No. ___

IN THE

Supreme Court of the United States

BRIAN HUFFMAN,

Petitioner,

v.

KIRSTJEN M. NIELSEN,
SECRETARY OF HOMELAND SECURITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. **Whether a court must remand a matter for a new board hearing when an administrative board's failure to follow its own regulations implicates a petitioner's fundamental due process right to counsel, as the Second, Third, Sixth, Seventh, Ninth, and Eleventh Circuits have held or whether a court may excuse the board's failings under a harmless error standard as the court below held?**

PARTIES TO THE PROCEEDING

Petitioner, the sole plaintiff-appellant in the courts below, is Brian Huffman.

Respondent, the appellee in the courts below, is the United States.

CORPORATE DISCLOSURE STATEMENT

There are no parents or subsidiaries whose disclosure is required under Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Brian Huffman respectfully petitions this Court for a writ of certiorari to review the judgment of the United State Court of Appeals for the District of Columbia.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals was not reported, but is reproduced at page 1a of the appendix to this petition ("App."). Petitioner appealed to the District of Columbia Circuit upon a final judgment rendered by the United States District Court for the District of Columbia, which was not published.

JURISDICTION

The District of Columbia Circuit issued the memorandum sought to be reviewed on May 1, 2018; On June 25, 2018, the U.S. District Court for the District of Columbia, put the judgment into effect. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions and treaties are:

The United States Constitution, Amendment VI, provides in pertinent part that:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On July 27, 1999, Petitioner enlisted in the USCG in Cleveland, Ohio. Petitioner was stationed at USCG Marblehead ("Marblehead") in Ohio from October 1999 until March 2001. Thereafter, Petitioner went to USCG's machinery technician school in Yorktown, Virginia. EOR[1] 0017. Within eight months of graduating from machinery technician school, MK3 was promoted to Petty Officer Second Class/E-5 ("MK2"). EOR 0470.

In 2001, the USCG stationed Petitioner in Miami at the Naval Engineer Support Unit as a Machinery Technician, where he served until 2005. EOR 0417. In 2005, Petitioner voluntarily deployed to Kuwait and Bahrain. EOR 0471.

In January 2006, Petitioner was stationed at the USCG Sitkinak ("Sitkinak") in Miami, Florida. EOR 0471-72. In June 2006, Petitioner was selected as Sailor of the Quarter, which recognized and awarded Petitioner's outstanding performance and dedication. EOR 0066. Petitioner received above average, excellent, and superior marks in his 2006 performance evaluations. EOR 0486. He was also recommended for advancement to a Petty Officer First Class/E-6 ("MK1"). EOR 0486.

In December 2006, Petitioner was arrested in Florida based on an allegation of a domestic altercation with his wife.[2] EOR 0428. As a response,

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[1] "EOR" refers to the Joint Appendix, filed in the District of Columbia Circuit Court of Appeals.

[2] Petitioner and his wife divorced in August 2007.

on December 29, 2006, Petitioner's Commanding Officer ("CO") Lieutenant Mark Glancy issued a 30-day no contact order prohibiting Petitioner from contacting his wife, except during mandated counseling sessions. EOR 0352. In January 2007, the State of Florida lifted the restraining order it imposed as a result of the accusations against Petitioner. EOR 0428. As a result of the lift of the restraining order, Petitioner began communicating with his wife with an understanding from LT. Glancy that the military no-contact order would be lifted. EOR 0360. The State of Florida ultimately dismissed all charges against Petitioner on February 13, 2007. EOR 0017, 0428.

On February 1, 2007, LT. Glancy renewed his December 29th no contact order. EOR 0353. As a result of the dismissal of the charges, Petitioner's counselor recommended LT. Glancy rescind the no contact order. EOR 0432. Instead of acknowledging the dismissal of the charges, and despite his unblemished record, Petitioner's command instigated a witch hunt to remove him from service. On March 8, 2007, Petitioner received a non-judicial punishment ("NJP") for failing to obey the no contact order in January. EOR 0331. LT. Glancy placed Petitioner on performance probation, which provided Petitioner an opportunity to resolve any deficiencies in his performance. EOR 0375. Prior to the NJP, Petitioner had no documented deficiencies under his command at USCG Sitkinak. EOR 0487. As a result of the NJP, Petitioner was reduced in rank from a MK2 to a MK3. EOR 0370-72. Notably, Petitioner was on the advancement list with promotion to MK1/E-6 guaranteed. EOR 0333, 0336. The NJP

resulted in his removal from the advancement list, and thus, had the effect of demoting him two pay grades. EOR 0487.

On March 14, 2007, LT. Glancy rescinded the no contact order. EOR 0353. LT. Glancy instructed Petitioner to continue the EAP program. EOR 0160, 0435. Despite having counseling every Saturday and having medical restrictions for boat and sea duty, between March 20, 2007 and April 8, 2007, Petitioner received the following reprimands: (1) a Performance & Discharge Administrative Remarks ("Page 7") and a NJP for not reporting for duty on April 7, 2007; (2) a Page 7 for failure to follow military customs and courtesies when addressing a Chief Petty Officer; and (3) a Page 7 for refusing to board the cutter. EOR 0376-79.

On April 17, 2007, LT. Glancy notified Petitioner he was being processed for discharge due to his violation of the no contact order, additional Page 7 and NJPs, and his alleged disrespectful and questionable moral character. EOR 0406-08. The discharge notification informed Petitioner of his "right to submit a statement on your own behalf" and "the opportunity to consult with a lawyer." EOR 0406. The discharge notification also provided that if Petitioner desired to submit a written statement, he should provide it to LT. Glancy "not later than three working days from" April 17, 2007. EOR 0406.

The same day Petitioner received the notification of discharge, LT. Glancy submitted a request for discharge authority to the Coast Guard Personnel Command to discharge Petitioner. EOR

0254,0414. Sector Chief of Logistics Commander Helen Toves was tasked with handling the paperwork of Petitioner's discharge and she endorsed LT. Glancy's request on April 17, 2007. EOR 0254, 0414. When Petitioner's acknowledgment form of the notification of discharge was submitted to Personnel Command on April 17, 2007, Personnel Command advised Commander Toves to be sure that Petitioner knew he had five days from the date of notification of discharge to submit his written statement. EOR 0430.

Petitioner was never advised he had five days to respond to the notification of discharge. Instead, on April 19, 2007, two days after notifying Petitioner of the discharge, Commander Toves sent an email to the Personnel Command requesting discharge orders for Petitioner and submitted a discharge package to Personnel Command without any statement by Petitioner. EOR 0430. At this time, Petitioner had not consulted with an attorney and only two days had passed since Petitioner received the notification of discharge. EOR 0410. Later that day, Petitioner submitted his discharge rebuttal statement without the benefit of conferring with counsel. EOR 0410.

No attorney was available to assist him by the three-day deadline to respond to the discharge imposed by LT. Glancy. EOR 0410. On April 20, 2007, three days after Petitioner received notification of the discharge, separation orders were issued for Petitioner. EOR 0006-07. On April 23, 2007, Petitioner was separated from the USCG with a general discharge, RE-4 reenlistment code (ineligible to reenlist), a JKA "Pattern of Misconduct"

separation code, and a pattern of misconduct narrative. EOR 0006-07.

As a result of his unlawful separation, Petitioner did not receive the final two payments of $2,120.30 of his enlistment bonus totaling $4,240.60. EOR 0473. At the time of separation, Petitioner had seven years and nine months of service. When a member reaches eight years of service, he or she is entitled to an Administrative Separation Board. Because Petitioner was a few months away from eight years of service, he did not receive the benefit of an Administrative Separation Board. EOR 0489.

Petitioner submitted an application to the Discharge Review Board ("DRB"). EOR 0101. The DRB found Petitioner's discharge and separation was proper and equitable and recommended his request for relief be denied. EOR 0100-01. On November 12, 2008, however, the Vice Commandant of the USCG rejected Petitioner's discharge proceedings and the DRB's recommendations. EOR 0098.

Upon review of Petitioner's discharge, the Vice Commandant of the USCG upgraded Petitioner's discharge to honorable and changed the narrative reason to miscellaneous/general reasons due to procedural flaws in the original discharge. EOR 0098. A new DD-214 was issued reflecting these changes. In early 2009, Petitioner filed an application with the USCG Board for Correction of Military Records ("the Board") requesting a change in the reenlistment code from RE-4 (ineligible to reenlist) to RE-1 (eligible to reenlist) and that his rank be returned to MK2/E-5. EOR 0001-12. The

Board denied his request for relief. EOR 0001-12. Petitioner filed a request for reconsideration to the Board, which the Board also denied on May 27, 2010. EOR 0222-83. Concerning the procedures utilized by the USCG in discharging Petitioner, the Board found:

> The CO first notified the applicant of the proposed discharge on a Page 7 dated April 16, 2007, but in his notification memorandum dated April 17, 2007, the CO gave the applicant three calendar days to submit his statement. However, an email from the Personnel Command dated April 17, 2007 indicates that the applicant should have had five days. Despite this information, the CO prepared his request for discharge and the Sector Chief prepared her endorsement on April 17, 2007, and they apparently forwarded the discharge package to the Personnel Command on April 19, 2007—only two days after the applicant was told that he would have three days to submit his statement. Therefore, it appears that the applicant may have been misled about how long his "opportunity" to submit his discharge rebuttal would be. . . Although the applicant dated his rebuttal statement April 19, 2007, it appears that the Personnel Command may not have received it nor reviewed it before issuing

the discharge orders on April 20, 2007. EOR 0254.

The Board also found Petitioner's statement was not listed as an enclosure to LT. Glancy's memorandum and was not included in the "discharge packet" in Petitioner's military record. EOR 0254. Despite the foregoing, the Board was "not persuaded that his discharge was wrong" and found Petitioner did not prove by a preponderance of the evidence that his RE-4 reenlistment code is erroneous or unjust. EOR 0255. On September 22, 2015, Petitioner filed a reconsideration of the Board's May 2010 decision based upon newly discovered evidence. He included new evidence concerning the validity of his separation from the USCG.EOR 0439. On October 29, 2015, the Board denied Petitioner's request for reconsideration of its prior decision. EOR 0437.

Petitioner appealed the Board's decision to the United States District Court for the District of Columbia. EOR 0484. In his complaint, Petitioner raised the following claims: (1) his separation violated the USCG's rules, regulations, and policies, (2) the USCG violated his constitutional right to due process, and (3) the Board's decision was arbitrary, capricious, and an abuse of discretion.

The government filed a motion to dismiss and a motion for summary judgment. In opposing the government's motion for summary judgement, Petitioner argued the Board erred by finding his separation lawful because the USCG violated the Manual by discharging him in April 2007 despite: (1)

denying him an opportunity to consult with counsel, (2) failing to provide him the requested amount of time to respond to the notice of discharge, and (3) failing to review Petitioner's rebuttal statement.

In its order granting the government's motion for summary judgment, the district court agreed that the Board's decision was arbitrary and capricious because (1) Petitioner "did not have an adequate opportunity to consult with a lawyer as envisioned by the manual," (2) he should have had three days[3] to submit his statement, and (3) the USCG should have considered Petitioner's rebuttal statement. EOR 0523-30. But the district court found the Board's errors were harmless and granted the government's motion for summary judgment. EOR 0524. The district court found that the Manual only governs the discharge of members "recommended for honorable or general discharge for misconduct." EOR 0524. The district court reasoned that Petitioner's General discharge for a "Pattern of misconduct" was later upgraded in November 2008 to an Honorable Discharge "for Miscellaneous/General Reasons," and thus, "because [Petitioner's] discharge was not for his misconduct, [Petitioner] was not entitled to the opportunity to consult with counsel and other

[3] The district court ruled that "once the commanding officer informed the plaintiff that he was entitled to three days to submit his statement . . . the plaintiff was entitled to rely on that representation." EOR 0525. While Appellant agrees with the district court that he did not have sufficient time to submit a statement and could rely on the commanding officer, notably, the April 17, 2007 discharge notice provided Appellant three days to respond. (EOR. 0405-06, 0068-90), and Personnel Command emailed the command to notify it that Appellant should have five days to respond to the discharge EOR. 0254.

procedural protections afforded by [the Manual]." EOR 0524.

Petitioner then filed an appeal with the District of Columbia Circuit Court of Appeals. The District of Columbia Circuit ruled to uphold the Board's decision not to change Petitioner's reenlistment code, and affirmed the district court's grant of summary judgment. The Court (1) rejected Petitioner's argument that the Coast Guard violated the personnel manual when it discharged him while he was on performance probation; (2) concluded that the Coast Guard erred in failing to consider Petitioner's rebuttal statement and might have well erred in declining to give Petitioner additional time to consult an attorney, upheld the Board's decision that any errors in those regards were harmless.

REASONS FOR GRANTING THE WRIT

The Decision below highlights a deep conflict among the circuits on a fundamental and recurring issue of administrative law: whether a claimant bears the burden of demonstrating prejudice from an agency's failure implicates a fundamental right.

The decision below casts highlights the significance of the circuit split. A serious agency error affecting important rights, such as the right to counsel, as occurred here would have resulted in a remand as a matter of right in the Second, Third, Sixth, Seventh, Ninth, and Eleventh Circuits but not in the Fourth and Federal Circuits because those two courts require an additional showing of prejudice. Accordingly, this case is an

appropriate vehicle to resolve the underlying conflict among the federal circuit courts. This Court should grant this petition to resolve the conflict

I. The Court should grant the petition to resolve a deep and mature circuit conflict regarding the application of this Court's decision in American *Farm Lines v. Black Ball Freight Service.*

In *United States ex. Rel. Accardi v. Shauhnessy*, 347 U.S. 260 (1954), this Court established what is now regarded as the *Accardi* principle, which requires an agency to follow its own regulations. In *Accardi,* the agency order was vacated because it violated the "unequivocal terms" of applicable regulations. *Accardi,* 347 U.S. at 266. In this Court's initial application of the *Accardi* principle, there was no prejudice inquiry in reviewing an agency's failure to abide by its own regulations. *See Service v. Dulles*, 354 U.S. 363, 388-89 (1957) (having adopted applicable regulations, the State Department could not "proceed without regard to them"). Agencies were required to scrupulously follow their own regulations and any deviation from those regulations was "illegal and of no effect." *Vitarelli v. Seaton,* 359 U.S. 535, 545 (1959).

In *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970), this Court, applying *Accardi*, distinguished between agency rules "intended primarily to confer important procedural benefits upon individuals," and "procedural rules adopted for the orderly transaction of business." *Id.*

at 538-39. The Court concluded that violation of mere procedural rules need not result in reversal of the agency decision if the complaining party was not substantially prejudiced. *Id.* at 539.

A few years later, the Court reaffirmed that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). This Court later stressed that "[a] court's duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by the Constitution or federal law." *United States v. Caceres*, 440 U.S. 741, 749 (1979).

a. The Petitioner has a fundamental due process right to appear with counsel as afforded to him under the personnel manual for the U.S. Coast Guard, which includes the right to counsel and the delay of proceedings if counsel is not available.

Section 6(a) of the Administrative Procedures Act ("APA") was designed to confirm and effectuate the right to appear with counsel before administrative agencies. It states that:

> . . . any person compelled to appear in person before any agency or presentative thereof shall be accorded the right to be *accompanied*, *represented*, and *advised* by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. (emphasis added).

Adminstrative Procedure Act § 6(a), 60 Stat. 240, 5 U.S.C. §1005(a). The first sentence recognizes that, in the administrative process, the benefit of counsel shall be accorded as of right, just as it is recognized by the Bill of Rights in connected with the judicial process. The entire section must be considered as one of the "*essential rights*" which affects the "*minimum requirements of a fair administrative hearing.*" S. Rep. No. 752, 79th Cong., 1st Sess. 31 (1946). (emphasis added).

As recognized by the district court, the USCG's decision on Petitioner's reenlistment code was made in April 2007 without consideration of Petitioner's statement and without affording Petitioner an opportunity to consult with counsel. The personnel manual provides that, upon notice of discharge, the Coast Guard must "[a]fford the member an opportunity to consult with a lawyer." EOR 349. It further states that, "[i]f the member requests counsel and one is not available, the commanding officer must delay discharge proceedings until such time as counsel is available." *Id.* As a result, his RE-4 reenlistment code (ineligible to reenlist) code was erroneously assigned. While his discharge was later

upgraded, the USCG did not afford Petitioner complete relief for its failure to afford due process, as it failed to fix Petitioner's reenlistment code. *See Rogers v. United States*, 24 Cl. Ct. 676 (1991) ("Where applicant has convinced military correction board to correct his record, it must not grant him partial relief; applicant must be made whole."); *Burd v. United States*, 19 Cl. Ct. 515, 521 (1990) (finding errors in the plaintiff's discharge have no force or effect and that he was entitled to a "discharge under Honorable Conditions together with an appropriate modification to his reenlistment code"). The Board's finding this was not error or injustice was arbitrary and capricious.

At the time of his discharge, Petitioner was facing a General Discharge for a "Pattern of Misconduct." Therefore, as a matter of law, when Petitioner was responding to his discharge, due to the nature of his proposed discharge, he was entitled to the right to consult with counsel and submit a written statement. *See Wilmina Shipping AS v. United States Dep't of Homeland Sec.*, 75 F. Supp. 3d 163, 173 (D.D.C. 2014) ("An agency must follow its own rules, procedures, and policies."). The fact that his discharge was upgraded at a later time has no bearing on the rights that should have been afforded to him at the time of his discharge. The district court's reasoning the Board's arbitrary and capricious violation was harmless error based on its retroactive application of Petitioner's discharge status to determine his rights at the time of discharge was error.

Contrary to the district court's ruling, the record shows the Board's error was not harmless error. Neither Article 12B.18(e) nor any other provision of the Manual provide a mechanism to retroactively apply any change to a service-member's discharge status in determining the rights of the service member *at the time of discharge*. Rather, the Manual clearly conveys a service-member's rights at the time of discharge. What happens after discharge is immaterial to the due process rights Petitioner had at the time of his discharge pursuant to the Manual and does not negate the fact that the Manual protected Petitioner at the time of his discharge. Retroactively altering the USCG's due process obligations to Petitioner is an error of law resulting in severe injustice to Petitioner because the district court's finding precludes Petitioner relief from violations the district court recognized were committed in the USCG's discharge.

Further, Petitioner has maintained that the assignment of an RE-4 reenlistment code is an error in his record which would not have existed but for his depravation of his procedural due process rights. The characterization of service and reenlistment code assignment are completely separate. An Honorable characterization of service is the highest characterization of service that can be received. It accords full entitlement to all the rights and benefits of one's military service without restriction. Alternatively, a reenlistment code is an indicator assigned by the same decision authority as to whether the service member is "eligible" for future service.

There are many other codes that could have been assigned which were appropriate and would have provided Petitioner the opportunity to apply to another branch and for that branch to exercise its discretion to either accept or decline his application. The USCG's decision was made outside of the procedural protections that were without question owed to Petitioner and resulted in severe prejudice. One commander's disregard for the rules should not bind all future commanders who might have decided differently.

Petitioner's erroneously assessed reenlistment code remains highly prejudicial to Petitioner and continues to negatively impact him, as he is unable to fulfill his desire for future service. The RE-4 reenlistment code is not waivable by any military branch, preventing Petitioner, who has an Honorable discharge, from any future service until his record is corrected.

Accordingly, Petitioner was prejudiced by the decision to discharge him without any adherence to the Manual or notions of due process that now prevents further service in the military, and thus, the USCG's decision to discharge Petitioner did not result in harmless error

b. The District of Columbia Circuit below disposed of this vital due process concern, holding that the Board's decision regarding the Coast Guard's failure to consider Petitioner's rebuttal statement or declining to give Petitioner additional time to consult with counsel, while erroneous were harmless error.

"Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton*, 415 U.S. at 235. The import of this Court's decisions applying the *Accardi* principle is a clear and consistent rule that an agency's action is subject to automatic remand where the violation of the agency rule involves important or fundamental due process rights as opposed to those rules which are nothing more than a mere aid to guide the agency action.

The District of Columbia Circuit's adoption of a prejudice requirement in all circumstances, even those implicating so fundamental a due process violation as having the right to counsel denied, cannot be reconciled with this Court's cases. In the instant case, it is clear from the consistent holdings of this Court that parties to an action

including parties who appear before an administrative agency, have a fundamental due process right to counsel. The Board, denying that right to counsel in violation of its own regulations, violated this fundamental right. The *Accardi* principle, as further discussed in *American Farm Lines*, *Morton v. Ruiz*, and *United States v. Caceres*, sets forth this Court's clear teaching that remand is required when the agency violates its own rules in a manner where "compliance with the regulation is mandated by the Constitution or federal law." *Caceres*, 440 U.S. at 749. Thus, the administrative board's decision to deem the Coast Guard's error in failing to consider Petitioner's rebuttal statement and declining to give Petitioner additional time to consult counsel should have resulted in automatic remand. However, because his case was heard in the District of Columbia District, the court applied a harmless error standard and remand was denied.[4]

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[4] Not only did the court below summarily dispose of this important issue, but it also gave no consideration to the fact that Petitioner is a soldier. This Court stated in *Shinseki v. Sanders*, 556 U.S. 396 (2009) that it is permissible for "a reviewing court to consider harmful in a veteran's case error that it might consider harmless in other circumstances." *Id.* at 412. The court below gave no credit at all to Petitioner's status as a veteran.

c. Most other circuit courts would have remanded the case and required the agency to review the case again, applying the correct standard

The same approach of recognizing that an action which fails to protect fundamental procedural rules is automatically deemed prejudicial has also been recognized by six other courts of appeals.

In *Montilla v. INS*, 926 F.2d 162, 166 (2d Cir. 1991), the Second Circuit was faced with a request to remand the petitioner's case for a new immigration hearing when the hearing officer did not scrupulously follow the agency regulations requiring the officer to explicitly advise the alien of his right to have counsel present at his own expense. The court first analyzed this Court's decisions interpreting the *Accardi* principle as well as the principle's interpretation by other circuits. *Id.* at 167-68. Rejecting the government's contention that a showing of prejudice is required, the court held that the agency's failure to comply with its own regulations subjects the agency decision to an automatic remand. *Id.* at 168-70. "All that need be shown is that the subject regulations were for the alien's benefit and that the INS failed to adhere to them." *Id.* at 169.

The Third Circuit, in *Leslie v. Attorney General of the U.S.*, 611 F.3d 171 (3d Cir. 2010),

similarly encountered a case in which it was undisputed that an immigration judge violated agency regulations by failing to advise the petitioner of free legal services available before a hearing. The question before the court was whether the petitioner should be required to show prejudice from the immigration judge's breach of the regulation. *Id.* at 174. The court, after analyzing *Accardi*, *American Farm Lines*, and their progeny, held "that when an agency promulgates a regulation protecting fundamental statutory or constitutional rights of parties appearing before it, the agency must comply with that regulation. Failure to comply will merit invalidation of the challenged agency action without regard to whether the alleged violation has substantially prejudiced the complaining party." *Id.* at 180.

The Sixth Circuit, in *Wilson v. Commissioner of Social Security*, 378 F.3d 541 (6th Cir. 2004), ordered remand where a Social Security administrative law judge, contrary to regulation, failed to articulate his reason for discounting the opinion of the claimant's physician. The court noted that "[a]lthough substantial evidence otherwise supports the decision of the Commissioner in this case, reversal is required because the agency failed to follow its own procedural regulation, and the regulation was intended to protect applicants like [the claimant]." *Id.* at 544. Noting that other circuits, following *Accardi*, "have remanded the Commissioner's

decisions when they have failed to articulate 'good reasons' for not crediting the opinion of a treating source, as [the regulation] requires," the court held that remand was necessary. *Id.* at 545-46. The court added that "[a] procedural right must generally be understood as 'substantial' . . . when the regulation is intended to confer a procedural protection on the party invoking it." *Id.* at 547. In *Martinez-Camargo v. INS*, 282 F.3d 487 (7th Cir. 2002), the Seventh Circuit applied *Accardi* and *American Farm Lines* to a case involving a violation of an immigration rule requiring an officer other than the arresting officer to ask an alien necessary immigration questions. The Seventh Circuit adopted a test under which automatic remand would not result unless the rule violated was for the protection of substantive rights. *Id.* at 491. The court found that this "analysis strikes the proper balance between recognizing the need for administrative agencies to follow their own rules with the practical reality that not every agency violation impacts an alien's substantive rights." *Id.* The court ultimately declined to remand after finding that the administrative rule violated was not for the protection of the appellant's substantial rights. *Id.* at 492.

The Ninth Circuit, in *Sameena Inc. v. United States Air Force*, 147 F.3d 1148 (9th Cir. 1998), a case involving a challenge to an

agency's failure to follow debarment regulations, stated:

> Where a prescribed procedure is intended to protect the interests of a party before the agency, 'even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed.' . . . . the [Federal Acquisition Regulation] sets out detailed procedures to ensure that [debarment], which is intended to safeguard the integrity of the acquisitions process, itself is applied in conformity with principles of fundamental fairness.

Id. at 1153 (quoting *Vitarelli*, 359 U.S. at 547) (citations omitted). After studying this Court's precedent in *Accardi* and its progeny, the Ninth Circuit held that failure to give the appellant an evidentiary hearing prior to debarment, as required by the regulation, required remand. *Id.*

Finally, in *Port of Jacksonville Maritime Ad Hoc Committee, Inc. v. United States Coast Guard*, 788 F.2d 705 (11th Cir. 1986), the Eleventh Circuit evaluated an *Accardi*-based challenge to the Coast Guard's interpretation of a definition within one of its administrative manuals. The court, reviewing this Court's holdings in *American Farm Lines* and *Caceres*, set forth three potential options for rectifying an agency's

violation of its own regulations. The reviewing court must:

> determine whether the regulation was intended1) to require the agency to exercise its independent discretion, or 2) to confer a procedural benefit to a class to which complainant belongs, or 3) to be a 'mere aid' to guide the exercise of agency discretion. If the first or second, invalidate the action; if the third, a further determination must be made whether the complainant has been substantially prejudiced.

Id. at 708. The court declined to presume error when the "rule" that the Coast Guard allegedly violated was merely a definition within an internal agency handbook and therefore was a "mere aid" to guide the agency's discretion.

The common thread among each of these decisions is that, in each, the court meticulously evaluated this Court's precedent prior to evaluating whether automatic remand for administrative failures that affect substantial rights was mandated. *See Montilla*, 926 F.2d at 166-67 (discussing both *Accardi* and *American Farm Lines*); *Leslie*, 611 F.3d at 175-77 (analyzing both *Accardi* and *American Farm*

Lines); *Wilson*, 378 F.3d at 547 (analyzing both *Accardi* and *American Farm Lines*); *Martinez-Camargo*, 282 F.3d at 491 (analyzing both *Accardi* and *American Farm Lines*); *Sameena*, 147 F.3d at 1153 (analyzing *Accardi*); and *Port of Jacksonville*, 788 F.2d at 208 (analyzing *American Farm Lines*).

d. The District of Columbia Circuit, like the Fourth Circuit, requires a showing of harm even when an agency's failure to follow its own regulations implicates a substantial right.

In sharp contrast, the Federal Circuit, like the Fourth Circuit in this case, has shown extraordinary deference to administrative agencies, applying the harmless error test even when the regulation violated by the administrative agency was intended to confer important procedural benefits.

In *Pam, S.P.A. v. United States*, 463 F.3d 1345 (Fed. Cir. 2006), the Federal Circuit addressed a case involving the dumping of pasta into the United States market by PAM, a foreign pasta manufacturer. PAM objected that it had not been properly served before the adjudication. *Id.* at 1346-47. The Court of International Trade held that "the regulation at issue confers important

procedural benefits upon foreign entities like PAM and therefore requires strict compliance." *Id.* at 1347. The issue before the Federal Circuit was whether a party must demonstrate prejudice from an administrative agency's failure to follow its rules when the rules were designed to confer important procedural benefits. *Id.* at 1347-48. The Federal Circuit held that a showing of prejudice is required in all such cases, even those involving substantial rights. *Id.* at 1348-49. The court stated that "[e]ven if a regulation is intended to confer an important procedural benefit, if the failure of a party to provide notice is required by such a regulation of a party to provide notice as required by such a regulation does not prejudice the non-notified party, then we think neither the government, the non-serving party, nor the public should be penalized for such a failure." *Id.* at 1348.

II. The questions presented are of national importance and require prompt resolution, and this case is an ideal vehicle for resolving the questions.

The lower courts, looking at this Court's decisions in *Accardi*, *American Farms Lines*, and their progeny, have come to opposite conclusions regarding remedies for administrative agencies that violate their own important rules. This has resulted in wildly different outcomes for individual

litigants such as Petitioner. This stark split has been recognized by the Third Circuit which observed: "[c]ourts have taken diverse approaches to reconciling the tension between *American Farm Lines* and *Accardi*, some imposing explicit prejudice requirements . . . and others explicitly rejecting a prejudice requirement." *Leslie*, 611 F.3d at 177 (citations omitted) (collecting cases). This circuit split can be easily summarized here by comparing just two quotes.

First, there is the Federal Circuit, stating:

> Quite, simply, the Supreme Court in *American Farm Lines* was not contemplating (and did not opine on) situations in which the rule in question *did* confer important procedural benefits on individuals. Rather, it only discussed circumstances in which the rule did *not* confer important procedural benefits, as those were the facts in that case. Thus, we need not decide whether [the regulation] confers such a benefit because we believe that substantial prejudice still must be shown.

Pam, 463 F.3d at 1348 (emphasis in original).

In radical contrast is the Third Circuit's decision in *Leslie*. There, the Court stated that:

> We. . . hold that violations of regulations promulgate to protect fundamental statutory or constitutional rights need not be accompanied by a showing of prejudice to warrant judicial relief.
> We believe that this rule comports with *Accardi* and *American Farm Lines*. *Accardi* teaches that some regulatory violations are so serious as to be reversible error without showing of prejudice, and *American Farm Lines*, 397 U.S. at 539, exempts from this principle those procedural regulations 'adopted for the orderly transaction of business.' With these precepts in mind, we believe a prejudice rule that distinguishes between regulations grounded in fundamental constitutional or statutory rights and agency-created benefits successfully carves out the procedural regulations exempt by *American Farm Lines* while honoring *Accardi's* insistence that some regulatory violations are so serious as to merit judicial relief.

Leslie, 611 F.3d at 178-79.

Thus, as the Third Circuit has observed, the Circuits have arrived at radically different

conclusions based on opposite readings of this Court's decisions in *Accardi*, *American Farm Lines*, and their progeny. This case presents an excellent opportunity for the Court to resolve this direct, recurring, and entrenched split of authority. Additionally, the record is not voluminous. The split of authority is long-standing and has been acknowledged by at least one circuit. Given the time that has elapsed, it is unlikely that the question presented in this case would benefit from being left to percolate among the Circuits. Now is an opportune time to resolve this fundamental question of agency discretion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5089

BRIAN HUFFMAN,

Plaintiff- Appellee

Versus

KIRSTJEN M. NIELSEN,

Defendant-Appellant

MANDATE

(JUNE 25, 2018)

In accordance with the judgment of May 1, 2018, and pursuant to the Federal Rule of Appellate Procedure 41, this constitutes the formal mandate of this court.

FOR THE COURT:

MARK J. LANGER
CLERK OF THE COURT
By: Ken R. Meadows
Deputy Clerk

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5089

BRIAN HUFFMAN,

Plaintiff- Appellee

Versus

KIRSTJEN M. NIELSEN,

Defendant-Appellant

JUDGMENT

(MAY 1, 2018)

Appeal from the United States District Court
For the District of Columbia
(No. 1:16-cv-00861)

Before: ROGERS, SRINIVASAN AND WILKINS, *Circuit Judges.*

The court considered this appeal on the record from the United States District Court for the District of Columbia, and on the briefs and arguments of the parties. The court has accorded the issues full consideration and determined that they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). For the reasons below, it is

ORDERED and **ADJUDGED** that the judgment of the district court be **AFFIRMED.**

Brian Huffman was involuntarily discharged from the U.S. Coast Guard in 2007 for a "pattern of misconduct." J.A. 233. As part of that discharge, he was given a reenlistment code of RE-4, which denied him the ability to reenlist. Because of certain procedural errors associated with Huffman's discharge, the Coast Guard later changed his record to reflect that he was honorably discharged for "miscellaneous/general reasons." *Id.* at 235. But the Coast Guard maintained the RE-4 reenlistment code.

Huffman challenged various aspects of his discharge through the Board for Correction of Military Records. He argued that the Coast Guard discharged him without providing him an opportunity to consult with counsel, without considering his discharge statement, and without giving him an opportunity to remedy any deficiencies in his performance, all in violation of the Coast Guard's personnel manual. Huffman further contended that those errors entitled him to a change in his reenlistment code that would allow him to reenlist in the Coast Guard. In orders issued in 2009 and 2010, the Board rejected Huffman's challenges.

Huffman then filed suit in the district court against the Secretary of Homeland Security (the Coast Guard is part of the Department of Homeland Security). Huffman argued that the Coast Guard wrongfully discharged him and discharged him without due process, and that the Board for Correction of Military Records violated the Administrative Procedure Act when it declined to change his reenlistment code. The district court granted summary judgment to the Secretary, concluding, among other things, that the Coast

Guard failed to comply with its personnel manual when it discharged Huffman but that those failures did not entitle Huffman to a change in his reenlistment code. The court dismissed Huffman's remaining claims on various grounds.

Huffman appeals, arguing that the Board erred in declining to change his reenlistment code in light of certain errors he contends the Coast Guard committed in connection with his discharge. We review a determination of a military corrections board under an "unusually deferential application of the 'arbitrary or capricious' standard." *Roberts v. United States*, 741 F.3d 152, 158 (D.C. Cir. 2014) (quoting *Kreis v. Sec'y of the Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989)). We assess "whether the '[Board's] decision making process was deficient, not whether [its] decision was correct.'" *Id.* (quoting *Kreis*, 866 F.2d at 1511). Accordingly, we will uphold the Board's decision as long as it "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Kreis v. Sec'y of the Air Force*, 406 F.3d 684, 686 (D.C. Cir. 2005) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Huffman argues that the Coast Guard failed to comply with its personnel manual in three respects when it discharged him. First, he argues that, because he was on performance probation prior to his discharge, the Coast Guard was required to afford him additional opportunity to change his behavior before it discharged him. Second, he contends that the Coast Guard discharged him without giving him

an opportunity to consult with counsel. Third, he argues that the Coast Guard discharged him without considering his rebuttal statement. Those errors, Huffman argues, required the Board to change his reenlistment code.

We uphold the Board's decision not to change Huffman's reenlistment code. We therefore affirm the district court's grant of summary judgment in favor of the Secretary.

Performance Probation. The personnel manual requires the Coast Guard to afford certain members on performance probation, like Huffman, "a reasonable probationary period . . . to overcome deficiencies before initiating administrative discharge action." J.A. 348. Huffman argues that the Coast Guard violated that provision when it discharged him without giving him an opportunity to overcome any deficiencies. But the same provision of the manual gives commanding officers discretion to "recommend discharge at any time during the probation if the member is not making an effort to overcome the deficiency." *Id.* The Board reasonably explained that the commanding officer appropriately recommended discharge on the ground that Huffman did not make sufficient effort to overcome the deficiency. We therefore reject Huffman's argument that the Coast Guard violated the personnel manual when it discharged him while he was on performance probation.

Opportunity to consult with an attorney and submit a statement prior to discharge. The personnel manual provides that, upon notice of discharge, the Coast Guard must "[a]fford the member an

opportunity to consult with a lawyer." J.A. 349. It further states that, "[i]f the member requests counsel and one is not available, the commanding officer must delay discharge proceedings until such time as counsel is available." *Id.* The manual also requires the Coast Guard to give members the "opportunity to make a written statement" prior to any discharge. *Id.* Taken together, those provisions contemplate that members will be able to consult an attorney in preparing their statement, and that the Coast Guard will consider that statement before making its final discharge decision.

Coast Guard told Huffman that he would have three days to consult with an attorney and draft a rebuttal statement. But on the second day, it informed him that he needed to submit his rebuttal statement immediately. Huffman ultimately submitted a statement that day. His statement noted that, while he had briefly spoken with an attorney, the attorney did not have an opportunity to review his statement. Even though Huffman submitted his statement when requested, the Coast Guard did not consider the statement prior to discharging him.

Huffman argues that the two days he was given to consult an attorney did not comply with the manual's requirement that he have an "opportunity to consult with a lawyer" prior to his discharge. He also contends that he was misled about the amount of time he would have to consult an attorney, and that, if he had been given the three days he was initially promised, his attorney would have been able to review his statement. Huffman further argues that the Coast Guard separately violated the manual

when it failed altogether to consider his rebuttal statement.

The Coast Guard conceded that it should have considered the rebuttal statement. But it argued, and the Board agreed, that Huffman had an adequate opportunity to consult with counsel before his discharge. On that issue, Huffman's arguments to the contrary are not without force. The manual contemplates a bona fide, rather than a perfunctory, opportunity for a member to consult with counsel before discharge. Otherwise, it would make little sense for the manual to require the Coast Guard to "delay discharge proceedings" to allow a member who has requested an attorney the opportunity to obtain one. Here, however, the Coast Guard, after initially telling Huffman he would have three days to consult with counsel, told him on the second day that he would need to submit his rebuttal statement that day, such that Huffman submitted his statement before his attorney had an opportunity to review it.

Although we conclude the Coast Guard erred in failing to consider Huffman's rebuttal statement and might well have erred in declining to give Huffman additional time to consult an attorney, we uphold the Board's decision that any errors in those regards were harmless. Huffman acknowledges that, to prevail on his argument that the Coast Guard erred when it declined to change his reenlistment code, he needed to show that the errors associated with his discharge affected his reenlistment code. The Board concluded that the errors associated with his rebuttal statement, including the failure to give Huffman sufficient time to consult with an attorney with respect to that statement, were harmless. The

Board reasoned that, even if Huffman had received additional time and even if the Coast Guard considered his statement, he "would have been discharged" with the same reenlistment code in light of the "allegations about his repeated misconduct, disrespect, and shading of the truth." J.A. 40.

Huffman fails to show that the Board's conclusion in that respect is arbitrary and capricious. In its orders, the Board explained that Huffman was discharged "based on documentation of repeated misconduct from January through April 2007," including disciplinary action for "continuing disrespect and failure to follow the chain of command." J.A. 252. In light of those allegations and its view that the rebuttals Huffman submitted in the aftermath of his discharge were wholly unpersuasive, the Board concluded that Huffman would have received the same reenlistment code even if the Coast Guard had complied with the personnel manual. *Id.* at 255. We conclude that the Board sufficiently explained the basis for its conclusion, and that its decision not to change Huffman's record therefore survives arbitrary-and-capricious review.

We have considered Huffman's remaining arguments in favor of reversal and conclude that they lack merit. We therefore affirm the judgment of the district court in all respects.

Pursuant to D.C. CIR. R. 36(d), this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing en banc. See FED. R. APP. P. 41(b); D.C. CIR. R. 41(b).

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Ken Meadows
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:16:cv-00861-RBW

BRIAN HUFFMAN

Plaintiff,

Versus

JOHN KELLY,[1]
Secretary of Homeland Security,

Defendant.

MEMORANDUM OPINION

The plaintiff, Brian Huffman, seeks judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706 (2012), of a decision by the United States Coast Guard Board for Correction of Military Records (the "Board") denying his

[1] Pursuant to Federal Rule of Civil Procedure 25 (d), John Kelly has been automatically substituted for Jeh Johnson, whom the parties' pleadings name as the defendant.

application to upgrade his reenlistment code and his rank after he was involuntarily discharged from the United States Coast Guard (the "Coast Guard"). See Complaint ("Compl.") ¶¶ 3, 37, 44. Currently before the Court is the Defendant's Motion to Dismiss and for Summary Judgment ("Def.'s Mot.") and the Plaintiff's Cross-Motion for Summary Judg[]ment and Opposition to Defendant's Motion to Dismiss and Defendant's Motion for Summary Judgment ("Pl.'s Mot."). Upon careful consideration of the parties' submissions and the administrative record in this case,[2] the Court concludes that it must grant in part and deny in part the defendant's motion to dismiss, deny the plaintiff's motion for summary judgment, and enter summary judgment in favor of the defendant.

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[2] In addition to the filings already identified, the Court considered the following submissions in reaching its decision: (1) the defendant's Memorandum in Support of Defendant's Motion to Dismiss and for Summary Judgment ("Def.'s Mem."); (2) the Plaintiff's Memorandum of Points and Authorities (1) in Support of Plaintiff's Cross-Motion for Summary Judgment, (2) in Opposition to Defendant's Motion to Dismiss, and (3) in Opposition to Defendant's Motion for Summary Judgment ("Pl.'s Mem."); (3) the Defendant's Memorandum in Opposition to Plaintiff's Cross Motion for Summary Judgment and Reply to Plaintiff's Opposition to Motion to Dismiss and Motion for Summary Judgment ("Def.'s Reply"); (4) the Plaintiff's Reply Memorandum in Support of Plaintiff's Cross-Motion for Summary Judgment ("Pl.'s Reply"); and (5) the Joint Appendix consisting of portions of the administrative record compiled in this case ("AR").

I. BACKGROUND

A. Events Leading to the Plaintiff's Discharge

The plaintiff enlisted in the Coast Guard on July 27, 1999, AR 0225, and his

> military record contains several awards and letters of appreciation highly praising his excellent performance and hard work as a[machinery technician]. His record also contains documentation showing that in 1999 and 2000 he was counseled on Page 7s [3] many times about unacceptable behavior, including insubordination, argumentativeness, apathy, provocative and contemptuous language, and ignoring military customs and courtesies. He was also placed on performance probation and awarded nonjudicial punishment (NJP) at mast in 2000 because of such behavior. In 2001, the [plaintiff] received another Page 7 for disrupting work with sarcasm, provocative language, and resentment, and he was referred for anger management training. However, there are no negative entries in his record from 2002 to December 2006.

AR 0225.

On December 8, 2006, while stationed in Miami, Florida, see Compl. ¶ 13; Def.'s Mem. at 4, the

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[3] "Page 7s" are official comments entered on a service member's record. See Def.'s Mem. At 4 n.4.

plaintiff was arrested and charged with battering and kidnapping his wife, and detained for two weeks by Florida state authorities. AR 0225-0226; Compl. ¶ 15. These charges were subsequently dismissed. AR 0017. "On December 29, 2006, [the plaintiff's commanding officer] issued a Military No-contact Order requiring the [plaintiff] not to have any contact with his wife for 30 days except during formal marriage counseling sessions through the Work Life/Employee Assistance Program (EAP)." AR 0226. Thereafter, "the Family Advocacy Specialist handling his case [ ] determined that the allegations of spousal abuse . . . had been substantiated . . . [and] the command renewed the no-contact order and made it indefinite until rescinded." AR 0226.

On February 27, 2007, the plaintiff was charged "with failing to obey the no-contact order in violation of Article 92 of the [United Code of Military Justice]." AR 0226. On March 8, 2007, after an investigation into the charge, the plaintiff received

> as nonjudicial punishment [a] reduction in pay grade . . . , restriction to base for two weeks, and two extra hours of duty per day for two weeks. On a performance evaluation prepared pursuant to the [nonjudicial punishment], the applicant received high marks in certain categories, such as professional knowledge and stamina, but low marks for communicating, working with others, responsibility, setting an example, military bearing, customs and courtesies, integrity, loyalty, respecting others, and judgment. He was not recommended for advancement.

AR 0227. The plaintiff was also put on performance probation for "failure to obey direct orders, lack of attention to detail, and [his] argumentative and disrespectful behavior." AR 0227. The plaintiff's commanding officer warned the plaintiff "that if he failed to make an effort to overcome his deficiencies or violated the conditions of the probation, the [commanding officer] would initiate his discharge." AR 0227. The plaintiff appealed his nonjudicial punishment, but his appeal was denied. See AR 0227, 0229.

On March 15, 2007, the plaintiff filed "an informal complaint of religious discrimination and retaliation" on the part of his supervisor. AR 0228; see also AR 0224. "On March 30, 2007, the [plaintiff] filed a formal complaint of discrimination and retaliation after a meeting with his chain of command and a District mediator the day before had not resolved his complaint." AR 0229.[4]

The plaintiff received additional Page 7s on March 20, 2007, for failure to obey a direct order to report for duty at 7:00 a.m. that morning, see AR 0229, and on April 9, 2007, for "showing direct disrespect and insubordination," AR 0230. Also on April 9, 2007, the plaintiff was charged with failure to obey an order and absence without leave. See AR 0230. On April 16, 2007, after an investigation of the two April 9, 2007 charges, the plaintiff received "two weeks of restriction to base and extra duties," and

[4] The plaintiff "did not submit [to the Board] a copy of the Final Agency Decision on his [equal employment opportunity] complaint," AR 0225, and thus, that complaint is not part of the administrative record in this case. The plaintiff does not pursue his retaliation claim before this Court. See generally Compl.

was told "that he was being processed for a General discharge because of continued misconduct." AR 0231. The plaintiff was told "that he had a right to consult a lawyer and to submit a statement on his own behalf." AR 0231.

B. The Plaintiff's Discharge Process

On April 17, 2007, the plaintiff's commanding officer issued a memorandum to the plaintiff informing the plaintiff that he supported the plaintiff's general discharge. See AR 0231. The commanding officer "again advised the [plaintiff] that he had a right to consult a lawyer and to submit a statement on his own behalf. [The commanding officer] told the [plaintiff] to submit his statement within three days and that the statement would be forwarded with the recommendation for separation." AR 0231–0232.

> [L]ater that day, the [plaintiff] signed a modified acknowledgement form with a note stating that he would contact a lawyer that day and would submit a statement within three working days. In response, the Personnel Command advised the sector to be sure that the [plaintiff] knew he had five days from the date of notification to submit his statement and that the Sector should inform them when the [plaintiff] had spoken to an attorney.
>
> On April 19, 2007, the Sector Chief of Logistics sent an email to the Personnel Command stating that the [plaintiff] had consulted an attorney and had had ample opportunity to prepare his rebuttal statement but had not yet done so. She requested authority to discharge

> the [plaintiff]. She stated that she would "like to see [discharge] orders tomorrow."
>
> On April 20, 2007, a chief warrant officer at the Sector sent an email to the Personnel Command inquiring into the status of the [plaintiff's] discharge. He noted that the [plaintiff] had not yet submitted a rebuttal statement although he "has been given ample time to work on it (no other work except to work on his statement)."
>
> Also on April 20, 2007, the Coast Guard Personnel Command issued separation orders authorizing the [plaintiff's] General discharge "by reason [of] misconduct due to [involvement] of a discreditable nature with civil or military authorities." The orders required use of the separation code JKA, which denotes an involuntary discharge due to a "pattern of misconduct."
>
> On April 23, 2007, the [plaintiff] received a General discharge from the Coast Guard. His original [discharge papers] showed that he received an RE-4 reenlistment code (ineligible for reenlist) and a JKA separation code, reflecting separation due to a "Pattern of Misconduct" pursuant to Article 12.B.18 of the Personnel Manual.

AR 0232-0233.

C. The Discharge Review Board and the Upgrade of the Plaintiff's Discharge and Reenlistment Code

After the plaintiff was discharged from the Coast Guard, he applied to the Discharge Review Board to upgrade his discharge and reenlistment code. AR 0234. Although the Discharge Review Board recommended that the plaintiff's discharge "should stand as issued," AR 0100, the Commandant disagreed "due to a procedural flaw in [the plaintiff's] discharge," AR 0099, 0235. The Commandant corrected the plaintiff's record to show an Honorable discharge "for Miscellaneous/General Reasons," but did not upgrade the plaintiff's reenlistment code. AR 0099, 0235. The Commandant did not explain the "procedural flaw" that he found in the plaintiff's discharge in his Memorandum, see AR 0099, but the Board subsequently determined that "the Commandant's decision to upgrade the [plaintiff's] discharge to Honorable and his narrative reason for separation to 'Miscellaneous/General Reasons' appears to have been based on a finding of error concerning the processing of the [plaintiff's] rebuttal statement," AR 0039. The Board stated that "it appears that the Personnel Command may not have received [the rebuttal statement] nor reviewed it before issuing the [plaintiff's] discharge orders." AR 0254.

D. The Board's Decisions

Thereafter, the plaintiff "filed an application with [the Board] requesting a change in the reenlistment code from RE-4 (ineligible to reenlist) to

RE-1 (eligible to reenlist)." Compl. ¶ 44; see also Def.'s Mem. at 11[5].The plaintiff alleged that "his chain of command railroaded his discharge . . . in retaliation for his decision to file a formal [equal employment opportunity] complaint against his supervisor, who had harassed him because of his religion." AR 0016. The Board denied his request on August 20, 2009. See AR 0016, 0041. The plaintiff then filed a request for reconsideration of the Board's decision on September 4, 2009, based on the submission of additional evidence—the complete report of investigation of the plaintiff's equal opportunity complaint—as well as the "legal and factual errors made on behalf of the [ ] [B]oard." See AR 0276. The Board denied the plaintiff's request for reconsideration on May 27, 2010. See AR 0224, 0256.

E. This Civil Action

On May 6, 2016, the plaintiff filed his Complaint in this case. See Compl. at 1. Count I of the Complaint alleges that the Board's "determination that [the plaintiff's] separation was not wrong, unlawful, in error, or unjust was in violation of [Coast Guard] rules, regulations, and policies." Id. ¶ 52. Count II alleges that the Board's

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[5] In his Complaint, the plaintiff states that he filed his application with the Board in "early 2009" and that, in addition to requesting a change in his reenlistment code, he also requested that "his rank be returned to MK2/E-5." See Compl. ¶ 44. The plaintiff's application to the Board, however, was filed on August 8, 2008, see AR 0220, before the Commandant corrected the plaintiff's record to show an Honorable discharge, see AR 0099, and the plaintiff's application only included a request for an upgrade to an Honorable discharge and a change to his reenlistment code, but not a request for a change in his rank, see AR 0220.

decision "was in violation of well-established constitutional protections due to [the plaintiff] under the Fifth and Fourteenth Amendments." Id. ¶ 76. Count III alleges that "[the Board's] decision to not correct [the plaintiff's] record was arbitrary, capricious, and an abuse of discretion." Id. at 13. The defendant seeks the dismissal of Counts I and II of the plaintiff's Complaint under Rule 12(b)(1) of the Federal Rules of Civil Procedure because these claims are time-barred, "implicate non-justiciable military personnel decisions[,] and seek relief that the Court does not have the authority to grant." Def.'s Mem. at 2–3. In addition, the defendant asserts that Count II should be dismissed pursuant to Rule 12(b)(6) because the plaintiff fails to state a valid due process claim upon which relief may be granted. See id. at 3. Both parties have also filed motions for summary judgment. See Def.'s Mot. at 1; Pl.'s Mot. at 1.

II. STANDARDS OF REVIEW

A. Federal Rule of Civil Procedure 12(b)(1)

Federal district courts are courts of limited jurisdiction, Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994), and "[a] motion for dismissal under [Federal Rule of Civil Procedure] 12(b)(1) 'presents a threshold challenge to the court's jurisdiction,'" Morrow v. United States, 723 F. Supp. 2d 71, 75 (D.D.C. 2010) (Walton, J.) (quoting Haase v. Sessions, 835 F.2d 902, 906 (D.C. Cir. 1987)). Thus, a district court is obligated to dismiss a claim if it "lack[s] . . . subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1). Because "[i]t is to be presumed that a cause lies outside [a federal court's] limited

jurisdiction," Kokkonen, 511 U.S. at 377, the plaintiff bears the burden of establishing by a preponderance of the evidence that a district court has subject-matter jurisdiction, see Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992).

In deciding a motion to dismiss for lack of subject-matter jurisdiction, the district court "need not limit itself to the allegations of the complaint." Grand Lodge of the Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 14 (D.D.C. 2001). Rather, "a court may consider such materials outside the pleadings as it deems appropriate to resolve the question [of] whether it has jurisdiction [over] the case." Scolaro v. D.C. Bd. of Elections & Ethics, 104 F. Supp. 2d 18, 22 (D.D.C. 2000); see also Jerome Stevens Pharms., Inc. v. FDA, 402 F.3d 1249, 1253 (D.C. Cir. 2005). Additionally, a district court must "assume the truth of all material factual allegations in the complaint and 'construe the complaint liberally, granting [the] plaintiff the benefit of all inferences that can be derived from the facts alleged.'" Am. Nat'l Ins. Co. v. FDIC, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (quoting Thomas v. Principi, 394 F.3d 970, 972 (D.C. Cir. 2005)). However, "'the [p]laintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion' for failure to state a claim." Grand Lodge, 185 F. Supp. 2d at 13–14 (quoting Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (3d ed. 1998)).

B. Federal Rule of Civil Procedure 12(b)(6)

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Thus, to survive a motion to dismiss for "failure to state a claim upon which relief may be granted," Fed. R. Civ. P. 12(b)(6), the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A "claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556); see also Kowal v. MCI Commc'ns Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994) (noting that the plaintiff is entitled to "the benefit of all inferences that can be derived from the facts alleged"). Although the Court must accept the facts pleaded as true, legal allegations devoid of factual support are not entitled to this assumption. See, e.g., Kowal, 16 F.3d at 1276. Along with the allegations made within the four corners of the complaint, the court may also consider "any documents either attached to or incorporated in the complaint and matters of which [it] may take judicial notice." EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997).

C. Summary Judgment Under the Administrative Procedure Act

"The Secretary of Homeland Security may . . . correct any military record of the Coast Guard . . . through boards of civilians" "when the Secretary considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1).

> Although judicial review is available under the APA to review correction-board decisions, courts apply an "unusually deferential application of the arbitrary or capricious standard of the APA" to ensure that "the courts do not become a forum for appeals by every soldier dissatisfied with his or her ratings [and thereby] destabilize military command and take the judiciary far afield of its area of competence."

Rudo v. Green, 818 F. Supp. 2d 17, 24–25 (D.D.C. 2011) (alteration in original) (quoting Musengo v. White, 286 F.3d 535, 538 (D.C. Cir. 2002)). Accordingly, the Court must determine only whether the Secretary's decision not to take corrective action "is flawed for one or more of the reasons enumerated in 5 U.S.C. § 706(2), not whether the decision was correct." Lebrun v. England, 212 F. Supp. 2d 5, 14 (D.D.C. 2002) (Walton, J.) (citing Kreis v. Sec'y of Air Force, 866 F.2d 1508, 1511 (D.C. Cir. 1989)). Therefore, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463

U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)). "Courts 'will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" Pub. Citizen, Inc. v. FAA, 988 F.2d 186, 197 (D.C. Cir. 993) (quoting Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)). The District of Columbia Circuit has noted that "[p]erhaps only the most egregious decisions may be prevented under such a deferential standard of review." Kreis, 866 F.2d at 1515.

III. ANALYSIS

A. Subject Matter Jurisdiction and Justiciability of Counts I and II

1. Statute of Limitations for Counts I and II

28 U.S.C. § 2401(a) provides, in relevant part, that a "civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." Section 2401(a) applies to an APA claim, which "'first accrues,' within the meaning of § 2401(a), as soon as (but not before) the person challenging the agency action can institute and maintain a suit in court." Spannaus v. U.S. Dep't of Justice, 824 F.2d 52, 56 (D.C. Cir. 1987) (quoting 28 U.S.C. § 2401(a)). In Spannaus, the District of Columbia Circuit noted that, "[u]nlike an ordinary statute of limitations, § 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed." Id. at 55; see also P & V Enters. v. U.S. Army Corps of Eng'rs, 516 F.3d 1021, 1026 (D.C. Cir. 2008) (affirming Spannaus).

"Because this statute of limitations is jurisdictional, neither waiver nor equitable tolling is applicable." Horvath v. Dodaro, 160 F. Supp. 3d 32, 43 & n. 9 (D.D.C. 2015) ("In United States v. Kwai Fun Wong, [__ U.S. __, __, 135 S. Ct. 1625, 1632 (2015),] the Supreme Court recently held that [the] statute of limitations with respect to the Federal Tort Claims Act in 28 U.S.C. § 2401(b) was not jurisdictional . . . . Nonetheless, because the D.C. Circuit Court of Appeals has explicitly held that [§] 2401(a) is jurisdictional, see Spannaus, 824 F.2d at 52, and because the Supreme Court's holding in Wong is limited to the [§] 2401(b), Circuit precedent remains binding on this Court").

The defendant argues that Counts I and II of the plaintiff's Complaint should be dismissed because they are time-barred under § 2401(a). See Def.'s Mem. at 18–21; see also Def.'s Reply at 2–4. Specifically, the defendant asserts that Counts I and II challenge the plaintiff's original discharge in April 2007, rather than the Board's decision upholding the discharge on May 27, 2010, and thus, the six-year statute of limitations expired in April 2013, over three years before the plaintiff filed his Complaint on May 6, 2016. See Def.'s Mem. at 19–20; Def.'s Reply at 2. The plaintiff argues that Counts I and II challenge the Board's decision, not his original discharge, and therefore, these claims were filed timely. See Pl.'s Mem. at 9–10.

The Court agrees with the plaintiff that Counts I and II are not time-barred. Although the defendant is correct that both counts contain a "litany of allegations against the discharge process," Def.'s

Mem. at 20; see also Compl. ¶¶ 53–73, 77–94, each count also contains a specific allegation that the Board's decision was, in the case of Count I, "in violation of [Coast Guard] rules, regulations, and policies," Compl. ¶ 52, and, in the case of Count II, "in violation of well-established constitutional protections due to [the plaintiff] under the Fifth and Fourteenth Amendments," id. ¶ 76. Both of these claims are proper under the APA, see 5 U.S.C. § 706 (permitting a district court to "hold unlawful and set aside agency action . . . found to be . . . not in accordance with law [or] contrary to constitutional right"), and the Court is satisfied that these allegations "sufficed to put the defendant on notice as to the nature of the claim against him and the relief sought," see Twombly, 550 U.S. at 574, particularly because the defendant was able to respond to both of these claims on the merits, see Def.'s Mem. at 28–34, Def.'s Reply at 11–12. Given the Court's obligation to "construe the complaint liberally in [the plaintiff's] favor in accordance with the standard of Federal Rule of Civil Procedure 8(a)," see Wuterich v. Murtha, 562 F.3d 375, 383 (D.C. Cir. 2009), as well as the procedural posture of this case, see Ass'n of Civilian Technicians, Inc. v. United States, 601 F. Supp. 2d 146, 158 & n.12 (D.D.C. 2009) (crediting the "[p]laintiffs' assertion that they are in fact seeking relief pursuant to the APA" despite "the nebulous nature of the Complaint," and declining to require the plaintiffs to file an amended Complaint, because "the filing of an amended Complaint is obviously

unnecessary" "given the disposition of this case on the parties' Cross-Motions for Summary Judgment"), the Court concludes that Counts I and II are challenges to the Board's decision, not the underlying discharge, and thus are timely because the Complaint was filed within six years of the Board's decision.[6]

2. Justiciability of the Relief Sought

In his Complaint, the plaintiff seeks judgment in his favor and a court order directing the Coast Guard to (1) upgrade his RE-4 reenlistment code; (2) restore him to active duty with all back pay, entitlements, and credit for time served; and (3) pay his remaining enlistment bonus of $4,240.60. See Compl. at 14. The defendant argues that the plaintiff's requests for relief, with the exception of the plaintiff's request that the Board's decision be ruled a violation of the APA, constitute relief that the Court does not have the authority to grant. See Def.'s Mem. at 23.

The Court agrees that its authority is limited to determining whether the Board's decisions violated Board's decision to the Board. Another member of

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[6] Because the Court determines that Counts I and II of the plaintiff's Complaint challenge the Board's decision and not the merits of the plaintiff's underlying discharge or the events leading up to the discharge, the defendant's argument that the plaintiff's claims are non-justiciable because he "challenges the merits of the Coast Guard's decision to discharge [the p]laintiff," see Def.'s Mem. at 23, is moot because the Court agrees with the plaintiff that he is not challenging his underlying discharge, see supra at Part III.A.1.

this Court has stated that, upon finding that the Board's "decision violated the APA, the Court would vacate and remand the Board's decision; the Court would not tell the Board how to decide on remand." Bates v. Donley, 935 F. Supp. 2d 14, 27 (D.D.C. 2013) (refusing to order the Board to, among other things, upgrade the plaintiff's discharge status and credit the plaintiff with back pay and allowances); see also Sakievich v. United States, 160 F. Supp. 3d 215, 220, 221 (D.D.C. 2016) (noting that the Court's authority was limited to "review [of] the [Board's] decisions for reasonableness," and therefore, it could not "grant [the] plaintiff active duty status he did not have"), appeal docketed, No. 16- 5072 (D.C. Cir. Apr. 11, 2016); Remmie v. Mabus, 846 F. Supp. 2d 91, 95 (D.D.C. 2012) (noting that "the Court cannot order reenlistment" in the military). Consequently, the Court does not have the authority to upgrade the plaintiff's reenlistment code or restore him to active duty with all corresponding benefits. [7]

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[7] Because the Court concludes that it does not have the authority to order the Coast Guard to restore the plaintiff to active duty, the plaintiff's request for a Court order directing the Coast Guard to pay his remaining enlistment bonus of $4,240.60 also fails because payment of that remaining bonus is conditioned on the plaintiff's continued enlistment. See AR 1116. Thus, the Court need not consider the plaintiff's argument that it has jurisdiction over his request for his remaining enlistment bonus under the Little Tucker Act. See Pl.'s Mem. at 12. The Court notes, however, that the plaintiff only cited the APA, not the Little Tucker Act, as the basis for the Court's jurisdiction in his Complaint, see Compl. ¶¶ 3–7, and "[u]nder the APA, a plaintiff may [only] sue the United States 'in the district courts for remedies other than money damages arising from an agency's unlawful action,'" Martin v. Donley, 886 F. Supp. 2d 1, 7–8 (D.D.C. 2012) (Walton, J.) (quoting Bublitz v. Brownlee, 309 F. Supp. 2d 1, 5 (D.D.C. 2004)).

B. The Plaintiff's Due Process Claim

As noted above, Count II of the plaintiff's Complaint alleges that the Board's decision violated the plaintiff's due process rights. See Compl. ¶ 76. Specifically, the plaintiff contends that the Board's "failure to find [that] the [Coast Guard's] procedure and process in discharging [him] violated the [Coast Guard Personnel] Manual and the Constitution is . . . a violation of [his] due process rights." Pl.'s Mem. at 30; see also Compl. ¶¶ 76–95. The defendant argues that the plaintiff has no valid liberty or property interest that the Board could have deprived. See Def.'s Mem. at 25–27.

"[D]ue process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." McManus v. District of Columbia, 530 F. Supp. 2d 46, 72 (D.D.C. 2007) (citing Mathews v. Eldridge, 424 U.S. 319, 323 (1976)). Thus, "[f]or a plaintiff to survive a motion to dismiss under Rule 12(b)(6), he must allege, at a minimum, that he has been deprived of either a life, liberty, or property interest protected by the due process clause." Id. (citations omitted).

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Id. (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)). "These entitlements are created by sources independent of the Constitution." Smith v. Harvey,

541 F. Supp. 2d 8, 15 (D.D.C. 2008). The Court agrees with the defendant, see Def.'s Mem. at 26, that the plaintiff has "no protected property interest in continued military service," Spadone v. McHugh, 864 F. Supp. 2d 181, 189 (D.D.C. 2012) (quoting Wilhelm v. Caldera, 90 F. Supp. 2d 3, 8 (D.D.C. 2000)), nor in "the employment benefits that come with military service," Smith, 541 F. Supp. 2d at 15. Here, the plaintiff alleges that he "has a property interest in the final two payments of his . . . enlistment bonus totaling $4,240.60." Pl.'s Mem. at 28. These payments, however, were conditioned on the plaintiff's continued enlistment, see AR 1116, and "property interests arise in specific benefits that a person has already acquired," Rudo v. McHugh, 931 F. Supp. 2d 132, 143 (D.D.C. 2013), not in benefits that one is "seeking to acquire," id. Accordingly, the plaintiff has not asserted a cognizable property interest in his remaining enlistment bonus.

In addition to protecting property interests, "[t]he Due Process Clause . . . forbids arbitrary deprivations of liberty. 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied." Goss v. Lopez, 419 U.S. 565, 574 (1975) (quoting Roth, 408 U.S. at 573). "A government employee may have a liberty interest in his employment under one of two theories: (1) a 'reputation-plus' theory, or (2) a 'stigma or disability' theory." Brown v. McHugh, 972 F. Supp. 2d 58, 66 (D.D.C. 2013) (quoting Okpala v. District of Columbia, 819 F. Supp. 2d 13, 16 (D.D.C. 2011)). Here, the plaintiff asserts that he has "allege[d] a cognizable liberty interest under the 'stigma or disability theory," because, even though he

received an Honorable discharge, "his discharge resulted in a RE-4 reenlistment code and a separation code of 'JND,' which is 'Other, Concealment of arrest record.'" Pl.'s Mem. at 27–28. However, the narrative reason associated with the "JND" separation code, is not "Other, Concealment of arrest record," as the plaintiff alleges, see id., but rather "Separation for Miscellaneous/General Reasons," see AR 0094, 0878. Therefore, because the plaintiff received an honorable discharge, and "the narrative reason for separation" on his updated discharge certificate does not disclose the plaintiff's misconduct, see AR 0878, no stigma or disability to the plaintiff's reputation arises that implicates a cognizable liberty interest. See Knehans v. Alexander, 566 F.2d 312, 422 (D.C. Cir. 1977) ("[W]hatever 'liberty' interest [the appellant] may have had in his reputation, has not been impinged by the mere fact of his honorable discharge and nonretention in the Army, especially since the reasons for his nonpromotion were never publicly disseminated . . . ." (citations and footnote omitted)); see also Brown, 972 F. Supp. 2d at 66 (determining that the plaintiff failed to assert a valid liberty interest because he "suffered no reputational harm or stigma because he received an honorable discharge . . . , and has not alleged that [the adverse report in his military record] has become public"). Accordingly, the plaintiff has not asserted a cognizable liberty interest, and his due process claim must be dismissed pursuant to Rule 12(b)(6).

C. Review of the Board's Final Decision on Reconsideration

1. The Board's Review of the Plaintiff's Discharge Process

The plaintiff argues that the Board erred by finding that his separation from the Coast Guard was lawful because the Coast Guard violated the Coast Guard Personnel Manual (the "Manual") when it discharged him by "(1) denying [him] an opportunity to consult with counsel, (2) failing to provide [him] the requisite amount of time to respond to the notice of discharge, (3) separating [him] without consideration of his statement, and (4) separating [him] while he was on performance probation." The Court will consider the Board's review of each of these alleged violations in turn.

a. The Opportunity to Consult with Counsel

Article 12B.18.e. of the Manual governs honorable or generable discharges for misconduct of Coast Guard members with fewer than eight years of service. See AR 0569. This article states that a commanding officer shall

> [a]fford the member an opportunity to consult with a lawyer as defined by Article 27(b)(1) [of

> the Uniform Code of Military Justice][8] if contemplating a general discharge. If the member requests counsel and one is not available, the commanding officer must delay discharge proceedings until such time as counsel is available.

AR 0569.

In the plaintiff's rebuttal statement to his commanding officer's memorandum in support of the plaintiff's discharge from the Coast Guard, which was submitted to and considered by the Board, see AR 0234, the plaintiff stated:

> I am submitting my response on 19 April 2007 without the benefit of counsel. It was my and my counsel's understanding that my statement was not due until close of business on 20 April 2007. Therefore, my attorney has not had the opportunity to review this statement or provide me with legal advice.

AR 0234. Upon review of this statement, the Board determined that "[t]he record shows that [the plaintiff] was allowed to consult an attorney but apparently did not have a chance to have the attorney review his rebuttal statement." AR 0254.

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[8] Article 27(b)(1) of the Uniform Code of Military Justice provides: "Trial counsel or defense counsel detailed for a general court-martial . . . must be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or the highest court of a State . . . ." 10 U.S.C. § 827(b)(1) (2012)

The plaintiff argues that the Board's conclusion that he had an opportunity to consult with counsel, as required by the Manual, is "contrary to law" because "[m]erely having the opportunity to briefly speak to an attorney is not an 'opportunity to consult' with a lawyer." Pl.'s Mem. at 19. The defendant responds that the Board's conclusion was correct because the plaintiff's "statement that his attorney had not been able to review the statement . . . reflect[s] that he had, in fact, consulted with a lawyer after being notified of his discharge." Def.'s Mem. at 29–30.

The Court agrees with the plaintiff that he did not have an adequate opportunity to consult with a lawyer as envisioned by the Manual. The record shows that the plaintiff's rebuttal statement was submitted "without the benefit of counsel" because the plaintiff and his counsel assumed that the rebuttal statement was not due until the following day. See AR 0234. Because the plaintiff submitted his statement without the benefit of his attorney "review[ing] []his statement or provid[ing] [him] with legal advice," see AR 0234, the Court is unable to conclude that the plaintiff had a meaningful opportunity to actually discuss the substance of his case with his attorney. Accordingly, the Court concludes that the Board's decision that the plaintiff had the opportunity to consult with counsel as required by Article 12B.18.e.3 was arbitrary and capricious.

The Court concludes, however, that the Board's error is harmless. As noted above, Article 12B.18.e governs only the discharge of members "recommended for honorable or general discharge for

misconduct." AR 0569 (emphasis added). As noted earlier, on November 12, 2008, the Commandant upgraded the plaintiff's General discharge for a "Pattern of Misconduct" to an Honorable discharge "for Miscellaneous/General Reasons." See AR 0099. Accordingly, because the plaintiff's discharge was not for misconduct, the plaintiff was not entitled to the opportunity to consult with counsel and other procedural protections afforded by Article 12.B.18.e. See AR 0569. Thus, the Board's error was harmless. See Jicarilla Apache Nation v. U.S. Dep't of the Interior, 613 F.3d 1112, 1121 (D.C. Cir. 2010) ("The harmless error rule applies to agency action because [i]f the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration." (internal quotation marks and citation omitted)); Appleby v. Geren, 330 Fed. App'x 196, 199 (D.C. Cir. 2009) (concluding that, "even if the Board was incorrect in concluding the delay [in the petitioner's promotion] was lawful in all respects, any error was harmless").

b. The Requisite Amount of Time to Respond to the Notice of Discharge

Article 12B.18.e.2 of the Manual states that a commanding officer must "[a]fford the member an opportunity to make a written statement." AR 0569. The Board noted in its decision that

> according to the Sector Chief of Logistics, the [plaintiff] was assigned no other duties from April 16 through April 19 except to consult the attorney and write his rebuttal statement. The

> [commanding officer] first notified the [plaintiff] of the proposed discharge on a Page 7 dated April 16, 2007, but in his notification memorandum dated April 17, 2007, the [commanding officer] gave the applicant three calendar days to submit his statement. However, an email from the Personnel Command dated April 17, 2007, indicates that the [plaintiff] should have had five days. Despite this information, the [commanding officer] prepared his request for discharge and the Sector Chief prepared her endorsement on April 17, 2007, and they apparently forwarded the discharge package to the Personnel Command on April 19, 2007—only two days after the applicant was told that he would have three days to submit his statement. Therefore, it appears that the applicant may have been misled about how long his "opportunity" to submit his discharge rebuttal would be.

AR 0254.

The plaintiff argues that he "was entitled to rely on the [three-day] time period to respond specifically provided in the notice of discharge, and any deviation from that time period is arbitrary and capricious." Pl.'s Mem. at 21. Furthermore, he contends that he "should have been informed of the five-day time period prescribed by the Personnel Command." Id. at 20. The defendant responds that the Board considered the plaintiff's argument, but concluded "that the Manual prescribed only that a member be given an 'opportunity' to respond—without specifying any fixed length of time," and

therefore the Board's conclusion that no violation of the Manual occurred should be upheld. See Def.'s Mem. at 29.

The Court agrees with the plaintiff. Even though the Manual does not provide a specific length of time required to make a written statement, see AR 0569, once the commanding officer informed the plaintiff that he was entitled to three days to submit his statement, see AR 0254, the plaintiff was entitled to reply on that representation, see Lefrancois v. Mabus, 910 F. Supp. 2d 12, 21 (D.D.C. 2012) (noting that the Board must follow its own regulations and procedures). However, because the opportunity to make a written statement, like the opportunity to consult an attorney, is only afforded to service members "recommended for honorable or general discharge for misconduct," AR 0569, the Board's error regarding the plaintiff's opportunity in this regard is harmless also because the plaintiff was not discharged for misconduct.

c. The Lack of Consideration of the Plaintiff's Statement

Article 12B.18.e.4.d(1) of the Manual requires the commanding officer to include the member's written statement in the discharge package sent to the Commander for action. AR 0569–0570. The Board noted in its decision that,

> [a]lthough the [plaintiff] dated his rebuttal statement April 19, 2007, it appears that the Personnel Command may not have received it nor reviewed it before issuing the discharge

orders on April 20, 2007. The rebuttal statement was not listed as an enclosure to the [commanding officer's] memorandum and is not included in the file labeled "discharge package" in the [plaintiff's] military record. In addition, the Commandant's decision to upgrade the [plaintiff's] discharge to Honorable and his narrative reason for separation to "Miscellaneous/General Reasons" appears to have been based on a finding of error concerning the processing of the applicant's rebuttal statement. Assuming that the applicant's rebuttal statement was not timely considered prior to the issuance of his discharge orders in accordance with Article 12.B.18.e of the Personnel Manual, the Board is still not persuaded that his discharge was wrong. Every member of the applicant's chain of command from his immediate supervisor up to the Sector Chief of Logistics had found his behavior to be unacceptable, and numerous incidents of misconduct, including ongoing disrespect, were documented in his record. Furthermore, the substance of the [plaintiff's] rebuttal statement is insufficient to rebut his [commanding officer's] allegations of misconduct. Therefore, it is extremely unlikely that the [plaintiff's] rebuttal statement, timely considered, would have prevented his discharge for misconduct, and under the Separation Program Designator Handbook,

> the only reenlistment code authorized for members discharged for misconduct is an RE-4. Moreover, the Board finds that any negative effect the procedural error could theoretically have had on the [plaintiff's] character of discharge and narrative reason for discharge has been corrected by the Commandant through the [Discharge Review Board].

AR 0254–0255 (emphasis added).

The plaintiff argues that the Board's decision is arbitrary and capricious because

> [t]he lack of consideration [of his rebuttal statement] prejudiced [him], as he was in effect provided no opportunity to respond to his discharge. This prejudice is recognized by the subsequent upgrade to an Honorable discharge. This change evidences that the [Coast Guard's] failure to consider[] [the plaintiff's] rebuttal would have impacted his discharge proceedings and his reenlistment code.

Pl.'s Mem. at 22. The Court disagrees.

The Board's review of the plaintiff's rebuttal statement makes clear that the Coast Guard's error in failing to consider the plaintiff's rebuttal statement was harmless because "the substance of the [plaintiff's] rebuttal statement [wa]s [determined by the Board to be] insufficient to rebut his [commanding officer's] allegations of misconduct." AR

0255; see also Rogers v. United States, 124 Fed. Cl. 757, 767 (2016) (noting that "the military's failure to comply with its procedures for effecting a discharge does not render the discharge itself unlawful where the procedural error is deemed 'harmless' because the regulatory violation did not substantially affect the outcome of the matter"). Thus, the Coast Guard's failure to consider the plaintiff's rebuttal would not, as the plaintiff alleges, "have impacted his discharge proceedings and his reenlistment code." Pl.'s Mem. at 22. The Court agrees with the defendant that the "[p]laintiff [ha]s not identif[ied] a single piece of evidence . . . that the Board failed to consider." Def.'s Reply at 15. And because the Board, upon consideration of the plaintiff's entire record, concluded that the plaintiff's rebuttal statement would not have impacted his discharge proceedings, the Court must defer to the Board's decision that the Coast Guard's failure to consider the plaintiff's rebuttal statement prior to discharging him was harmless. See Caez v. United States, 815 F. Supp. 2d 184, 191 (D.D.C. 2011) (determining, upon review of the evidence, that there was "no indication that the [Board] failed to consider critical evidence or made an irrational decision").

d. The Separation of the Plaintiff While on Performance Probation

Article 12B.18.c of the Manual requires commanding officers to "afford a member a reasonable probationary period to overcome deficiencies before initiating administrative discharge action" for certain forms of misconduct. AR 0568. Pursuant to the Manual,

> [if] a command contemplates discharging a member for reasons contained in this paragraph, it shall counsel the member a formal probation or treatment period of at least six months has begun and make an appropriate [Page 7] entry in the member's [record] stating the command will initiate administrative discharge processing unless the member shows significant improvement in overcoming the deficiency during the probationary period. . . . However, commanding officers are authorized to recommend discharge at any time during the probation if the member is not making an effort to overcome the deficiency.

AR 0568. The Board noted in its decision that,

> [i]n light of the [plaintiff's] repeated violations of the terms of his probation, as documented in the Page 7s and by the [nonjudicial punishment] dated April 16, 2007, the Board finds that the [commanding officer] reasonably concluded that the applicant was not making a reasonable effort to overcome the deficiencies detailed in the probationary Page 7 dated March 8, 2007.

AR0254.

The plaintiff contends that because his discharge was initiated "only a month and a half after [he] was placed on performance probation . . . [, he] was not afforded a reasonable opportunity to overcome any deficiencies" as required by the Manual. Pl.'s Mem. at 22. This argument clearly

challenges his underlying discharge, not the Board's decision. In any event, the Board considered whether the plaintiff was afforded a reasonable opportunity to overcome his deficiencies, and concluded that, given the plaintiff's repeated documented misconduct, the plaintiff had failed to "mak[e] a reasonable effort to overcome th[ose] deficiencies." AR 0254. In such circumstances, the Manual authorizes commanding officers "to recommend discharge at any time," AR 0568, and thus, the Board's conclusion that the plaintiff's discharge was proper despite his probationary status was not arbitrary or capricious or contrary to law.

2. The Board's Denial of the Plaintiff's Request to Upgrade his Reenlistment Code and Pay Grade

The Board reached the following conclusions regarding the plaintiff's requests for an upgrade of his reenlistment code and pay grade in its decision:

> [ ] Under the Separation Program Designator Handbook, someone discharged for "miscellaneous/general" reasons may receive either an RE-1 or RE- 4 reenlistment code. In light of the [plaintiff's] history of misconduct and disrespect toward his chain of command from January through April 2007, the Board finds that the [plaintiff] has not proved by a preponderance of the evidence that the Coast Guard committed an error or injustice in assigning him the RE-4 code so that he may not reenlist.

> [ ] Accordingly, the applicant's requests for relief should be denied because he has not proved by a preponderance of the evidence that his RE-4 reenlistment code or his reduction in pay grade at mast were or are erroneous or unjust.

AR 0255 (footnote omitted).

The plaintiff argues that the Board's "recognition of the procedural errors in the [Coast Guard's] discharge and separation of [the plaintiff] and providing some, but not all, relief is arbitrary and capricious." Pl.'s Mem. at 23. According to the plaintiff, "[t]he deficiencies of the proceedings rendered all actions in [his] separation void[, and that t]he Vice Commandant recognized this by upgrading his discharge. For the same reasons, the reenlistment code should also be upgraded." Id. The Court disagrees because the plaintiff cites no authority, see id, nor could the Court find any, that supports his proposition that a procedural deficiency in the discharge process requires granting all relief requested or voids all subsequent decisions made by the Coast Guard.

The Board considered the Vice Commandant's decision to grant the plaintiff partial relief by upgrading his discharge from General to Honorable and determined that, even though the plaintiff was therefore eligible to receive either an RE-1 code (eligible to reenlist) or RE-4 code (not eligible to reenlist), "[i]n light of the [plaintiff's] history of misconduct and disrespect toward his chain of command . . . , the [plaintiff] ha[d] not proved by a

preponderance of the evidence that the Coast Guard committed an error or injustice in assigning him the RE-4 code so that he may not reenlist." AR 0255 (footnote omitted). The Board clearly considered the plaintiff's request to upgrade his reenlistment code and pay grade and determined that such relief would be improper considering the plaintiff's disciplinary record. Therefore, the Court concludes that the Board properly "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action[,] including a 'rational connection between the facts found and the choice made.'" State Farm, 463 U.S. at 43 (quoting Burlington Truck Lines, 371 U.S. at 168). This conclusion is especially appropriate considering that the Court's "ability to review matters related to military discharges is limited, as military personnel decisions themselves lie outside the [C]ourt's jurisdiction." Penland v. Mabus, 78 F. Supp. 3d 484, 494 (D.D.C. 2015) (quoting Burt v. Winter, 503 F. Supp. 2d 388, 390 (D.D.C. 2007)).

IV. CONCLUSION

For the foregoing reasons, the Court concludes that Counts I and II of the plaintiff's Complaint are timely under 28 U.S.C. § 2401(a) and assert justiciable claims under the APA. Count II, however, must be dismissed because the plaintiff failed to assert a cognizable liberty or property interest. The Court also concludes that although the Board's decisions regarding the plaintiff's opportunity to consult with counsel and submit a written statement were arbitrary and capricious, these errors were harmless because these protections are only afforded to service members discharged for misconduct.

Finally, the Court concludes that the Board's decisions regarding the consideration of the plaintiff's written statement and his discharge while on performance probation, as well as the Board's refusal to upgrade the plaintiff's reenlistment code and pay grade, were not arbitrary or capricious. Accordingly, the Court will grant in part and deny in part the defendant's motion to dismiss, deny the plaintiff's motion for summary judgment, and enter summary judgment in favor of the defendant.

SO ORDERED this 8th of March, 2017. [9]

REGGIE B. WATSON
United States District Judge

[9] The Court will contemporaneously issue an Order consistent with this Memorandum Opinion.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:16:cv-00861-RBW

BRIAN HUFFMAN

Plaintiff,

Versus

JOHN KELLY,[10]
Secretary of Homeland Security,

Defendant.

ORDER

In accordance with the Memorandum Opinion issued this same date, it is hereby **ORDERED** that the Defendant's Motion to Dismiss and for Summary Judgment is **GRANTED IN PART AND DENIED IN PART.** Specifically, the defendant's motion to dismiss Count II of the plaintiff's complaint is **GRANTED**, the defendant's motion to dismiss Count

[10] Pursuant to Federal Rule of Civil Procedure 25 (d), John Kelly has been automatically substituted for Jeh Johnson, whom the parties' pleadings name as the defendant.

I of the complaint is **DENIED**, and the defendant's motion for summary judgment is **GRANTED**. It is further

ORDERED that the Plaintiff's Cross-Motion for Summary Judgment is **DENIED**. It is further

ORDERED that this case is **CLOSED.**

SO ORDERED this 8th day of March 2017.

REGGIE G. WALTON
United States District Judge

APPENDIX E

CONSTIUTIONAL PROVISIONS AND STATUTES

THE UNITED STATES CONSTITION, AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July 2018, I served the foregoing Petition for Writ of Certiorari by e-mail and three copies via first-class mail on the following:

By E-Mail	By First-Class Mail
Charlene Goodwin Supervisor, Case Management Office of the Solicitor General SupremeCtBriefs@USDOJ.gov	Jeffrey B. Wall, Acting Solicitor General Solicitor General of the United States, Room 5616 Department of Justice 950 Pennsylvania Ave., N. W. Washington, DC 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 30, 2018

Eric S. Montalvo
The Federal Practice Group
1750 K Street, NW, Suite 900
Washington, DC 20001
(202) 808-3126

In The
Supreme Court of the United States

NO._____

BRIAN HUFFMAN
Petitioner,

v.

KIRSTJEN NIELSEN, SECRETARY
DEPARTMENT OF HOMELAND SECURITY
Respondent.

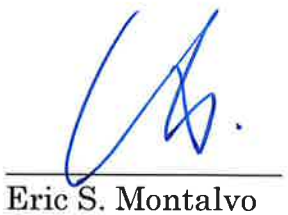
CERTIFICATE OF COMPLIANCE

This Petition for Writ of Certiorari with appendix has been prepared using: Microsoft Word 2010; New Century Schoolbook; 12 Point Type Space.

As required by Supreme Court Rule 33.1(h), I certify that the Petition for Writ of Certiorari contains 5,631 words, excluding the parts of the Petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 30, 2018



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