United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5089 **September Term, 2017**

FILED ON: MAY 1, 2018

BRIAN HUFFMAN,

APPELLANT

v.

KIRSTJEN M. NIELSEN,

APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cv-00861)

Before: ROGERS, SRINIVASAN and WILKINS, *Circuit Judges*.

J U D G M E N T

The court considered this appeal on the record from the United States District Court for the District of Columbia, and on the briefs and arguments of the parties. The court has accorded the issues full consideration and determined that they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the judgment of the district court be **AFFIRMED**.

Brian Huffman was involuntarily discharged from the U.S. Coast Guard in 2007 for a "pattern of misconduct." J.A. 233. As part of that discharge, he was given a reenlistment code of RE-4, which denied him the ability to reenlist. Because of certain procedural errors associated with Huffman's discharge, the Coast Guard later changed his record to reflect that he was honorably discharged for "miscellaneous/general reasons." *Id.* at 235. But the Coast Guard maintained the RE-4 reenlistment code.

Huffman challenged various aspects of his discharge through the Board for Correction of Military Records. He argued that the Coast Guard discharged him without providing him an opportunity to consult with counsel, without considering his discharge statement, and without giving him an opportunity to remedy any deficiencies in his performance, all in violation of the Coast Guard's personnel manual. Huffman further contended that those errors entitled him to a change in his reenlistment code that would allow him to reenlist in the Coast Guard. In orders issued in 2009 and 2010, the Board rejected Huffman's challenges.

Huffman then filed suit in the district court against the Secretary of Homeland Security (the Coast Guard is part of the Department of Homeland Security). Huffman argued that the Coast Guard wrongfully discharged him and discharged him without due process, and that the Board for Correction of Military Records violated the Administrative Procedure Act when it declined to change his reenlistment code. The district court granted summary judgment to the Secretary, concluding, among other things, that the Coast Guard failed to comply with its personnel manual when it discharged Huffman but that those failures did not entitle Huffman to a change in his reenlistment code. The court dismissed Huffman's remaining claims on various grounds.

Huffman appeals, arguing that the Board erred in declining to change his reenlistment code in light of certain errors he contends the Coast Guard committed in connection with his discharge. We review a determination of a military corrections board under an "unusually deferential application of the 'arbitrary or capricious' standard." *Roberts v. United States*, 741 F.3d 152, 158 (D.C. Cir. 2014) (quoting *Kreis v. Sec'y of the Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989)). We assess "whether the '[Board's] decision making process was deficient, not whether [its] decision was correct.'" *Id.* (quoting *Kreis*, 866 F.2d at 1511). Accordingly, we will uphold the Board's decision as long as it "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Kreis v. Sec'y of the Air Force*, 406 F.3d 684, 686 (D.C. Cir. 2005) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Huffman argues that the Coast Guard failed to comply with its personnel manual in three respects when it discharged him. First, he argues that, because he was on performance probation prior to his discharge, the Coast Guard was required to afford him additional opportunity to change his behavior before it discharged him. Second, he contends that the Coast Guard discharged him without giving him an opportunity to consult with counsel. Third, he argues that the Coast Guard discharged him without considering his rebuttal statement. Those errors, Huffman argues, required the Board to change his reenlistment code.

We uphold the Board's decision not to change Huffman's reenlistment code. We therefore affirm the district court's grant of summary judgment in favor of the Secretary.

Performance Probation. The personnel manual requires the Coast Guard to afford certain members on performance probation, like Huffman, "a reasonable probationary period . . . to overcome deficiencies before initiating administrative discharge action." J.A. 348. Huffman argues that the Coast Guard violated that provision when it discharged him without giving him an opportunity to overcome any deficiencies. But the same provision of the manual gives commanding officers discretion to "recommend discharge at any time during the probation if the member is not making an effort to overcome the deficiency." *Id.* The Board reasonably explained that the commanding officer appropriately recommended discharge on the ground that Huffman did not make sufficient effort to overcome the deficiency. We therefore reject Huffman's argument that the Coast Guard violated the personnel manual when it discharged him while he was

on performance probation.

Opportunity to consult with an attorney and submit a statement prior to discharge. The personnel manual provides that, upon notice of discharge, the Coast Guard must "[a]fford the member an opportunity to consult with a lawyer." J.A. 349. It further states that, "[i]f the member requests counsel and one is not available, the commanding officer must delay discharge proceedings until such time as counsel is available." *Id.* The manual also requires the Coast Guard to give members the "opportunity to make a written statement" prior to any discharge. *Id.* Taken together, those provisions contemplate that members will be able to consult an attorney in preparing their statement, and that the Coast Guard will consider that statement before making its final discharge decision.

The Coast Guard told Huffman that he would have three days to consult with an attorney and draft a rebuttal statement. But on the second day, it informed him that he needed to submit his rebuttal statement immediately. Huffman ultimately submitted a statement that day. His statement noted that, while he had briefly spoken with an attorney, the attorney did not have an opportunity to review his statement. Even though Huffman submitted his statement when requested, the Coast Guard did not consider the statement prior to discharging him.

Huffman argues that the two days he was given to consult an attorney did not comply with the manual's requirement that he have an "opportunity to consult with a lawyer" prior to his discharge. He also contends that he was misled about the amount of time he would have to consult an attorney, and that, if he had been given the three days he was initially promised, his attorney would have been able to review his statement. Huffman further argues that the Coast Guard separately violated the manual when it failed altogether to consider his rebuttal statement.

The Coast Guard conceded that it should have considered the rebuttal statement. But it argued, and the Board agreed, that Huffman had an adequate opportunity to consult with counsel before his discharge. On that issue, Huffman's arguments to the contrary are not without force. The manual contemplates a bona fide, rather than a perfunctory, opportunity for a member to consult with counsel before discharge. Otherwise, it would make little sense for the manual to require the Coast Guard to "delay discharge proceedings" to allow a member who has requested an attorney the opportunity to obtain one. Here, however, the Coast Guard, after initially telling Huffman he would have three days to consult with counsel, told him on the second day that he would need to submit his rebuttal statement that day, such that Huffman submitted his statement before his attorney had an opportunity to review it.

Although we conclude the Coast Guard erred in failing to consider Huffman's rebuttal statement and might well have erred in declining to give Huffman additional time to consult an attorney, we uphold the Board's decision that any errors in those regards were harmless. Huffman acknowledges that, to prevail on his argument that the Coast Guard erred when it declined to change his reenlistment code, he needed to show that the errors associated with his discharge

affected his reenlistment code. The Board concluded that the errors associated with his rebuttal statement, including the failure to give Huffman sufficient time to consult with an attorney with respect to that statement, were harmless. The Board reasoned that, even if Huffman had received additional time and even if the Coast Guard considered his statement, he "would have been discharged" with the same reenlistment code in light of the "allegations about his repeated misconduct, disrespect, and shading of the truth." J.A. 40.

Huffman fails to show that the Board's conclusion in that respect is arbitrary and capricious. In its orders, the Board explained that Huffman was discharged "based on documentation of repeated misconduct from January through April 2007," including disciplinary action for "continuing disrespect and failure to follow the chain of command." J.A. 252. In light of those allegations and its view that the rebuttals Huffman submitted in the aftermath of his discharge were wholly unpersuasive, the Board concluded that Huffman would have received the same reenlistment code even if the Coast Guard had complied with the personnel manual. *Id.* at 255. We conclude that the Board sufficiently explained the basis for its conclusion, and that its decision not to change Huffman's record therefore survives arbitrary-and-capricious review.

We have considered Huffman's remaining arguments in favor of reversal and conclude that they lack merit. We therefore affirm the judgment of the district court in all respects.

Pursuant to D.C. CIR. R. 36(d), this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing en banc. See FED. R. APP. P. 41(b); D.C. CIR. R. 41(b).

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk