NO. 13-5117

United States Court of Appeals
For the
Federal Circuit

JAMES ALLPHIN, DANIEL ALVIA, FRANK AMADOR, PHILIP ANDERSON, AARON ARCE, LARRY ARMSTRONG, PAUL ARMSTRONG, MARCOS ARREOLA, MICHAEL ATIENZA, JEREMY AUSTAD, JEFFREY AVEY, JAMES BACOLO, JEFFREY BAILEY, MICHAEL BAKER, KEVIN BAILLARGEON, ROMELYN BANGLOY, CHRISTOPHER BANKES, CHARLES BARNETTE, JOSE BARRIOS, CRAIG BAUMCRATZ, TIMOTHY BAUTISTA, WALTER BEASLEY, JENNIFER BENSON, JOSHUA BIGLER, BRIAN BORDELON, KEVIN BRAGWELL, MORGAN BROOKS, MICHAEL BROPHY, CHRISTOPHER BROWN, KEVIN BROWN, TARA BROWN, TODD BROWNE, DERRICK BRUNSON, TOM BURDEN, JOE BUSBY, NICHOLAS BUTLER, JEFFREY CAMILO, RODERICK CAMPBELL, LUIS CARDONA, JONATHAN CARTER, ANTHONY CAUDILL, MAURICE CELESTINE, ERIC CHAMPLIN, RAYMOND CHARNAHAN, MATTHEW CLARK, SETH CLARK, ERIC CLEVINGER, DONALD CONWAY, DANIEL COOPERWOOD, DARRELL CRADDOCK, KENNETH CROSTON, TAKONI DANIEL, STEPHEN DARLOW, TOCCARA DAVIS, JOHN DECARLO, NICHOLAS DECKARD, NICHOLAS DECORSE, ADAM DEITZ, GEORGE DEKLE, JR., ANGEL DELGADO-BURGOS, ANTHONY DELUCA, EDGAR DIAZ, OSCAR DIAZ, NATHAN DODSON, BRIAN DORSEY, TRAVIS DOWNING, ANDREW DYER, AMY ECKERT, DANIEL EDWARDS, JASON EVANS, FRANKLIN EVERLY, GIOVANNI FADDA, MAXIMILIAN FEJGE, LEE FERGUSON, SEVERINO FERNANDEZ, RUDY FIERRO, KEVIN FISHEL, EDUARDO FLORES, STEPHANIE FORMAN, GREGORY FOX BRYAN FREEMAN, KEVIN GILLES, BRANDON GOKEY, ANTONIO GOMEZ, LEMUEL GOMEZ, CYRUS GRAY, DAVID GRAY, BETHANY GREENE, JASON GREENE, MARVIN GUEVARA, TIMOTHY GWINN, BENJAMIN HAIGHT, JARROD HALE, ALLEN HALL, ANDREW HALL, KEVIN HALLIWELL, WILLIAM HAMBACK, GARY HARPSTER, JOSEPH HELLER, GARY HERRERA, MARK WRSCHEY, JASON HJTE, ROBERT HOLMES, LAINE HOUSECOWDREY, CHRISTOPHER HUCIK, TIMOTHY HUFF, RASHAD HUNT, RYAN HUTLEY, AURIINOCENCIO, CORY DIONS, COREY JACKSON,

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TONCHE, JASON TREMBLAY, RUEL VALERA, DAVID VASQUEZ, RAUL VASQUEZ, DAVID VAUGHN, LUIS VEGAS, JOSEPH VERHALEN, OMAR VIERACLASS, CHITAPANYA VONGSOUTHI, WILLIAM WALKER, NATALIE WALLACE, SCOTT WATSON, JOSHUA WEBB BRADLEY WENZEL, JAMES WHITE, MICHAEL WHITE, CHARLES WHITESTONE, JONATHAN WILBURN, JACOB WILEY, DOUGLAS WILLIAMS, ATHENA WILLIAMS, JAKEENAN WILLIAMS. MARION WILLIAMS. MICHAEL WILSON; CHRISTOPHER WOLFE, KEVIN WOODS, ERIC WOOTEN, ADAM WORDEN, JARVIS WRIGHT, BRENT YAMADA, ROGER YOST, CHRISTOPHER YOUNG TIMOTHY YOUNG, LIN YUAN, PAUL ZEPEDA, and ANDREW ZOBAVA,

Plaintiffs-Appellants,

vs.

THE UNITED STATES,

Defendant - Appellee,

On appeal from the United States Court of Federal Claims
Case No 12—486C
Judge Lynn J. Bush

CORRECTED BRIEF IN CHIEF OF PLAINTIFFS-APPELLANTS

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PLAINTIFFS-APPELLANTS

October 7, 2013

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FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)
Appellants certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:
(See attached list of all appellants as per notice of docketing)

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:
n/a

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:
none

4. ☑ The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:
KELLER, KELLER & DALTON PC LAW FIRM AND ELVIN W. KELLER

SEPTEMBER 30, 2013
Date

Elvin W. Keller
Signature of counsel

ELVIN W. KELLER
Printed name of counsel

Please Note: All questions must be answered
cc: DANIEL KIM AND ANDREW CARMICHAEL

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF DOCKETING

13-5117 - Anderson v. US

Date of docketing: July 30, 2013

Appeal from: United States Court of Federal Claims case no. 12-CV-0486

Appellant(s): A. Sorrentino, Aaron Arce, Adam Deitz, Adam Myslivy, Adam Shellenberger, Adam Worden, Alexander Partido, Alfredo Raguindin, Allen Hall, Allen Ruiz, Alywin Thompson, Amado Kong, Amy Eckert, Andrew Dyer, Andrew Hall, Andrew Zobava, Angel Delgado-Burgos, Anthony Cavalli, Anthony Deluca, Antonio Gomez, April Johnston, Athena Williams, Avri Inocencio, Benjamin Haight, Bethany Greene, Boon Moua, Brad Sibley, Bradley Smith, Bradley Wenzel, Brandi Rue, Brandon Gokey, Brandon Maxwell, Brent Yamada, Brian Bordelon, Brian Dorsey, Brian Kenley, Brian Payton, Brian Reeves, Bryan Freeman, Bryan Lambrecht, Carley Mickle, Cesar Schira, Charles Barnette, Charles Moura, Charles Whitestone, Chitsperwa Vongsouthi, Christopher Bankas, Christopher Brown, Christopher Hucik, Christopher Jett, Christopher Johnson, Christopher Kilbourne, Christopher Kuzniicki, Christopher McDowell, Christopher Mckenna, Christopher Shepherd, Christopher Spurlock, Christopher Starkey, Christopher Wolfe, Christopher Young, Christian Rivas, Corey Jackson, Cory Diona, Craig Baumgratz, Cyrus Gray, Daniel Alvis, Daniel Cooperwood, Daniel Edwards, Daniel Lord, Daniel Snock, Dario Roaquin, Darrell Craddock, Darwin Martinez, David Gray, David Knapp, David Lash, David Moreno, David Szymanski, David Tello, David Vasquez, David Vaughn, Demarcus Stokes, Derrick Brunson, Derrick Jones, Devon Sims, Donald Conway, Donald Layton, Donald Sublett, Douglas Williams, Earl Plumlee, Edgar Diaz, Eduardo Flores, Eric Champlin, Eric Clevenger, Eric Wooten, Erik Kloster, Eugene Mansueto, Frank Amador, Franklin Everly, Gabriel Milbauer, Gary Harpster, Gary Herrera, Gary Powers, George Dekle, Giovanni Fadda, Gregory Fox, Gregory Jackson, Gregory Kufchak, Jacob Wiley, Jakeenan Williams, Jamarion Lane, James Allphin, James Baccolo, James Johnson, James Kincaid, James Steele, James Terry, James White, Jarrod Hale, Jarvis Wright, Jason Evans, Jason Greene, Jason Hite, Jason Kauffman, Jason Lee, Jason Rife, Jason Rotherman, Jason Saruwatari, Jason Severson, Jason Trombley, Jean Luc Pelchat, Jeffrey Avey, Jeffrey Bailey, Jeffrey Carrillo, Jeffrey Perry, Jeffrey Ramirez, Jeffrey Taylor, Jeffrey Timms, Jennifer Benson, Jeremy Austad, Jeremy Lord, Jeremy Poore, Jesse Smith, Jessica Kushon, Jill Ramdeen, Joe Busby, Joel Long, John Decarlo, John Merzberg, John Rilling, John Rogers, John Samia, John Stacy, John Stevens, Jon Parks, Jonathan Carter, Jonathan Taylor, Jonathon Wilburn, Jorge Ortiz, Jose Ramos, Jose Zallego, Jose Paredes, Joseph Heller, Joseph Masters, Joseph Verhulsen, Joshua Bigler, Joshua Rabb, Joshua Ruiz-Rivera, Joshua Webb, Juan Torres-Torcha, Justin Thurman, Kathryn Morgan, Kan Mueller, Kenneth Croston, Kenneth Kuchta, Kevin Baillargeon, Kevin Bragwell, Kevin Brown, Kevin Fishel, Kevin Gilles, Kevin Hallwell, Kevin Woodt, Kyle Krantz, Laine Housecowdrey, Lakwandolyn Patterson, Larry Armstrong, Lawrence Nedermayer, Lee Ferguson, Lemuel Gomez, Levi Jones, Lin Yuan, Lorie Roback, Luis Cardona, Luis Marroquin, Luis Vegas, Luke Smith, Marcus Arreola, Marion Williams, Mark Hinchey, Marlon Munoz, Marvin Guevara, Matthew Clark, Matthew Medland, Matthew Norton, Matthew Peace, Matthew Shafer, Maurice Celestine, Maximilian Feige, Mervin Jackson, Michael Alianza, Michael Baker, Michael Brophy, Michael Mobley, Michael Richards, Michael Sanders, Michael Sprague, Michael Thomas, Michael White, Michael Wilson, Michael Jacob Moore, Michael John Moore, Miguel Madrigal, Morgan Brooks, Natalie Wallace, Nathan Dodson, Nathan Klingman, Neil Lyon, Nicholas Butler, Nicholas Deckard, Nicholas Decorse, Omar Heraclass, Ortiz Javier Medina, Oscar Diaz, Paul Armstrong, Paul Tappan, Paul Zapeda, Phillip Anderson, Phillip Potter, Randall Johnson, Rashad Hunt, Raul Milano, Raul Vasquez, Ray Rodriques, Raymond Chamahan, Raymond Sutherland, Ricardo Santos, Richard Jackson, Richard Rodriques, Robert Holmes, Roderick Campbell, Roger Yost, Romelyn Bangloy, Ronald Reichenbach, Ronald Simon, Rosauro Ramos, Rudy Fierro, Ruel Valera, Ryan Hutley, Ryan Scott, Santos Tamaz, Scott Watson, Sean Mahjay, Seth Clark, Severino Fernandez, Shawn Raymond, Shawn Spriggle, Stephanie Forman, Stephen Darrow, Steven McFadden, Takoni Daniel, Tara Brown, Tarrii Murriell, Theodore Jewell, Timothy Bautista, Timothy Gwinn, Timothy Huff, Timothy Kaiser, Timothy Lichtenberg, Timothy Nuqui, Timothy Swanson, Timothy Young, Toccara Davis, Todd Browne, Tom Burden, Travis Downing, Valentin Munoz, Veronica Powell, Vishnu Seenath, Walter Beasley, William Hemback, William Patterson, William Rivera, William Scott, William Walker, Giovany Negron

I. STATEMENT OF RELATED CASES

No prior appeals in or from this case have been brought before this Appellate Court. Counsel is unaware of any specific cases this appeal will affect; However, counsel notes this appeal may affect other cases brought by Naval personnel subject to the Enlisted Retention Board (ERB).

II. JURISDICTIONAL STATEMENT

Plaintiffs seek Appellate review of Judge Bush's June 7, 2013 Judgment in Anderson, et al v. United States, Case No 12-486C which is a final order subject to appeal, as it adjudicates or dismisses all claims;

Plaintiffs seek Appellate Review of Judge Bush's June 6, 2013 Opinion in Anderson, et al v. United States, Case No. 12-486 which became final and subject to appeal on June 7, 2013.

Plaintiff seeks Appellate Review of Judge Bush's February 5, 2013 Order denying Motion to Disqualify which became final and subject to appeal on June 7, 2013.

III. STATEMENT OF ISSUES

1. Did Judge Bush error in refusing to recuse/disqualify herself?
2. Did the Court error in refusing to allow the Administrative record to be supplemented with facts in existence at the time of the ERB?
3. Did the Court error in dismissing the Plaintiffs' claims for wrongful

discharge?

4. Did Plaintiffs' discharges violate constitutional and statutory law?

5. Was the ERB improperly convened?

6. May an ERB be based upon untrue facts known at the time?

7. Did the Court error in denying Plaintiffs' claims for back pay and allowances?

8. Did the Court err in ruling on an incomplete Administrative Record?

9. Did the Court err in dismissing with prejudice Plaintiffs' complaint as to their discharges for failure to state a claim?

10. Did the Court of Federal Claims have jurisdiction to hear denial of Constitutional Rights claims of due process and equal protection?

11. Were Plaintiffs' claims justiciable?.

12. Were Plaintiffs denied Constitutional and Department of Defense regulatory rights to notice and a hearing prior to their discharge?

13. Does a Reduction in Force (RIF) have to be based upon a rational basis?

14. Is the Navy's power of discharge unlimited and not subject to review?

15. Were Plaintiffs' procedural rights violated?

16. Did the RIF not meet concepts of basic fairness?

17. Trial Court must apply Department of Defense Regulation in existence at the time of discharges of Plaintiffs on September 1, 2012.

IV. STATEMENT OF THE CASE

Plaintiffs brought this case contesting the formation of the ERB (RIF), being wrongfully discharged, denial of notice and hearing, and of violations of Plaintiffs'

Constitutional, Statutory Rights and violation of Department of Defense Regulations (DoD).

Judge Bush by Opinion of June 6, 2013 and Judgment entered on June 7, 2013 granted Defendant's Motion to Dismiss as to Plaintiffs' wrongful discharge and granted Judgment upon the Administrative Record as to Plaintiffs' claims for back pay and allowances.

Plaintiffs appeal the above and the Court's ruling denying Supplementation of the Administrative Record to reflect known facts in existence at the time of the ERB and the Court's denial of disqualification.

No prior or other related appeals have been brought.

V. and VI. STATEMENT OF FACTS AND SUMMARY OF ARGUMENT

The Navy convened an Enlisted Retention Board (ERB) in 2011 and recommended the discharge of 2,946 sailors in the middle of their tours. The Secretary of the Navy issued a memorandum titled "Notification of Intent to Convene a Quota Based Enlisted Retention Board" in which he stated:

> "The Navy will be challenged to reduce enlisted manning to meet future planned end strength controls due to record high retention in the current economic environment. . ."

Thereafter the Navy issued three difference consecutive orders:

1. NAVADMIN 129-11 April 14, 2011 reduce because of over mandated quota as set by Congress;

2. NAVADMIN 160-11 May 9, 2011 – Over manning of certain ratings; and
3. NAVADMIN 332-11 November 4, 2011 Discharge for under performance.

The Navy set a termination end date for 2,946 sailors during the course of their tour of June 1, 2012. They later delayed the termination to September 1, 2012 at which time the 2,946 sailors were terminated regardless of the status of their tour. The sailors being terminated were pay grades E5, E6 and E7 which were sailors with 12 to 15 years of service.

Plaintiffs originally sought an injunction to prevent the September 1, 2012 termination which was not rational and not supported by the facts. The Motion for injunction was summarily denied by the Trial Judge, stating that the injunctive relief was not available in this Court.

Plaintiffs then filed a Motion to Disqualify the Trial Judge because she had been an attorney for the Navy for 9 years. This Motion was denied.

The Trial Judge in her opinion of June 6, 2013 granted judgment on the Administrative Record; Denied the Class Action as moot; Denied Plaintiffs' Motion to Supplement the Administrative Record and Dismissed Plaintiffs' Complaint.

At page 29 of her opinion the Trial Judge states that the

> "facts of this by the Navy were reasonably conceived and the predicted success of the ERB to address over manning issues was a **rational speculation**." (Emphasis Ours) (A42)

The Trial Judge anchored her opinion on the termination of 2,946 sailors as

being "rational speculation." If this case is permitted to stand the Navy can without reason or cause terminate sailors at their 19th year and never have to pay any pension or retirement benefits. The same effect occurred to the 2,946 sailors terminated in this action by the ERB.

VI. STANDARD OF REVIEW

The standard of review for a dismissal based upon a failure to state a claim is de novo. Pursuant to Rule 12b of the Rules of the Court of Federal Claims, complaints are not to be dismissed unless it appears no set of facts can be shown which would entitle Plaintiff to relief. ***Conley v., Gibson***, 355 U.S. 41, 45, 46, 78 S.Ct. 99 (1957). Pursuant to ***Henke v. United States***, 60 F.3d 795, 797 (Fed. Cir. 1998) all factual allegations and reasonable inferences are to be drawn in favor of Plaintiff.

Review of the Administrative Record is de novo. ***Chandler v. Roudenbush***, 425 U.S. 840, 863, 96 S.Ct. 1949 (1976).

Supplementation of the Administration Record may be made upon a showing of necessity. ***International Resource Recovery, Inc. v. U.S.***, 59 Fed. Cl. 537, 542 (Fed. Cl. 2004)

As to disqualification/recusal:

> "The standard of review is 'whether an objective, disinterested lay observer fully informed of the facts underlay the grounds on which recusal was sought would entertain a significant doubt about the Judge's impartiality.' *United States v. Patti*, 337 F.3d

> 1317. 1321 (11th Cir. 2003) (quoting, *Parker v. Conners Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988). The standard is thus an objective on4e, 'designed to promote the public's confidence in the impartiality and integrity of the judicial process.' *In re: Evergreen Sec. Ltd.* 570 F.3d 1257, 1263 (11th Cir. 2009)"

VII. ARGUMENT

1a. PLAINTIFFS WERE A "CLASS" OR GROUP OF SAILORS SELECTED AND ARE ENTITLED TO THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION

The Trial Court admitted on p. 2 (A14) of her opinion that the Plaintiffs selected were only those in pay grades of E5, E6 and E7. These were personnel who had 12 to 15 years seniority and were on the doorstep of retirement and she deems that they are not a "suspect or quasi suspect class." If her statement was true why weren't sailors from E1 through E12 selected.

Plaintiffs never have known why they were discharged. The reason of being over mandated numbers, over manned positions and failure to perform all of which did not pertain to the plaintiffs, leaves the Navy without cause in discharging these plaintiffs. Therein lies a definite violation of due process.

The Trial Court's opinion continues at p. 27 (A40) to express that these Plaintiffs do not possess any "right to continued employment with the Navy." This is in direct violation of 10 U.S.C. §1169 which provides that sailors cannot be discharged in the course of their "term of service." This is unless prescribed by the Secretary of the Navy, but no cause was prescribed by the Secretary for

discharge of the Plaintiffs as they have not known what the cause was. The Trial Court then resorts to the reasoning that the military can do anything they want to do citing ***Woodward v. US***, 871 F.2d 1068, 1077 and quoting:

> "As defendant persuasively argues, it was within the Navy's discretion to reduce force levels and to convert some but not all affected service-members to other job specialties."

The Trial Judge then finds on the same page "ERB process was rational in its inception."

This is obviously untrue. In the first place the present case did not involve "discipline, moral, composition (differences in units or formations) and alike" and also there was no "considered professional judgment" involved in the present case. The process in the present case does not survive "rational basis review." If it were rational would not the plaintiffs understand the reason for their discharge.

The Secretary of the Navy and ERB are not above the law. They must follow rules, regulations and the constitution.

> "But, like the boards, the Secretary must not act in an arbitrary, capricious manner, unsupported by substantial evidence, or in violation of the law. Actions of both are subject to judicial reversal for violation of such standards. This is will settled. See Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974). To say that the statute confers on correction boards or the Secretaries such discretion that we cannot review their action when a case is properly within our jurisdiction, is contrary to the purpose of the statute."
>
> **Sanders v. United States**, 219 Ct. Cl. 285; 594 F.2d 804 (1979)

In another Navy case ***Reed v. Franke***, 297 F.2d 17 (1961) the Court stated "The constitutionality of the discharge procedure is a justiciable issue." The Court held:

> "We conclude that, where there is a substantial claim that prescribed military procedures violate one's constitutional rights, the District Courts have jurisdiction to resolve the constitutional questions. See Estep v. United States, 327 U.S. 114, 120, 66 S.Ct. 423, 90 L.Ed 567 (1946) . . ."

As alleged in Plaintiffs' Third Amended Complaint and as shown in Argument III of this brief the Navy did violate plaintiffs constitutional rights by failing to give them a hearing prior to their discharge, the same as in the ***Reed*** supra.

In ***Berkley v. United States***, 59 Fed.Cl. 675, 93 Fair Empl.Prac.Cas. (BNA) 852 a group of Air Force officers brought a class action for military pay as a result of a reduction in force (RIF) board for violation of their Fifth Amendment rights to equal protection wherein the class members were asking for active duty credit from the time they were discharged by the selection board. The issue involved receiving back pay and allowances. The Court did have jurisdiction and the case was submitted for a proposed class action settlement. The case did find that the Court had jurisdiction over a constitutional question.

1b. TRIAL JUDGE SHOULD HAVE RECUSED

The Trial Judge worked for the Department of Justice (Defense Counsel in this Case) in handling civil cases in the United States Court of Claims. The Trial

Judge also worked for a period of 9 years from 1987 through 1996 as an attorney representing the Navy. The Navy is a party in the present proceedings. These facts are not disputed by the Trial Judge.

Plaintiffs filed a motion and supporting brief requesting that Judge Bush disqualify herself. 28 U.S.C. §455(a) was set forth as the basis for her recusal, which states:

> "**Disqualification of justice, judge or magistrate judge**
>
> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Plaintiffs in the conclusion of their Motion to Disqualify pointed out that the Federal test applicable under Section 455(a) is if "impartiality might be reasonably questioned" or if there is a "appearance of impropriety." However, neither of these tests were used by Judge Bush in her Order refusing to disqualify.

The Trial Judge uses the wrong standard in failing to recuse herself. In her order at page 1 she contends:

> "In their Motion, Plaintiffs argue that the undersigned cannot be impartial in the subject matter due to her previous employment with the Department of the Navy and the Department of Justice." (Emphasis Ours)

On page 2 of her Order Judge Bush states:

> "Plaintiffs go on to surmise that the undersigned cannot be impartial because . . . "

Because of Judge Bush failing to use the proper crux she concludes that the "standard for recusal set forth in 28 U.S.C. §455 has not been met." However the standard is not whether Judge Bush believes she can be impartial but instead, would an objective observer believe there is an appearance of impartiality, 28 U.S.C. § 455(a) provides:

> "Shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

It is from the perspective of the public or "objective observer" as to whether there is "an appearance of impropriety" and not the perspective of what the Judge believes about herself that is important.

The reason these new tests are now the law is that "public confidence in the judiciary is in a disturbing state of decline."[1] The recusal is not limited to those cases where the Judge herself "cannot be impartial" or has a personal bias, but where her impartiality "might reasonably be questioned."[2] It is required in the new statute that all judicial grounds for disqualification be evaluated on an objective

[1]OK Bar Journal Vol. 76,-No. 34-12/10/2005 p. 2826 1. *An Independent Judiciary*, Report of the ABA Commission on Separation of Powers & Judicial Independence (1997).

[2]OK Bar Journal Vol. 76,-No. 34-12/10/2005 p. 2827 15. 28 U.S.C. §455(a) (2002); Okl., Stat. Tit. 5 ch. 1, app. 4 Canon 3(E)(1)(a) The footnote in Subparagraph 15 of Bar Association

basis so that what matters is not the reality of bias but its appearance.[3]

All 295 Plaintiffs have a "significant doubt" as to Judge Bush's impartiality. Any reasonable member of the public who was aware of her having represented the Navy for 9 years would wonder about her impartiality in deciding a case where the Navy was a party. It really doesn't matter what Judge Bush personally feels about her own impartiality or ability to be fair. It's the fact there exists the "appearance" of a question of impartiality. The new standard was not formed for Judge Bush or any Judge individually, but for the appearance of the integrity of the Federal Court system. For this reason Judge Bush should have immediately disqualified herself,

_____.

> ". . . 'The goal of section 455(a) is to avoid even the appearance of impartiality. If it would appear to a reasonable person that a judge has knowledge of facts what would give him an interest in the litigation, then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case, or because the judge is pure in heart and incorruptible. …'"

Judge Bush represented the Navy for 9 years. It doesn't matter if it was yesterday, one year ago or how many years ago. There would be a "appearance" of impropriety for a past Navy lawyer of 9 years to be a Judge on a Navy case.

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[3]OK Bar Journal Vol. 76,-No. 34-12/10/2005 p. 2827 16. 28 U.S.C. #455 *See also Liteky v. United States***,** 510 U.S. 540, 548 (1994)(' [q]uite simply and quite universally, recusal [is] required whenever partiality might reasonably be questioned."]

She should have recused herself from this case.

2a. THE "WHOLE RECORD" SHOULD BE ALLOWED IN THE ADMINISTRATIVE RECORD

Judge Bush denied Plaintiffs' Motion to Supplement the record on the sole basis of the ***Axiom v. United States***, 564 F.3d 1379 (US Ct. of Appeals Fed. Cir.) case. However, ***Axiom*** supports rather than denies Plaintiffs' Motion.

There the materials asked to be supplemented were facts and information "not before the agency." The **Axiom** case is dissimilar and unlike the present case. The facts and material sought to be supplemented by the plaintiffs here were existing facts and information that the Navy had available to it at the time of its decision and especially at the time of its termination of the Plaintiffs.

Apparently the Navy discovered its error when it canceled its termination date of June 1, 2012 and then delayed the termination date until September 1, 2012. The Navy saw the mistake it made and was well aware that they were undermanned. Although they later admit their mistake they don't remand their orders. The sailors are terminated anyway. Those admission of the Navy were not made a part of the administrative record submitted by the Defendant. That is only one of many items defendant has failed to include in the Administrative Record.

The Court in ***Axiom*** quotes ***Camp v. Pitts***, 411 U.S. 138 993 S.Ct. 1241, 36 L.Ed.2d 106 (1973)for the authority that "the focal point or judicial review should

be the Administrative Record already in existence, not some new record made initially in the reviewing Court." The Court in ***Axiom*** further states that the reviewing Court is:

> "The purpose of limiting review to the record actually before the agency is to guard against courts using new evidence . . . ***Murakami v. United States***, 46 Fed. Cl. 731, 735 (2000)" (emphasis added)
> ***Axiom*** at p. 1380

The supplemental record sought to be added by Plaintiffs was the Administrative Record of admissions and declarations by the Defendant (Navy) itself. They confess that their ERB discharge order was "unwarranted by the facts" in existence at the time of the Order. This is not new evidence sought and created by the Plaintiffs after the ERB's determination. The supplemental materials show that the administrative record submitted by the Navy is incomplete in that their order does not reflect that the Navy was "undermanned". Those facts existed and were available to them. For this reason the Defendant has purposely left such materials out of the administrative record and seek to win this case by not disclosing to the court not only the fact that it was undermanned, but the fact that it was going to be hiring 3000 new sailors and eventually over 8600 sailors Also, it fails to show that they were claiming they were overmanned in positions for which they were beginning to hire new sailors. The Defendant does not want this information in the Administrative Record.

Further in ***Axiom***, the Appeals Court pointed out that the agency failed to determine if supplemental material was necessary.

> "We conclude that the trial court abused its discretion in this case by adding Axiom's documents to the record **without evaluating whether the record before the agency was sufficient to permit meaningful judicial review** . . ."(Emphasis ours)

The Trial Judge in the present case has never made a finding as to whether or not the record before her was sufficient "to permit a meaningful judicial review."

This failure by Judge Bush makes her ruling an error as stated in ***Axiom***:

> " . . . by so doing failed to make the required threshold determination of whether additional evidence was necessary."
> Id. P. 1380.

The Supplemental Material in the present case is necessary for this Court to make a "meaningful judicial review" for the following reasons:

1. The Navy did not include in their Administrative Record the congressionally mandated end strength at the time of their decision;
2. The Administrative Record does not include the fact the Navy discovered that their "projected end strength" which was the basis of their discharge of Plaintiffs was unfounded;
3. The Administrative Record submitted by the Navy does not show the requests by Plaintiffs for an Administrative Separation Board Review Hearing. These requests were made before the September 1, 2012 discharge;
4. The Supplemental materials offered by the Plaintiffs show that the Administrative Record by the Navy was not only incomplete but shows that the action of the ERB in discharging Plaintiffs was "unwarranted by the facts" in existence and available to the Navy;
5. The Administrative Record submitted by the Navy does not show the actual end strength numbers required by the Navy which would have alleviated any necessity for discharging plaintiffs.

6. The Administrative Record does not show the many admissions of the Navy as to their mistake and devastation to the sailors.

To be consistent with the Administrative Procedures Act (APA) which states:

> "the Court shall review the whole record or those parts of it cited by a party, and due account should be taken of the rule of prejudicial error." (Emphasis ours)
>
> ***Axiom***

The whole record has not been submitted in this case. Without the full record there is no meaningful review. The Navy's action was "arbitrary, capricious, an abuse of discretion" and "not in accordance with the Law" and not only because they disallowed the hearing for each sailor discharged but because they used "projected end strength" or merely a fiction rather than the actual number of sailors mandated by Congress. This is not "rational" speculation the Trial Judge supposes. The supplemental materials indicated that the administrative record is incomplete and that Navy was fully aware of their shortfall and wrongdoing ***before*** the termination date of September 1, 2012 of the Plaintiffs.

In the late case of ***Pitney Bowes, Inc. v. United States***, 93 Fed. Cl. 327 (2010) The Department of Justice was defending and asked to submit the Administrative Record by producing e-mails and even by depositions that were to be taken **after** the decision and ruling by the Agency involved. The Court stated:

> "The burden of proof required for supplementing the administrative record is lower than required for demonstrating

> bad faith or bias on the merits. The test for supplementation is whether there are sufficient well-grounded allegations of bias to support an inquiry and supplementation. . .”

It is important to note that the depositions were to be engendered and taken by the Department of Justice after the agency ruling and then their supplementation was to be allowed. The attorney representing the Department of Justice and successfully supplemented the record in ***Pitney Bowes***, supra, was Jeanne E. Davidson, the same counselor who is one of the attorneys objecting to the supplementation in the present case.

The Navy’s admissions should be supplemented to the record in the present case. Otherwise this Court does not have before it the “whole record” and cannot give a valid judicial decision. The supplemental materials sought to be included are evidences of bad faith on the part of the Navy. The Navy should not be able to cherry pick only those factors it wants in the Administrative Record. Evidentiary discovery would expose the real reason for the terminations.

3a. THE NAVY’S ERB ORDER WAS BASED ON FALSE INFORMATION, WAS ILLEGAL AND VIOLATED PLAINTIFFS’ CONSTITUTIONAL RIGHTS

The formation of a RIF/ERB must be based upon facts and rational projections. In this case the facts establish there was never a need for the RIF/ERB. The Navy was aware before any discharges took place that the alleged basis of the ERB did not exist.

The ERB's Administrative Record is based on false facts and violates Plaintiffs' Constitutional Rights. Plaintiff's believe the creation of the ERB was a pretext to allow the Navy to fire sailors near their 15 years service eligibility for early retirement. Where an ERB is created for specified reasons it must act in accordance with the specified reasons. The record discloses that the alleged reasons for the creation of the ERB were a sham.

The ERB in the present case was directed by three different Orders

1. NAVADMIN 129-11 April 14, 2011 reduce because of over mandated quota as set by Congress;
2. NAVADMIN 160-11 May 9, 2011 – Over manning of certain ratings; and
3. NAVADMIN 332-11November 4, 2011 Discharge for under performance;

3b. THE CONGRESSIONAL MANDATED QUOTA OF NAVY PERSONNEL WAS A FALSE BASIS FOR DISCHARGE OF PLAINTIFFS

By memorandum of March 23, 2011 by the Secretary of the Navy a NAVIS was issued "Notification of Intent to Convene a quota based Enlisted Retention Board." (A45) In the memorandum the Secretary pointed out that "the Navy will be challenged to reduce enlisted manning to future planned end strength controls" and "will focus on those ratings that are over manned" in reducing the manning. At the time of such directive by the Secretary of the Navy the Navy was undermanned or below the quota as set by Congress.

DATE ACTUAL END/ AUTHORIZED
STRENGTH END STRENGTH
LEVEL LEVEL

30SEP2010---------- 328,303 / 328,800 ******Under Authorized Strength Levels***
31MAR2011---------- 328,227 / 328,700 ******Under Authorized Strength Levels***
30SEP2011---------- 325,123 / 328,700 ******Under Authorized Strength Levels***
29FEB2012---------- 321,190 / 325,700 ******Under Authorized Strength Levels***
31MAR2012----------320,961 / 325,700 ******Under Authorized Strength Levels***
---FY2013 BEGINS---
16NOV2012----------318,406 / 322,700******Under Authorized Strength Levels***
(4294 deficit)
31MAR2013----------No Data / 322,700
**Source: http://siadapp.dmdc.osd.mil
**Source: http://www.navy.mil/navydata/nav_legacy.asp?id=146

This establishes that any reason for creating an ERB due to excessive enlisted manning is false. The Navy was under Congressional mandated quotas when the ERB was being formed and Navy did not put the above data in the Administrative Record.

The concept by the Navy that there was over manning was false and untrue. The Navy later admitted their error. Vice Admiral Scott VanBuskirk on December 4, 2012 stated "We had been working toward a lower demand signal, and so we did overshoot (the draw down)".(***Navy Times*** 12/17/12 @ pg. 18 Faram) (A47) "We were targeting for a lower force structure and, as a result of that, we did overshoot in terms of targeting a lower (end strength) number". As of December 6, 2012 the Navy had 317,600 active duty sailors which is the lowest manning since 1940. By the end of 2012 the Navy was supposed to have a force of 322,700 sailors. Without the discharge of the 2946 sailors by the ERB as of

September 1, 2012 the Navy would still have been below the mandated level of force of 322,700 sailors. In short the ERB was created and then fired Plaintiffs on a false basis.

3c. THE ALLEGED OVER MANNING OF DIFFERENT RATINGS OR CLASSIFICATIONS

Despite being under the mandated end strengths the Chief of Navy Personnel by memo of August 4, 2011 to the President, FY-12 Active Duty Quota Based Enlisted Retention Board (Emphasis ours) convened the ERB. By this memo they targeted enlisted members with "at least 7 and less than 15 years of service. The total purpose of the ERB as shown by Secretary Ray Mavis' March 23, 2011 memo was to "reduce enlisted manning." The title to the Board in the August 4, 2011 letter from Chief of Navy Personnel emphasizes by referring to it as the "Quota Based Enlisted Retention Board Precept."

Sailors were discharged in ratings that were not over manned. An example is the PS1 rating (classification) wherein they needed to discharge 130 sailors and then advanced 216 to the same position. In other words they promoted and put more people in an over manned position than existed prior to the discharge being effected. Again the over manning of any position is due to mismanagement and derelict by the Navy itself. Intentional over manning would allow the Navy to indiscriminately discharge any sailor.

The over manning excuse is further shown because the Navy at the time of

the ERB discharge of Plaintiffs was never in any danger of being over end strength or over manned. The Navy used Military Performance Manual 1910-010 (MILPERSMAN) improperly and erroneously to create a new process in order to deny the Plaintiff sailors herein due process and as an excuse for blanket discharges of sailors. (A135).

The Navy without authority had turned the ERB or retention board into a reduction in force RIF board. They decided they could use rebalancing of over manning in certain positions to correct years of mismanagement in causing the over manning. This is a sign of lack of due diligence and neglect in manning of positions in the Naval force. The conduct of the ERB was carried out even though the Navy knew the projected end strength numbers used in making their original decision to have the ERB were incorrect. Remanning was ERB's excuse. This is pointed out by the head of Congressional Affairs for the Department of the Navy in a letter by T.E. Decent to Congressman Charles W. Boustany, Jr. in letter dated December 5, 2012 attached hereto (A49-50). In the letter Decent explains why John O. Stephens, Jr., sailor was non-selected for retention. He shows that his non-selection was by the fiscal year 2012 "active duty quota based enlisted retention board (ERB)" "Duty quota" again is shown as the reason for the Board. However, in the second paragraph of this letter he states that it has become "necessary to rebalance job specialty rates across the Navy." In the last paragraph

of page one of his letter Decent states that "the primary criterion for retention of sailors was sustained superior performance . . ." In other words by mystical means the Navy has turned Secretary Mabus' original memorandum "to convene a quota based" ERB to "reduce enlisted manning" into a rebalancing of over manned positions by sailors with 7 to 15 years of service. As a result of discharging too many persons in certain enlistments, the Navy suspended early outs and started to offer bonuses for certain enlistments in order to up their numbers. (A46)

3d. THE CLAIMED UNDER PERFORMANCE BASIS TO DISCHARGE PLAINTIFFS

The ERB finally used under performance as a basis for their determination to discharge Plaintiffs. Again this basis is a pretext.

In fact performance records were not used to discharge the sailors. Of the 2946 sailors discharged as shown by the Administrative Record submitted by the Navy 2,633 of the discharges **were not** based on performance. The Administrative Record submitted by the Navy showing "non-quota" indicating discharge for under performance of only 323 out of the 2,946. However, the Plaintiffs were never told why they were discharged, for performance based, quota based, etc.

Further evidence is pointed out in the April 14, 2011 NAVADMIN to All Sailors: "Substandard performance indicators" were used to discharge Plaintiffs. If this is true the Navy selected Walter Beasley, a sailor of the year for 2011 as a substandard performer and discharged him. The vast majority, 2633 sailors did not

have a substandard performance record. They also had none of the six elements named by the ERB in the April 14, 2011 Notice that applied to them that would cause their discharge. In other words the ERB did not have any legal ground upon which to discharge the Plaintiffs or the 2,946 sailors discharged. They merely selected sailors who were about to reach their 15 year retirement credit and who intended to be career sailors to obtain the 20 year retirement credit.

To plaintiff Donald W. Layton's knowledge, he was discharged for under performance when he received a NAM. (Navy and Marine Corp. Achievement Medal) the month before he received notification of his discharge. He then received letters of disappointment for the ERB's action from his Commander, T.C. Petersen and from the Deputy C. E. Baker now Commander Strategic Communications Wing 1 (A56-57)

Further, Plaintiff Maximilian C. Feige had received five (5) NAM (Navy and Marine Corp Achievement Medals, was nominated Jr. Sailor of the year in 2010 which led to his command advancement to Petty Officer Class E6 (0058-0061) and was discharged for under performance.

3e. RIGHT TO A HEARING AND ADEQUATE NOTICE

The plaintiffs did not receive notice at the time of their discharge of all of the alternatives in their notice and rebalancing was not the cause of the creation of the ERB. An example of the Notice the Plaintiffs received is that of Sailor DW

Layton marked "(A55). Also attached hereto is an affidavit of Sailor Layton describing the incidents of the notice he received. (A51-53) He was put in a windowless room and instructed that he had to sign this paper with an armed guard standing by to enforce the command. He also requested a hearing but was not allowed a hearing. This was the extent of his notification of discharge and he was never told why he was discharged.

Sailor Layton had 13 years plus of service. All of the Plaintiffs had more than 6 years of service. Under the Department of Defense regulations at the time of termination any sailor with more than six years of service is entitled to a hearing if he is involuntarily discharged in the tour of his duty. In the Department of Defense Instruction attached as (A80-132) after a hearing is requested:

> "3. Administrative Board Procedure down to A. Notice – If an Administrative Board is required, the Respondent shall be notified in writing of :
>
> (6) The respondent's right to request a hearing before an Administrative Board; (A80-132)

Neither of these DoD Regulation Administrative Board procedures were followed in Plaintiffs cases. A sailor with more than six years of service was entitled to a hearing upon being involuntarily discharged. In fact most Plaintiffs requested a hearing but none were supplied or granted a hearing. The Administrative Record is devoid of any Plaintiff receiving notices and administrative hearings in compliance with DoD Inst. 1332.14. The Navy ignored their own ADSEP

notification procedures and did not notify servicemen of their rights. MILPERSMAN 1910-010 provides notice shall be given to enlisted men. The Notice must be in writing and provide an explanation of the type of basis of separation, and possible effect of separation. See MILPERSMAN 1910-010 attached as (A133-135). Pursuant to MILPERSMAN 1910-402 the Navy is to keep a signed copy of the Notice and serviceman's response. (A136) The only authorized form counsel is aware of is NAVPERS 1910-32 (Rev. 01-07).

Under 28 U.S.C. §1169 if the secretary legally "prescribes" the termination, it can be during sailors term of service. However, the ERB was still within the "prescription" of the Secretary of the Navy. In the present case the administrative procedures by the ERB were not done within DoD Regulations and were not done for the original purpose to lower the congressional mandated quota. Later reasons were then prescribed, ergo: rebalance because of over manning and under performance.

MILPERSMAN 1910-010 ¶5 provides that

> "[a]n explanation shall be given to all enlisted members concerning
>
> (1) **Types** of separations;
> (2) **Basis** for separation issuance;
> (3) **Possible** effects of various actions upon reenlistment, civilian employment, veterans' benefits, and related matters; and
> (4) **Denial** of certain benefits to members who fail to complete at least 2 years of an original enlistment.

. . .

(c) The requirement that the effect of the ***various types*** of separations be explained is a command responsibility, not a procedural entitlement." (Emphasis added)

MILSPERSMAN 1910-010 ¶5(c) relates only to the ***types*** of separation i.e. 5(a)(1). It does not relieve the requirements of providing the information set forth in 5 a(2)(3) and (4). Ie: the ***basis*** for separation, the ***possible*** effects and ***denial*** of benefits.

3f. THE APPARENT REAL REASON OR MOTIVE FOR THE NAVY TO DISCHARGE PLAINTIFFS DURING THE MIDDLE OF THEIR TOURS

The notice given to Plaintiffs did not state the reason for their discharge. Plaintiffs were never given an opportunity to have a hearing to discover the reason for the discharge and to defend against it. However, after reviewing what has occurred and reviewing the comments of Congress the real purpose appears.

The ERB used three different excuses for discharging the Plaintiffs. The number of sailors, rebalance of the force and under performance. Records of the Plaintiffs indicates these premises were not true.

The ERB targeted only the sailors about to pass 15 years service eligible for early retirement and on their way to full retirement for the sole purpose of saving money. **This was proven as a fact when Congress in HR 4310 – FY13** (A137-143) stated in its record:

> "As a result, the Navy took more reductions than were necessary ***for budget saving measures***, involuntarily forcing enlisted sailors out of the Navy." (Emphasis Ours)

Congress has confirmed the purpose of the ERB which was to reduce its budget on personnel. Under the present discharge by the ERB, none of the Plaintiffs will receive a retirement from active duty.

3g. APPELLANT'S ALLEGATIONS HEREIN ARE JUSTICIABLE

The Trial Court appears to acknowledge significant personnel decisions that violate a Statute or Regulation are subject to judicial review but, then inexplicably concludes the Appellants' allegations herein are nonjusticiable. By the Court's own language

> "When a procedural or statute violation has been alleged to have rendered a discharge wrongful, this type of challenge to a discharge is generally viewed as justiciable."
> **Holley v. United States**, 124 F.3d 1462 (Fed Cir. 1997)

Then in a seemingly 180º change in direction the Court finds appellants' "Challenges to the merits of their discharge are nonjusticiable."

Justiciability is defined as a "matter appropriate for court review." ***Black's Law Dictionary*** 5th Edition. The Trial Court finds the appellants' allegations herein are nonjusticiable despite the Court's admission:

> "An administrative discharge issued to a serviceman prior to the exploration of his enlistment term is void if it exceeds applicable statutory authority, or ignores pertinent procedural regulations, or violates minimum concepts of basic fairness."
> ***Brigante v. United States***, 35 Fed. Cl. 526 (1996)

The Court then completely overlooks the DoD Regulation Inst. 1332.14 at the time of termination which requires all appellants be provided an administrative hearing to address the merits of their wrongful termination. The omission of a hearing constitutes a breach of the DoD's own regulations and thus rises to the standard of justiciability as defined by the Trial Court.

Appellants would submit the attempt by the Court to distinguish between a wrongful termination and a decision of the ERB is irrelevant and an improper attempt to allow ERB to supersede fast and firm DoD regulations. To appellants' knowledge there is no authority allowing an ERB to avoid well settled DoD Regulations. The Court concludes DoD 1332.14 at the time of termination does not apply to the ERB but fails to cite any authority.

Appellants submit, if allowed to survive, The current decision allows an ERB to circumvent and disregard all DoD regulations. Appellants submit such a result constitutes an impermissible "jackpot" for wrongful terminations by the Department of Defense. All employment contracts which were required to be signed by all Appellants, and the myriad of terms therein, primarily time of service, will be rendered meaningless under the Trial Court's interpretation of the law.

VIII. CONCLUSION

Should due process be allowed only for criminals or persons who have

violated the military laws? No. Due process also applies to the Plaintiffs in this case. Due process is a fundamental right which Courts have consistently recognized and protected.

The gravity of this case is extreme. Sailors have lost their careers, their retirement and by the Navy's own admission in the supplemental material two sailors committed suicide because of the discharge and loss of their careers. (A144)

The Navy has admitted they made a mistake (Faram, Mark "Cutting too far". *Navy Times*, 12/17/12, p. 18) (A46-48). Congress has confirmed that mistake (H.R. 4310—FY13 NATIONAL DEFENSE AUTHORIZATION BILL) Plaintiffs should be allowed an evidentiary hearing to prove all the reasons why they should be compensated for those mistakes.

The record is devoid of Plaintiffs receiving any proper notice or due process. Plaintiffs have properly set forth causes of action establishing due process violations, wrongful discharge, ERISA violations, discriminating discharge, illegality of the ERB and Administrative process.

IX. RELIEF SOUGHT

Plaintiffs respectfully request this Court to:

1. Order recusal of the Trial Judge as her representing the Navy and Department of Justice constitutes an appearance of impropriety.
2. Allow plaintiffs to supplement the Administrative Record to show facts

actually in existence at the time of the ERB and admission thereafter.

3. Reverse the Trial Court's dismissal as to Plaintiffs' claims and find Plaintiffs' complaint does state a cause of action.

4. Reverse the Trial Court's dismissal based upon the Administrative Record of Plaintiffs' claims for back pay, allowances and future damages.

5. Allow Plaintiffs' case to proceed based upon denial of military regulations, statutory and Constitutional rights.

6. Allow Plaintiffs to proceed in establishing that the ERB (RIF) was not based upon rational speculation but was instead contrary to known facts.

7. Allow Plaintiffs to seek redress for their being illegally discharged.

Dated this 30th day of September, 2013.

Respectfully submitted,

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