

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

NICHOLAS HARRISON, ET AL.,

Plaintiffs,

v.

MARK T. ESPER, ET AL.,

Defendants.

CIVIL ACTION NO. 1:18-cv-00641(LMB/IDD)

**MEMORANDUM IN SUPPORT OF PLAINTIFF HARRISON'S MOTION FOR
CLARIFICATION OF ORDER DATED APRIL 6, 2022 (AS AMENDED MAY 10, 2022)**

On April 6, 2022, this Court struck down Defendants’ unconstitutional policies that prevented Sergeant Nicholas Harrison from commissioning as an officer and ordered the “Secretary of the Army rescind her decision denying Harrison’s application to commission in the Judge Advocate General Corps for the District of Columbia National Guard and reevaluate that application in a manner consistent with the injunctive relief awarded to plaintiffs in this Order.” Dkt. No. 308. Yet, *one year* since this Court’s order—and nearly *a decade* after Harrison first applied—the Secretary of the Army has still not made a decision on Sergeant Harrison’s application. Sergeant Harrison respectfully requests that the Court clarify the time frame for complying with its order and provide a date certain by which Defendants must make a determination on Sergeant Harrison’s application.

I. Background

In 2014, Sergeant Harrison was preselected and applied for a position as an attorney in the Judge Advocate General (JAG) Corps for the D.C. National Guard. Dkt. No. 307 at 16. However, at that time, the military prohibited the accession of individuals living with HIV, including appointment as a commissioned officer in either the Army or Reserves. In accordance with this policy, Harrison’s medical waiver regarding his HIV status and his request for exception to policy were denied by both the Deputy Chief of Staff for the Army and the Under Secretary of Defense for Personnel and Readiness, effectively barring his commission. In May 2018, Harrison brought an Equal Protection Clause lawsuit requesting declaratory and injunctive relief against Defendants. Dkt. No. 1.

From the start of the litigation, this Court recognized the life-altering harm Sergeant Harrison faced due to Defendants’ categorical ban and suggested that Defendants try to limit that harm. In September 2018, the Court observed during a motion hearing that “there are two plaintiffs here”—Harrison and an organization representing Servicemembers. Sept. 14, 2018 Hr’g Tr. at

18:6-12. “The fact that you might settle with one plaintiff and not the other is something that might be considered. In other words, you have an individual, and you have a group, and there’d be nothing in my view that would prevent you from resolving perhaps the situation of Mr. Harrison and then the group perhaps remaining the plaintiff in the case.” *Id.* The Court noted that “everything that’s in the papers so far would suggest that [Sergeant Harrison] is an individual who wants to serve his country and who has developed skills in that respect, and the government has invested money in him.” *Id.* at 17:3-8. Nevertheless, Defendants did not grant Sergeant Harrison an exception to policy.

On April 6, 2022, the Court granted Sergeant Harrison’s motion for summary judgment. Dkt. No. 307 at 1. The Court concluded that Defendants’ policies were “irrational as well as arbitrary and capricious” in violation of the Equal Protection Clause and issued a permanent injunction ordering the Army to reconsider Sergeant Harrison’s application. *Id.* at 47. Specifically, the Court “ORDERED that the Secretary of the Army rescind her decision denying Harrison’s application to commission in the Judge Advocate General Corps for the District of Columbia National Guard and reevaluate that application in a manner consistent with the injunctive relief awarded to plaintiffs in this Order.” Dkt. No. 314 (as amended, May 10, 2022).

On May 27, 2022, Sergeant Harrison’s counsel asked Defendants to meet and confer regarding how Defendants would implement the injunction as it related to his commission. Ex. 1. Sergeant Harrison’s counsel followed up on June 10 because Sergeant Harrison’s enlistment term was coming to an end on July 22, and “the status of the commissioning process [was] highly material to his decision whether to extend.” *Id.* After additional follow-up from Sergeant Harrison’s counsel, Defendants informed Sergeant Harrison that, instead of considering his original application—which had been in limbo while he was forced to vindicate his constitutional

rights in court—Sergeant Harrison would need to submit an entirely new application with another request for a medical waiver, because the Army still considered HIV a potentially disqualifying medical condition. *Id.* Defendants also informed Sergeant Harrison that a decision would take somewhere between six and eight months, and Sergeant Harrison would need to extend his enlistment in order to remain in consideration for a JAG position. *Id.*

Relying on Defendants’ representations on timing, Sergeant Harrison agreed to a six-month extension. Despite the significant burdens associated with reassembling all the necessary application materials, including requesting and securing another medical waiver, Sergeant Harrison did so and submitted his renewed application for a commission by the deadline for consideration during the October 2022 sitting of the National Guard JAG Accessions Board. Ex. 2.¹

Although Defendants had implied that they would reach a decision in early January—before Sergeant Harrison’s extended period of service ended—his six-month extension came and went without a decision. After inquiring into the status of his application on January 4, 2023, Sergeant Harrison learned that the National Guard was still awaiting “results” from the Army’s Human Resources Command (HRC)—an initial step in the process. *Id.* His application would not move forward to the Federal Recognition Board, the statutorily prescribed body charged with evaluating his eligibility “for Federal recognition as an officer of the National Guard” (32 U.S.C. § 307), until after it received a favorable decision from HRC—a process expected to take at least

¹ On August 22, 2022, Sergeant Harrison tendered an official request that his application be considered by a Special Selection Board on the ground that the military’s denial of his initial application for a commission constituted an error or injustice. When he heard nothing back, he followed up with a letter to the Assistant Secretary of the Army (Manpower and Reserve Affairs) on January 27, 2023. The military has neither acknowledged receipt of nor responded to that official request.

four more months. And assuming Sergeant Harrison were to receive a certificate of eligibility from the Federal Recognition Board, his candidacy would still require Congressional approval. *Id.* To allow sufficient time for this process to unfold, Sergeant Harrison was forced to accept yet another six-month extension of his service in January 2023. *Id.*

Since then, Sergeant Harrison's application has continued to languish, necessitating this motion. Sergeant Harrison's counsel met and conferred with counsel for Defendants on March 22, 2023. Defendants informed counsel that the Judge Advocate General had "certified and approved the results" the National Guard JAG Accessions Board recommended in January 2023. Ex. 3. But while Army and National Guard "expect" that Sergeant Harrison "will receive notification of the results . . . within the next 60 days," because "[t]here still remain some steps" before candidates can be notified, they "cannot guarantee that notification of the results will occur within any particular timeframe." *Id.* And not only could Defendants "[n]ot guarantee[] that Sgt. Harrison will know whether or not he was selected as an officer by the January 2023 Board within the next 60 days," they warned that "there are of course some additional administrative steps between notification of the Board's decision and the actual date at which candidates are finally approved and able to be sworn in as officers." *Id.* Ultimately, then, Defendants could not confirm whether Sergeant Harrison's candidacy will proceed, when he will find that out, and if successful, when the process would finally be complete.

In sum, a year has passed since this Court ordered Defendants to reconsider Sergeant Harrison's application, and Sergeant Harrison still has no decision regarding his commission. Sergeant Harrison has done everything in his power to facilitate the review of his application. With little clarity on when a decision will arrive, or how much longer he will have to await a decision on his future, Sergeant Harrison has had to put his life on hold while Defendants delay.

II. Legal Standard

Although the Federal Rules of Civil Procedure do not expressly authorize motions to clarify, courts are often called upon to, and do, decide them. *Courtland Co., Inc. v. Union Carbide Corp.*, 2021 WL 1083451, at *2 (S.D. W. Va. Mar. 19, 2021); *see, e.g.*, Dkt. No. 313. “The general purpose of a motion for clarification is to explain or clarify something ambiguous or vague [in an order], not to alter or amend.” *United States v. Philip Morris USA Inc.*, 793 F. Supp. 2d 164, 168 (D.D.C. 2011). But even if this motion were to be construed as a motion to alter or amend the judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure, he could satisfy that standard as well.² Fed. R. Civ. P. 60(b)(6) (“any other reason that justifies relief”). “Whether a case qualifies under [Rule 60(b)(6)] for relief is one for discretion of the district court,” but the Rule “gives the courts ample power to vacate [or amend] judgments wherever that action is appropriate to accomplish justice.” *White v. Invs. Mgmt. Corp.*, 888 F.2d 1036, 1040 (4th Cir. 1989) (quoting 11 Wright & Miller, *Federal Practice and Procedure* § 2864 (1973)).

III. Argument

Sergeant Harrison seeks clarification of the time frame the Court contemplated for Defendants to reevaluate his application pursuant to the April 6, 2022 order.

Defendants were “order[ed to] reevaluate that application in a manner consistent with the injunctive relief awarded to plaintiffs.” Dkt. No. 314 at 2. Although the order does not expressly include a time frame for compliance, it implies one—otherwise, Defendants could delay indefinitely, or at least so long that the relief awarded would no longer be useful or meaningful to Sergeant Harrison.

² “A motion under Rule 60(b) must be made within a reasonable time.” Fed. R. Civ. P. 60(c)(1). Before filing this motion, Sergeant Harrison gave Defendants ample time to comply with the order—and, once their non-compliance was pointed out, to cure. They have not done so.

Instead of promptly and diligently evaluating Harrison's application, Defendants have delayed a decision for several months. Even though Defendants originally asked Harrison to extend his enlistment by six months to give them time to reevaluate the application, they missed that deadline, and Harrison had to reenlist for *another* six months so the evaluation process could continue.

Harrison and his counsel have repeatedly contacted the Justice Department, the Assistant Secretary of the Army, and the Special Selection Board as to the status of his application. Ex. 2. Despite these efforts, Defendants have refused to provide a date certain for a decision and have instructed Harrison to keep waiting. But Sergeant Harrison cannot be forced to wait forever, putting his life on hold and forgoing other opportunities.

As this Court proclaims from the face of its building, "justice delayed is justice denied." Defendants' delay in implementing the relief Harrison was awarded is inconsistent with this principle—and the Court's order. The Court should clarify that Defendants must reevaluate Harrison's application within a reasonable but definite time frame. Since it has been one year since the Court's order was entered, it is reasonable for Defendants to be required to make their decision on his application within 60 days.

IV. Conclusion

For the reasons discussed above, Sergeant Harrison respectfully requests the Court specify a date by which Defendants must reevaluate Sergeant Harrison's application in a manner consistent with the injunctive relief awarded to plaintiffs and notify him of their decision.

Dated: April 5, 2023

Respectfully submitted,
/s/ John W. H. Harding
John W.H. Harding
Virginia State Bar No. 87602
JWHarding@winston.com
WINSTON & STRAWN LLP
1901 L St., NW
Washington, DC 20036
T: (202) 282-5000

CERTIFICATE OF SERVICE

I certify that, on April 5, 2023, I caused this document to be filed electronically through the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

Dated: April 5, 2023

Respectfully submitted,

/s/ John W. H. Harding
John W.H. Harding

EXHIBIT 1

From: [Abbuhl, Joshua \(CIV\)](#)
To: [Harding, John](#); [Berman, Keri L. \(CIV\)](#); [Talmor, Kate \(CIV\)](#); "[Scott Schoettes](#)"; "[sommera@gtlaw.com](#)"; "[Kara Ingelhart](#)"
Cc: [Barghaan, Dennis \(USAVAE\)](#); [Gailey, Lauren](#)
Subject: RE: Harrison & Roe -- 1:18-cv-641 & 1565
Date: Thursday, June 30, 2022 9:49:20 AM

Hi John,

Following up on Sgt. Harrison, the National Guard is looking into ways to potentially expedite his application processing. To do so, a DC Army National Guard accessions officer plans to contact Sgt. Harrison to work with him on updating and completing his application, to get it ready to go to the JAG accessions board. We do not yet have a sense of an expected timeframe for completion of the process, but I understand that the accessions officer wants to reach out to Sgt. Harrison in order to help move things along quickly.

We don't see any problem with the accessions officer reaching out to Sgt. Harrison directly, but please confirm with us that you have no objection to the DC National Guard contacting Sgt. Harrison directly for this purpose.

Best,
Josh

From: Harding, John <JWHarding@winston.com>
Sent: Monday, June 27, 2022 3:02 PM
To: Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; Talmor, Kate (CIV) <Kate.Talmor@usdoj.gov>; Abbuhl, Joshua (CIV) <Joshua.Abbuhl@usdoj.gov>; 'Scott Schoettes' <sschoettes@gmail.com>; 'sommera@gtlaw.com' <[sommera@gtlaw.com](mailto:sommerer@gtlaw.com)>; 'Kara Ingelhart' <Kingelhart@lambdalegal.org>
Cc: Barghaan, Dennis (USAVAE) <DBarghaan@usa.doj.gov>; Gailey, Lauren <LGailey@winston.com>
Subject: [EXTERNAL] RE: Harrison & Roe -- 1:18-cv-641 & 1565

Hi Keri and Josh,

Thank you for the productive call on Friday. We look forward to hearing from you soon regarding Sgt. Harrison's application. Additionally, **Redacted**

Redacted

Redacted

Thanks,
John

John Harding

Winston & Strawn LLP

D: +1 202-282-5774

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From: Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>
Sent: Thursday, June 23, 2022 9:50 PM
To: Harding, John <JWHarding@winston.com>; Talmor, Kate (CIV) <Kate.Talmor@usdoj.gov>;
Abbuhl, Joshua (CIV) <Joshua.Abbuhl@usdoj.gov>; 'Scott Schoettes' <sschoettes@gmail.com>;
'sommera@gtlaw.com' <[sommera@gtlaw.com](mailto:sommerer@gtlaw.com)>; 'Kara Ingelhart' <Kingelhart@lambdalegal.org>
Cc: Barghaan, Dennis (USAVAE) <Dennis.Barghaan@usdoj.gov>; Gailey, Lauren
<LGailey@winston.com>
Subject: RE: Harrison & Roe -- 1:18-cv-641 & 1565

Good evening John,

We are continuing to collect necessary information to facilitate Mr. Harrison's participation in the JAG application process. We'd like the opportunity to discuss this with you further, and confer more with our client, before any emergency motion is filed.

In particular, it would be helpful if you could explain to us your client's concern or objection to updating his application. Based on currently available information, we understand that the original application, which is now more than 8 years old, is missing certain necessary information. If, as implied by your earlier email, the concern is primarily one of timing, we have confirmed with the National Guard Bureau that both the original application and the updated application would take approximately the same amount of time, 6-8 months, to be fully processed.

It is not the intent of the National Guard Bureau or of the Army to delay the consideration of Mr. Harrison's application, but in order for him to be evaluated in compliance with the Court's order, any application will need to pass through all of the steps of the JAG application process. You indicated that Mr. Harrison's current term of service would elapse on July 22, 2022, before the processing of any JAG application could be completed. It is our understanding that it is possible for a request to be made to hold over an end of service date for a specified period.

We are available to meet with you at 3:30 tomorrow. Please let us know if your client has additional concerns to those discussed above.

Best,
Keri

From: Harding, John <JWHarding@winston.com>
Sent: Thursday, June 23, 2022 2:22 PM
To: Talmor, Kate (CIV) <Kate.Talmor@usdoj.gov>; Abbuhl, Joshua (CIV) <Joshua.Abbuhl@usdoj.gov>;
'Scott Schoettes' <sschoettes@gmail.com>; 'sommera@gtlaw.com' <[sommera@gtlaw.com](mailto:sommerer@gtlaw.com)>; 'Kara
Ingelhart' <Kingelhart@lambdalegal.org>
Cc: Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; Barghaan, Dennis (USAVAE)

<DBarghaan@usa.doj.gov>; Gailey, Lauren <LGailey@winston.com>

Subject: [EXTERNAL] RE: Harrison & Roe -- 1:18-cv-641 & 1565

Hi Josh and Kate,

We are looking forward to the government's response tomorrow. To ensure that we fulfill our meet and confer obligations, can we also have a call tomorrow to discuss the proposed emergency motion to enforce? I am generally available tomorrow until about 4:00.

Thanks,
John

John Harding

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From: Harding, John

Sent: Monday, June 20, 2022 10:54 PM

To: Talmor, Kate (CIV) <Kate.Talmor@usdoj.gov>; Abbuhl, Joshua (CIV) <Joshua.Abbuhl@usdoj.gov>; 'Scott Schoettes' <sschoettes@gmail.com>; 'sommerra@gtlaw.com' <sommerra@gtlaw.com>; 'Kara Ingelhart' <Kingelhart@lambdalegal.org>

Cc: Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; Barghaan, Dennis (USAVAE) <Dennis.Barghaan@usdoj.gov>; Gailey, Lauren <LGailey@winston.com>

Subject: RE: Harrison & Roe -- 1:18-cv-641 & 1565

Hi Kate,

Thank you for providing a courtesy copy of the letter. However, the process that is proposed in the letter is contrary to the Court's Order. Judge Brinkema specifically ordered the Secretary of the Army to "rescind her decision denying Harrison's application to commission in the Judge Advocate General Corps for the District of Columbia National Guard and *reevaluate that application* in a manner consistent with the injunctive relief awarded to plaintiffs in this Order." *Harrison*, Dkt. 314 (emphasis added). The Army is asking Sgt. Harrison to entirely reapply, which allegedly is a process that can "take six to eight months to complete." This is not what Judge Brinkema ordered.

Further, in September 2018, the Court encouraged the Military to resolve Sgt. Harrison's case. Specifically the Court noted that "there are two plaintiffs here. The fact that you might settle with one plaintiff and not the other is something that might be considered. In other words, you have an individual, and you have a group, and there'd be nothing in my view that would prevent you from resolving perhaps the situation of Mr. Harrison and then the group perhaps remaining the plaintiff in the case." (Sept. 14, 2018 Tr. 18: 6-12). The reason Judge Brinkema encouraged settling with Sgt. Harrison is because "everything that's in the papers so far would suggest that [Sgt. Harrison] is an individual who wants to serve his country and who has developed skills in that respect, and the government has invested money in him. (*Id.* at 17:3-8). Now, almost four years later, this statement

remains true. It is time to make Sgt. Harrison whole.

Fortunately, we were mistaken about Sgt. Harrison's reenlistment deadline—it is actually July 22, not June 22. This provides the Parties enough time to come to a resolution that is consistent with Judge Brinkema's order and is fair to Sgt. Harrison, who has had to wait almost eight years while the military defended a policy that was not rational. Please confirm that the Military will expeditiously reevaluate Sgt. Harrison's initial application in a fair and appropriate way or Plaintiff will be required to file a motion to enforce. Please provide a response by June 24. If Defendants are unwilling to reconsider their proposal, then Plaintiffs will file their emergency motion to enforce on June 27 so as to allow the Court to rule by July 22.

Thanks,

John Harding

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From: Talmor, Kate (CIV) <Kate.Talmor@usdoj.gov>

Sent: Wednesday, June 15, 2022 10:05 AM

To: Harding, John <JWHarding@winston.com>; Abbuhl, Joshua (CIV) <Joshua.Abbuhl@usdoj.gov>; 'Scott Schoettes' <sschoettes@gmail.com>; 'sommera@gtlaw.com' <[sommera@gtlaw.com](mailto:sommer@gtlaw.com)>; 'Kara Ingelhart' <Kingelhart@lambdalegal.org>

Cc: Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; Barghaan, Dennis (USAVAE) <Dennis.Barghaan@usdoj.gov>; Gailey, Lauren <LGailey@winston.com>

Subject: RE: Harrison & Roe -- 1:18-cv-641 & 1565

Hi John,

Josh is tied up in depositions yesterday and today, so I wanted to pass along a courtesy copy of the attached letter, which we understand was mailed to SSG Harrison yesterday.

Thank you,

Kate Talmor

Trial Attorney | United States Department of Justice | Civil Division

Federal Programs Branch

1100 L Street NW | Washington, DC 20005

☎ 202-305-5267 | ✉ kate.talmor@usdoj.gov

From: Harding, John <JWHarding@winston.com>

Sent: Wednesday, June 15, 2022 8:30 AM

To: Abbuhl, Joshua (CIV) <Joshua.Abbuhl@usdoj.gov>; Talmor, Kate (CIV) <Kate.Talmor@usdoj.gov>; 'Scott Schoettes' <sschoettes@gmail.com>; 'sommera@gtlaw.com' <[sommera@gtlaw.com](mailto:sommer@gtlaw.com)>; 'Kara Ingelhart' <Kingelhart@lambdalegal.org>

Cc: Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; Barghaan, Dennis (USAVAE) <DBarghaan@usa.doj.gov>; Gailey, Lauren <LGailey@winston.com>
Subject: [EXTERNAL] RE: Harrison & Roe -- 1:18-cv-641 & 1565

Hi Josh,

Any update on this?

John Harding

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From: Abbuhl, Joshua (CIV) <Joshua.Abbuhl@usdoj.gov>
Sent: Friday, June 10, 2022 6:54 PM
To: Harding, John <JWHarding@winston.com>; Talmor, Kate (CIV) <Kate.Talmor@usdoj.gov>; 'Scott Schoettes' <sschoettes@gmail.com>; 'sommerra@gtlaw.com' <sommerra@gtlaw.com>; 'Kara Ingelhart' <Kingelhart@lambdalegal.org>
Cc: Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; Barghaan, Dennis (USAVAE) <Dennis.Barghaan@usdoj.gov>; Gailey, Lauren <LGailey@winston.com>
Subject: RE: Harrison & Roe -- 1:18-cv-641 & 1565

Hi John,

DOD has been working on providing a substantive update to Sgt. Harrison since my last email. We expect to be able to provide an update early next week. We hope for Monday, but cannot guarantee it. We certainly understand your client's timing concerns and are working to get him substantive guidance about next steps ASAP.

Best,
Josh

From: Harding, John <JWHarding@winston.com>
Sent: Friday, June 10, 2022 9:22 AM
To: Abbuhl, Joshua (CIV) <Joshua.Abbuhl@usdoj.gov>; Talmor, Kate (CIV) <Kate.Talmor@usdoj.gov>; 'Scott Schoettes' <sschoettes@gmail.com>; 'sommerra@gtlaw.com' <sommerra@gtlaw.com>; 'Kara Ingelhart' <Kingelhart@lambdalegal.org>
Cc: Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; Barghaan, Dennis (USAVAE) <DBarghaan@usa.doj.gov>; Gailey, Lauren <LGailey@winston.com>
Subject: [EXTERNAL] RE: Harrison & Roe -- 1:18-cv-641 & 1565

Hi Josh,

On May 31 you wrote that you were discussing next steps with agency counsel regarding reevaluating Sgt. Harrison's application to commission. Since it is now clear that DOJ and DOD do not intend to defend the policy, where are we with Sgt. Harrison's reevaluation? Can you please provide a substantive update by close of business June 13? We would like to get this issue resolved as soon as possible. Sgt. Harrison's End of Term of Service date is June 22, and the status of the commissioning process is highly material to his decision whether to extend. For this reason, a timely response would be very much appreciated.

Thanks,
John

John Harding

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From: Abbuhl, Joshua (CIV) <Joshua.Abbuhl@usdoj.gov>

Sent: Tuesday, May 31, 2022 11:52 AM

To: Harding, John <JWHarding@winston.com>; Talmor, Kate (CIV) <Kate.Talmor@usdoj.gov>; 'Scott Schoettes' <sschoettes@gmail.com>; 'sommera@gtlaw.com' <sommera@gtlaw.com>; 'Kara Ingelhart' <Kingelhart@lambdalegal.org>

Cc: Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; Barghaan, Dennis (USAVAE) <Dennis.Barghaan@usdoj.gov>; Gailey, Lauren <LGailey@winston.com>

Subject: RE: Harrison & Roe -- 1:18-cv-641 & 1565

Hi John,

Thanks for your email. **Redacted**

[Redacted]

With respect to Sergeant Harrison's reevaluation, we are reaching out to agency counsel to discuss potential next steps. We will be in touch as soon as we can about that process, but we are not sure if we will be able to have a full discussion about the process by tomorrow or Thursday. We will get back to you as soon as we can about those next steps.

Best,
Josh

From: Harding, John <JWHarding@winston.com>
Sent: Friday, May 27, 2022 11:52 PM
To: Talmor, Kate (CIV) <Kate.Talmor@usdoj.gov>; 'Scott Schoettes' <sschoettes@gmail.com>; 'sommera@gtlaw.com' <sommera@gtlaw.com>; 'Kara Ingelhart' <Kingelhart@lambdalegal.org>
Cc: Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; Abbuhl, Joshua (CIV) <Joshua.Abbuhl@usdoj.gov>; Barghaan, Dennis (USAVAE) <DBarghaan@usa.doj.gov>; Gailey, Lauren <LGailey@winston.com>
Subject: [EXTERNAL] RE: Harrison & Roe -- 1:18-cv-641 & 1565

Hi DOJ Team,

Redacted
[Redacted]

Redacted
[Redacted]

Additionally, the Government did not move to stay Judge Brinkema’s orders before the filing deadline so they are now enforceable. This is especially important for Sgt. Harrison as the Secretary of the Army was ordered to “rescind her decision denying Harrison’s application to commission in the Judge Advocate General Corps for the District of Columbia National Guard and *reevaluate that application* in a manner consistent with the injunctive relief awarded to plaintiffs in this Order.” *Harrison*, Dkt. 308 (emphasis added). We need to meet and confer regarding how this injunctive relief will be implemented and ask that someone be prepared to discuss Sgt. Harrison’s case during next week’s call.

Thanks,
John

John Harding

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From: Talmor, Kate (CIV) <Kate.Talmor@usdoj.gov>

Sent: Monday, May 9, 2022 12:20 PM

To: Harding, John <JWHarding@winston.com>; 'Scott Schoettes' <sschoettes@gmail.com>; 'sommera@gtlaw.com' <sommera@gtlaw.com>; 'Kara Ingelhart' <Kingelhart@lambdalegal.org>

Cc: Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; Abbuhl, Joshua (CIV) <Joshua.Abbuhl@usdoj.gov>; Barghaan, Dennis (USAVAE) <Dennis.Barghaan@usdoj.gov>

Subject: RE: Harrison & Roe -- 1:18-cv-641 & 1565

Redacted

A large black rectangular redaction box covering several lines of text.

Kate Talmor
202-305-5267

From: Talmor, Kate (CIV)

Sent: Thursday, May 5, 2022 10:24 AM

To: Harding, John <JWHarding@winston.com>; 'Scott Schoettes' <sschoettes@gmail.com>; 'sommera@gtlaw.com' <sommera@gtlaw.com>; 'Kara Ingelhart' <Kingelhart@lambdalegal.org>

Cc: Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; Abbuhl, Joshua (CIV) <Joshua.Abbuhl@usdoj.gov>; Barghaan, Dennis (USAVAE) <DBarghaan@usa.doj.gov>

Subject: RE: Harrison & Roe -- 1:18-cv-641 & 1565

Redacted

A large black rectangular redaction box covering several lines of text.

Kate Talmor
202-305-5267

From: Harding, John <JWHarding@winston.com>
Sent: Tuesday, May 3, 2022 7:21 PM
To: Talmor, Kate (CIV) <Kate.Talmor@usdoj.gov>; Pezzi, Stephen (CIV) <Stephen.Pezzi@usdoj.gov>; 'Scott Schoettes' <sschoettes@gmail.com>; 'sommerra@gtlaw.com' <sommerra@gtlaw.com>; 'Kara Ingelhart' <Kingelhart@lambdalegal.org>
Cc: Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; Abbuhl, Joshua (CIV) <Joshua.Abbuhl@usdoj.gov>; Barghaan, Dennis (USAVAE) <DBarghaan@usa.doj.gov>
Subject: [EXTERNAL] RE: Harrison & Roe -- 1:18-cv-641 & 1565

Redacted

[Redacted]

John Harding

Winston & Strawn LLP
D: +1 202-282-5774
winston.com

[Redacted]

From: Talmor, Kate (CIV) <Kate.Talmor@usdoj.gov>
Sent: Tuesday, May 3, 2022 1:19 PM
To: Harding, John <JWHarding@winston.com>; Pezzi, Stephen (CIV) <Stephen.Pezzi@usdoj.gov>; 'Scott Schoettes' <sschoettes@gmail.com>; 'sommerra@gtlaw.com' <sommerra@gtlaw.com>; 'Kara Ingelhart' <Kingelhart@lambdalegal.org>
Cc: Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; Abbuhl, Joshua (CIV) <Joshua.Abbuhl@usdoj.gov>; Barghaan, Dennis (USAVAE) <Dennis.Barghaan@usdoj.gov>
Subject: RE: Harrison & Roe -- 1:18-cv-641 & 1565

Redacted

Kate Talmor
202-305-5267

From: Harding, John <JWHarding@winston.com>
Sent: Monday, May 2, 2022 8:19 PM
To: Talmor, Kate (CIV) <Kate.Talmor@usdoj.gov>; Pezzi, Stephen (CIV) <Stephen.Pezzi@usdoj.gov>; 'Scott Schoettes' <sschoettes@gmail.com>; 'sommerra@gtlaw.com' <sommerra@gtlaw.com>; 'Kara Ingelhart' <Kingelhart@lambdalegal.org>
Cc: Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; Abbuhl, Joshua (CIV) <Joshua.Abbuhl@usdoj.gov>; Barghaan, Dennis (USAVAE) <DBarghaan@usa.doj.gov>
Subject: [EXTERNAL] RE: Harrison & Roe -- 1:18-cv-641 & 1565

EXHIBIT 2

From: [Abbuhl, Joshua \(CIV\)](#)
To: [Scott Schoettes](#)
Cc: [Berman, Keri L. \(CIV\)](#); [Harding, John](#); [Kara Ingelhart](#); [Peter Perkowski](#)
Subject: RE: [EXTERNAL] Status of Sgt. Harrison's Application for a Commission
Date: Thursday, January 19, 2023 5:40:31 PM
Attachments: [Fwd_SGT Harrison's Extension of ETS .pdf](#)

Scott,

Thanks for your email and voicemail. I only just received your voicemail as I was out of the office for much of the day today. While we note that we would disagree with several of the characterizations about Sgt. Harrison's commissioning process contained in your email, it sounds like everyone is in agreement that the best way forward is for Sgt. Harrison to extend his enlistment. We understand that the D.C. National Guard is willing to further extend Sgt. Harrison's enlistment on similar terms as the last extension. I have attached an email that Sergeant Booty sent to Sgt. Harrison today, which includes the contact information for SFC Cochran, who Sgt. Harrison should reach out to as soon as possible to get the relevant paperwork signed. I understand that this is a drill weekend for the DC Guard, so I believe that Sgt. Harrison could sign his papers in person over the weekend, but it may also be possible to do so beforehand. Sgt. Harrison should reach out to SFC Cochran (and perhaps cc Sergeant Booty) to ask for the relevant details.

Josh

From: Scott Schoettes <sschoettes@gmail.com>
Sent: Wednesday, January 18, 2023 4:40 PM
To: Abbuhl, Joshua (CIV) <Joshua.Abbuhl@usdoj.gov>
Cc: Berman, Keri L. (CIV) <Keri.L.Berman@usdoj.gov>; Harding, John <jwharding@winston.com>; Kara Ingelhart <kingelhart@lambdalegal.org>; Peter Perkowski <peter@perkowskilegal.com>
Subject: [EXTERNAL] Status of Sgt. Harrison's Application for a Commission

Josh:

I am writing to inquire as to the status of Sgt. Nick Harrison's application for a commission, because he is currently set to separate from service this coming Sunday, January 23, 2023.

As you are aware, Sgt. Harrison reluctantly agreed to extend his time in the military by six months to give the relevant bodies time to consider the application the National Guard required him to recreate, because it had lost his original application and a significant amount of time had elapsed since that application.

Sgt. Harrison had insufficient time to put together all of the required materials for the July 2022 application gate, but submitted his application before the October 1, 2022, application gate. He was subsequently contacted about some purported deficiencies in his application materials and scrambled to rectify those issues by the end of November.

After inquiring via email as to the status of his application on January 4, 2023, Sgt. Harrison received an email that same day from SFC Jason Booty informing him that they were still awaiting "results" from Human Resources Command (HRC) and that they would move the application to the Federal Recognition (FED REC) Board after they received a favorable decision from HRC. Based on a quick Google search, it seems that the FED REC process takes at least four months.

Would you please inquire as to the status of Sgt. Harrison's application to receive a commission? Is it the case that Sgt. Harrison never had any chance of completing the approval process by the end of his six-month extension after being unable to submit his application in July? If so, that is very disappointing as it seems Sgt. Harrison and his counsel were misled regarding the prospects of that occurring.

I don't think this is the case, but is the decision of the HRC the real determination, with the FED REC process merely a "rubber stamp" to the determination made by HRC? If so, will you please let attempt to shake loose the decision of the HRC prior to Sgt. Harrison's planned separation from service on Sunday. I am not sure Sgt. Harrison would be willing to further extend his service to let that process play out, but I would like to present that option to him if the FED REC Board approval is merely a formality.

It has been incredibly frustrating that the National Guard has been unable to make an exception to expedite Sgt. Harrison's application given the destruction of his original application and the eight-year odyssey he has been on to overcome the DOD and National Guard's irrational bar to a commission for Service members living with HIV. The Court struck down that irrational policy in April, and nine months later Sgt. Harrison is still awaiting the somewhat hollow recognition that he was right all along. The DOD cannot give back to Sgt. Harrison the eight years he missed as a JAG officer in the U.S. National Guard; the least it could do is make some effort to secure the commission to which he is clearly entitled prior to his retirement.

Please let me know that you received this email and are taking appropriate action to assess the status of Sgt. Harrison's application. Plaintiffs' counsel sincerely hopes Defendants can steer their way clear to resolving this in a way that is commensurate with the appreciation they should have for Sgt. Harrison's 22 years of service and for his willingness to stand and fight to make the fatally flawed policies and practices of the entity he loves better for the HIV-positive Service members who will follow in his footsteps and, ultimately, for the military itself.

Sincerely,
Scott A. Schoettes
(773) 474-9250

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Scott Schoettes (he/him)
HIV Advocate/Attorney/Consultant

Scott A. Schoettes, Esq.
773.474.9250

EXHIBIT 3

From: [Abbuhl, Joshua \(CIV\)](#)
To: [Harding, John](#)
Cc: [Berman, Keri L. \(CIV\)](#)
Subject: Harrison meet-and-confer
Date: Friday, March 24, 2023 3:17:13 PM

John,

Following up on our meet-and-confer, I have some new information for you as well as a response to your request. As you'll recall, during the meet-and-confer on Wednesday, I relayed that the recommendations from the January 2023 National Guard JAG Accessions Board had been forwarded to the Judge Advocate General (TJAG), who had not yet acted on those decisions, but we expected a decision on those results sometime in the near future (although we could not provide a specific date). We have now learned that yesterday (March 23) TJAG certified and approved the results of the January 2023 Board.

There still remain some steps before all of the candidates who appeared before the January 2023 Board will be notified of the results of the Board. The Army/National Guard has informed me that, while they cannot guarantee that notification of the results will occur within any particular timeframe, they expect that these candidates (including Sgt. Harrison) will receive notification of the results of the January 2023 Board within the next 60 days.

I further understand that there are of course some additional administrative steps between notification of the Board's decision and the actual date at which candidates are finally approved and able to be sworn in as officers, but per the above we expect (but cannot guarantee) that Sgt. Harrison will know whether or not he was selected as an officer by the January 2023 Board within the next 60 days.

In light of the above, could you please inform us whether Plaintiffs intend to file a motion asking the Court to set a date certain by which Defendants must take action on Sgt. Harrison's application.

Josh

Joshua C. Abbuhl

Trial Attorney
United States Department of Justice
Civil Division – Federal Programs Branch
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Washington, DC 20005
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