UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANGE SAMMA, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF DEFENSE and MARK ESPER, in his official capacity as Secretary of Defense, Defendants.	Civil Action No. 1:20-cv-01104-ESH The Honorable Ellen Segal Huvelle

DEFENDANTS' SURREPLY IN RESPONSE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL

Pursuant to the Court's June 11, 2020 Order, ECF No. 28, Defendants, the United States Department of Defense and Secretary of Defense Mark Esper, sued in his official capacity, hereby file this surreply in response to Plaintiffs' Motion for Class Certification and Appointment of Class Counsel ("Pls.' Mot."), ECF No. 5. Since Defendants filed their response to Plaintiffs' motion on June 2, 2020, *see* ECF No. 23, Plaintiffs filed both a reply in support of their motion and an Amended Complaint, *see* ECF No. 24.[1] As requested by the Court, Defendants now file this surreply to address points raised in Plaintiffs' reply brief, to address the effect of the Amended Complaint on the class certification motion, and to respond to the six questions raised by the Court in its Order.

[1] Plaintiffs filed their Amended Complaint on the same day that Defendants filed their reply in support of their cross-motion for summary judgment. *See* ECF No. 27.

I. RESPONSES TO PLAINTIFFS' REPLY

A. Because Plaintiffs have standing to challenge the time-in-service requirement only, any certified class can challenge that policy only as well.

Despite representing at the outset of this case that (1) they are being harmed by only the time-in-service and O-6 requirements, *see, e.g.*, Tr. of 5/5/20 Status Conf., ECF No. 19-3, at 6:23 – 7:7, and (2) they are challenging Section I of the October 13, 2017 policy memorandum only, *id*. at 3:4-7, Plaintiffs now contend that they are challenging the October 13, 2017 policy memorandum "as a whole," Pls.' Reply at 2. Defendants have explained elsewhere why this contention is wrong. *See* Defs.' Reply in Supp. of Cross-Mot. for Summ. J. ("Defs.' Cross-Mot. Reply"), ECF No. 27, at 2-5. In brief, at no point in this case have Plaintiffs plausibly alleged that the policy's screening requirements have harmed them or that the O-6 policy has prevented or delayed their ability to obtain certification,[2] nor have they ever even addressed the policy's requirement that those seeking N-426 certification not be the subject of certain legal or disciplinary matters. *See* SAMMA_0007-08. Plaintiffs also fail to clarify whether they are challenging the April 24, 2020 update to the policy and its requirement that N-426 requests be processed and returned within thirty days of submission. *Id*. at 0001. Overall, Defendants' point is a simple one: because Plaintiffs have standing to challenge only those requirements which they have identified and plausibly alleged to be causing them injury, any class certified in this case be similarly limited. *See* Defs.' Response to Pls.' Mot. for Class Cert. and Appointment of Class Counsel ("Defs.' Resp."), ECF No. 23, at 3.

[2] Plaintiffs assert that "there can be no doubt that Plaintiffs' inability to obtain certificates of honorable service stems from . . . the O-6 requirement," Pl.'s Reply at 6, but they again fail to make any supporting allegation describing how the requirement has purportedly harmed them.

B. The relation-back doctrine does not apply in this case.

Plaintiffs argue that "[e]ven if all the named Plaintifs received N-426 certifications before a class is certified, the Court . . . should still certify the proposed class" under "the relation-back doctrine" as inherently transitory. Pls'. Reply Mem. in Supp. of Pls.' Mot. for Class Cert. ("Pls.' Reply"), ECF No. 26, at 3-4. "[T]he 'inherently transitory'" doctrine is an "exception to mootness." *J.D. v. Azar*, 925 F.3d 1291, 1311 (D.C. Cir. 2019). But Defendants never argued that this Court should not certify a class because of the mootness of any Plaintiffs' claim. Rather, Plaintiffs' class definition is overbroad because it is not limited to potential class members who have yet to meet the time-in-service requirements. *See* Defs.' Resp. at 5. Indeed, five of the six plaintiffs named in the original Complaint satisfied the challenged time-in-service requirements at the time the Complaint was filed. *Id*. at 4-6. Whether these Plaintiffs' claims have become moot because they received N-426 certifications since the Complaint was filed is beside the point: the fact that they are not harmed by the challenged requirements at all means that they lack standing to proceed in this case and accordingly cannot serve as class representatives.

In any event, the Court should not apply the relation-back doctrine in order to certify the class, if it is unable to certify the class before Plaintiffs Isiaka, Gunawan, and Machado (the only Plaintiffs with standing to challenge the time-in-service requirements at the time the Amended Complaint was filed) meet the time-in-service requirements. "Whether the certification can be said to relate back to the filing of the complaint may depend on the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review." *J.D.*, 925 F.3d at 1310 (citation omitted). "[W]here a named plaintiff's claim is inherently transitory, and becomes moot prior to certification, a motion for certification may

relate back to the filing of the complaint." *Id*. at 1308 (D.C. Cir. 2019) (citation omitted). First, a court "must consider the extent to which the individual claims are 'inherently transitory.'" *Id*. The question is "whether it is 'by no means certain' that an individual claim will persist long enough for it to adjudicate class certification." *Id*. (citation omitted).

In this case, the time-in-service requirements are both sufficiently certain and sufficiently long to provide "the district court a reasonable amount of time to decide class certification." *Id.* at 1311. In *J.D.*, the D.C. Circuit found that claims "at issue . . . at least might . . . end quickly" when "the average length of custody" at issue was "90 days by the beginning of fiscal year 2019." *Id*. Key to the court's determination was the uncertainty of the period of time at issue. *Id*. at 1311 (noting that "[a] minor under [agency] custody . . . may seek voluntary departure" or the government "may find a sponsor at any point and . . . it may obviate the claim by finding one swiftly").

In contrast, the time-in-service requirement at issue in this case is a certain requirement of a definite period of time. And 180 days—let alone a full year for a reservist—is a "reasonable amount of time to decide class certification." *J.D.*, 925 F.3d at 1311; *see also Banks v. Nat'l Collegiate*, 977 F.2d 1081, 1086 (7th Cir. 1992) (holding that "nearly 120 days" was sufficient time "to bring [a] claim for injunctive relief" and for a judge to certify a class); *Trotter v. Kilncar*, 748 F.2d 1177, 1184-85 (7th Cir. 1984) (concluding that a 70-day period was a sufficient amount of time for a class certification determination).

In sum, the relation-back doctrine does not apply here because no Plaintiff's claim was mooted by the expiration of the time-in-service requirement. And even if a Plaintiff's challenge to that requirement becomes moot in the future, the time-in-service requirement is sufficiently

long and certain that the doctrine is still inapplicable. The class certification motion must be decided only by reference to the live claims of a Plaintiff.

C. Plaintiffs' proposed class should exclude the *Kotab* plaintiff and could interfere with the *Kuang* class.

Defendants respond briefly to Plaintiffs' discussion of *Kotab v. U.S. Department of Air Force* and *Kuang v. U.S Department of Defense*. With regard to *Kotab*, Plaintiffs erroneously claim that the plaintiff in that case never enlisted in the military. Pls.' Reply at 9. That is not true. To the contrary, the *Kotab* plaintiff signed an enlistment contract on December 20, 2018 and attended two Air Force drilling periods in January and February 2019. *See* Decl. of Stephen A. Thomas, *Kotab v. U.S. Dep't of the Air Force*, Case No. 2:18-cv-02031-KJD-CWH, ECF No. 16-1 (D. Nev.), ¶¶ 3-4. Two days prior to his ship date to basic training, the Air Force learned that the plaintiff had admitted to falsifying various entries on his Standard Form 86, Questionnaire for National Security Positions. *Id*. ¶ 5. The plaintiff, moreover, had his base privileges revoked and was under consideration for discharge. *Id*. ¶ 6. Consequently, the *Kotab* plaintiff should not be permitted to obtain N-426 certification by way of inclusion in a certified class in this case because he was denied that same relief by the District of Nevada.

Plaintiffs also fail to appreciate the potential overlap between the certified class in that case and a potential certified class here. The certified class in *Kuang* consists of all LPRs—both those on active duty as well as reservists—who have yet to attend basic training pending completion of their military service suitability determinations and national security determinations. *See* 340 F. Supp. 3d 873, 893 (N.D. Cal. 2018). Plaintiffs claim that there is no potential for overlap between this case and *Kuang* because *Kuang* concerns LPRs who have not yet entered service. Pls.' Reply at 10. But Plaintiffs also seek to extend this Court's rulings in *Kirwa* to LPRs and active-duty MAVNI service members. *See* Pls.' Opp'n to Defs.' Mot. for

Summ. J. and Reply in Supp. of Pls.' Mot. for Summ. J., ECF No. 21, at 1. Were that to occur, reservist LPRs would be eligible for N-426 certification based on one day of drilling in the Delayed Training Program ("DTP") prior to attending basic training. *See Kirwa v. Dep't of Defense*, 285 F. Supp. 3d 21, 31 (D.D.C. 2017) ("This litigation concerns MAVNIs who enlisted in the Army Reserve's Selected Reserve of the Ready Reserve and who are in the DTP."). Such an outcome would enable LPR reservists in the *Kuang* class to mitigate the harm that they have alleged in that case, *see* Pls.' Reply at 10 (acknowledging that "the plaintiffs in *Kuang* . . . alleged injury to their inability to naturalize expeditiously"), despite the Ninth Circuit's vacatur of the preliminary injunction.

II. EFFECT OF PLAINTIFFS' AMENDED COMPLAINT

In addition to addressing new arguments Plaintiffs made in their reply brief, Defendants discuss briefly the effects of Plaintiffs' Amended Complaint on the class action analysis. Plaintiffs amended their complaint in two general ways: (1) adding two Plaintiffs and (2) adding new allegations that the Plaintiffs are not aware of whether they have completed their background screening. Of these various new allegations, only the addition of Plaintiff Machado expands the scope of the claims in this case.

To begin, the addition of Plaintiffs Gunawan and Machado does not change which section of the October 13, 2017 memorandum is at issue but does alter what requirements in that section are being challenged. Both Plaintiffs Gunawan and Machado enlisted in 2019. *See* Am. Compl., ECF No. 24. Consequently, Section I of the policy applies to them, just as it does to the rest of the Plaintiffs in this case. *See* Defs.' Cross-Mot. Reply at 2-5. Plaintiff Gunawan, moreover, alleges that he is unable to obtain N-426 certification because he has not met the time-in-service requirements at the time they enlisted. *See* Am. Compl. ¶¶ 133-34. Plaintiff

Gunawan's allegations thus challenge the time-in-service requirements, just like the original Plaintiffs.

Plaintiff Machado, by contrast, appears to challenge the requirement that he complete basic training before being eligible for N-426 certification, though he does not say so explicitly. *See* Am. Compl. ¶¶ 140-42. To the extent that he is raising such a challenge, this would expand the scope of the claims in this case. Permitting Plaintiffs to pursue this claim and certify a class of those similarly situated would be unduly prejudicial to Defendants. Defendants did not compile the Administrative Record to address this requirement, nor did they have an opportunity to move for summary judgment on this claim due to its belated addition to the case. *See, e.g.*, Tr. of 5/5/20 Status Conf., ECF No. 19-3, at 6:23 – 7:7 (representation by Plaintiffs' counsel that Plaintiffs are unable to obtain N-426 certification due to the time-in-service and O-6 requirements only).

In addition to adding two new Plaintiffs, the Amended Complaint asserts new allegations by seven of the eight Plaintiffs that they do not know whether they have completed background screening. *See* Am. Compl. ¶¶ 96, 103, 108, 116, 123, 135, 143. Plaintiffs made similar allegations in supplemental declarations they filed in opposition to Defendants' Cross-Motion, ostensibly in an effort to demonstrate that they are challenging the background screening requirement. *See* ECF Nos. 21-9 – 21-14. But Plaintiffs' alleged injuries stem from the fact that they were told that they have not met the time-in-service requirements, or in the case of Plaintiff Machado, from the fact that he has not completed basic training.[3] Am. Compl. ¶¶ 107, 133-34, 140-42. In other words, Plaintiffs have not pled a viable challenge to the background screening

[3] Despite the fact that Plaintiffs conceded in their reply in support of their class certification motion that four of the six named Plaintiffs now have certified N-426s, *see* Pls.' Reply at 3 n.2, Plaintiffs fail to make any mention of this fact in their Amended Complaint.

requirement simply by alleging that they are unaware as to whether they have completed that screening.

III. RESPONSES TO THE COURT'S QUESTIONS

In its June 11, 2020 Order, the Court requested that Defendants in their surreply provide answers to six questions raised by the Court. Those questions and Defendants answers are as follows:

1. *What does "accession" mean with respect to Section I and Section II of the October 13, 2017 Certification Memorandum?*

The word "accession" as used in Sections I and II of the October 13, 2017 memorandum refers to service members who have been inducted into the military such that they have begun a period of creditable service. *See, e.g.*, Department of Defense Instruction 1215.07, Enclosure 3.1.b (establishing anniversary for creditable service based on "[t]he date the Service member entered into active service or active status in a[] R[eserve] C[omponent]"); Department of Defense Instruction 1304.26, Enclosure 3 (setting forth criteria for induction into the military); *cf.* 10 U.S.C. § 12103(b). Reservists who do not have orders to report for induction are excluded from this definition. Once they have accessed and entered into active-duty service, including active-duty training for reservists, service members are entitled to military pay and are eligible for certain benefits, including creditable service toward retirement and medical benefits.

2. *Assuming that Samin Park and Yu Min Lee remain as plaintiffs, are they covered by Section I or Section II, since they enlisted prior to October 13, 2017?*

Section I applies to both Plaintiffs Park and Lee. Although they enlisted prior to October 13, 2017, both were inducted into the Army when they shipped to basic training, which occurred after October 13, 2017. As soldiers who enlisted into active-duty service, neither Plaintiff began

military pay or were eligible for benefits nor entered into a period of creditable service until they attended basic training.

3. *Of the plaintiffs listed in the amended complaint, who, if anyone, has received a favorable MSSD and, if so, when?*

Plaintiffs Perez and Lee have received favorable MSSDs. Plaintiff Perez received his favorable MSSD on November 29, 2018 and Plaintiff Lee (an active-duty MAVNI soldier) received his on September 20, 2018. DoD presently does not require a favorable MSSD in order for LPR service member to obtain N-426 certification in light of the November 16, 2018 preliminary injunction in *Kuang v. U.S. Department of Defense* (which suspended the requirement that LPRs have favorable MSSDs prior to attending basic training) and the July 30, 2019 policy requiring LPRs to undergo the Expedited Screening Protocol ("ESP") in lieu of a MSSD.

4. *Did all plaintiffs who arrived at Basic Combat Training prior to July 30, 2019, have a completed MSSD? (On July 30, 2019, the requirement in the October 13, 2017 MSSD/LPR memo that LPRs have a favorable MSSD prior to shipping to basic training was suspended.)*

The October 13, 2017 policy memorandum requiring LPRs to have a favorable MSSD prior to attending basic training was enjoined by the district court in *Kuang* on November 16, 2018, and DoD suspended its policy in light of that injunction. Although the injunction in *Kuang* was vacated by the Ninth Circuit, *see Kuang v. U.S. Dep't of Defense*, 778 Fed. App'x 418 (9th Cir. 2018), DoD has held in abeyance the MSSD requirement for LPRs upon issuance of the July 19, 2019 ESP policy, *see* 7/31/19 Letter from Thomas Pulham to Molly C. Dwyer, *Kuang v. U.S. Dep't of Defense*, No. 18-17381, ECF No. 46 (9th Cir). Plaintiffs Samma, Perez, Bouomo, and Park all shipped to basic training prior to the issuance of the July 31, 2019 ESP memo, and all four shipped between the time the *Kuang* court entered its injunction and the issuance of the July

31 ESP policy. Of these four Plaintiffs, only Perez received a favorable MSSD (issued shortly after the *Kuang* injunction was entered because the Army had already processed the MSSD).

5. *If an LPR is no longer in entry-level status and receives a negative MSSD, how is their discharge characterized by the Army?*

DoD has not been requiring LPRs to have MSSDs in light of the preliminary injunction in *Kuang* and the subsequent ESP policy. If an LPR were discharged as the result of an unfavorable Tier 3 background investigation or unfavorable ESP (the screening requirements applicable to LPRs under the July 31, 2019 policy), characterization of that discharge would be made on a case-by-case basis depending on the evaluation of the unit command (or other appropriate separation authority).

6. *If we assume that plaintiffs are attacking all of the Section I requirements, including the requirement that an individual have a favorable MSSD before an N-426 will be issued, do we have an adequate administrative record?*

No. Defendants compiled the Administrative Record in this case to defend the time-in-service and O-6 requirements only. *See* Cert. of Index of the Admin. R., ECF No. 18-1, ¶ 3 (certifying index of "all non-privileged information that was considered, directly or indirectly, in connection with [Defendants'] issuance of the *challenged sections*" of the October 13, 2017 and April 24, 2020 memoranda). Defendants did not, for example, include in the certified Administrative Record all materials that were considered when promulgating the screening requirement, including certain materials that were included in the Administrative Record in *Kirwa*. Nor have Defendants compiled for this case or in *Kirwa* materials that were considered, directly or indirectly, in promulgating the requirement that a service member not the subject of any legal or disciplinary matters (a requirement that at no point in this case have Plaintiffs specifically targeted but is nevertheless part of the "suite" of requirements in Section I of the memorandum).

CONCLUSION

For the foregoing reasons, the Court should decline to certify a class using Plaintiffs' proposed class definition to cover all aspects of the October 13, 2017 memorandum. If the Court does grant certification, it should limit the class to service members harmed by the time-in-service requirements only, and should further exclude the *Kotab* plaintiff and the *Kuang* class from relief where doing so would disturb the rulings in those cases.

Dated: June 22, 2020

Respectfully submitted,

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