

JANE DOE 1, et al.,
Plaintiffs,
v.
DONALD TRUMP, et al.,
Defendants.

Civil Action No. 17-cv-1597 (CKK)

DECLARATION OF MR. ROBERT O. BURNS
(Relating to Plaintiff Dylan Kohere)

I, Mr. Robert O. Burns, hereby state and declare as follows:

1. I am currently employed as the Deputy Chief of Staff for Personnel, G1, for the United States Army Cadet Command (USACC), Fort Knox, Kentucky. USACC is the command responsible for overseeing the Reserve Officers' Training Corps (ROTC) program by partnering with universities through local ROTC detachments in order to recruit, educate, train, develop, and commission officers in the U.S. Army. I have been in this position for five years and four months. I am responsible to the Commanding General (CG), USACC, for personnel-related activities within the organization, to include strength management, assignments, awards, evaluations, and other personnel policies. Due to my official duties related to this responsibility, I have an understanding of USACC's policy regarding the various levels of students' participation in the ROTC program. I make this declaration based on my personal knowledge and on information that has been provided to me in the course of my official duties. I submit this declaration in support of the defendants' motion to dismiss the above-captioned action and in opposition to the plaintiffs' motion for a preliminary injunction. In particular, I address below the current status of plaintiff Dylan Kohere with respect to the ROTC program. US Army Cadet Command's current policy is to recognize an ROTC student's gender according to the gender recognized by the student's university registrar. Dylan Kohere is registered as a female with her

university. However, for the convenience of the Court and the parties, I will refer to Dylan using male pronouns for the remainder of this declaration, which corresponds to his gender identity referenced in the amended complaint. In sum, Dylan Kohere is currently registered in an ROTC academic class for freshmen, for academic credit, and is able to participate in certain labs that do not include physical activity. Based upon current ROTC policies, he may continue this level of participation. Further, because he is a first year student, he would not be eligible to receive an appointment until he graduates, which if he follows a four-year program, would be in the spring of 2021.

2. Students interacting with the ROTC program fall into four categories:

a. *Auditing* students may observe academic classes in the Military Science (MS) Basic Course and the Advance Course curricula; however, they do not receive academic credit for taking Military Science classes and do not receive a grade. The Basic Course consists of the MS-I (i.e., freshman) and MS-II (i.e., sophomore) academic classes while the Advanced Course consists of the MS-III (i.e., junior) and MS-IV (i.e., senior) academic classes. Auditing is available to any student registered with the university if permitted by the school and approved by the Professor of Military Science (PMS), if the school's course catalogue requires the PMS to approve an auditing student.

b. *Participating* students are students who are registered/taking a Military Science academic class in either the Basic or Advance Courses, but are either ineligible to enroll, or choose not to enroll, in the ROTC program. Participating students receive academic credit for a course but not commissioning credit. Participating students may attend academic labs that are required to be taken as part of an academic ROTC course in either the Basic or Advance Courses of instruction, but not labs that are physically oriented. Participating students may not wear uniforms or equipment and may not participate in activities requiring physical training or physical activity. The primary reason for restricting physical activities outside of approved

classroom instruction associated with a specific course is because of liability due to injury. Participating students are not “designated applicants” under Title 10, United States Code, because they are not enrolled in ROTC, and therefore are not eligible for medical care under Title 10, related statutes, and regulations in the event of an injury.

c. *Enrolled* students are students who are enrolled in a Military Science academic class and are also enrolled in the ROTC program. They must complete a medical screening and complete a Cadet Command Form 139-R (Cadet Application and Enrollment Record) to complete the Cadet Command enrollment process. Although enrolled, they have not yet signed a contract with the Army. Enrolled students are classified as cadets, and may participate in all aspects of the ROTC Basic Course program for both academic and commissioning credit. An enrolled student that does not contract prior to the student’s MS-III (i.e., junior) year can continue to take Advance Course classes for academic credit (as a participating cadet) but not commissioning credit. Enrolled cadets meet the criteria as defined by the term “designated applicant” found in Title 10 U.S.C.

d. *Contracted* students swear an oath of loyalty and sign a contract committing them to a service obligation in the U.S. Army following their completion of the program. They also enlist in the Individual Ready Reserves of the Armed Forces. Contracted students are cadets, and may participate in all aspects of the ROTC Basic Course and Advanced Course programs. They are also eligible for a ROTC academic scholarship.

e. In sum, there is a distinction between taking ROTC courses that are offered in a university course catalogue and being a qualified student/cadet in either the Basic or Advance programs of ROTC. Any university student can take any ROTC course if they meet the prerequisites in the course catalogue, but this does not mean they are in the Basic or Advanced programs of ROTC working toward a commission.

3. Certain students enrolled in the ROTC program are eligible for academic scholarships. A

cadet's eligibility for a scholarship is based upon his or her demonstrated excellence as a scholar, athlete, and leader. In addition, only contracted cadets may receive a scholarship.

a. Four-year scholarships and three-year Advanced Designee scholarships are administered at the national level and are selected by a scholarship selection board. A three-year Advanced Designee scholarship is awarded while the applicant is still in high school; however, because it is only a three-year scholarship and not four, the applicant does not receive any scholarship benefits during their freshmen year.

b. Eligible candidates typically communicate their interest in a scholarship with the ROTC program prior to the start of their first undergraduate year. For students who enter a university in the fall after graduating from high school in the spring, this is typically done prior to high school graduation. Each year, an application period is opened for on line applications (recent years the window has opened in June and closed in January). Subsequent to the application window closing, a scholarship board convenes to select a limited number of candidates to receive four-year scholarships and Three Year Advanced Designee scholarships.

c. Three-year (non-Advanced Designee) and two-year scholarships, which are administered at the campus level, are available for a small number of Cadets. Due to the limited number of available scholarships, these three-year and two-year scholarships are highly competitive. Candidates for these scholarships are nominated by their local ROTC detachment and approved by Headquarters, USACC.

4. There are two general options for entering the ROTC program:

a. Students may enter through *progression*, which is when a student begins ROTC in the MS-I (i.e., freshman) year and progresses all the way through the program to MS-IV (i.e., senior) year. In the Basic Course portion of ROTC, a student may be classified as participating, enrolled, or contracted. The normal progression timeline is for a student to take the MS-I classes during their first undergraduate year, one per semester, and the MS-II class during their second year.

However, the PMS may authorize accelerated progression by allowing the cadet to take more than one course per semester or academic year in order to complete the Basic Course on-time if the cadet has only three years remaining before graduation. Upon completion of the Basic Course, cadets are then eligible to enter the Advanced Course. While participating students are allowed in the Basic Course, students in the Advanced Course must either be enrolled or contracted cadets in order to receive commissioning credit. For students registered in a four-year degree program, the Advanced Course's MS-III and MS-IV classes are typically completed during the student's third (i.e., junior) and fourth (i.e., senior) academic years, respectively.

b. The second option for entry into the ROTC program is *lateral entry*, which includes any method of entry into the Advanced Course other than through progression. One lateral entry option is when a non-scholarship Cadet attends the Basic Camp after their MS-II academic year (i.e., normally the sophomore or second academic year) in lieu of completing the Basic Course. The Basic Camp is a condensed four-week summer training program that trains Cadets on the leadership fundamentals they will need to successfully complete the ROTC program and commission into the Service. This allows the program to recruit students who are further along in their undergraduate timeline to still enroll in ROTC and commission on-time after graduation.

c. Students may also qualify for placement credit, which provides constructive credit for completing ROTC program requirements based upon prior military service or prior enrollment in a Senior ROTC (university level) or Junior ROTC (high school level) program. The amount of credit depends on the level of prior experience.

d. Alternate Entry Option (AEO) is when a non-scholarship Cadet attends the Basic Camp after their MS-III academic year (i.e., normally the junior or third academic year) in lieu of completing the Basic Course. This allows the program to recruit students who are further along in their undergraduate timeline who missed the Basic Camp prior to their MS-III year. These students will then attend the Advance Camp and commission after graduation. AEO is only open

to non-scholarship cadets.

e. The Accelerated Cadet Commissioning Training (ACCT) Program is for students who have missed the window for placement through the Basic Camp option, who also demonstrate exceptional skills as a scholar, athlete, and leader. These students may contract at the beginning of their MS-III academic year after completing a training program of critical tasks that must be mastered prior to contracting. Candidates for entry through ACCT must be approved by the Commanding General, USACC.

f. There are other lateral entry options into ROTC for students pursuing engineering or nursing degrees, or cadets from Sister Service ROTC programs that wish to cross-commission into the U.S. Army.

5. Cadets who successfully complete the ROTC educational and training requirements, and are otherwise qualified based upon age, security clearance, citizenship, character, education, and physical and medical fitness, are eligible to receive a Presidential appointment into the U.S. Army as a commissioned officer. ROTC graduates must take an oath of office, which constitutes the acceptance of the officer's appointment.

6. USACC has a formal policy prescribing the authorized participation of transgender students within the ROTC training program (attached). The policy distinguishes between students who are applicants; non-contracted, enrolled cadets; or contracted cadets. Transgender applicants are allowed to participate in the Basic and Advanced Courses (see para. 2(b) above) for academic credit, and are treated based upon the gender recognized by the university registrar. At this time, transgender applicants are not allowed to enroll or contract, although those already in that status may remain so.

7. Current Department of Defense policy precludes contracted, transgender Cadets from commissioning. However, USACC intends to re-visit the policies in paragraph 6 and in the attached memoranda pending the final outcome of the Secretary of Defense's implementation

plan and final promulgation of policy, which were directed by the President in his 25 August 2017 memorandum, *Military Service by Transgender Individuals*. This includes the potential, dependent upon the outcome of the policy, for students to receive credit towards commissioning based upon successfully completing Basic or Advanced Course academic courses as participating students.

8. I am generally aware of the allegations made by Dylan Kohere in the filings and his associated declaration in *Jane Doe 1 v. Trump*, No. 17-cv-1597, currently pending in the United States District Court for the District of Columbia. Based upon my knowledge of his allegations, and information that I have learned through my official duties as the G1, I provide the following

a. Dylan Kohere is a student at the University of New Haven in New Haven, Connecticut. The University of New Haven's ROTC program is administered by the ROTC detachment from the University of Connecticut in Storrs, Connecticut. After the start of the fall semester, Dylan Kohere expressed his interest in the ROTC program to Sergeant First Class (SFC) David Andino and Captain (CPT) Christopher Mace, ROTC cadre at the University of New Haven. They, in-turn, advised the Professor of Military Science (PMS), Lieutenant Colonel (LTC) Tanya Wahlberg, at the University of Connecticut. During the conversation with the ROTC cadre at University of New Haven, Dylan Kohere identified as transgender. He was informed that, due to his self-identification as transgender, while he could not formally enroll in ROTC, he was eligible to participate in the MS-I academic class in accordance with USACC's interim policy. He is currently registered in the MS-I class and is able to participate in certain labs that do not include physical activity. For the fall semester, the labs he can participate in include a brief on the Judge Advocate General's Corps, and two training events on military communications and weapons systems.

b. I am aware Dylan Kohere is not presently receiving an ROTC scholarship as the scholarships for this academic year were awarded in the spring of 2017 and he never applied to

receive a scholarship. Dylan cannot presently apply to receive a scholarship for the current academic year because the deadline to apply has passed (for this year: June 2016 to February 2017). A non-transgender student in Dylan's same position (of failing to apply during the application open window) would not be eligible for a four-year scholarship, either. Further, the opportunity to apply for campus-managed three-year or two-year scholarships has not yet approached. A three-year scholarship would be awarded during the summer between a student's freshman and sophomore years. His opportunity to apply for a three-year or two-year scholarship will not occur until after the Secretary of Defense's implementation plan is due to the President. Similarly, his eligibility for such scholarships will not be determined until after the implementation plan date.

c. I am also aware of Dylan Kohere's allegation that he fears he will not be able to continue in ROTC or ultimately serve in the military. Dylan Kohere is a freshman and is currently allowed to participate in the Basic Course academic classes through his sophomore year. The current policy will also allow him to participate in Advanced Course academic classes his junior and senior years, and could potentially receive credit toward commissioning if he successfully completes the courses and depending on the final outcome of Department of Defense's accessions guidance. Based upon his current timeline, he would not be eligible to receive an appointment until he graduates, which based upon a four-year program, would be in the spring of 2021. In addition, the deadline for the Secretary of Defense's implementation plan is scheduled to occur during his freshman year. Depending on the outcome of the final accessions policy, Dylan could still be eligible for entry into the ROTC program through both the progression and lateral entry options. Based upon these options, it is difficult, if not impossible, to assess any prejudice Dylan will encounter towards completing the ROTC program until the final guidance is issued.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 4th day of October 2017.

Robert O. Burns
Robert O. Burns
Deputy Chief of Staff, G1
U.S. Army Cadet Command
Fort Knox, Kentucky