

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MAHLON KIRWA, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:17-cv-01793
)	The Honorable Ellen Segal Huvelle
UNITED STATES DEPARTMENT OF)	
DEFENSE and JAMES MATTIS, in his)	
official capacity as Secretary of Defense,)	
)	
Defendants.)	
)	

**DEFENDANTS’ OPPOSITION TO PLAINTIFFS’ MOTION TO REFER THE CASE TO
THE MAGISTRATE JUDGE FOR CASE MANAGEMENT PURPOSES**

Defendants, the U.S. Department of Defense (“DoD”) and Defense Secretary James Mattis, in his official capacity, file this opposition to Plaintiffs’ Motion to Refer the Case to the Magistrate Judge for Case Management Purposes, ECF No. 66. Plaintiffs’ motion is premised on two assertions: (1) that Defendants have failed to comply with the reporting obligations imposed by this Court, and (2) that there exist ongoing problems between the parties that necessitate Court intervention. Neither assertion is correct, and, accordingly, Plaintiffs’ motion should be denied.

A. Defendants have fulfilled their bi-weekly reporting obligations

Plaintiffs first contend that Defendants’ bi-weekly reports have failed to satisfy the Court’s intended purpose of requiring those reports, but this argument is founded on Plaintiffs’ misreading of the Court’s Order and Plaintiffs’ apparent desire for information that the Court has not ordered Defendants to provide. In its Order requiring Defendants to file bi-weekly status reports, the Court gave Defendants two instructions: (1) to update a chart previously filed at

ECF No. 46, and (2) to provide the total number of new N-426s requested and the total number of new N-426s approved since the last report. *See* 12/15/17 Order, ECF No. 55. Starting on January 3, 2018, Defendants have done precisely that, filing every two weeks a status report with an attached declaration and an updated version of the chart¹ that was previously filed at ECF No. 46. In the body of the status report, Defendants state the number of new N-426s requested and the number of new N-426s approved since the date of the last report. *See* Defs.’ Status Rep., ECF Nos. 56, 62, 65; Decls. of Lin. St. Clair, ECF Nos. 56-1, 62-1, 65-1.

Plaintiffs’ complain about the type of information Defendants provide in the chart, but these complaints are unfounded. Plaintiffs first object to Defendants’ use of the date the N-426 request is received by the Office of the Chief, Army Reserve (OCAR) for the “Date of Application” column. But this is the same information that was used for the chart that Defendants filed with the Court on November 28, 2017, which the Court ordered Defendants to update in their status reports.² *Compare* ECF No. 46-12 *with* ECF Nos. 56-1, 62-1, 65-1; *see also* Second Decl. of Col. Brian A. Thomas ¶ 9, ECF No. 46-7 (“Second Thomas Decl.”) (stating that the number of N-426 requests reflect those received by OCAR). Defendants have therefore complied with the Court’s Order by consistently providing the same information called for by the Court’s order on the timeline set by the Court.

¹ Because the chart contains the names of individual MAVNI soldiers, Defendants file a redacted version on the public docket and file an unredacted version under seal. *See* 1/4/18 Minute Order (granting Defendants leave to file unredacted chart under seal). Defendants provide a copy of the unredacted chart to Plaintiffs’ counsel via email.

² Defendants use the date the N-426 certification request is received by OCAR because that is the date that the soldier-provided information on the Form N-426 has been verified as accurate and complete, with all further data entries after that point made by OCAR officials. St. Clair Decl. ¶ 3. Using this date is also the most administratively feasible and accurate method to centrally manage and track requests for N-426 certification that are made at various local Army Reserve units dispersed across the country. *Id.*

Plaintiffs' second objection is that Defendants' chart does not "identify the dates when the class members actually have their completed N-426s in hand." Pls.' Mot. at 4. Plaintiffs' objection in this regard overlooks the last column of information in Defendants' chart; that column contains the date on which OCAR sent an email, with the signed Form N-426 request attached, to the email address provided by the requesting MAVNI soldier. *See, e.g.*, ECF No. 65-1; *see also* Decl. of Lin St. Clair (attached as Exhibit 1) ¶ 2 (explaining significance of column headings on reporting chart). The chart also includes a column showing the date a certified N-426 is uploaded into the Army Military Human Resource Record. *Id.* Defendants have accordingly been providing the dates on which certified Forms N-426 are returned to MAVNI soldiers via two different forms of delivery.

Plaintiffs' contention that Defendants' reporting chart fails to serve its intended purpose rings hollow. Presumably, the Court ordered Defendants to submit periodic status reports to ensure that Defendants are continuing to certify Forms N-426. The charts provided by Defendants thus far demonstrate such compliance. When Defendants filed their first report (as of November 27, 2017), OCAR had received 185 requests for N-426 certification, with 61 having been approved. *See* Second Thomas Decl. ¶ 9. Approximately two months later, as of January 30, 2018, the Army had received 1,233 requests for N-426 certification, with 1,049 of those requests having been granted.³ *See* Decl. of Lin St. Clair ¶ 2, ECF No. 65-1. The fact that nearly 1,000 MAVNI soldiers have received N-426 certification in a two-month period, and that eighty-five percent of MAVNI soldiers who had requested N-426 certification as of January 30, 2018 had received it, plainly demonstrates that Defendants have been complying with the Court's preliminary injunction order.

³ Defendants' next status report is due by February 14, 2018.

B. Defendants have been responsive to Plaintiffs' myriad inquiries, and further Court intervention is not necessary

Nor is Court intervention necessary to address the "disputes and concerns" that Plaintiffs' counsel believe to exist. To the contrary, Defendants have gone to great lengths to respond to and address numerous inquiries from Plaintiffs, relating both to concerns about individual MAVNI soldiers and to broader questions about N-426 certification.

Inquiries about individual MAVNI soldiers have been addressed by Major Dana Hollywood, who is an administrative law attorney at the United States Army Reserve Command and who has served as a designated point of contact for MAVNI soldiers who encounter issues with obtaining a certified Form N-426. *See* Decl. of Dana Hollywood (attached as Exhibit 2) ¶¶ 1-2; *see also* Notice to Class at 6, ECF No. 54-1 (designating for Major Hollywood as a point of contact for class members). Since December 14, 2017, Major Hollywood has personally assisted and ensured that more than 500 MAVNI soldiers have received certified Forms N-426, and has also assisted with other issues, including ensuring that MAVNI soldiers are able to complete and submit naturalization applications while at basic combat training. Hollywood Decl. ¶ 3. In addition to inquiries that he has received from individual MAVNI soldiers directly, Major Hollywood has received approximately 50 email messages from Plaintiffs' counsel since December 22, 2017. *Id.* ¶ 4. Since that date, Major Hollywood has sent in excess of 200 email messages either directly to Plaintiffs' counsel or to individual MAVNI soldiers (with Plaintiffs' counsel included on the "cc" line) to explain the steps Major Hollywood will take to ensure that a soldier receives a certified N-426. *Id.* ¶ 5.

Inquiries from Plaintiffs' counsel at a programmatic level have been handled by undersigned counsel for the Defendants. Between January 8 and January 30, 2018, counsel for Defendants have responded to three lengthy email inquiries from Plaintiffs, including inquiries

about dissemination of class notice and language used in one section of the Form N-426. Counsel for Defendants have responded promptly to Plaintiffs' inquiries and have addressed the issues raised to the best of their abilities, despite the lack of detail provided by Plaintiffs' counsel. For instance, in Defendants' most recent email to Plaintiffs' counsel (dated January 30, 2018), counsel for Defendants requested additional information about the purported problem Plaintiffs were experiencing so that counsel could better inquire about Plaintiffs' concerns. *See* 1/30/18 Email from Nathan M. Swinton to Jennifer Wollenberg (attached as Exhibit 3). Rather than providing such information or otherwise responding to Defendants' request, Plaintiffs filed the instant motion.

Referral of the case to a magistrate judge to address purported compliance issues will do nothing to address Plaintiffs' concerns if Defendants lack information necessary to investigate Plaintiffs' complaints. Moreover, the fact that the Court has referred the parties in *Nio v. DHS* does not mean that such a referral is appropriate here. The Court in that case recently expressed concern that the plaintiff class had not been progressing with background investigations and directed the defendants there to provide additional information in their reports. *See Nio v. DHS*, Tr. of 1/23/18 Hr'g at 69:1-11 (expressing desire to "have accurate reporting," including "how many people are getting over to you, how many people are stuck at the CAF level like my eight plaintiffs are sitting there We want to know how many people are coming over to you that don't have N-426s, so you don't do anything. How many people are coming to you with N-426s and how long they're staying with you."). Here, Defendants' bi-weekly status reports demonstrate a steady increase in the number of N-426 certifications requested as well as the number that have been granted, thereby evidencing Defendants' best efforts to comply with the Court's preliminary injunction order. In light of this showing, as well as Defendants' extensive

efforts to respond in a timely fashion to Plaintiffs' numerous complaints, referral to a magistrate judge is neither necessary nor appropriate.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion should be denied.

Dated: February 13, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Branch Director
Federal Programs Branch

/s/ Nathan M. Swinton

NATHAN M. SWINTON

JOSEPH C. DUGAN

Trial Attorneys

U.S. Department of Justice

Civil Division, Federal Programs Branch

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Attorneys for Defendants

EXHIBIT 1

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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MAHLON KIRWA, et al.,)
)
Plaintiffs,)
)
v.) Civil Action No. 1:17-cv-01793
) The Honorable Ellen Segal Huvelle
UNITED STATES DEPARTMENT OF)
DEFENSE and JAMES MATTIS, in his)
official capacity as Secretary of Defense,)
)
Defendants.)
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DECLARATION OF LIN ST. CLAIR

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

- I am currently the Assistant Deputy for Recruiting, Office of the Assistant Secretary of the Army (Manpower & Reserve Affairs). In this capacity, I am responsible for serving as the Senior Advisor on all matters relating to military accessions and retention for the Assistant Secretary of the Army for Manpower and Reserve Affairs, the Principal Deputy, and the Deputy Assistant Secretary of the Army for Military Personnel. I have oversight responsibilities for the Army’s officer and enlisted accessions and retention programs across all components, to include youth outreach programs (such as JROTC). In this capacity, I serve as the action officer oversight for non-citizen recruiting (MAVNI and Lawful Permanent Residents).
- As part of the Defendants’ obligations to provide bi-weekly status updates to the Court, I have filed three declarations to date stating the current number of requests for Form N-426 certification from MAVNI soldiers and the total number of such requests that have been granted. *See* ECF Nos. 56-1, 62-1, 65-1. Attached to these declarations are spreadsheets entitled

“N-426 Certification Status.” The column titled “Date of Application” refers to the date an administratively complete N-426 certification request was received at the Office of the Chief, Army Reserve (OCAR). The column titled “Date N-426 Uploaded into AMHRR” refers to the date the form is entered into the Soldiers’ Army Military Human Resource Record (AMHRR). Approximately two weeks after a document has been entered into the AMHRR, the Soldier may access it through the Army’s Personnel Electronic Records Management System (iPERMS). The column titled “Date Soldier Notified of Certification (Approval)” refers to the date that OCAR sent an email, with the signed Form N-426 attached, to the email address the soldier provided at Part 4, “Requestor’s Contact Information” of the N-426.

3. The “Date of Application” column uses the date an administratively complete N-426 certification request is received at OCAR because it is the date that the Soldier-provided information on the form has been verified as accurate and complete and all further data entries are to be made by OCAR officials. Additionally, this has proven to be an administratively feasible and accurate method to centrally manage requests that come from more than one thousand soldiers in units dispersed across the Army Reserve.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 13, 2018.



LIN ST. CLAIR

EXHIBIT 2

obtaining a certified Form N-426. Since late December 2017, I have personally assisted more than 500 soldiers with receiving certified N-426s. I have also ensured that a MAVNI soldier who had received a certified Form N-426 during basic combat training (BCT) received the necessary assistance to complete and submit his naturalization application while at BCT.

4. On several occasions I have also responded to individual requests from Jennifer Wollenberg, an attorney with Fried Frank who I understand is representing Plaintiffs in this action. Since December 22, 2017, I have received approximately 50 email messages from Ms. Wollenberg. Ms. Wollenberg contacts me on a variety of issues but the majority include requests to assist individual soldiers in obtaining a certified N-426.

5. Also since December 22, 2017, I have sent more than 200 email messages either directly to Ms. Wollenberg or to an individual MAVNI soldier (with the email address for Kirwa class counsel included on the "cc" line). The majority of these emails are to apprise the soldier and Ms. Wollenberg of the steps I will take to ensure that the soldier receives a certified Form N-426.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 13, 2018.

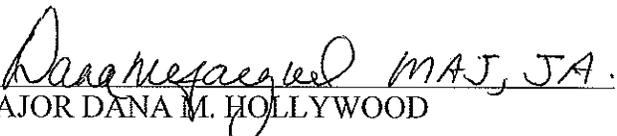

MAJOR DANA M. HOLLYWOOD

EXHIBIT 3

Swinton, Nathan M. (CIV)

From: Swinton, Nathan M. (CIV)
Sent: Tuesday, January 30, 2018 6:35 PM
To: Wollenberg, Jennifer; Dugan, Joseph (CIV)
Cc: Baruch, Douglas W.; LoBue, Joseph
Subject: RE: Kirwa v. DoD

Tracking:	Recipient	Delivery	Read
	Wollenberg, Jennifer		
	Dugan, Joseph (CIV)	Delivered: 1/30/2018 6:35 PM	Read: 1/30/2018 6:35 PM
	Baruch, Douglas W.		
	LoBue, Joseph		

Counsel,

We write in response to your email dated January 29, 2018. As I mentioned in my prior email dated January 24, we have inquired with the Army about the effect of derogatory information on N-426s. The Army has informed us that because nearly all MAVNIs have not completed their security screening before requesting N-426 certification, there should be no derogatory information to report at the time a certification decision is made. Your email quotes statements purportedly made by Major Hollywood, though you have not provided us with the communications in which he supposedly made these statements, and we do not know the date on which they were made or the context in which they arose. In any event, those statements do not reflect the current Army practice or policy requiring completion of security vetting to ascertain whether information is derogatory. Major Hollywood has received guidance to this effect and is standing by to assist any class members who have not received a certified N-426 after requesting one.

Our understanding is that you have alleged (in a communication to Major Hollywood) that there are approximately ten MAVNI soldiers who believe that their N-426s were denied because of derogatory information. In our prior email, we requested that you provide us the names of such MAVNI soldiers so that we may make effective inquiries with the Army. Your email below does not identify any MAVNI soldier or provide us with any specific information, so we renew that request here. Having as much detailed information as possible enables us to make effective inquiries with the Army, and address your clients' concerns to the best of our abilities.

You have requested the names and contact information for Kirwa class members. The Army has agreed to provide this information, which we will do shortly.

Lastly, we oppose your request to refer this case to a magistrate judge, nor do we think such a request is warranted in this case. Defendants have made prompt inquiries in response to various allegations of noncompliance by plaintiffs, many of which were lacking in details. For example, you previously made allegations of non-compliance by email dated January 8, to which we responded in full on January 12. You have not responded to us further about these issues since that time, and your email below does not explain why you believe Defendants' response to be unsatisfactory. Nor have you provided any information to support your assertion that there are "other on-going concerns with Defendants' compliance with the Court's preliminary injunction Order and the Court-approved Notice" which you claim are "obvious." We have consistently responded to Plaintiffs' concerns since the preliminary injunction order was issued, but our ability to assist is limited when you do not provide us with specific information underlying your claims.

For similar reasons, we oppose the appointment of an independent monitor, regardless of which party bears the cost.

Best,

Nate

Nathan Swinton
U.S. Department of Justice
Civil Division, Federal Programs Branch
(202) 305-7667
Nathan.M.Swinton@usdoj.gov

From: Wollenberg, Jennifer [mailto:Jennifer.Wollenberg@friedfrank.com]
Sent: Monday, January 29, 2018 4:45 PM
To: Swinton, Nathan M. (CIV) <NSwinton@civ.usdoj.gov>; Dugan, Joseph (CIV) <jdugan@CIV.USDOJ.GOV>
Cc: Baruch, Douglas W. <Douglas.Baruch@friedfrank.com>; LoBue, Joseph <Joseph.LoBue@friedfrank.com>
Subject: RE: Kirwa v. DoD

Counsel –

We assume you have made inquiry with your contacts at Army and have reviewed any email communications that you want to review involving Major Hollywood. If so, you should understand that the issue is not with only particular class members because Major Hollywood has stated that “derogatory information precludes certification of [a MAVNI soldier’s] N-426” and his understanding is that “an N-426 will not be provided to the very few numbers of MAVNIs for whom derogatory information was found.”

As you must know (since the inquiry resulted in Major Hollywood, the Army legal counsel designated to receive N-426 inquiries, referring the inquiry to you), we had noted to Major Hollywood that we did not understand the rationale for not providing N-426s to these soldiers, unless the soldiers for some reason withdrew their requests. The N-426 form itself clearly contemplates that the certification be completed regardless of whether actual or potential “derogatory” information is identified. Moreover, we understand the Court’s preliminary injunction order to require that the N-426s be completed and returned to requesting soldiers in all instances.

Thus, we ask again that you please explain and clarify Defendants’ position on providing N-426s to MAVNI soldiers found to have so-called “derogatory” information identified in their background checks.

In addition, we again request that Defendants provide us, as class counsel, with a list of the *Kirwa* class members as well as contact information for those class members.

Further, as you should be aware, Judge Huvelle has referred the related *Nio* matter to Magistrate Judge Meriweather for all case management matters and to oversee ongoing compliance and reporting issues. The *Kirwa* Plaintiffs intend to ask the Court to refer this matter to the Magistrate Judge for the same reasons and purposes. Do Defendants consent to that request (unless Defendants instead will agree to a court-appointed independent monitor to be paid for by Defendants, as that is an alternative Plaintiffs are willing to explore)? The issues that Plaintiffs intend to raise in their referral request and then with the magistrate judge include the above outlined issues, the issues raised in our January 8 email, and other on-going concerns with Defendants’ compliance with the Court’s preliminary injunction Order and the Court-approved Notice, all of which are obvious – as we previously explained – from Defendants’ own communications with class members and can be readily located through the email accounts of Major Hollywood and MSG Fale.

Please provide your position with respect to the above no later than COB tomorrow.

Regards,

Jenny

Jennifer M. Wollenberg
Jennifer.Wollenberg@friedfrank.com | Tel: +1 202 639 7278

Fried, Frank, Harris, Shriver & Jacobson LLP
801 17th Street, NW Washington, DC 20006
friedfrank.com

From: Swinton, Nathan M. (CIV) [<mailto:Nathan.M.Swinton@usdoj.gov>]
Sent: Wednesday, January 24, 2018 5:00 PM
To: Wollenberg, Jennifer <Jennifer.Wollenberg@friedfrank.com>; Dugan, Joseph (CIV) <Joseph.Dugan@usdoj.gov>
Cc: Baruch, Douglas W. <Douglas.Baruch@friedfrank.com>; LoBue, Joseph <Joseph.LoBue@friedfrank.com>
Subject: RE: Kirwa v. DoD

Counsel,

We can inquire with our contacts at Army. Do you have any other information with which you can provide us? For example, you did not include your prior email communication(s) with Maj. Hollywood in your message below. It would also assist our inquiry to know the names of class members who have contacted you about this issue.

Best,

Nate

Nathan Swinton
U.S. Department of Justice
Civil Division, Federal Programs Branch
(202) 305-7667
Nathan.M.Swinton@usdoj.gov

From: Wollenberg, Jennifer [<mailto:Jennifer.Wollenberg@friedfrank.com>]
Sent: Wednesday, January 24, 2018 4:31 PM
To: Swinton, Nathan M. (CIV) <NSwinton@civ.usdoj.gov>; Dugan, Joseph (CIV) <jdugan@CIV.USDOJ.GOV>
Cc: Baruch, Douglas W. <Douglas.Baruch@friedfrank.com>; LoBue, Joseph <Joseph.LoBue@friedfrank.com>
Subject: Kirwa v. DoD

Counsel --

Please see the email message from Maj. Hollywood below. We assume that you instructed him to tell us to "contact DOJ" and that you intended that we communicate with you about the referenced issue. If that is not the case, please direct us to the appropriate DOJ personnel.

With respect to the concern raised in the email, we need an explanation for any DoD and/or Army decision not to issue N-426s to soldiers who followed the procedure set forth in the Notice approved by the Court and pursuant to the preliminary injunction. The military's obligation, under the statute and the PI order, is to provide the certification to requesting soldiers, even in those instances in which the Army has identified what it believes to be derogatory information regarding the requesting soldier. Indeed, the form itself requires that any such alleged derogatory information be specified on the form.

As we have received multiple inquiries from class members regarding this issue, and we already have spent several days pursuing this question without success, we need a prompt answer.

Regards,

Jenny

Jennifer M. Wollenberg
Jennifer.Wollenberg@friedfrank.com | Tel: +1 202 639 7278

Fried, Frank, Harris, Shriver & Jacobson LLP
801 17th Street, NW Washington, DC 20006
friedfrank.com

-----Original Message-----

From: Hollywood, Dana M MAJ USARMY USARC HQ (US) [<mailto:dana.m.hollywood.mil@mail.mil>]
Sent: Tuesday, January 23, 2018 3:11 PM
To: Kirwa Class Counsel <kirwaclasscounsel@friedfrank.com>
Subject: RE: List of MAVNIs with Derogatory Information

Good Afternoon Jenny,

I apologize for not responding sooner on your inquiry below.

I have been instructed to ask you to contact DOJ with respect to the issue of certifying N-426s for those enlistees who have completed the security vetting and have derogatory information.

Very Respectfully,

MAJ Dana Michael Hollywood
Administrative Law Attorney
United States Army Reserve Command
4710 Knox St, Fort Bragg, NC 28310 (Bldg. 8-1808)

Phone (Office): [REDACTED]
Phone (DSN): [REDACTED]
Phone (Cell): [REDACTED]
Fax: [REDACTED]
Email: dana.m.hollywood.mil@mail.mil

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