IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BROCK STONE, *et al.*, *Plaintiffs*, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, *Defendants*.	Case 1:17-cv-02459-MJG Hon. Marvin J. Garbis

DEFENDANTS' MOTION FOR CLARIFICATION AND, IF NECESSARY, A PARTIAL STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

On November 21, 2017, the Court entered an Order granting in part and denying in part Defendants' motion to dismiss and granting Plaintiffs' motion for a preliminary injunction. ECF No. 85. The Court preliminarily enjoined Defendants from enforcing or implementing certain "policies and directives" in the President's August 25, 2017 Memorandum regarding military service by transgender individuals (the "Presidential Memorandum"). ECF No. 84. One aspect of the Court's injunction barred the Secretary of Defense from carrying out the President's direction to delay the effective date of changes to the accession policy for military service by transgender individuals that are scheduled to take effect on January 1, 2018. *See id*. at 2. That policy is set forth in Defense Department Directive-Type Memorandum ("DTM") 16-005, issued on June 30, 2016, ECF No. 85 at 6-8. On June 30, 2017, prior to the issuance of the Presidential Memorandum, Secretary of Defense Mattis exercised his independent authority to delay the effective date of DTM 16-005 to January 1, 2018. *Id.* at 9.

For the following reasons, Defendants seek clarification that the Preliminary Injunction does not prohibit the Secretary of Defense from again exercising his independent discretion to defer the January 1, 2018 effective date for the accessions provisions of DTM 16-005 for a limited period of time to further study whether the policy will impact military readiness and lethality or to complete further steps needed to implement the policy.

Alternatively, in the event the Court clarifies that the meaning of its Order is that the Secretary of Defense is preliminarily enjoined from exercising his own authority to defer the January 1, 2018 effective date, Defendants move to stay the accessions portion of the Preliminary Injunction pending a decision from the Fourth Circuit on their appeal of the Court's Preliminary Injunction.

I. Motion to Clarify Scope of Preliminary Injunction

Prior to and wholly apart from the directives in the Presidential Memorandum, the Secretary of Defense exercised his independent authority to defer the effective date of the accessions provisions of DTM 16-005, for the purpose of further studying whether the DTM will impact military readiness and lethality. Specifically, as the Court noted in its order, *see* ECF No. 85 at 9, Secretary Mattis exercised his authority on June 30, 2017, to defer the effective date for the accessions provisions of DTM 16-005 from July 1, 2017, to January 1, 2018. *See* Department of Defense, Release No. NR-250-17 (June 30, 2017).[1] Plaintiffs did not challenge the Secretary's exercise of that authority, nor have they suggested that the Secretary's action was unlawful in any respect. Instead, Plaintiffs have only sought prospective relief to enjoin the

[1] The Department of Defense Release is available online at: https://www.defense.gov/News/News-Releases/News-Release-View/Article/1236145/statement-by-chief-pentagon-spokesperson-dana-w-white-on-transgender-accessions/ (last visited December 12, 2017).

Secretary from implementing the Presidential Memorandum, which the President issued subsequent to the Secretary's exercise of his independent authority.

Accordingly, Defendants believe that the Court's November 21, 2017 Order does not prohibit the Secretary of Defense from again exercising his discretion to defer the January 1, 2018 effective date for the accessions provisions of DTM 16-005 for a limited period of time, in order to further study whether the policy will impact military readiness and lethality, or to complete further steps needed to implement the policy. Nor could the Court have enjoined the Secretary of Defense from exercising such discretion because, as noted, the Plaintiffs have not challenged the Secretary's exercise of his independent authority to study whether the DTM 16-005 will impact military readiness and lethality. Notwithstanding these facts, and out of an abundance of caution, Defendants seek clarification of the Court's preliminary injunction order on this point.[2]

Accordingly, Defendants respectfully request that this Court clarify that its preliminary injunction does not prohibit the Secretary of Defense from exercising his discretion to defer the January 1, 2018 effective date for the accessions provisions of DTM 16-005 for a limited period of time to further study whether the policy will impact military readiness and lethality or to complete further steps needed to implement the policy.

[2] Defendants sought a similar clarification of the preliminary injunction entered in the related case of *Doe v. Trump*, No. 17-cv-1596 (CKK) (D.D.C.). *Id.*, 2017 WL 4873042 (D.D.C. Oct. 20, 2017). The *Doe* Court rejected the government's proposed clarification of its injunction, stating that the referenced "*status quo*" in its injunction should be read to mean "the retention and accession policies established in the June 30, 2016 Directive-type Memorandum as modified by Secretary of Defense James Mattis on June 30, 2017.," *Id.*, Doc. No. 70 at 2, and that defendants were enjoined from altering that status quo. Defendants respectfully disagree with the *Doe* Court's clarification order because it is inconsistent with the status quo that existed prior to the Presidential Memorandum, under which the Secretary had independent discretion and authority to extend the effective date of the new policy in DTM 16-005. In any event, that clarification order is irrelevant to determining the meaning of this Court's preliminary injunction.

II. Motion to Stay Preliminary Injunction Pending Appeal

If the Court clarifies that, under the terms of its preliminary injunction, the Secretary of Defense is enjoined from exercising his discretion to defer the January 1, 2018 effective date of the new accessions policy, Defendants move to stay the accessions portion of the preliminary injunction pending appeal. The Court should grant Defendants' motion for several reasons.

STANDARD OF REVIEW

In deciding a motion to stay pending appeal, courts consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009).[3]

ARGUMENT

In this case, the four factors weigh heavily in favor of a stay of the accession portion of the Court's preliminary injunction until the Fourth Circuit decides Defendants' appeal.

A. Defendants Will Be Irreparably Harmed If They Are Forced to Implement a New Accessions Policy by January 1, 2018.

Defendants have submitted a declaration from Lernes J. Hebert ("Hebert Decl."), Acting Deputy Assistant Secretary of Defense for Military Personnel Policy, explaining that, in order to

[3] Although a party seeking a stay pending appeal must make a strong showing of likely success on the merits of the appeal, "this standard does not require the trial court to change its mind or conclude that its determination on the merits was erroneous." *St. Agnes Hosp. of City of Baltimore, Inc. v. Riddick*, 751 F. Supp. 75, 76 (D. Md. 1990). "Rather, a stay may be appropriate in a case where the threat of irreparable injury to the applicant is immediate and substantial, the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear and the interests of the other parties and the public are not harmed substantially." *Id.* (citation omitted).

adequately prepare to access transgender individuals, the military will need to promulgate new, complex, and interdisciplinary medical standards that will necessarily require evaluation across several medical specialties, including behavior and mental health, surgical procedures, and endocrinology. Hebert Decl. ¶6. The military must then train "tens of thousands" of geographically dispersed personnel on the application of those complex medical standards. *Id.* ¶5. These personnel include 20,367 recruiters, 2,785 employees across 65 Military Entrance Processing Stations, 32 Service Medical Waiver Authorities, and personnel at nine (9) initial military entrance locations ("boot camps") and the associated medical hospitals that support them. *Id.*

Moreover, given the complexity of the interdisciplinary medical standards that need to be issued and the number of geographically dispersed individuals that need to be carefully trained on those standards, the Department would not be adequately and properly prepared to begin processing transgender applicants on January 1, 2018. *Id.* ¶¶6, 9. Thus, if the military is "compelled to execute transgender accessions by January 1," then "applicants may not receive the appropriate medical and administrative accession screening necessary for someone with a complex medical condition" and thereby enter the military even though they are "not physically or psychologically equipped to engage in combat/operational service." *Id.* ¶8. Put simply, compliance with the district court's January 1 deadline "will impose extraordinary burdens" on the military and have a "harmful impact" on "its missions[] and readiness." *Id.* ¶¶3, 5. Because Defendants are likely to suffer serious and irreparable harms if they are forced to begin accessing transgender individuals beginning on January 1, 2018, the Court should stay the accessions portion of its preliminary injunction until the Fourth Circuit decides Defendants' appeal.

The Department is also in the process of a high-level review of military service by transgender individuals that is scheduled to conclude in the next few weeks and could result in an accessions policy that differs from the one that the Court has ordered the military to implement by January 1, 2018. *Id.* ¶4, 10. In these circumstances, implementing a new accessions policy that would permit the accession of transgender individuals while the Department is in the process of concluding a comprehensive study that may ultimately lead to the implementation of a different policy would present not only the prospect of significant duplicative costs and administrative burdens but the high potential for sowing confusion in the ranks as well. *Id.* ¶10. Moreover, the military will be significantly harmed if it is required by the Court to access individuals that it would have rejected had it been permitted to complete its study and implement its final policy.

II. Plaintiffs Will Not Be Harmed by a Stay of the Accession Provision of the Court's Preliminary Injunction.

Plaintiffs will not be harmed by a stay of the accessions portion of the Court's preliminary injunction pending the outcome of Defendants' appeal. Only two of the Plaintiffs allege that they will be affected by the accessions provision of the August 25, 2017 Presidential Memorandum. But Plaintiff Gilbert must complete her undergraduate degree before she is eligible to accept a commission and is not schedule to graduate until the Spring 2019. ECF No. 66-11 ¶¶ 6-8. Similarly, Plaintiff George is scheduled to complete his associate's degree in nursing in December 2017, and then plans to begin a program to earn his bachelor's degree in nursing, which he expects to be able to complete "in 12-18 months," ECF No. 66-9 ¶ 5. Even assuming (as the district court did) that George will forego those educational plans if permitted to commission, ECF No. 85 at 32-33, plaintiff George has never even sought a waiver to accede under the longstanding policy, and it is unclear that the preliminary injunction would even allow

him to accede under the medical requirements of DTM 16-005. In any event, this sort of employment-related harm is not irreparable, particularly in light of the "higher requirement of irreparable injury [that] appli[es] in the military context." *Guerra v. Scruggs*, 942 F.2d 270, 271, 274 (4th Cir. 1991) (holding that general discharge of military employee "does not rise to the . . . level of irreparable injury justifying an injunction," even where employee alleged that discharge procedures violated the Due Process Clause and the Equal Protection Clause).

III. A Stay of the Accession Provision of the Court's Preliminary Injunction Is in the Public Interest.

In these circumstances, it is not in the public interest for the Court to compel the military to begin accessing transgender individuals before it has had an opportunity to issue the necessary medical standards and train its personnel on those standards to ensure that military applicants are properly screened. *See Gilligan v. Morgan*, 413 U.S. 1 at 10 ("The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.").

III. Defendants Are Likely to Prevail on the Merits of Their Appeal.

Defendants can also show a likelihood of success on the merits of their appeal of the preliminary injunction. First, the Court will have erred if it enjoins the Secretary of Defense from exercising his independent authority to extend the effective date of the new accessions policy when the Secretary's authority has not been challenged in this case and was not properly before the Court.

Second, the Court erred by entering a worldwide injunction, particularly in light of the fact that only two Plaintiffs are challenging the accession provision of the Presidential Memorandum and their alleged injuries could be remedied by an injunction that applies only to them. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (explaining that equitable relief should "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.").

Third, the Court erred by concluding that at least one Plaintiff has established standing and a likelihood of irreparable harm from the accessions provision of the Presidential Memorandum. As discussed above, the impact of the policy on Plaintiff George is speculative; George has never sought a waiver, the details of the final policy have yet to be developed, and it is not clear that George would be eligible to accede even under DTM 16-005. Any harm to Plaintiff Gilbert is even more speculative, as Gilbert will not be eligible to commission until at least Spring 2019. *See* ECF No. 66-11 ¶¶ 6-8. In any event, as discussed above, any harm is not irreparable. *Guerra*, 942 F.2d at 274. These Plaintiffs' allegations of speculative, future harm do not outweigh the hardship that the injunction will impose on the military.

Fourth, the Court erred on the merits, in particular by reaching substantial constitutional questions and not applying the appropriate level of deference when the military is presently examining the policy at issue.

Fifth, for the reasons given above, the Court abused its discretion in weighing the equities to decide that a preliminary injunction was warranted.

Accordingly, Defendants are likely to succeed on these issues in their appeal and have, at the very least, presented serious and difficult questions of law that are sufficient in light of the other factors to warrant a stay. *Riddick*, 751 F. Supp. 75, 76 (D. Md. 1990)

III. Request for Expedited Ruling

Because the January 1, 2018 deadline for complying with the accessions portion of the Court's preliminary injunction is quickly approaching, Defendants waive their right to file a reply to any opposition that Plaintiffs may file to this motion and respectfully request a decision on their motion by 12:00 PM on Thursday, December 14, so they may have sufficient time to seek an emergency stay from the Court of Appeals prior to January 1, 2018, if the Court denies the motion. Defense counsel has conferred with Plaintiffs' counsel, and Plaintiffs oppose this motion.

Date: December 12, 2017

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BROCK STONE*, et al.*,

Plaintiffs,

v.

DONALD J. TRUMP*, et al.*,

Defendants.

Civil Action No. 17-cv-2459 (MJG)

DECLARATION OF LERNES J. HEBERT

I, Lernes J. Hebert, do hereby declare as follows:

1. I am currently the Acting Deputy Assistant Secretary of Defense, Military Personnel Policy, in the Office of the Under Secretary of Defense for Personnel and Readiness. In that capacity, I am responsible for overseeing the human resource policies impacting the sustainment of the all-volunteer-force for the Department of Defense ("DoD" or "the Department"), which consists of 1.4 million active duty military personnel and 1.1 million Guard and Reserve personnel. I have served in Military Personnel Policy since August 2003 and have led the Department through a number of major personnel initiatives and policy changes. Prior to my retirement from the United States Air Force in the rank of Colonel after 24 years of active service, I served at every level of the field of personnel management to include key assignments in the Office of the Secretary of Defense, the Air Staff, at the Air Force Personnel Center, and with Air Combat Command. I hold a Master of Science Degree in

National Security Strategy from the National War College and a Master of Arts degree in Management and Computer Resource Management from Webster University.

2. In the exercise of my official duties, I have been made aware of the above-referenced litigation pending in the U.S. District Court for the District of Maryland, as well as three additional suits by transgender individuals pending in other jurisdictions, including *Jane Doe 1 v. Trump*, pending in the District of Columbia, in which I have submitted a declaration similar to the one here. Specifically, I am aware of the preliminary injunction entered by the Court in this action on November 21, 2017, with respect to three aspects of the Presidential Memorandum of August 25, 2017, including the provision directing DoD to maintain the Department's longstanding policy which generally prohibits accession of transgender individuals into military service. My understanding is that the Court's injunction resets an effective date of January 1, 2018, for the accessions provisions of Defense Department Directive-Type Memorandum ("DTM") 16-005, issued on June 30, 2016, which allows for the accession of transgender individuals into the military.

3. I submit this declaration in support of Defendants' Motion for a Partial Stay of the Court's Preliminary Injunction Orders Pending Appeal. The purpose of this declaration is to provide the Court with my assessment, based on my experience and professional judgment, regarding the feasibility of implementing the court's orders by January 1, 2018, and the harmful impact to the military, its missions, and readiness if it is required to comply with the Court's orders that mandate the January 1, 2018 effective date for the accessions policy in DTM 16-005. The statements made herein are based on my personal knowledge and information available to me in the course of my official duties.

4. Secretary of Defense Mattis exercised his authority on June 30, 2017, to defer the effective date for the accessions provisions of DTM 16-005 from July 1, 2017, to January 1, 2018. *See* Department of Defense, Release No. NR-250-17 (June 30, 2017). Subsequently, the Presidential Memorandum of August 25, 2017, directed the Secretary of Defense (and the Secretary of Homeland Security with respect to the U.S. Coast Guard) to maintain the then-currently effective policy restricting accession by transgender individuals into military service beyond January 1, 2018, until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the President. The Presidential Memorandum also directed the Secretary of Defense to submit an implementation plan to the President by February 21, 2018, with respect to the policy set forth in the memorandum concerning accession and service by transgender individuals in the military. The Presidential Memorandum further directed that the implementation plan shall adhere to the determinations made by the Secretary as to what steps are appropriate and consistent with military effectiveness, lethality, budgetary constraints, and existing law. The review being undertaken by the Panel of Experts appointed by the Secretary on September 14, 2017, to carry out the study directed by the President remains ongoing. The Panel's work is expected to result in recommendations to the Secretary of Defense early next year. The Department would also establish the policy, standards, and procedures to support those Panel recommendations adopted by the Secretary. Thus, at present, the Department is studying revisions to policy concerning military service by transgender individuals, to be completed in early 2018, while at the same time preparing to operate under a judicial order to implement DTM 16-005 by January 1, 2018.

5. Implementing the Court's orders with respect to the accessions policy in DTM 16-005 by January 1, 2018, will impose extraordinary burdens on the Department and the

military services. For organizations as large and as complex as DoD and the military services, the study, development, and implementation of significant personnel policies is necessarily a substantial undertaking. As set forth below, there are considerable requirements associated with implementing this significant and complex policy change across the Department, considering that those personnel directly responsible for execution number in the tens of thousands and are geographically dispersed across the United States. Specifically, implementation of a new accession policy necessitates preparation, training, and communication to ensure those responsible for application of the accession standards are thoroughly versed in the policy and its implementation procedures. This requires that the following personnel have a working knowledge or in-depth medical understanding of the standards and identity validation requirements associated with processing an applicant under new requirements:

- 20,367 recruiters (responsible for resolving any gender identity conflict between an applicant's government identification documents and the gender in which they present themselves and assisting the applicant in completing the Accession Medical Prescreen Report (DD Form 2807-2), including by providing substantiating and supporting medical documents);
- 2,785 employees across 65 geographically dispersed Military Entrance Processing Stations (MEPS), including 568 medical division personnel, 102 Chief and Assistant Chief Medical Officers, and approximately 375 fee-based medical providers, all necessitating in-depth knowledge of the standards;
- 32 Service Medical Waiver Authorities authorized to grant medical waiver requests following a thorough evaluation of the applicant's medical history and recommendation from the MEPS Chief Medical Officer; and

- Personnel at the nine initial military entrance training locations ("boot camps") and the associated military hospitals that support them.

6. Beyond the sheer number of components and personnel involved, the implementation of accessions criteria is itself a complex undertaking. Accession criteria are based on service needs and are designed to ensure that those individuals accepted are "qualified, effective, and able-bodied persons" (10 U.S.C. § 505) who are capable of successfully performing military duties. Such duties involve a wide range of demands including exposure to danger, emotional stress, harsh environments, and the operation of dangerous, sensitive or classified equipment. Such demands are not normally found in civilian occupations. Further, all military members must be available for worldwide duty 24 hours a day without restriction or delay. This duty may be in remote areas lacking immediate and comprehensive medical support. An important objective of this thorough applicant screening is to ensure that persons accepted for the military are physically and psychologically qualified to withstand such isolation and rigors. These policies exist to protect both the individuals concerned, as well as members of their units and the overall readiness of the force. The accession screening process requires military and medical professionals well versed in the standards, and their applicability to military readiness, to ensure both the individual and the Department's best interests are served. In the case of the transgender accession standards, the standards themselves are complex, interdisciplinary standards necessitating evaluation across several systems of the body, to include behavioral and mental health (e.g. diagnosis of gender dysphoria or related comorbidities), surgical procedures (particularly thoracic and genital), and endocrinology (for the purposes of cross-sex hormone therapy). No other accession standard has been implemented that presents such a multifaceted review of an applicant's medical history.

7. It is also important to remember that this court-mandated policy change comes at a time when the military's operational tempo remains high and DoD's primary focus is on ongoing combat and contingency operations overseas.

8. Accordingly, if the Department is compelled to execute transgender accessions by January 1 absent sufficient guidance, resources, and training, the possibility exists that transgender applicants may not receive the appropriate medical and administrative accession screening necessary for someone with a complex medical condition. As a result, an applicant may be accessed for military service who is not physically or psychologically equipped to engage in combat/operational service.

9. Although the Department was in the process of implementing DTM 16-005 after its issuance in June 2016, that process was first extended by the Secretary in June 2017, and then deferred further pending completion of the study directed by the President on August 25, 2017. In addition, key personnel involved in that accession enterprise have rotated in the past several months, necessitating additional preparation, training, and communication to ensure those responsible for application of the accession standards are thoroughly prepared. Thus, notwithstanding the implementation efforts made to date, the Department still would not be adequately and properly prepared to begin processing transgender applicants for military service by January 1, 2018.

10. Finally, especially given that this extensive and elaborate process for implementing the DTM 16-005 accessions policy is time-consuming and costly, the Department will be twice burdened if it is required to implement DTM 16-005 by January 1, and then potentially a different policy after the Department concludes its study and finalizes a policy. It is possible that the accession standards and the implementing procedures that result from that

ongoing policy review could be different from those that the Court has directed DoD to implement on January 1, 2018. Carrying out the implementation enterprise again, after the ongoing policy review is completed, would not only present the prospect of significant duplicative costs and administrative burdens, but the high potential for sowing confusion in the ranks as to the applicable policy.

Pursuant to 28 U.S.C. § 1746(2), I declare under the penalty of perjury that the foregoing is true and correct.

Executed on 12/06/17

Lernes J. Hebert