



**ARGUMENT**

Defendants are in full compliance with the Court’s injunction as to Harrison, so enforcement of the injunction is unjustified and clarification is unnecessary. The Court recently considered, and denied, a motion to enforce two of the other injunctions that this Court entered through the same orders on which Harrison’s present motion is based. *See* ECF Nos. 349; 363; 390. That denial was based in part on the fact that the motion sought relief beyond the bounds of the existing injunction. Moreover, in the briefing for that motion, the parties agreed that the proper standard for an enforcement motion is the contempt standard. To justify enforcement of the Court’s injunction, Harrison must demonstrate “by clear and convincing evidence”:

(1) the existence of a valid decree of which the alleged contemnor had actual or constructive knowledge; (2) that the decree was in the movant’s favor; (3) that the alleged contemnor by its conduct violated the terms of the decree, and had knowledge (at least constructive knowledge) of such violations; and (4) that the movant suffered harm as a result.

*Rainbow Sch., Inc. v. Rainbow Early Educ. Holding LLC*, 887 F.3d 610, 617 (4th Cir. 2018)

(citation omitted). Harrison has demonstrated neither a violation nor any resulting harm. The injunction at issue<sup>1</sup> requires:

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...

Amended Order, ECF No. 314 at 1-2. The other injunctive relief referenced is the requirement that asymptomatic HIV-positive service members with undetectable viral loads not be denied commissions as officers “because they are classified as ineligible for worldwide deployment or deployment to CENTCOM due to the HIV-positive status.” *Id.* at 1.

---

<sup>1</sup> Two of the injunctions in the Court’s Order apply to Plaintiff Harrison but this motion concerns only the injunction related to reconsideration of his individual application for commissioning.

It is undisputed that the denial of Harrison's application to commission was rescinded, that he was reconsidered for commissioning under the Secretary of Defense's new June 6, 2022, policy which permits commissioning of certain HIV-positive service members, and that Harrison was in fact granted a commission. *See, e.g.*, Mot. to Clarify (ECF No. 372) ¶ 3. Harrison contends, nevertheless, that Defendants violated the Court's injunction because they did not specifically reconsider his commissioning application from 2013. *Id.* ¶¶ 2-3. Harrison is mistaken. The Court's injunction merely requires reconsideration of Harrison as a candidate to commission and does not suggest that reconsideration of a particular written submission is the only possible route for compliance. Moreover, as all of the information in Harrison's prior submission was nearly a decade out of date, reliance on that specific application packet would have disqualified him from consideration. *See, e.g.*, Department of the Army Pamphlet 40-502: Medical Readiness Procedure, sec. 6-5(a)(1) ("Medical examinations will be valid for 24 months from the date of the medical examination to qualify for...initial appointment as a commissioned officer...").

However, even if the language of the injunction could be construed as narrowly as Harrison argues, enforcement would still be unwarranted because Harrison suffered no harm as a result of the alleged violation, and there is no further relief the Court could provide because his commissioning – regardless of the specific application on which that commissioning was based – renders his claim moot. Contempt sanctions will not lie unless the alleged violation resulted in cognizable harm to the movant. *See Rainbow Sch.*, 887 F.3d at 617. The harms alleged by Harrison, Mot. to Clarify ¶¶ 6-9; *infra* p. 4-6, are completely unrelated to the alleged failure to properly reconsider his application to commission. The Army properly considered Harrison's application to commission, but even if there had been some procedural flaw, it did not prevent Harrison's reconsideration for commissioning under the revised policy, which was all that was

required by the Court's order. *See* Amended Order. Moreover, since Harrison in fact received a commission, which was not required by the Court's injunction, there is no basis to assert that the reconsideration of his application was negatively affected by any alleged harmless procedural error, and there is no further relief the Court can order.

If Harrison's motion is to clarify the injunction, he has not alleged that any aspect of the injunction is unclear or that the parties are unable to conform their conduct to it. Indeed, he states that the Court "specifically directed the Defendants to address the injury done to the Plaintiff [by] rescinding the decision and reevaluating the application." Mot. to Clarify ¶ 4. As explained *supra*, it is undisputed that Defendants took both of these actions, resulting in the grant of a commission to Harrison on May 23, 2023. Although Harrison asserts that Defendants' reconsideration of his application and grant of his commission "do nothing to acknowledge, accept, and address the injury to the Plaintiff," *id.*, they clearly comply with the written requirements of the injunction and that is all that is required of the Defendants. *See, e.g., Life Techs. Corp. v. Govindarai*, 931 F.3d 259, 268 (4th Cir. 2019) ("[A] party must be able to discern from the language of a court's order the actions necessary to comply with the court's directive.").

The particular relief now requested by Harrison concerning Special Selection and Retention Boards, Mot. to Clarify ¶ 10, is entirely unrelated to the injunction at issue and indeed to this case. Both of these types of Boards are only available or applicable to individuals who are already officers in the Army. *See* 10 U.S.C. §§ 628(a)(2)-(b)(2). Harrison was not an officer during the pendency of this case nor did any of the injunctive relief granted by the Court direct him to be made an officer or depend on him achieving a commission as an officer. *See* Amended Order. Thus, Harrison's request for the Court to intervene in various subsequent employment disputes he has now raised with the Army since becoming an officer is entirely inappropriate for a motion to

enforce or clarify the injunction, and well beyond the scope of the case as a whole. Harrison cannot seek any of the relief he requests in this motion.

In addition to Harrison's motion indisputably seeking to significantly expand rather than enforce or clarify the existing injunction, it also misunderstands the various policies and regulations to which his service as an officer is subject. First, contrary to Harrison's assertion, Mot. to Clarify ¶ 6, he is not required to appear before a Selective Retention Board and is not in danger of being separated in the short term for that reason. An officer with "at least 20 years of qualifying service for non-regular retired pay" who has also received "a Notice of Eligibility for Retired Pay for Non-Regular Service" may be considered by a Selective Retention Board. NGR 635-102, sec. 1-7(a). Assuming Harrison qualifies under these conditions, he nevertheless is "not subject to selective retention consideration" as a "newly commissioned officer[]" with less than 36-month time-in-grade (and service for newly appointed 1LT) from when the board convenes." NGR 635-102(1-7)(b)(9). Therefore, he neither needs nor is he entitled to any relief from this Court.

Second, Harrison contends that he is entitled to promotion to a different rank through an Army Special Selection Board (SSB), but Harrison is not entitled to be heard by an SSB nor does the Court have authority under the applicable statute to require one. Harrison was commissioned at the grade of 1st Lieutenant in compliance with the applicable statutes and regulations establishing the available constructive service credit. *See* 10 U.S.C. § 12207(b)(1)(A); ("in any professional field, the Secretary concerned shall credit an officer with, but not more than, the number of years of advanced education required by a majority of institutions that award degrees in that professional field..."); 10 U.S.C. § 533(b)(1)(A) (same for Regular Army); DoDI 1312.03, sec. 3.5(a) ("The total amount of constructive service credit awarded to judge advocates and chaplains for advanced education may not exceed 3 years"); AR 135-100, Table 1-2, "Grade on appointment"

(“Commissioned Service Credit: 3 years or more, but less than 7 years; Appointment Grade: First Lieutenant”). If Harrison moves forward with his JAG service he can expect to be promoted to the grade of Captain “upon completion of Initial Military Training, certification by TJAG as fully qualified for promotion, approval of the promotion list by the Secretary of Defense, and fulfillment of minimum time-in-grade requirements.” JAG Publication 1-1: Initial Active Duty Grade. This promotion, assuming Harrison completes all necessary requirements on a typical timeline, would likely take place in approximately one year.

Harrison alleges he submitted an official request for an SSB seeking retroactive promotion above his entry grade, *see* Mot. to Clarify ¶¶ 7-8, on August 22, 2022. SSBs are available only to officers, and Harrison was not commissioned until May 23, 2023, *see* Declaration of Nicholas Harrison, ECF No. 372-1, ¶ 10. Therefore, by definition he was not eligible to seek an SSB at the time of his request and no statutory deadline would have started to run. Beyond this clear error in Harrison’s argument, SSBs are restricted by statute to “persons not considered by promotion boards due to administrative error,” 10 U.S.C. § 628(a), and “persons considered by promotion boards in an unfair manner,” 10 U.S.C. § 628(b). Harrison is a new officer and has not yet served any meaningful time in grade. He has neither been considered by any promotion board nor been qualified for consideration by any promotion board and therefore is outside the statutory bounds of relief available from an SSB.<sup>2</sup>

---

<sup>2</sup> Harrison also submitted an application to the Army Board for the Correction of Military Records (ABCMR) on February 20, 2023, prior to his commissioning, requesting that the Board recommend convening a special selection board to consider him for promotion. That request is still under review and will be answered in accordance with the statutory timelines as established by 10 USC § 1557. On June 28, 2023, the Army provided the ABCMR Harrison’s appointment orders, dated May 26, 2023, showing his appointment as a First Lieutenant in the Army National Guard.



1100 L Street, N.W.  
Washington, D.C. 20530  
Telephone: (202) 616-8366  
Facsimile: (202) 616-8460  
Joshua.Abbuhl@usdoj.gov

*Counsel for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (“NEF”) to all counsel of record, and I have caused a true and correct copy of the foregoing to be sent to the following “non-filing user” via electronic mail:

Nick Harrison  
Harrison-Stein, PC  
601 Pennsylvania Avenue, N.W.  
South Building, Suite 900  
Washington, D.C. 20004-3647  
Email: [nick@harrison-stein.com](mailto:nick@harrison-stein.com)

\_\_\_\_\_/s/  
DENNIS C. BARGHAAN, JR.  
Deputy Chief, Civil Division  
2100 Jamieson Avenue  
Alexandria, Virginia 22314  
Tel: (703) 299-3891  
Fax: (703) 299-3983  
[dennis.barghaan@usdoj.gov](mailto:dennis.barghaan@usdoj.gov)

*Counsel for Defendants*