

# THE BOARDS FOR CORRECTION OF MILITARY AND NAVAL RECORDS: AN ADMINISTRATIVE LAW PERSPECTIVE

EUGENE R. FIDELL\*

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## INTRODUCTION

Military pay cases are one of the hardy perennials of the jurisdiction of the United States Court of Federal Claims, yet few practitioners are familiar with this obscure corner of the court's work. The Boards for Correction of Military and Naval Records often figure in these cases but rarely surface in the professional literature.<sup>1</sup> A brief summary may show

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\* Senior Research Scholar and Florence Rogatz Visiting Lecturer in Law, Yale Law School. This Article is adapted from remarks presented at the Judicial Conference of the United States Court of Federal Claims, Washington, D.C., on Nov. 15, 2012. I am indebted to Dennis E. Curtis, Alan E. Goldsmith, Judith Resnik, Raymond J. Toney, and Michael J. Wishnie for comments on a draft, and to the correction boards that kindly responded to my inquiries.

1. The sparse literature includes John J. Field, *Military Personnel Law: Waiving the Discretionary Statute of Limitations Governing the Boards for Correction of Military Records*, 62 GEO. WASH. L. REV. 920, 920 (1994); Jeffrey M. Glosser & Keith A. Rosenberg, *Military Correction Boards: Administrative Process and Review by the United States Court of Claims*, 23 AM. U. L. REV. 391 (1973); Robert H. Joost & Nancy Battaglia, *The Board for Correction of Military Records of the Coast Guard: A Unique Dispute Resolution Mechanism*, 41 ADMIN. L. REV. 441, 441-42 (1989); John A. Wickham, *Federal Court Developments in Military Personnel Law: Protecting Service Members*, 55 NAVAL L. REV. 337, 337-38 (2008). I have written a number of short articles about the Coast Guard Board for readers in that branch of the armed forces. *E.g.*, Eugene R. Fidell, *DOT and Your Career: What's Up at the BCMR?*, U.S. COAST GUARD ACAD. ALUM. BULL., Aug. 2002, at 31.

these boards and their work in a new light.

Congress created the correction boards in 1946 to take over the task it had been performing of correcting error and removing injustice in military records by private bill.<sup>2</sup> The boards operate under a single statute,<sup>3</sup> and their procedures, while promulgated by the various service secretaries, must be approved by the Secretary of Defense.<sup>4</sup>

The theory of the record-correction statute is that the record-correction function is being performed by the Secretary, acting through boards of civilians. So what are we in fact dealing with? In administrative law terms, the boards conduct informal adjudication. That is, they decide matters that are in the past, and they do so without using “on the record” proceedings associated with formal adjudication within the meaning of the Administrative Procedure Act (APA).<sup>5</sup> What that means, on one level, is that the correction boards are not required to use administrative law judges (ALJs), and in fact they do not. One might think it *also* means the boards’ decisions are not subject to judicial review for substantial evidence, since that requirement also arises only if the proceeding is required to be made “on the record.”<sup>6</sup> In *Chappell v. Wallace*,<sup>7</sup> however, where the Supreme Court ruled that military personnel could not sue their superiors for racial discrimination, the Court pointed out that Congress has provided for record corrections that would be subject to judicial review for, among other things, substantial evidence.<sup>8</sup> As authority, the Court cited several Tucker Act cases,<sup>9</sup> rather than the APA. In my opinion, that part of *Chappell* is wrong. Nonetheless, it has never been questioned and remains the law.

The Court of Federal Claims lacks the district courts’ general federal question jurisdiction.<sup>10</sup> The APA is not a basis for Tucker Act judicial

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2. See Legislative Reorganization Act of 1946, Pub. L. No. 79-601, §§ 131, 207, 60 Stat. 812, 831, 837. See generally *Ogden v. Zuckert*, 298 F.2d 312, 314 (D.C. Cir. 1961).

3. 10 U.S.C. § 1552 (2006 & Supp. II 2008).

4. *Id.* § 1552(a)(3). Procedures of the Coast Guard and Public Health Service commissioned corps correction boards are not subject to review by the Defense Department, as those uniformed services are located in the Departments of Homeland Security and Health and Human Services, respectively. See *id.* § 1552(a)(1); 42 U.S.C. § 213a(b) (2006).

5. See 5 U.S.C. §§ 554(a), 556(a) (2006).

6. *Id.* § 554(a).

7. 462 U.S. 296 (1983).

8. *Id.* at 303.

9. *Grieg v. United States*, 640 F.2d 1261, 1268 (Ct. Cl. 1981); *Sanders v. United States*, 594 F.2d 804 (Ct. Cl. 1979). The Tucker Act, 28 U.S.C. § 1491(a)(1) (2006), authorizes actions in the Court of Federal Claims against the United States for money claims not sounding in tort. The Little Tucker Act, 28 U.S.C. § 1346(a)(2), authorizes such actions in district court for cases seeking damages of \$10,000 or less.

10. 28 U.S.C. § 1331.

review,<sup>11</sup> but it cannot be denied that it applies to the correction boards as federal agencies that are not exempt from its strictures.<sup>12</sup> So if the APA does not require substantial-evidence review or the use of ALJs, what does it demand of the correction boards? For informal adjudication, all that is required of an agency is “a brief statement of the grounds for denial.”<sup>13</sup>

Rarely in American law have so few words spawned so much law. Read with the familiar tests for judicial review of agency action, the agency’s “brief statement of the grounds for denial” may not be so terse or cryptic that a reviewing court cannot tell why the agency did what it did. A reviewing court is entitled to have an explanation that it can test for compliance with the usual standards of judicial review—is it arbitrary and capricious, an abuse of discretion, or otherwise contrary to law?<sup>14</sup>

The case law boils down to a handful of core propositions. Has the correction board addressed nonfrivolous arguments an applicant has made to it?<sup>15</sup> If not, a remand is required. Has it given “a ‘reason that a court can measure’?”<sup>16</sup> Has it explained its decision in a coherent manner?<sup>17</sup> Has it committed an error of law, such as applying an inapposite statute or regulation or failing to apply one that *is* applicable? Has it decided like cases inconsistently?<sup>18</sup> Has it departed from precedent without explanation?<sup>19</sup> Has it followed an impermissible procedure in adjudicating a case?<sup>20</sup> There are other, equally familiar administrative law pitfalls, all of which increasingly—and usefully—figure in judicial review of board decisions.

The correction boards decide thousands of cases per year. The success rates naturally vary from board to board, but many, and at some boards, most, applications are denied.<sup>21</sup> This may not be mass administrative

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11. *E.g.*, *Wopsock v. Natchees*, 454 F.3d 1327, 1333 (Fed. Cir. 2006).

12. 5 U.S.C. § 551(1) (2006).

13. *Id.* § 555(e).

14. *Id.* § 706(2)(A).

15. *E.g.*, *Frizelle v. Slater*, 111 F.3d 172, 174, 177 (D.C. Cir. 1997).

16. *Kreis v. Sec’y of the Air Force*, 866 F.2d 1508, 1514–15 (D.C. Cir. 1989).

17. *Coburn v. McHugh*, 679 F.3d 924, 934–35 (D.C. Cir. 2012) (citing *Kreis*, 866 F.2d at 1514–15; *Tripoli Rocketry Ass’n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 437 F.3d 75, 77 (D.C. Cir. 2006)) (no deference owed to incoherent agency explanation).

18. *E.g.*, *Wilhelmus v. Geren*, 796 F. Supp. 2d 157, 162–63 (D.D.C. 2011).

19. *E.g.*, *Kreis v. Sec’y of the Air Force*, 406 F.3d 684, 686–87 (D.C. Cir. 2005) (citing *Indep. Petroleum Ass’n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996)); *Wilhelmus*, 796 F. Supp. 2d at 162–63.

20. *E.g.*, *Lipsman v. Sec’y of the Army*, 335 F. Supp. 2d 48, 53–54 (D.D.C. 2004).

21. For example, in 2011, the Board for Correction of Naval Records (BCNR) denied relief in 64% of the cases. 2011 Annual Report, Board for Correction of Naval Records (Jan. 3, 2012) [hereinafter BCNR Annual Report] (on file with author). In the same year, the Coast Guard board denied relief in 72 of the 158 cases it decided. E-mail from Julia

justice along the lines of the Niagara of social security, veterans, and immigration cases, but it is still a sizable caseload—the Army board alone received 17,674 applications in fiscal year 2012, of which 9,314 were considered by three-member panels; the Board for Correction of Naval Records (BCNR) received 13,204 applications in calendar year 2011<sup>22</sup>—and one in which the vast majority of applicants represent themselves.

Important consequences flow from the size of the caseload and the frequency of self-representation. For one thing, cases are often not presented fully, logically, cogently, or in a way that connects with governing case law. For another, they take a good deal of time to adjudicate—even if the applicant is properly represented. Congress has responded to the problem of delay, at least, by setting targets for the completion of agency action in record-correction cases.<sup>23</sup>

Another result of the caseload is that the boards rarely exercise their power to conduct evidentiary hearings.<sup>24</sup> The Army Board for Correction of Military Records conducted no live hearings in fiscal year 2012. The BCNR has not conducted one in the last twenty years. The Coast Guard board has not conducted one in the last ten years. The Court of Federal Claims has rarely, if ever, directed a correction board to conduct an evidentiary hearing,<sup>25</sup> and the same is true of the district courts, which also review corrections boards' decisions. While the absence of live hearings harms applicants, who bear the burden of proof (in contrast to the government's highly advantageous presumption of regularity),<sup>26</sup> the agency can also suffer. This is so because the lack of an evidentiary hearing may make it more difficult for a correction board to render the kind of credibility judgments that can make a difference if and when the time comes for judicial review. Of course, if there were more live hearings, there would also presumably be higher public confidence in the boards' administration of justice.

Finally, and most disturbingly, one of the correction boards—the BCNR—is given to short-form letter rulings that are often little more than

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Andrews, Deputy Chair, Coast Guard Bd. for the Corr. of Military Records, to author (Oct. 2, 2012, 15:18 EDT) (on file with author).

22. Letter from Jose L. Burgos, Chief, Freedom of Info. Act Program, Office of the Admin. Assistant to the Sec'y of the Army, to author (Oct. 22, 2012) (on file with author); BCNR Annual Report, *supra* note 21.

23. 10 U.S.C. § 1557 (2006).

24. Hearings are permitted, but not required, in cases under the Military Whistleblower Protection Act. 10 U.S.C. § 1034(f)(2)(C).

25. *See Helferty v. United States*, 101 Fed. Cl. 224, 228–29 (2011) (implying that refusal to conduct an evidentiary hearing on remand is reviewable for arbitrariness).

26. *E.g.*, *Richey v. United States*, 322 F.3d 1317, 1326–27 (Fed. Cir. 2003).

boilerplate. To be sure, many record-correction cases are not very complicated or the applicant or counsel may not have bothered to respond to the uniformed service's advisory opinion.<sup>27</sup> In such cases, a letter ruling ought to suffice, especially given the low bar the APA creates for decisions in informal adjudications. The problem is that the BCNR also uses letter rulings in cases that no reasonable observer would consider straightforward. Often, these letter rulings merely cross reference and adopt positions taken in the advisory opinion. Rote advisory opinions invite—and often lead to—remands. The BCNR should use letter rulings far more sparingly.

Oddly, the BCNR also does not *sua sponte* reveal the names and votes of the members when it has denied relief. Instead, it informs applicants and counsel that this information will be provided on request. This compels applicants to write a follow-up letter seeking information that ought to be included in the decisional document as a matter of routine. This rigmarole is an inexplicable and pointless bureaucratic hurdle.

### I. A CASE FROM HELL

It may be instructive to describe an APA case I handled for several years in the United States District Court for the District of Columbia.<sup>28</sup> It lasted years and is thankfully now over. In the end, the agency action was upheld and no appeal was taken. Along the way, the BCNR and the Marine Corps's intramural enlisted remedial selection board probably violated every bedrock rule of administrative law. Let me count the ways.

The controversy between this career-enlisted Marine and the government began in 1994, went through several cycles of administrative action, both within the Marine Corps and at the correction board, and wound up in the district court in 2005. At issue was whether the plaintiff should have been remedially promoted to a higher enlisted pay grade. As it happens, the case lasted so long that he retired before it was over.

In April 2006, faced with a motion for summary judgment, the Secretary of the Navy requested that the case be remanded. After further administrative proceedings, the case returned to the district court, which in 2008 remanded for a second time when it became apparent that the Marine Corps's enlisted remedial selection board—not the correction board—had acted without the minimum number of voting members required by the governing regulation.<sup>29</sup>

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27. "Advisory opinion" is the term used for the uniformed service's response to a correction board application. It is, in effect, a brief.

28. *Pettiford v. Sec'y of the Navy*, 858 F. Supp. 2d 86 (D.D.C. 2012).

29. During the litigation the Marine Corps changed the regulation to reduce the required number.

Thereafter, the BCNR rendered a further decision upholding the Marine Corps's action. Unfortunately, the panel members were laboring under a misimpression as to whether the Marine Corps's internal board had actually compared Gunnery Sergeant Pettiford's service record with those of other Marines when deciding whether he should be remedially promoted. This led to a third remand.

Two months later, there was a fourth remand when we learned that the correction board had engaged in improper *ex parte* contacts<sup>30</sup> about the case with the Marine Corps.

A further BCNR decision ensued, but that decision neglected to respond to one of the plaintiff's nonfrivolous arguments. As a result, in 2011—six years into the litigation—the case was remanded a fifth time. This time Judge Huvelle left nothing to chance—or so she must have thought—by giving the agency specific questions to address.<sup>31</sup>

It did not work. The correction board failed to respond to several of the questions that had been put to it in the order of remand. This compelled a sixth remand.

The seventh and final remand—the third of three in 2011 alone—was required when we learned that the board's voting members had never reconvened for the purpose of responding to Judge Huvelle's earlier order. The staff had simply made up a response and made it seem like the board members had functioned.

In the end, the correction board assigned a new, previously uninvolved staff member to review the file and work with yet another panel of voting members. The result was a lengthy ruling which once again denied relief. Although an appealable issue was presented, the plaintiff, who by now was overseas, holding a responsible civilian position in the Department of State, decided, not surprisingly, that enough was enough. By then it was 2012.

Most lawyers prefer to talk about their victories. That includes me. But readers ought to know about this case. Through the prism of the APA, it vividly shows how the correction board process can work even when an applicant is represented by counsel and has the patience and resources to do battle over a protracted period, and even under the watchful eye of a tenacious federal judge.

In describing this case, I want to be very clear that I do not believe this sad tale of informal adjudication is typical of the BCNR, much less of any of the other correction boards. Nonetheless, and regardless of the correctness of the final outcome, what I have described did happen and is far from ancient history. It could happen again, especially to the countless

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30. 10 U.S.C. § 1556 (2006).

31. *Pettiford v. Sec'y of the Navy*, 774 F. Supp. 2d 173 (D.D.C. 2011).

correction board applicants who lack proper representation or are not represented at all.

## II. RECOMMENDATIONS

Summing up (and recognizing that I have not developed all of the points that follow), I have a few suggestions for the Court of Federal Claims, the Executive Branch, and Congress.

For the court, I recommend that judges take a hard look at whether there are times when a remand should include instruction to conduct an evidentiary hearing. I also recommend that whether by rule change<sup>32</sup> or by order in individual cases, the deadline for agency action on remands should be shortened. Somewhat more broadly, I would hope that the correction boards should be treated like any other federal agency when it comes to judicial review, whether that review takes place under the rubric of the Tucker Act or of the APA. I know there are cases galore that take a different view, but I have come to believe no one should grow misty-eyed simply because a case has something to do with national defense.

For the Executive Branch, a greater effort should be made to achieve uniformity in the correction boards' rules and jurisprudence. Why is it, for example, that some correction boards believe they have the power to recommend the directed promotion of a commissioned officer (i.e., without referral to a special selection board), while others do not? Why do some refer reconsideration requests to the voting members while others rely on staff to rule on such matters?<sup>33</sup> Why do some require voting members to sign or initial decisions while others do not? After all, the governing statutes apply to all of the military services. The Defense Department should revisit its *laissez faire* correction board regulation and mandate standardization among the boards.<sup>34</sup>

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32. See U.S. Ct. Fed. Claims R. 52.2(b)(1)(B) (remand for up to six months), available at [http://www.uscf.uscourts.gov/sites/default/files/court\\_info/20120702\\_rules/12.07.02%20FINAL%20VERSION%20OF%20RULES.pdf](http://www.uscf.uscourts.gov/sites/default/files/court_info/20120702_rules/12.07.02%20FINAL%20VERSION%20OF%20RULES.pdf). Six-month remands seem to be the norm. *But see* Mendez v. United States, 103 Fed. Cl. 370, 384 (2012) (ninety-day remand). The remand period can also be extended. U.S. Ct. Fed. Claims R. 52.2(d)(1).

33. *E.g.*, Schmidt v. United States, 89 Fed. Cl. 111, 124 (2009) (BCNR); Lipsman v. Sec'y of the Army, 335 F. Supp. 2d 48, 54 (D.D.C. 2004) (Army Board for Correction of Military Records (ABCMR)); Mosley v. Dep't of the Navy, No. 7:10-CV-973, 2011 U.S. Dist. LEXIS 149258, at \*3-4 (N.D.N.Y. Dec. 29, 2011) (BCNR). *But see* 33 C.F.R. § 52.67(b) (2012) (Coast Guard).

34. Directive 1332.41, Department of Defense, Boards for Correction of Military Records (BCMRs) and Discharge Review Boards (Mar. 8, 2004), <http://www.dtic.mil/whs/directives/corres/pdf/133241p.pdf>. The directive imposes virtually no duties on the BCMRs. All it demands, in ¶ 3.2, is that the services' correction board procedures comply with it and the governing statutes and:

The services should also improve their systems for access to decisions of the correction boards. The decisions—some of them—are online, but they seem to be posted at irregular intervals and at a leisurely pace. Moreover, there is no effort to summarize in a useful way—as the Court of Federal Claims’ own website does very nicely—what each case is about. There is no overall online index.<sup>35</sup> The result is that only those with time on their hands will a-hunting go for pertinent precedents.<sup>36</sup> All of this makes it needlessly difficult for an applicant to situate his or her case within the relevant board’s decisions and frame an argument based on precedent.<sup>37</sup>

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[A]t a minimum, require that:

3.2.1. The boards consider applications individually and fashion relief appropriate to the facts and circumstances of each case.

3.2.2. Applications be submitted by the individual seeking relief or by an appropriate representative as defined in reference (c), as applicable.

3.2.3. Before granting relief, sufficient evidence justifying the relief must be on the record or provided by the applicant. Relief shall be denied if there is insufficient material evidence in the record or provided by the applicant to warrant relief.

*Id.* ¶ 3.2.

The only other requirement the Defense Department has imposed is that service secretaries must ensure that BCMR applicants are “provided a copy of all correspondence to or from the agency or board with an entity outside the agency or board,” *id.* ¶ 4.2.2., as required by 10 U.S.C. § 1556, and that the time standards set in 10 U.S.C. § 1557 are met. The directive does not require the service secretaries to submit their BCMR regulations to the Secretary of Defense for approval. *Id.* ¶ 4.2.1.

35. For example, the online link to the index of Air Force board decisions leads nowhere. See *Air Force Boards*, DEP’T OF THE AIR FORCE, <http://boards.law.af.mil/AFboards.htm> (last updated Apr. 12, 2012) (follow “BCMR/BRD Index” hyperlink). The Army BCMR does not even have such a link, broken or otherwise. See *Army Board for the Correction of Military Records (BCMR)*, DEP’T OF THE ARMY, [http://boards.law.af.mil/ARMY\\_BCMR.htm](http://boards.law.af.mil/ARMY_BCMR.htm) (last updated Apr. 3, 2013).

36. That is not to say that it is impossible to find the precedential needle in the adjudicatory haystack. See, e.g., *Kreis v. Sec’y of the Air Force*, 406 F.3d 684 (D.C. Cir. 2005); *Wilhelmus v. Geren*, 796 F. Supp. 2d 157 (D.D.C. 2011). Sometimes it may happen that counsel for an applicant will have handled a similar case and therefore know about an otherwise undiscoverable precedent. The BCNR seems not to believe in precedent, notwithstanding settled administrative law on the point. Thus, the web page for its decisions recites: “*Disclaimer: This site is not intended to provide technical support for submission of an application. Each application is decided upon based on it’s [sic] own merit.*” See *Navy Boards*, DEP’T OF THE NAVY, <http://boards.law.af.mil/NAVYboards.htm> (last updated Apr. 12, 2012).

37. One would like to think that correction board members in one military department would also take respectful note of decisions of another service’s board if called to their attention, but my impression is that citation across service lines is rare, and I know of no case in which a correction board has, *sua sponte*, invoked a decision of a sister board. In a perfect universe, indeed, there would be only one correction board, operating under one set of procedures. Perhaps attention will be given to this kind of radical surgery as the armed services increasingly face austerity budgets. Happily, Congress has already demonstrated its hostility to any degradation in the processing of correction board cases as a result of



Since agency action can be set aside on the basis that like cases must be treated alike, the effect is to deny applicants a potentially potent tool.

As for Congress, I would like to take a leaf from Judge Bruggink's excellent 1999 article in the *Public Contract Law Journal*<sup>38</sup> and recommend a serious effort to rationalize the allocation of responsibility between the Court of Federal Claims and the district courts for correction board cases.<sup>39</sup> While appellate review of Little Tucker Act litigation lies with the Federal Circuit,<sup>40</sup> many correction board cases are quite properly, and without so much as a whiff of artful pleading, framed as APA matters. These cases will wind up in the geographical circuits.<sup>41</sup> Since correction board cases are probably way down there with longshore and harbor workers' cases when it comes to the chances of a grant of certiorari, there is little prospect that divergent approaches will be resolved by the Supreme Court. For all these reasons, Congress should examine the current allocation of jurisdiction over correction board cases. This is emphatically not to say either that all correction board cases belong in the Court of Federal Claims or that they all belong in the district courts, but it *is* to say that the current state of affairs is a legal minefield, with far too much risk of wasted effort all around. Our active duty and former military personnel—the vast majority of whom cannot afford much civilian lawyering—deserve better.

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personnel reductions. *See* 10 U.S.C. § 1559 (2006).

38. Eric Bruggink, *A Modest Proposal*, 28 PUB. CONT. L.J. 529, 531–32, 543 (1999).

39. Irrationally, the same correction board case may be subject to different periods of limitation depending on whether review is sought under the Tucker or Little Tucker Acts, on the one hand, or under the Administrative Procedure Act (APA), on the other. *See* 28 U.S.C. §§ 2401, 2501 (2006). Similarly, notwithstanding *Darby v. Cisneros*, 509 U.S. 137 (1993), or John A. Wickham, *Federal Courts in the District of Columbia Resurrect Service Members' Right to Direct Judicial Review of Personnel Actions*, 55 ADMIN. L. REV. 23 (2003), the exhaustion doctrine is still likely to be invoked in correction board APA litigation in the district court, whereas correction board remedies need not be exhausted in the Court of Federal Claims (unless the plaintiff voluntarily applies to the board and then decides not to wait for final agency action).

40. 28 U.S.C. § 1295(a)(2).

41. *Id.* § 1291.