No. _____

In the Supreme Court of the United States

CHRISTOPHER P. DOWNEY,
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE ARMY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Code of Federal Regulations entitles a soldier to relief from an unjust or erroneous military decision when the soldier demonstrates the error by a preponderance of the evidence. The Army Board for the Correction of Military Records denied such relief to the Petitioner, explicitly and illegitimately holding him to the far more onerous burden of clear and convincing evidence. The courts below declined to remand, finding the error harmless.

The question presented is:

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 right to a fair hearing, 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 and the Federal Circuit have held.

PARTIES TO THE PROCEEDING

The Petitioner is Christopher P. Downey.

The Respondents are United States Department of the Army and Ryan D. McCarthy, Acting Secretary of the Army, collectively referred to as Respondents.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Christopher P. Downey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. 1-18) is unreported. The opinion of the district court granting Respondents' motion to dismiss and for summary judgment (App. 19-62) is reported at 110 F. Supp. 3d 676 (E.D. Va. 2015).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered judgment on April 13, 2017. App. 1. The petition for rehearing or rehearing *en banc* was denied on June 12, 2017. App. 77. This Court has jurisdiction under 28 U.S.C. § 1254(1).

REGULATORY PROVISION INVOLVED

The regulatory provision involved is 32 C.F.R. § 581.3(e)(2), which states:

> Burden of proof. The [Army Board for the Correction of Military Records] begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

STATEMENT OF THE CASE

Unchecked agency deference "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). Now "the time has come to face the behemoth." *Id.* The decision below grants extraordinary deference to an administrative board which applied a heightened burden of proof to the Petitioner's case, destroying the career and reputation of one of the United States Army's most accomplished aviation officers. The administrative board's actions were contrary to its own unambiguous regulation as well as firmly rooted standards of due process.

In the decision below, the Fourth Circuit acknowledged that the Army violated its own regulation when it held the Petitioner to a higher burden of proof than Army regulations required. App. 14 n.6. Nevertheless, the court of appeals applied a harmless error test, declining to remand the case for a rehearing by the administrative board.

This Court has previously held that it is fundamental to reasoned decision-making by an administrative agency that the agency apply the correct standard of proof. *See Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 374 (1998). Where, as here, the administrative board's failure to follow its own regulation resulted in the impairment of a substantial right of the litigant (in this case, the right to have his case decided on the correct burden of proof),

an automatic remand to the agency would have been ordered if the Petitioner had brought this case in the Second, Third, Sixth, Seventh, Ninth, or Eleventh Circuits. However, this case was brought in the Fourth Circuit, which, like the Federal Circuit, conducts a harmless error analysis despite the fundamental nature of the error. Indeed, the Petitioner's important claim of error was barely analyzed at all, but was instead relegated to a summary analysis and decision in a footnote. App. 14 n.6.

Where so fundamental a breach of agency decision-making is dealt with according to radically different approaches in different circuits, this Court should intervene.

I. FACTUAL BACKGROUND

In early April of 2012, the Petitioner, Army Lieutenant Colonel Christopher Downey, received a prestigious award recognizing him and the unit that he commanded as the best aviation battalion in the United States Army. App. 70. This was a fitting tribute to a man who had earned three Bronze Star medals for his actions during combat and a host of other combat and non-combat awards during his service, which included a term as the Director of Airlift Operations for the White House. *Id.* at 58.

On the evening of April 14, 2012, Lieutenant Colonel Downey's unit hosted its formal military ball. App. 3. Late in the evening, Lieutenant Colonel Downey was approached by one of his soldiers who was concerned about the actions of two of Lieutenant Colonel Downey's subordinate officers (of unequal rank), who were engaged in inappropriate public

displays of affection on the dance floor. *Id.* at 3. The soldier also reported to Lieutenant Colonel Downey that he believed the scandalous and salacious display of affection was being photographed by other soldiers. *Id.* at 20. Lieutenant Colonel Downey was concerned that the pictures would be posted online. *Id.* at 22. As soon as he received this report, Lieutenant Colonel Downey knew it was his duty as a commander to intervene immediately to protect the reputations of his subordinate officers and his unit. *Id.* at 3.

Moving quickly to the dance floor, Lieutenant Colonel Downey observed the two officers in uniform engaged in a very public and very inappropriate display of affection. *Id.* at 67. As Lieutenant Colonel Downey approached, he noted that two of his soldiers were photographing the spectacle, which was described by others as two officers engaged in public and passionate "making out." *Id.* at 67, 3. As Lieutenant Colonel Downey passed a filming soldier on his way to correct the errant couple on the dance floor, he pushed down the soldier's camera in an effort to stop him from further photographing the scene. *Id.* Although he did not know it, or intend it, Lieutenant Colonel Downey's action of lowering the camera resulted in the camera striking the soldier on the bridge of his nose. *Id.*

After a rushed investigation, Lieutenant Colonel Downey's commander notified Lieutenant Colonel Downey of his intent to impose non-judicial punishment under Article 15 of the Uniform Code of Military Justice ("Article 15") on Lieutenant Colonel Downey based on what occurred on the dance floor. *Id.* at 68. After the Article 15 hearing, the senior commander acquitted Lieutenant Colonel Downey of

the majority of the charges against him, but did find that Lieutenant Colonel Downey's actions in lowering the soldier's camera constituted assault consummated by battery under the Uniform Code of Military Justice. *Id.* at 69.

After the Article 15 hearing, Lieutenant Colonel Downey learned, for the first time, that the Army was in possession of medical records of the supposed victim (the photographing soldier) that would tend to be exculpatory or mitigate his guilt. These records showed that the Army's allegation that Lieutenant Colonel Downey had caused the soldier to suffer a broken nose, was incorrect; the soldier's nose was never broken. *Id.* at 32.

Later, a formal board hearing ("the formal board") of three senior Army officers convened to review the same matters in deciding whether Lieutenant Colonel Downey should be retained in the Army. *Id.* at 65-66. The formal board, unlike the Article 15 proceedings, conducted an exhaustive adversarial hearing in which the Army was represented by an attorney and Lieutenant Colonel Downey was also represented by counsel. The hearing board listened to the testimony of multiple witnesses, reviewed evidence, and listened to the arguments of government and defense attorneys. *Id.* At the conclusion of this hearing, the formal board unanimously determined that the allegations against Lieutenant Colonel Downey were not supported by a preponderance of the evidence. *Id.* at 66.

II. PROCEEDINGS BEFORE THE ARMY BOARD FOR CORRECTION OF MILITARY RECORDS.

Despite the unanimous decision of the formal board of officers, which decided that the allegations were unsupported, the prior contrary findings of the Article 15 hearing remained a part of Lieutenant Colonel Downey's official record. The Article 15 findings did lasting harm, halting the further progression of Lieutenant Colonel Downey's stellar career and tarnishing his good name. *Id.* at 17. On August 16, 2013, Lieutenant Colonel Downey petitioned for relief to the Army Board for Correction of Military Records ("the Board"), which is the highest level of administrative review in the Army. *Id.* at 31. His petition requested that the Board remove the Article 15 record of non-judicial punishment from his Army human resource records because of manifest error in the procedures below, including the fact that the Army failed to disclose material exculpatory evidence prior to the Article 15 hearing. *Id.* at 43, 44, 65.

The Administrative Board Applied The Wrong Burden Of Proof.

Unfortunately for Lieutenant Colonel Downey, the Board applied the wrong burden of proof to his case. The Board is governed by 32 C.F.R. § 581.3(e)(2) which provides: "Burden of proof. The [Army Board for the Correction of Military Records] begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence." App. 84 (emphasis added). Rather than holding Lieutenant Colonel Downey to the correct burden of

proof, the Board held him to the much more difficult burden of proving an error or injustice by clear and convincing evidence. App. 75. Finding that Lieutenant Colonel Downey had not met this illegitimately high standard, the Board denied him relief. *Id.* at 76.

III. DISTRICT COURT PROCEEDINGS

On November 12, 2014, Lieutenant Colonel Downey filed a three-count Complaint against the United States Department of the Army and Secretary of the Department of the Army seeking reversal of the arbitrary and capricious decision of the Board under the Administrative Procedures Act and a declaration that the Army violated Lieutenant Colonel Downey's right to due process under the Fifth Amendment to the United States Constitution, U.S. Const. amend. V, alleging, among other things, that the Board had applied the wrong burden of proof in his case. App. 9. On June 19, 2015, the district court granted Defendants' Motions to Dismiss and for Summary Judgment and denied Lieutenant Colonel Downey's Cross-Motion for Summary Judgment. *Id.*

IV. FOURTH CIRCUIT'S DECISION

On April 13, 2017, a Panel of the Fourth Circuit Court of Appeals affirmed the judgment of the district court. *Downey v. United States Dep't of the Army*, No. 15-1870 (4th Cir. 2017). App. 1. In so holding, the Panel recognized that the Board applied the wrong burden of proof by requiring Lieutenant Colonel Downey to demonstrate his allegations by clear and convincing evidence rather than a preponderance of the evidence. *Id.* at 14 n.6. Nevertheless, citing the rule it adopted in *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253 (4th

Cir. 2016), the Panel disposed of this important issue in a footnote, finding the error harmless because the Board stated (without further discussion or evidentiary support) that there was no evidence to support the claim. *Id.* at 14 n.6.

REASONS FOR GRANTING THE PETITION

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 to follow its own regulation when the agency's failure implicates a fundamental right.

The decision below casts the split among the circuits in the starkest possible light. A serious agency error affecting important rights such 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. A WELL-DEFINED AND IMPORTANT CONFLICT EXISTS AMONG THE FEDERAL CIRCUITS REGARDING APPLICATION OF THIS COURT'S DECISION IN *AMERICAN FARM LINES v. BLACK BALL FREIGHT SERVICE*.

In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), this Court established what is now regarded as the *Accardi* principle. *See* Kevin M. Stack, Interpreting Regulations, 111 Mich. L. Rev. 355, 375 (2012) ("The *Accardi* principle 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 have the correct burden of proof applied in his case.

This Court, in *Addington v. Texas*, 441 U.S. 418 (1979), left no doubt that the application of the correct standard of proof is a right that is embodied in the Due Process Clause and is therefore fundamental to the concept of due process. In that case, a civil proceeding was brought to involuntarily commit an individual under state law. *Id.* at 418. In holding that a standard of "clear, unequivocal and convincing evidence" was constitutionally adequate for commitment proceedings, the unanimous court stated that:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in

> the correctness of factual conclusions for a particular type of adjudication."

Id. at 423 (quoting *In re Winship*, 397 U.S. 358, 370 (1970)).

In another civil hearing (this time involving the termination of parental rights), this Court enunciated the rule that due process and fundamental fairness are violated when the wrong standard is applied.

> Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance. **Retrospective case-by-case review cannot preserve fundamental fairness** when a class of proceedings is governed by a constitutionally defective evidentiary standard.

Santosky v. Kramer, 455 U.S. 745, 757 (1982) (emphasis added).

More recently, in *Allentown Mack Sales & Serv.*, this Court looked at the actions of a federal administrative agency. The Court pointed out the, by now obvious, maxim that administrative agencies, such as the Board in the instant case, are "subject to the requirement of reasoned decisionmaking." *Id.* at 374. Consistent with its prior decisions establishing the rule that due process demands a consistent and correct application of the standard of proof, the Court stated that "[i]t is hard to imagine a **more violent breach** of that requirement than applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced." *Id.* (emphasis added).

These decisions explicitly tie the standard of proof to the requirements of constitutional due process for one important reason: the standard of proof that applies to a litigant's case is critical and often determines the outcome of the case.[1] Accordingly, this Court has unambiguously held that there is no more violent breach of the requirement for reasoned decision-making for an administrative board than for it to apply the wrong burden of proof.

B. It is undisputed that the wrong burden of proof was applied in this case.

Here, there is no question the Board applied the wrong burden of proof, in violation of its own regulation, when it required Lieutenant Colonel Downey to prove an error by clear and convincing evidence (App. 75) even though the governing regulation simply required him to demonstrate an error by a preponderance of the evidence. App. 84, 14 n.6. The record below clearly demonstrates that applying the correct standard of review is outcome determinative because the Board, applying the incorrect standard of "clear and convincing evidence," ruled against Lieutenant Colonel Downey whereas the formal board of officers, reviewing the same facts and applying the correct standard of "preponderance of the evidence," unanimously ruled in Lieutenant Colonel Downey's favor. App. 66, 75-76. As the discussion below

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[1] This Court has been equally unforgiving of lower courts that apply the wrong standard of review as those that apply the wrong burden of proof. *See Ornealas v. United States*, 517 U.S. 690, 698-99 (1996) (reversing a court of appeals decision and remanding with directions that it apply the correct standard of review).

demonstrates, the violation of an agency rule that is fundamental to due process, as this rule is, requires remand to the Board for a new hearing.

C. The Fourth Circuit below disposed of this vital due process concern in a footnote, holding, in summary fashion, that the Board's application of the wrong burden of proof was not worthy of remand because it was a 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 (*see* discussion *supra* pp. 9-10) 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 Fourth Circuit's adoption of a prejudice requirement in all circumstances, even those implicating so fundamental a due process violation as having the incorrect burden of proof applied, cannot be reconciled with this Court's cases. The panel decision failed to address this issue, relying instead on its prior decision in *Sea "B" Mining*[2] for the premise that the

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[2] While the Fourth Circuit panel below chose to rely on *Sea "B" Mining*, the Circuit's precedent is inconsistent. In *United States v.*

harmless error rule applies to administrative adjudications. As described above, however, this premise is inapplicable in the instant case where the error in question—application of the wrong burden of proof—implicates important due process rights. In *Sea "B" Mining*, the court considered the "evidentiary error" of an administrative law judge concerning whether the judge was required to review three MRI reports or just one MRI report prior to making his ruling concerning black lung benefits. *Id.* at 253.

The *Sea "B" Mining* holding (that a mere "evidentiary error" is subject to a harmless error analysis) could potentially be consistent with this Court's decision in *American Farm Lines*, allowing deference to administrative decision-making where the rules violated were not intended to confer "important procedural benefits." *American Farm Lines*, 397 U.S. at 538. However, *Sea "B" Mining* did not involve the misapplication of a burden of proof and, as the discussion above makes clear, the application of the wrong burden of proof is not a mere evidentiary error; it is violation of a rule that is meant to confer important procedural—and therefore fundamental due process—rights.

Morgan, 193 F.3d 252 (4th Cir. 1999), the Fourth Circuit noted with approval the Ninth Circuit's approach that prejudice is presumed where: (1) the Constitution mandates compliance with the regulation that was incorrectly applied; or (2) the agency creates but then fails to follow a procedural framework created to ensure that agency actions are processed fairly. *Id.* at 267-68. Apparently abandoning the prior approval of the Ninth Circuit approach, the Fourth Circuit instead applied the highly deferential *Sea "B" Mining* approach in the instant case.

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 have the correct burden of proof applied to their case. The Board, in applying the wrong burden 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 hold Lieutenant Colonel Downey to a burden of proof well in excess of what the regulations specified should have resulted in automatic remand. However, because his case was heard in the Fourth Circuit, the court applied a harmless error standard and remand was denied.[3]

[3] Not only did the court below summarily dispose of this important issue in a footnote, but it also gave no consideration to the fact that Lieutenant Colonel Downey 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 Lieutenant Colonel Downey's status as a veteran.

D. 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 intended 1) 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*).

E. The Federal Circuit, like the Fourth Circuit in this case, requires a showing of harm even where 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 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. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE CIRCUIT SPLIT THAT IS RIPE FOR REVIEW.

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 Lieutenant Colonel Downey. 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 promulgated 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 a 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 exempted 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 Court 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. Lieutenant Colonel Downey has preserved the discrete issue related to the Board's failure to follow its own controlling regulation to his detriment. App. 14 n.6. 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 writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1870

[Filed April 13, 2017]

CHRISTOPHER P. DOWNEY,
Plaintiff - Appellant,

v.

UNITED STATES DEPARTMENT OF THE ARMY; ERIK FANNING, Secretary of the United States Department of the Army,
Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (1:14-cv-01503-LMB-TCB)

Argued: December 9, 2016 Decided: April 13, 2017

Before GREGORY, Chief Judge, MOTZ, Circuit Judge, and Richard D. BENNETT, United States District Judge for the District of Maryland, sitting by designation.

Affirmed by unpublished opinion. Chief Judge Gregory wrote the opinion, in which Judge Motz and Judge Bennett joined.

ARGUED: Erin Jude Kuenzig, THOMAS MORE LAW CENTER, Ann Arbor, Michigan, for Appellant. Antonia Marie Konkoly, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellees. **ON BRIEF**: Richard Thompson, Erin E. Mersino, THOMAS MORE LAW CENTER, Ann Arbor, Michigan; Samuel C. Moore, LAW OFFICE OF SAMUEL C. MOORE, PLLC, Alexandria, Virginia, for Appellant. Dana J. Boente, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

GREGORY, Chief Judge:

Lieutenant Colonel Christopher T. Downey appeals the district court's grant of summary judgment on his claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 *et seq.*, in favor of the United States Department of the Army and John M. McHugh, Secretary of the Department of the Army ("Appellees"), and dismissal of his due process claims. Downey alleged that the Army Board for Correction of Military Records (the "Board") arbitrarily and capriciously denied his request to remove a record from his personnel file that stated he was found guilty of assault. Downey also alleged that the procedures used to determine his guilt violated the Due Process Clause. For the reasons stated below, we affirm the district court's judgment.

I.

The district court's opinion sets forth the extensive procedural history of this case, so we do not relay it

here. *See Downey v. U.S. Dep't of the Army*, 110 F. Supp. 3d 676 (E.D. Va. 2015). We recount only the relevant factual background.

On April 14, 2012, the 6th Squadron, 6th Cavalry, 10th Combat Aviation Brigade held a ball where Downey, Commander of the Brigade, was the commanding officer. During the ball, a soldier informed Downey of allegedly inappropriate behavior on the dance floor. The soldier stated that he saw Captain Katherine Robinson and Second Lieutenant Heather Parsons dancing and kissing. The soldier also stated that he believed the couple was being photographed.

Downey approached two individuals holding cameras who he believed were photographing the couple. Downey attempted to lower Specialist Jeremy Reuter's camera by pushing it down, but instead knocked the camera into Reuter's face. The camera struck Reuter in the nose, causing him to fall to the floor. Downey approached Robinson and Parsons and told them to "watch their behavior and what they were doing was unacceptable and placed them in a compromising situation." J.A. 98. When Downey left the dance floor, he spoke to Captain Thomas Jones, who saw what transpired, and Downey explained that he believed Reuter was taking inappropriate photographs of Robinson and Parsons. Downey explained that in 2011 a male officer in his unit videotaped several female officers who were showering and Downey's intention was to prevent any possible exploitation of Robinson and Parsons. Jones examined Reuters's photos and reported to Downey that he did not see any inappropriate pictures. In the meantime,

Reuter was taken to the hospital and was diagnosed with a concussion and fractured nose.[1]

After Downey's exchange with Robinson and Parsons, Command Sergeant Major Patrick McGuire approached the couple and got into a heated discussion with Robinson, in which he allegedly called her a disgrace and an abomination. McGuire eventually pushed Robinson to the ground and walked away. The following evening, Downey spoke to both Parsons and Robinson. He told Parsons that the unit had to move past the event, and told Robinson to forget the incident with McGuire and that if she reported it, her career would be adversely affected. Downey also told them he had nothing against their sexual orientation.

On April 18, 2012, Major General Mark A. Milley, Downey's superior officer, assigned Colonel Paul Schlimm to investigate the incidents at the ball. After a thorough investigation, in which Schlimm interviewed Downey, Reuters, Robinson, Parsons, McGuire, and several other officers who witnessed the events, Schlimm determined that Downey committed an "assault consummated by a battery." J.A. 138. Schlimm also found that Downey violated Army Directive 2011-01—the repeal of 10 U.S.C. § 654, commonly known as "Don't Ask, Don't Tell"—by enforcing the public displays of affection policy against Robinson and Parsons, but not against heterosexual

[1] It was later determined that Reuter did not have any facial bone fractures, but this information was not provided to the Board.

couples engaged in similar behavior.[2] Schlimm also found that Downey may have engaged in obstruction of justice by advising Robinson not to report McGuire's conduct.

Based on Schlimm's recommendation, Major General Milley initiated nonjudicial punishment ("NJP") proceedings against Downey pursuant to Article 15 of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 815, for the offense of assault consummated by a battery. An Article 15 proceeding is a non-adversarial, summary proceeding at which a commanding officer may impose discipline on his subordinates "for minor offenses without the intervention of a court-martial." 10 U.S.C. § 815(b). Service-members have the option to refuse an Article 15 proceeding and demand an adversarial court-martial. *Id.* § 815(a); *see Guerra v. Scruggs*, 942 F.2d 270, 272 (4th Cir. 1991). Courts-martial, which are nearly always presided over by lawyer-judges with counsel for both the prosecution and the defense, generally resemble judicial proceedings. *Middendorf v. Henry*, 425 U.S. 25, 31 (1976) (referring to general and special courts-martial); *accord* 10 U.S.C. § 816. Article 15 proceedings provide fewer procedural rights than trials by court-martial, but limit the nature of punishments imposed. *See* Dwight H. Sullivan, *Overhauling the Vessel Exception*, 43 Naval L. Rev. 57, 58–59 (1996) (identifying procedural rights not afforded during Article 15 proceeding, including legal

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[2] Army Directive 2011-01 did not affect the enforcement of public displays of affection ("PDA") standards, as the policy is sexual orientation neutral. J.A. 341. PDA is generally prohibited. J.A. 350.

representation, suppression of unconstitutionally obtained evidence, confrontation of one's accuser, and decision by a panel of disinterested service members); *see also Parker v. Levy*, 417 U.S. 733, 750 (1974) (noting that Article 15 proceedings imposed limited discipline, including suspension, reduction in pay grade, and arrest in quarters for not more than thirty days).

Upon notice of the Article 15 proceeding, Downey requested to speak to a military lawyer, who allegedly told him that if he demanded a court-martial, he would be required to hire a civilian lawyer. Downey chose to submit to the Article 15 proceeding and the military lawyer allegedly recommended that she not appear as a spokesperson on his behalf because he would seem weak. On May 30, 2012, during the Article 15 hearing, Milley determined that Downey was guilty of assault consummated by battery in violation of UCMJ Article 128. Milley found him not guilty of obstruction of justice and dismissed a disorderly conduct charge. Downey appealed Milley's assault finding, which was denied on June 27, 2012. On June 4, 2012, Milley completed an officer evaluation report for Downey, giving him a satisfactory performance rating—a level below his usual "outstanding performance" rating—and noting that he was relieved of his command position due to his poor judgment at the ball. On June 8, 2012, Milley issued Downey letters of reprimand for the assault against Reuter and for violating Army Directive 2011-01. Milley also issued a letter that stated he lost confidence in Downey's ability to command the Brigade and relieved Downey from his position.

On August 16, 2013, Downey applied to the Board for removal of the Article 15 record. Downey presented

several arguments in his petition, including: the elements of assault were not met because he used lawful force and the incident was an accident; there were no facts demonstrating that his hand or fist came in contact with Reuter; x-ray reports demonstrated that Reuter's nose was not fractured;[3] he was not given the right to present a full defense; Milley did not use the reasonable doubt standard when finding him guilty; the refusal to produce a transcript of the Article 15 hearing hindered his ability to file a meritorious appeal and obtain effective assistance of counsel; the letter of reprimand regarding the assault was not supported by the evidence because the majority of the Article 15 hearing discussed his alleged violation of Army Directive 2011-01;[4] the finding that he violated the directive was legally incorrect; the repeal of Don't Ask Don't Tell was not an appropriate subject for a letter of reprimand because his conduct did not involve denying homosexuals the right to serve in the armed forces; Robinson and Parsons violated the PDA standard; he was not acting out of an intent to discriminate against the women, but to protect them from exploitation; the publicity surrounding the repeal of Don't Ask Don't Tell motivated the decision to find him guilty of assault; and he had an outstanding military career.

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[3] Downey submitted an x-ray report showing that Reuter did not have a spinal fracture, but it made no mention of Reuter's nose. J.A. 88.

[4] Downey did not seek removal or correction of the letters of reprimand.

The Secretary of the Department of the Army, acting through the Board, is authorized to correct any Army military record when he "considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1). An application for correction of a military record is considered by a panel of at least three Board members. 32 C.F.R. § 581.3(e)(3)(i). The Board members are charged with the responsibility to first "[r]eview all applications that are properly before them to determine the existence of error or injustice." *Id.* § 581.3(b)(4)(i). The Board will then recommend a correction if it determines that "the preponderance of the evidence shows that an error or injustice exists" in an applicant's records. *Id.* § 581.3(e)(3)(iii)(A). A denial of an application is a final action of the Board, *id.* § 581.3(g)(2)(i)(A), and the denial must be in writing, *id.* § 581.3(g)(1).

On October 21, 2013, the Board issued an opinion denying Downey's application. The Board stated that it considered all of the evidence submitted by Downey and the arguments in the brief submitted by his counsel. J.A. 24-29. The Board found that "[t]he evidence of record confirms [Downey] violated the UCMJ while serving as [a Lieutenant Colonel], in a leadership position and subsequently accepted NJP . . . for unlawfully striking a Soldier on his face with a camera which he pushed into his face." J.A. 30-31. The Board also acknowledged that Downey "was provided a defense attorney, was given the right to demand trial by court-martial, and was afforded the opportunity to appeal the Article 15 through proper channels." J.A. 31. The Board concluded that the Article 15 proceeding was "conducted in accordance with law and regulation" and that "there is no evidence of record and [Downey]

provides no evidence to show the [Article 15 record] is untrue or unjust." *Id.* Finding no error or injustice, the Board found "no reason" to remove the Article 15 record. *Id.*

On November 12, 2014, Downey brought this action against Appellees, alleging that the Board's decision was arbitrary and capricious and failed to address and correct due process violations during his underlying Article 15 proceeding (Counts I and II). Downey also alleged his Article 15 proceeding violated his Fifth Amendment right to due process (Counts III and IV). Appellees moved for summary judgment as to Counts I and II, and to dismiss Counts III and IV for failure to state a claim upon which relief could be granted. Downey filed a cross-motion for summary judgment as to Counts I and II. On June 19, 2015, the district court granted Appellees' motions and denied Downey's motion. This appeal timely followed.

II.

We first address the district court's judgment regarding the parties' cross-motions for summary judgment as to Counts I and II.

We review de novo the district court's grant of summary judgment, employing the same standard used by the district court. *Randall v. United States*, 95 F.3d 339, 348 (4th Cir. 1996). "A district court 'shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 568 (4th Cir. 2015) (quoting Fed. R. Civ. P. 56(a)). When reviewing an appeal from cross-motions for

summary judgment, this Court must separately review the merits of each motion, taking care to "resolve all factual disputes and any competing, rational inferences in the light most favorable to the party opposing that motion," *Defs. of Wildlife v. N.C. Dep't of Transp.*, 762 F.3d 374, 392 (4th Cir. 2014), to ascertain "whether either of the parties deserves judgment as a matter of law," *id.* (quoting *Bacon v. City of Richmond*, 475 F.3d 633, 638 (4th Cir. 2007)).

Under the APA, this Court's review of a Board's decision is quite limited as the Board has broad authority to correct servicemembers' records. 10 U.S.C. § 1552(a); *Guerra v. Scruggs*, 942 F.2d 270, 273 (4th Cir. 1991). We will set aside the Board's decision only if it was arbitrary, capricious, contrary to law, or unsupported by substantial evidence. *Randall*, 95 F.3d at 348. Because review of an agency's decision is narrow, the function of this Court is not to reweigh the evidence presented to the Board, make credibility determinations, or substitute its judgment for that of the agency. *See Randall*, 95 F.3d at 348; *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (considering an agency's ruling arbitrary and capricious if it "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."). Rather, this Court must determine "whether the conclusion being reviewed is supported by substantial evidence." *Randall*, 95 F.3d at 348 (quoting *Robbins v. United States*, 29 Fed. Cl. 717, 725 (1993)); *see Platone v. U.S. Dept. of Labor*, 548 F.3d 322, 326 (4th Cir. 2008) (stating substantial evidence

is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

Primarily, Downey argues that the Board's decision was arbitrary and capricious because it failed to address or resolve all of his arguments and did not articulate a rational connection between its factual findings and legal conclusions. Downey states that the Board's decision failed to address his arguments concerning an x-ray report that demonstrated that Reuter's nose was not fractured, his defense that Reuter's injury was an accident, his claim that Army Regulations were not followed, and his assertion that the Article 15 proceeding was tainted by the appearance of unlawful command influence.[5]

The district court found that the Board's decision was not arbitrary and capricious given the substantial evidence supporting a finding that the Article 15 record was correct and should not be removed. The court further stated that the Board was not required to address in writing every argument raised in Downey's petition because the arguments would not have altered the outcome that substantial evidence supported the finding of guilt.

We agree with the district court's conclusion. Under the APA, an agency must examine the relevant data and articulate a satisfactory explanation for its action

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[5] UCMJ Article 37 "restricts the influence of higher authorities on the findings of any military proceeding"—commonly referred to as unlawful command influence—and "erects a safeguard against individual attempts to improperly sway" the commanding officer in an Article 15 proceeding. *(N G) v. United States*, 94 Fed. Cl. 375, 387 (2010).

including a "rational connection between the facts found and the choice made." *Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 350 (4th Cir. 2001) (quoting *State Farm*, 463 U.S. at 43). When addressing the adequacy of an agency's explanation, a reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transp. Inc. v. Arkansas-Best Freight Sys.,* 419 U.S. 281, 285 (1974). The agency's explanation need not be a "model of analytic precision." *Shalala*, 244 F.3d at 350 (quoting *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1404 (D.C. Cir. 1995)). And while this Court may not supply a reasoned basis for the agency's action that the agency has not given, we must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman*, 419 U.S. at 286.

Here, the Board's decision demonstrates adequate consideration of the evidence and Downey's claims and a rational conclusion that Downey failed to show that his Article 15 record was untrue or unjust and should be removed from his personnel file. In fact, the opinion began with a summary of Downey's arguments and the evidence he provided to the Board for consideration. The opinion then summarized the arguments in the brief submitted on his behalf by his counsel. The Board noted, for instance, Downey's arguments that he was not guilty, "[h]e used no unlawful force," "[h]is intentions were not to harm" Reuter, Reuter's nose was not broken, Schlimm's investigation was "incomplete," and Milley's determination of his guilt "involved outside influence by matters not within the scope of the investigation." J.A. 24-25.

The Board also restated the factual findings in Schlimm's investigation report, including that Downey approached Reuter and "attempted to take away [Reuter's] camera and in his attempt, he knocked the camera into [Reuter's] face." J.A. 27. According to UCMJ Article 128, the elements of assault consummated by battery include "[t]hat the accused did bodily harm to a certain person" and "[t]hat the bodily harm was done with unlawful force or violence." J.A. 484. The Board concluded that "[t]he evidence of record confirm[ed]" that Downey committed an assault consummated by battery against Reuter by "unlawfully striking [Reuter] on his face with a camera which [Downey] pushed into his face," and that "[t]here is no evidence of record . . . to show that the [Article 15 record] is untrue or unjust." J.A. 30-31.

Further, when addressing Downey's arguments that Milley "did not conduct the [Article 15] hearing in a fair and impartial manner," J.A. 25, the Board stated that the Article 15 proceeding was "conducted in accordance with law and regulation," J.A. 31. The opinion detailed that Downey was provided with a defense attorney, given the right to demand a trial by court-martial, and afforded the opportunity to appeal the Article 15 decision through the proper channels. Finding no "error" or "injustice" during Downey's Article 15 proceeding, the Board concluded that "there [was] no reason to remove it from his record." J.A. 31.

It is evident from the Board's explanation that it considered Downey's claims. *See* J.A. 24-25, 28-29 (twice detailing Downey's arguments and evidence in support of his application to the Board); *see also Shalala*, 244 F.3d at 351 (finding that "nothing more is

required" when a board's explanation is "fairly comprehensive" and demonstrates adequate consideration of relevant factors). Although the Board could have explained its reasons for rejecting Downey's claims in more detail and its decision may lack "ideal clarity," the Board's opinion nevertheless demonstrates a rational connection between its factual findings and its conclusion. *Bowman*, 419 U.S. at 286. As a result, we hold that the Board satisfactorily explained its rationale and its decision was not arbitrary and capricious.[6] Accordingly, we affirm the district court's grant of summary judgment.

III.

We now review the district court's dismissal of Downey's due process claims regarding his Article 15

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[6] Downey also argues that the Board committed reversible error by incorrectly employing a clear and convincing burden of proof. Pursuant to 32 C.F.R. § 581.3(e)(2), the Board was instead required to evaluate Downey's claims of error and injustice "by a preponderance of the evidence." Though the Board erred by applying the wrong standard, the Board's mistake does not amount to reversible error. On appeal, Downey has the burden of demonstrating that the Board's error was prejudicial. *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253 (4th Cir. 2016) ("The harmless error rule applies to agency action because if the agency's mistake did not affect the outcome, it would be senseless to vacate and remand for reconsideration."). After extensive review of the evidence, the Board stated that "there is *no* evidence and [Downey] provides *no* evidence" to demonstrate that the Article 15 record was untrue or unjust. J.A. 31 (emphasis added). Even under the preponderance of the evidence standard, Downey would not have been able to meet his burden of proof. Downey has therefore failed to show any prejudice. As such, we agree with the district court's conclusion that the Board's error was harmless.

proceeding. We review the grant of a motion to dismiss for failure to state a claim de novo. *Weidman v. Exxon Mobil Corp.*, 776 F.3d 214, 219 (4th Cir. 2015). "To survive a motion to dismiss, a 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 Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Downey argues that the district court erred in dismissing his due process claims. The district court concluded that Downey's claims were nonjusticiable because he failed to sufficiently allege a deprivation of a constitutional right or that Appellees violated applicable statutes or Army regulations. The district court based its conclusion on the justiciability doctrine set forth in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971) (providing a four-factor test for reviewability of claims based on internal military affairs). *See also Williams v. Wilson*, 762 F.2d 357, 359 (4th Cir. 1985) (adopting *Mindes* test where a servicemember challenged the National Guard's empaneling of a selective retention board); *Guerra*, 942 F.2d at 276 (applying *Mindes* test).

Under the *Mindes* test, a service member seeking to sue the military over an internal military decision must demonstrate: "an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations," and "exhaustion of available intraservice corrective measures." *Williams*, 762 F.2d at 359 (quoting *Mindes*, 453 F.2d 197). Thus, the court must first determine whether the allegations are sufficiently pled. *Mindes*, 453 F.2d at 202. If the allegations are

"sufficient to withstand a motion to dismiss at the pleading stage," *id.*, and the servicemember exhausted available intraservice remedies, the court then weighs four factors to determine the justiciability of the allegations, *Williams*, 762 F.2d at 359. These factors include "(1) the nature and strength of the plaintiff's challenge to the military determination; (2) the potential injury to the plaintiff if review is refused; (3) the type and degree of anticipated interference with the military function; (4) the extent to which the exercise of military expertise or discretion is involved." *Id.* Here, the district court determined that Downey failed to satisfy the first threshold requirement of sufficiently pleading his due process claims.

We agree with the district court's conclusion. As the court noted, many of the allegations in the Amended Complaint directly contradict his due process claims. In the Amended Complaint, Downey alleged that during his Article 15 proceeding he was not able to fully present his arguments, the reasonable doubt standard was not used, he was denied the ability to collect and proffer evidence and witness testimony in his favor, and he did not make a knowing and voluntary choice to waive his right to a court-martial. Yet, Downey paradoxically alleged that he was able to call witnesses to testify in his favor and present arguments. *See, e.g.*, J.A. 396-97. He further alleged that he chose to proceed with the Article 15 proceeding after speaking with military counsel. *See Fairchild v. Lehman*, 814 F.2d 1555, 1559 (Fed. Cir. 1987) (stating that waiver of right to court-martial proceeding must satisfy the standards set forth in *Brady v. United States*, 397 U.S. 742, 748 (1970), which require awareness of direct consequences of waiver); J.A. 438-39 (Army Regulation 27-10

explicitly provides servicemembers with a right to counsel to determine whether to demand a trial by court-martial). The record also shows that Milley found Downey guilty beyond a reasonable doubt. J.A. 49.

More importantly, Downey failed to plausibly allege an actual deprivation of any protected liberty or property interest. *See Guerra*, 942 F.2d at 277 (4th Cir. 1991) ("Procedural due 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." (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976))). Downey argues he was removed from the National War College attendance list, relieved of command, and deprived of his good name and reputation. Downey, however, cites no statute, regulation, rule, or other basis for establishing a property interest in his command position or attendance at the National War College. *See id.* (stating servicemember had no property interest in continued service). And assuming without deciding that Downey has a liberty interest in his good name and reputation, he cannot make out a due process claim because he cannot show that any statements made by the Army in connection with his Article 15 proceeding were untrue. *See id.* at 278-79 (finding that servicemember had no liberty interest in his good name and reputation because he could not show that the stated reasons for his discharge were untrue). Accordingly, the Court concludes that Downey's due process claims are nonjusticiable and affirms the district court's dismissal of the claims.

IV.

For the foregoing reasons, the district court's judgment is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

1:14-cv-1503 (LMB/TCB)

[Filed June 19, 2015]

CHRISTOPHER P. DOWNEY,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE ARMY, and JOHN M. McHUGH, Secretary of the United States Department of the Army,
Defendants.

MEMORANDUM OPINION

Following an incident that occurred during a military ball in April2012, plaintiff Lieutenant Colonel Christopher P. Downey ("Downey" or "plaintiff') was charged with three violations of the Uniform Code of Military Justice ("UCMJ"). Downey's superior officer, two-star Major General Mark Milley ("Milley"), held an administrative hearing known as an "Article 15," after which he found Downey guilty of one of the three charges—assault consummated by a battery. The only punishment Downey received as a direct result of this

finding of guilt was that the record of the Article 15 was placed in the restricted section of his personnel file. He also experienced certain adverse administrative actions affecting his career in the Army.

After an unsuccessful intermediate appeal, Downey appealed his Article 15 to the Army Board for Correction of Military Records ("ABCMR" or the "Board"), which denied his appeal. Downey filed the instant four-count action challenging the ABCMR's decision; the Article 15 proceeding; and various regulations, policies, and procedures of the defendants. The parties have filed cross-motions for summary judgment on Counts I and II, and defendants have filed a motion to dismiss Counts III and IV. The motions have been fully briefed and oral argument has been held. For the reasons that follow, defendants' motions will be granted and plaintiff's motion will be denied.

I. BACKGROUND

A. Factual Background[1]

On April 14, 2012, a formal squadron ball was held on the base of Fort Drum, New York. AR 330. At that time, Downey was serving as the commander of the 6th Squadron, 6th Calvary, 10th Combat Aviation Brigade at Fort Drum, AR 330, 336, and was the commanding officer at the ball, AR 91. Between roughly 11:00 p.m. and midnight, Chief Warrant Officer Aaron Simbro ("Simbro") alerted Downey to what he thought appeared to be a crowd gathering around the dance floor and photographing a lesbian couple, Captain

[1] The facts in this Opinion are taken from the administrative record, which is cited as "AR _."

Katherine Robinson ("Robinson") and Second Lieutenant Heather Parsons ("Parsons"), who were dancing and possibly engaging in an inappropriate public display of affection. AR 218, 330. Downey quickly made his way towards the couple and, in the process, he reached out and open-handedly attempted to push down the cameras of two soldiers in his path whom he thought were photographing the couple. AR 218, 330-31, 414, 611. One of those individuals, Specialist Jeremy Reuter ("Reuter"), was sufficiently pushed off balance from the force of Downey's thrust to wind up lying prone on the floor. AR 218, 224, 330-31. It is undisputed that Reuter's nose was cut when the camera hit his face. AR 415, 611. Downey's intention in attempting to push down the cameras had been to stop any further photographing of the couple. AR 218, 333, 611. After his impact with Reuter, Downey reached the lesbian couple and briefly told them to alter their behavior. AR 218, 332. He then stepped off the dance floor without waiting to determine whether his order had been followed and began explaining the situation to Captain Thomas Jones, who had witnessed the incident and asked what happened. AR 331-32. After Downey explained that he thought Reuter had been taking inappropriate pictures of Robinson and Parsons, Jones immediately retrieved Reuter's camera and reviewed the last 20 to 30 photographs; however, he found none of them captured inappropriate conduct and most of them were actually of Jones and his wife, Captain Samantha Jones, as they had asked Reuter to photograph them as they were dancing. AR 225, 331.

By this time, Captain Samantha Jones and some others had moved Reuter outside of the hall where they observed his nose starting to swell. AR 225, 331, 415-

16, 611. Downey left the hall and met Reuter and the others, apologizing to Reuter and explaining that he had not intended to injure Reuter; rather, he had only meant to prevent potentially inappropriate photographs of Robinson and Parsons from being published on social media without their permission. AR 331. Afterwards, Reuter was taken to the emergency room, where he was preliminarily diagnosed with a fractured nose and a concussion. AR 331, 409-10. He was released and returned home around 4:30 a.m. AR 331.

Shortly after Downey left the ballroom, an altercation arose on the dance floor between Robinson and Command Sergeant Major Patrick McGuire ("McGuire"). AR 332. According to Robinson and Parsons, McGuire called Robinson an "abomination," stated that their actions were against regulations, and referenced the Don't Ask, Don't Tell policy ("DADT"). Id. Robinson responded that DADT had been repealed months earlier, in September. AR 373. Their heated exchange escalated until finally McGuire shoved Robinson with enough force to move her backwards and to make an audible "thump" when his hands made contact with her body. AR 332, 334.

After apologizing to Reuter, Downey returned to the ballroom to check on Robinson and Parsons, but neither of them mentioned the altercation with McGuire. AR 611. Downey found out about that altercation the following day. AR 333, 611. Between his arrival at the ball at 5:00 p.m. and the beginning of the relevant events around 11:00 p.m., Downey had consumed six alcoholic beverages. AR 219, 611. Reuter

had also consumed five or six alcoholic drinks by the time the incident with Downey occurred. AR 404-05.

B. Article 15 Investigation, Charges, and Hearing

Four days after the events at the ball, on April 18, 2012, Downey's superior officer, Milley, appointed Colonel Paul Schlimm ("Schlimm") to investigate what happened at the ball. AR 330, 336. On April 23, Milley suspended Downey from duty and issued a "no contact" order preventing him from having any contact with members of his unit. Am. Compl. ¶ 91. Schlimm conducted an extensive investigation during which he obtained the sworn testimony or statements of 34 witnesses to the events at the ball, including statements from Downey, Reuter, Robinson, Parsons, and Simbro. AR 309-14, 332. Schlimm also interviewed all the wait staff on duty during the ball, although none saw the incident at issue. AR 523-24. In addition to investigating the incident between Downey and Reuter, Schlimm also inquired into the subsequent incident between McGuire and Robinson, as well as the alcohol situation at the ball and the implementation of DADT in Downey's unit. AR 332, 334-36. Among the hundreds of pages of documentation gathered by Schlimm during his investigation, see AR 309-629, was the preliminary diagnosis that Reuter had suffered a concussion and fractured nose, which was reflected on his "After Care Instructions" from the hospital, AR 409-11. These instructions summarized the symptoms typically associated with such injuries; advised on how to manage those symptoms, including using ice to reduce nasal swelling; directed Reuter to follow up with his unit's physician assistant, Justin Overholt, on Monday,

April 16, 2012; and explained that Reuter would be notified if the radiologist's final report on Reuter's x-rays differed significantly from the preliminary report and diagnosis. AR 410.

After completing his investigation, Schlimm presented his report to Milley on May 4, 2012, recommending, among other things, that Downey "receive an Article 15 for the offense of assault consummated by a battery and be relieved from command." AR 336. A deputy staff judge advocate reviewed Schlimm's investigation report and found that "the Report complies with legal requirements, the evidence supports the findings and the recommendations are consistent with the findings. The Report is legally sufficient." AR 337.

Downey was advised that Milley was considering whether Downey should receive punishment for three offenses: (1) assault consummated by a battery, (2) disorderly conduct, and (3) obstruction of justice.[2] AR 59. The same form advising him of these charges, the DA Form 2627,[3] also advised him of his rights

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[2] The obstruction of justice charge was based on Downey's suggestion to Robinson, the day after the ball, that she wait to go to the military police with her accusations against McGuire until an in-unit investigation could be conducted. AR 334, 374. Downey also allegedly told her that if she reported the incident to the military police, it would adversely affect his career. AR 333.

[3] The DA Form 2627 is the official record of the entire Article 15 proceeding. It contains the offenses charged, informs the accused of the right to proceed to trial by court-martial, provides the location of an appointed attorney with whom the accused may consult in deciding whether to waive a court-martial proceeding,

under an Article 15 proceeding and his "right to demand trial by court-martial" if he did not want the charges disposed of under Article 15.[4] AR 59. An Article 15 proceeding is a non-adversarial, summary proceeding at which a commanding officer may impose discipline on his subordinates "for minor offenses without the intervention of a court-martial." 10 U.S.C. § 815(b). Because the proceeding, by design, offers soldiers only minimal procedural protections, the UCMJ grants all service-members the option to refuse an Article 15 proceeding and to demand an adversarial court-martial, which offers a much fuller range of protections but also carries the risk of much more severe punishments. Due to the consequences of choosing to waive court-martial protections, a soldier is entitled to consult with counsel, free of charge, before making the decision. Fairchild v. Lehman, 814 F.2d 1555 (Fed. Cir. 1987). Downey—who was himself authorized to administer Article 15 non-judicial

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states the outcome of the Article 15 hearing (if the accused chose to waive trial by court-martial), indicates the punishment dealt (if any), and includes the outcome of any appeal.

[4] The UCMJ actually "provides four methods of disposing of cases involving offenses committed by servicemen: the general, special, and summary courts-martial, and disciplinary punishment administered by the commanding officer pursuant to Art[icle] 15 [of the] UCMJ, 10 U.S.C. § 815." Middendorf v. Henry, 425 U.S. 25, 31 (1976). The methods vary in both procedural protections afforded and in the seriousness of the possible punishments that may result. See id. Of the four methods, non-judicial proceedings under Article 15 are the least formal; they constitute an "administrative method of dealing with the most minor offenses" and are "conducted personally by the accused's commanding officer." Id. at 31-32.

punishment to his own subordinates—was given this choice and counseled on this choice by an attorney provided free of charge by the Army. After consulting with counsel, Downey elected to accept the Article 15 proceeding.[5]

The Article 15 hearing took place on May 30, 2012. Am. Compl. ¶ 151. Because a non-judicial proceeding is non-adversarial, a soldier does not have a right to counsel during the proceeding, cf. Middendorf v. Henry, 425 U.S. 25, 40, 45-48 (1976); however, a soldier does have the right to bring a spokesperson—who, at the soldier's option, may be an attorney—to the Article 15 proceeding. Army Reg. 27-10 ¶ 3-18(h) (Oct. 3, 2011). Here, Downey's military attorney, who had counseled him during the waiver phase, allegedly informed Downey that although she could act as his spokesperson, it would make him "appear weak." Am. Compl. ¶ 150. She allegedly also told Downey that she had spoken with the Command Staff Judge Advocate and he informed her that the hearing would merely be a "commanders' conversation." Id. Accordingly, Downey

[5] Downey alleges he "initially informed his military attorney that he wanted to proceed with a court-martial instead of submitting to non-judicial punishment under Article 15;" however, he alleges that "[h]is attorney informed him that if he chose to do so, he would have to hire a civilian lawyer and would have to pay for those services." Am. Compl. ¶¶ 144-45. Based in part on that information, he agreed to proceed with the Article 15 hearing. Am. Compl. ¶ 146. At oral argument, defense counsel clarified that there is in fact a right to appointed counsel during a trial by court-martial. Regardless, Downey has not claimed that his waiver of a court-martial was rendered invalid by his reliance on this inaccurate information.

chose to proceed in the Article 15 hearing without a spokesperson.

Non-judicial proceedings are conducted largely at the direction of the imposing commander who determines, for example, whether the soldier or the spokesperson may examine or cross-examine witnesses and what witnesses are reasonably available for the proceeding. Army Reg. 27-10 ¶ 3-18(h) (Oct. 3, 2011). Formal rules of evidence do not apply, and the commander may consider any evidence he reasonably believes to be relevant to the charges at issue. Id. ¶ 3-18(j). After considering all of the evidence, the commander may only find the soldier guilty if he is convinced beyond a reasonable doubt that the soldier committed the offense charged. Id. ¶ 3-18(*l*).

Following a five-hour hearing, Milley adjudicated Downey guilty of assault consummated by a battery but sentenced him to no punishment. Am. Compl. ¶ 151; AR 59-60. Pursuant to Army regulations, a copy of the Article 15 record was placed in Downey's military personnel file, but only in the restricted section. Army Reg. 27-10 ¶ 3-37 (Oct. 3, 2011). The disorderly conduct charge was dismissed and Downey was found not guilty of obstruction of justice. AR 59. Through counsel,[6] Downey appealed that decision to the next superior authority, the Army Forces Command ("FORSCOM"), which denied his appeal on June 29, 2012, after a reviewing judge advocate found that the "proceedings were conducted in accordance

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[6] Downey's counsel for his appeal to the Army Forces Command was Tory J. Langemo of Gagne, Scherer & Langemo LLC, a self-described firm of "Military Trial Attorneys." AR 305-06.

with law and regulation and the punishments imposed were not unjust nor disproportionate to the offense committed." AR 60.

C. Collateral Consequences

On June 4, 2012, the same day the Article 15 decision was issued, Milley imposed an administrative reprimand (General Officer Memorandum of Reprimand or "GOMOR") on Downey for violating the repeal of DADT by "wrongfully and unfairly singl[ing] out a same sex couple for kissing and dancing together at the Squadron Ball." AR 12.

Also on June 4, 2012, Milley relieved Downey of his command pursuant to the regulation permitting such decisions when a superior commander "loses confidence in a subordinate commander's ability to command due to misconduct, poor judgment, the subordinate's ability to complete assigned duties, or for other similar reasons [including the performance of an informal investigation under Army Reg. 15-6]." Army Reg. 600-20 ¶ 2-17 (Mar. 18, 2008).[7] When an officer is relieved

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[7] More specifically, this regulation provides:

> a. When a senior commander loses confidence in a subordinate commander's ability to command due to misconduct, poor judgment, the subordinate's inability to complete assigned duties, or for other similar reasons, the senior commander has the authority to relieve the subordinate commander. . . . [F]inal action to relieve an officer from any command will not be taken until after written approval by the first general officer (to include one frocked to the grade of brigadier general) in the chain of command of the officer being relieved is obtained. . . .

from command for cause,[8] the relieved officer's supervisors must prepare a "relief for cause" Officer Evaluation Report ("OER"). Army Reg. 623-3 ¶ 3-58 (Aug. 10, 2007). Completed OERs are placed in the performance section of the officer's personnel file. Army Reg. 600-8-104, Table 3-1 (Apr. 7, 2014). After the OER is posted to a soldier's file, it is presumed to be administratively correct and to represent the "considered opinion and objective judgment of the rating officials at the time of preparation." Army Reg. 623-3 ¶ 3-39(a) (Aug. 10, 2007). A soldier may appeal any report that he believes to be inaccurate or prepared in violation of regulations. Id. ¶ 6-7(c). If an officer seeks to appeal an adverse OER, he must file that appeal with the appropriate Army Special Review Board ("ASRB"). Id. ¶¶ 6-7(i), 6-12. Only after a soldier submits an unsuccessful appeal to the ASRB may he

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> [Army Reg.] 623-3 concerning administrative review of relief reports remain applicable.
>
> b. If a relief for cause is contemplated on the basis of an informal investigation under [Army Reg.] 15-6, the referral and comment procedures of that regulation must be followed before initiating or directing the relief. . . .

Army Reg. 600-20 ¶ 2-17 (Mar. 18, 2008).

[8] "Relief for cause is defined as an early release of an officer from a specific duty or assignment directed by superior authority and based on a decision that the officer has failed in their performance of duty. In this regard, duty performance will consist of the completion of assigned tasks in a competent manner and compliance at all times with the accepted professional officer standards shown in DA Form 67-9, Part IV. These standards will apply to conduct both on and off duty." Army Reg. 623-3 ¶ 3-58 (Aug. 10, 2007).

then apply to the ABCMR to correct the allegedly incorrect OER. Id. ¶ 6-9(f). In Downey's case, his relief for cause OER covered his performance from October 2011 through June 2012. In his OER, Milley wrote:

> LTC Chris Downey was relieved for cause of his Squadron Command due to a terrible mistake in judgement [sic] he made during a unit social event which resulted in my loss of confidence in him as a commander. Although a very severe lapse in judgement [sic] by Chris, I firmly believe this was a one-time mistake on his part and he is an otherwise quality officer who still retains potential for continued service to our Army. . . . Although I relieved Chris, there is no doubt in my mind that he is a fully qualified officer and should retain his rank of [Lieutenant Colonel] and continue contributing to our Army.

AR 6 (signed by Milley in August 2012).

On July 19, 2012, an administrative elimination board was convened to determine whether Downey should be separated from the Army based on the derogatory activity reported in his relief for cause OER. AR 40-44. That board found that the allegations of derogatory activity and of conduct unbecoming an officer were not supported by a preponderance of the evidence. AR 44. Accordingly, the board recommended that Downey be retained on active duty, a decision consistent with Milley's conclusion. AR 44, 55. This decision did not result in Downey being reinstated to his command position; it merely permitted him to remain in the Army.

Downey suffered other consequences, including being removed from the National War College attendance list, being repeatedly passed over for promotion, and being put on a list to be considered for early retirement, as a result of the Article 15 and relief for cause OER. By order of the Secretary, a Selective Early Retirement Board ("SERB") convened on November 12, 2014, to recommend a certain number of lieutenant colonels for early retirement. See generally 10 U.S.C. §§ 638, 3911; U.S. Army Military Personnel Message 14-205. Although Downey was notified that he was among the officers the SERB would be considering for early retirement, Am. Compl. ¶ 223, the SERB has now submitted, and the Secretary has reviewed and approved, the final "early retirement" list and Downey was not among those selected. See 10 U.S.C. § 638. Downey maintains that he will likely be considered again for early retirement as long as the Article 15 and relief for cause OER remain in his file.

D. ABCMR Decision

On August 16, 2013, Downey, through counsel, petitioned the ABCMR, which is the highest level of administrative review in the Army, to remove the Article 15 record from his personnel file on the ground that such removal was "necessary to correct an error or remove an injustice."[9] 10 U.S.C. § 1552(a)(1). During

[9] Downey had initially submitted his request for removal of the Article 15 to the Department of the Army Suitability Evaluation Board, a lower-level administrative board within the Army that generally possesses jurisdiction over unfavorable personnel records; however, that board informed him that it did not have the authority to remove an Article 15 and that, instead, he needed to petition the ABCMR directly. AR 255.

this appeal, Downey had both civilian and military counsel representing him.[10] AR 203-04.

Before the ABCMR, Downey focused on an x-ray report showing that it was later determined that Reuter's nose had not actually been fractured. See Pl.'s Opp'n to Defs.' Mots. and Cross-Mot. Summ. J. ("Pl.'s Opp'n"), Ex. 1 [Dkt. No. 36]. Downey discovered this report after his Article 15 and presented it to the ABCMR as part of his application for relief. Am. Compl. ¶129. Nevertheless, the Board concluded that the record evidence demonstrated that Downey had committed an assault consummated by a battery in violation of the UCMJ by unlawfully striking Reuter "on his face with a camera which he pushed into his face."[11] AR 27- 28. Additionally, the ABCMR found that

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[10] Richard Thompson of the Thomas More Law Center was Downey's civilian counsel before the Board and continues to represent Downey in this litigation.

[11] There is some dispute between the parties as to whether the relevant x-ray report was actually submitted to the ABCMR. The only x-ray report in the record describes a "cervical spine" x-ray series and concludes that Reuter's spine was not fractured. AR 100. Downey insists he also submitted a second x-ray report regarding a "facial bone" x-ray series, which concluded that Reuter's nose and facial bones were not fractured. See Am. Compl. ¶¶ 128-29; Pl.'s Opp'n, Ex. 1. Defendants confirmed with the ABCMR that it was not in possession of any additional documents not in the administrative record. See Defs.' Opp'n to Pl.'s Cross Mot. Summ. J. 8 n.4 [Dkt. No. 37]. For the purpose of this Opinion, the Court assumes as true Downey's assertion that he submitted both x-ray reports to the Board. The Board considered Downey's written statement in support of his application, which was prepared with the assistance of counsel, as well as his attorney's memorandum, both of which stressed the significance of the fact

"the fact that members of [an] administrative separation board found the allegations of derogatory activity resulting in the referred OER and the allegations of conduct unbecoming an officer were not supported by a preponderance of the evidence does not mean that the imposing officer. . .—the person with the UCMJ authority—erred. . . . These are two separate actions and one does not negate the other." AR 28. The Board issued its final decision denying Downey's request on October 21, 2013, after concluding that the Article 15 was conducted in accordance with the law and regulations and that there was no evidence in the record to establish that the Article 15 was untrue or unjust. AR 28.

On November 27, 2013, Downey submitted additional documentation to the ABCMR, and requested that the ABCMR remove the relief for cause OER from his personnel file. AR 3-18. By letter dated December 23, 2013, the ABCMR responded, stating that it could not treat the OER as an additional issue in his original ABCMR proceeding because that proceeding had been closed in October 2013. The ABCMR further informed Downey that he could not apply to the ABCMR for relief regarding the relief for cause OER until he exhausted his administrative remedies by presenting his request to the Department of the Army Suitability Evaluation Board or appropriate ASRB. AR 1-2; see also Army Reg. 623-3 ¶ 6-7(i) (Aug. 10, 2007).

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that Reuter's nose was not fractured. See AR 22, 34, 65-66, 93. The Board's ultimate decision did not turn on the severity level of Reuter's injury. AR 27-28.

E. Procedural Posture

Following his unsuccessful appeal to the ABCMR, Downey filed this lawsuit. His Amended Complaint contains four counts:

Count I - "The ABCMR's decision was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or otherwise contrary to law."

Count II - "The ABCMR's decision was contrary to applicable regulations and violated plaintiff's constitutional right to due process."

Count III - "Defendants' actions have deprived plaintiff of his constitutional right to due process."

Count IV - "Defendants' regulations, policies, and procedures have deprived plaintiff of his constitutional right to due process."

Plaintiff seeks reversal of the ABCMR's decision and a declaration that the defendants violated plaintiff's fundamental rights, as well as an order: enjoining defendants from instituting separation proceedings against plaintiff pending the outcome of this action, directing defendants to remove the Article 15 and the relief for cause Officer Evaluation Report from plaintiff's personnel file, and requiring the ABCMR to restore plaintiff to the position he would have had absent the wrongful findings. Alternatively, plaintiff seeks an order directing a Special Selection Board to convene to restore plaintiff to the position he held

before the events underlying his claims. Lastly, he seeks an award of reasonable attorneys' fees and costs under the Equal Access to Justice Act. Each party has moved for summary judgment on Counts I and II. Defendants have also moved for the dismissal of Counts III and IV for failure to state a claim upon which relief can be granted.

II. CROSS-MOTIONS FOR SUMMARY JUDGMENT ON COUNTS I AND II

Counts I and II state claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq. Defendants contend that the ABCMR's decision satisfies the standards set forth in the APA and should therefore be upheld. Plaintiff responds that the Board's decision should be reversed as arbitrary, capricious, and unsupported by substantial evidence.

A. Standard of Review

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). Decisions of the ABCMR are final agency actions subject to judicial review under the APA. Cf. Chappell v. Wallace, 462 U.S. 296, 303 (1983). The APA "confines judicial review of executive branch decisions to the administrative record of proceedings before the pertinent agency. As such, there can be no genuine issue of material fact in an APA action. . . ." Shipbuilders Council of Am. v. U.S. Dep't of Homeland Sec., 770 F. Supp. 2d 793, 802 (E.D. Va. 2011) (citations omitted). In such actions, "the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the

agency to make the decision it did." Id. (internal quotation marks omitted).

For an ABCMR decision to be found invalid under the APA, the decision must be "arbitrary, capricious, contrary to law, or unsupported by substantial evidence," Portner v. McHugh, 395 F. App'x 991, 992 (4th Cir. 2010) (per curiam); Randall v. United States, 95 F.3d 339, 348 (4th Cir. 1996); 5 U.S.C. § 706(2)(A), (E), or "contrary to constitutional right, power, or privilege," 5 U.S.C. § 706(2)(B). "In determining whether agency action was arbitrary or capricious, the court must consider whether the agency considered the relevant factors and whether a clear error of judgment was made." Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 192 (4th Cir. 2009) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)). "Deference is due where the agency has examined the relevant data and provided an explanation of its decision that includes 'a rational connection between the facts found and the choice made.'" Id. (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

The APA also "includes 'the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases.'" Bechtel v. Admin. Review Bd., 710 F.3d 443, 449 (2d Cir. 2013) (quoting Shinseki v. Saunders, 556 U.S. 396, 406 (2009)); see 5 U.S.C. § 706 ("[D]ue account shall be taken of the rule of prejudicial error."). "As incorporated into the APA, the harmless error rule requires the party asserting error to demonstrate prejudice from the error." Friends of Iwo Jima v. Nat'l Capital Planning Comm'n, 176 F.3d 768, 774 (4th Cir. 1998) (quoting Air Canada v. Dep't of Transp., 148 F.3d

1142, 1156 (D.C. Cir. 1998)). "If a party fails to carry that burden, the agency's decision must be upheld." Id.

The Secretary of the Army, acting through the ABCMR, "may correct any military record . . . when the Secretary considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1).[12] Challenges to the ABCMR's decisions are considered under an "unusually deferential application of the arbitrary or capricious standard of the APA." Cone v. Caldera, 223 F.3d 789, 793 (D.C. Cir. 2000) (internal quotation marks omitted). Such deference ensures that the courts function neither as a "super correction board," Charette v. Walker, 996 F. Supp. 43, 50 (D.D.C. 1998), nor as "a forum for appeals by every soldier dissatisfied with [a military personnel action or decision], a result that would destabilize military command and take the judiciary far afield of its area of competence." Cone, 223 F .3d at 793; see also Ferguson v. McHugh, --- F. Supp. 2d ---, 2014 WL 3973053, at *5 (D.D.C. Aug. 14, 2014) (noting that because the ABCMR is authorized to "correct records 'when the Secretary considers it necessary to correct an error or remove an injustice,'" judicial review of its determinations is necessarily "substantially restrict[ed]" (quoting 10 U.S.C. § 1552(a)(1)) (emphasis

[12] Specifically, this statute provides: "The Secretary of a 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. Except as provided in paragraph (2), such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department." 10 U.S.C. § 1552(a)(1). The ABCMR constitutes the board of civilians acting on behalf of the Secretary of the Department of the Army.

in original)). "The ABCMR begins its consideration of each case with the presumption of administrative regularity." Army Reg. 15-185 ¶ 2-9 (Mar. 31, 2006). To overcome this presumption, the applicant "has the burden of proving an error or injustice by a preponderance of the evidence." Id.

B. Discussion

Counts I and II of the Amended Complaint challenge the ABCMR' s decision under the APA. Specifically, Count I alleges that the ABCMR decision was arbitrary, capricious, and/or unsupported by substantial evidence, and Count II alleges that the decision "failed to address and correct" purported "due process violations" in the underlying Article 15 proceeding. Am. Compl. ¶¶227-43; see 5 U.S.C. § 706(2)(A)-(B), (E).

Although Downey has raised arguments challenging every aspect of the Board's decision, the primary issue presented is quite narrow: whether the ABCMR was justified in finding that Downey had not met his burden of proving an error or injustice and thereby denying his request to correct or remove the Article 15. The record of Downey's Article 15 stated that he was guilty of assault consummated by a battery for unlawfully striking Reuter "on his face with . . . a camera which [Downey] pushed into his face." AR 59. The Board found that the record evidence supported the conclusion that Downey had indeed unlawfully struck Reuter by pushing a camera into his face. AR 27-28. Based on that finding, the Board concluded there was no error or injustice to correct.

The record reflects that the ABCMR's decision was supported by substantial evidence and that the Board's written opinion made a "rational connection" between that evidence and its conclusion. Ohio Valley, 556 F.3d at 192 (quoting State Farm, 463 U.S. at 43). Through counsel, Downey submitted to the Board a 30-page memorandum in support of removing the Article 15, and he enclosed over 150 pages of evidence, including some of the sworn testimony gathered by Schlimm during the investigation, Schlimm's report of his findings and recommendations, and an x-ray report regarding Reuter's injury that Downey had obtained after his Article 15 hearing. In its written decision, the Board summarized its review of all the evidence before it. AR 21-26. This evidence included the verbatim testimony of numerous witnesses who all agreed that Downey intentionally made contact with the camera that Reuter was holding and that the force of Downey's contact caused the camera to hit Reuter's nose and caused Reuter to lose his balance. See, e.g., AR 414 (testimony of Samantha Jones); AR 439 (testimony of Nicholas Wood); AR 517 (testimony of Dustin Tagliaboski); AR 526-27 (testimony of Thomas McHale II). Most importantly, in Downey's sworn statement, he admits that he "pushed down" Reuter's camera and "[i]n the process, SPC Reuters [sic] camera struck him in the nose and as a result, he stumbled backwards to the floor and was somehow injured." AR 218.

Under the UCMJ, the offense of assault consummated by a battery is defined as the use of "unlawful force" to do "bodily harm" to another. 10 U.S.C. § 928. The severity of the harm is immaterial so long as some amount of offensive contact occurs.

Manual for Courts-Martial, Pt. IV ¶ 54(c)(1)(a) (2012 ed.) ("'Bodily harm' means any offensive touching of another, however slight."). Accordingly, Downey's own acknowledgement that he intentionally made contact with Reuter who then suffered injury "as a result" of his pushing the camera Reuter was holding into his face establishes that the "bodily harm" element was undeniably satisfied. That Downey later discovered that Reuter's nose had not been fractured does not alter that conclusion. It is uncontested that the camera hit Reuter's nose with sufficient force to cut the nose slightly causing it to bleed and that the injury appeared sufficiently serious to his colleagues to warrant them taking him to the emergency room. Moreover, his injury was severe enough that the medical professionals initially treating Reuter at the hospital believed his nose appeared to be fractured, AR 108-10, although further examination of his x-rays showed that not to be the case. The emergency care professionals also preliminarily diagnosed Reuter with a concussion, AR 108-10, and there is no evidence in the record that disproved that part of the diagnosis.

Similarly, there is more than substantial evidence in the record that the "unlawful force" element was satisfied. Force is unlawful if used "without legal justification or excuse and without the lawful consent of the person affected." Manual for Courts-Martial, Pt. IV ¶ 54(c)(1)(a). Unlawful force can occur through either an intentional or culpably negligent act or omission. Id. ¶ 54(c)(1)(b)(ii). Moreover, even if the use of force is justified or excused, using "more force than is required" constitutes an assault consummated by a battery. Id. ¶ 54(c)(2)(c). As Milley stated in a reprimand letter, Downey "had many alternative ways

to address what [he] believed to be inappropriate conduct without assaulting a junior enlisted Solider under [his] command."[13] AR 13. As Downey's subordinate, Reuter would have been required to cease his photographing had Downey simply ordered him to do so. Plaintiff's contention that the music was loud, leading him to think Reuter might not be able to hear him if he gave such an order is pure speculation. Moreover, the noise level would not have prevented Downey from stepping in front of Reuter to immediately prevent further photographing and to gain Reuter's attention. Downey also could have ordered the music stopped or ended the ball if he believed things were getting out of hand. Reuter's photography posed no threat of imminent harm to anyone at the ball. The lack of any imminent threat and the numerous peaceful alternatives available to Downey amount to substantial evidence that his immediate resort to physical force was unjustified and unlawful under the circumstances, even if he never intended to harm Reuter.

Downey argued before the ABCMR that injuring Reuter was accidental, which should excuse him from the assault charge. His accident defense was also properly rejected because there is no dispute that he intentionally made contact with the camera while Reuter was holding it in an attempt to stop what he assumed were inappropriate photographs from being taken. AR 218; Am. Compl. ¶ 60. Downey did not

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[13] Milley withdrew this letter of reprimand before Downey appealed to FORSCOM, thereby rendering the record of the Article 15 itself as the only punishment following directly from the finding of guilt; however, Milley's statement accurately reflected that Downey could have used reasonable alternative methods.

merely bump into the camera inadvertently. The offense of assault consummated by a battery does not require the offender to have the specific intent to harm the person against whom force is applied. Manual for Courts-Martial, Pt. IV ¶ 54(c)(1)(b)(ii) ("Specific intent to inflict bodily harm is not required."). Therefore, it is immaterial that Downey had not intended to harm Reuter. He purposely reached to lower the camera and, although he may have used more force than he intended, he is responsible for the reasonably foreseeable consequence that he would knock the camera into Reuter's face and cause Reuter to lose his balance and become injured. See United States v. Jenkins, 59 M.J. 893, 899 (Army Ct. Crim. App. 2004) ("[T]he accident defense does not excuse injury resulting from a deliberate act toward another if the natural and direct consequences of that act include injury."). The ABCMR considered the above evidence and arguments and reached the well-supported conclusion that there was no error or injustice in the record of the Article 15 concluding that Downey was guilty of assault consummated by a battery.

Downey has argued that the decision of the Board failed to address all of the issues he raised in his 30-page, single-spaced application. The Board was not required to address in writing every argument attacking the Article 15 proceeding raised in that application because none of those arguments could alter the outcome that there was clearly enough record evidence to satisfy the two elements of the offense reflected in the Article 15. In fact, "[e]ven when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account if the agency's path may reasonably be

discerned." Nat'l Elec. Mfrs. Ass'n v. U.S. Dep't of Energy, 654 F.3d 496, 514-15 (4th Cir. 2011) (internal citation omitted). This approach is especially valid given the added deference due to military boards of correction. Cone, 223 F.3d at 793. Under this deferential standard, and given the substantial evidence demonstrating that Downey's Article 15 record was not untrue or unjust, the ABCMR's decision was not arbitrary, capricious, an abuse of discretion, or otherwise in violation of law.

None of Downey's other claims in Counts I and II alters this conclusion. For example, in Count II, Downey claims that the ABCMR failed to address and correct alleged due process violations that occurred during his Article 15 proceeding, thereby rendering the Board's decision contrary to applicable regulations. Specifically, he complains that he was not found guilty beyond a reasonable doubt; he was not given the opportunity to present a full defense to the charges; exculpatory evidence, including the x-ray report showing Reuter did not have a fractured nose, was not considered; and he was not given the notes of those who were present during the Article 15 proceeding, which hindered his ability to appeal the findings. Am. Compl. ¶¶ 237-43.

Contrary to Downey's contentions, the ABCMR found that the Article 15 proceeding was procedurally sufficient and "conducted in accordance with law." AR 28. Specifically, the Board found that Downey was provided an attorney with whom he consulted before having to decide whether to proceed with the Article 15 or elect trial by court-martial, and he was given the opportunity to demand a trial by court-martial. AR 28.

He was also afforded the right to appeal the Article 15 findings to the next superior authority (FORSCOM), which appeal was denied, AR 28, and was able to defend himself during the Article 15 by submitting his own version of events in writing, calling witnesses, including Simbro and Justin Overholt, and submitting several letters of support demonstrating his good character, see Am. Compl. ¶¶ 164-65, 168-69. The investigating officer's failure to discover, and Milley's failure to consider, the x-ray report did not prejudice the outcome of the Article 15, given that bodily harm, "however slight," is all that is required under the UCMJ and there is no question that Reuter suffered at least some injury.[14] To the extent Downey complains

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[14] By the same reasoning, Downey's claims in Counts I, II, and III that the ABCMR failed to consider exculpatory evidence (the x-ray report regarding Reuter's nose) and that the Board's decision was based on incomplete and missing documents also fail. The only potentially missing document was the x-ray report reflecting that Reuter's nose had not been fractured. If Downey failed to submit this report to the ABCMR, then it was not an error of the Board to not consider it. See Ohio Valley Envtl. Coal., 556 F.3d at 201 ("[R]eview of agency action is typically limited to the administrative record that was available to the agency at the time of its decision . . . ." (citing Camp v. Pitts, 411 U.S. 138, 142 (1973) (per curiam)). Even assuming Downey submitted this report and the ABCMR misplaced it, the Board's decision still would not have been different had it considered the report because its decision did not turn on the level of severity of Reuter's injury and there was more than substantial evidence in the record demonstrating that Reuter had suffered at least a "slight" injury.

Further, although Downey is correct that AR 207 states that "documents are missing," the document referenced by that notation is a character reference letter written on behalf of Downey by James L. Terry, which appears elsewhere in the record.

that he was deprived of notes needed for his appeal, given that Downey was authorized to conduct Article 15 proceedings for his own subordinates, he was aware that the only official record of the proceedings is the DA Form 2627. Downey had a copy of that form, as well as the documentary evidence from the investigation, which documents enabled him to fully appeal the Article 15 findings.

Finally, in Count I, Downey complains that the Board applied the wrong standard of review. Rather than requiring him to prove that the record of his Article 15 was untrue or unjust by a preponderance of the evidence, as is appropriate under Army Reg. 15-185 ¶ 2-9 (Mar. 31, 2006), the Board held him to a clear and convincing evidence standard, AR 26-27. This was harmless error as the Board found that there was "no evidence" of error or injustice. AR 28. Given the substantial evidence supporting his Article 15, Downey could not have met his burden of proof even under the lower preponderance standard. For these reasons, defendants' motion for summary judgment on Counts I and II will be granted.

III. MOTION TO DISMISS COUNTS III AND IV

A. Standard of Review

To survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss, a complaint must allege facts that "state a plausible claim for relief" and "are sufficient to raise a

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See AR 205-08 (skipping from Enclosure 24 to Enclosure 26); AR 96 (indicating that Plaintiff's "Enclosure 25" to the ABCMR was the Terry letter); AR 264 (letter by Terry entitled "Character Reference").

right to relief above the speculative level." Walters v. McMahen, 684 F.3d 435, 439 (4th Cir. 2012) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Com. v. Twombly, 550 U.S. 544, 555 (2007)). Although a plaintiff "need not forecast evidence sufficient to prove the elements of the claim," the complaint must "allege sufficient facts to establish those elements." Id. (quoting Robertson v. Sea Pines Real Estate Cos., 679 F.3d 278, 291 (4th Cir. 2012)) (internal quotation marks omitted). Thus, "a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555.

In evaluating whether a plaintiff has successfully "nudg[ed] [his] claims across the line from conceivable to plausible," a court must "accept the truthfulness of all factual allegations," Burnette v. Fahey, 687 F.3d 171, 180 (4th Cir. 2012) (quoting Twombly, 550 U.S. at 555); however, "the court need not accept the [plaintiffs] legal conclusions drawn from the facts, nor need it accept as true unwarranted inferences, unreasonable conclusions, or arguments." Philips v. Pitt Cnty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009) (internal quotation marks omitted). "Dismissal for failure to state a claim is proper where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Randall, 95 F.3d at 343 (internal quotation marks omitted).

Lastly, "[a]lthough as a general rule extrinsic evidence should not be considered at the 12(b)(6) stage, [the Fourth Circuit has] held that when a defendant attaches a document to its motion to dismiss, a court may consider it in determining whether to dismiss the

complaint [if] it was integral to and explicitly relied on in the complaint and [if] the plaintiffs do not challenge its authenticity." Am. Chiropractic Ass'n v. Trigon Healthcare, Inc., 367 F.3d 212, 234 (4th Cir. 2004). Under this standard, the administrative record is deemed incorporated into Downey's Amended Complaint because it is integral to this action and its authenticity is not at issue.[15]

B. Discussion

In Count III, Downey claims that defendants' actions deprived him of his right to due process based on alleged defects in how his Article 15 proceeding was conducted. Am. Compl. ¶¶ 246-55. In Count IV, he challenges the defendants' regulations, policies, and procedures, claiming that they deprive an accused, including himself, the right to due process by failing to allow access to notes and transcripts upon which to base an appeal; failing to provide a right to counsel when waiving the right to a trial by court-martial; failing to provide a fair opportunity to be heard before the ABCMR; and denying liberty and property without due process. Am. Compl. ¶¶ 258-61. Defendants have moved to dismiss Counts III and IV on the ground that both counts raise non-justiciable issues and that, even

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[15] The Court's consideration of the administrative record in its review of the motion to dismiss is especially appropriate given that Downey filed his Amended Complaint after defendants submitted the administrative record. See Am. Chiropractic Ass'n, 367 F.3d at 234 ("[T]he primary problem raised by looking to documents outside the complaint—lack of notice to the plaintiff—is dissipated [w]here plaintiff has actual notice . . . and has relied upon these documents in framing the complaint." (internal quotation marks omitted)).

if the issues were justiciable, these counts fail to state a claim because Downey has not pointed to any deprivation of a cognizable liberty or property interest.

Relying on the reasoning in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), which has been adopted by the Fourth Circuit, Downey contends that Counts III and IV are justiciable and that his allegations sufficiently satisfy the threshold pleading requirements to defeat dismissal. To avoid dismissal under the Mindes framework for determining whether a federal court should review an internal military decision, two threshold requirements must be satisfied. "First, there must be an 'allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations.'" Guerra v. Scruggs, 942 F.2d 270, 276 (4th Cir. 1991) (quoting Mindes, 453 F.2d at 201). "Second, the plaintiff must have exhausted the 'available

intraservice corrective measures.'"[16] Id. (quoting Mindes, 453 F.2d at 201).

Defendants characterize Counts III and IV as seeking direct review of the Article 15 proceeding in this Court and argue that such review is impermissible under Brannum v. Lake, 311 F.3d 1127 (D.C. Cir. 2002). In Brannum, the plaintiff, an Air Force member charged with being absent without leave, had chosen to proceed "by way of non-judicial punishment in lieu of trial by court martial." Id. at 1129. He was found guilty of that charge and demoted one rank as a result. Id. In his lawsuit, the plaintiff claimed, among other things, that his rights had been violated by numerous procedural defects in his non-judicial punishment, such as his case having been pre-judged and having been denied copies of the evidence used against him. Id. He

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[16] If these two threshold requirements are met, then the court should use a four-part balancing test that weighs:

> 1. The nature and strength of the plaintiffs challenge to the military determination. . . .
> 2. The potential injury to the plaintiff if review is refused.
> 3. The type and degree of anticipated interference with the military function. Interference per se is insufficient since there will always be some interference when review is granted, but if the interference would be such as to seriously impede the military in the performance of vital duties, it militates strongly against relief.
> 4. The extent to which the exercise of military expertise or discretion is involved. Courts should defer to the superior knowledge and expertise of professionals in matters such as promotions or orders directly related to specific military functions.

Guerra, 942 F.2d at 276 (quoting Mindes, 453 F.2d at 201-02).

sought an injunction setting aside his non-judicial punishment. Id. The D.C. Circuit rejected this claim, relying on Schlesinger v. Councilman, 420 U.S. 738 (1975), explaining that "[t]he acts of a court martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civil courts, by writ of prohibition or otherwise."[17] Id. at 1131 (quoting Schlesinger, 420 U.S. at 746). The court explained that this rule reflects "sensitivity to the special requirements of the military" and found that the rule "surely" applied to "challenges as well to non-judicial punishment offered in lieu of a court martial." Id.

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[17] The Schlesinger Court further elaborated on the principle forbidding judicial interference with military decisions:

> Congress is empowered under Art. I, § 8, to "make Rules for the Government and Regulation of the land and naval Forces." It has, however, never deemed it appropriate to confer on this Court appellate jurisdiction to supervise the administration of criminal justice in the military. Nor has Congress conferred on any Art. III court jurisdiction directly to review court-martial determinations. The valid, final judgments of military courts, like those of any court of competent jurisdiction not subject to direct review for errors of fact or law, have res judicata effect and preclude further litigation of the merits. This Court therefore has adhered uniformly to the general rule that the acts of a court martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civil courts, by writ of prohibition or otherwise.

Schlesinger, 420 U.S. at 746 (internal quotations marks, citations, and footnote omitted). The Court went on to state that "it must be assumed that the military court system will vindicate servicemen's constitutional rights." Id. at 758.

Although Downey failed to distinguish or even address Brannum, other courts, including the Fourth Circuit, have not taken such a limited approach to reviewing non-judicial proceedings under Article 15 and instead will consider claims solely alleging procedural defects. See, e.g., Murphy v. United States, 993 F.2d 871, 873 (Fed. Cir. 1993) ("A court may appropriately decide whether the military followed procedures . . . ."); Bluth v. Laird, 435 F.2d 1065, 1071 (4th Cir. 1970) ("[N]either this Court, nor others to which a similar issue has been presented, has evidenced hesitation in directing the military to comply with its own regulations where it has been shown that a regulation was not followed, and there has been a prima facie showing that a member of the military has been prejudiced thereby."); Sobczak v. United States, 93 Fed. Cl. 625, 632-36 (2010) (addressing veteran's claims that his procedural rights were violated by the United States Marine Corps' failure to follow applicable regulations regarding his non-judicial punishment), aff'd, 415 F. App'x 247 (Fed. Cir. 2011). Given this authority, the Court will address Downey's claims that Milley failed to follow certain Army Regulations in conducting the hearing and thereby deprived him of the limited procedural rights to which he was entitled. Specifically, in Count III, Downey claims he: was denied the ability to present a full defense to the charges in violation of Army Reg. 27-10 ¶ 3-18(e) (Oct. 3, 2011); was not afforded the presumption of innocence and was found guilty on less than a beyond a reasonable doubt in violation of Army Reg. 27-10 ¶ 3-18(*l*) (Oct. 3, 2011); and was denied the ability to collect and proffer evidence and witness testimony in his favor. He also claims that his election of non-judicial punishment was not made knowingly and voluntarily.

The factual allegations underlying Count III do not plausibly support any of these procedural claims, particularly in light of the evidence in the administrative record. See Am. Compl. ¶¶ 142-81 (describing Downey's Article 15 proceeding). Downey was in fact able to call witnesses and present evidence, as both Justin Overholt and Simbro testified in his favor. Id. ¶¶ 164-65. As the unit's physician assistant, Overholt had performed a follow-up examination of Reuter within 36 hours of his trip to the emergency room and, based on that examination, he believed that Reuter's nose was not fractured. AR 66; Am. Compl. ¶¶ 123-26. Although Downey alleges that Milley disregarded these witnesses' testimony, id. ¶¶ 164-65, Milley had the authority as the decision maker and fact finder to afford each witness's testimony as much or as little weight as he saw fit. In contrast to his claims that he did not have a reasonable opportunity to speak or defend himself or to present evidence, Downey did speak on his own behalf at the hearing and also submitted multiple letters of support and a sworn written statement providing his version of events and his reasons for taking the actions he did.[18] AR 217-21; Am. Compl. ¶ 166, 168-69. Tellingly, Downey does not identify which witnesses he was prevented from calling and how such testimony would have advanced his

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[18] Although this claim is vague, it appears Downey's main complaint is that he was not permitted to fully elaborate on his accident defense, his reasons behind his actions, and his argument that his use of force was lawful, AR 87-88, 91, 93; however, Downey did explain his accident defense, intentions, and argument that his use of force was lawful in his sworn statement and to the investigating officer, who credited Downey's claim that he had not meant to harm Reuter. AR 333.

defense.[19] Downey's claims that the evidence did not support a finding of guilt beyond a reasonable doubt and that he was not afforded a presumption of innocence are conclusory and not supported by factual allegations. Moreover, there was more than enough evidence in the record for Milley to find Downey guilty beyond a reasonable doubt of assault consummated by a battery.

Downey further claims that his election of non-judicial punishment and his waiver of the right to counsel were not knowing, voluntary, and intelligent. There is no basis in the record supporting these claims. "Article 15 is an 'administrative method of dealing with the most minor offenses,' thus, the fifth and sixth amendment rights applicable to criminal proceedings do not apply to Article 15 proceedings." Dumas v. United States, 620 F.2d 247, 252 (Ct. Cl. 1980) (quoting Middendorf, 425 U.S. at 31-32). Army Regulations do provide the right to have a spokesperson present during an Article 15 who may be an attorney; however, Downey chose not to exercise this right. Downey also claims that his election of non-judicial punishment was not knowing, voluntary, and intelligent because the waiver was conducted without his counsel's presence. Pl.'s Opp'n 37. This argument is meritless. Downey had the right to consult with counsel, and did consult with appointed military counsel, before going into the hearing at which he chose to waive trial by court-martial. His decision not to bring his military counsel with him into the hearing as his spokesperson does not

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[19] Downey alleges that Milley did not call Reuter, Am. Compl. ¶ 173; however, Downey does not allege that he asked to call Reuter.

constitute a violation of any rights. Moreover, it is completely implausible that Downey, as a Lieutenant Colonel and squadron commander authorized to administer non-judicial punishment to his subordinates, was unaware of the contours of the Article 15 proceeding he was choosing.

Finally, Downey claims that he was denied access to notes of others who were at the Article 15 hearing. Downey points to no regulation requiring such access. Moreover, as non-adversarial, non-judicial proceedings, Article 15 proceedings are not transcribed or recorded; the only record of the proceeding is the DA Form 2627, which Downey received. See Army Reg. 27-10 ¶¶ 3-36 to 3-37 (Oct. 3, 2011).

The above analysis comports with the Mindes framework for determining whether a court should review a military decision. Downey's claims in Counts III and IV fail the first threshold requirement that "there must be an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations." Guerra, 942 F.2d at 276 (internal quotation marks omitted). The Count III claims alleging violations of Army Regulations are unsupported and implausible in light of the allegations in the Amended Complaint and the record evidence showing that the regulations cited were in fact followed.

In Count IV, Downey claims that the regulations, policies, and procedures themselves violated his constitutional right to due process. To state a procedural due process claim, a plaintiff must plausibly allege an actual deprivation of a protected liberty or

property interest. Kendall v. Balcerzak, 650 F.3d 515, 528 (4th Cir. 2011). Downey has failed to do so. Downey was neither discharged nor demoted; instead, the only actual deprivations Downey experienced were being removed from the National War College ("NWC") attendance list, being relieved from command, and his stigmatization as an assaulter. Pl.'s Opp'n 39. The first two deprivations are insufficient to support a due process claim because there is no protected liberty or property interest in NWC attendance or a command position. C.f. Wilhelm v. Caldera, 90 F. Supp. 2d 3, 8 (D.D.C. 2000) (collecting cases holding that there is no right to continued military service or its attendant benefits and privileges), aff'd, 6 F. App'x 3 (D.C. Cir. 2001). Similarly, Downey's allegation of being stigmatized does not satisfy the requirements for showing that he was deprived of a protected liberty interest in his good name and reputation. See Guerra, 942 F.2d at 278 ("A critical element of a claimed invasion of a reputational liberty interest . . . is the falsity of the government's asserted basis for the employment decision at issue." (emphasis in original)).

IV. UNLAWFUL COMMAND INFLUENCE

In both Counts II and III, Downey raises claims regarding unlawful command influence ("UCI") based on concerns over the adverse media attention the incidents at the ball garnered in the wake of the repeal of DADT. Specifically, Downey claims that UCI tainted the Article 15 investigation and hearing and also tainted "[a]ll proceedings concerning" him, presumably

including the ABCMR's decision.[20] See Am. Compl. ¶¶ 240, 250, 252; see also 10 U.S.C. § 837 (prohibiting UCI). In his application to the Board, Downey pointed to a Department of Defense press release indicating that the repeal of DADT was being implemented successfully, AR 84; however, he did not allege that either of the two high-level officials quoted in the press release made any efforts to influence his Article 15 proceeding. Such statements to the media by high-level officials unconnected to the proceeding at issue are far too speculative to constitute UCI. See, e.g., United States v. Ashby, 68 M.J. 108, 128-29 (C.A.A.F. 2009). Downey also pointed to an article published online by the Huffington Post on April 20, 2012, AR 85-86, which described Robinson's perspective of the events of the ball but did not name any individuals or even specify the military base on which the ball was held. AR 252-53. Moreover, Downey has conceded that "there [was] no express evidence of bias by the presiding Article 15 Officer." AR 86. Any claim of UCI also ignores Milley's dismissal of the second charge and acquittal of Downey on the third charge.

Lastly, Downey referenced for the first time in this litigation a September 2012 New York Times article[21]

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[20] The only UCI claim in Count II states, "The investigations and findings against LTC Downey were tainted by unlawful command influence." Am. Compl. ¶ 240. Because Count II is framed as an attack on the ABCMR's decision rather than as a direct attack on the Article 15, plaintiff seemingly intended to claim that the ABCMR's failure to specifically address his UCI allegations rendered its decision unlawful under APA standards.

[21] Specifically, Downey emphasizes the article's paraphrased statement by a member of an LGBT veteran advocacy group that

about the status of gay service members one year after the repeal of DADT and a clip from a television interview[22] of Robinson that was published in June 2014. Because the New York Times article was not part of the record before the ABCMR, it will not be considered.[23] See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."). Moreover, the statements contained in the New York Times article and interview clip do not plausibly imply that Milley or the ABCMR were unlawfully influenced to reach an improper decision. In sum, Downey has not alleged facts which, even if true, would have constituted unlawful command influence in either his Article 15 or the ABCMR proceeding. This conclusion with respect to the ABCMR proceeding is bolstered by the Board being composed of civilians not within any military chain of command.

"after the female officers [Robinson and Parsons] contacted his organization, the Pentagon investigated and the squadron commander and the sergeant major were relieved of their jobs and forced to retire." See Pl.'s Opp'n, Ex. 2 (New York Times article entitled One Year Later, Military Says Gay Policy Is Working, available at http://www.nytimes.com/2012/09/20/us/don't-ask-don't-tell-anniversary-passes-with-little-note.html?_r=0).

[22] Pl.'s Opp'n, Ex. 3 (TakePart Live, Openly Gay in The Military?, (June 12, 2014), https://www.youtube.com/watch?v=yVibI6PzJ6I).

[23] Although Downey argues that he is entitled to present this article as new evidence because it was not available when he petitioned the ABCMR, see Pl.'s Reply 18, the article is dated September 19, 2012, which predates his August 16, 2013, application to the ABCMR.

For these reasons, Downey's UCI claims fail under both the summary judgment and motion to dismiss standards of review.

V. CONCLUSION

As summarized in seven pages in his Amended Complaint, Downey had an exemplary military record before the events in April 2012. He served three combat tours of duty and earned three Bronze Stars and seven Air Medals, including an Air Medal with a distinction for valor in combat. Am. Compl. ¶¶ 14-15, 22. In addition, he was selected to serve as the Presidential Airlift Coordinator for the White House between 2008 and 2010; held various command positions during his career; received consistently exemplary OERs; and received numerous glowing evaluations by commanding officers. See Am. Compl. ¶¶ 18-21, 23-24, 26, 30.

That record is not relevant to the issues before this Court. As discussed above, the informal Article 15 proceeding that Downey knowingly and voluntarily chose was conducted properly, and the ABCMR's affirmance of that proceeding was neither arbitrary, capricious, contrary to law, nor unsupported by substantial evidence. Moreover, Downey was not denied due process because the process he was due was in fact followed and he was not deprived of any constitutionally recognized liberty or property interest. For these reasons, the defendants' motions to dismiss and for summary judgment will be granted by an Order to be issued with this Memorandum Opinion.

Entered this 19th day of June, 2015.

Alexandria, Virginia

/s/ LMB
Leonie M. Brinkema
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

1:14-cv-1503 (LMB/TCB)

[Filed June 19, 2015]

CHRISTOPHER P. DOWNEY, Plaintiff,	)
v.	)
UNITED STATES DEPARTMENT OF THE ARMY, and JOHN M. McHUGH, Secretary of the United States Department of the Army, Defendants.	)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, Defendant's [sic] Motion to Dismiss and Motion for Summary Judgment [Dkt. No. 31] is GRANTED, Plaintiff's Cross-Motion for Summary Judgment [Dkt. No. 36] is DENIED, and it is hereby

ORDERED that judgment be and is entered in favor of the defendants.

The Clerk is directed to enter judgment in favor of the defendants under Fed. R. Civ. P. 58 and to forward copies of this Order and the accompanying Memorandum Opinion to counsel of record.

Entered this 19th day of June, 2015.

Alexandria, Virginia

/s/ LMB
Leonie M. Brinkema
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 1:14cv1503 (LMB/TCB)

[Filed June 19, 2015]

Christopher P. Downey, Plaintiff,	)
v.	)
United States Department of the Army, et al., Defendant.	)

JUDGMENT

Pursuant to the order of this Court entered on 6/19/2015 and in accordance with Federal Rules of Civil Procedure 58, JUDGMENT is hereby entered in favor of the Defendants and against the Plaintiff.

FERNANDO GALINDO, CLERK OF COURT

By: /s/
Richard Banke
Deputy Clerk

Dated: 6/19/2015
Alexandria, Virginia

APPENDIX C

IN THE CASE OF:
BOARD DATE: 17 October 2013
DOCKET NUMBER: AR20130015629

THE BOARD CONSIDERED THE FOLLOWING EVIDENCE:

1. Application for correction of military records (with supporting documents provided, if any).

2. Military Personnel Records and advisory opinions (if any).

THE APPLICANT'S REQUEST, STATEMENT, AND EVIDENCE:

1. The applicant requests removal of the DA Form 2627 (Record of Proceedings Under Article 15, Uniform Code of Military Justice (UCMJ)), dated 6 May 2012, from the restricted section of his Army Military Human Resource Record (AMHRR).

2. The applicant states the imposition of the Article 15 and the ensuing punishment resulted in a clear injustice. The Article 15 found him guilty of assault consummated by battery. A review of the facts and circumstances surrounding this incident will show that he is not guilty of the charge. He used no unlawful force. His actions as a (squadron) commander were authorized and expected under the circumstances. His intentions were not to harm but to lower a camera that was capturing images of two officers in uniform engaged in inappropriate and sensational behavior.

Additionally, a 3-member Show Cause Board found no evidence of misconduct. This board found the allegations of derogatory activity resulting in a referred Officer Evaluation Report (OER) and the allegation of conduct unbecoming an officer were not supported by the preponderance of the evidence. If bodily harm is inflicted unintentionally and without culpable negligence, there is no battery.

3. The applicant provides:

* Contested Article 15
* DA Form 1574 (Report of Proceedings by Investigating Officer (IO)/Board of Officers), with findings and recommendations
* Summarized Record of Board of Inquiry
* General Officer Memorandum of Reprimand (GOMOR)
* General Officer Punitive Letter of Reprimand
* Relief for Cause Memorandum
* A 31-page self-authored statement
* A binder consisting of 41 enclosures, including:

* GO letter of recommendation to National War College
* GO letter of congratulations
* X-ray report
* Army Regulation (AR) 15-6 (Procedures for Investigating Officers and Board of Officers) findings and recommendations
* Hospital after care instructions
* Law memorandum of a captain
* Multiple sworn statements of various military personnel
* Multiple verbatim testimonies or affidavits of various military personnel

* Multiple character reference letters
* Multiple legal arguments from attorneys
* Multiple email, blogs, and Facebook comments
* Multiple press releases/newspaper articles
* Other enclosures, articles, and documents

COUNSEL'S REQUEST, STATEMENT, AND EVIDENCE:

1. Counsel did not make a statement, an argument, or provide additional evidence. However, on 10 October 2013, counsel submitted a brief, as follows, and requested the applicant personally appear before the Board. Counsel states:

a. The applicant received an Article 15 on 4 June 2012. The Commander, 10th Mountain Division, Fort Drum, NY was the commander who made the determination of guilt in the matter. However, he did not conduct the hearing in a fair and impartial manner. His determination was made on an incomplete investigation and involved outside influence by matters not within the scope of the investigation. Furthermore, his focus was on the "breaking" of the "victim's" nose. It was determined by the medical treatment facility and the Soldier's unit physician's assistant that the "victim" did not have a broken nose. The Soldier was cleared for all duty less than 36 hours after the incident.

b. A Show Cause Board was held at the Office of the Staff Advocate, Military District of Washington on 9 July 2013. The board, consisting of two colonels and one lieutenant colonel (LTC) found the allegation of derogatory activity resulting in a referred OER and the allegation of conduct unbecoming an officer in the

notification of proposed separation were not supported by a preponderance of the evidence. This was after the board heard testimony from multiple witnesses to the events which formed the basis of the Article 15. Essentially, the board overturned the findings of the Commander, 10th Mountain Division, unfounded the misconduct, and recommended the applicant be retained on active duty.

c. The applicant did not commit assault consummated by battery as was determined by the Commander of the 10th Mountain Division. As the board reviews Article 128 and the facts as presented at the Show Cause Board, the Board will clearly see that the applicant's actions did not meet the elements of this charge. Furthermore, within the definition of what does not constitute battery, it states "if bodily harm is inflicted unintentionally and without culpable negligence, there is no battery." The Soldier himself is on record stating that he did not believe the applicant's actions were done with the intent to assault him and that the applicant's actions were done in an effort to prevent him from taking photographs.

2. On 15 October 2013, counsel provided a memorandum reiterating the above contentions.

CONSIDERATION OF EVIDENCE:

1. The applicant is currently a Regular Army (RA) aviation LTC. He was appointed as an RA commissioned officer and entered active duty on 19 June 1992.

2. He has served in various staff and leadership positions in a variety of stateside or overseas assignments and he was promoted to LTC on 1 April

2009. He was assigned as the Squadron Commander, 6th Squadron, 6th Cavalry (Task Force (TF), 10th Combat Aviation Brigade (CAB), 10th Mountain Division, Fort Drum, NY.

3. On 18 April 2012, an IO was appointed by the Commanding General (CG), 10th Mountain Division to investigate the circumstances surrounding an incident that occurred during a unit function. In his AR 15-6 investigation, dated 4 May 2012, the IO provided facts, findings, and recommendations, as follows:

a. On 14 April 2012, 6th Squadron, 6th Cavalry held a ball at Fort Dum, NY, that began at 1700 hours and ended after 0000 hours on 15 April 2012. Around 2300 hours, an officer alerted the applicant of what he believed to be inappropriate behavior on the dance floor. He witnessed two female officers, Captain (CPT) KR and Second Lieutenant (2LT) HP, dancing together, "making out," and being the subject of various photographers. The applicant approached two Soldiers holding cameras, First Lieutenant (1LT) JH and specialist (SPC) JR. The applicant attempted to take away SPC JR's camera and in his attempt, he knocked the camera into SPC JR's face. The Soldier needed medical attention as he stained a fractured nose and a concussion. He then attempted to take 1LT JH's camera away while questioning him why he was taking pictures. The 1LT replied that he did not understand the concern as he was taking pictures of his commander and her husband. The applicant later apologized to the SPC and admitted his actions were wrong and that he was concerned that someone may publish the pictures without the Soldiers' permission.

b. The IO found, in pertinent part, sufficient evidence that:

* the applicant pushed a camera held by SPC JR into his face with enough force to fracture his nose, an assault consummated by battery
* the applicant probably engaged in obstructions of justice by encouraging CPT KR not to report the incident outside the Squadron
* alcohol was potentially a contributing factor in the incident between the applicant, SPC JR, and CPT KR
* the applicant updated his chain of command of the incident
* the applicant (and his command sergeant major (CSM)) singled out CPT KR and 2LT HP, thus violating the "Don't ask, Don't tell' policy

c. The IO recommended, in pertinent part, the applicant receive an Article 15 for the offense of assault consummated by a battery.

4. On 6 May 2012, the CG, 10th Mountain Division, notified the applicant that he was considering whether he should be punished under Article 15 of the UCMJ for the following misconduct:

* unlawfully striking SPC JR on his face with either his hands or a camera which he pushed into his face
* being disorderly while in uniform, to the disgrace of the armed forces
* wrongfully endeavor to influence the actions of CPT KR, a victim of assault by the Squadron CSM, by calling her and discouraging her from filing a complaint with the Military Police regarding said misconduct

5. On 30 May 2012, at a closed hearing, the applicant declined trial by a court-martial. He was found guilty of one charge and accepted nonjudicial punishment (NJP) under the provisions of Article 15 of the UCMJ for unlawfully striking SPC JR on his face with a camera which he pushed into his face. The imposing officer dismissed the second charge of being disorderly and found the applicant not guilty of the third charge of endeavoring to influence the actions of CPT KR.

6. On 4 June 2012, the CG imposed no punishment other than imposition of the Article 15 filed in the restricted section of the applicant's AMHRR.

7. Also on 4 June 2012, a series of actions took place. The applicant was relieved from command, received an administrative GOMOR, and a punitive letter of reprimand.

8. On 8 July 2012, the applicant appealed to the CG, Forces Command (FORSCOM). After reviewing the applicant's case and finding the proceedings were conducted in accordance with law and regulation, the CG, FORSCOM denied his appeal on 29 June 2012. The applicant acknowledged notification of this denial on 10 August 2012.

9. On 19 July 2013, an administrative elimination board convened at the Military District of Washington to determine if the applicant should be separated for misconduct, moral or professional dereliction. After considering the evidence before it, the board found the allegations of derogatory activity resulting in a referred OER and the allegation of conduct unbecoming an officer were not supported by the preponderance of the

evidence. The board recommended the applicant be retained on active duty.

10. A review of his AMHRR reveals that the contested DA Form 2627 together with the allied documents is, in fact, filed in the restricted section of his AMHRR.

11. The applicant provides:

a. A letter, dated 19 September 2011, from the imposing officer, prior to the Article 15, recommending the applicant for selection to the National War College.

b. A letter, dated 1 April 2012, also from the imposing officer, prior to the Article 15, for his unit being recognized as the Active Aviation Unit of the Year for 2011 by the Army Aviation Association of America.

c. Emergency Department Encounter Note, dated 15 April 2012, showing SPC JR was treated for an altercation with face and neck pain, and a Hospital After Care Instruction sheet, dated 15 April 2012 for SPC JR.

d. A 31-page self-authored statement wherein he essentially argues that he is not guilty of the assault charge.

e. Multiple sworn statements of various military personnel; multiple verbatim testimonies or affidavits of various military personnel; multiple character reference letters, multiple legal arguments from attorneys; multiple emails, blogs, Facebook comments; multiple press release/newspaper articles; and other enclosures, articles, and documents, pertaining to the incident.

12. Army Regulation 27-10 (Military Justice) prescribes the policies and procedures pertaining to the administration of military justice and implements the Manual for Courts-Martial. It provides that a commander should use nonpunitive administrative measures to the fullest extent to further the efficiency of the command before resorting to NJP under the UCMJ. Use of NJP is proper in all cases involving minor offenses in which nonpunitive measures are considered inadequate or inappropriate. NJP may be imposed to correct, educate, and reform offenders who the imposing commander determines cannot benefit from less stringent measures; to preserve a Soldier's record of service from unnecessary stigma by record of court-martial conviction; and to further military efficiency by disposing of minor offenses in a manner requiring less time and personnel than trial by court-martial.

a. Paragraph 3-6 addresses filing of NJP and provides that a commander's decision whether to file a record of NJP in the performance section of a Soldier's AMHRR is as important as the decision relating to the imposition of the NJP itself. In making a filing determination, the imposing commander must weigh carefully the interests of the Soldier's career against those of the Army to produce and advance only the most qualified personnel for positions of leadership, trust, and responsibility. In this regard, the imposing commander should consider the Soldier's age, grade, total service (with particular attention to the Soldier's recent performance and past misconduct), and whether the Soldier has more than one record of NJP directed for filing in the restricted section. However, the interests of the Army are compelling when the record

of NJP reflects unmitigated moral turpitude or lack of integrity, patterns of misconduct, or evidence of serious character deficiency or substantial breach of military discipline. In such cases, the record should be filed in the performance section.

b. Paragraph 3-37b(2) states that for Soldiers in the ranks of sergeant and above, the original will be sent to the appropriate custodian for filing in the AMHRR. The decision to file the original DA Form 2627 in the performance section or restricted section of the AMHRR will be made by the imposing commander at the time punishment is imposed. The filing decision of the imposing commander is subject to review by superior authority.

c. Paragraph 3-43 contains guidance on the transfer or removal of DA Forms 2627 from the AMHRR. It states that applications for removal of an Article 15 from the AMHRR based on an error or injustice will be made to the Army Board for Correction of Military Records (ABCMR). It further indicates that there must be clear and compelling evidence to support the removal of a properly-completed, facially-valid DA Form 2627 from a Soldier's record by the ABCMR.

13. AR 600-8-104 (AMHRR Management) provides policies, operating tasks, and steps governing the AMHRR. The naming convention AMHRR replaces the official military personnel file (OMPF). Folders and documents previously authorized for filing in any part of the OMPF will remain in the AMHRR.

a. Paragraph 2-3 (Composition of the AMHRR) of AR 600-8-104 provides that the restricted section of the AMHRR is used for historical data that may normally

be improper for viewing by selection boards or career managers. The release of information in this section is controlled. It will not be released without written approval from the Commander, U.S. Army Human Resources Command, or the Department of the Army Headquarters selection board proponent. This paragraph also provides that documents in the restricted section of the AMHRR are those that must be permanently kept to maintain an unbroken, historical record of a Soldier's service, conduct, duty performance, and evaluation periods; show corrections to other parts of the AMHRR; record investigation reports and appellate actions; and protect the interests of the Soldier and the Army.

b. Table B-1 is a compilation of all forms and documents which have been approved by Department of the Army for filing in the AMHRR and/or the interactive Personnel Electronic Records Management System. Table B-1 states Article 15, UCMJ, is filed in either the "Performance" or the "Restricted" folder as directed by item 4b or 5 of DA Form 2627.

14. Army Regulation 15-185 (ABCMR) states ABCMR members will review all applications that are properly before them to determine the existence of an error or injustice; direct or recommend changes in military records to correct the error or injustice, if persuaded that material error or injustice exists and that sufficient evidence exists on the record; recommend a hearing when appropriate in the interest of justice; or deny applications when the alleged error or injustice is not adequately supported by the evidence and when a hearing is not deemed proper. The ABCMR will decide cases on the evidence of record. It is not an

investigative body. The ABCMR may, in its discretion, hold a hearing. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

DISCUSSION AND CONCLUSIONS:

1. The evidence of record confirms the applicant violated the UCMJ while serving as an LTC, in a leadership position and subsequently accepted NJP on 4 June 2012 for unlawfully striking a Soldier on his face with a camera which he pushed into his face. The imposing commander directed filing the Article 15 in the restricted section of his AMHRR. This is where the subject Article 15 is currently filed.

2. The ABCMR does not normally reexamine issues of guilt or innocence under Article 15 of the UCMJ. This is the imposing commander's function and it will not be upset by the ABCMR unless the commander's determination is clearly unsupported by the evidence. The applicant was provided a defense attorney, was given the right to demand trial by court-martial, and was afforded the opportunity to appeal the Article 15 through the proper channels. The applicant further appealed this Article 15 to the next higher commander and his appeal was denied.

3. The administrative separation board was not tasked to determine his guilt or innocence. It was held to determine if he should be separated. The fact that members of the administrative separation board found the allegations of derogatory activity resulting in a referred OER and the allegation of conduct unbecoming an officer were not supported by the preponderance of

the evidence does not mean the imposing officer and - the person with the UCMJ authority -erred or committed an error. These are two separate actions and one does not negate the other.

4. His NJP proceedings were conducted in accordance with law and regulation and his Article 15 and allied documents are properly filed in the restricted portion of his AMHRR as directed by the imposing commander. There is no evidence of record and he provides no evidence to show the DA Form 2627 is untrue or unjust. In order to remove a document from the AMHRR, there must be clear and convincing evidence showing the document is untrue or unjust.

5. The applicant's request for a personal appearance hearing was carefully considered. However, by regulation, an applicant is not entitled to a hearing before the ABCMR. Hearings may be authorized by a panel of the ABCMR or by the Director of the ABCMR. In this case, the evidence of record and independent evidence provided by the applicant is sufficient to render a fair and equitable decision at this time. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

6. In the absence of an error or an injustice, there is no reason to remove it from his records.

BOARD VOTE:

_____ _____ _____ GRANT FULL RELIEF

_____ _____ _____ GRANT PARTIAL RELIEF

_____ _____ _____ GRANT FORMAL HEARING

____X___ ____X___ ___X__ _ DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

_____ _ X _____ ___
CHAIRPERSON

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

ABCMR Record of Proceedings (cont) AR20130015629

3

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

1

ABCMR Record of Proceedings (cont) AR20130015629

2

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

1

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1870
(1:14-cv-01503-LMB-TCB)

[Filed June 12, 2017]

CHRISTOPHER P. DOWNEY,
Plaintiff - Appellant,

v.

UNITED STATES DEPARTMENT OF THE ARMY; ERIK FANNING, Secretary of the United States Department of the Army,
Defendants - Appellees.

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Gregory, Judge Motz, and Judge Bennett.

For the Court
/s/ Patricia S. Connor, Clerk

APPENDIX E

2013 32 CFR 581.3

2013 Code of Federal Regulations Archive

LEXISNEXIS' CODE OF FEDERAL REGULATIONS > TITLE 32 -- NATIONAL DEFENSE > SUBTITLE A -- DEPARTMENT OF DEFENSE > CHAPTER V -- DEPARTMENT OF THE ARMY > SUBCHAPTER F -- PERSONNEL > PART 581 -- PERSONNEL REVIEW BOARD

§ 581.3 Army Board for Correction of Military Records.

(a) General --

(1) Purpose. This section prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the Army Board for Correction of Military Records (ABCMR).

(2) Statutory authority. Title 10 U.S.C Section 1552, Correction of Military Records: Claims Incident Thereto, is the statutory authority for this regulation.

(b) Responsibilities --

(1) The Secretary of the Army. The Secretary of the Army will oversee the operations of the ABCMR. The Secretary will take final action on applications, as appropriate.

(2) The ABCMR Director. The ABCMR Director will manage the ABCMR's day-to-day operations.

(3) The chair of an ABCMR panel. The chair of a given ABCMR panel will preside over the panel, conduct a hearing, maintain order, ensure the applicant receives a full and fair opportunity to be heard, and certify the written record of proceedings in pro forma and formal hearings as being true and correct.

(4) The ABCMR members. The ABCMR members will --

(i) Review all applications that are properly before them to determine the existence of error or injustice.

(ii) If persuaded that material error or injustice exists, and that sufficient evidence exists on the record, direct or recommend changes in military records to correct the error or injustice.

(iii) Recommend a hearing when appropriate in the interest of justice.

(iv) Deny applications when the alleged error or injustice is not adequately supported by the evidence, and when a hearing is not deemed proper.

(v) Deny applications when the application is not filed within prescribed time limits and when it is not in the interest of justice to excuse the failure to file in a timely manner.

(5) The director of an Army records holding agency. The director of an Army records holding agency will –

(i) Take appropriate action on routine issues that may be administratively corrected under authority inherent in the custodian of the records and that do not require ABCMR action.

(ii) Furnish all requested Army military records to the ABCMR.

(iii) Request additional information from the applicant, if needed, to assist the ABCMR in conducting a full and fair review of the matter.

(iv) Take corrective action directed by the ABCMR or the Secretary of the Army.

(v) Inform the Defense Finance and Accounting Service (DFAS), when appropriate; the applicant; applicant's counsel, if any; and interested Members of Congress, if any, after a correction is complete.

(vi) Return original records of the soldier or former soldier obtained from the Department of Veterans Affairs (VA).

(6) The commanders of Army Staff agencies and commands. The commanders of Army Staff agencies and commands will --

(i) Furnish advisory opinions on matters within their areas of expertise upon request of the ABCMR, in a timely manner.

(ii) Obtain additional information or documentation as needed before providing the opinions to the ABCMR.

(iii) Provide records, investigations, information, and documentation upon request of the ABCMR.

(iv) Provide additional assistance upon request of the ABCMR.

(v) Take corrective action directed by the ABCMR or the Secretary of the Army.

(7) The Director, Defense Finance and Accounting Service (DFAS). At the request of the ABCMR staff, the Director, DFAS, will --

(i) Furnish advisory opinions on matters within the DFAS area of expertise upon request.

(ii) Obtain additional information or documentation as needed before providing the opinions.

(iii) Provide financial records upon request.

(iv) On behalf of the Army, settle claims that are based on ABCMR final actions.

(v) Report quarterly to the ABCMR Director on the monies expended as a result of ABCMR action and the names of the payees.

(c) ABCMR establishment and functions.

(1) ABCMR establishment. The ABCMR operates pursuant to law (10 U.S.C. 1552) within the Office of the Secretary of the Army. The ABCMR consists

of civilians regularly employed in the executive part of the Department of the Army (DA) who are appointed by the Secretary of the Army and serve on the ABCMR as an additional duty. Three members constitute a quorum.

(2) ABCMR functions.

(i) The ABCMR considers individual applications that are properly brought before it. In appropriate cases, it directs or recommends correction of military records to remove an error or injustice.

(ii) When an applicant has suffered reprisal under the Military Whistleblower Protection Act 10 U.S.C. 1034 and Department of Defense Directive (DODD) 7050.6, the ABCMR may recommend to the Secretary of the Army that disciplinary or administrative action be taken against any Army official who committed an act of reprisal against the applicant.

(iii) The ABCMR will decide cases on the evidence of record. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing in 10 U.S.C. 1034 and DODD 7050.6) or request additional evidence or opinions.

(d) Application procedures -- (1) Who may apply. (i) The ABCMR's jurisdiction under 10 U.S.C. 1552 extends to any military record of the DA. It is the nature of the record and the status of the applicant that define the ABCMR's jurisdiction.

(ii) Usually applicants are soldiers or former soldiers of the Active Army, the U.S. Army Reserve (USAR), and in certain cases, the Army National Guard of the United States (ARNGUS) and other military and civilian individuals affected by an Army military record. Requests are personal to the applicant and relate to military records. Requests are submitted on DD Form 149 (Application for Correction of Military Record under the Provisions of 10 U.S.C. 1552). Soldiers need not submit applications through their chain of command.

(iii) An applicant with a proper interest may request correction of another person's military records when that person is incapable of acting on his or her own behalf, missing, or deceased. Depending on the circumstances, a child, spouse, parent or other close relative, heir, or legal representative (such as a guardian or executor) of the soldier or former soldier may be able to demonstrate a proper interest. Applicants must send proof of proper interest with the application when requesting correction of another person's military records.

(2) Time limits. Applicants must file an application within 3 years after an alleged error or injustice is discovered or reasonably should have been discovered. The ABCMR may deny an untimely application. The ABCMR may excuse untimely filing in the interest of justice.

(3) Administrative remedies. The ABCMR will not consider an application until the applicant has exhausted all administrative remedies to correct the alleged error or injustice.

(4) Stay of other proceedings. Applying to the ABCMR does not stay other proceedings.

(5) Counsel.

(i) Applicants may be represented by counsel, at their own expense.

(ii) See DODD 7050.6 for provisions for counsel in cases processed under 10 U.S.C. 1034.

(e) Actions by the ABCMR Director and staff -- (1) Criteria. The ABCMR staff will review each application to determine if it meets the criteria for consideration by the ABCMR. The application may be returned without action if --

(i) The applicant fails to complete and sign the application.

(ii) The applicant has not exhausted all other administrative remedies.

(iii) The ABCMR does not have jurisdiction to grant the requested relief.

(iv) No new evidence was submitted with a request for reconsideration.

(2) Burden of proof. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.

(3) ABCMR consideration.

(i) A panel consisting of at least three ABCMR members will consider each application that is properly brought before it. One panel member will serve as the chair.

(ii) The panel members may consider a case on the merits in executive session or may authorize a hearing.

(iii) Each application will be reviewed to determine --

(A) Whether the preponderance of the evidence shows that an error or injustice exists and --

(1) If so, what relief is appropriate.

(2) If not, deny relief.

(B) Whether to authorize a hearing.

(C) If the application is filed outside the statute of limitations and whether to deny based on untimeliness or to waive the statute in the interest of justice.

(f) Hearings. ABCMR hearings. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

(g) Disposition of applications.

(1) ABCMR decisions. The panel members' majority vote constitutes the action of the ABCMR. The

ABCMR's findings, recommendations, and in the case of a denial, the rationale will be in writing.

(2) ABCMR final action. (i) Except as otherwise provided, the ABCMR acts for the Secretary of the Army, and an ABCMR decision is final when it --

(A) Denies any application (except for actions based on reprisals investigated under 10 U.S.C. 1034).

(B) Grants any application in whole or in part without a hearing when --

(1) The relief is as recommended by the proper staff agency in an advisory opinion; and

(2) Is unanimously agreed to by the ABCMR panel; and

(3) Does not involve an appointment or promotion requiring confirmation by the Senate.

(ii) The ABCMR will forward the decisional document to the Secretary of the Army for final decision in any case in which --

(A) A hearing was held.

(B) The facts involve reprisals under the Military Whistleblower Protection Act, confirmed by the DOD Inspector General (DODIG) under 10 U.S.C. 1034 and DODD 7050.6.

(C) The ABCMR recommends relief but is not authorized to act for the Secretary of the Army on the application.

(3) Decision of the Secretary of the Army.

(i) The Secretary of the Army may direct such action as he or she deems proper on each case. Cases returned to the Board for further consideration will be accompanied by a brief statement of the reasons for such action. If the Secretary does not accept the ABCMR's recommendation, adopts a minority position, or fashions an action that he or she deems proper and supported by the record, that decision will be in writing and will include a brief statement of the grounds for denial or revision.

(ii) The Secretary of the Army will issue decisions on cases covered by the Military Whistleblower Protection Act (10 U.S.C. 1034 and DODD 7050.6). In cases where the DODIG concluded that there was reprisal, these decisions will be made within 180 days after receipt of the application and the investigative report by the DODIG, the Department of the Army Inspector General (DAIG), or other Inspector General offices. Unless the full relief requested is granted, these applicants will be informed of their right to request review of the decision by the Secretary of Defense.

(4) Reconsideration of ABCMR decision. An applicant may request the ABCMR to reconsider a Board decision under the following circumstances:

(i) If the ABCMR receives the request for reconsideration within 1 year of the ABCMR's original decision and if the ABCMR has not previously reconsidered the matter, the ABCMR staff will review the request to determine if it contains evidence (including, but not limited to, any facts or arguments as to why relief should be granted) that was not in the record at the time of the ABCMR's prior consideration. If new evidence has been submitted, the request will be submitted to the ABCMR for its determination of whether the new evidence is sufficient to demonstrate material error or injustice. If no new evidence is found, the ABCMR staff will return the application to the applicant without action.

(ii) If the ABCMR receives a request for reconsideration more than 1 year after the ABCMR's original decision or after the ABCMR has already considered one request for reconsideration, then the case will be returned without action and the applicant will be advised the next remedy is appeal to a court of appropriate jurisdiction.

(h) Claims/Expenses -- (1) Authority. (i) The Army, by law, may pay claims for amounts due to applicants as a result of correction of military records.

(ii) The Army may not pay any claim previously compensated by Congress through enactment of a private law.

(iii) The Army may not pay for any benefit to which the applicant might later become entitled under the laws and regulations managed by the VA.

(2) Settlement of claims.

(i) The ABCMR will furnish DFAS copies of decisions potentially affecting monetary entitlement or benefits. The DFAS will treat such decisions as claims for payment by or on behalf of the applicant.

(ii) The DFAS will settle claims on the basis of the corrected military record. The DFAS will compute the amount due, if any. The DFAS may require applicants to furnish additional information to establish their status as proper parties to the claim and to aid in deciding amounts due. Earnings received from civilian employment during any period for which active duty pay and allowances are payable will be deducted. The applicant's acceptance of a settlement fully satisfies the claim concerned.

(3) Payment of expenses. The Army may not pay attorney's fees or other expenses incurred by or on behalf of an applicant in connection with an application for correction of military records under 10 U.S.C. 1552.

(i) Miscellaneous provisions -- (1) Special standards. (i) Pursuant to the November 27, 1979 order of the United States District Court for the District of Columbia in Giles v. Secretary of the Army (Civil Action No. 77-0904), a former Army soldier is entitled to an

honorable discharge if a less than honorable discharge was issued to the soldier on or before November 27, 1979 in an administrative proceeding in which the Army introduced evidence developed by or as a direct or indirect result of compelled urinalysis testing administered for the purpose of identifying drug abusers (either for the purposes of entry into a treatment program or to monitor progress through rehabilitation or follow-up).

(ii) Applicants who believe that they fall within the scope of paragraph (i)(1)(i) of this section should place the term "CATEGORY G" in block 11b of DD Form 149. Such applications should be expeditiously reviewed by a designated official, who will either send the individual an honorable discharge certificate if the individual falls within the scope of paragraph (i)(1)(i) of this section, or forward the application to the Discharge Review Board if the individual does not fall within the scope of paragraph (i)(1)(i) of this section. The action of the designated official will not constitute an action or decision by the ABCMR.

(2) Public access to decisions.

(i) After deletion of personal information, a redacted copy of each decision will be indexed by subject and made available for review and copying at a public reading room at Crystal Mall 4, 1941 Jefferson Davis Highway, Arlington, Virginia. The

index will be in a usable and concise form so as to indicate the topic considered and the reasons for the decision. Under the Freedom of Information Act (5 U.S.C. 552), records created on or after November 1, 1996 will be available by electronic means.

(ii) Under the Freedom of Information Act and the Privacy Act of 1974 (5 U.S.C. 552a), the ABCMR will not furnish to third parties information submitted with or about an application unless specific written authorization is received from the applicant or unless the Board is otherwise authorized by law.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

10 U.S.C. 1552, 1553, 1554, 3013, 3014, 3016; 38 U.S.C. 3103(a).

History

[35 FR 15992, Oct. 10, 1970, as amended at 42 FR 17442, Apr. 1, 1977; 45 FR 17990, Mar. 20, 1980; 46 FR 33518, June 30, 1981; 65 FR 17440, 17441, Apr. 1, 2000; 70 FR 67367, 67368, Nov. 7, 2005]

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