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letter of censure - in lieu of courts-martial trial - for officers conduct while a prisoner

- Sect. rejected Bd finding that censure procedures violated navy regulation

see pg. 801 F.2d at 496

801 F.2d 492 printed in FULL format.

EDISON W. MILLER v. JOHN F. LEHMAN, JR., Appellant

No. 85-5328 Columbia (D.C. Civil Action No. 84-8417)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

255 U.S. App. D.C. 278; 801 F.2d 492; 1986 U.S. App. LEXIS 30681

March 14, 1986, Argued
September 19, 1986

COUNSEL: [**1]

E. Roy Hawkens, Attorney, Department of Justice, with whom Richard K. Willard, Acting Assistant Attorney General, Joseph E. diGenova, United States Attorney, and John F. Cordes, Attorney, Department of Justice, were on the brief, for Appellant. R. Craig Lawrence and Mitchell R. Berger, Assistant United States Attorneys, also entered appearances for Appellant.

Richard L. Swick for Appellee. David H. Shapiro also entered an appearance for Appellee.

JUDGES: Edwards, Scalia, and Buckley, Circuit Judges. Opinion for the court filed by Circuit Judge Buckley. Opinion concurring in the result filed by Circuit Judge Edwards.

OPINIONBY: BUCKLEY

OPINION: [*493] BUCKLEY, Circuit Judge:

The government appeals a decision of the district court ordering Secretary of the Navy John Lehman to expunge a letter of censure from the service record of Edison W. Miller, a retired Marine Corps colonel, 603 F. Supp. 164. The letter was issued by one of Lehman's predecessors, John Warner, and concerned Miller's conduct while held as a prisoner of war in North Vietnam.

The court reasoned that Secretary Lehman acted arbitrarily in rejecting a finding of the Board for Correction of Naval Records ("BCNR" or [**2] "Board") that expungement was required because the procedures used to censure Miller were unjust. The court further reasoned that the Secretary [*494] should have found that the censure was legally erroneous because it violated the twin limitations on secretarial censures that they be nonpunitive in nature and relate only to minor offenses.

We conclude that the district court's decision misconstrues controlling legal principles and therefore must be reversed. We nevertheless find that, because the determinations of both the Secretary and the BCNR concerned only the procedures used to censure Miller, the merits of the censure have never been reached. Accordingly, we remand this case to the district court with instructions that it be remanded to the BCNR for a determination as to whether Miller's conduct warranted censure by the Secretary of the Navy.

I. FACTUAL BACKGROUND

Edison W. Miller was shot down while flying a combat mission over North Vietnam on October 13, 1967. He was captured by the North Vietnamese and imprisoned until February 13, 1973. Upon Miller's return to the United States, Admiral James Stockdale, the most senior naval officer imprisoned in North Vietnam, [**3] formally preferred charges against Miller and several other former prisoners concerning their conduct while in captivity. Among the charges against Miller were soliciting fellow prisoners to mutiny, refusing to obey lawful orders, accepting special favors from the enemy, and informing on fellow prisoners.

Secretary of the Navy John Warner assumed personal control of Miller's case. Warner interviewed nineteen potential witnesses (including several potential defense witnesses identified by Miller's lawyers), reviewed reports on the case by the Naval Investigative Service and the Navy Judge Advocate General, and met with Miller's lawyers. On October 27, 1973, Warner publicly announced his decision to issue an administrative letter of censure to Miller in lieu of having him tried by a court-martial. The letter of censure, a copy of which was placed in Miller's service record, stated in pertinent part:

I have reached the judgment that your conduct during certain of the periods when you were a prisoner of war in North Vietnam failed to meet those high standards which are required of an officer in the Armed Forces of the United States. You placed your personal comfort and welfare [**4] above that of your fellow prisoners of war. But of greater seriousness, your conduct, at times and for extended periods, was severely detrimental to both the welfare and morale of your fellow prisoners, many of whom had been in captivity with you for a number of years.

Based upon the foregoing, and pursuant to section 0102b of the Manual of the Judge Advocate General, you are hereby administratively censured.

Although the charges preferred against you do warrant the convening of a pretrial investigation under Article 32, Uniform Code of Military Justice, and thereafter possible trial by general court-martial, I have decided to dismiss those charges. I feel that further proceedings, with their attendant publicity, would subject many former prisoners of war and their families, as well as your own family, to additional serious disruption and hardship disproportionate to any national interest which could conceivably be served thereby. I make this decision with a view to the best interests of the United States Naval Service and the community of returned prisoners of war and their families.

Administrative Record ("A.R.") at 147-48.

At a subsequent press conference, Warner [**5] elaborated on his reasons for dismissing the charges against Miller. Among other things, he stated that "administratively I could achieve the same thing as the courts-martial and I thereby removed the inconvenience to perhaps 100 or more from being brought back from all corners of the United States to participate in a long trial." A.R. at 40.

Upon dismissal of the charges, Miller received a promotion and then retired for medical reasons, receiving full pension and [*495] medical disability benefits. Miller also availed himself of his right under section 0102b of the Manual of the Judge Advocate General to have a written reply to the letter of censure included in his service record.

II. SUBSEQUENT PROCEEDINGS

In September 1974, Miller applied to the BCNR for expungement of the letter of censure from his record. The Board's authority to recommend modifications of naval records derives from 10 U.S.C. @ 1552(a) (1982), which provides in relevant part:

The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may [**6] correct any military record of that department when he considers it necessary to correct an error or remove an injustice. . . . Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

This statute authorizes relief if the Secretary determines that a serviceman has suffered from either an "error" or an "injustice." See Sanders v. United States, 219 Ct. Cl. 285, 594 F.2d 804, 812 (1979).

Miller appeared before the Board in May 1977 and January 1980 to testify in support of his application. In October 1981 the Board unanimously recommended to the Secretary of the Navy that the letter of censure be expunged from Miller's record. This recommendation was based on the Board's conclusion that the procedures used to issue the censure constituted an "injustice" within the meaning of section 1552(a). Specifically, the Board found that Miller improperly had been denied access to the "charge sheet" setting forth the precise crimes of which he was accused and identifying potential witnesses against him. In addition, the Board found that the report of the Naval Investigative Service on Miller's case was wrongfully [**7] withheld from him, that he was not permitted to confront his accusers, and that Secretary Warner and the Naval Investigative Service both declined to interview him despite his requests for an opportunity to explain his conduct. In view of these findings, the Board concluded that Miller had been "deprived of the fundamental fairness traditionally accorded a member of the Naval Service." A.R. at 6.

The Board emphasized that its recommendation did not rest on an evaluation of the merits of Miller's censure. In its report to the Secretary, the Board stated:

The findings of the Board are specifically directed to the procedures used to censure Petitioner [Miller] . . . . What Petitioner did or did not do in confinement is immaterial to the resolution of the issue, and the Board specifically declines to make findings as to whether or not Petitioner engaged in misconduct while a prisoner of war.

Id. at 6-7. The Board also made clear that its recommendation was based

solely on a finding of "injustice" under section 1552(a) and did not rest on a finding of "error" within the meaning of that section. Indeed, the Board reported to the Secretary that the procedures [**8] used to censure Miller "may well be legally unobjectionable." Id.

In March 1982, Assistant Secretary of the Navy John Herrington, acting on behalf of Secretary Lehman, rejected the recommendation of the BCNR. Harrington offered the following explanation of the Secretary's decision:

The Board's report in this case has been carefully reviewed. It does not contain sufficient evidence to support the Board's conclusion that the petitioner has suffered an injustice. The procedures used by the Secretary in administratively censuring the petitioner have not been shown to be incorrect nor has evidence been made a matter of record which would refute the Secretary's long recognized authority to so act. Further, the record does not reflect that such action by the Secretary should have been governed by the Uniform Code of Military Justice . . . Art. 15, or that the petitioner [*496] was deprived of due process to the extent that corrective action is warranted.

Id. at 8. Shortly thereafter Miller was notified that the Secretary's decision constituted a final adjudication of his application for expungement under section 1552(a). Id. at 1.

Miller thereupon [**9] brought an action in district court challenging the Secretary's refusal to carry out the recommendation of the BCNR. Considering the case on cross-motions for summary judgment, the district court found in favor of Miller in January 1985. The court ruled that Miller was entitled to expungement on both of the grounds for relief set forth in section 1552(a). First, the court held that the Secretary had abused his discretion in rejecting the Board's finding that Miller's treatment constituted an injustice. The court reasoned that because the Board's finding was based on a determination that the procedures used to issue the censure violated "traditional standards of fair play in the Navy," the Secretary was required to accept the Board's recommendation unless he could meet the "heavy burden" of "show[ing] in his written decision that the Board was wrong in its assessment of Navy tradition." Miller v. Lehman, 603 F. Supp. 164, 172 (D.D.C. 1985). Second, the court held that the Secretary acted arbitrarily in not considering whether issuance of the censure was "legal error." The court then undertook its own evaluation of this issue and concluded that the Secretary should have found [**10] that there was legal error. The error allegedly arose from the censure's contravention of two limitations that the district court found to be applicable to secretarial censures: (1) that such censures not be "punishments in disguise," and (2) that they be "reserved for the most minor of offenses." Id. at 173.

The government appeals from this decision.

III. ANALYSIS

For the reasons stated below, we disagree with the district court's conclusion that the Secretary was required to find that Miller's censure was both unjust and legally erroneous under section 1552(a). Nevertheless, because neither the Secretary nor the BCNR has considered whether Miller's conduct warranted censure, we remand the case with instructions that the Board make a

merits determination on Miller's application for expungement.

A. Injustice

Both parties to this appeal agree that the Secretary's denial of an application for correction of naval records is a final agency action subject to review under the standards of the Administrative Procedure Act. See Neal v. Secretary of the Navy, 639 F.2d 1029, 1037 (3d Cir. 1981). Accordingly, both parties have focused on whether his decision was [**11] "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and whether it was supported by "substantial evidence." 5 U.S.C @ 706(2)(A), (E). This in turn has led the parties to attempt to show that the factual findings underlying the Board's conclusion that Miller was treated unjustly either were or were not supported by the Administrative Record. To this end, the parties point to conflicting indications in the record regarding whether Miller was notified of the charges against him and whether he was afforded an opportunity to respond to the charges.

We think these efforts are misplaced, for we do not read the Secretary's decision as a rejection of the Board's findings that Miller had neither notice of the charges against him nor an opportunity to respond to the charges. Rather, we read the Secretary's decision as finding that Miller was afforded all of the procedural due process to which he was entitled. Thus, we believe that the disagreement between the Secretary and the Board concerns not how Miller was treated, but rather whether the treatment he received violated naval tradition.

Neither the Board nor the Secretary cites any authority in [**12] support of their conclusions regarding naval tradition. We recognize that there are a number of cases suggesting that findings of the Board are [*497] entitled to deference by the Secretary because of section 1552(a)'s mandate that the Secretary "act[] through boards of civilians" when correcting military records. See, e.g., Weiss v. United States, 187 Ct. Cl. 1, 408 F.2d 416, 421-22 (1969); Proper v. United States, 139 Ct. Cl. 511, 154 F. Supp. 317, 325-26 (Ct. Cl. 1957). Accord Neal v. Secretary of the Navy, 639 F.2d at 1043 n. 13. In the instant case, however, we conclude that the Secretary did not abuse his discretion in rejecting the Board's finding that the procedures used to censure Miller violated naval tradition.

It must be emphasized that the Secretary is by no means a cipher in the process of correcting naval records. Though section 1552(a) directs the Secretary to act through a civilian board, it leaves no doubt that the final decision is to be made by him: "The Secretary of a military department . . . may correct any military record of that department when he considers it necessary to correct an error or remove an injustice." 10 U.S.C. @ [**13] 1552(a) (emphasis added). See also 32 C.F.R. @ 723.7 (1985) (recommendations of the BCNR "will be forwarded to the Secretary of the Navy who will direct such action in each case as he determines to be appropriate . . ."). Moreover, members of the Board are appointed by the Secretary and serve at his pleasure. See id. @ 723.2(a). We therefore cannot agree with the district court's apparent conclusion that findings of the Board are binding on the Secretary unless shown to be unsupported by substantial evidence. We conclude instead that the substantial evidence standard applies only to judicial review of final agency actions, see 5 U.S.C. @ 704, which in the context of applications for correction of military records means review of decisions by the Secretary. See 10 U.S.C.

@ 1552(a).

In this case, the failure of the Board to cite any authority in its decision leaves us with no basis upon which to conclude that the Secretary's finding with respect to naval tradition was arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence. We therefore hold that the district court erred in reversing the Secretary's determination that the procedures [**14] used to censure Miller were not unjust.

B. Legal Error

As an initial matter, we disagree with the district court's ruling that the Secretary failed to adequately explain his finding that Miller's censure was not legally erroneous. While the Secretary could have provided a more detailed explanation of his reasoning, we are required to "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Bowman Transportation, Inc. v. Arkansas-Best Motor Freight System, Inc., 419 U.S. 281, 286, 42 L. Ed. 2d 447, 95 S. Ct. 438 (1974). In addition, "if the necessary articulation of basis for administrative action can be discerned by reference to clearly relevant sources other than a formal statement of reasons, we will make the reference." Environmental Defense Fund, Inc. v. EPA, 150 U.S. App. D.C. 348, 465 F.2d 528, 537 (D.C. Cir. 1972).

In this case, the Secretary's decision reveals a number of conclusions regarding the correctness of the procedures used to censure Miller, including: (1) the Secretary had authority to issue the censure, (2) the Secretary was not required to follow the procedures set forth in Article 15 of the Uniform [**15] Code of Military Justice, 10 U.S.C. @ 815, relating to nonjudicial punishments, and (3) Miller was not deprived of due process to the extent that corrective action was warranted. All three of these conclusions are directly supported by a legal analysis of Miller's claims provided to the BCNR by the Navy Judge Advocate General in June 1976. See A.R. at 55-61. Under these circumstances, we hold that the Secretary adequately considered whether there was legal error and sufficiently explained his reasons for concluding that there was not.

The district court's independent analysis of the legal error question resulted in a finding that the censure was erroneous because it violated two limitations applicable [*498] to secretarial censures: (1) that such censures be nonpunitive in nature, and (2) that they relate only to minor offenses. The district court deemed these limitations applicable to secretarial censures based on its analysis of the military justice system. The court noted that, in increasing order of seriousness, there are three tiers of discipline in the military: nonpunitive measures, nonjudicial punishment, and courts-martial. The court reasoned that the Secretary's [**16] authority to issue censures derives from the authority of officers to use nonpunitive measures, and therefore such censures are subject to limitations governing use of nonpunitive measures, including that such measures truly be nonpunitive and that they be reserved "for the most minor of offenses." Miller v. Lehman, 603 F. Supp. at 173. The court ruled that Miller's censure violated the first limitation because the language of the censure and Secretary Warner's comments to the press after issuing it revealed an intent to punish Miller. The court found the second limitation violated because the underlying charges against Miller were very serious. Id.

The fundamental flaw in the district court's analysis is the assumption that the Secretary's authority to censure naval personnel is based on the provision authorizing military commanders to use nonpunitive measures, paragraph 128c of the Manual for Courts-Martial, United States ("MCM") (1969). n1 In fact, the authority of the Secretary to issue censures is inherent in his office. See 28 Op. Atty. Gen. 622, 625 (1911) ("the Secretary of the Navy may, within his discretion, when he believes it for the good of the service, [**17] send communications to subordinate officers which may be in the nature of a reprimand. This right is necessarily vested in him as chief officer of that department. . . ."). This authority has been recognized since the earliest days of the Republic, see, e.g., 22 Cong. Rec. 2468-69, 2471-72 (1891) (citing instances of secretarial reprimands between 1799 and 1890), and is an essential instrument for maintaining discipline and protecting the integrity of the service.

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n1 The MCM is a compilation of Defense Department regulations issued pursuant to the Uniform Code of Military Justice ("UCMJ"). Paragraph 128c of the MCM provides as follows:

c. Nonpunitive measures. Article 15 [of the UCMJ, governing nonjudicial punishment] and this chapter [XXVI, concerning nonjudicial punishment] do not apply to, include, or limit the use of those nonpunitive measures that a commanding officer or an officer in charge is authorized and expected to use to further the efficiency of his command or unit, such as administrative admonitions, reprimands, exhortations, disapprovals, criticisms, censures, reproofs, and rebukes, written or oral, not imposed as punishment for a military offense. These nonpunitive measures may also include, subject to any applicable regulations, administrative withholding of privileges.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - -
[**18]

The unique nature of secretarial censure is confirmed by the special provision for such censure in the Manual of the Judge Advocate General ("MJAG") (1970). Unlike all other forms of censure, which are discussed in section 0102a of the MJAG, secretarial censure is treated in section 0102b. n2 Significantly, section 0102b makes [*499] clear that, unlike most other forms of censure, secretarial censure is exempt from the provisions of Article 15 of the UCMJ, as well as the appeal provisions of the MCM.

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n2 The MJAG is a compilation of Navy Department regulations issued pursuant to the MCM and the UCMJ. Section 0102 of the MJAG provides in pertinent part as follows:

0102 LETTERS OF CENSURE

a. General. "Censure" is a generic term applicable to adverse reflection upon or criticism of an individual's character, conduct, performance or military appearance. Censure may be punitive or nonpunitive. Punitive censure is imposed as commanding officer's nonjudicial punishment or as the result of a

sentence by court-martial. In increasing order of severity, there are two degrees of punitive censure, namely, "admonition" and "reprimand." Nonpunitive censure is provided for in paragraph 128, MCM and in section 0101c. When imposed upon officers, punitive admonition or reprimand is required to be by written communication. If imposed upon enlisted personnel, punitive admonition or reprimand may be by either oral or written communication. Copies of punitive letters of admonition or reprimand, unless withdrawn or set aside, will be filed in the official records of the individuals to whom they are addressed and recorded in departmental records. As provided in section 0101i, once a letter of admonition or reprimand has been received by the individual to whom it is addressed, it may not be increased in severity or withdrawn to impose a more severe punishment. . . .

b. Administrative letters of censure by the Secretary of the Navy. In addition to the censures discussed in section 0102a, the Secretary of the Navy may, by means of a written communication, administratively censure persons in the naval service without reference to Article 15, UCMJ. Unless otherwise directed, a copy of the communication will be filed in the official record of the person censured and recorded in departmental records. The provisions of Article 15, UCMJ, chapter XXVI, MCM, and sections 0101 and 0102 of this Manual (including the right of appeal) are not applicable to administrative censure by the Secretary of the Navy. However, if the person censured is an officer and a copy of the communication is to be filed in his official record and recorded in departmental records, the officer being censured may submit such official statement as he may choose to make in reply. Any such reply shall be couched in temperate language and shall be confined to pertinent facts. Opinions shall not be expressed nor the motives of others impugned. Replies shall not contain countercharges.

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[**19]

It follows that the Secretary's authority to issue censures is sui generis; the fine analytical distinctions that are recognized with respect to other forms of military discipline have no meaning when applied to secretarial censure. Such censure is neither a "nonpunitive measure" within the meaning of paragraph 128c of the MCM nor a punitive sanction of the type that can be imposed as nonjudicial punishment or as the judgment of a court-martial. In addition, the distinction recognized in section 0102a of the MJAG between punitive and nonpunitive censure cannot properly be applied to secretarial censure. The district court therefore erred in concluding that secretarial censure is subject to the limitations that govern nonpunitive measures imposed under paragraph 128c of the MCM.

When we look beyond the district court's legal analysis to considerations of policy, we remain convinced that the two limitations imposed on secretarial censure by the district court are not only without support in law or tradition, but would render administrative censures meaningless as instruments of military discipline.

With respect to the requirement that secretarial censure be nonpunitive, [**20] we cannot accept the district court's suggestion that subjective harm to a person censured can render a secretarial censure impermissibly punitive. While a Secretary's censure cannot "be regarded in the nature of a punishment"

within the meaning of Navy regulations defining punishable offenses and assigning sanctions for those found guilty of them, 28 Op. Atty. Gen. at 625, it would be naive to believe that the Secretary of the Navy can censure a subordinate without the subordinate feeling some form of public or private embarrassment. If censure did not engender feelings of humiliation and shame, it would be of no use as a disciplinary tool. Creating such feelings has been an objective of secretarial censure ever since its first recorded use in 1799, and it will undoubtedly remain an objective for so long as Congress and the President allow the Secretary to issue censures. To hold that the Secretary may not censure subordinates if a consequence would be public or private discomfort would preclude the use of secretarial censure in virtually all cases.

The district court's related suggestion that the intent of the Secretary can serve as a guide in determining when censure is impermissibly [**21] punitive suffers from the same flaw. If the Secretary were permitted to censure subordinates only when he had no punitive intent, he would never be able to issue censures, for censure is always motivated at least in part by an intent to punish. A Secretary utterly lacking such an intent and desiring only to advise subordinates that they have acted improperly would choose a less harsh means of communicating his displeasure. Because secretarial censure is an extremely useful administrative tool, we hold that the district court erred in adopting a limitation that would effectively prevent its use.

[*500] Similar reasoning leads us to reject the second limitation imposed by the district court. If the Secretary were permitted to censure subordinates only for "the most minor of offenses," he would never issue censures, for he must attend to far more important matters than minor infractions by naval personnel. In order for censure to be a meaningful tool in the hands of the Secretary, it must be available to him in cases important enough to command his attention. The Secretary's authority to reprimand subordinates for serious acts of misconduct has been recognized at least since [**22] 1799, see 22 Cong. Rec. 2468-69, 2471-72 (1891), and there is no reason why he should be stripped of that authority today.

Viewed against the record of secretarial censures over the last two centuries, it is clear that the circumstances surrounding Miller's censure are not without precedent. While we can reach no conclusions as to whether the facts of this case justified issuance of the censure, the public nature of the censure and the seriousness of the underlying charges are consistent with past practice. We accordingly hold that Miller's censure was not legally erroneous for either of the reasons advanced by the district court. Because we conclude that the district court's findings with respect to both injustice and legal error were erroneous, we reverse the court's order requiring the Secretary to expunge Miller's censure.

C. Merits of Miller's Application

While we cannot concur in the reasons articulated by the district court for reversing the Secretary's decision, we nevertheless conclude that this case must be remanded to the Department of the Navy for further proceedings. Miller's application for expungement clearly sought review of both the merits of [**23] his censure and the procedures used to issue it. Nevertheless, both the Secretary and the BCNR directed their attention exclusively to matters of procedure, and neither reached the question of whether Miller's conduct while

in captivity warranted a secretarial censure. Under these circumstances, the Secretary was required upon rejecting the Board's procedural findings to remand the case to the Board for adjudication of Miller's remaining claims.

Colonel Miller has waited nearly twelve years for a ruling on whether he deserved to be censured. In order to give him that ruling, we remand this case to the district court with instructions that it be remanded to the BCNR for a merits determination.

Reversed and remanded.

Student in NROTC, used drugs, ordered out of NROTC, + to enroll as enlisted after graduation -

- Sect. rejected BD ~~drain~~ recommendation to not order enlistment

see pg. 466

597 F. Supp. 463 printed in FULL format.

Paul M. KOLESA, Plaintiff, v. John F. LEHMAN, Jr., Secretary of the Navy, Defendant

No. 81-CV-545

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

597 F. Supp. 463; 1984 U.S. Dist. LEXIS 21854

November 20, 1984

DISPOSITION: [**1]

Defendant's motion is granted, and the Clerk is directed to enter summary judgment for the defendant.

COUNSEL: John C. Scholl, Utica, New York, for Plaintiff.

Frederick J. Scullin, Jr., U.S. Atty., Syracuse, New York, Commander Donald M. Hill, Dept. of the Navy, Alexandria, Virginia, for Defendant, Joseph A. Pavone, Asst. U.S. Atty., Syracuse, New York.

JUDGES: McCurn, District Judge.

OPINIONBY: McCURN

OPINION: [*463] MEMORANDUM-DECISION AND ORDER

McCURN, District Judge.

Plaintiff Paul M. Kolesa commenced this action in May of 1981, challenging an order of the Secretary of the Navy whereby Kolesa was disenrolled from the Naval Officers' Training Corps ("NROTC") program and directed to commence two years active duty in the Navy as an enlisted man. Presently before the court is the Secretary's motion for entry of final order of dismissal or in the alternative for summary judgment. For reasons set forth herein, the court grants summary judgment for the Secretary.

[*464] Background

The events that preceded Kolesa's commencement of this action are set forth in some detail in this court's prior decision, Kolesa v. Lehman, 534 F. Supp. 590, 591-93 (NDNY 1982). Familiarity [**2] with the court's prior decision is assumed. Summarized, in 1977 Kolesa executed an NROTC Scholarship Service Agreement in which he agreed to enlist in the Naval Reserve for a period of six years in exchange for a college education at the Navy's expense. As part of the agreement, Kolesa acknowledged that "if I fail to complete the four year course of instruction . . . I may be ordered to active duty by the Secretary of the Navy to serve in an enlisted status for a period not to exceed four years." In addition, Kolesa executed a drug usage statement in which he denied ever having used either marijuana or other stimulants, and forswore "the abuse of drugs both now and in the future."

In September of 1980, during a pre-commissioning physical examination, Kolesa informed the examining doctor that he had tried marijuana, hashish, and an over-the-counter stimulant. These admissions were reported to NROTC authorities, and in December Kolesa received notice that a Board of Review would be convened "to investigate the alleged use of illegal drugs and recommend to the professor of Naval Science a proper course of action."

Allegedly acting upon the prior advice of Lt. Ballard, one of the Review [**3] Board Members, Kolesa submitted a written statement to the Board in which he admitted having "tried" marijuana, but represented that "this experimentation is now in my past. . . ."

The Board of Review thereafter issued a decision in which it found that Kolesa had used illegal drugs, and that Kolesa had "acknowledged that he made a false statement while being processed for a scholarship during his sophomore year in that he indicated no prior use of illegal drugs." The Board then recommended that "based upon his use of illegal drugs and his marginal military performance that he be disenrolled from the NROTC Program and ordered to active duty upon completion of his degree in May of 1981." On February 27, 1981, the Secretary affirmed the Board's recommendation that Kolesa be disenrolled, and ordered him to report for two years active duty as an enlisted man, no later than May 31, 1981.

Kolesa then commenced this action and obtained a temporary restraining order, which has been continued by written consent of the parties. As stated in this court's prior decision, Kolesa's principal non-abandoned claims were that the Review Board hearing violated his right to procedural due process in [**4] that (1) the notice was inadequate because it did not inform him that his military performance and his 1978 drug use statement were at issue; (2) he was denied the right to have counsel represent him at the hearing; and (3) that Lt. Ballard improperly advised him before the hearing, yet continued to act both as witness and judge on the Review Board, thereby depriving plaintiff of the right to an impartial decision-maker.

Upon the Secretary's earlier motion to dismiss or for summary judgment, the court held, first, that "due process did not require that Kolesa be represented by counsel at the Board of Review hearing," 534 F. Supp. at 594, and granted judgment in favor of the defendant as to that claim. Id. at 595. Secondly, the court discussed certain principles pertaining to Kolesa's two remaining claims, but it refrained from deciding the Secretary's motion with respect to such claims. Instead the court directed the plaintiff to apply for review of the Secretary's decision in accordance with 32 C.F.R. @ 723.1-11 before the Board for the Correction of Naval Records ("BCNR"). As the court explained:

It is the opinion of this Court that an airing of plaintiff's claims [**5] in a BCNR hearing will cure any constitutional deficiencies that may have attended his Board of Review hearing, will provide the Secretary with a useful, second look at an important decision, and will accord with the accepted judicial practice of [*465] avoiding unnecessary resolution of constitutional issues.

534 F. Supp. at 595. The court did, however, retain jurisdiction over this case, and provide for the continued effectiveness of the stipulated restraining order.

Now represented by counsel, Kolesa applied for correction of his naval records and obtained a hearing before the BCNR. At the hearing, Kolesa stated

that he had used marijuana or hashish only two or three times, and only once after entering college; that he did not report his prior marijuana use on the NROTC application papers because the relevant question inquired about "use" of the drugs, and he considered himself an "experimenter," not a "user." Plaintiff's Exhibit A.

In its decision, issued February 14, 1983, the BCNR stated the following conclusions:

A. The Board concluded that the review board which originally heard Petitioner's case was tainted by the actions of Lt. Ballard. The Board opined [**6] that it was improper for this individual to, in effect, act as Petitioner's counsel and then sit as a member of the review board convened specifically to hear Petitioner's case.

B. The Board further concluded, however, that adequate grounds for disenrollment existed. Petitioner, the Board opined, did use drugs on several occasions prior to and during his college years. It further appears to the Board that Petitioner should have used better judgment in answering the questions contained in NROTC application documents pertaining to drug usage.

C. The Board concluded that ordering Petitioner to active duty in an enlisted status would be unwise at this time. The Board noted, in this regard, that petitioner has admitted to past drug use. Considering the Navy's policy concerning drug abuse, it does not appear to be in the Navy's best interest to order an individual with an admitted history of drug use to active duty. The Board further opined that, even if Petitioner does not use drugs while serving in an enlisted status, he might well be an unmotivated individual, who would probably serve without distinction.

Plaintiff's Exhibit A.

Accordingly, the BCNR recommended "that Petitioner's [**7] naval record be corrected to show that the Secretary of the Navy approved the recommendation that Petitioner be disenrolled from the NROTC program . . . but disapproved the recommendation that Petitioner be ordered to serve two years of active enlisted service." Id.

The Secretary, however, directed the BCNR to reconsider conclusions A and C of its report. Specifically, the BCNR was instructed to request Lt. Ballard to comment on the finding regarding the impropriety of his actions, and to "identify the specific error or injustice that occurred which formed the basis for the Board's conclusion C," i.e., the conclusion that ordering Kolesa to active duty "would be unwise." Plaintiff's Exhibit B.

After reviewing additional information submitted by Lt. Ballard, the BCNR issued a second decision on June 3, 1983. The decision recites that Lt. Ballard informed the Board "that he did not vote to disenroll Petitioner from NROTC program and that he dissented from the majority opinion which recommended that course of action." The Board, therefore, modified its conclusion A by opining that, although Ballard's appointment to the Review Board was unwise, his service "appears to have [**8] worked to Petitioner's advantage and hence constitutes harmless error." Plaintiff's Exhibit C.

However, with respect to its prior recommendation that Kolesa not be ordered to active service, the Board adhered to its view. Indeed, the Board supported its conclusion in a detailed statement wherein it observed, inter alia, that Kolesa's drug usage was "in the nature of infrequent episodes of experimentation," and that requiring him to perform active service would "be more in the nature of a punishment rather than enforcement of a contractual obligation." Id.

[*466] In a Memorandum dated July 8, 1983, the Secretary rejected the Board's recommendation that Kolesa not be ordered to active duty. The Memorandum, in its entirety, states:

The board's recommendations that the subject petitioner's record be corrected to show that he was not ordered to serve two years active enlisted service but rather was honorably discharged on 17 December 1980, which includes the recommendation that orders issued in contemplation of his active duty be cancelled, are disapproved. The Board's conclusion that requiring the petitioner to perform active enlisted service is more in the nature [**9] of a punishment rather than enforcement of a contractual obligation is not supported by the record.

The facts of this case do not distinguish it from others in which the individual concerned has accepted educational assistance and subsequently failed to qualify for a commission. Former Midshipman Kolesa has not proved that he has suffered either an error or an injustice of that the action of the Under Secretary in terminating his appointment as a midshipman and ordering him to two years active enlisted service was other than proper and appropriate under the circumstances of his case.

Plaintiff's Exhibit D.

Subsequently, the Secretary filed the instant motion for entry of final order of dismissal or in the alternative for summary judgment.

Discussion

Pursuant to 10 U.S.C. @ 1552, the Secretary of the Navy, "acting through boards of civilians of the executive part of that military department, may correct any military record . . . when he considers it necessary to correct an error or remove an injustice." Under applicable regulations, the BCNR, following a hearing, is required to make written findings, conclusions and recommendations, 22 CFR @ 723.6, after which [**10] the Secretary "will consider the board's submission" and "will direct such action . . . as he deems to be appropriate." 22 CFR @ 723.7. The Secretary is, thus, authorized to overrule the Board's recommendations although "he must act on either explicitly stated policy reasons, or upon evidence presented in the record made to the Board." Horn v. Schlesinger, 514 F.2d 549, 553 (8th Cir.1975); Weiss v. United States, 408 F.2d 416, 418, 187 Ct.Cl. 1 (1969); Nelson v. Miller, 373 F.2d 474, 478 (3d Cir.) cert. denied, 387 U.S. 924, 87 S. Ct. 2042, 18 L. Ed. 2d 980 (1967). That decision is then final and conclusive, unless upon judicial review it is found to be "arbitrary, capricious, in bad faith, unsupported by substantial evidence or contrary to applicable law or regulation." Crispino v. United States, 3 Cl.Ct. 306, 312 (1983).

In his memorandum in opposition to the Secretary's motion, Kolesa argues, first, that it is arbitrary and capricious for the Secretary to require him to serve as an enlisted man because there is substantial evidence for the Board's findings that he had poor judgment, would be unmotivated, and would serve without distinction. Thus, Kolesa contends, [**11] not without irony, that the Board's findings demonstrate that the Navy is better off without his service as an enlisted man, and that there is no basis for the Secretary's rejection of those findings.

Accepting plaintiff's premise that there is substantial evidence for the Board's findings, the court still cannot conclude for that reason that the Secretary's rejection of the Board's recommendation is arbitrary and capricious. Kolesa's motivation or potential (or lack thereof) is not the Secretary's only concern. The active duty requirement enables the Navy to recoup to some extent the government's expenditure for the training and education of NROTC midshipmen. See generally, 1964 U.S.C.C. & A.M. 1764 et seq. (legislative history of Pub.L. 88-647, codified at 10 U.S.C. @ 2107, which authorizes the Secretary's action). As the Court of Appeals for the Fourth Circuit recently stated in the course of discussing the active duty requirement, "It would be a great waste for the government to lose its investment in training what proved to be unsatisfactory midshipmen if [*467] it could not put them in a lesser spot which they were capable of filling." Wimmer v. Lehman, 705 F.2d [**12] 1402, 1403, 1408 (4th Cir.1983). The Board did not find, and nothing in the record indicates that Kolesa is "incapable" of serving as an enlisted man.

For similar reasons, the court cannot accept Kolesa's argument that it is arbitrary and capricious to order "an admitted drug user, albeit an experimenter," to active duty. Plaintiff's Memo at 6. As the Secretary points out, the Naval Recruiting Manual permits the enlistment of "an individual who has abused dangerous drugs over one (1) year ago," although it does not permit the enlistment of an individual who has been addicted or dependent on a drug, has been a "trafficer" [sic] of drugs, has abused narcotics within the past year or dangerous drugs within the past month. Defendant's Exhibit B at 1-I-12. The Secretary's assumption that Kolesa is eligible for enlistment under these standards is entirely consistent with the BCNR's conclusions of June 3, 1983:

The Board views Petitioner's usage as being more in the nature of experimentation, and the result of poor judgment and impulsive behavior. The Board can readily distinguish Petitioner's situation from the serious drug abuser whose use is far more regular and premeditated. [**13] The Board's perception of Petitioner as an infrequent and impulsive experimenter is supported by the action of the disenrollment board in recommending that Petitioner be ordered to active duty. It is clear that under current Navy policy, the serious or regular drug abuser's presence on active duty will not be tolerated regardless of his status as an officer or enlisted servicemember.

Plaintiff's Exhibit C.

Kolesa also contends that the Secretary's decision is arbitrary and capricious in that it rejects the Board's conclusion that the active service requirement would, as applied to Kolesa, "be more in the nature of punishment rather than enforcement of a contractual obligation." The court would readily agree that ordering Kolesa to active service is a disproportionately harsh consequence of his minor drug experimentation; it is not, however, "punitive" in any sense that enables this court to overturn the order. As the Board itself

stated in its initial report, "Scholarship students who default or disenroll during their third or fourth year are ordinarily ordered to active duty in an enlisted status for a period of two years." Plaintiff's Exhibit A. Other courts have [**14] also recognized that "the Navy has followed a fairly consistent policy of imposing an active enlisted service obligation upon midshipmen disenrolled from the NROTC Scholarship Program in their third or fourth years." Hickey v. Commandant of Fourth Naval District, 461 F. Supp. 1085 (E.D.Pa.1978), aff'd mem., 612 F.2d 572 (3d Cir.1979); McCourt v. Culkin, 473 F. Supp. 1247, 1250 (E.D.Pa.1979).

In rejecting the Board's recommendations, the Secretary concluded that "the facts of this case do not distinguish it from others in which the individual concerned has accepted educational assistance and subsequently failed to qualify for a commission." Plaintiff's Exhibit D. If this court had the power, it would substitute the Board's judgment for that of the Secretary and excuse Kolesa from the ordinary active duty requirement. However, the court's power is limited to determining whether that decision is arbitrary or capricious. In the final analysis, the Secretary's decision is not a clear error in judgment, lacking support in the record. Therefore, this court cannot set aside the Secretary's decision as "arbitrary or capricious." See Citizens to Preserve Overton Park, Inc. [**15] v. Volpe, 401 U.S. 402, 416, 91 S. Ct. 814, 823, 28 L. Ed. 2d 136 (1971).

Kolesa also advances two additional arguments that challenge the Secretary's action as violative of certain instructions promulgated by the Chief of Naval Education and Training. He maintains (1) that the Secretary failed to comply with CNETINST 1533.12A @ 214(a), (f) by failing to obtain review of the enlisted service order by the Chief of Naval Personnel, or recommendations [*468] for such order from the Chief of Naval Personnel and the professor of Naval Science; and (2) that the Secretary failed to comply with CNETINST 1553.12A @ 213(q) by failing to make a determination that Kolesa "willfully" violated his agreement with the Navy.

These contentions could have been, but were not, raised before the BCNR. Since this case was already referred once to the BCNR for the exhaustion of administrative remedies, it is especially inappropriate for these claims of noncompliance with naval procedures to be considered for the first time here on review of the Secretary's action. As the court stated in Doyle v. United States, 220 Ct.Cl. 285, 599 F.2d 984, 1000-01 (1979):

[A] party cannot raise [**16] an issue on appeal to a court when it failed to raise it before an administrative agency competent to hear it. . . . A party is not entitled to many independent chances to prevail, and his voluntary choice will often determine the extent of a court's review. Decision-making bodies normally have the power to correct their own errors, . . . and the Correction Board is no exception. . . .

Cf. Bd. of Ed. of City School Dist. of City of NY v. Harris, 622 F.2d 599 (2d Cir.), cert. denied, Hufstadler v. Bd. of Ed., 449 U.S. 1124, 101 S. Ct. 940, 67 L. Ed. 2d 110 (1980).

Accordingly, defendant's motion is granted, and the Clerk is directed to enter summary judgment for the defendant.

SO ORDERED.

Board of Corrections

authority of Board and Secretary

see pgs 246-247

name during a fiscal year would be considered in determining whether the subsidiary's employees or former employees may be required to file form DD 1787. A list of the "defense prime contractors" meeting the criteria of this definition for the preceding fiscal year is published each December (each September for fiscal years prior to FY 1976) in the FEDERAL REGISTER, appearing as an amendment of 32 CFR 166.11. Such a list will also be disseminated annually to all naval activities by a JAG Notice.

(3) *Fiscal year* means the period beginning on July 1, 1975, and ending on September 30, 1976, and, after the latter date, means a year beginning on October 1 and ending on September 30 of the following year. It is designated by the calendar year in which it ends—for example, FY 1977, begins on October 1, 1976 and ends on September 30, 1977.

(1 CFR 18.14, and part 21, Subpart B)

[41 FR 34745, Aug. 17, 1976, as amended at 45 FR 8599, Feb. 8, 1980]

§ 722.4 Filing and review procedures.

(a) Individuals required under § 722.3 to file reports of DoD and defense related employment (form DD 1787) shall submit such reports, in triplicate, in the format prescribed in form DD 1787 and the completion instruction which accompany the form, not later than January 15 following the close of the fiscal year to which the report pertains. The reports shall be submitted to the following officials:

(1) Active civilian personnel formerly employed by defense prime contractors: the Director of Civilian Manpower Management (Administrative Office (01B)), Department of the Navy, Washington, DC 20390;

(2) Former civilian personnel subsequently employed by defense prime contractors: The Director of Civilian Manpower Management (Administrative Office (01B), Department of the Navy, Washington, DC 20390;

(3) Former or retired Navy or Naval Reserve officers subsequently employed by defense prime contractors: The Chief of Naval Personnel (Pers–14), Department of the Navy, Washington, DC 20370;

(4) Former or retired Marine Corps or Marine Corps Reserve officers subsequently employed by defense prime contractors: The Commandant of the Marine Corps (Code MSPA–3), Department of the Navy, Washington, DC 20380.

(b) The Director of Civilian Manpower Management, Chief of Naval Personnel, and Commandant of the Marine Corps shall receive for the Secretary of the Navy, as provided in paragraph (a) of this section, all reports of DoD and defense related employment (form DD 1787) submitted by personnel and former personnel of the Department of the navy, and shall review each report in the manner prescribed in paragraph (d) of this section. Not later than February 15 each year, they shall forward to the Assistant Secretary of the Navy (Manpower and Reserve Affairs) three copies of each form received by them, together with a listing of the names of individuals submitting the forms, segregated by the names of the defense prime contractors for which the individuals were employed or performed services. (RCS DD–M&RA(A) 1051 (5370).)

(c) Not later than February 28 each year, the Assistant Secretary of the Navy (Manpower and Reserve Affairs) shall forward to the Assistant Secretary of Defense (Manpower and Reserve Affairs) three copies of each form received pursuant to paragraph (b) of this section, together with a composite listing, in triplicate, of the names of individuals submitting the forms, segregated by the names of the defense prime contractors concerned. (RCS DD–M&RA(A) 1051 (5370).) (Copies of the completed forms and listings are later provided by the Assistant Secretary of Defense (Manpower and Reserve Affairs) to the Congress and are filed for public inspection in the Office of the Secretary of Defense.)

(d) In conducting the review prescribed in paragraph (b) of this section, the Director of Civilian Manpower Management, Chief of Naval Personnel and Commandant of the Marine Corps, as appropriate, shall determine whether:

(1) Each form submitted is required under this part and 50 U.S.C. 1436;

(2) All required information has been furnished; and

(3) The information submitted indicates an apparent violation of a conflict-of-interests law or regulation cited or provided in part 721 of this chapter. (For example, the fact that a former officer became employed by a defense prime contractor after terminating Government duties involving that contractor might indicate a possible violation of 18 U.S.C. 207 or 208(A), or the fact that a retired Regular officer represents a contractor in transactions or negotiations with DoD components might indicate a possible violation of 18 U.S.C. 281 or temporarily disentitle him from receiving military retirement pay under 31 U.S.C. 801(c).)

(e) If, upon review of a form, it is determined that the form was not required to be submitted or that all required information has not been furnished, appropriate corrective action shall be taken. If it is determined that a conflict-of-interests violation may have been committed, the form will be processed as provided in paragraph (b) of this section, but a copy of the form shall be forwarded, for such additional review, inquiry, advice, or further action as may be warranted, to the Chief of Naval Material if involving a possible violation in connection with the procurement, acquisitions, or disposal of property within the purview of SECNAVINST 4385.1B; or to the Judge Advocate General in any other case.

§§ 722.5—722.6 [Reserved]

§ 722.7 Availability of forms.

Supplies of form DD 1787 are available in the Forms and Publications Segment of the Navy Supply System under Stock Number 0102–Lf–025–5090.

PART 723—BOARD FOR CORRECTION OF NAVAL RECORDS

Sec.

723.1 General provisions.
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AUTHORITY: 10 U.S.C. 1034, 1552.

SOURCE: 62 FR 8166, Feb. 24, 1997, unless otherwise noted.

§ 723.1 General provisions.

This part sets up procedures for correction of naval and marine records by the Secretary of the Navy acting through the Board for Correction of Naval Records (BCNR or the Board) to remedy error or injustice. It describes how to apply for correction of naval and marine records and how the BCNR considers applications. It defines the Board's authority to act on applications. It directs collecting and maintaining information subject to the Privacy Act of 1974 authorized by 10 U.S.C. 1034 and 1552.

§ 723.2 Establishment, function and jurisdiction of the Board.

(a) *Establishment and composition.* Under 10 U.S.C. 1034 and 1552, the Board for Correction of Naval Records is established by the Secretary of the Navy. The Board consists of civilians of the executive part of the Department of the Navy in such number, not less than three, as may be appointed by the Secretary and who shall serve at the pleasure of the Secretary. Three members present shall constitute a quorum of the Board. The Secretary of the Navy will designate one member as Chair. In the absence or incapacity of the Chair, an Acting Chair chosen by the Executive Director shall act as Chair for all purposes.

(b) *Function.* The Board is not an investigative body. Its function is to consider applications properly before it for the purpose of determining the existence of error or injustice in the naval records of current and former members of the Navy and Marine Corps, to make recommendations to the Secretary or to take corrective action on the Secretary's behalf when authorized.

(c) *Jurisdiction.* The Board shall have jurisdiction to review and determine all matters properly brought before it, consistent with existing law.

§ 723.3 Application for correction.

(a) *General requirements.* (1) The application for correction must be submitted on DD 149 (Application for Correction of Military Record) or exact facsimile thereof, and should be addressed to: Board for Correction of Naval Records, Department of the Navy, 2 Navy Annex, Washington, DC 20370–5100. Forms and other explanatory matter may be obtained from the Board upon request.

(2) Except as provided in paragraph (a)(3) of this section, the application shall be signed by the person requesting corrective action with respect to his/her record and will either be sworn to or will contain a provision to the effect that the statements submitted in the application are made with full knowledge of the penalty provided by law for making a false statement or claim. (18 U.S.C. 287 and 1001)

(3) When the record in question is that of a person who is incapable of making application, or whose whereabouts is unknown, or when such person is deceased, the application may be made by a spouse, parent, heir, or legal representative. Proof of proper interest shall be submitted with the application.

(b) *Time limit for filing application.* Applications for correction of a record must be filed within 3 years after discovery of the alleged error or injustice. Failure to file within the time prescribed may be excused by the Board if it finds it would be in the interest of justice to do so. If the application is filed more than 3 years after discovery of the error or injustice, the application must set forth the reason why the Board should find it in the interest of justice to excuse the failure to file the application within the time prescribed.

(c) *Acceptance of applications.* An application will be accepted for consideration unless:

(1) The Board lacks jurisdiction.

(2) The Board lacks authority to grant effective relief.

(3) The applicant has failed to comply with the filing requirements of paragraphs (a)(1), (a)(2), or (a)(3) of this section.

(4) The applicant has failed to exhaust all available administrative remedies.

(5) The applicant has failed to file an application within 3 years after discovery of the alleged error or injustice and has not provided a reason or reasons why the Board should find it in the interest of justice to excuse the failure to file the application within the prescribed 3-year period.

(d) *Other proceedings not stayed.* Filing an application with the Board shall not operate as a stay of any other proceedings being taken with respect to the person involved.

(e) *Consideration of application.* (1) Each application accepted for consideration and all pertinent evidence of record will be reviewed by a three member panel sitting in executive session, to determine whether to authorize a hearing, recommend that the records be corrected without a hearing, or to deny the application without a hearing. This determination will be made by majority vote.

(2) The Board may deny an application in executive session if it determines that the evidence of record fails to demonstrate the existence of probable material error or injustice. The Board relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties. Applicants have the burden of overcoming this presumption but the Board will not deny an application solely because the record was made by or at the direction of the President or the Secretary in connection with proceedings other than proceedings of a board for the correction of military or naval records. Denial of an application on the grounds of insufficient evidence to demonstrate the existence of probable material error or injustice is final subject to the provisions for reconsideration contained in § 723.9.

(3) When an original application or a request for further consideration of a previously denied application is denied without a hearing, the Board's determination shall be made in writing and include a brief statement of the grounds for denial.

(4) The brief statement of the grounds for denial shall include the

reasons for the determination that relief should not be granted, including the applicant's claims of constitutional, statutory and/or regulatory violations that were rejected, together with all the essential facts upon which the denial is based, including, if applicable, factors required by regulation to be considered for determination of the character of and reason for discharge. Further the Board shall make a determination as to the applicability of the provisions of the Military Whistleblower Protection Act (10 U.S.C. 1034) if it is invoked by the applicant or reasonably raised by the evidence. Attached to the statement shall be any advisory opinion considered by the Board which is not fully set out in the statement. The applicant will also be advised of reconsideration procedures.

(5) The statement of the grounds for denial, together with all attachments, shall be furnished promptly to the applicant and counsel, who shall also be informed that the name and final vote of each Board member will be furnished or made available upon request. Classified or privileged material will not be incorporated or attached to the Board statement; rather, unclassified or nonprivileged summaries of such material will be so used and written explanations for the substitution will be provided to the applicant and counsel.

§ 723.4 Appearance before the board; notice; counsel; witnesses; access to records.

(a) *General.* In each case in which the Board determines a hearing is warranted, the applicant will be entitled to appear before the Board either in person or by counsel of his/her selection or in person with counsel. Additional provisions apply to cases processed under the Military Whistleblower Protection Act (10 U.S.C. 1034).

(b) *Notice.* (1) In each case in which a hearing is authorized, the Board's staff will transmit to the applicant a written notice stating the time and place of hearing. The notice will be mailed to the applicant, at least 30 days prior to the date of hearing, except that an earlier date may be set where the applicant waives his/her right to such notice in writing.

(2) Upon receipt of the notice of hearing, the applicant will notify the Board in writing at least 15 days prior to the date set for hearing as to whether he/she will be present at the hearing and will indicate to the Board the name of counsel, if represented by counsel, and the names of such witnesses as he/she intends to call. Cases in which the applicant notifies the Board that he/she does not desire to be present at the hearing will be considered in accordance with § 723.5(b)(2).

(c) *Counsel.* As used in this part, the term "counsel" will be construed to include members in good standing of the federal bar or the bar of any state, accredited representatives of veterans' organizations recognized by the Secretary of Veterans Affairs under 38 U.S.C. 3402, or such other persons who, in the opinion of the Board, are considered to be competent to present equitably and comprehensively the request of the applicant for correction, unless barred by law. Representation by counsel will be at no cost to the government.

(d) *Witnesses.* The applicant will be permitted to present witnesses in his/her behalf at hearings before the Board. It will be the responsibility of the applicant to notify his/her witnesses and to arrange for their appearance at the time and place set for hearing. Appearance of witnesses will be at no cost to the government.

(e) *Access to records.* (1) It is the responsibility of the applicant to procure such evidence not contained in the official records of the Department of the Navy as he/she desires to present in support of his/her case.

(2) Classified or privileged information may be released to applicants only by proper authorities in accordance with applicable regulations.

(3) Nothing in this part authorizes the furnishing of copies of official records by the Board. Requests for copies of these records should be submitted in accordance with applicable regulations governing the release of information. The BCNR can provide a requestor with information regarding procedures for requesting copies of these records from the appropriate retention agency.

§ 723.5 Hearing

(a) *Convening of board.* The Board will convene, recess and adjourn at the call of the Chair or Acting Chair.

(b) *Conduct of hearing.* (1) The hearing shall be conducted by the Chair or Acting Chair, and shall be subject to his/her rulings so as to ensure a full and fair hearing. The Board shall not be limited by legal rules of evidence but shall maintain reasonable bounds of competency, relevancy, and materiality.

(2) If the applicant, after being duly notified, indicates to the Board that he/she does not desire to be present or to be represented by counsel at the hearing, the Board will consider the case on the basis of all the material before it, including, but not limited to, the application for correction filed by the applicant, any documentary evidence filed in support of such application, any brief submitted by or in behalf of the applicant, and all available pertinent records.

(3) If the applicant, after being duly notified, indicates to the Board that he/she will be present or be represented by counsel at the hearing, and without good cause and timely notice to the Board, the applicant or representative fails to appear at the time and place set for the hearing or fails to provide the notice required by § 723.4(b)(2), the Board may consider the case in accordance with the provisions of paragraph (b)(2) of this section, or make such other disposition of the case as is appropriate under the circumstances.

(4) All testimony before the Board shall be given under oath or affirmation. The proceedings of the Board and the testimony given before it will be recorded verbatim.

(c) *Continuance.* The Board may continue a hearing on its own motion. A request for continuance by or in behalf of the applicant may be granted by the Board if a continuance appears necessary to insure a full and fair hearing.

§ 723.6 Action by the Board.

(a) *Deliberations, findings, conclusions, and recommendations.* (1) Only members of the Board and its staff shall be present during the deliberations of the Board.

(2) Whenever, during the course of its review of an application, it appears to the Board's satisfaction that the facts have not been fully and fairly disclosed by the records or by the testimony and other evidence before it, the Board may require the applicant or military authorities to provide such further information as it may consider essential to a complete and impartial determination of the facts and issues.

(3) Following a hearing, or where the Board determines to recommend that the record be corrected without a hearing, the Board will make written findings, conclusions and recommendations. If denial of relief is recommended following a hearing, such written findings and conclusions will include a statement of the grounds for denial as described in § 723.3(e)(4). The name and final vote of each Board member will be recorded. A majority vote of the members present on any matter before the Board will constitute the action of the Board and shall be so recorded.

(4) Where the Board deems it necessary to submit comments or recommendations to the Secretary as to matters arising from but not directly related to the issues of any case, such comments and recommendations shall be the subject of separate communication. Additionally, in Military Whistleblower Protection Act cases, any recommendation by the Board to the Secretary that disciplinary or administrative action be taken against any Navy official based on the Board's determination that the official took reprisal action against the applicant will not be made part of the Board's record of proceedings or furnished the applicant but will be transmitted to the Secretary as a separate communication.

(b) *Minority report.* In case of a disagreement between members of the Board a minority report will be submitted, either as to the findings, conclusions or recommendation, including the reasons therefor.

(c) *Record of proceedings.* Following a hearing, or where the Board determines to recommend that the record be corrected without a hearing, a record of proceedings will be prepared. Such record shall indicate whether or not a quorum was present, and the name and

vote of each member present. The record shall include the application for relief, a verbatim transcript of any testimony, affidavits, papers and documents considered by the Board, briefs and written arguments, advisory opinions, if any, minority reports, if any, the findings, conclusions and recommendations of the Board, where appropriate, and all other papers, documents, and reports necessary to reflect a true and complete history of the proceedings.

(d) *Withdrawal.* The Board may permit an applicant to withdraw his/her application without prejudice at any time before its record of proceedings is forwarded to the Secretary.

(e) *Delegation of authority to correct certain naval records.* (1) With respect to all petitions for relief properly before it, the Board is authorized to take final corrective action on behalf of the Secretary, unless:

(i) Comments by proper naval authority are inconsistent with the Board's recommendation;

(ii) The Board's recommendation is not unanimous; or

(iii) It is in the category of petitions reserved for decision by the Secretary of the Navy.

(2) The following categories of petitions for relief are reserved for decision by the Secretary of the Navy:

(i) Petitions involving records previously reviewed or acted upon by the Secretary wherein the operative facts remained substantially the same;

(ii) Petitions by former commissioned officers or midshipmen to change the character of, and/or the reason for, their discharge; or,

(iii) Such other petitions as, in the determination of Office of the Secretary or the Executive Director, warrant Secretarial review.

(3) The Executive Director after ensuring compliance with this section, will announce final decisions on applications decided under this section.

§ 723.7 Action by the Secretary.

(a) *General.* The record of proceedings, except in cases finalized by the Board under the authority delegated in § 723.6(e), and those denied by the Board without a hearing, will be forwarded to the Secretary who will direct such action as he or she determines to be appropriate, which may include the return of the record to the Board for further consideration. Those cases returned for further consideration shall be accompanied by a brief statement setting out the reasons for such action along with any specific instructions. If the Secretary's decision is to deny relief, such decision shall be in writing and, unless he or she expressly adopts in whole or in part the findings, conclusions and recommendations of the Board, or a minority report, shall include a brief statement of the grounds for denial. See § 723.3(e)(4).

(b) *Military Whistleblower Protection Act.* The Secretary will ensure that decisions in cases involving the Military Whistleblower Protection Act are issued 180 days after receipt of the case and will, unless the full relief requested is granted, inform applicants of their right to request review of the decision by the Secretary of Defense. Applicants will also be informed:

(1) Of the name and address of the official to whom the request for review must be submitted.

(2) That the request for review must be submitted within 90 days after receipt of the decision by the Secretary of the Navy.

(3) That the request for review must be in writing and include:

(i) The applicant's name, address and telephone number;

(ii) A copy of the application to the Board and the final decision of the Secretary of the Navy; and

(iii) A statement of the specific reasons the applicant is not satisfied with the decision of the Secretary of the Navy.

(4) That the request must be based on the Board record; request for review based on factual allegations or evidence not previously presented to the Board will not be considered under this paragraph but may be the basis for reconsideration by the Board under § 723.9.

§ 723.8 Staff action.

(a) *Transmittal of final decisions granting relief.* (1) If the final decision of the Secretary is to grant the applicant's request for relief the record of proceedings shall be returned to the Board for

disposition. The Board shall transmit the finalized record of proceedings to proper naval authority for appropriate action. Similarly final decisions of the Board granting the applicant's request for relief under the authority delegated in §723.6(e), shall also be forwarded to the proper naval authority for appropriate action.

(2) The Board shall transmit a copy of the record of proceedings to the proper naval authority for filing in the applicant's service record except where the effect of such action would be to nullify the relief granted. In such cases no reference to the Board's decision shall be made in the service record or files of the applicant and all copies of the record of proceedings and any related papers shall be forwarded to the Board and retained in a file maintained for this purpose.

(3) The addressees of such decisions shall report compliance therewith to the Executive Director.

(4) Upon receipt of the record of proceedings after final action by the Secretary, or by the Board acting under the authority contained in §723.6(e), the Board shall communicate the decision to the applicant. The applicant is entitled, upon request, to receive a copy of the Board's findings, conclusions and recommendations.

(b) *Transmittal of final decisions denying relief.* If the final decision of the Secretary or the Board is to deny relief, the following materials will be made available to the applicant:

(1) A statement of the findings, conclusions, and recommendations made by the Board and the reasons therefor;

(2) Any advisory opinions considered by the Board;

(3) Any minority reports; and

(4) Any material prepared by the Secretary as required in §723.7. Moreover, applicant shall also be informed that the name and final vote of each Board member will be furnished or made available upon request and that he/she may submit new and material evidence or other matter for further consideration.

§ 723.9 Reconsideration.

After final adjudication, further consideration will be granted only upon presentation by the applicant of new and material evidence or other matter not previously considered by the Board. New evidence is defined as evidence not previously considered by the Board and not reasonably available to the applicant at the time of the previous application. Evidence is material if it is likely to have a substantial effect on the outcome. All requests for further consideration will be initially screened by the Executive Director of the Board to determine whether new and material evidence or other matter (including, but not limited to, any factual allegations or arguments why the relief should be granted) has been submitted by the applicant. If such evidence or other matter has been submitted, the request shall be forwarded to the Board for a decision. If no such evidence or other matter has been submitted, the applicant will be informed that his/her request was not considered by the Board because it did not contain new and material evidence or other matter.

§ 723.10 Settlement of claims.

(a) *Authority.* (1) The Department of the Navy is authorized under 10 U.S.C. 1552 to pay claims for amounts due to applicants as a result of corrections to their naval records.

(2) The Department of the Navy is not authorized to pay any claim heretofore compensated by Congress through enactment of a private law, or to pay any amount as compensation for any benefit to which the claimant might subsequently become entitled under the laws and regulations administered by the Secretary of Veterans Affairs.

(b) *Application for settlement.* (1) Settlement and payment of claims shall be made only upon a claim of the person whose record has been corrected or legal representative, heirs at law, or beneficiaries. Such claim for settlement and payment may be filed as a separate part of the application for correction of the record.

(2) When the person whose record has been corrected is deceased, and where no demand is presented by a duly appointed legal representative of the estate, payments otherwise due shall be made to the surviving spouse, heir or beneficiaries, in the order prescribed by the law applicable to that kind of payment, or if there is no such law covering order of payment, in the order set forth in 10 U.S.C. 2771; or as otherwise prescribed by the law applicable to that kind of payment.

(3) Upon request, the applicant or applicants shall be required to furnish requisite information to determine their status as proper parties to the claim for purposes of payment under applicable provisions of law.

(c) *Settlement.* (1) Settlement of claims shall be upon the basis of the decision and recommendation of the Board, as approved by the Secretary or his designee. Computation of the amounts due shall be made by the appropriate disbursing activity. In no case will the amount found due exceed the amount which would otherwise have been paid or have become due under applicable laws had no error or injustice occurred. Earnings received from civilian employment, self employment or any income protection plan for such employment during any period for which active duty pay and allowances are payable will be deducted from the settlement. To the extent authorized by law and regulation, amounts found due may be reduced by the amount of any existing indebtedness to the Government arising from military service.

(2) Prior to or at the time of payment, the person or persons to whom payments are to be made shall be advised by the disbursing activity of the nature and amount of the various benefits represented by the total settlement and shall be advised further that acceptance of such settlement shall constitute a complete release by the claimants involved of any claim against the United States on account of the correction of the record.

(d) *Report of settlement.* In every case where payment is made, the amount of such payment and the names of the payee or payees shall be reported to the Executive Director.

§ 723.11 Miscellaneous provisions.

(a) *Expenses.* No expenses of any nature whatsoever voluntarily incurred by the applicant, counsel, witnesses, or by any other person in the applicant's behalf, will be paid by the Government.

(b) *Indexing of decisions.* (1) Documents sent to each applicant and counsel in accordance with §723.3(e)(5) and §723.8(a)(4), together with the record of the votes of Board members and all other statements of findings, conclusions and recommendations made on final determination of an application by the Board or the Secretary will be indexed and promptly made available for public inspection and copying at the Armed Forces Discharge Review/Correction Boards Reading Room located on the Concourse of the Pentagon Building in Room 2E123, Washington, DC.

(2) All documents made available for public inspection and copying shall be indexed in a usable and concise form so as to enable the public to identify those cases similar in issue together with the circumstances under and/or reasons for which the Board and/or Secretary have granted or denied relief. The index shall be published quarterly and shall be available for public inspection and distribution by sale at the Reading Room located on the Concourse of the Pentagon Building in Room 2E123, Washington, DC. Inquiries concerning the index or the Reading Room may be addressed to the Chief, Micromation Branch/Armed Forces Discharge Review/Correction Boards Reading Room, Crystal Mall 4, 1941 Jefferson Davis Highway, Arlington, Virginia 22202.

(3) To the extent necessary to prevent a clearly unwarranted invasion of personal privacy, identifying details of the applicant and other persons will be deleted from the documents made available for public inspection and copying. Names, addresses, social security numbers and military service numbers must be deleted. Deletions of other information which is privileged or classified may be made only if a written statement of the basis for such deletion is made available for public inspection.

PART 724—NAVAL DISCHARGE REVIEW BOARD

Subpart A—Definitions

Sec.

724.101 Naval Service.
724.102 Naval Discharge Review Board.

174-118 O—97——9

Court found that P ought to have been promoted before he retired, but for errors and complications associated with his injury. P therefore entitled to retroactive promotion and pay of that rank

178 F. Supp. 604 printed in FULL format.

WARD W. CADDINGTON v. THE UNITED STATES

No. 408-57

United States Court of Claims

147 Ct. Cl. 629; 1959 U.S. Ct. Cl. LEXIS 136; 178 F. Supp. 604

December 2, 1959. Defendant's motion for rehearing overruled March 2, 1960

SYLLABUS: [**1]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Military pay; disability retired pay; correction of military records -- duty of Secretary. -- In an action by plaintiff to recover the difference between disability retired pay computed on the basis of 75 percent of the pay of a lieutenant colonel with over 24 years of service which he had been receiving, and 75 percent of the pay of a full colonel with over 24 years of service to which he claims he is entitled from September 17, 1945, the date of his retirement from the Army for physical disability, where upon his application for correction of his military records the Army Board for the Correction of Military Records found that under the Terminal Leave Promotion Policy effective December 13, 1945, he possessed all the qualifications for promotion to the grade of full colonel and recommended that his record be corrected to show such promotion on December 13, 1945, but stipulated that no additional retired pay should be awarded plaintiff on the basis of such promotion, it is held that the duty of the Secretary of the Army under the Legislative Reorganization Act of 1946, 60 Stat. 812, as amended October 25, 1951, 65 [**2] Stat. 655, to correct records to eliminate errors or injustice obligated the Secretary to make a full correction and denying plaintiff the pay of the grade to which he admittedly should have been promoted is a denial of the full relief intended by Congress. Plaintiff is entitled to recover.

Military pay; disability retired pay; correction of military records -- duty of Secretary. -- Under the Legislative Reorganization Act of 1946, 60 Stat. 812, as amended October 25, 1951, 65 Stat. 655, it is the duty of the Secretary of each armed force covered by the act to correct records to eliminate errors and injustices and the Secretaries are thus obligated to make full corrections. Thus, when the Secretary of the Army corrected plaintiff's record to show that he was promoted to full colonel on December 13, 1945, the effective date of the Army's Terminal Leave Promotion Policy, but did not require that the plaintiff receive the additional disability retired pay of such higher rank, the plaintiff has been denied the full relief intended by Congress and he is entitled to the pay of the rank of full colonel back to December 13, 1945.

COUNSEL: Mr. James M. McCullough for the plaintiff. [**3] Messrs. Leo J. McCullough and Edwin L. Bright were on the brief.

Mr. Arthur E. Fay, with whom was Mr. Assistant Attorney General George Cochran Doub, for the defendant.

OPINIONBY: JONES

OPINION: [*630] [***605] JONES, Chief Judge, delivered the opinion of the court:

Plaintiff seeks to recover the difference between 75 percent of the pay of a lieutenant colonel with over 24 years of service, which he has been receiving, and 75 percent of the pay of a colonel with over 24 years of service, to which he claims he is entitled, from September 17, 1945, the date of his retirement from the Army for physical disability. There is no dispute as to any material fact.

After 20 years of service in the Maryland National Guard and the National Guard of the United States, plaintiff was ordered into Federal service early in 1941 in the grade of captain, National Guard of the United States. During 1941, he was appointed major, National Guard of the United States, and on September 4, 1942, he was appointed lieutenant colonel, Army of the United States. In August 1944, plaintiff was hospitalized following a combat injury, and on June 26, 1945, he was found permanently unfit [**4] for further military service by reason of physical disability. He was retired on September 17, 1945, in the grade of lieutenant colonel, with 40 percent disability. He has received retired pay from that date at the rate of 75 percent of the pay of a lieutenant colonel with over 24 years of service as provided by statute. n1

n1 R.S. @ 1274, 10 U.S.C. 971 (1946 Ed.).

By TWX message dated December 13, 1945, the Adjutant General of the Army announced an administrative policy (hereinafter called "the Terminal Leave Promotion Policy" or "the Policy") which provided, in substance, for one-grade promotions for officers who possessed certain qualifications.

On March 1, 1956, the plaintiff applied to the Army Board for the Correction of Military Records, requesting that his records be corrected to reflect "promotion to full colonel under terminal leave promotion policy which was established Dec. 13, '45 if not otherwise eligible." In the application, he stated that he had been recommended for promotion to full colonel while still on active duty but that the promotion had never actually been made because of his injury and [*631] hospitalization and certain administrative errors. [**5] As a result of this application, a hearing was held at which plaintiff and his counsel were present. The Board made certain findings, conclusions, and recommendations based on the evidence presented to it.

The Board found that plaintiff had been in grade as a lieutenant colonel, Army of the United States for 36 months and that during such period his efficiency index exceeded 40. It found that the Terminal Leave Promotion Policy entitled officers with those qualifications to promotion to full colonel "incident to their relief from active duty." The Board concluded that plaintiff was eligible for promotion to colonel, Army of the United States under the Policy and that his failure to receive such promotion was in error and unjust. It recommended [***606] correction of all plaintiff's records to reflect the promotion, effective December 13, 1945, "provided, that the Department of the Army pay no money as a result of this correction of the record." The Secretary of the Army adopted this recommendation, including the prohibition against paying out any money, and ordered that the corrections be made.

It is plaintiff's position that he is entitled to have his promotion dated incident [**6] to his release from active duty irrespective of the hiatus between the release and the promulgation of the promotion policy. Defendant urges with equal vigor that under no interpretation of the administrative policy could the promotion be dated earlier than December 13, 1945, and that the Secretary's action has provided plaintiff with every relief to which he is due. However, we do not believe, in view of the facts revealed by the pleadings and briefs, that it is necessary to decide the issue solely on the question of whether plaintiff's recovery is dependent upon the promotion policy dated December 13, 1945. That he should be granted this relief regardless of the existence of that policy is strongly supported by the admitted facts of record.

The Legislative Reorganization Act of 1946, 60 Stat. 812, 837, as amended October 25, 1951, 65 Stat. 655, includes provision for the Secretary of each armed force to correct records of his department where, in his judgment, it is necessary to correct an error or to remove an injustice. He is authorized [*632] to act through boards of civilian officers in this task. The act is remedial in nature. We believe that this imposes on the [**7] Secretary the twofold duty to properly evaluate the nature of any error or injustice and, in addition, to take such corrective action as will appropriately and fully erase such error or compensate such injustice.

From the facts contained in plaintiff's service records and the uncontroverted testimony before the Correction Board, we find that plaintiff should have been promoted to the rank of colonel no later than the date of his release from active duty. In fact, he undoubtedly would have been promoted but for an unfortunate loss of records while he was serving in the South Sea Islands of the Pacific. The plaintiff had an unusually good record. Prior to his being wounded, all of his ratings had been either superior or excellent. He alleges in paragraph 3 of his petition that he was recommended for promotion to colonel on his record while he was still at Guam and before he was wounded in combat on one of the other islands.

It is true that in his appearances before the Correction Board the plaintiff voluntarily admitted he had not actually seen the recommendation but testified he was advised of the fact that the recommendation had been made; that he was later sent to Guadalcanal [**8] where he received his combat injury; that he was sent on the hospital ship to the island Bonitka, which was at that time being evacuated; that he was flown to one or two other places and finally evacuated to New Caledonia; that somewhere in the process his military records, including X-rays and other medical examinations, were completely lost; that the X-ray pictures were again taken at the Caledonia General Hospital, but the other records were never found.

While the Department was never able to find the record of the recommended promotion, it offered no evidence whatever to combat the statements of plaintiff. Apparently the Board for the Correction of Military Records accepted these statements as true. Apparently, on that basis the Board found that the failure to promote the plaintiff to colonel was "in error and unjust."

[*633] We have not the slightest doubt that the plaintiff would have received his promotion to colonel long before and certainly not later than his actual discharge on September 17, 1945, but for the unfortunate circumstances which we have mentioned and which are undisputed. [***607] Not only had

he long experience as an officer, but he had been on [**9] active duty as a field grade officer since before the entry of the United States into World War II.During that period and up to the date of his release from active duty his efficiency ratings were never other than excellent or superior. He had commanded his unit's combat team on a number of occasions and he had discharged this duty in commendable fashion. Among plaintiff's decorations is the Combat Infantryman's Badge.

Following his combat injury, he was evacuated by hospital ship and it was only after a period of island hopping that he and his comrades settled down to any intense sort of hospitalization on New Caledonia. Not surprisingly, during his evacuation, his military records, as well as his medical records and X-rays, were lost. Plaintiff ultimately passed almost 14 months in one Army hospital or another.

That plaintiff had been deprived of a very real reward which he had earned was recognized by the Correction Board. It could not fail to believe that the facts were as had been related to it. And its action in recommending the promotion to colonel reflects an intention to make plaintiff whole. The fact that it attempted to do so through so illusory and imperfect [**10] a means indicates a failure to grasp the real wrong and the real remedy.

To acknowledge plaintiff's right to a promotion and at the same time to deprive him of one of the principal benefits of the promotion cannot truly be viewed as such action as would remove an injustice. We think that to confer on plaintiff a fitting recognition of the reward earned by him during months of valiant service, more than a promotion in name only is required. An action which is designed to remove an injustice or correct an error, as this one must have been under the statutory enactments, should include every essential benefit. The Secretary can only discharge the duty imposed on him by the Legislative Reorganization Act of [*634] 1946, as amended, by effectively expunging those errors and injustices to which his attention is directed.

We feel that the Secretary and his boards have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief.

We can reach no reasonable conclusion other than all of the elements of promotion were present and that viewing the record as a whole the plaintiff should [**11] be treated as having, in effect, received an actual promotion to colonel before his retirement. The record leaves no doubt of this fact. By every principle of equity and fair dealing we know anything about, either from reading or experience, plaintiff is entitled to the benefits of a record that is only slightly incomplete, due wholly to circumstances that were no fault of his own.

There are certain principles of equity that through long usage have grown into maxims. These include "equity regards that as done which ought to be done;" "equity will not suffer a wrong to be without a remedy;" "equity regards substance rather than form;" "equity delights to do justice and not by halves."

We believe that plaintiff's case falls within each of these maxims. These maxims, founded in justice and based on human experience, are among the proud traditions of Anglo-Saxon jurisprudence.

We believe that the Board for the Correction of Military Records and the Secretary who approved the findings reached a conclusion that falls short of complete justice. This is not to say that there was any intention to deny plaintiff any of his rights but the effect was just the same.

We hold, therefore, [**12] on the facts admitted by the briefs and pleadings, that plaintiff ought to have been promoted to full colonel during his tour of active duty and under no circumstances later than September 17, 1945, the date of his release from active duty. This is not accomplished by simply pinning a badge [***608] on the plaintiff without giving him the rights that ordinarily flow from such a promotion.

Under the statute plaintiff's actual grade of colonel as of the date of his retirement would normally entitle him to retired pay based on a percentage of the pay of a colonel from [*635] that date and he should be entitled to recover any difference between that amount and the amount of the retired pay which he has been receiving. However, in view of the state of the record and the findings of the Board which remove any question of his rank from December 13, 1945, we find that the difference in pay should be calculated from the latter date.

Plaintiff's motion for summary judgment is granted and defendant's motion for summary judgment is denied. The amount of the judgment will be determined pursuant to Rule 38(c).

It is so ordered.

LITTLETON, Judge (Ret.); LARAMORE, Judge, [**13] and WHITAKER, Judge, concur.

In accordance with the opinion of the court and on a memorandum report of the commissioner as to the amount due thereunder, it was ordered on March 4, 1960, that judgment for the plaintiff be entered for $8,442.48.

dicta asserting Board power to enhance in grade

see pg 551 + 552 n.11

514 F.2d 549 printed in FULL format.

Jesse L. Horn, Appellant, v. Honorable James R. Schlesinger, Secretary of Defense, and Honorable Howard H. Callaway, Secretary of the Army, and Brigadier General, Louis J. Prost, Appellees

No. 74-1821

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

514 F.2d 549; 1975 U.S. App. LEXIS 14909

March 13, 1975, Submitted
April 29, 1975, Decided

PRIOR HISTORY:

Appeal from the United States District Court for the Eastern District of Missouri.

JUDGES: Van Oosterhout, Senior Circuit Judge, Ross, Circuit Judge, and Talbot Smith, * Senior District Judge.

* Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation.

OPINIONBY: SMITH

OPINION: [*550] TALBOT SMITH, Senior District Judge.

The appellant before us (hereinafter plaintiff), a former United States Army Major, was discharged from the service for his alleged failure to meet the standards required for promotion in rank. n1 His bill of complaint n2 sought review of this discharge and reinstatement to active status in the United States Army. The District Court granted defendants' motion for summary judgment on the ground that plaintiff had failed to exhaust his administrative remedies. We agree and affirm.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n1 10 U.S.C. @ 3303 requires the discharge or forced retirement of certain officers who have been considered twice but not selected for promotion.

n2 Counts I and II pertained to plaintiff's efficiency reports, charging failures to properly prepare, evaluate and process. Count III alleged that the appeal procedures therefor were vague and arbitrary, depriving plaintiff of due process. Count IV charged that defendants' evaluation procedures employed vague and unreasonable standards, and that plaintiff's discharge based thereon was violative of due process.

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The issues presented revolve around two Officer Efficiency Reports (OERs) and the processing thereof. These periodic reports constitute an appraisal of the officer's performance of duty; "an individual's failure to receive OERs

competitive with other officers similarly situated can, especially with today's contracting military manpower, result in passovers [promotion non-selection] and involuntary separation from active duty." n3 The reports in controversy here cover the periods from 26 May through 4 October 1970 (OER 1) and from 5 October 1970 through 31 August 1971 (OER 2). They are considered by plaintiff to have caused or contributed to his failure of promotion.

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n3 Glosser & Rosenberg, Military Correction Boards: Administrative Process and Review by the United States Court of Claims, 23 Am. U.L. Rev. 391, 403 (1973) [hereinafter cited as Glosser].

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In May, 1973 plaintiff appealed OER 1, alleging that "the rating officer who made the disputed OER was contrary to" an Army regulation n4 requiring that "Reports are [to be] completed at the lowest level possible in order to obtain two accurate and considered opinions based on the closest possible knowledge and observation of the officer." Plaintiff asserted in his appeal that "Colonel Pruett was the officer who should have performed the function of rating officer" and not Colonel Bonifas.

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n4 AR 623-105 para. 1-3b (March 6, 1970), as amended, AR 623-105 para. 1-4b (May 15, 1974).

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The Army Special Review Board, which heard the appeal, held that the evidence presented did not warrant remedial action thereon. Plaintiff then appealed to the Army Board for the Correction of Military Records (ABCMR) n5 which denied the application on January 16, 1974 "on the basis that insufficient relevant evidence had been presented to demonstrate the existence of probable material error or injustice." This was held to be "without prejudice to further consideration in the event new relevant evidence is submitted (paragraph 10b, Army Regulation 15-185)."

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n5 See notes 9-11, infra, and accompanying text.

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[*551] Meanwhile, on July 11, 1974, plaintiff had appealed OER 2 to the Special Review Board. His complaints respecting OER 2 were similar to those asserted concerning OER 1. It was alleged that Colonel Pruett rather than Lieutenant Colonel Hallinan should have performed the function of rating officer. The appeal of OER 2 was denied by the Special Review Board on grounds similar to those stated with respect to OER 1. New and additional evidence concerning both OER 1 and OER 2 was then submitted, on September 20, 1973, to the Special Review Board, and it again denied relief. OER 2 was not submitted to the ABCMR.

Thus with respect to the two OERs complained of, a part only (absent the new and additional evidence submitted on September 20, 1973) of one claim, OER 1, was ruled upon by the ABCMR. OER 2 was not submitted to such Board and hence, of course, not ruled upon.

The defendants urge to us that plaintiff has not exhausted his administrative remedies. We share, with other courts that have addressed the point, the traditional judicial reluctance to interfere with the military establishment. This is not to say that it will never be done when grave constitutional rights seem imperiled, as the court-martial n6 and selective service n7 cases well attest. But in judgments requiring military expertise and involving military discretion within unique professional fields this long-established view found apt expression in Orloff v. Willoughby, 345 U.S. 83, 93-94, 97 L. Ed. 842, 73 S. Ct. 534 (1953) where the Supreme Court, after noting that "judges are not given the task of running the Army," stated that "the responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates." And, further,

The military constitutes a specialized community governed by a separate discipline from that of the civilian. Ordely government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters.

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n6 E.g., Burns v. Wilson, 346 U.S. 137, 97 L. Ed. 1508, 73 S. Ct. 1045 (1953); Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965).

n7 E. g., Oestereich v. Selective Service Bd., 393 U.S. 233, 21 L. Ed. 2d 402, 89 S. Ct. 414 (1968); Wolff v. Selective Service Local Bd. No. 16, 372 F.2d 817, 825 (2nd Cir. 1967).

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It is at this point -- legitimate Army matters -- that our duty in the premises becomes clear. What we have here are allegedly erroneous and adverse OERs which have resulted in plaintiff's separation from active duty. As to OER 1, as we have noted, it is alleged that Colonel Pruett should have been the rating officer and not Colonel Bonifas, whereas for OER 2 Colonel Pruett again should have been the rating officer and not Lieutenant Colonel Hallinan. The degree of involvement with internal Army organization and procedures that this question presents may be gleaned from plaintiff's arguments on this point in his appeal to the Army Special Review Board, a portion of which (respecting OER 1, though OER 2 is similar) appears in the margin. n8

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n8

3. During the period covered by the OER I was assigned to duty as Senior Advisor to the 2nd Brigade (BCT), 85th Division (TNG). Headquarters of the Brigade was located at 6400 Stratford Avenue, St. Louis, Mo. 63120. The

Division Headquarters was located at Chicago, Ill. The Senior Advisor to the Division was Colonel Lloyd O. Pruett, USA, whose station was at Division Headquarters in Chicago. For administrative purposes I was assigned to the U.S. Army Advisor Group (USAR) which was located at 12th and Spruce, St. Louis, Mo. 63178. That Group was commanded by Colonel Arsene E. Bonifas, USA. (A chart indicating the various relevant positions and the individuals occupying them during the period mentioned above is attached as Inclosure 2.) Colonel Bonifas acted as the rating officer on the disputed OER. It is my belief that, for the reasons hereinafter appearing, under the provisions of the Regulation quoted above Colonel Pruett was the officer who should have performed the function of rating officer.

4. It is obvious that because my duty station was in St. Louis, and because my immediate superior, Colonel Pruett, was stationed in Chicago, it was assumed that Colonel Bonifas, also stationed in St. Louis, would have "the closest possible knowledge and observation" of my performance of my professional duties as Brigade Advisor. Actually, this was not so and quite the contrary was true.

5. Guidance with respect to matters pertaining to the activities of the 85th Division (TNG) and its subordinate units, including the 2nd Brigade (BCT), were received by me from the Senior Advisor, Colonel Pruett (Statement of Maj General William P. Levine, USAR, Inclosure 3; Statement of Lt. Colonel John R. Braue, USAR, Inclosure 9.) and reports on the status and progress of the training of the 2nd Brigade (BCT) were sent by me to Colonel Pruett. In other words, as would be expected, the flow of policy guidance, progress reports, and supervision of activities was basically vertical, from Division to Brigade and from Brigade to Division, and any flow between brigade and US Army Advisor Group (USAR) in St. Louis was minimal. (Statement of Jacob B. Krebsbach, SAA, GS-10, Inclosure 4.) Colonel Pruett visited the 2nd Brigade (BCT) frequently, both at home station drills and at active duty training, and he was thus in a position to form an opinion of my performance as Brigade Advisor "based on the closest possible knowledge and observation." (Statement of Colonel Lloyd O. Pruett, USA (Ret), Inclosure 5; Statement of Colonel J. W. Christy, USAR (Ret), Inclosure 6; Statement of Major John L. Politte, USAR, Inclosure 7; Krebsbach Statement, Incl. 4.) On the other hand, Colonel Bonifas, who was the rating officer on the OER, admittedly only observed my performance "infrequently." (Statement of Colonel Arsene P. Bonifas, USA (Ret), Inclosure 8.) Actually, "very rarely" would better describe Colonel Bonifas' opportunities to observe the performance of my duties as Brigade Advisor. (Christy Statement, Incl. 6; Politte Statement, Incl. 7; Krebsbach Statement, Incl. 4; Braue Statement, Incl. 9.)

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[*552] The issue presented lies squarely within the competence and statutory authority of the Army Board for Correction of Military Records (ABCMR). This Board, established pursuant to 10 U.S.C. @ 1552 and 32 C.F.R. @ 581.3 (1974) n9 is to "consider all applications properly before it for the purpose of determining the existence of an error or an injustice," 32 C.F.R. @ 581.3(b)(2) (1974), and may "correct any military record" when necessary to "correct an error or remove an injustice," 10 U.S.C. @ 1552(a). n10 Its powers include the review and correction of passover discharges which have resulted from erroneous adverse OERs. n11

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n9 The history of the Board and the need for its establishment are summarized in Williams, The Army Board for Correction of Military Records, 6 Military L. Rev. 41, 41-42 (1959) [hereinafter cited as Williams]:

The Army Board for Correction of Military Records (hereafter referred to as the ABCMR or the Board) was established, pursuant to Section 207 of the Legislative Reorganization Act of 1946, in a successful attempt by the Congress to free itself from the burdens of private relief legislation concerning military and naval records. Section 207 also established similar boards in the Air Force, the Coast Guard and the Navy. Prior to their establishment, upon the exhaustion of the administrative remedies available within a military department, an aggrieved individual was left to court action if the matter was justiciable (which it often was not) or to private relief legislation.

* * *

Since its establishment in 1947, the Board has received more than 18,000 applications for correction of individual military records. Approximately half of these have come from individuals who have received dishonorable or bad conduct discharges, and the balance have covered a wide variety of alleged errors or injustices, chief among which are eligibility for disability retirement. More than 2,000 changes of individuals' records have resulted from formal hearings by the Board, and over $2,500,000 has been paid as a result of such corrections. The ABCMR considers a range of cases as inclusive as the number of possible actions affecting Army personnel. [Footnotes omitted.]

See Glosser, supra note 3, at 392-96.

n10 See generally, Glosser, supra note 3; Williams, supra note 9. For studies of the powers and procedures of review bodies generally, and examination of exhaustion requirements see Everett, Military Administrative Discharges -- The Pendulum Swings, 1966 Duke L.J. 41; Lunding, Judicial Review of Military Administrative Discharges, 83 Yale L.J. 33 (1973); Meador, Judicial Determinations of Military Status, 72 Yale L.J. 1293 (1963); Sherman, Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement, 55 Va. L. Rev. 483, 497-503, 520-25 (1969); Suter, Judicial Review of Military Administrative Decisions, 6 Houston L. Rev. 55 (1968).

n11 Glosser, supra note 3, at 402-05; Affidavit of Raymond J. Williams, Executive Secretary of the ABCMR:

In my tenure as Executive Secretary, I have seen the ABCMR correct improper efficiency reports, resulting in payment of back pay, advancement in grade, and restoration to active duty status, as necessary to correct any injustice.

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[*553] Plaintiff characterizes an appeal to the ABCMR as futile, charging that the improbability of reversal by that body excuses application to it, since appeal would involve resort to "a non-existence [sic] remedy." We do not share the plaintiff's pessimism. We will indulge, until otherwise convinced, n12 in the presumption that the military will be astute to afford to the plaintiff all of the rights and the protections afforded him by the Constitution, the statutes, and its own regulations. n13 It will not be forgotten, of course,

that the Board's action is subject to judicial reversal if it is arbitrary, capricious, unsupported by substantial evidence or erroneous in law. n14 And, although the Secretary is authorized, in a proper case, to overrule the Board's recommendations, n15 he cannot do so arbitrarily, but must act on either explicitly stated policy reasons, or upon evidence presented in the record made to the Board. n16

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n12 E.g., Colson v. Bradley, 477 F.2d 639 (8th Cir. 1973) mandamus to process complaint in accordance with law and Army regulations.

n13 See Hodges v. Callaway, 499 F.2d 417, 422-23 (5th Cir. 1974).

n14 Sanford v. United States, 399 F.2d 693, 694 (9th Cir. 1968); Hoorwitz v. Resor, 329 F. Supp. 1050, 1051 (D. Conn. 1970), aff'd per curiam, 445 F.2d 1407 (2nd Cir. 1971); Esgate v. United States, 186 Ct. Cl. 207 (1968), cert. denied, 395 U.S. 913, 23 L. Ed. 2d 226, 89 S. Ct. 1759 (1969).

n15 See 10 U.S.C. @ 1552(a); 32 C.F.R. @ 581.3(f)(2) (1974).

n16 Nelson v. Miller, 373 F.2d 474, 478 (3rd Cir.), cert. denied, 387 U.S. 924, 18 L. Ed. 2d 980, 87 S. Ct. 2042 (1967); Weiss v. United States, 187 Ct. Cl. 1, 408 F.2d 416, 418 (1969); Hertzog v. United States, 167 Ct. Cl. 377, 384-85 (1964); Proper v. United States, 139 Ct. Cl. 511, 154 F. Supp. 317, 326 (1957).

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It is in situations of this type, involving challenge to the retention and promotion of personnel, that the exhaustion requirement finds peculiar applicability. A failure to exhaust the remedies available within the service itself will inevitably upset the balance, carefully struck, between military authority and the power of the federal courts. In the case before us we are in an area involving judgments as to military character, a field foreign to our normal competence. The application of the exhaustion doctrine n17 upon these facts allows the military an opportunity to exercise its own expertise, and to correct its own errors, all without subjecting the courts to inefficient employment of judicial resources through rulings upon matters yet interlocutory within the military system. n18

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n17 See analysis in McKart v. United States, 395 U.S. 185, 193-95, 23 L. Ed. 2d 194, 89 S. Ct. 1657 (1969).

n18 Mindes v. Seaman, 453 F.2d 197, 201-02 (5th Cir. 1971); see Pickell v. Reed, 446 F.2d 898 (9th Cir.), cert. denied, 404 U.S. 946, 30 L. Ed. 2d 262, 92 S. Ct. 301 (1971); McCurdy v. Zuckert, 359 F.2d 491 (5th Cir.), cert. denied, 385 U.S. 903, 87 S. Ct. 212, 17 L. Ed. 2d 133 (1966).

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Finally, plaintiff alleges a series of constitutional defects. n19 It is argued that there are no procedures for discovery before the Board, that there

are no provisions for the compulsory attendance of witnesses, and that all members of the Board are appointed by the Secretary, it thus being, according to plaintiff, "absolutely inconceivable that [the Board] would declare one of his regulations unconstitutional." These flaws plaintiff asserts, deprive him of due process. Such matters, however, whether or not fatal within context, as to which we express no opinion, will never be reached should the plaintiff prevail before the Board. n20 We advert to the fundamental doctrine that the Court should avoid passing on unnecessary constitutional questions, n21 a doctrine peculiarly [*554] applicable here in view of our traditional reluctance to interfere with the military establishment.

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n19 See analysis of constitutional claims within traditional military area in Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971).

n20 Cf. Beard v. Stahr, 370 U.S. 41, 8 L. Ed. 2d 321, 82 S. Ct. 1105 (1962); Sohm v. Fowler, 124 U.S. App. D.C. 382, 365 F.2d 915, 918 (D.C. Cir. 1966).

n21 Pub. Util. Comm'n v. United States, 355 U.S. 534, 539-40, 78 S. Ct. 446, 2 L. Ed. 2d 470 (1958); 3 K. Davis, Administrative Law Treatise @ 20.04 (1958).

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Upon a careful review of the entire record we find no procedural or other error in the case and, in the light of the foregoing, we affirm for failure to exhaust administrative remedies.

BCMR does not have authority to order promotion, they can order an opportunity for promotional consideration based upon an accurate record.

see pg 692

618 F.2d 686 printed in FULL format.

HENRY D. THORNTON, Plaintiff-Appellee, v. MAJ. GEN. JOHN COFFEY, JR., Defendant-Appellant.

No. 78-1702

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

618 F.2d 686; 1980 U.S. App. LEXIS 19146; 22 Fair Empl. Prac. Cas. (BNA) 709; 22 Empl. Prac. Dec. (CCH) P30,796

January 24, 1980, Argued
March 28, 1980, Decided

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. Civ. 76-0187-B)

COUNSEL: Alfred Mollin, Atty., Dept. of Justice, Civil Division, App. Staff, Washington, D. C. (Barbara Allen Babcock, Asst. Atty. Gen., Washington, D. C., Larry D. Patton, U. S. Atty., Oklahoma City, Okl., and Robert E. Kopp, Atty., Dept. of Justice, Civil Division, App. Staff, Washington, D. C., with him on the brief), for defendant-appellant.

Lewis Barber, Jr., Oklahoma City, Okl., for plaintiff-appellee.

JUDGES: Before BARRETT, DOYLE and SEYMOUR, Circuit Judges.

OPINIONBY: SEYMOUR

OPINION: [*689]

Henry David Thornton, a black, filed this action in district court seeking injunctive and monetary relief for alleged racial discrimination and retaliation by the Oklahoma National Guard, in violation of Title VII of the Civil Rights Act, 42 U.S.C. @ 2000e-16.

Thornton served in the regular Army from 1961 through 1970. In January, 1971, he joined the Oklahoma National Guard as a Captain, serving as a part-time or weekend soldier. The National Guard also employs people in full-time civilian jobs, although a person cannot hold a full-time position unless he is also a military [**2] member of the Guard. 32 U.S.C. @ 709. In January, 1973, Thornton applied for a civilian job with the Guard as the Equal Employment Officer (EEO) for the state, a position he did not receive. In September, 1973, Thornton applied for another civilian position and was not selected.

On October 26, 1973, Thornton sent a letter to the Civil Service Commission alleging discrimination concerning his failure to be selected for the EEO position. A formal complaint was made to the National Guard on February 28, 1974. In March, 1975, an investigation and report were made by the Assistant Executive Officer, National Guard Bureau, Department of Army, in which no discrimination was found. Thereafter, Thornton requested a formal hearing on

the matter, which was held before the U. S. Civil Service Commission. On December 19, 1975, a final decision was rendered finding no discrimination.

In the meantime, in connection with his military position in the Guard, Thornton was given an adverse Officer's Efficiency Report (OER) for the period from May 2, 1975 through August 10, 1975, which report was not rendered until February 2, 1976. He filed this action on February 27, 1976, alleging inter alia that [**3] the Guard unlawfully discriminated against him on the basis of his race when it refused to hire him for the civilian EEO position, and then retaliated against him for filing the discrimination complaint by its preparation of the adverse military OER.

Subsequently, Thornton was discharged from the National Guard on May 6, 1977, pursuant to the Reserve Officer Personnel Act. That Act requires any officer not promoted within three years to leave the Guard and accept a mandatory promotion into the Army Reserve. Thornton had failed to achieve promotion to Major within the required time. Upon his discharge from the military side of the Guard, Thornton was no longer eligible to hold a civilian position.

The trial court found that Thornton was denied the position of Equal Employment Officer for racial reasons, but made no findings concerning the adverse OER or Thornton's failure to receive a military promotion. The court ordered Thornton to be retroactively promoted to a civilian GS-11 grade, and awarded back pay in the amount he would have received if he had been given the EEO position, beginning on September 15, 1973. While the Guard was not ordered to immediately place Thornton as the [**4] EEO, Thornton was given the right of first refusal when the position becomes available. In addition, the court ordered Thornton reinstated in the Guard with a promotion to the rank of Major, retroactive to September 19, 1973. Thornton was awarded the corresponding back pay for this military promotion.

For reasons set out below, we affirm the trial court's award of back pay for the EEO position for the period of September 15, 1973 only up to May 6, 1977, the date on which Thornton was discharged from the Guard and became ineligible for the position. We reverse the trial court's order that the Guard reinstate Thornton and retroactively promote him to the military rank of Major. Consequently, we reverse the corresponding award of military back pay, and the order that Thornton be given the right of first refusal of the EEO position.

[*690] I.

The Equal Employment Officer Position

The trial court found as a conclusion of law that Thornton established a prima facie case of racial discrimination in connection with his denial of the EEO position. n1 It further concluded that the Guard failed to rebut this prima facie case with a valid business reason. The court based its legal conclusions [**5] on fact findings which support Thornton's qualifications for the job, and demonstrate both the Guard's past history of deliberate segregation and the absence of black officers in full-time civilian positions.

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n1. Thornton's application for the EEO job was made before his application for the other full-time Guard position. Because we uphold the trial court's finding of discrimination in connection with the first position, we need not consider his claim regarding the later job which carried a lower GS rating.

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The findings of fact by a trial court must be upheld on appeal unless they are clearly erroneous. Fed.R.Civ.P. 52(a). We have held that findings are not to be determined clearly erroneous unless, after a review of the entire record, we are left with a definite and firm conviction that a mistake has been made. Diggs v. Western Electric Co., 587 F.2d 1070 (10th Cir. 1978). Our study of the record shows that the trial court's findings are supported by the evidence and are not clearly erroneous.

Thornton [**6] was required to first prove a prima facie case of employment discrimination under the test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). We believe he did this by showing that he 1) belongs to a racial minority; 2) that he applied and was qualified for a job for which the employer was seeking applicants; 3) that, despite his qualifications, he was rejected; and 4) that, after his rejection, the position remained available.

The only controverted issue in the finding of a prima facie case is whether Thornton was qualified for the position. The record shows that Thornton received very favorable officer efficiency ratings while in the Army. Rec., vol. III, at 116, 117, 118. Even the reports offered by the Guard show that Thornton was rated as superior with only one exception. Rec., vol. IV, Def.Ex. 6. He received an Army Commendation Medal in 1970. Rec., vol. III, at 108. His academic record shows specialized college-level education in race relations and minority groups. Rec., vol. III, at 121. His application for the EEO position lists impressive involvement in devising and teaching programs dealing in human relations for Oklahoma [**7] State University and the Post Office. Rec., vol. III, at 139. The trial court clearly had sufficient evidence to find that Thornton was qualified for the position he sought.

Once Thornton established a prima facie case, the Guard then had the burden of proving that the employment decision was based upon a legitimate, nondiscriminatory reason. Furnco Const. Co. v. Waters, 438 U.S. 567, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1977). To meet this burden, the Guard contended it was justified in selecting another applicant, Colonel William Kelley, because Kelley had ranked higher than Thornton under the evaluation system used by the Guard. We find the use of this rating procedure by the Guard to be improper under Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971), and affirm the trial court's finding of no valid business reason.

The Oklahoma National Guard was segregated by law until 1958. Rec., vol. V, at 100, 234-35. The Guard testified at trial that no black officer had ever been a full-time employee of the Guard. Rec., vol. V, at 100, 118. Kelley, who is white, has been a full-time Guard employee since 1956. The Guard admits that the rating procedure applied [**8] to Thornton and Kelley favored applicants who were already full-time civilian employees. Griggs holds that "under the Act (Title VII), practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze'

the status quo of prior discriminatory employment practices." 401 U.S. at 430, 91 S. Ct. at 853.

[*691] It is beyond argument that a rating procedure used by an historically segregated employer which favors applicants already employed full-time falls squarely within the prohibition of Griggs. See Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954, 91 S. Ct. 972, 28 L. Ed. 2d 237 (1971). Any claim which the Guard might raise that the rating procedure was required by business necessity is obviated by the fact that the Guard stopped using the procedure well before trial, and implemented what it felt to be a better rating method. The new method does not prefer applicants already "on board". Rec., vol. V, at 109, 121.

The only other reason given for Kelley's selection for the EEO position was offered [**9] by Major General David Matthews, the selecting officer. He testified at trial that he had chosen Kelley because he had soldiered with him for twenty years and felt he could do the job. Rec., vol. V, at 83. He also testified that the affirmative action requirements placed upon the Guard did not enter into his decision. Rec., vol. V, at 86. The trial judge found this justification to be insufficient to rebut Thornton's prima facie case and noted that such a subjective determination may offer a convenient pretext for giving force and effect to racial prejudice, perhaps without a conscious effort by the decision maker. Abrams v. Johnson, 534 F.2d 1226 (6th Cir. 1976). We agree.

We affirm the trial judge's finding that Thornton's failure to be selected for the EEO position was in violation of Title VII. However, we uphold the award of back pay only for the period up to May 6, 1977, the date Thornton was discharged from the Guard. For the reasons stated below, we find that any award for back pay after that date must be stayed pending final disposition of this case in accordance with the remainder of this opinion.

II.

The Military Promotion

Thornton alleges that the adverse Officer Efficiency [**10] Report is substantively incorrect, and was prepared in retaliation for his civilian discrimination complaint. OERs are of primary concern when an officer is considered for promotion. Horn v. Schlesinger, 514 F.2d 549 (8th Cir. 1975); Sanders v. United States, 219 Ct. Cl. 285, 594 F.2d 804 (Ct.Cl.1979). Thornton's adverse OER may have resulted in his failure to receive a promotion. Thornton had to leave the Guard when he was not promoted, and he cannot hold the full-time civilian position as EEO officer when it becomes vacant unless he is a military member of the Guard. Therefore, Thornton contends on appeal that the trial court properly gave him the complete relief to which he was entitled as a result of the civilian employment discrimination by ordering the Guard to promote him in the military.

As we have noted, the EEO position with the National Guard has a dual status, both civilian and military. Consequently, the trial court was faced with a conflict in judicial policies when it attempted to give Thornton a remedy for the discrimination it found. The court has a duty when it finds a Title VII violation to use the wide variety of discretionary powers given it by Congress

to fashion [**11] the most complete relief possible. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421, 95 S. Ct. 2362, 2373, 45 L. Ed. 2d 280 (1975). In the usual civilian case these powers include both the award of back pay and appropriate injunctive relief. Id. However, the courts also have a strong policy of avoiding interference in internal military matters. Orloff v. Willoughby, 345 U.S. 83, 93-94, 73 S. Ct. 534, 539-540, 97 L. Ed. 842 (1953). This policy is particularly compelling with regard to military promotions. Yee v. United States, 206 Ct. Cl. 388, 512 F.2d 1383 (Ct.Cl.1975); Brenner v. United States, 202 Ct.Cl. 678 (1973), cert. denied, 419 U.S. 831, 95 S. Ct. 54, 42 L. Ed. 2d 56 (1974). We find that the trial court did not strike the proper balance between these conflicting judicial policies for two reasons. First, Thornton must exhaust his administrative remedies, and, second, we have [*692] grave doubts that the power of the court extends to the ordering of military promotions.

In Bard v. Seamans, 507 F.2d 765 (10th Cir. 1974), we held that a person who seeks to have a military record reviewed and corrected must first exhaust his administrative remedies. Thornton has not done so. [**12] As Bard points out, the Army Board for the Correction of Military Records (BCMR) is the review mechanism provided by Congress. See 10 U.S.C. @ 1552. The BCMR considers applications for the correction of military records and claims for loss of pay under procedures set out in 32 C.F.R. @ 581.3, promulgated pursuant to section 1552.

Courts have emphasized that application of the doctrine of exhaustion is particularly desirable in matters of military promotion. Horn v. Schlesinger, 514 F.2d 549 (8th Cir. 1975); Sanders v. United States, 219 Ct. Cl. 285, 594 F.2d 804 (Ct.Cl.1979); Skinner v. United States, 219 Ct. Cl. 322, 594 F.2d 824 (Ct.Cl.1979). The need for military expertise is compelling when review of an OER is sought. "An Officer Efficiency Rating as to the quality of an officer's service is a highly subjective process which requires the opinions and judgments of military professionals." Turner v. Department of Army, 447 F. Supp. 1207, 1213 (D.D.C.1978).

Although the requirement of exhaustion is not a rigid one, we stated in Bard "that a strong policy exists that demands resort to the BCMR unless to do so would be futile." 507 F.2d at 769 (emphasis added). The record is unclear [**13] as to why Thornton did not apply to the BCMR to have the adverse OER reviewed for substantive errors. n2 However, he did not do so, and he has not offered any reason why such an application would be futile. Thornton must resort first to the BCMR to allow "the military an opportunity to exercise its own expertise, and to correct its own errors." Horn, 514 F.2d at 553.

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n2. Thornton testified at trial that he sought correction of the procedural errors in the OER, Rec., vol. V, at 60, but did not ask to have a review of the alleged substantive errors. The Army investigation in May, 1977, found that Thornton's problems in attempting to deal with the adverse OER were caused in part by serious bureaucratic bungling, and that the officers who were responsible for monitoring the relevant administrative procedures were derelict in performing their duties. Rec., vol. III, at 122.

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We note that under 32 C.F.R. @ 581.3(c)(2), one must file an application with the BCMR for review of a record within three years after discovery [**14] of the alleged error. However, failure to file within the prescribed time may be excused by the BCMR in the interests of justice. Id. In view of the fact that a federal trial judge ordered the promotion of Thornton more than two years ago, which very likely led Thornton to believe he need not consider further administrative remedies, we believe that it would be in the interests of justice for the BCMR to consider Thornton's untimely application should he choose to make one.

The BCMR has the power under section 1552 to correct a military record and to order payment for losses incurred because of the incorrect record. It has been held that this statute by implication gives the BCMR the power to provide full reinstatement and back pay. Knehans v. Alexander, 184 U.S. App. D.C. 420, 566 F.2d 312 (D.C.Cir.1977). There is even some authority to the effect that the BCMR has the power to effect advancement in grade if necessary to correct an injustice. Horn, 514 F.2d at 552 n. 11. However, we do not believe that either the BCMR or a reviewing court n3 can order Thornton promoted in the Guard; they can do no more than order the record corrected, reinstatement at discharge rank, back pay, and [**15] an opportunity for promotional consideration based upon an accurate record. Sanders, 594 F.2d at 820; Abruzzo v. United [*693] States, 513 F.2d 608 (Ct.Cl.1975); Yee, 512 F.2d at 1388.

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n3. If Thornton successfully applies for administrative review of the adverse OER, the action of the BCMR will be subject to judicial review to determine whether its decision is "arbitrary, or capricious, or in bad faith, or unsupported by substantial evidence, or contrary to law, regulation, or mandatory published procedure of a substantive nature by which plaintiff has been seriously prejudiced . . . ." Sanders, 594 F.2d at 811.

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Accordingly, all trial court awards of injunctive and monetary relief which are based directly or indirectly on Thornton's military promotion must be set aside. Therefore, we reverse the trial court's order that the Guard promote Thornton to the rank of Major and the corresponding award of military back pay. We also reverse the ordered right of first refusal of the EEO position, and the award [**16] of civilian back pay for the period after May 6, 1977, when Thornton became ineligible to hold the civilian position. Should Thornton choose to pursue his administrative remedies, the trial court may retain jurisdiction and reconsider appropriate monetary and injunctive relief after the BCMR's final disposition of the OER and military reinstatement issues.

Affirmed in part and reversed in part in accordance with our opinion.

Marine officer must be promoted by the President with the advice and consent of the Senate, therefore BoI's recommended promotion is not self-realizing, nor does it authorize the Sec. to promote the officer; it does support the Sec. proposing that the President propose the promotion.

41 Op. Atty Gen. 10 printed in FULL format.

OPINION OF HON. TOM C. CLARK, OF TEXAS
APPOINTED JUNE 15, 1945 *
* Entered on duty July 1, 1945.

CORRECTION OF MILITARY AND NAVAL RECORDS

41 Op. Atty Gen. 10; 1948 U.S. AG LEXIS 1

October 11, 1948 n1
n1 Released for publication February 19, 1958.

SYLLABUS:
[*1]

Under section 207 of the Legislative Reorganization Act of 1946 of August 2, 1946, c. 753, 60 Stat. 837, as amended, which provides for the correction of military and naval records when necessary to correct an error or to remove an injustice, the Board for the Correction of Naval Records has directed the Commandant of the Marine Corps to take such action as may be necessary to restore Second Lieutenant Richard M. Bickford to his former position as a First Lieutenant with the date of rank and lineal precedence as a First Lieutenant without regard to a resignation he had submitted. His attempted withdrawal of the resignation before its effective date was inadvertently filed without action thereon.

The Constitution and pertinent statutes require that appointment of officers, which would include those of the Regular Marine Corps, upon promotion, shall be made by the President by and with the advice and consent of the Senate. It is, therefore, not within the power of either the Secretary of the Navy or the Board for the Correction of Naval Records to restore Lieutenant Bickford to his former position. However, it would not be unprecedented for the Secretary of the Navy to recommend [*2] to the President a nomination so worded as to accomplish the result contemplated by the finding of the Board. No opinion is expressed regarding this since the matter was not submitted for consideration.

ADDRESSEE:
THE SECRETARY OF THE NAVY

OPINIONBY: CLARK

OPINION:
MY DEAR MR. SECRETARY: This refers further to your letter of May 28, 1948, requesting an opinion regarding your authority under section 207 of the Legislative Reorganization Act (60 Stat. 837) to comply with a decision of the Board for the Correction of Naval Records which directed the Commandant of the Marine Corps "to initiate and take such action as may be necessary to restore 2d Lieutenant Richard M. Bickford to his former position as a 1st Lieutenant with the date of rank (30 November 1944) and the lineal precedence as a 1st Lieutenant he would presently be assigned had his resignation from the U.S. Marine Corps on 19 October 1946 not been effected." (A dispatch from Lieutenant Bickford attempting to withdraw his resignation before its effective date was inadvertently filed without any action thereon being taken.)

Section 207 of the Legislative Reorganization Act provides:

"The Secretary of War, the Secretary of the Navy, and [*3] the Secretary of the Treasury with respect to the Coast Guard, respectively, under procedures set up by them, and acting through boards of civilian officers and employees of their respective departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or to remove an injustice." n2

n2 Amended in 1951 (65 Stat. 655) to include Secretary of the Air Force

In his opinion which you inclosed with your letter of May 28, the Judge Advocate General of the Navy stated that under the Constitution and the pertinent statutes it is "expressly required that the appointment of officers of the Regular Marine Corps, upon promotion, shall be made by the President by and with the advice and consent of the Senate" and that therefore it is not within the power of the Secretary of the Navy or of the Board for the Correction of Naval Records to accomplish the restoration of Lieutenant Bickford to his former position. I concur in this view.

In connection with my consideration of this question, I sought the views of the Secretary of the Army, the Secretary of the Air Force, and the Secretary of the Treasury, in view of the [*4] fact that similar questions could arise in the services under their respective jurisdictions. The following excerpt from an opinion of the General Counsel of the Treasury Department, which was accordingly submitted to me, might be of interest to you:

"The method by which the Board's recommendation is to be accomplished is left in the discretion of the Secretary, the Board's decision stating only 'that the Commandant of the Marine Corps be directed to initiate and take such action as may be necessary.' * * * As a practical matter, the Board's decision is little more than a finding that an injustice has been perpetrated coupled with a recommendation that, to remove the injustice, the Secretary initiate such action as may be necessary to promote Bickford to the grade of First Lieutenant. The Board's decision does not, of itself, effect the promotion, nor does it direct or make it mandatory that the Secretary take action on the case. Instead, the decision partakes of the character of advice or counsel, and apparently contemplates that if the promotion is to be effected, it would be accomplished in the same manner and under the same procedures as are utilized in the promotion [*5] of officers generally. Inasmuch as all promotions are submitted to the President and the Senate, it is difficult to discern any problem concerning the constitutionality of the proposed action."

In addition, the Acting General Counsel of the Air Force commented that the promotion might be made by the President by and with the advice and consent of the Senate, but that "such action could affect the officer's relative rank retroactively only to the extent specifically authorized by existing law."

It is my understanding, as the result of conferences between members of our respective staffs, that a recommendation by the Secretary of the Navy to the President for a nomination so worded as to accomplish the result contemplated by the finding (or recommendation) of the Board for the Correction of Naval Records would not be unprecedented. However, that is a matter which has not been submitted for my consideration and, of course, I express no views regarding it.

Sincerely yours,

TOM C. CLARK.

Opinion of AG that Sect. of Army has the authority to change the date of appointment from 12 April 1946 (the actual date) to 4 Aug 1948. Raises the question of whether it is beyond the scope of the Bd to effect a retroactive appointment of an officer. but no such question is raised as to simply considering him retroactively appointed for pay purposes.

41 Op. Atty Gen. 71 printed in FULL format.

OPINION OF HON. J. HOWARD MCGRATH, OF RHODE ISLAND
APPOINTED AUGUST 24, 1949

CORRECTION OF MILITARY AND NAVAL RECORDS

41 Op. Atty Gen. 71; 1951 U.S. AG LEXIS 5

January 22, 1951 *
* Released for publication January 3, 1958.

SYLLABUS:
[*1]

Section 207 of the Legislative Reorganization Act of 1946 of August 2, 1946, c. 753, 60 Stat. 837, as amended, which provides for the correction of military and naval records when necessary to correct an error or to remove an injustice, was intended, together with section 131 of the same act, to free Congress of the burden of dealing with matters previously dealt with by private bills and to provide a method for their disposition by administrative action.

The Army Board on Correction of Military Records found that there was a delay of more than two years in the promotion of Lieutenant Colonel Albert J. Foy in the Officers' Reserve Corps to the grade now held by him, which was the result of administrative error and worked and continued to work an injustice on the applicant.

The Board has recommended to the Secretary of the Army that all the military records of the Department of the Army relative to Lieutenant Colonel Foy be corrected to show him promoted to such grade, effective as of April 12, 1946.

The Secretary of the Army has authority under section 207 to extend to Lieutenant Colonel Foy the rights and privileges that he would have, had he been promoted on April 12, 1946, instead [*2] of August 4, 1948, and the recommendations of the Army Board on Correction of Military Records are adequate for this purpose.

ADDRESSEE:
The SECRETARY OF THE ARMY

OPINIONBY: FORD

OPINION:
MY DEAR MR. SECRETARY: This refers to your request for my opinion regarding your authority under section 207 of the Legislative Reorganization Act of 1946, as amended, (approved August 2, 1946, c. 753, 60 Stat. 812, 837; 5 U.S.C. 191a) to "change the date of the oppointment of A.J. Foy to his present grade of lieutenant colonel in the Officers' Reserve Corps from 4 August 1948 (when such appointment was actually effected) to 12 April 1946."

Section 207 reads as follows:

"The Secretary of the Army, the Secretary of the Navy [also now the Secretary of the Air Force] and the Secretary of the Treasury with respect to the Coast Guard, respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective departments, are

authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or to remove an injustice."

The Army Board on Correction of Military Records, acting on an application for relief submitted by Lieutenant [*3] Colonel Foy under section 207, found that there was a delay of more than two years in his promotion to the grade now held, which "was the result of administrative error and worked and continues to work an injustice on the applicant." The Board has submitted to you the following recommendations:

"1. That all of the military records of the Department of the Army relative to Lieutenant Colonel Albert J. Foy, O-266 938, Organized Reserve Corps be corrected to show him promoted to such grade effective as of 12 April 1946.

"2. That the Department of the Army in any computation of service in the Organized Reserve Corps consider Lieutenant Colonel Albert J. Foy, O-266 938, to have been promoted to such grade as of 12 April 1946."

There can be no doubt of your authority under section 207 to extend to Lieutenant Colonel Foy the rights and privileges that he would have had if he had actually been promoted on the earlier date. Before the enactment of the Legislative Reorganization Act of 1946 the Congress from time to time passed private acts to accomplish that purpose in comparable cases. See e.g. act of June 13, 1946, 60 Stat. 1222. Other comparable acts are cited in memoranda [*4] prepared by the Judge Advocate General of the Army and submitted for my consideration. Section 207 of the Legislative Reorganization Act of 1946 was designed to supply a substitute for such private acts, which were barred by section 131.

The Judge Advocate General does not doubt your authority to accomplish that result. He feels, however, that recommendation No. 1, if carried out, would amount to a new and retroactive appointment which was beyond the power of the Congress to make under the old practice of correcting records by private acts and beyond the contemplation of section 207. But, as the Board points out in its memorandum to you dated May 2, 1950 (p. 11), "The appointment has previously been conferred upon Lieutenant Colonel Foy and all that remained to be done was to adjust the effective date of entitlement to the rights and privileges appurtenant to the appointment."

Presumably, if the recommendations of the Board should be approved, the Adjutant General would issue to Lieutenant Colonel Foy a document similar to that used in the case of Major Harris B. Drake, a copy of which was annexed to the above-mentioned memorandum of the Board. It reads as follows:

"Pursuant [*5] to the provisions of Section 207 of the Legislative Reorganization Act of 1946 (Act 2 Aug 1946, Public Law 601, 79th Congress) the Secretary of the Army on 19 March 1949 directed that the effective date of promotion of Harris B. Drake, O415189, Army of the United States, from the grade of captain to the grade of major be, and is hereby, corrected and changed from 6 September 1946 to 13 December 1945."

Such a "correction" effects no change in the date that the individual actually assumed the office, and no new appointment is involved. The "correction of the record" is a fiction, but constitutes the basis for treating the individual for certain (but not necessarily all) purposes as though he had

attained the office on the earlier date. I think the recommendation of the Board in the present case can and must be interpreted in this manner.

It may well be that what is sought to be accomplished could be effected as well without adoption of the Board's recommendation No. 1. But, as stated by the General Counsel of the Department of Defense, "from an administrative point of view, correcting the records would seem to be the simplest and cleanest way of handling the matter." I [*6] find no basis for regarding the selection of this method as beyond your discretion.

For the foregoing reasons it is my opinion that you have the authority under section 207 of the Legislative Reorganization Act of 1946 to extend to Lieutenant Colonel Foy the rights and privileges that he would have, had he been promoted on April 12, 1946, and that recommendations of the Army Board on Correction of Military Records, if approved by you, are adequate for the purpose.

Sincerely yours,

PEYTON FORD,

Acting Attorney General.

BD corrected his "dates of rank" to be a few years earlier than actually happened. Officer entitled to back pay based on change of dates. (did not count yrs of Navy service)

173 F. Supp. 619 printed in FULL format.

CHARLES R. DARBY v. THE UNITED STATES

No. 189-58

United States Court of Claims

146 Ct. Cl. 211; 1959 U.S. Ct. Cl. LEXIS 155; 173 F. Supp. 619

June 3, 1959

SYLLABUS: [**1]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Military pay; active duty pay; adjusted (corrected) date of rank; right to additional pay. -- In an action by plaintiff, an Army officer, to recover additional active duty pay and allowances which he claims are due him as a result of corrections in his dates of rank made pursuant to orders of the Secretary of the Army acting pursuant to a recommendation of the Army Board for the Correction of Military Records, and the action of the Adjutant General pursuant thereto, it is held (1) that, under the express provisions of the order of the Secretary which stated that the corrected dates of rank should be "for all purposes", pay as well as rank was subject to correction, and (2) the limiting provisions of the Act of October 14, 1942, 56 Stat. 787, reenacted substantially in 10 U.S.C. @ 3451(a), did not prohibit such increased payment since, within the meaning of that statute, plaintiff was entitled to receive the pay and allowances of the higher grade from dates earlier than the original promotion orders under "some other provision of law", namely, the statute providing for the correction of military records, 10 U.S.C. @ [**2] 1552. Plaintiff is entitled to recover.

Military pay; active duty pay; correction of military records; claim for pay resulting from corrected record -- accrual of. -- Where a Correction Board recommends, and the Secretary of the particular service complies with the recommendation, that an officer's records be corrected to show that his dates of rank for all purposes shall be at dates earlier than the dates on which he was actually promoted (because of the Army's refusal to give the officer credit for prior commissioned service in the Navy), the failure of the Department of the Army to pay his claim for increased active duty pay (upon disapproval of the claim by the General Accounting Office) gave rise to a claim under an act of Congress, i.e., 10 U.S.C. @ 1552, which section permitted the Department of the Army of pay him in accordance with his corrected records.

Military pay; active duty pay; correction of military records; retroactive promotion -- adjusted date of rank; right to pay. -- The Act of October 14, 1942, 56 Stat. 787, and a later statute to the same effect, 10 U.S.C. @ 3451(a), provide that the date of the order announcing a promotion shall be deemed, for all purposes [**3] including pay, as the date of the promotion unless "some other provision of law" permits the officer to receive the increased pay and allowances of the higher grade from an earlier date. Where an officer's records are corrected pursuant to a proceeding under the Correction Board legislation (10 U.S.C. @ 1552) to show his promotions to higher ranks at earlier dates and the correction also provides that it shall be "for all purposes", the officer

has become entitled to the higher pay from those earlier dates under "another provision of law," i.e., 10 U.S.C. @ 1552.

COUNSEL: Mr. Frederick Bernays Wiener for the plaintiff.

Mr. Cyril Moscow, with whom was Mr. Assistant Attorney General George Cochran Doub, for the defendant.

OPINIONBY: LARAMORE

OPINION: [*213] [***619] LARAMORE, Judge, delivered the opinion of the court:

Plaintiff, an Army officer, seeks to recover pay and allowances resulting from an adjusted date of rank.

Both plaintiff and defendant have filed motions for summary judgment, presenting the question as to whether the correction of plaintiff's records "* * * to show that his dates of rank, for all purposes, * * *" is to be construed as entitling plaintiff [**4] to pay and allowances from the corrected dates of rank.

The material facts are not in dispute and are, briefly, as follows: Plaintiff was appointed a Midshipman in the U.S. Navy on June 11, 1943. Following his graduation from the Naval Academy he was commissioned an Ensign in the Navy of June 5, 1946. Because of chronic seasickness he was permitted to resign from the Navy under honorable conditions on November 18, 1948, in expectation of an Army commission. Plaintiff was appointed a Second Lieutenant, Regular Army, on December 10, 1948. Thereafter he was appointed to the temporary grade of First Lieutenant on May 29, 1950; to the permanent grade of First Lieutenant on December 10, 1951; to the temporary grade of Captain on December 31, 1952; and to the permanent grade of Captain on October 29, 1954. Plaintiff is currently on duty as a Captain, U.S. Army.

After his acceptance of any Army commission, recommendations by plaintiff's military superiors for his promotion were disapproved because of the Army's refusal to give him credit for his commissioned Navy service. A request for the adjustment of plaintiff's position on the promotion list to give him such credit was also denied. [**5]

Plaintiff filed application to the Army Board for Correction of Military Records. As a result thereof, the Secretary of the Army directed "that all of the Department of the [*214] Army records of Charles R. Darby be corrected to show that his dates of rank, for all purposes, as Second Lieutenant in the Regular Army and First Lieutenant, Army of the United States, are 25 June 1946, and 27 May 1949, respectively, and that his dates of rank for grades subsequently held be adjusted in accord therewith."

[***620] The Adjutant General of the Army in due course notified plaintiff that his date of rank as Captain, Army of the United States, was similarly corrected. The Army register issued subsequent to these corrections reflected plaintiff's appointments to permanent and temporary grades in accordance with the corrected dates as directed by the Secretary of the Army and as published by the Adjutant General of the Army.

The results of the corrections made are indicated by the notification to plaintiff by the Adjutant General as follows:

2. Under the provisions of title 10, U.S. Code, section 1552, Department of the Army General Orders 12 and Memorandum 1522, both dated 1 [**6] March 1957, your permanent dates of rank in the following grades in the Regular Army are changed as indicated:

Grade	Old Date of Rank	New Date of Rank
Second Lieutenant	10 Dec 1948	25 Jun 1946
First Lieutenant	10 Dec 1951	25 Jun 1949
Captain	29 Oct 1954	1 Apr 1953

3. Your basic date has been changed to 25 June 1946, and your position on the Regular Army promotion list has been adjusted accordingly so that you now follow Charles R. Smith, O50542, who has Promotion List Number 12787 in the 1957 Official Army Register.

4. It has been determined that your date of rank as first lieutenant, AUS, should be 27 May 1949, and that your temporary date rank as captain should be adjusted on the basis that if you had been positioned on the Regular Army Promotion List in 1950 in accordance with the above changes to your records, you would have been eligible for promotion in the temporary promotion program announced in WCL 36753 dated 4 August 1950.

5. By direction of the President, your date of rank and promotion eligibility date in the temporary grade of first lieutenant, AUS, is changed to 27 May 1949 and your date of rank and promotion eligibility date [**7] in the temporary grade of captain, AUS, changed to 30 December 1950.

[*215] Plaintiff filed claim for the difference in pay and allowances actually received by him in the amount be would have received if his promotions had not been withheld. This claim was disallowed by the Comptroller General on the basis of the Act of October 14, 1942, 56 Stat. 787, which provides:

That every officer of the Army of the United States, or any component thereof, promoted to a higher grade at any time after December 7, 1941, shall be deemed for all purposes to have accepted his promotion to higher grade upon the date of the order announcing it unless he shall expressly decline such promotion, and shall receive the pay and allowances of the higher grade from such date unless he is entitled under some other provision of law to receive the pay and allowances of the higher grade from an earlier date. No such officer who shall have subscribed to the oath of office required by section 1757, Revised Statutes, shall be required to renew such oath or to take a new oath upon his promotion to a higher grade, if his service after the taking of such an oath shall have been continuous.

This suit results. [**8]

Plaintiff's claim is based entirely upon his revised "dates of rank." He argues [***621] that the correction of his dates of rank changes his promotion dates so that he became entitled to additional compensation. In support of this plaintiff points to the language of the Correction Board order which says "that all of the Department of the Army records of Charles R. Darby

be corrected to show that his dates of rank, for all purposes, * * *" and says that this means the Secretary of the Army changed the date of plaintiff's promotions and not simply his date of eligibility for promotion.

Defendant argues that the language is more restrictive in that "for all purposes" related only to results directly flowing from "dates of rank." This argument is not without merit. On the other hand, the objective of the Correction Board was not to correct an error, but to remove an injustice. What then is the injustice sought to be removed? All of plaintiff's fellow officers enjoyed an earlier improvement in their rank as well as pay, and in this respect unquestionably plaintiff would have climbed the ladder of success at the same rate as others had his Navy service been recognized by the [**9] [*216] Army. Certainly getting the same pay for an equal amount of knowledge, training and service is as important to an officer in the Army as to a person occupying a civilian position. To say otherwise would be to say that the emoluments of office are unimportant to a man in the military. This we cannot conceive. One cannot eat or put in the bank the glitter and glory that goes hand-in-hand with an officer of the Army. Officers like civilians have their future and families to think of and the pay commensurate to their station is of the greatest personal importance to the soldier. Consequently the Correction Board found an injustice had been done and when it acted to remove the injustice it must have meant to remove all the injustice.

Therefore, we read "for all purposes" to mean everything necessary to place plaintiff in the same position of his fellow officers and not to mean "for all purposes" except pay and allowances, which to us seems as important as rank or dates of rank.

The defendant cites an example of another correction of records to illustrate that the Correction Board meant not to change the promotion date. The cited example, an exhibit to its motion, [**10] reads "* * * that all of the Department of the Army records of (name deleted) be corrected to show: * * * c. that he was promoted to the grade of lieutenant colonel, Army of the United States, on 26 March 1954."

We have no way of knowing the facts behind the correction example offered by defendant in its exhibit. Many facts could have motivated this action. However, we do know that this correction read "for all purposes." "All" could only mean everything.

Furthermore, to give plaintiff benefit of the change in dates of rank, it was not necessary to say "for all purposes." Changing the date was enough to give plaintiff the fruits flowing from such a correction. Nor can we believe the choice of words was a mere accident, inasmuch as we cannot attribute to the Correction Board and/or the Secretary of the Army, the use of meaningless words. Thus to attribute any meaning to the expression is to say that it meant "everything," which includes pay.

[*217] Defendant points to this court's decisions in the cases of Berry v. United States, 130 C. Cls. 33, cert. denied 349 U.S. 938, and Campbell v. United States, 137 C. Cls. 742, to show the distinction between date [**11] of rank and date of promotion. However, in the Berry and Compbell cases the promotion statute under which Berry and Campbell were promoted clearly stated that the pay and allowances of the higher grade be from the dates on which such

appointments were made by the President. No such statute is present here.

Plaintiff bases his claim here under the statute which permitted the Department of the Army to pay plaintiff pursuant to correction of his records, 10 U.S.C. 1552. However, defendant says that the [***622] Act of October 14, 1942, 56 Stat. 787, prevents the payment thereof. Notwithstanding the fact that said act had been repealed prior to the instant correction of records, defendant says that a later act, 10 U.S.C. 3451(a), provides substantially the same. Each of the above acts referred to contains practically the same language; i.e., unless entitled to pay and allowances from an earlier date under another provision of law. We believe that "another provision of law", 10 U.S.C. 1552, permitted the Department of the Army to pay to plaintiff the sum sought here. Having failed to do so, plaintiff is entitled to recover in this suit the pay and allowances petitioned [**12] for.

Plaintiff's motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied. The amount of recovery will be determined pursuant to rule 38(c) of the Rules of this court.

It is so ordered.

BRYAN, District Judge, sitting by designation; MADDEN, Judge; WHITAKER, Judge, and JONES, Chief Judge, concur.

In accordance with the opinion of the court had on a memorandum report of the commissioner as to the amount due thereunder, it was ordered on September 18, 1959, that judgment for the plaintiff be entered for $1,891.41.

Retired

mailed retirement papers May 12, new Act said retirees before June 3 with the requisite qualifications should be placed in the first grade, retirement not approved until after June 3; Bd recommended changing his date of retirement to June 2. Opinion of Atty Gen. said Bd was authorized to change date

1ST CASE of Level 1 printed in FULL format.

OPINION OF HON. J. HOWARD MCGRATH, OF RHODE ISLAND
APPOINTED AUGUST 24, 1949

CORRECTION OF MILITARY AND NAVAL RECORDS

41 Op. Atty Gen. 94; 1952 U.S. AG LEXIS 5

March 20, 1952

SYLLABUS:
[*1]

Section 207 of the Legislative Reorganization Act of 1946, 65 Stat. 655, authorizing the correction of military and naval records "to correct an error or remove an injustice" was intended, together with section 131 of the same act, to free the Congress of the burden of dealing with matters previously dealt with by private bills and to provide a method for their disposition by administrative action.

In the case of the Army the responsibility for deciding whether an "error" or "injustice" has occurred with should be corrected under section 207 rests on the Secretary of the Army, acting through the Army Board on Correction of Military Records. The words "error" and "injustice" as used in section 207 do not have a limited or technical meaning and, to be made the basis for remedial action, the "error" or "injustice" need not have been caused by the service involved.

The Secretary of the Army, if he determines that such action will "remove an injustice," is authorized by section 207 to correct the records of a deceased non-commissioned officer to note thereon that he shall be considered to have been retired at a date earlier than his actual retirement date.

ADDRESSEE:
THE SECRETARY OF THE ARMY

OPINIONBY: [*2]

McGRATH

OPINION:
MY DEAR MR. SECRETARY: This is with further reference to your request for my opinion concerning your authority under section 207 of the Legislative Reorganization Act of 1946, as amended (60 Stat. 837, 65 Stat. 655; 5 U.S.C. 191a 275, 456a), to "change the date of former Sergeant James W. Grose's retirement from 4 September 1916 (when such retirement was actually effected) to 2 June 1916."

The facts are not in dispute and may be briefly summarized as follows:

On May 12, 1916, Grose, serving in the Philippine Islands as a sergeant, first class, Hospital Corps, applied for retirement with over thirty years service. His papers did not reach Washington until June 28 of that year. The application was approved and orders for his retirement issued on July 12, and he was actually retired in September 1916. In the meantime, there was enacted the National Defense Act of June 3, 1916 (39 Stat. 166, 172), which provided an opportunity for sergeants, first class, in the Hospital Corps, who had at

least one year's satisfactory service in that capacity to advance to the grade of master sergeant in the Medical Department established by that act. Sergeant Grose had [*3] no knowledge of the enactment of the 1916 Act until after his application for retirement had been approved, and therefore was in no position to avail himself of the benefits of the act by withdrawing his application for retirement before it was acted upon. Subsequently, the act of March 3, 1927 (44 Stat. 1356) was enacted. This statute provided that "sergeants, first class, Hospital Corps, retired prior to June 3, 1916" (emphasis supplied) should be "placed in the first grade" (master sergeant). But since Sergeant Grose was not retired until after June 3, 1916, the benefits of the 1927 statute were not available to him. The Court of Claims so held in Grose v. United States, 97 Ct. Cls. 383 (1942) although it felt that Grose's case had "strong equity" (id. at p. 387). The Court said:

"The act of June 3, 1916 * * * established enlisted grades of Master Hospital Sergeant and Hospital Sergeant, in the Medical Department established by that act, which were above the grade of Sergeant, first class, Hospital Corps, under prior statutes. As pointed out by the Committee [on Military Affairs of the House of Representatives, in H. Rept. 2081, 69th Cong.], it was for [*4] this reason that sergeants, first class, Hospital Corps, and the other noncommissioned officers who had served long and faithfully under the prior less liberal statutes were retroactively given the benefit of the more liberal provisions of the 1916 act, which, if they had continued to serve under the 1916 act, they doubtless would have received by promotion because of long service. Plaintiff had no knowledge of the new statute until after his application had been approved and was not therefore in a position where, has he known of the act of June 3, he might have withdrawn his application because of the opportunity for advancement in the enlisted grades afforded by that act. But the court cannot enlarge the limitation of the act of 1927 so as to extend the benefits thereof to an officer who after becoming eligible for retirement made application to retire May 12, 1916, before enactment of the new statute of June 3, 1916, but whose application, because of the distance from Washington, was not approved until after June 3, 1916." [pp. 389-390]

Grose also sought relief by private legislation, but bills introduced to that end failed of passage.

Now Sergeant Grose is dead. [*5] His widow and son have applied for relief under section 207 of the Legislative Reorganization Act of 1946, as amended, which provides as follows:

"Sec. 207. (a) The Secretaries of the Army, Navy, and Air Force and the Secretary of the Treasury (with respect to the Coast Guard), respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective Departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice, and corrections so made shall be final and conclusive on all officers of the Government * * *." [65 Stat. 655] Proceeding under that provision, the Army Board on Correction of Military Records has found that "the placing of former Sergeant Grose on the retired list subsequent to June 3, 1916 worked an injustice on him," and has recommended that his Army records "be corrected by entry of the notation thereon that he shall be held and considered to have been retired on 2 June 1916 in the grade of Sergeant, First Class, Hospital Corps." The question on which you have sought my opinion is whether or not section 207 authorizes the [*6] execution of the

Board's recommendation.

In 40 Op. A.G. 504, 505 (1947) former Attorney General Clark pointed out that in enacting sec. 207 of the Legislative Reorganization Act of 1946 (together with sec. 131 of that act, which bars receipt or consideration in either House of Congress of any "private bill or resolution * * * authorizing or directing * * * the correction of a military or naval record"), the Congress intended "to free itself from the burden of dealing with such matters by private bills and to provide a method for their disposition by administrative action." The case of Sergeant Grose, in my opinion, is one involving precisely the kind of "correction of a military or naval record" that constituted a part of the burden of which the Congress intended to relieve itself. In fact, private legislation was introduced for Grose himself in 1937 and 1939, before the enactment of the Legislative Reorganization Act of 1946. Those bills failed of passage, but there are other cases where similar bills succeeded. See, e.g., Pr. L. 646, 79th Cong., 60 Stat. 1222; Pr. L. 107, 60th Cong., 35 Stat. 1436.

The power granted by section 207 is to "correct" a record, and the [*7] purposes for which such correction may be made are twofold: "to correct an error," or "to remove an injustice." The words "error" and "injustice" are not defined in the act, and there is no indication that the Congress intended any limited or technical meaning for them here. It has been suggested that the "error" or "injustice" must be caused by the service involved before such error or injustice may be made the basis of remedial action under section 207. But such a construction appears to me not only to effect an unjustified and gratuitous limitation on the power conferred by the plain language of the section, but actually to contradict the intention of the Congress to which I have already referred. The suggested limitation is not necessary, in my opinion, in order to sustain the validity of section 207 against a challenge of unlawful delegation of legislative authority by the Congress. The standards "to correct an error" and "to remove an injustice" are in my judgment sufficient. See Lichter v. United States, 334 U.S. 742, 774-787 (1948), and cases there cited.

In my opinion, the responsibility for deciding whether the disadvantage suffered by Sergeant Grose in the [*8] circumstances does or does not constitute an "injustice" to be removed under section 207 rests, under that provision, on you, acting through the Army Board on Correction of Military Records. If that Board, properly constituted and functioning under procedures, set up by you in accordance with section 207, determines that this case does involve an "injustice" that may be removed by the recommended correction of Sergeant Grose's record, I deem such correction to be authorized under the statute. For the actual making of that determination, the responsibility, of course, remains with you and the Board.

Sincerely,

J. HOWARD McGRATH.

OFFICE OF THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1000

Chief of Staff

April 22, 1998

Dear Richard,

I just got back from a week overseas with the boss and saw your fax. I want to thank you for your thoughtful and supportive comments on the Blade article. I will share them with the Secretary.

As you know, the Reno letter has been badly misinterpreted on both ends of the press spectrum -- in our view, it was a supportive gesture designed to keep the settlement proceeding smoothly. Your effort to explain rather than enflame the matter is most appreciated.

Best. Bill

FYI

– Richard Socarides

1ST STORY of Level 1 printed in FULL format.

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The National Law Journal

September 15, 1997

SECTION: AGENCY WATCH; Pg. A10

LENGTH: 175 words

HEADLINE: Navy Ordered To Pay;
Department of the Navy

BODY:

The 9th U.S. Circuit Court of Appeals has upheld a lower court decision ordering the Navy to pay the legal fees retired Petty Officer Keith Meinhold incurred opposing the military's attempt to discharge him for announcing in 1992 that he was gay. Voting 2-1, the panel affirmed U.S. District Judge Terry J. Hatter's ruling that the Navy must pay Mr. Meinhold's fees under the Equal Access to Justice Act because the department was not "substantially justified" in seeking his discharge based solely on his admission of his homosexuality on "Nightline," the television news program. Judge Hatter had knocked about one-fourth off the $ 600,000 request made by Mr. Meinhold's lawyers, led by Robert Barnes, of the L.A. office of New York's Kaye, Scholer, Fierman, Hays & Handler L.L.P., which had taken the case probono. The appellate court approved a $ 421,487 fee award and remanded the matter to Judge Hatter to determine Mr. Meinhold's cost of defending the fee award on appeal, for which the panel said he should be reimbursed as well.

LANGUAGE: ENGLISH

LOAD-DATE: September 29, 1997

TO BOB WEINER

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4TH DISTRICT, MASSACHUSETTS

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FAX FROM THE WASHINGTON OFFICE OF CONGRESSMAN BARNEY FRANK

TODAY'S DATE: 4/22

TO: John Podesta

FROM: Barney Frank

FAX NUMBER: 456-2883

NUMBER OF PAGES [INCLUDING THIS ONE]: 2

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COMMENTS:

Rob Weiner

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Congress of the United States
House of Representatives
Washington, DC

MEMORANDUM

TO: John Podesta

FROM: Barney Frank BF

RE: Senior Chief (Petty Officer) Timothy McVeigh

DATE: April 22, 1998

I have researched the issue of the ability of the Navy to award Timothy McVeigh a settlement in cash equal to the amount he would be entitled to if he retired after 20 years of service. I have found no impediment in the law to the Navy's doing this.

I note that I may not have been clear about what I expect the Navy to provide. I understand the Navy's position that it is restricted by law in the form of settlement it can agree to. I may have led you to believe that it is my position that McVeigh should be deemed to have served 20 years, and I understand that the Navy asserts it does not have the authority to do that. However, in fact, I am advocating that McVeigh be treated for purposes of the amount of his cash settlement *as if* he served for 20 years. The difference is one of status -- whether he is promoted to the status of a 20-year sailor or whether he remains a 17-year sailor with a cash settlement equal to what he would have received had he served 20 years. I am requesting the second alternative, which is clearly permitted by law.

Section 2733 of Title 10 of the U.S. Code provides that the Armed Forces may compensate service members for loss of personal property in non-combat situations that is caused by a member of the Armed Forces acting within the scope of his or her employment. For settlement amounts above $100,000, 10 U.S.C. §2733(d) provides as follows:

> If the Secretary concerned considers that a claim in excess of $100,000 is meritorious, and the claim otherwise is payable under this section, the Secretary may pay the claimant $100,000 and report any meritorious amount in excess of $100,000 to the Secretary of the Treasury for payment under section 1304 of title 31. [31 U.S.C. §1304(a)(3)(D) indicates that the necessary amounts are appropriated for Treasury to pay claims that exceed amounts payable under 10 U.S.C. §2733.]

From my point of view, this is not an issue of money. The reason that it is important to me that McVeigh receive what he would have received had he served 20 years is that the full cash settlement represents an acknowledgment on the part of the Navy, consistent with Judge Sporkin's decision, that an error was made in the way McVeigh was treated.

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Richard Socarides 02/19/98 05:59:46 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: NC6120: Ask, Tell, Pursue, 563 times

---------- Forwarded by Richard Socarides/WHO/EOP on 02/19/98 05:59 PM ----------

rwockner @ netcom.com
02/19/98 05:02:00 PM

Record Type: Record

To: Stuart D. Rosenstein, Richard Socarides

cc:
Subject: NC6120: Ask, Tell, Pursue, 563 times

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SAN FRANCISCO CHRONICLE, February 19, 1998
901 Mission St., San Francisco,CA,94103
(Fax 415-896-1107)(E-MAIL:
chronletters@sfgate.com)(http://www.sfgate.com)

WASHINGTON -- `Don't Ask' Policy Reportedly Ignored
Gays in the military list 563 cases of rule being violated

Louis Freedberg, Chronicle Washington Bureau Thursday, February 19, 1998

Military commanders routinely violate the Pentagon's ``don't ask, don't tell'' policy, according to a report to be released today, by aggressively investigating the private lives of military personnel suspected of being gay and failing to protect them from harassment.

The report charges that violations of the policy have become increasingly frequent each year since it was introduced by President Clinton in the face of considerable controversy in 1993.

The Servicemembers Legal Defense Network, which provides legal assistance to gay servicemembers, said the number of violations of the policy reported to the organization rose from 443 in 1996 to 563 in 1997.

The worst offender was the Navy, with the Air Force close behind, it said.

``The violations we are seeing are very basic; they should not be occurring five years into the policy,'' said Michele Benecke, co-director of the group. ``Don't ask means don't ask. The rule could not be more clear, but time and time again, investigating officers ask.''

Benecke said the main problem is that military commanders don't know the rules, and their superiors have not informed them of the ``letter or intent'' of the policy. ``Commanders are in the field without a road map,'' she said.

She identified one favorable development over the past year: For the first time, not a single servicemember was convicted and sent to prison for consensual gay sex.

The 80-page report was to be released at a press conference in Washington today. A Pentagon spokesman said he had not seen the report yet and could not comment on it.

The report describes what it calls ``heavy handed and increasingly intrusive investigative tactics against suspected gays, including coercion and fishing expeditions.'' In addition, it said there is ``no recourse or redress for service members asked, pursued or harassed'' and that those who violate the policy are not held accountable for their actions.

Under the policy, commanders are allowed to begin an investigation if they receive ``credible information'' of homosexual conduct. But the report says investigations are often initiated based on nothing more than ``belief or suspicion,'' rather than on ``articulable facts.''

These violations occur despite a promise last February by Secretary of Defense William Cohen to stop any ``continued pursuits and prosecutions'' under the policy.

One of the most egregious violations occurs when servicemen report that they are the target of anti-gay harassment, the report concluded.

The report described what it called a ``most harrowing set of cases'' on the aircraft carrier Eisenhower over a two- month period last year. One sailor was knocked unconscious by an assailant who addressed him with a homophobic epithet in an off-base assault, just days after his car tires had been slashed on his base. Another found a note tacked to his bunk on the carrier which read, ``Leave or Die'' plus an anti-gay slur. Another had a similar threat written in ketchup on his bunk.

But ``the ship's command did little to attempt to track down the perpetrators, and instead investigated the private lives of the threatened sailors and questioned their veracity.'' All of the sailors who complained of harassment were discharged.

This response was, the report alleges, in direct violation of a memo sent out by the Pentagon last year that stated that ``servicemembers should be able to report crimes free from fear of harm, reprisal or

inappropriate or inadequate governmental response."

The report does cite some instances in which the military actively enforced the policy. In one incident, five Marines detonated a stolen military tear-gas canister in Remington's, a gay bar in Washington, D.C. More than a dozen customers suffered severe burning of the eyes and throat.

All five Marines were court-martialed. Four were sentenced to confinement of one to four months. Three of the four will receive bad-conduct discharges on completion of their sentences. The remaining Marine is awaiting punishment.

021917BY.TX

Message Sent To:

Laura S. Marcus/WHO/EOP
John Podesta/WHO/EOP
Sara M. Latham/WHO/EOP
Dawn L. Smalls/WHO/EOP
Maria Echaveste/WHO/EOP
Joseph D Eyer/OVP @ OVP
Monica M. Dixon/OVP @ OVP
LUZZATTO_A @ A1@CD@LNGTWY
Amy W. Tobe/WHO/EOP
Sean P. Maloney/WHO/EOP
Marjorie Tarmey/WHO/EOP
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Robert N. Weiner/WHO/EOP
Virginia Apuzzo/WHO/EOP

Richard Socarides 02/19/98 05:58:37 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Michael D. McCurry/WHO/EOP
Subject: NC6121: Gay harassment up in military

---------- Forwarded by Richard Socarides/WHO/EOP on 02/19/98 05:58 PM ----------

rwockner @ netcom.com
02/19/98 05:03:00 PM

Record Type: Record

To: Stuart D. Rosenstein, Richard Socarides

cc:
Subject: NC6121: Gay harassment up in military

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Group Cites More Gay Harassment

.c The Associated Press

By SLOBODAN LEKIC

WASHINGTON (AP) - The number of gays facing harassment in the military has risen for the fourth consecutive year, despite the Clinton administration's pledge to prevent further discrimination of homosexuals in the armed services, according to a gay rights advocacy group.

The Servicemembers Legal Defense Network attributed the increase to ``a climate in many commands where 'anything goes' in the pursuit of suspected gay personnel.''

In its annual report, the group cited 563 ``command violations'' that servicemembers had reported to it, including instances where commands asked, pursued and harassed service members in direct violation of President Clinton's ``don't ask, don't tell'' policy, which sets limits on gay investigations.

In contrast, the number of violations reported in 1996 by members of all the services was 443, the group said.

Last year's report said a total of 850 people had been discharged from the military for homosexuality in 1996, a five-year high. No figures were given discharges of gays in 1997.

``The difference is that last year we received the number of discharges from the Pentagon, but, despite repeated efforts, we have not been able to get them this year,'' said Kevin Winston, a spokesman for the group. ``We'd love to have the numbers, but we can't get them.''

A Pentagon spokesman, Capt. Jim Knotts, declined to comment on the report, saying the Defense Department had not had a chance to review it or analyze its contents.

``The reason underlying continued violations of (the administration's policy) is a lack of commitment from top military and civilian authorities,'' the document said.

It said the Navy was the worst service in anti-gay harassment and asking, with 193 violations.

The group's recommendations included placing strict limits on gay investigations, disciplining commanders who disobey them, and providing recourse to personnel involved in improper investigations.

``It is time for military leaders to obey the law,'' the report concluded.

AP-NY-02-19-98 0900EST

021917E2.TX

Message Sent To:

Laura S. Marcus/WHO/EOP
John Podesta/WHO/EOP
Sara M. Latham/WHO/EOP
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Marjorie Tarmey/WHO/EOP
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Robert N. Weiner/WHO/EOP
Virginia Apuzzo/WHO/EOP

Richard Socarides 02/19/98 05:58:03 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Michael D. McCurry/WHO/EOP
Subject: NC6122: SLDN action alert

---------- Forwarded by Richard Socarides/WHO/EOP on 02/19/98 05:57 PM ----------

rwockner @ netcom.com
02/19/98 05:36:00 PM

Record Type: Record

To: Stuart D. Rosenstein, Richard Socarides

cc:
Subject: NC6122: SLDN action alert

From:SLDN1@aol.com
To: rwockner@netcom.com
Subject: Take Action: military harassment and pursuit surge

SLDN is proud to announce the release of our Fourth Annual Report on the implementation of "Don't Ask, Don't Tell, Don't Pursue" at a press conference at the National Press Club in Washington, DC this morning. For the fourth consecutive year, we have documented continued asking, harassment and witch hunts against military personnel suspected of being gay in violation of the Defense Department's own regulations. Among this year's top findings:

** The service branches have failed to train commanders and investigators in the limits placed on gay investigations.
** Inquiry officers and investigators use heavy-handed tactics (including threats of criminal charges, confinement, non-judicial punishment, and "outing" to family members, friends and colleagues) in pursuit of gay, lesbian and bisexual servicemembers.
** "Don't Ask" violations are up by 39% over last year, indicating a sharp increase in violations of the most simple of the policy's limits: Don't Ask.
** "Don't Pursue" violations are up 23%.
** "Don't Harass" violations are up 38%.
** Total DoD violations climb 29%.
** The Navy was the worst offender in violating DA, DT, DP last year.

For a full copy of this year's report, please visit
http://www.sldn.org/reports/fourth.htm.

>>>TAKE ACTION: YOUR VOICE IS IMPORTANT<<<

1. Let decision makers know that the Armed Forces must live up to their promises and regulations' requirements that asking, harassing and pursuing of suspected gay troops would stop. [see below for specific actions to take]
2. Write letters to the editors of your local newspapers alerting them to our report and to the Defense Department's failure to live up to it's end of "Don't Ask, Don't Tell, Don't Pursue." Express your opinion that the Armed Forces must stop asking, harassing and pursuing suspected gay troops.
3. Contact your local public and school/university libraries; ask them to obtain a copy of our report and its supporting documents. Requests can be made to SLDN at (202) 328-3244 or jadams@sldn.org.

CONTACT DECISION MAKERS

Let decision makers know that you expect military commanders and investigators to respect the limits on gay investigations required by "Don't Ask, Don't Tell, Don't Pursue." The Armed Forces must live up to President Clinton's promise that there will be a "decent regard for the privacy and associational rights" of all military members regardless of their sexual orientation.

The list below of officials to contact is longer than most SLDN action alerts. Realizing that your time is valuable, we urge to contact as many of the leaders below as you are able regarding this important issue. The first four are essential decision makers who **must** get the message that the military must observe the limits imposed on gay investigations by DA, DT, DP. The others on the list are important leaders whose guidance and oversight bears directly on how this policy is enforced. Unfortunately, not everyone has publicly available email addresses and some of the email addresses are for the public affairs offices in the various agencies.

President William Jefferson Clinton: email: president@whitehouse.gov; voice: (202) 456-1111; snail: White House, 1600 Pennsylvania Ave., NW, Washington, DC 20500.

Vice-President Albert Gore: vicepresident@whitehouse.gov, White House, 1600 Pennsylvania Ave., NW, Washington, DC 20500.

Secretary of Defense William Cohen: comment via DoD web page: http://www.defenselink.mil/faq/comment.html; voice: (703) 695-5261; fax: (703) 695-1219; snail: 1000 Defense Pentagon, Washington, D.C. 20301-1000.

General Henry H. Shelton, Chairman of the Joint Chiefs of Staff. Email: PublicAffairs@js.pentagon.mil; voice: (703) 697-9121; mail: 9999 Defense Pentagaon, Washington, DC 20318-9999.

Your Representatives in the U.S. Senate and House of Representatives. Visit the Human Rights Campaign's Congressional page at http://www.hrc.org/actncntr/index.html to learn who represents you in Congress and for a direct email link to their offices where possible.

The Honorable F. Whiten Peters, Acting Secretary of the Air Force. Air Force

comment link:
http://www.af.mil/comment.html; fax: (703) 693-7553; voice: (703) 697-7376; mail: 1740 AF Pentagon, Room 4E871, Washington, DC 20330-1740.

General Michael E. Ryan, Chief of Staff of the Air Force. voice: (703) 697-1887; mail: 1670 Defense Pentagon, Washington, DC 20330-1670.

CMSAF Eric W. Benken, Chief Master Sergeant of the Air Force. voice (703) 695-0498; mail: 1670 Air Force Pentagon, Washington, DC 20330-1670.

The Honorable Togo West, Secretary of the Army. voice (703) 695-3211; mail: 101 Army Pentagon, Washington, DC 20310-0101.

General Dennis J. Reimer, Chief of Staff of the Army. Email: csaweb@hqda.army.mil; voice: (703) 695-2077; mail: 200 Army Pentagon, Washington, DC 20310-0200.

SMA Robert E. Hall, Sergeant Major of the Army. Email: smaweb@pentagon-hqda5.army.mil; voice: (703) 695-2150; mail: 200 Army Pentagon, Washington, DC 20310-0200.

The Honorable John Dalton, Secretary of the Navy. fax: (703) 617-3477; voice: (703) 695-3131; mail: 1000 Navy Pentagon, Washington, DC 20350-1000.

Admiral Jay Johnson, Chief of Naval Operations. voice: (703) 695-5664; mail: 2000 Navy Pentagon, Washington, DC 20350-2000.

General C. C. Krulak, Commandant of the Marine Corps. Email: mailm@mpg-smtp3.usmc.mil, voice: (703) 614-2500; mail: Washington, DC 20380-0001.

MCPON John Hagan, Master Chief Petty Officer of Navy. Email: mcpon@bupers.navy.mil; voice: (703) 614-4854.

SGTMAJ L. G. Lee, Sergeant Major of the Marine Corps. voice: (703) 614-2475; mail: Washington, DC 20380-0001.

The Honorable Rodney Slater, Secretary of Transportation. Email: webmaster@ost.dot.gov; voice: (202) 366-1111; mail: 400 7th Street, SW, Washington, DC 20590.

Admiral Robert E. Kramek, Commandant of the Coast Guard. voice: (202) 267-2390; mail: 2100 2nd Street, SW, Washington, DC 20593-0001.

021917IU.TX

Message Sent To:

Laura S. Marcus/WHO/EOP
John Podesta/WHO/EOP
Sara M. Latham/WHO/EOP
Dawn L. Smalls/WHO/EOP
Maria Echaveste/WHO/EOP
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Kay Casstevens/OVP @ OVP
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This marker identifies the place of a publication.

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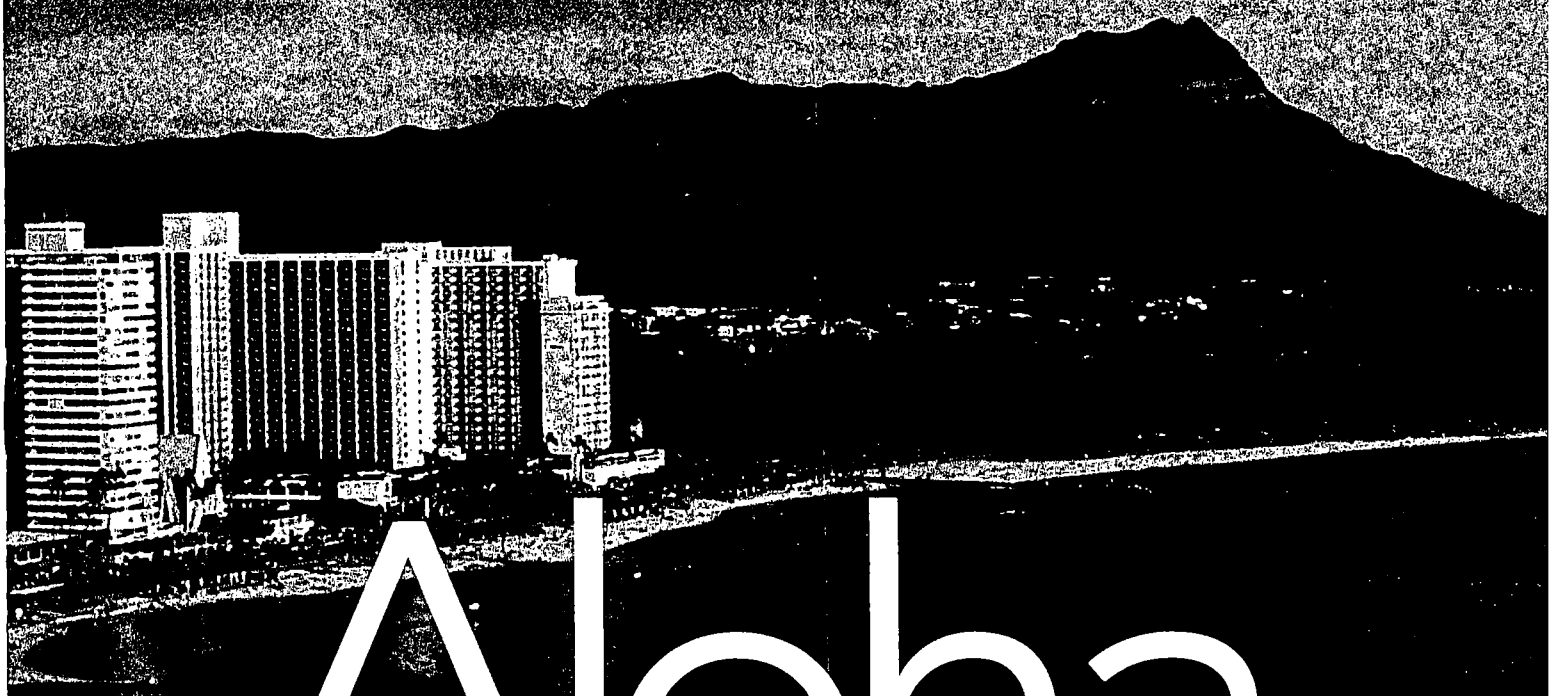
HUMAN RIGHTS CAMPAIGN

HRC

POLITICAL NEWS FOR GAY AND LESBIAN AMERICA

QUARTERLY



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SPRING 1998

PROSKAUER ROSE LLP

1233 Twentieth Street NW
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Washington, DC 20036-2396
Telephone 202.416.6800
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NEW YORK
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BOCA RATON
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PARIS

Christopher Wolf
Member of the Firm

Direct Dial 202.416.6818
cwolf@proskauer.com

FOR SETTLEMENT DISCUSSION PURPOSES ONLY

VIA FACSIMILE: 202-616-8470

May 22, 1998

David M. Glass, Esq.
Civil Division
United States Department of Justice
901 E Street, N.W., Room 1080
Washington, D.C. 20004

Re: Timothy R. McVeigh v. William Cohen, et al.; Civ. Action No. 1:98CV00116

Dear David:

As the June 1st hearing date approaches, I think it is important for us to make a final effort to settle the McVeigh case. Accordingly, I am writing to make a final offer on behalf of our client. We propose that the case be settled on these grounds:

(1) Mr. McVeigh will be permitted to serve until December 31, 1998, and will be transferred to King's Bay, Georgia expeditiously.

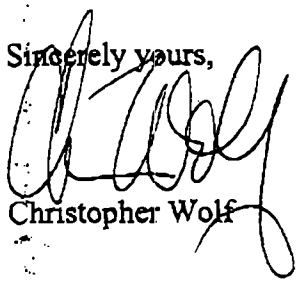
(2) Upon completion of his service, Mr. McVeigh will be allowed to retire early, at the E-9 rank and pay, with the commensurate pension and health benefits.

(3) Proskauer Rose LLP shall be paid $140,852.30 in attorneys' fees and $21,559.14 in costs associated with our representation of Mr. McVeigh in this matter.

PROSKAUER ROSE LLP

Please let us know early next week whether these terms are acceptable.

Sincerely yours,



Christopher Wolf

bcc: Mr. Robert N. Weiner

PROSKAUER ROSE LLP

1585 Broadway
New York, NY 10036-8299
Telephone 212.969.3000
Fax 212.969.2900

LOS ANGELES
WASHINGTON DC
BOCA RATON
CLIFTON NJ
PARIS

Fax Transmittal

Sender	Date	Client-Matter
Christopher Wolf	May 22, 1998	50842-001

Sender's Voice Number	Main Fax Operator's Number	Room Number	Pages (incl. cover)
202.416.6818	212.969.5050 (Voice)		4

To	Company	Fax Number	Voice Number
Robert N. Weiner	The White House	202-456-1647	202-456-6297

Message

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Department of Justice

FOR IMMEDIATE RELEASE
FRIDAY, JUNE 12, 1998

CIV
(202) 606-2765
TDD (202) 514-1888

NEWS ADVISORY

The U.S. Navy has reached a settlement in its litigation with Master Chief Petty Officer Timothy McVeigh. A copy is attached (3 PAGES).

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98-272

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY R. McVEIGH, Plaintiff. v. WILLIAM S. COHEN, Secretary of Defense, et al., Defendants.	No. 1:98CV00116 SS/AK SETTLEMENT AGREEMENT

The parties, through their undersigned counsel, hereby agree to settle this case on the following terms and conditions:

1. Plaintiff will submit forthwith a request for transfer to the Fleet Reserve in pay grade E-9 with an effective date of transfer of August 31, 1998, under the Navy's temporary early retirement authority, 10 U.S.C. § 1293 note.

2. Within 10 working days of the Navy's receipt of plaintiff's request, the request will be approved and orders will be issued directing plaintiff's transfer to Naval Air Station Jacksonville for retirement processing.

3. The approval of plaintiff's request will include any waivers necessary to permit plaintiff to retire on August 31, 1998, at E-9 rank and pay, with all commensurate pay and benefits.

4. Plaintiff will receive $90,000 from the United States in full settlement of all claims against defendants for attorney fees and litigation costs.

5. This case shall be dismissed with prejudice.

6. Plaintiff hereby waives and releases all claims relating to matters alleged in the initial complaint or in the amended complaint that plaintiff has asserted or could have asserted against defendants, the Department of Defense, the Department of the Navy, or their employees or former employees in either their official or individual capacities.

7. This settlement agreement shall not constitute an admission of liability or an admission that any law, rule or regulation has been violated by defendants, the Department of Defense, the Department of the Navy, or any of their employees or former employees; nor shall it constitute evidence or an admission by any of the foregoing or by plaintiff as to any issue of law or fact raised by this lawsuit.

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8. The parties will execute the attached stipulations of dismissal, to be filed, respectively, in the district court and the court of appeals.

Date: 6/11/98

Christopher Wolf
Alec W. Farr
PROSKAUER ROSE LLP
1223 Twentieth Street, N.W.
Suite 800
Washington, D.C. 20036
Tel: (202) 416-6800
Attorneys for Plaintiff

Date: 6/11/98

TIMOTHY R. McVEIGH

FRANK W. HUNGER
Assistant Attorney General
WILMA A. LEWIS
United States Attorney

Date: 6/4/98

VINCENT M. GARVEY
DAVID M. GLASS
Attorneys, Dep't of Justice
901 E Street, N.W., Room 1080
Washington, D.C. 20530
Tel: (202) 514-4469
Attorneys for Defendants

Department of Justice

FOR IMMEDIATE RELEASE
FRIDAY, JUNE 12, 1998

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Alec W. Farr
PROSKAUER ROSE LLP
1223 Twentieth Street, N.W.
Suite 800
Washington, D.C. 20036
Tel: (202) 416-6800
Attorneys for Plaintiff

Date: 6/11/91

TIMOTHY R. McVEIGH

FRANK W. BURGER
Assistant Attorney General
WILMA A. LEWIS
United States Attorney

Date: 6/11/91

VINCENT M. GARVEY
DAVID M. GLASS
Attorneys, Dep't of Justice
901 E Street, N.W., Room 1080
Washington, D.C. 20530
Tel: (202) 514-4469
Attorneys for Defendants

Department of Justice

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PROSKAUER ROSE LLP
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Suite 800
Washington, D.C. 20036
Tel: (202) 416-6800
Attorneys for Plaintiff

Date: 6/11/91

TIMOTHY R. McVEIGH

FRANK W. HUNGER
Assistant Attorney General
WILMA A. LEWIS
United States Attorney

Date: 6/6/91

VINCENT M. GARVEY
DAVID M. GLASS
Attorneys, Dep't of Justice
901 E Street, N.W., Room 1080
Washington, D.C. 20530
Tel: (202) 514-4469
Attorneys for Defendants

Department of Justice

DRAFT

FOR IMMEDIATE RELEASE
THURSDAY, JUNE 11, 1998

CIV
(202) 616-2765
TDD (202) 514-1888

GOVERNMENT AND SAILOR AGREE TO SETTLEMENT

WASHINGTON, D.C. -- Navy Master Chief Petty Officer Timothy McVeigh has agreed to retire from the Navy under a settlement announced by the Department of Justice today.

The government and Master Chief McVeigh have agreed to settle the lawsuit that has prevented the Navy from discharging McVeigh.

Under terms of the agreement, Master Chief McVeigh will request and the Navy will approve his early retirement effective August 31, 1998. The Government will withdraw its notice of appeal of the injunction entered by the District Court, and Master Chief McVeigh will withdraw his lawsuit. Under the agreement, the United States will also pay attorney fees and litigation costs in the amount of $90,000.

In January 1998, the U.S. District Court in Washington, D.C., enjoined the Navy from discharging McVeigh. Following the lower court's decision, the government filed a notice of appeal.

"This settlement preserves morale, good order and discipline within the Navy by removing McVeigh from active duty," said Navy

spokesperson Lt. Cmdr. Lydia Robertson. "It is in no way an admission of liability on the part of the Navy."

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98-272

U.S. DEPARTMENT OF JUSTICE
OFFICE OF PUBLIC AFFAIRS

IMPORTANT INFORMATION

ATTENTION: Rob Weiner

DATE: 6-12-98

OF: _____

SUBJECT: _____

FAX NUMBER: 456-1647

NUMBER OF PAGES: COVER + 4

Rob –

This is what we released not the news release that you discussed w/Bert. Please call if you need anything further.

Chris

ORIGINATOR: Chris Watney

ORIGINATOR'S PHONE: (202) 514-4389

ORIGINATOR'S FAX: _____

NOTE: If you are not the intended receiver written above, please do not read the contents of this facsimile, for it may contain confidential information. Please call immediately and inform the sender. We are sorry for the inconvenience.

Please call 202-514-2008 and ask for _____ if there is a problem with the transmission.

Department of Justice

FOR IMMEDIATE RELEASE
FRIDAY, JUNE 12, 1998

CIV
(202) 606-2765
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NEWS ADVISORY

The U.S. Navy has reached a settlement in its litigation with Master Chief Petty Officer Timothy McVeigh. A copy is attached (3 PAGES).

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98-272

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY R. McVEIGH, Plaintiff, v. WILLIAM S. COHEN, Secretary of Defense, et al., Defendants.	No. 1:98CV00116 SS/AK SETTLEMENT AGREEMENT

The parties, through their undersigned counsel, hereby agree to settle this case on the following terms and conditions:

1. Plaintiff will submit forthwith a request for transfer to the Fleet Reserve in pay grade E-9 with an effective date of transfer of August 31, 1998, under the Navy's temporary early retirement authority, 10 U.S.C. § 1293 note.

2. Within 10 working days of the Navy's receipt of plaintiff's request, the request will be approved and orders will be issued directing plaintiff's transfer to Naval Air Station Jacksonville for retirement processing.

3. The approval of plaintiff's request will include any waivers necessary to permit plaintiff to retire on August 31, 1998, at E-9 rank and pay, with all commensurate pay and benefits.

4. Plaintiff will receive $90,000 from the United States in full settlement of all claims against defendants for attorney fees and litigation costs.

5. This case shall be dismissed with prejudice.

6. Plaintiff hereby waives and releases all claims relating to matters alleged in the initial complaint or in the amended complaint that plaintiff has asserted or could have asserted against defendants, the Department of Defense, the Department of the Navy, or their employees or former employees in either their official or individual capacities.

7. This settlement agreement shall not constitute an admission of liability or an admission that any law, rule or regulation has been violated by defendants, the Department of Defense, the Department of the Navy, or any of their employees or former employees; nor shall it constitute evidence or an admission by any of the foregoing or by plaintiff as to any issue of law or fact raised by this lawsuit.

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5. The parties will execute the attached stipulations of dismissal, to be filed, respectively, in the district court and the court of appeals.

Date: 6/11/98

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Alec W. Farr
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Date: 6/11/98

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Date: 6/4/98

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