in four broad “faith groups.” The four groups are Roman Catholic, liturgical Protestant, non-liturgical Protestant, and Special Worship.³ Chaplain Harkness represents the Christian Church (Disciples of Christ), which the Navy categorizes in the non-liturgical Protestant faith group.

¹ This is a decision of the United States Court of Appeals for the 6th Circuit. The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from federal district courts in Kentucky, Michigan, Ohio, and Tennessee.

² Navy chaplains provide religious service for the Marine Corps and the Coast Guard, and those services do not have their own chaplains.

³ The Special Worship category apparently includes minority religions like Islam, Judaism, Eastern Orthodox, Church of Jesus Christ of Latter Day Saints, etc.

Because there is a serious shortage of Roman Catholic priests in North America, there is also a severe shortage of Roman Catholic chaplains in the Navy, Army, and Air Force. The Catholic Church does not endorse enough chaplains to fill the quota for Catholic chaplains, based on the percentage of Navy and Marine Corps personnel who identify themselves as Roman Catholic. As a result, other faith groups are overrepresented in the Navy Chaplain Corps.

Like other Navy and Navy Reserve officers, chaplains compete for promotion in the Navy's promotion board system, which is probably familiar to most readers. Chaplain Corps promotion boards consider chaplains, so chaplains do not have to compete with aviators, surface warfare officers, judge advocates, etc. The Navy tries to maintain the balance among the four faith groups at each level. Accordingly, chaplains in underrepresented groups (like Roman Catholic) have a better shot at promotion, and chaplains in overrepresented groups (like liturgical and non-liturgical Protestants) face stiffer competition when they are considered for promotion.

Chaplain Harkness made an "Establishment Clause" challenge to the Navy's promotion system for chaplains. This refers to the first two clauses of the First Amendment: "Congress shall make no law respecting an *establishment of religion*, or prohibiting the free exercise thereof." United States Constitution, Amendment I (ratified December 15, 1791) (emphasis supplied).

Some people argue that the Chaplain Corps in general violates the Establishment Clause—that the Federal Government has no business employing officers whose principal duty is to conduct religious services. I do not agree with that argument. When there is an unavoidable tension between the Free Exercise Clause and the Establishment Clause, the Free Exercise Clause wins.

On Navy and Coast Guard ships at sea, and in places like Afghanistan, service members will have no opportunity to have religious services unless the Navy, Army, or Air Force provides such services through chaplains. It should also be noted that military chaplains provide important counseling and other services on every day of the week, not just the Sabbath.⁴

After he failed to be selected for promotion to Captain, Commander Harkness brought this lawsuit in the United States District Court for the Western District of Tennessee (Memphis). The District Court dismissed his lawsuit for want of jurisdiction, because Chaplain Harkness had not exhausted his remedies through the Secretary of the Navy, as required by federal law as a condition precedent to filing a lawsuit of this nature. Chaplain Harkness argued that constitutional challenges to the policies underlying the selection process are exempted from the exhaustion of remedies requirement, but both the District Court and the Court of Appeals rejected that argument.

⁴ In the mid to late 1990s, I regularly attended Protestant services at the Washington Navy Yard Chapel. These services were very sparsely attended and eventually petered out in 1999, for lack of interest, while the Catholic services at the Navy Yard Chapel have continued. In a place like Washington there are hundreds of Protestant and Catholic churches that service members can attend, and there is no overriding need for the military to provide Sabbath services through chaplains, but there is still a great need for chaplains, even in a major metropolitan area.

In its decision, the Court of Appeals acknowledged that the system of review established by Congress serves “to insulate the Naval promotion process from all but the most rudimentary judicial oversight.” I think that is generally good. I would not like to see the federal courts routinely inserting themselves into the process by which the Navy and the other services select officers for promotion.

If you are disappointed about not having been selected for promotion, I suggest that you think long and hard before wasting significant money and time on challenging the process and the outcome in court. Sometimes it is time to “stop throwing good money after bad” as my late father used to say.

The *Harkness* case is probably over. There are two more steps available to Chaplain Harkness. He can ask all the sitting judges of the 6th Circuit to grant him a rehearing *en banc*, but I think that it is most unlikely that such a rehearing would be granted. Finally, he can ask the Supreme Court for *certiorari* (discretionary review). Four of the nine Justices must vote to grant *certiorari*, and it is denied more than 98% of the time. If there are any further developments in this case, we will keep the readers informed of them.