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F.#2017V1584

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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CONNOR CULIVER, DAVID BURKHARDT,
MICHAEL HECKMULLER and
GAVIN YINGLING,

Plaintiffs,

- against -

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT
OF TRANSPORTATION, UNITED STATES
MERCHANT MARINE ACADEMY,
JAMES A. HELIS and JOHN DOES 1-10,

Defendants.

DECLARATION OF
JAMES A. HELIS,
REAR ADMIRAL, UNITED
STATES MARITIME SERVICE,
SUPERINTENDENT,
UNITED STATES MERCHANT
MARINE ACADEMY

Civil Action No.
17 CV 3514

(Wexler, J.)
(Locke, M.J.)

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RADM James A. Helis hereby declares and states as follows:

1. I am the Superintendent at the United States Merchant Marine Academy at Kings Point, New York. I have held this position since July 24, 2012. As Superintendent, I am responsible for all programs, activities and facilities at the Academy, including the academic and regimental programs. I submit this declaration in support of the opposition to Plaintiffs' Order to Show Cause.
2. The Academy is a Federal service academy that educates and graduates licensed Merchant Marine officers of exemplary character who serve America's marine transportation and defense needs in peace and war. Known for its rigorous academic program, the Academy requires more credit hours for a baccalaureate degree than any other Federal service academy.
3. After a rigorous admission process, applicants accepted to the Academy receive free tuition, quarters, subsistence, limited medical and dental care, and certain travel expenses. 46 CFR 310.62(a). In exchange, after successfully beginning his or her junior year, a Midshipman is obligated, upon graduation, to either (1) work five years in the United States maritime industry with eight years of service as an officer in any reserve unit of the armed forces or (2) serve five years active duty in any of the nation's armed forces. 46 U.S.C. § 51306(a); 46 CFR § 310.58(a)(5).

4. An individual who fails to graduate after becoming obligated or who fails to fulfill the obligation after graduation may be ordered by the Secretary of Defense to active duty or, alternatively, the Maritime Administrator may recover from the individual the cost of the education provided by the Federal government. 46 CFR 310.58(e). The estimated cost for a Midshipman attending the Academy from 2012-2016 is \$262,000. The estimated cost for 2013-2017 has not yet been calculated.

5. A Midshipman will graduate from the Academy upon successfully meeting the following requirements: (1) completing the required course of study; (2) fulfilling the requirements for a license as an officer in the U.S. merchant marine; (3) applying for, and accepting if tendered, an appointment as a commissioned officer in any U.S. Armed Forces reserve unit; and (4) complying with the midshipman disciplinary and honor systems. 46 CFR 310.65(b)(1).

6. Midshipmen who master the Academy's demanding curriculum and meet the other requirements set forth in Paragraph 5, above, earn a unique combination of credentials: (1) a highly-regarded Bachelor of Science degree; (2) a U.S. Coast Guard (USCG) license either as third officer or third assistant engineer; and (3) if proffered, an officer's commission in the U.S. Armed Forces Reserve. 46 CFR 310.65(b)(2).

7. The Superintendent is delegated authority to issue all regulations necessary for the accomplishment of the Academy's mission. 46 CFR 310.67. Pursuant to this delegation, the Superintendent issues policies and directives, called Superintendent Instructions or Superintendent Notices, which govern all aspects of the Academy's programs and activities.

8. Midshipmen who fail to meet one or more of the requirements set forth in Paragraph 5, above, are placed on deferred graduate status pursuant to Superintendent Instruction (SI) 6335.1 (2011-06), attached as Exhibit A. This SI superseded a similar policy dating from 2005. To my knowledge, this is the first time any Midshipman has legally challenged being placed on deferred graduate status.

9. For each Academy graduation that has occurred during my tenure as Superintendent (2013-2017), I have placed Midshipmen on deferred graduate status pursuant to this policy. This year, six Midshipmen have been placed on deferred graduate status for academic reasons, ten for conduct reasons, one for physical fitness reasons and one for medical reasons. Twenty-four Midshipmen were placed on deferred graduate status in 2016, sixteen in 2015, eight in 2014 and 20 in 2013. With the exception of one Midshipman from 2014, who was disenrolled for misconduct, all other Midshipmen placed on deferred graduate status for the years 2013-2016 ultimately graduated.

10. Previous Midshipmen placed on deferred graduate status for disciplinary reasons have been at various stages in the administrative process, depending on when the potential misconduct was discovered. Some have had the charges against them fully adjudicated prior to graduation and are placed on deferred graduate status because the discipline imposed cannot be completed prior to graduation. Some are still in the investigatory or hearing stage and are placed on deferred graduate status because the investigation or hearing cannot be completed prior to graduation. For example, in 2015, a senior Midshipman was charged with misconduct the night

before graduation and immediately placed on deferred graduate status. Pursuant to the SI on deferred graduate status, this Midshipman, like all Midshipmen on such status, did not walk at graduation. After graduation, this Midshipman was found in violation of the Midshipman Regulations, served his discipline and ultimately received his diploma, USCG license and commission.

11. Pursuant to Department of Transportation (DOT) Order 8000.8, attached as Exhibit B, when the Academy becomes aware of potential fraud, waste, mismanagement, or abuse, or potential criminal activity, whether by Federal employees or Midshipmen, the Academy notifies the local investigatory unit of the Office of Inspector General (OIG) of the DOT. If the OIG elects not to investigate, then the Academy conducts an administrative investigation and, if warranted, takes appropriate administrative action against the employees or Midshipmen.

12. If the OIG elects to investigate, then the Academy defers to the OIG until it completes its investigation. Once complete, the OIG shares its evidence with the Academy, which the Academy then reviews to determine if there is sufficient cause to proceed with administrative action, and if so, follows its documented procedures for such action.

13. On or about February 14, 2017, and consistent with the DOT policy referenced in Paragraph 11, above, the OIG commenced an investigation of sexual misconduct by members of the Academy's Men's soccer team that allegedly occurred during travel to an away game in September 2016, of which the Academy had only then learned from unrestricted sources. Per the DOT policy referenced in Paragraph 11 above, the Academy refrained from conducting an administrative investigation.

14. Given the seriousness of the allegations under investigation, even if criminal charges are not proffered against any of the subjects under investigation, one or more of them could face Class I charges under the Academy's Midshipman Regulations (student code of conduct), attached as Exhibit C, including but not limited to the following: hazing; conduct which reflects discredit on the Academy and the Regiment of Midshipmen; engaging directly or indirectly in physical violence towards another person; and/or sexual misconduct. In addition, one or more of the Plaintiffs could face charges for violating the Academy's Sexual Assault, Dating Violence, Domestic Violence, Stalking, Prevention Education, and Response Policy (SI 2016-02), attached as Exhibit D, If proven by a preponderance of the evidence, Class I and sexual assault policy violations can result in discipline up to and including disenrollment from the Academy. The Executive Board hearing procedures for Class I violations are set out in Superintendent Notice 2016-01, attached as Exhibit E. The hearing procedures for sexual assault violations are set forth in the Procedures for Superintendent's Disciplinary Hearing in the Case of Sexual Assault/Harassment, attached as Exhibit F.

15. As one of the five federal service academies, the Academy has a significant interest in ensuring that it bestows a diploma on an individual who has not only complied with all its graduation requirements, but also is of exemplary character. The Academy owes it to the taxpayers who fund the education of the Midshipmen at the Academy to only graduate those who have met all graduation requirements, and who will serve their obligation with distinction. The

Plaintiffs, as of this date, may not have met all graduation requirements, and it is the Academy's responsibility to ensure that they do. Thus, the Academy placed the Plaintiffs on deferred graduate status to protect the Academy's interests that all graduates are fully qualified and capable of serving as officers and leaders of character in the Merchant Marine and Armed Forces while not permanently harming the Plaintiffs. It is not a punishment nor a suspension; instead, it is an administrative step toward resolving potential misconduct charges.

16. I made a deliberate decision to allow the Plaintiffs to complete the term and take their USCG license exam to expressly insure that, when and if it was determined that they had not engaged in any criminal activity or violated any Academy rules and regulations that would warrant discipline, they could immediately be issued their diplomas and their USCG licenses. I also made a deliberate decision to hold off informing the Plaintiffs that they were being placed on deferred graduate status until after they had taken the USCG license exam so as to not impede their studies. On June 2, 2017, upon completion of their required course of study and USCG license exam, I placed Plaintiffs in deferred graduate status.

17. Unless a Midshipman admits to a violation of the Midshipman Regulations, the Academy always conducts investigations for all alleged disciplinary violations before proceeding with disciplinary proceedings. At the OIG's written request, the Academy has refrained from conducting an administrative investigation related to the alleged assaults to avoid unduly impacting the OIG investigation. Thus, the Academy is awaiting the results of the OIG investigation to determine whether administrative actions are warranted.

18. I have suspended the Academy's soccer program pending resolution of the matters under investigation by the OIG.


19. To my knowledge, the Academy has never revoked a diploma, and the Academy currently has no procedure to do so. As Academy graduates, the Plaintiffs will either sail in the Merchant Marine and at sea for months at a time, or go active duty (if commissionable) and be deployed overseas. This would make it difficult, if not impossible, for the Academy to conduct a hearing post-graduation for conduct that occurred prior to commencement.

20. Moreover, at graduation, in addition to receiving a diploma, graduates receive a Coast Guard license and a commission in a reserve or active duty branch of the armed services. The Academy does not have the statutory authority to revoke Coast Guard licenses, and the Academy has been advised by a representative from the National Maritime Center, which oversees the issuance of licenses, that it would be preferable to withhold the Plaintiffs' licenses than to have to revoke it later. Also, I have been informed by a representative of the U.S. Navy that, if the Plaintiffs graduate while still under investigation, they will not be commissioned as officers as it is the policy of the Navy Training Systems Center to not commission an individual who is under formal investigation for any infraction which may lead to disenrollment on disciplinary grounds.

21. Allowing Plaintiffs to graduate on the condition that their degrees could be revoked if they are ultimately found in violation of the Midshipman Regulations or the Academy's sexual assault SI would effectively nullify the SI on deferred graduate status as all Midshipmen placed on such status would make the same demand. This places a significant administrative burden on the Academy. It would also create a disincentive for Midshipmen to successfully meet all

graduation requirements prior to graduation as they would still get their diploma, USCG license and commission. Even if the Academy ultimately revoked the degree, as stated previously, the Academy does not have the authority to revoke the USCG license or to decommission an individual from reserve or active duty in the armed service. Thus, it would also create an administrative burden for the Coast Guard and the Department of Defense, each of which would have to conduct its own investigation and hold a hearing to revoke and/or decommission.

Dated: Kings Point, New York
June 15, 2017



JAMES A. HELIS
Rear Admiral
United States Maritime Service
Superintendent, United States Merchant
Marine Academy