

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

RICHARD ROE; VICTOR VOE; and)
OUTSERVE-SLDN, INC.,)
)
Plaintiffs,)
)
v.)

PATRICK M. SHANAHAN, in his official)
capacity as Acting Secretary of Defense;)
HEATHER A. WILSON, in her official)
capacity as Secretary of the Air Force; and)
the UNITED STATES DEPARTMENT OF)
DEFENSE,)
)
Defendants.)

No. 1:18-cv-1565-LMB-IDD

**DEFENDANTS’ OPPOSITION TO PLAINTIFF
OUTSERVE-SLDN’S MOTION TO AMEND THE
PRELIMINARY INJUNCTION**

On February 15, 2019, Plaintiff OutServe-SLDN (“OutServe”) moved the Court to amend the preliminary injunction it entered on the same date. Dkt. 74. Specifically, Plaintiff OutServe moves the court to remove the term “active-duty” from the phrase “active-duty member[s] of the Air Force,” in the second paragraph of the Court’s February 15, 2019 Order. Dkt. 75 (citing Dkt. 72). The purpose of OutServe’s proposed amendment is to enjoin the discharge of Senior Airman Q.S., and those similarly situated, from the Air National Guard.¹ Dkt. 75.

Defendants oppose Plaintiff OutServe’s motion. Plaintiff OutServe has not yet disclosed the identity of Senior Airman Q.S. to the Defendants. However, based on the Declaration of Peter Perkoski, Senior Airman Q.S. is a member of a State Air National Guard being separated because

¹ Further, OutServe has also not asserted, let alone provided a declaration or any other evidence, that Senior Airman Q.S. is a member of its organization. The Declaration of Peter Perkowski merely states that “OutServe-SLDN has also heard from members of the Air National Guard (ANG) who are facing separation because their HIV status makes them not worldwide deployable.” Decl. of Peter Perkowski in Support of Motion for Preliminary Injunction ¶¶ 28 (Dkt. 40).

he has reached the end of his term of enlistment. *See* Decl. of Peter Perkowski in Support of Motion for Preliminary Injunction ¶¶ 28-30 (Dkt. 40).

First, Senior Airman Q.S.'s situation is expressly excluded from the reasoning in the Court's February 19, 2019 Memorandum, which limited the injunctive relief granted. The Court explained that that "[t]he order will not address . . . the reenlistment of HIV-positive servicemembers whose terms of service have expired." Dkt. 72 at 52 n.46. Now, Plaintiff OutServe is requesting that the Court expand the scope of the relief that it expressly limited with its Memorandum Opinion. Senior Airman Q.S.'s term of service has expired, and therefore his or her situation should not be covered by the preliminary injunction.

Second, as we understand the circumstances involving Senior Airman Q.S.'s service from the limited information provided by OutServe, Defendants may lack the authority to comply with requested relief. The National Guard, which incorporates both the Army National Guard and the Air National Guard, is a component of the organized militia of the United States. 10 U.S.C. § 101(c). All fifty States have their own National Guard. *Jorden v. Nat'l Guard Bureau*, 799 F.2d 99, 101 (3rd Cir.1986). "In each state, the Guard is a state agency, under state authority and control." *Charles v. Rice*, 28 F.3d 1312, 1315 (1st Cir.1994). "The governor and his or her appointee, the Adjutant General, command the Guard in each state." *Id.* Except when called to federal duty by the President, 32 U.S.C. §§ 101(12), 102, 325, the States are responsible for the administration and training of their National Guard. *See Ass'n of Civilian Technicians, Inc. v. United States*, 603 F.3d 989, 993 (D.C. Cir. 2010). For this reason, the federal government lacks the authority to direct a state National Guard to re-enlist a service member who is not on active duty. *See id.* (holding federal government lacks authority to order reinstatement of a National Guard soldier).

Here, there is nothing in the record that suggests Senior Airman Q.S. is on federal active duty. The decision not to re-enlist Senior Airman Q.S. therefore apparently was made by the State official for the Midwestern state that Senior Airman Q.S. serves. Neither that official nor the National Guard of that particular State are named defendants in this lawsuit. As such, Senior Airman Q.S., as well as other members of the National Guard, would not be similarly situated to Plaintiffs Roe and Voe, who are active duty airmen with discharge decisions made by the Secretary of the Air Force following recommendations from Secretary of the Air Force Personnel Council. For this reason, Plaintiff OutServe's requested relief—effectively to enjoin a third-party State authority to re-enlist Senior Airman Q.S. for the duration of this lawsuit—would be beyond the scope of both the allegations of the Complaint and the injunctive relief granted by the Court. Accordingly, the Defendants oppose Plaintiff OutServe's request.

DATE: February 19, 2019

Respectfully submitted,

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/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, I filed the foregoing using the Court's CM/ECF system, which will send a notification of electronic filing (NEF) to the following counsel of record:

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