

No. 18-138

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**

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondent ("government") does not dispute that the Board's decision that the Petitioner had the opportunity to consult with counsel as required by Article 12B.18.e.3 was arbitrary and capricious. Nor does the government seriously dispute that United States Coast Guard's ("USCG") failure to follow its own policies and procedures in relations to discharging members implicates a fundamental right to due process. Instead, the government dedicates the weight of its response to arguing that the specific facts of this case warrant the "harmless error" view espoused by the D.C. Circuit. The government attempts to reframe and minimize the significance of the legal question Petitioner's case actually presents. This court should reject the government's opposition and grant Petitioner's petition.

The decision of the USCG Board for Correction of Military Records ("the Board") violated due process because the USCG failed to follow its policies and procedures in discharging Petitioner. After criminal allegations against Petitioner were promptly dismissed, and despite Petitioner's previously unblemished record, the USCG initiated a witch hunt to remove Petitioner from service. After reprimanding Petitioner for minor infractions, over a variably short period of time, the USCG proceeded with hasty discharge proceedings to deny Petitioner due process and prevent him from receiving the benefit of a discharge review board he would be entitled to at eight years of service. In discharging Petitioner from the USCG, Petitioner was denied the

opportunity to consult with counsel and not provided the required time to submit a statement. Moreover, the USCG did not even consider the statement he did provide under its truncated deadline. Petitioner was prejudiced by the decision to discharge him without adherence to the Manual or respect for due process and the flawed discharge now prevents his further service in the military. Thus, the USCG's decision to discharge Petitioner did not result in harmless error. While the error in the USCG discharge was later acknowledged and his discharge upgraded to Honorable, Petitioner was arbitrarily denied the ability to reenlist and complete relief from the due process violations. Despite his Honorable service, the USCG has denied Petitioner the opportunity to seek for further service in the military.

ARGUMENT

I. The decision below implicates a significance conflict among the circuits on a fundamental and recurring issue of administrative law.

The government suggests that there is no circuit split. But, as discussed in the instant petition for certiorari, not only do the circuits have contrary holdings on the questions presented; the divergent opinions have been directly acknowledged by at least one circuit.

As discussed in the petition for certiorari, several courts of appeals have recognized that the violation of fundamental procedural rules is automatically deemed prejudicial. Pet. 10-23. A serious agency error affecting important rights as occurred in Petitioner's case would have

resulted in a remand as matter of right in the Second, Third, Sixth, Seventh, Ninth, and Eleventh Circuits, but not in the Fourth or Federal Circuit. *Montilla v. INS*, 926 F.2d 162, 166 (2d Cir. 1991). (“All that need be shown is that the subject regulations were for the alien’s benefit and that INS failed to adhere to them”); *Leslie v. Attorney General of the U.S.*, 611 F.3d 171 (3d Cir. 2010), (“[W]hen 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.”); *Wilson v. Commissioner of Social Security*, 378 F.3d 541 (6th Cir. 2004), (“Although 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 petitioner].”); *Martinez-Camargo v. INS*, 282 F.3d 487 (7th Cir. 2002), (“The court ultimately declined to remand after finding that the administrative rule violated was not for the protection of the appellant’s substantial rights.”); *Sameena Inc. v. United States Air Force*, 147 F.3d 1148 (9th Cir. 1998); (“held that failure to give the appellant an evidentiary hearing prior to debarment, as required by the regulation, required

remand.”); *Port of Jacksonville Maritime Ad Hoc Committee, Inc. v. United States Coast Guard*, 788 F.2d 705 (11th Cir. 1986) (setting forth review process in line with *American Farm Lines* and recognized that where the regulation an agency violated was intended to confer procedural benefit to a claimant, the agency’s action should be invalidated).

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. See *Pam, S.P.A. v. United States*, 463 F.3d 1345 (Fed. Cir. 2006) (“The Federal Circuit held that a showing of prejudice is required in all such cases, even those involving substantial rights. 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”).

II. Petitioner has consistently argued that the District of Columbia Circuit below disposed of this vital due process concern, given that Petitioner's rebuttal statement, discharge, and re-enlistment code were all conducted without the benefit of counsel's contributions.

"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.¹

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

¹ 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.

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 deprivation 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.

III. Petitioner was never provided the benefit of counsel's contributions

When discharged, Petitioner did not have an opportunity to consult with counsel. Adequate consultation with counsel is bedrock of due process and courts have found decisions invalid based on failure of an adequate consultation. *See United States v. Espinosa*, 789 F. Supp. 2d 681, 688 (E.D. Va. 2011) (finding that service-members' attorney consultations relating to their decision to enter a non-judicial punishment was "seriously inadequate to permit them to make voluntary, knowing, and intelligent waivers of their right to trial by court-martial where that waiver would result in civilian prosecution.").

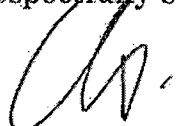
The Board's decision is contrary to law. Petitioner did not admit to having consulted with an attorney in his statement. Merely having the opportunity to briefly speak to an attorney is not an "opportunity to consult" with a lawyer. Petitioner was entitled to work with an attorney to draft a response to the notice of discharge within the time provided by the USCG. He was not afforded this opportunity. The opportunity to "consult" is not satisfied merely because Petitioner made contact with an attorney. Black's Law Dictionary defines the verb "consult" as "1. The act of asking the advice or opinion of someone (such as a lawyer). 2. A meeting in which parties consult or confer. 3. Int'l law. The interactive methods by which states seek to prevent or resolve disputes." CONSULTATION, Black's Law Dictionary (10th ed. 2014). Pursuant to the Manual, Appellant was entitled to seek information or advice from his

counsel, and his statement specifically provides his attorney did not have the "opportunity to review this statement or provide me with legal advice." Further, the proceedings were not delayed in order for Petitioner to have time to consult with his attorney as the Manual requires.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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