1-16-2020

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Page 04

Appeals Court Sides With HIV-Positve Air Force Officers

Fourth Circuit says discharge decision based on outmoded science, arbitrary review

BY ARTHUR S. LEONARD

A unanimous three-judge appellate panel has blasted the Trump administration for relying on "outmoded" information "at odds with current science" when the Air Force moved to discharge otherwise healthy HIV-positive service members based on the spurious assertion they were not available for deployment outside the US.

The January 10 ruling from the Richmond-based Fourth Circuit Court of Appeals affirmed a preliminary injunction on the plaintiffs' behalf issued last year by District Judge Leonie M. Brinkema barring the discharges while the case proceeds to a ruling on the merits.

The court's opinion, written by Circuit Judge James Wynn, provides a detailed review of relevant Defense Department policies and current medical facts, leaving little doubt that Brinkema's conclusion that the two plaintiffs — anonymously identified as Richard Roe and Victor Voe — are likely to win their case is solidly grounded in legal reasoning.

The three-judge panel consisted of Wynn, Albert Diaz, and Henry Floyd, all of whom were appointed by President Barack Obama. Floyd had previously served as a district judge appointed by George W. Bush.

Lambda Legal and Outserve-SLDN (which recently merged with the American Military Partner Association to form the Modern Military Association of America, or MMAA) brought the case on behalf of Roe and Voe, as well as other MMAA members who are HIV-positive and subject to discharge for that reason. Both Roe and Voe had years of meritorious service when they were diagnosed as HIV-positive in 2017 as a result of the Defense Department's policy of requiring periodic testing of personnel. Both men immediately went into treatment, are taking antiretroviral therapy, have undetectable HIV, and are healthy and uncompromised in their ability to perform their duties.

LAMBDA LEGAL

DC Army National Guard Sergeant Nick Harrison, who is fighting his discharge in a case similar to Richard Roe and Victor Voe's challenge to the Air Force's effort to discharge them due to their HIV-positive status.

Defense Department written policies state unequivocally that HIV-positive personnel who are "determined to be fit for duty will be allowed to serve in a manner that ensures access to appropriate medical care." The Air Force has a written policy stating that HIV-positive status "alone is not grounds for medical separation or retirement," and that, "force-wide, HIV-infected employees are allowed to continue working as long as they are able to maintain acceptable performance and do not pose a safety or health threat to themselves or others." They "may not be separated solely on the basis of laboratory evidence of HIV infection," according to written policy.

The Catch-22 in all this, however, comes with the Air Force's insistence that personnel must be deployable anywhere in the world, and in particular to the central theater of Air Force active operations, known as CENTCOM, which covers operations in North Africa, Central Asia, and the Middle East. Under a rule known as "Modification 13," personnel who are "found to be medically non-deployable will not enter [the Central Command area] until the non-deployable condition is completely resolved or an approved waiver is obtained." It lists "confirmed HIV infection" as "disqualifying for deployment." The official in charge of granting waivers has stated that it is highly unlikely that a waiver would be granted for HIV-positive service members, and in fact no such waiver has ever been granted.

In this litigation, the Defense Department takes the position that neither it, nor in particular the Air Force, has an absolute ban on continued employment of healthy HIV-positive personnel. On the other hand, since most of the Air Force's current activity is in the CENTCOM area, Modification 13 prohibits deployment of HIV-positive personnel to CENTCOM without a waiver, and the official in charging of granting waivers does not grant them for HIV-positive personnel, there is, *de facto*, a ban.

The lawsuit claims that the discharge of Roe, Voe, and similarly-situated service members for being HIV-positive violates the federal Administrative Procedure Act (APA), as being "arbitrary and capricious" in light of the specifics of their individual cases, and also violates the Fifth Amendment's equal protection requirements.

Judge Brinkema and the court of appeals narrowed their attention to the alleged APA violation, given the well-established tradition of avoiding constitutional questions if a plaintiff is able prevail based on a statutory claim.

It seemed clear to Brinkema and the appeals panel that the government's position was inconsistent with medical facts and based on outmoded ideas about HIV and current treatments. The court emphasized that Roe and Voe take daily pills not requiring any special treatment — refrigeration or shielding from temperature extremes, which were required for some earlier HIV treatments, is no longer required — and that neither man has experienced any significant medication side effects. The court also summarized the well-established science that somebody with undetectable levels of HIV presents virtually no risk of transmission through casual contact, and even blood exposure or sexual contact with somebody under antiretroviral treatment whose HIV level is undetectable is exceedingly unlikely to result in transmission.

Both men present themselves as fully capable of performing their duties, and in both cases their commanding officers have endorsed their request to be allowed to continue serving, as have military physicians. However, the Air Force, despite the requirements in published policies to evaluate each case on its individual merits, has maintained a *de facto* categorical exclusion. Each man appealed the initial rulings against them within the military structure, and both were met with virtually identical formulaic statements that they had to be discharged on medical grounds under the deployability rules. That alone suggests their cases did not receive individualized consideration.

"To comply with the APA," wrote Judge Wynn, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the

➤ **AIR FORCE DISCHARGES**, continued on **p.22**

➤ **BRONX DEBATE**, from **p.9**

"I think sometimes they miss the point," Jackson, the former director of programs for Destination Tomorrow, told Gay City News. "It's not about showing up and telling us what you can do for us because you think this is what we want to hear. They were just answering questions, some were stuck, some were reading, and that doesn't make me feel comfortable.

She continued, "Politicians have to be invested in what they're doing, they have to be invested in the community that they are trying to get votes from, and tonight I must tell you I am not into politics like that and I was not impressed."

MATT TRACY

"Pose" star Dominique Jackson was "not impressed" with the candidates, saying "sometimes they miss the point."

Other members of the audience felt differently. Tabazz Ebony, a Black gay man involved in the ball scene who hails from the House of Ebony, said he thought the candidates were informative.

"The candidates all spoke out, each one as an individual," Ebony said. "This is the poorest [congressional district] in the Bronx and they came here to pitch what they want to do to the community. I applaud that."

James L. Goode, Jr., known also as Junior LaBeija from the 1990 documentary "Paris Is Burning," was among the moderators of the evening.

"Tonight we allowed our potential candidates for District 15 of the Bronx to understand and learn what our specific needs are within the community," he said after the event concluded. "We also let them know that we do not consider ourselves exclusive; we are to be inclusive. It cannot be ignored that the LGBTQ community exists everywhere. We are here, and because we are here we must educate you on how to meet our needs. If you meet our needs, we will be more willing to give you what you want."

Other candidates on stage included Jonathan Ortiz, a financial counselor at Phipps Neighborhoods Financial Empowerment Center, and Frangell Basora, a former intern for Serrano.

➤ **ASYLUM SEEKER**, from **p.5**

guidelines that protect individuals who are traveling to and from courthouses from arbitrary arrest in order to guarantee their access to the justice system, the legislation would create a broader zone of protection than the current court system rules provide. An October study published by Ceres Policy Research found that the threat of detention by ICE has a chilling effect on immigrants and their families participating in criminal, family, and civil court proceedings.

Supporters of the measure were in Albany on January 14 to lobby legislators. Sponsored by out gay Manhattan State Senator Brad Hoylman and Long Island Assemblymember Michaelle Solages, both Democrats, the bill has an additional 33 co-sponsors in the 63-member Senate and 72 co-sponsors in the 150-member Assembly.

Yaritza Mendez, Make the Road NY's associate director of organizing, underscored how Benitez Lopez's case illustrates the necessity of the new legislation.

"Yimy's case demonstrates exactly why we need to pass the Protect Our Courts Act," Mendez said. "Yimy has a pending criminal case which is headed towards a dismissal but when they went to court in November, ICE followed them outside of court and arrested them across the street from the courthouse. Despite the fact that Yimy had already been released on their own recognizance by a Nassau County criminal judge, they have now spent the last two months in ICE detention in New Jersey, where they have not been able to attend criminal court or meet with their public defender. The Protect Our Courts Act would prevent this unnecessary detention, make sure that New Yorkers like Yimy have access to the courts, and keep our community members with their loved ones, where they belong."

Joshua Joseph, a spokesperson for Solages said that the assemblymember is "gung-ho" on getting action on the Protect Our Courts Act in the new legislative session, saying the measure is among her key priorities for 2020.

In a written statement, Hoylman said, "ICE arrests in and around courthouses have skyrocketed by an astonishing 1736% between 2016 and 2018. That has a chilling effect on our judicial system, preventing victims, witnesses, defendants, and family members — especially those who are from marginalized communities — from feeling comfortable participating in our judicial system. I'm proud to sponsor the Protect Our Courts Act with Assemblymember Michaelle Solages which will finally end these disruptions and allow our courts to operate with fairness and due process."

➤ **AIR FORCE DISCHARGES**, from **p.6**

facts found and the choice made. Agency action is arbitrary and capricious when the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Wynn focused particular attention on the government's inconsistency regarding deployment to CENTCOM's area of operations. Prior to the Roe-Voe litigation, it had treated Modification 13 as a "categorical ban" on transgender service. Now, it is emphasizing the opportunity for a waiver, even though none has ever been issued and these two plaintiffs would appear to qualify.

"If Modification 13 is not a categorical ban," wrote Wynn, "the Air Force acted arbitrarily by treating them as categorically ineligible to deploy to CENTCOM's area of responsibility and denying Plaintiffs the required individualized assessment of their fitness for continued service. If Modification 13 is a categorical ban, the Government failed to satisfy the APA's requirements in promulgating their policy."

The appeals panel endorsed Brinkema's conclusion that Roe and Voe are likely to succeed on their claim that their discharge decisions were "arbitrary and capricious, in violation of the APA."

Wynn's opinion dismissed a series of arguments put forward by the government — that HIV requires "highly specialized" treatment and that there is a risk of battlefield transmission, with not a single case ever documented of a service member contracting HIV through non-sexual means.

"A ban on deployment may have been justified at a time when HIV treatment was less effective at managing the virus and reducing transmission risks," wrote Wynn, who made clear that conditions have changed considerably.

Beyond demonstrating their likelihood of prevailing on the merits, the plaintiffs also easily met the other tests for obtaining a preliminary injunction, the appeals panel found. They showed they are likely to suffer irreparable harm if they are given medical discharges, forcing them to out themselves as HIV-positive when they apply for non-military employment and setting them back in their military careers should they prevail and be allowed to rejoin the Air Force.

Responding to the argument that the preliminary injunction improperly intrudes into military personnel decision-making, the court agreed with Judge Brinkema that the plaintiffs' request that the military "adhere to their stated policies and make nonarbitrary, personalized determinations about each individual's fitness for service did not do violence to the notion of military independence."

Lambda Legal's lead attorney on the case is Scott Schoettes from its Chicago office. Outserve-SLDN/MMAA's lead attorney is Peter Perkowski of Washington, DC.