UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CONLEY MONK, KEVIN MARRET, GEORGE SIDERS, JAMES COTTAM, JAMES DAVIS, VIETNAM VETERANS OF AMERICA, VIETNAM VETERANS OF AMERICA CONNECTICUT STATE COUNCIL, and NATIONAL VETERANS COUNCIL FOR LEGAL REDRESS, on behalf of themselves and all others similarly situated, Plaintiffs,	)	
v.	)	Civil Action No. 3:14-CV-00260 (WWE)
RAY MABUS, Secretary of the Navy, JOHN MCHUGH, Secretary of the Army, and DEBORAH LEE JAMES, Secretary of the Air Force, Defendants.	)	

MOTION BY DEFENDANTS SECRETARY OF THE NAVY AND SECRETARY OF THE ARMY FOR A VOLUNTARY REMAND OF PLAINTIFF MARRET'S, PLAINTIFF SIDER'S, AND PLAINTIFF COTTAM'S CLAIMS TO THE RESPECTIVE BOARD FOR THE CORRECTION OF MILITARY RECORDS

Defendant, the Secretary of the Navy, requests that he be permitted to voluntarily remand the claims of Plaintiff Kevin Marret and Plaintiff George Siders to the Board for Correction of Naval Records ("Naval Board"). As explained further below, when the claims of these Plaintiffs were previously before the Naval Board, the Executive Director, acting consistent with the Navy's reconsideration regulation, 32 C.F.R. § 723.9, screened Plaintiff Marret's and Plaintiff Sider's requests for reconsideration of prior decisions

denying their application for the correction of their naval records and determined that the reconsideration requests did not present material evidence requiring consideration by the Naval Board. Upon voluntary remand, the Naval Board members themselves would determine whether Plaintiffs submitted material evidence with their reconsideration requests. The proposed voluntary remand would enable the Naval Board to resolve without litigation a procedural issue raised by a prior district court decision concerning whether review by the Board's staff alone was adequate under the law.

Defendant, Secretary of the Army, also requests that he be permitted to voluntarily remand the claims of Plaintiff James Cottam to the Army Board for the Correction of Military Records ("Army Board"). Since the filing of the Complaint in this case, the Army has located relevant separation documents and medical records that were not before the Army Board when it denied Plaintiff Cottam's application for the correction of his military records. The proposed voluntary remand would allow the Army Board to reconsider Plaintiff Cottam's application in the context of these additional materials, and any other materials Plaintiff Cottam would like to submit. [1]

As required by the Local Rules of Civil Procedure, undersigned counsel for Defendants contacted Plaintiffs' counsel to determine whether Plaintiffs consent to this motion. Plaintiffs' counsel has indicated that Plaintiffs do not consent to this motion.

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[1] A remand of the claims of Plaintiffs Marret, Siders, and Cottam will not delay the litigation of the other two individual Plaintiffs' claims in this case. Regarding Plaintiff James Davis, the Army has not located any additional documentation that would justify a remand of his claims. Regarding Plaintiff Conley Monk, he did not file a reconsideration request that was screened by the Naval Board's Executive Director, as was the case for Plaintiff Marret and Plaintiff Siders. Instead, the Board itself is currently considering his claim, although no final decision has been made. Defendant Army and Defendant Navy intend to address the validity of these claims in their response to the Complaint, currently due on or before June 30, 2014.

ARGUMENT

Voluntary remand is consistent with the principle that "[a]dministrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider." *Trujillo v. General Electric Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980). *See also Lute v. Singer Co.*, 678 F.2d 844, 846 (9th Cir.1982) (discussing *Trujillo*). Voluntary remand also promotes judicial economy by allowing the relevant agency to reconsider and rectify a potentially erroneous decision without further expenditure of judicial resources. *See*, *e.g.*, *Ethyl Corp. v. Browner*, 989 F.2d 522, 523 (D.C. Cir.1993). Courts have recognized that voluntary remand is generally appropriate when new evidence becomes available after an agency's original decision was rendered, or where "intervening events outside of the agency's control" may affect the validity of an agency's actions. *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 132 (D.D.C. 2010). Even in the absence of new evidence or an intervening event, however, courts retain the discretion to remand an agency decision when an agency has raised "substantial and legitimate" concerns in support of remand. *Id.* (citing *See Sierra Club v. Antwerp*, 560 F. Supp. 2d 21, 23 (D.D.C. 2008) (citing cases). As set forth below, voluntary remand is appropriate for three of the Plaintiffs' claims pending in this case.

I. DEFENDANT NAVY REQUESTS THAT THE COURT VOLUNTARILY REMAND THE CLAIMS OF PLAINTIFF MARRET AND PLAINTIFF SIDERS TO THE BOARD FOR CORRECTION OF NAVAL RECORDS.

A. Background

Plaintiff Marret and Plaintiff Siders have filed requests for the Board to reconsider its previous decision denying their application for the correction of their naval

records. Plaintiff Siders filed a reconsideration request on February 6, 2012, and Plaintiff Marret filed a reconsideration request on April 8, 2010 and another reconsideration request on August 11, 2011. In sum, their requests asked the Board to upgrade the character of their other-than-honorable discharges. *See* Compl., ECF No. 1, ¶ 60, 67, 86.

Applying the Board's regulation on reconsideration requests, 32 C.F.R. § 723.9, the Executive Director of the Board screened Plaintiff Marret's and Plaintiff Siders's requests to determine whether they contained new and material evidence before forwarding the requests to the Board members for a decision. The Executive Director informed Plaintiff Marret and Plaintiff Siders that their evidence, while new, was not material. The Executive Director accordingly declined to forward the reconsideration requests to the Board for a decision. *See* Ex. 1 and Ex. 2, BCNR Letters Denying Marret's and Sider's Reconsideration Requests.

In response, Plaintiff Marret and Plaintiff Siders instituted this case, alleging that the Executive Director's decision denying their reconsideration requests violates the Administrative Procedure Act, Section 504 of the Rehabilitation Act, and the Fifth Amendment of the United States Constitution. *See generally* Compl.

B. Request for Voluntary Remand

Under 10 U.S.C. § 1552, the Secretary of each military department "may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1). Except for certain circumstances not pertinent to this case, such corrections "shall be made by the Secretary acting through boards of civilians of the executive part of that military

department . . . ." *Id.* These record-corrections "shall be made under procedures established by the Secretary concerned." *Id.* § 1552(a)(3).

Pursuant to this statutory authority, the Secretary of the Navy has promulgated 32 C.F.R. § 723.9, which governs an applicant's request for reconsideration of the Board's decision. Under this regulation, "[a]ll requests for further consideration will be initially screened by the Executive Director of the Board to determine whether new and material evidence or other matter . . . has been submitted by the applicant." 32 C.F.R. § 723.9. If new or material evidence is submitted by the applicant, then the Executive Director forwards the request to the Board for a decision. *Id.* If no new or material evidence is submitted, however, the applicant will be informed that his or her request "was not considered by the Board because it did not contain new and material evidence or other matter." *Id.* In other words, under the Navy's reconsideration regulation, the Board's Executive Director – not the Board members themselves – determines whether evidence is both new and also whether it is material.

In this case, the Executive Director determined that the evidence supporting Mr. Marret's and Mr. Sider's reconsideration requests, while new, was not material, and thus Board consideration was not necessary. The Executive Director considered the reconsideration requests consistent with 32 C.F.R. § 723.9, and this regulation remains valid and effective.

Nonetheless, a similar reconsideration regulation promulgated by the Secretary of the Army previously was declared invalid by a district court in the District of Columbia on the ground that, in enacting Section 1552(a)(1), Congress intended that the Army's Board for Correction of Military Records, and not the Board's staff, is the only entity

authorized to make substantive determinations on reconsideration requests. *See Lipsman v. Secretary of the Army*, 335 F. Supp. 2d 48, 54 (D.D.C. 2004). After *Lipsman*, the Army revised its reconsideration regulation, providing, in pertinent part, that the Board's staff will consider whether evidence is new while the Board itself will determine whether evidence is material. *See* 32 C.F.R. § 581.3(g)(4)(i).

Although *Lipsman* addressed a different military department's reconsideration regulation and is non-binding in this case, the Navy is currently revising its own regulation, and respectfully requests that the Court permit the Navy to voluntarily remand Mr. Marret's and Mr. Sider's claims to the Board so that the Board members themselves can consider the substance and materiality of the evidence submitted with their reconsideration requests. In particular, the Board itself would consider whether the evidence submitted by Mr. Siders in support of his reconsideration request on February 6, 2012, and the evidence submitted by Mr. Marret in support of his reconsideration requests on April 8, 2010 and on August 11, 2011, along with any new evidence either Plaintiff may wish to submit, is sufficient to warrant an upgrade to the character of their discharges under 10 U.S.C. § 1552. This voluntary remand would allow Mr. Marret's and Mr. Sider's claims to be further adjudicated at the administrative level by the Board members and thereby avoid the need for unnecessary litigation concerning the procedural issue addressed in the *Lipsman* litigation.

II. DEFENDANT SECRETARY OF THE ARMY REQUESTS THAT THE COURT VOLUNTARILY REMAND THE CLAIMS OF PLAINTIFF COTTAM TO THE ARMY BOARD FOR THE CORRECTION OF MILITARY RECORDS.

A. Background

In March 2009, Plaintiff James Cottam filed an application with the Army Board for the Correction of Military Records ("Army Board") seeking to upgrade the character of his other-than-honorable discharge status and restore his rank to that of Sergeant (E-5). *See* Compl., ¶ 94. Plaintiff Cottam received an other-than-honorable discharge in August 1974, pursuant to Chapter 10 of Army Regulation 635-200. *See* Ex. 3, Army Board Decision Denying Cottam's Application, at 3, ¶ 14. Under this provision, a member who is facing a court-martial may request a discharge for the good of the service, and, if the request is accepted, the member can avoid potential criminal conviction, confinement, and a punitive discharge. *See id.* In exchange, however, a member who requests separation under Chapter 10 generally receives an other-than honorable-discharge and a reduction to the lowest enlisted grade. *See id.*

On July 14, 2009, the Army Board denied Plaintiff Cottam's application seeking to upgrade the character of his other-than-honorable discharge status. *Id.* at 5. Under its governing regulations, the ABCMR considers each case "with the presumption of regularity" and thus the applicant alone "has the burden of proving an error or injustice by a preponderance of the evidence." 32 C.F.R. § 581.3(e)(2). Consistent with this administrative presumption and burden of proof, the Board presumed that Mr. Cottam's Chapter 10 separation proceedings, which a service member must affirmatively request, were administratively correct and in conformance with applicable regulations. *Id.* at 2-3. Further, the Board recognized that, while certain separation documents from the 1970s

were not present in Mr. Cottam's administrative file, the absence of these documents did not demonstrate by a preponderance of the evidence that Plaintiff Cottam's other-than-honorable characterization of discharge was in error or unjust. The Board accordingly concluded that there was not a basis for granting Plaintiff Cottam's request to upgrade the character of his discharge status or restore his rank to Sergeant (E-5). *Id.* at 4-5, ¶ 5-6.

In response, Plaintiff Cottam instituted this case, alleging that the Army Board's decision violates the Administrative Procedure Act, Section 504 of the Rehabilitation Act, and the Fifth Amendment of the United States Constitution. *See generally* Compl.

B. Request for Voluntary Remand

In the course of assembling the administrative record in this case, the Army has located certain separation documents and medical records that were not before the Board when it issued its decision and that are relevant to evaluating the substance of Plaintiff Cottam's application. These documents include paperwork from the 1970s describing the circumstances leading to Plaintiff Cottam's Chapter 10 proceedings and medical documents describing Plaintiff Cottam's physical and mental condition at discharge. Thus, while the Army Board's decision in July 2009 denying Mr. Cottam's application was lawful and consistent with 10 U.S.C. § 1552 and its implementing regulations, the Army would nonetheless request that the Court remand Mr. Cottam's claims so that the Board can consider these additional materials in ruling on his application. The Army also will consider any documentation Mr. Cottam would like to submit in support of his application.

CONCLUSION

In light of the foregoing, Defendant Secretary of the Navy requests that the Court voluntarily remand the claims of Mr. Marrett and Mr. Siders to the Board for Correction of Naval Records so that the Board members can consider whether the evidence submitted in support of their reconsideration requests is material and thus warrants a substantive review by the Board of their cases on the merits. Defendant Secretary of the Navy proposes giving Plaintiffs Marret and Siders sixty days to provide their submissions to the Naval Board. The Navy anticipates that the Naval Board will have a decision on whether it will grant reconsideration within ninety days from the date all submissions are received. If the Naval Board grants reconsideration, the Navy anticipates that a substantive decision will be issued within ninety days from the date reconsideration is granted.

Defendant Secretary of the Army requests that the Court voluntarily remand the claims of Mr. Cottam to the Army Board for the Correction of Military Records so that the Board can consider the separation documents and medical records that were not before the Board when it made its decision. Defendant Army proposes giving Plaintiff Cottam sixty days to provide any submissions to the Army Board. The Army anticipates that it will have a substantive decision within ninety days from the date all submissions are received.

Dated: June 11, 2014

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on June 11, 2014 the foregoing motion was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Matthew A. Josephson
Matthew A. Josephson