CASE NOT SET FOR ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Robert L. PAYNE, Appellant	)	
v.	)	No. 06-5110
Hon. Francis J. HARVEY, Secretary of the Army, et al. Appellees	)	

APPELLANT'S OPPOSITION TO APPELLEES' MOTION FOR SUMMARY AFFIRMANCE

I. BACKGROUND

With his mother's consent, seventeen-year old Robert L. Payne enlisted in the U.S. Army in 1959 for a term of three years. Administrative Record ("Admin. R.") at 242, 244, 273. After training as an infantryman, he was stationed in Bamberg, Germany. Admin. R. at 256. On June 26, 1960, Appellant Payne was the driver of an automobile involved in an off-post accident that resulted in the death of a fellow soldier. Admin. R. at 201. After a two-day trial by special court-martial, he was found guilty on November 4, 1960, of negligent homicide. He was sentenced to reduction to the grade of Recruit, forfeiture of $50 dollars per month for six months, and three months of hard labor without confinement. Admin. R. at 192.

The District Court's memorandum opinion ("Mem. Op.") granting Appellees' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment notes at p. 2: "Initially, 'two trained military lawyers' were appointed to represent [Appellant]. Before trial began,

these lawyers were removed and succeeded by a lieutenant who allegedly 'had no training in law.'" The trial record (Admin. R. at 12) makes clear that at trial the defense counsel was not a lawyer in the sense of Art. 27 of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 827, which requires legally trained defense counsel in certain situations.

In a 1961 court-martial, Mr. Payne pled guilty to being absent without leave from his unit in Massachusetts and was sentenced to be confined at hard labor for three months and to forfeit $43 a month for three months. Admin. R. at 197.

A curious sequence of events began on January 3, 1962, when Pvt. Payne, while in confinement,[1] signed a statement reciting that he had "been counseled and advised" by his commanding officer, 1st Lt. Walter Hoese, that he had been furnished a copy of his commanding officer's report, and that he "may be given" an Undesirable Discharge. Pvt. Payne then waived his right to counsel, a hearing, and the right to submit a statement in his own behalf. Admin R. at 137. Five days later, his commanding officer, 1st Lt. Hoese -- his counselor and adviser -- recommended an Undesirable Discharge. Admin. R. at 125.

On January 9, 1962, Pvt. Payne was interviewed in the stockade by a medical officer and given "psychiatric clearance ... for whatever administrative or judicial action his command deems appropriate." He was determined to have, among other things, "a history of a disturbed family background." Before being taken again to the stockade, he cut his wrist with a razor, because "he did not want to return to the stockade." Admin. R. at 240.

While his commander's recommendation was pending at higher headquarters, Pvt. Payne pleaded guilty on January 15, 1962, to a charge of leaving his appointed place of duty in yet a third special court-martial and sentenced to confinement at hard labor for 1 month

[1] Pvt. Payne's DD Form 214, Report of Discharge indicates that January 8, 1962, falls within one of the periods "30 Dec 61 thru 28 Jan 62" of so-called "bad time" listed therein. Admin. R. at 117.

and forfeiture of $70 from one month's pay -- an event that is not mentioned in the District Court's opinion, the ABCMR decisions, nor in Appellee's Memorandum. Admin. R. at 197. On January 30, 1962, he was discharged from the Army with an Undesirable Discharge. Admin. R. at 271. He was twenty years old.

On March 8, 1976, Mr. Payne applied to the Army Discharge Review Board ("ADRB")[2] asking that his discharge be upgraded to Honorable. On January 6, 1977, the ADRB denied Mr. Payne's petition on the grounds that he was properly discharged, but stated that he could apply to the Army Board for Correction of Military Records ("ABCMR" or "the Board"), noting that the ABCMR is not bound by the ADRB decision. The ADRB's letter enclosed an application form with instructions. Admin. R. at 90.

Appellant subsequently applied to the ABCMR. Because his application does not appear in the record, the District Court presumed that Mr. Payne challenged his Undesirable Discharge at that time. Mem. Op. at n. 3, p. 6. On November 19, 1982, the ABCMR wrote Mr. Payne that it could not make a decision on his application because his military records appeared to have been destroyed in a 1973 fire at the National Personnel Records Center. The ABCMR advised Mr. Payne that "you can reapply at any time if you can submit the necessary supporting documents and/or information." Admin. R. at 107. Mr. Payne later discovered that his military records were not destroyed when they were made available to his probation officer for use in a pre-sentence report. Mem. Op. at 3; Compl. ¶ 11.

On November 18, 1991, Appellant, armed with the knowledge that his military

[2] Unlike the Army Board for Correction of Military Records, which is composed of civilians appointed by the Secretary of the Army, 10 U.S.C. § 1552(a), the Army Discharge Review Board may be composed of military members, 10 U.S.C. § 1553. See, Wilson v. Sec'y of the Navy, 417 F.2d 297 (3d Cir. 1969) (The ["Army Discharge] Review Board is to be distinguished from the Correction Board, created pursuant to 10 U.S.C. §1552. That statute requires that the Correction Board be composed of civilians ...."). In Mr. Payne's case, the Army Discharge Review Board was composed entirely of military members. Admin. R. at 91.

records had not been destroyed, re-applied to the ABCMR requesting reversal of his 1960 court-martial for negligent homicide, an upgraded discharge, and the expunging of his records of the subsequent courts-martial. His application specifically noted: "I was told by mail that my records had been burned, but if I could find any supporting evidence, I would still be considered." Admin. R. at 100.

In a January 13, 1992, decision, the ABCMR ruled that Mr. Payne had not filed within the three-year period set by 10 U.S.C. § 1552(b). Although Mr. Payne's application referred to the 1960 court-martial and asked for the expunging of subsequent courts-martial, the Board characterized his request by referring to *a* subsequent court-martial, using the singular, and did not mention Mr. Payne's January 15, 1962, court-martial. The ABCMR also did not mention of Mr. Payne's destroyed-records explanation for his delay. Admin. R. at 95- 98. In a February 19, 1993, letter to Mr. Payne, the Board repeated its decision that "it was not in the interest of justice to excuse your failure to timely file." The Board's letter then asserted that if it had found Mr. Payne's claim meritorious it would have excused his failure to timely file because "The Board has never rejected an application simply because of a failure to apply within the time prescribed." Admin. R. at 102, 103.

Mr. Payne replied to the ABCMR decision in a November 28, 1993, letter, explaining his delay by noting that he had been waiting for advice from the American Legion. His letter noted "I feel that the time limits prescribed in [10 U.S.C. § 1552(b)] has been waived by the [November 19, 1982 ABCMR letter] misstating that my records were burned in a fire, and in addition, the letter gives me express permission to reapply at any time that I could provide more evidence." Admin. R. at 104.

On January 13, 2004, Mr. Payne re-applied to the ABCMR, asking that the November

3, 1960, court-martial for negligent homicide by expunged from his record. He specifically stated that "I was not allowed trained military counsel, I was not allowed to hire civilian counsel & I was not allowed to appeal the conviction, all in violation of the Constitution & the decisions of the U.S. Supreme Court." Admin. R. at 6. In a September 2, 2004, decision, the ABCMR concluded that "the overall merits of this case are insufficient as a basis to amend" the January 13, 1993, decision. Admin. R. at 5.

On December 13, 2004, Mr. Payne filed the instant action in the District Court pro se asking that his court-martial for negligent homicide be declared unconstitutional, that the ACBMR decision be reversed, his negligent homicide conviction be expunged, and his discharge upgraded to honorable. Mr. Payne's pro se motions of December 29, 2004, and April 7, 2005, for court-appointed counsel were denied. In a March 24, 2006, memorandum opinion, the District Court granted Defendants' Motion to Dismiss or, in the alternative, for Summary Judgment, holding that (i) consideration of Appellant's claim for an upgrade of his discharge was barred by 28 U.S.C. § 2401 because the cause of action arose on January 30, 1962, the date of his discharge, (ii) Appellant's failure to raise objections in the military courts bars review in the federal court, and (iii) that Appellant had not produced sufficient evidence to depart from the deference accorded to decisions of boards for correction of military records. Mem.Op. at 9. Mr. Payne appealed pro se to this Court on April 20, 2006. The undersigned entered his appearance on behalf of Appellant on May 18, 2006.

II. ARGUMENT

A. The District Court Erred by Holding that Appellant's Challenge to His Discharge was Barred by 28 U.S.C §2401(a).

It may be possible to argue that this Circuit has never directly ruled on the question whether, in an action seeking review of a correction board decision, the 28 U.S.C. § 2401(a)

statute of limitations begins to run on the date of discharge rather than the date the agency denies the application. However, the appellate and district courts of this Circuit have long assumed that the statute runs from the date of the administrative decision, and it would run counter to the jurisprudence of this Circuit for this Court to rule otherwise. Set forth in the margin is a partial list of decisions that would have been either unnecessary, their holdings reversed, or their reasoning rendered incorrect, if this Court were to determine that the six-year statute of limitations of 28 U.S.C. § 2401(a) begins to run on the date of the offending military record rather than on date the administrative agency refused to correct that record.[3]

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[3] Dickson v. Sec'y of Defense, 68 F.3d 1396, 1399-1400 (D.C. Cir. 1995) (three plaintiffs: 20, 30 & 22 years between discharge and administrative action); Kidwell v. Dept. of the Army, 56 F.3d 279 (D.C. Cir. 1995) (17 years between discharge and initial civil action); Ortiz v. Sec'y of Defense, 41 F.3d 738 (D.C.Cir. 1994)(14 years between discharge and application to Discharge Review Board; White v. Sec'y of the Army, 878 F.2d 501, 504, 506 (D.C. Cir. 1989) (17 years between discharge and court remand); Gay Veterans Assoc., Inc. v. Sec'y of Defense, 850 F.2d 764 (D.C. Cir. 1988) (reviewing discharges dating from "the late 1950s and early 1960s"); Vietnam Veterans of America v. Sec'y of the Navy, 843 F.2d 528, 532 (D.C. Cir. 1988) (8 & 12 years between discharge and administrative application); Baxter v. Claytor, 652 F.2d 181, 185 (D.C. Cir. 1981) (20 years between court-martial and civil action); Robinson v. Resor, 469 F.2d 944 (D.C. Cir. 1972) (11 years between discharge and civil action); Homcy v. Resor, 455 F.2d 1345 (D.C. Cir. 1971) (23 years between discharge and civil action); Van Bourg v. Nitze, 388 F.2d 557 (D.C.Cir. 1967) (16 years between discharge and administrative proceeding); Carter v. Dep't of the Navy, No. 05-0775, 2006 U.S.Dist. LEXIS 59767 (D.D.C. Aug. 24, 2006) (27 years between discharge and civil action, pro se plaintiff granted leave to amend complaint with respect to corrections board applications); Roberts v. Harvey, No. 05-2430, 2006 U.S.Dist. LEXIS 53509 (Aug. 3, 2006) (36 years between discharge and civil action); Wielkoszewski v. Harvey, 398 F.Supp. 2d 102 (D.D.C. 2005) (at least 20 years between discharge and civil action); Levant v. Roche, 384 F.Supp.2d 262 (D.D.C. 2005) (12 years between denial of promotion and civil action); Lipsman v. Sec'y of the Army, 257 F.Supp. 2d 3 (D.D.C. 2003) (38 years between discharge and civil action); Lebrun v. England, 212 F.Supp.2d 5, 19 (D.D.C. 2002), aff'd per curium, 2003 U.S.App. LEXIS 3490 (2003) (33 years between resignation from service academy and civil action); Pleus v. Peters, 1999 U.S. Dist. LEXIS 10065 (D.D.C. June 17, 1999) (8 years between discharge and civil action); Smith v. Peters, 1999 U.S.Dist.LEXIS 6980 (1999) (9, 8, & 7 years between offending report and civil action); Johnson v. West, 1999 U.S.Dist.LEXIS 5145 (1999); Robinson v. Dalton, 45 F.Supp.2d 1 (D.D.C. 1998) (18 years between letter of reprimand and civil action); Kosnik v. Peters, 31 F.Supp.2d 151 (D.D.C. 1998) (13 years between offending report and civil action); Mudd v. Caldera , 26 F.Supp.2d 113, 117 (D.D.C. 1998) (121 years between offending military record and administrative application); Glick v. Dep't of the Army, 1991 U.S.Dist. LEXIS 2204 (D.D.C. 1991) (16 years between discharge and BCMR petition); Lewis v. Sec'y of the Navy, 1990 WL 454624 (D.D.C. 1990) (18 years between discharge and civil action); Bittner v. Sec'y of Defense, 625 F.Supp. 1022 (D.D.C. 1985) (multiple plaintiffs whose discharges occurred more than 6 years before civil action; White v. Sec'y of the Army, 629 F.Supp.64 (D.D.C. 1984) (10 years between discharge and civil action); Nethery v. Orr, 566 F.Supp. 804 (D.D.C. 1983) (24 years between discharge and administrative proceeding); Miskill v. Lehman, 566 F.Supp. 1486, 1489 (D.D.C. 1983) (10 years between resignation and civil action); Wood v. Sec'y of Defense, 496 F.Supp. 192, 198 (D.D.C. 1980) (multiple plaintiffs, all more than six years after discharge); Hoskin v. Resor, 324 F. Supp at 277 (D.D.C. 1971) (50 years, claim apparently made directly to Sec'y of Army rather that ABCMR).

This Court may wish to strike off in a new direction from these decisions, but it should not do so by a summary affirmance in the instant case.

Of course, the "judicial review of a claim of wrongful discharge is distinct and independent from judicial review of a claim challenging the Correction Board's review of the underlying discharge decision." Lebrun v. England, 212 F.Supp.2d 5, 19 (D.D.C. 2002), aff'd per curium, 2003 U.S.App. LEXIS 3490 (2003). As the district court noted in Lebrun, 212 F.Supp.2d at 17:

> While the District of Columbia Circuit has not directly considered this issue, it is evident that of those Circuit Courts that have addressed the question, an overwhelming majority have found that the right to obtain judicial review of a Board of Corrections' decision under the APA ... accrues at the time of the final agency decision, or the exhaustion of all administrative remedies, rather than at the time when the underlying discharge ... occurred. Blassingame v. Sec'y of the Navy, 811 F.2d 65, 71 (2d Cir. 1987), rev'd on other grounds after remand, 866 F.2d 556 (1989); Dougherty v. U.S. Navy Bd. for Corr. of Naval Records, 784 F.2d 499, 501-02 (3d Cir. 1986); Geyen v. Marsh, 775 F.2d 1303, 1306 (5th Cir. 1985), aff'd, 849 F.2d 1469 (1988); Smith v. Marsh, 787 F.2d 510, 512 (10th Cir. 1986) (footnote omitted).[4]

See also, Robinson v. Dalton, 45 F.Supp.2d 1 (D.D.C. 1998) (petition to the Board for Correction of Naval Records to remove a sixteen-year letter of reprimand not time barred); Lewis v. Sec'y of the Navy, 1990 WL 454624 (D.D.C. 1990) ("the right to obtain APA review of the decision of a military appeals board accrues at the time of the board's decision rather than at the time of the underlying discharge."); Bittner v. Secretary of Defense, 625 F.Supp. 1022, 1028 (D.D.C. 1985) ("The majority of courts that have addressed the question of whether individuals may attack review board decisions in Federal court, despite the fact that the original discharge took place more than six years before suit was filed, have concluded that there is no bar.").

[4] The Ninth Circuit can be added to list. See, Guerrero v. Marsh, 819 F.2d 238 (9th Cir. 1987).

Of course, the time between the offending military record and the application to the Board is immaterial. See supra note 3. Under 10 U.S.C. § 1553(a), applications to the ADRB can be made within 15 years of the date of discharge. After 15 years have elapsed, applicants can turn to the ABCMR, as Mr. Payne did. Were the six-year statute to run from the date of discharge, any ADRB or ABCMR rulings after that period would be beyond the reach of judicial review. A review or corrections board that received an application the day after discharge could preclude judicial review merely by taking six years to complete its review. See, Blassingame v. Secretary of the Navy, 811 F.2d 65, 71 (2d Cir. 1987) ("The essential difficulty with the government's argument is that it completely insulates from judicial review any Board decision rendered more than six years from discharge, even though Congress has authorized both the Review Board and the Correction Board to act thereafter."); Pleus v. Peters, 1999 U.S. Dist. LEXIS 10065 (D.D.C. June 17, 1999) ("Under defendant's reading of the statute of limitations, if the review board were to need more than six years to decide the case, plaintiff would be barred from bringing his action in federal court. This would be an undesirable result...."). Moreover, as the court in Lebrun pointed out, "since an action for correction of records involves judicial review based on the administrative record, the statute of limitations should begin to run when the administrative record is complete. That is, the action is not ripe for review until the correction board has rendered its final decision." 212 F.Supp. 2d at 21 (quoting Smalls v. U.S., 87 F.Supp. 2d 1055 (D.Haw. 2000) and citing Dougherty, 784 F.2d at 501.)

Both the District Court below and Appellees' Memorandum cite Kendall v. Army Board for Correction of Military Records, 996 F.2d 362, 365 (D.C. Cir. 1993) and Walters v. Sec'y of Defense, 725 F.2d 107 (D.C. Cir. 1983), reh'g denied, 737 F.2d 1038 (D.C. Cir.

1984) (en banc) (per curiam). As for Walters, the footnote omitted from the above Lebrun quotation notes: "This Court has not overlooked Walters ... where the District of Columbia Circuit found that a class action seeking to upgrade discharges was barred by the statute of limitations. However, the judicial review that was being sought there was the underlying discharge and not of an agency's review of the discharge decision." Lebrun, 212 F.2d at 17 n.11. See, Walters v. Sec'y of Defense, 737 F.2d 1038 (D.C.Cir. 1984) (Judges Wald and Mikva concurring) ("Walters explicitly does not speak to the altogether distinct question of what time period governs when review is sought of administrative discharge decisions."); Lewis v. Sec'y of the Navy, 1990 WL 454624 (D.D.C. 1990) ("Walters specifically left unresolved the question of whether section 2401(a) bars judicial review of an administrative decision concerning a discharge when the administrative review, but not the discharge, occurred within six years of the filing of the lawsuit in federal court."); Pleus v. Peters, 1999 U.S. Dist. LEXIS 10065 (D.D.C. June 17, 1999) ("[T]he Walters Court specified that its decision did not hold for a discharge review board when the party exerted an effort to exhaust administrative remedies. 'We need not and do not decide whether, had a named plaintiff sought and received a final decision from a discharge review board, the statute of limitations could have been tolled in any way.' 725 F.2d at 115."). The Pleus court concluded by noting that this Circuit in Ortiz v. Secretary of Defense, 41 F.3d 738 (D.C. Cir. 1994), similarly held that the special three-year statute of limitations in 10 U.S.C § 1552(b) for applications to the ABCMR begins to run from the date of an adverse ADRB decision, not the date of discharge: "We hold, in view of the regulatory requirement that service members exhaust their remedies with the Review Board before they seek redress from the Correction Board, that the three-year statute of limitations begins to run at the conclusion of Review Board proceedings." 41

F.3d at 738. [5] This Circuit's decision in Ortiz noted that "Walters held that the statute of limitations ... 28 U.S.C. § 2401(a), begins to run from the date of discharge when the servicemember makes no effort to exhaust administrative remedies." 41 F.3d at 744. Indeed, the opinion in Walters is clear that it is not applying the six-year statute to foreclose judicial review of subsequent review board consideration:

> We note ... that Congress' closing of the door to the federal courthouse after six years has not left servicemembers in Walters' situation entirely without a remedy. Congress has required, and the services have established, both correction boards and discharge review boards under 10 U.S.C §§ 1552 and 1553. These boards may hear claims subject respectively to the flexible limitation period of section 1552(b) and the generous fifteen year period of section 1553(a).... Apparently Walters simply chose to ignore these available remedial routes. ... We are presented, of course, with a somewhat unusual case, in that Walters has made no serious effort to exhaust his administrative remedies.

725 F.2d at 114, 115 (emphasis in original, footnotes omitted).

Other Circuits have relied upon what appears to be settled law in this Circuit. In Lebrun, quoted above, the court noted that the "overwhelming majority" of the other Circuits have not hesitated to note that for the purposes of the 28 U.S.C. § 2401(a) statute of limitations, the cause of action accrues at the time of the ABCMR decision. In two of these decisions, Geyen v. Marsh, 775 F.2d 1303, 1311 (5th Cir. 1985), ("Geyen's action challenging the ABCMR's decision denying him an upgraded discharge is barred neither by statute of limitations nor by the doctrine of laches.") and Dougherty v. U.S. Board for Correction of Naval Records, 784 F.2d 499, 501 (3d Cir. 1986) ("[W]e hold that the six-year statute of limitation ... did not begin to run until the BCNR issued its final decision."), the Circuit Courts had no trouble noting that this Circuit's Walters decision, cited by the District

[5] In Appellant's case, the ABCMR erred in ruling in 1993 that the three-year statute in 10 U.S.C § 1552(b) began to run from the date of Appellant's 1962 discharge. Admin. R. at 97.

Court and Appellees in the instant appeal, never reached the question whether an action brought after a correction board denial is barred by the six-year statute. Geyen: "The Walters court expressly declined to address the limitations applicable to actions for review of ABCMR decisions.") 775 F.2d at 1309. Dougherty: "We have not overlooked Walters .... In that case, review of the discharge itself was sought and not review of any military correction board action." 784 F.2d at 502.

In Kendall, the majority opinion relied on Walters, and like Walters, the Kendall court held that for a direct attack on a court-martial, the six-year statute of limitations of 28 U.S.C. § 2401(a) runs from the date of the discharge: "Therefore, insofar as Kendall is seeking review of the decision of the court-martial, his claims were time barred six years later ...." 996 F.2d at 366. However, Kendall addressed the ABCMR's assertion of the three-year statute of limitations of 10 U.S.C. § 1553(b), and its conclusion was clearly labeled: "CONCLUSION. Even if the District Court has jurisdiction to review ABCMR decisions on untimely appeals, *an issue we do not decide today*, there is no reversible error in the Board's application of the statute of limitation on the facts presented to it." 996 F.2d at 367 (emphasis added). This limited holding was made clear in Chief Judge Mikva's dissent: "I cannot agree with the majority's holding that the ABCMR properly explained its refusal to waive the three-year limitations period in this case." 996 F.2d at 367-368. Here, the District Court erred by citing Walters and Kendall for the proposition that section 2401(a) bars judicial review of a Board decision to deny an upgrade of a more-than-six-year-old discharge.

B. The District Court Erred by Holding That Appellant Waived his Right to Challenge the Validity of his Court-Martial.

The Military Justice Act of 1968, P.L 90-632, 82 Stat.1337, amended the Uniform

Code of Military Justice ("UCMJ") Art. 27, 10 U.S.C. § 827, to afford special court-marital defendants the opportunity to be represented by legally trained defense counsel "unless counsel having such qualification cannot be obtained on account of physical conditions or military exigencies." It is possible to convene certain special courts-martial without legally trained counsel (see fn 4, page 5 of Appellees' Memorandum), but Art. 27 requires a "detailed explanation" of the circumstances.

In 1960, UCMJ Art. 38, 10 U.S.C. § 838, provided that: "The accused has the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available...." See Art. 38 prior to amendment by Act of Nov. 20, 1981, set forth in note to 10 U.S.C. § 838; U.S. v. Culp, 33 C.M.R. 411 (C.M.A. 1963). Appellant's pre-1968-amendment case is similar to U.S. v. Cutting, 34 C.M.R. 127 (1964), where the court noted: "While in [U.S. v. Culp], the Court declared an accused's appointed counsel in a special court-martial need not be legally qualified, it is ... equally clear that Congress afforded him the right to be so represented if he made an appropriate request and an attorney was reasonably available." Appellant Payne's complaint declared that he had requested trained military lawyers or civilian counsel (Compl. at ¶ 5), a situation similar to that in Cutting, where the record was unclear on Defendant Cutting's request for legally-trained counsel, leading the court to declare: "While the burden is normally on the aggrieved party to support his contention of abuse, we are loath so to charge one represented by untrained counsel when considering a matter of basic statutory entitlement." 34 C.M.R. 127, 132.

Appellees assert that Appellant waived his right to challenge the validity of his court-martial, arguing that the military justice system is separate from the federal court system. Of

course, there can be no question in this Circuit that the district court has jurisdiction to review constitutional defects in a court-martial conviction. See, Homcy v. Resor, 455 F.2d 1345 (D.C.Cir. 1971) ("[W]e held in Kauffman [v. Secretary of the Air Force, 415 F.2d 1991 (D.C.Cir. 1969)] that the District Court did have jurisdiction to review alleged constitutional defects in the appellant's court martial conviction."). However, in this case, Appellant points to the constitutional defects in his court-martial, not in a direct attack on that court-martial, but in the context of the Board's refusal to consider Appellant's argument that he was denied legally qualified counsel.

Both the District Court opinion (p. 6) and Appellees' motion (p. 7) make much of the notion that Appellant did not pursue an appeal of his 1960 court-martial conviction within the military justice system. In 1960, Article 66(b)(1) of the UCMJ, 10 U.S.C. § 866(b)(1), provided for appeals to each service's Court of Criminal Appeals (see note to 10 U.S.C. § 866), but limited those appeals to cases in which the sentence extended to death, dismissal, bad conduct discharge, or confinement for one year or more. The District Court declared at p. 9 that "Nothing in the record indicated plaintiff's intention or attempt to pursue an appeal in the military courts,"[6] and Appellees' Motion for Summary Affirmance states at p. 7 that there is no "evidence Appellant ever even attempted to pursue an appeal within the military justice system." Of course, Appellant did not pursue such an appeal, because in 1960, the UCMJ did not permit it. Appellant's only recourse was to civilian courts, hardly an option when he was stationed in Germany without counsel.

The District Court noted at p. 8 that Appellant's case "presumably underwent review by the Judge Advocate General prior to its approval by the convening authority." The

[6] The District Court's statement is odd because the preceding sentence acknowledges that Appellant's conviction did not require an automatic referral to the Court of Criminal Appeals.

Board's September 2, 2004, decision used similar language: "Presumably the convening authority approved his sentence only after receiving the judge advocate's review." Admin. R. at 5. However, it is remarkable that the court-martial orders for Appellant's other convictions bear inked stamps indicating that the one-page order was "legally sufficient" (AR 195 and 197), no such stamp appears on the one-page order for the 1960 negligent homicide court-martial (Admin. R. at 192). Prior to 1983, Art. 61 required the convening authority to refer "each general court-martial to his staff judge advocate," but there was no such requirement for special courts-martial. See note to Art. 61, 10 U.S.C. § 861. If the Board and the district court are referring to Article 64, 10 U.S.C.§ 64, which requires that a judge advocate review a conviction and make certain conclusions in writing, that provision did not exist prior to the 1983 amendments to Article 64. Before 1983, Article 64 did not contain the words "judge advocate," but referred only to approval by the convening authority. See 10 U.S.C. § 864 prior to amendment by Act of Dec. 6, 1983, as set forth in note to 10 U.S.C. § 864. Presumably, the stamped reviews on the court-martial orders other than the one in question, were made by a judge advocate officer who is not an independent authority, but rather reports to the convening authority, and who may have conducted a review at the convening authority's request. Not only did Appellant's 1960 negligent homicide special court-martial order bear no indicia of review by an attorney, but this staff review does not appear to be the type of review contemplated by the current version of Article 64 and by the district court.

In 1960, the only recourse for a soldier convicted by a special court-martial and sentenced to something less than death, dismissal, bad conduct discharge, or confinement for one year would be to submit "matters for consideration" to the convening authority under

Art. 60(b)(1) of the UCMJ, 10 U.S.C. § 860(b)(1). Article 60(b)(1) currently permits the accused to submit to the convening authority in writing "matters for consideration" within 10 days of his conviction. An accused can waive this right, but only in writing. In 1960, an accused had 20 days to submit any "matters for consideration," but there was no requirement for a written submission, nor for a waiver of this right. See 10 U.S.C. § 860(b)(1) prior to amendment by Act of Nov. 14, 1986, as set forth in note to 10 U.S.C. § 860(b)(1). Moreover, there is no evidence that Appellant was represented by anyone, lawyer or non-lawyer, at this critical stage in the proceeding. See, e.g. U.S. v. Perez, 5 M.J. 913 (1978) ("[A]ppellant should have been afforded counsel to represent him, and the counsel notified in connection with the connection with the convening authority's reassessment of the sentence."). Indeed, Appellant has declared that he was never advised of any right "to appeal" or present additional material to the convening authority. Admin. R. at 6.

Moreover, "Whatever procedural rights appellant might have waived in 1951 [by accepting an undesirable discharge] could not afford a basis for depriving him of the procedural rights he was entitled to before the review Board in 1963." Van Bourg v. Nitze, 388 F.2d 557, 565 (D.C.Cir. 1967). See, Giles v. Sec'y of the Army, 627 F.2d 554, 557 (D.C.Cir. 1980) (No waiver of self incrimination where soldier not informed of statutory right not to incriminate himself); Williamson v. Sec'y of the Navy, 395 F.Supp. 146, 148 (D.D.C. 1975): "However the test for waiver on collateral review of a military conviction is the same as on collateral review of a conviction in the state court, i.e. whether or not a defendant has deliberately by-passed an issue for some strategical or tactical reason. The test for determining a deliberate by-pass was stated by the Supreme Court in Fay v. Noia, 372 U.S. 391 (1963): "[The issue is whether the defendant] after consultation with competent

counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical or any other reason that can fairly be described as the deliberate by-passing of state procedures."

Here, the District Court concluded, and Appellees try to argue, that Appellant has waived any defect in his 1960 court-martial, in spite of the fact that Appellant was not represented by a lawyer. However, since at least 1956, military courts have recognized that the doctrine of waiver does not apply to a defendant not represented by a lawyer.

> It is clear that once a suspected accused indicates a desire to consult with *legal* counsel he must be afforded that opportunity ... While in [U.S. v. Culp), this Court decided that the appearance of nonlawyer-counsel in a special court-martial is *not, in itself, a violation of an accused's constitutional or statutory rights*, we have often decried the dangers in the lay practice of the law. And we have resolutely refused to invoke the doctrine of waiver in those instances in which the accused has not been represented by trained counsel. ... The value, to one accused of crime, of the advice and assistance of trained legal counsel is incalculable ... (citations omitted, emphasis in original).

U.S. v. Richard Williams, 40 C.M.R. 230 (1969). See also, U.S. v. Joe Williams, 24 C. M.R. 253 (1957) ("We are not disposed to apply the doctrine of waiver in a special court-martial case in which the appointed defense counsel was not a lawyer ...."; U.S. v. Eddie Williams, 22 C.M.R. 224 (1956) ("Since this is a special court-martial case in which defense counsel was neither a lawyer nor certified in accordance with Art. 27 ..., we do not consider the omission as a waiver of the deficiency.").

The trial court also erred by citing a reason -- Appellant's supposed failure to raise constitutional issues at the time of the trial -- that was not given by the Board. "[A] simple but fundamental rule of administrative law ... is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If

those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." SEC v. Chenery Corp., 332 U.S. 194, 196 (1946).

Lastly, it should be noted that the constitutional errors that Appellant asserted before the Board were not available in 1960. As this Court noted in Baxter v. Clayton, 652 F.2d 181, 185 (D.C. Cir. 1981), "We feel constrained to point out the obvious reason Baxter waited until the seventies to challenge the events of the fifties. The cases which form the basis for Baxter's constitutional challenge [that he was denied the assistance of legally trained counsel] were not decided until 1972 and 1973." (citing Argersinger v. Hamlin, 407 U.S. 25 (1972) and Berry v. City of Cincinnati, 414 U.S. 29 (1973)).

C. The ABCMR Violated the Administrative Procedure Act by Improperly Refusing to Correct Appellant's Military Records.

Under any standard of review, the Board's decisions of January 13, 1993, (Admin. R. at 85) and September 2, 2004, (Admin. R. at 2) are clearly deficient. "On review of a grant of summary judgment, we review the ABCMR's decision *de novo*, applying the same standards as the district court." Frizelle v. Slater, 111 F.3d 172, 176 (D.C. Cir. 1997).

Appellant presented his non-attorney defense counsel argument to the ABCMR on both occasions. The Board's 1993 decision ignored his argument, finding instead that he did not file within the three-year period prescribed by 10 U.S.C. § 1552(b). [7] Admin. R. at 95-98. The Board's 2004 decision characterized Appellant's argument as not permitted "military counsel" (Admin. R. at 3) and then addressed that argument by noting that the court-martial record (supplied by Appellant) indicates that he was represented by "military

[7] See Wielkoszewski v. Harvey, 398 F.Supp.2d 102, 114, 155 (D.D.C. 2005) where a Board decision, almost identical with that provided Appellant in 1993, was remanded after being described as "cursory" and indicative of "less than a full review."

defense counsel." Admin. R. at 4. That decision failed to mention that Appellant was asking for an attorney defense counsel, as was his entitlement to under UCMJ Art. 38, 10 U.S.C. § 838. Similarly, Appellees' instant Motion fails to mention at pp. 3 and 9 that Appellant's "military defense counsel" was not an attorney. This, of course, is the heart of Appellant's application, yet the Board refused to address it. Indeed, the Board underscored its failure to address Appellant's argument that he was denied *attorney* defense counsel by concluding in paragraph 1 that he had "military defense counsel" and there was no evidence that he requested "civilian defense counsel." Appellant's petitions to the Board made clear that he was requesting an "attorney" or "trained" defense counsel. Admin R. at 100, 6.

"The District of Columbia Circuit has concluded that the failure to respond to arguments raised by a plaintiff, which do not appear frivolous on their face and could affect the Board's ultimate disposition, is arbitrary." Calloway v. Brownlee, 366 F.Supp.2d 43, 53 (D.D.C. 2005), citing Frizelle v. Slater, 111 F.3d 172, 177 (D.C.Cir. 1997). In Kreis v. Sec'y of the Air Force, 406 F.3d 684, 686 (D.C. Cir. 2005), this Court described the district court's responsibility to review Board decisions: "The court, therefore, must be able to conclude that the Board 'examined the relevant data and articulated a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'' [quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983]." This Court in Kreis went on to reject any "unusually deferential" standard of review, noting that "the issue before the court does not involve a military judgment requiring military expertise, but rather review of the Board's application of a procedural regulation governing its case adjudication processes." 406 F.3d at 686.

The Board's September 15, 2004, contains other errors that should have concerned

the District Court. For example, it relied upon and quoted Rules for Courts-Martial ("RCM") 1110, 1112, and 1201 (Admin. R. at 4). However, these three rules did not come into existence until 1983 -- twenty-three years after Appellant's 1960 court-martial. See, Manual for Courts-Martial -- 2005, Appendix 21 - Analysis of Rules for Courts-Martial, Rules 1110, 1112, 1201. Moreover, even after 1983, RCM 1201, by its own terms, is inapplicable to Appellant's 1960 court-martial, and its inclusion in paragraph 11 of the Board's decision makes sense only if the Board mistakenly believed that The Judge Advocate General was required to refer Appellant's court-martial to the Court of Criminal Appeals.

The September 15, 2004, Board decision contains other obvious errors. For example, it noted that Appellant had requested reconsideration of his earlier appeal (Admin R. at 3), which clearly requested an upgraded discharge (Admin. R. at 100). Yet, it concluded only that it had no authority "to disturb the finality of a court-martial conviction." The Board never addressed Appellant's request for an upgraded discharge.

The Board's 1993 decision noted that Appellant's commander recommended that he be discharged for unfitness and that Appellant "waived his right to consult with an attorney, to have his case heard by a board of officers, and to submit a statement on his own behalf." Admin. R. at 97. The Board never mentioned that the officer recommending Appellant's discharge and the officer who counseled and advised him when he signed the waiver of counsel and a hearing were one and the same individual -- 1st Lt. Walter F. Hoese, Appellant's commanding officer. Admin. R. at 126, 137.

Appellant's case is remarkably like this Circuit's decision in Baxter v. Clayton, 652 F.2d 181 (D.C.Cir. 1981). Baxter was given a bad conduct discharge from the Navy in 1957 as a result of court-martial convictions in 1955 and 1956. After a number of right-to-counsel

Supreme Court decisions in the late 60's and early 70's, Baxter sued to challenge his court-martial convictions and to force the Board to consider his claim that his discharge should be upgraded. This Court held that 28 U.S.C. § 2401 did not bar the Board from considering the constitutional challenges to his convictions pursuant to 10 U.S.C. § 1552. 652 F.2d at 186. To be sure, section 1552 was amended in 1983 to prohibit the Board from overturning court-martial convictions. However, the Board is clearly charged with the duty of upgrading a service member's discharge in response to arguments that a court-martial conviction was unconstitutionally defective. See, e.g., Piersall, v. Winter, 435 F.3d 319, 324 (D.C. Cir. 2006) ("Piersall's challenge to the decision of the Board ... is not a request ... for review of the judgment of a military court. Piersall seeks review only of a decision rendered by a civilian administrative board established by Congress separate and apart from the system of military courts and appeals and charged with the authority to change a military record when necessary to 'correct an error' or 'remove an injustice.'").

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully asks this Court to deny Defendants' Motion for Summary Affirmance.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served by first-class mail, postage prepaid, to:

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