IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL O'GRADY,

OPINION AND ORDER

Plaintiff,

01-C-94-C

v.

MARK NYVOLD,

Defendant.

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This is a civil action for injunctive relief in which pro se plaintiff Michael O'Grady contends that he was discharged improperly from the Army reserve. Presently before the court is defendant's motion to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), on the grounds that plaintiff (1) has failed to plead a proper jurisdictional basis for his action; (2) has failed to fully exhaust his administrative remedies; (3) cannot bring a claim for damages against his superior; and (4) has no property or liberty interest in his continued military employment. Defendant's motion will be granted because the decision of the Army discharge board is not a "final decision" subject to review under the Administrative Procedure Act, 5 U.S.C. § 704, and because a decision by the Court of Appeals for the Seventh Circuit bars constitutional claims for reinstatement brought by

military personnel in which the challenge is to the nature of the procedure given in the termination. See Knutson v. Wisconsin National Guard, 995 F.2d 765 (7th Cir. 1993).

A motion to dismiss will be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint. Cook v. Winfrey, 141 F. 3d 322, 327 (7th Cir. 1998) (citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). For the purpose of deciding this motion to dismiss, I accept as true the allegations in plaintiff's complaint.

ALLEGATIONS OF FACT

Plaintiff Michael O'Grady lives in the state of Wisconsin. Defendant Mark Nyvold is self-employed as a lawyer in Minnesota and is employed part-time as a United States Army lieutenant colonel reserve officer.

After defendant assigned plaintiff to an Army reserve unit in Minnesota, plaintiff asked to be transferred because it was approximately 240 miles between his home and the reserve unit. Defendant did not process plaintiff's transfer request and denied that it was ever submitted. Plaintiff was not able to continue traveling to Minnesota because of problems with his car, money and the health of one of his family members.

Plaintiff filed an administrative complaint with the Army Inspector General representative. Defendant or his representative began to harass plaintiff at work and home

as well as plaintiff's family members, demanding that plaintiff perform his military duties without pay, expend personal money to respond to administrative inquiries and provide medical records of a member of his family. Plaintiff learned that defendant had copies of plaintiff's legal documents relating to a prior lawsuit in the Western District of Wisconsin and had been in contact with the lawyer for the defendants in the prior lawsuit.

Defendant accused plaintiff of having committed crimes in the state of Michigan in 1994, violating Army regulations and falsifying personal documents. Defendant began an administrative proceeding to discharge plaintiff from the Army reserve involuntarily. Plaintiff was represented by Army Reserve Major Jeffrey Hart. The discharge hearing was held in Arden Hills, Minnesota, on October 7, 2000, after which an administrative separation board recommended that plaintiff be discharged involuntarily. The Army discharge board members voted to dismiss the criminal allegations against plaintiff but sustained other allegations. Plaintiff received notice on February 6, 2001, that he would be discharged immediately from the United States Army reserve.

Plaintiff was not present for his administrative separation board hearing. Plaintiff never met with his lawyer, Major Hart. Plaintiff was not able to attend the hearing because he was ill at the time of the scheduled hearing and his request to reschedule the hearing was denied. Plaintiff does not have a reliable vehicle or adequate financial resources to travel from Madison to Minnesota for several days. Plaintiff was not given proper notice of the

hearing, an opportunity to review all of the evidence submitted at the hearing, competent legal counsel or a copy of the Army regulations relating to a discharge action. Defendant concealed or destroyed plaintiff's Army personnel file and submitted an improper document at the hearing. Major Hart denied plaintiff's request to file an appeal of his discharge and failed to respond to correspondence from plaintiff.

OPINION

A. Lack of Subject Matter Jurisdiction

Defendant contends that plaintiff's complaint should be dismissed because this court lacks subject matter jurisdiction. Reading plaintiff's complaint liberally, Haines v. Kerner, 404 U.S. 519, 521 (1972), I am persuaded that this court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because plaintiff's complaint can be fairly read to allege a claim under the Administrative Procedure Act for defendant's alleged failure to adhere to Army regulations in discharging plaintiff as well as a Bivens action in which plaintiff alleges a violation of the due process clause of the Fifth Amendment. See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

B. Administrative Procedure Act Claim

1. Administrative exhaustion

Defendant contends that plaintiff's complaint should be dismissed for plaintiff's failure to exhaust his administrative remedies prior to filing suit. In Mindes v. Seaman, 453 F.2d 197, 201-02 (5th Cir. 1971), the Court of Appeals for the Fifth Circuit set forth a test to determine whether a service member could bring a suit against the government challenging an internal military decision, specifying that service members must exhaust his intramilitary remedies before filing suit. Although the Mindes test was widely accepted, the Court of Appeals for the Seventh Circuit rejected it in Knutson v. Wisconsin Air National Guard, 995 F.2d 765, 768 (7th Cir. 1993), stating that the justiciability inquiry should focus on "whether the military seeks to achieve legitimate ends by means designed to accommodate the individual right at stake to an appropriate degree." Subsequently, the Supreme Court decided Darby v. Cisneros, 509 U.S. 137, 154 (1993), in which it held that unless exhaustion is required by statute or agency rule as a prerequisite to judicial review, the Administrative Procedure Act divests courts of the discretion to require a plaintiff to exhaust administrative remedies before seeking judicial review of a final agency action. Since Darby was decided, there has been some confusion about the need to exhaust his administrative remedies "in the context of claims brought by service members under the Administrative Procedure Act." Captain E. Roy Hawkens, *The Exhaustion Component of the Mindes Justiciability Test Is Not Laid to Rest By Darby v. Cisneros*, 166 Mil. L. Rev. 67 (2000).

Defendant contends that plaintiff should have sought relief under 10 U.S.C. §§ 1552,

1553. Pursuant to § 1553, the Army Discharge Review Board is authorized to "change a discharge or dismissal, or issue a new discharge, to reflect its findings." See also 32 C.F.R. § 581.2. Pursuant to § 1552, the Army Board for Correction of Military Records is authorized to "direct[] or recommend[] correction of military records to remove an error or injustice." 32 C.F.R. § 581.3; see also 10 U.S.C. § 1552(a)(1) (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.") The language of §§ 1552 and 1553 does not indicate that exhaustion is a prerequisite to judicial relief.

In Perez v. United States, 850 F. Supp. 1354 (N.D. Ill. 1994), a former naval petty officer brought a challenge under the Administrative Procedure Act and the Constitution to his "Other Than Honorable Discharge By Reason of Misconduct Due to Commission of Serious Offense." In denying defendant's motion to dismiss plaintiff's complaint for his failure to exhaust his administrative remedies, the District Court for the Northern District of Illinois stated, "[w]hile cognizant of the special nature of the armed services and the potential dangers of unwarranted judicial interference with military activity, this court declines the government's invitation to carve out a special military exception to the Supreme Court's decision in Darby." Id. at 1360-61. See also St. Clair v. Secretary of Navy, 970 F. Supp. 645 (C.D. Ill. 1997) (citing Darby, 509 U.S. 137) (denying defendant's motion to dismiss complaint brought by discharged naval enlistee because administration exhaustion

not required by statute or regulation).

Although there may be important policy reasons to carve out a military exception to the Supreme Court's holding in Darby, the Seventh Circuit has not done so. See *The Exhaustion Component of the Mindes Justiciability Test Is Not Laid to Rest By Darby v. Cisneros*, 166 Mil. L. Rev. at 76 ("[N]o court of appeals has squarely resolved in a published opinion whether Darby extends to APA claims brought by service members."). See also Crane v. Secretary of the Army, 92 F. Supp. 2d 155, 163 (W.D.N.Y. 2000):

> [N]either the statute which governs the Army's administrative procedures, . . . nor the Army's own internal regulations require exhaustion. Further, more than six years have passed since the Court's decision in Darby, and Congress has yet to enact legislation for the Armed Forces which include an exhaustion requirement; nor has the Secretary of the Army acted to impose such a requirement by regulation.

I am not persuaded that plaintiff was required to exhaust his administrative remedies before filing a complaint in which he alleges violations of the Administrative Procedure Act.

2. Review of a final agency action

It appears that plaintiff alleges that the Army discharge board violated the Administrative Procedure Act by failing to follow Army regulations in discharging him from the Army. The Administrative Procedure Act, 5 U.S.C. §§ 701-706, sets forth the standards for judicial review of an agency's decision. 5 U.S.C. § 706(2) provides that the reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute."

5 U.S.C. § 704 provides that "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of a final agency action." Soon after plaintiff filed a complaint in this court, he filed an "application for correction of military record" pursuant to 10 U.S.C. § 1552. It is my view that plaintiff's appeal to the Army Board for Correction of Military Records means that the Army discharge board's decision is not a final agency action. For that reason, plaintiff's claim under the Administrative Procedure Act must be dismissed.

C. Due Process Claim

Defendant contends that plaintiff's constitutional claim is barred by Chappell v. Wallace, 462 U.S. 296 (1983), in which the Supreme Court held that military personnel may not maintain Bivens suits to recover damages from a superior officer for alleged constitutional violations. See also Feres v. United States, 340 U.S. 135 (1950) (interpreting 28 U.S.C. § 2680(j) to mean that government is not liable under Federal Tort Claims Act

for injuries to service members when injuries "arise out of or are in the course of activity incident to service"). Defendant also contends that plaintiff's due process claim should be dismissed because plaintiff lacks a property or liberty interest in his continued employment with the Army.

In Knutson, 995 F. 2d at 771, the Seventh Circuit held that although injunctive relief may be available in certain constitutional challenges brought by military personnel, it was not available in the plaintiff's challenge to his termination from the Wisconsin Air National Guard because the plaintiff's suit "implicate[d] only the nature of the procedure used in his termination." In holding that the plaintiff's claim nonjusticiable, the court stated, "The interference that judicial review poses here is more than a matter of administrative inconvenience. . . . If civilian courts are regularly open to claims challenging personnel decisions of the military services, judicial review may also undermine military discipline and decisionmaking or impair training programs and operational readiness." Id. Although Knutson involved a challenge pursuant to § 1983, the court's reasoning is applicable to plaintiff's Bivens claim for reinstatement. Plaintiff's sole request for relief is reinstatement, a request that "would require [this court] to intrude on a province committed to the military's discretion." Id. Accordingly, plaintiff's constitutional claim must be dismissed as nonjusticiable. Therefore, I need not reach defendant's other arguments in support of dismissing plaintiff's constitutional claim.

D. Abuse of Judicial Process

Defendant asks this court to prohibit plaintiff from filing additional cases in the Western District of Wisconsin without prior court approval, pointing out that plaintiff has filed several cases relating to his involuntary discharge from the Army in this district and in the District Court for the Western District of Michigan and District Court for the District of Minnesota. Although the judicial system would have been well-served if plaintiff had filed all of his claims relating to his discharge in one case, I am not persuaded that his filings need to be restricted at this time. However, it is appropriate to point out to plaintiff that he faces the prospect of sanctions if he files the same challenge again and if defendant applies for sanctions in conformance with Fed. R. Civ. P. 11.

ORDER

IT IS ORDERED that defendant Mark Nyvold's motion to dismiss plaintiff Michael O'Grady's complaint is GRANTED. The clerk of court is directed to enter judgment for

defendant and close this case.

Entered this 2nd day of July, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge