In the United States Court of Federal Claims

No. 03-1955 C
Filed December 10, 2004
TO BE PUBLISHED

MAJOR DOUGLAS GETHERS, USMC, Plaintiff, v. THE UNITED STATES, Defendant.	)	Military pay, retroactive promotion, 10 U.S.C. § 628, 10 U.S.C. § 1552, Tucker Act, subject matter jurisdiction, Corrections Board, Special Selection Board, 28 U.S.C. § 1631

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OPINION AND ORDER

GEORGE W. MILLER, Judge.

This case is before the Court on defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, or, in the Alternative, Motion for Judgment on the Administrative Record and plaintiff's Cross-Motion for Judgment on the Administrative Record. For the following reasons, the Court ORDERS that plaintiff's complaint be DISMISSED for lack of subject matter jurisdiction and that this action be transferred to the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1631 (2000).

BACKGROUND

Plaintiff, Maj. Douglas Gethers, is an active duty member of the United States Marine Corps. On April 23, 1998, Maj. Gethers received a fitness report that he felt was inaccurate and

improperly prepared. He alleged that the report was adverse without being declared as such and was motivated by personal animus. With this fitness report included in his military record, Maj. Gethers failed of selection for promotion in the FY 2000 and FY 2001 Lieutenant Colonel selection boards. Concerned about these failures, Maj. Gethers contacted the Marine Corps Officer Assignment Branch, Personnel Management Division ("MMOA-4"), the branch of the Marine Corps responsible for performance counseling. Maj. Gethers asserts that a counselor at the MMOA-4 informed him that the fitness report was the "key factor" in his having been passed over for promotion by the selection boards.

On April 14, 2000, Maj. Gethers filed with the Board for Correction of Naval Records ("BCNR" or "Board") an Application for Correction of Naval Record, seeking removal of the April 23, 1998 fitness report from his Naval record, removal of the failures of selection to Lieutenant Colonel for FY 2000 and FY 2001, and consideration for promotion by a special selection board ("SSB"), *see* 10 U.S.C. § 628(b) (2000). The Marine Corps Performance Evaluation Review Board ("PERB") reviewed the fitness report and concluded that it should be removed from Maj. Gethers's record. The PERB transferred the case to the BCNR for consideration of the failures of selection. In response to a request by the PERB, Col. D.S. Burgess of the MMOA-4 prepared an advisory report for the BCNR. In the report, he concluded that Maj. Gethers was "definitely unlikely" to have been promoted even absent the fitness report. He cited several other areas of competitive concern unrelated to that report. Ultimately, on August 10, 2000, the BCNR decided not to remove the failures of selection, and the Board did not recommend consideration of Maj. Gethers for promotion by a special selection board. The Board stated that it based its decision on "the entire record," but did not specifically address Maj. Gethers's assertion that an MMOA-4 counselor had advised Maj. Gethers that the fitness report was the "key factor" in his having been passed over for promotion by the selection boards.

On August 20, 2003, Maj. Gethers filed a complaint against the United States in this court. The complaint alleged that the BCNR acted arbitrarily and capriciously in denying Maj. Gethers's application for correction of Naval records by 1) failing to address the MMOA-4 counselor's statement, 2) denying Maj. Gethers's request to remove from his record the failures of selection by the FY 2000 and FY 2001 selection boards, and 3) failing to convene a special selection board to consider Maj. Gethers's request for remedial promotion. *See* Compl. ¶¶ 16-19. The complaint also asked for back pay in the grade of Lieutenant Colonel from the appropriate date of rank "upon his selection after consideration of his Naval record by the special selection board for FY 2000 and/or FY 2001 as corrected." Compl. at 5 ¶ 2. In response, the Government filed a Motion to Dismiss, or, in the Alternative, a Motion for Judgment on the Administrative Record. Maj. Gethers filed a Cross-Motion for Judgment on the Administrative Record. The Government proposed several bases for its motion. First, the Government argued that under *United States v. Testan*, 424 U.S. 392 (1976), Maj. Gethers failed to state a claim upon which relief can be granted.[1] Second, the Government argued, Maj. Gethers's claim was nonjusticiable

[1] The Government challenges whether plaintiff has identified a money-mandating statute, and characterizes the deficiency as a failure to state a claim upon which relief can be granted,

because it was, at bottom, a request for promotion. Third, and finally, the Government argued that the BCNR's decision was neither arbitrary nor capricious.

DISCUSSION

A. In Order to Establish Subject Matter Jurisdiction, Maj. Gethers Must Identify a Provision of Law That Is Reasonably Amenable, With Fair Inferences Drawn, To a Reading That It Mandates Money Damages

Though the Government did not move to dismiss Maj. Gethers's claim for lack of jurisdiction, Rule 12(h)(3) of the Rules of the United States Court of Federal Claims ("RCFC") provides that "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Many of the arguments that the parties made on the Government's Motion to Dismiss, though based on RCFC 12(b)(6), are relevant in considering the issue of subject matter jurisdiction.

"[T]he party seeking to invoke federal court jurisdiction bears the burden of establishing that such exists." *Raymark Indus., Inc. v. United States*, 15 Cl. Ct. 334, 337 (1988). "[I]n passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

The Tucker Act confers jurisdiction on the Court of Federal Claims "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States . . . ." 28 U.S.C. § 1491(a)(1) (2000). "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983).

The Tucker Act supplies consent, constituting a waiver of sovereign immunity. *Mitchell*, 463 U.S. at 212. However, the Tucker Act does not create a substantive right enforceable against the United States. *Testan*, 424 U.S. at 398. The claimant must identify another source of law that creates the substantive right and demonstrate that the source of law mandates compensation. *Mitchell*, 463 U.S. at 216-17. The Supreme Court held in *Mitchell* that "the court must inquire whether the source of substantive law can fairly be interpreted as mandating" monetary compensation from the government. *Mitchell*, 463 U.S. at 218.

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rather than as a failure of subject matter jurisdiction. *See* Def.'s Resp. to Pl.'s Supp. Br. at 2 n.2. The Court, however, is of the view that plaintiff's complaint fails to satisfy even the lowered threshold for establishing subject matter jurisdiction described by the United States Court of Appeals for the Federal Circuit in *Fisher v. United States*, 364 F.3d 1372, 1379 (Fed. Cir. 2004).

In *Fisher v. United States*, 364 F.3d at 1377, the Court of Appeals recognized a new test for determining whether the Court of Federal Claims has jurisdiction to address the merits of a suit under the Tucker Act. "The new test clearly lowers the threshold for establishing that a statute or regulation is money-mandating, for it replaces a normal 'fairly interpreted' test with a less-demanding test of 'reasonable amenability' based on 'fair inferences.'" *Id*. (citing *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472-73 (2003)). "Thus, under *White Mountain*, when a Tucker Act plaintiff makes a non-frivolous allegation that a particular statute is reasonably amenable, with fair inferences drawn, to a reading that it mandates money damages, a basis for jurisdiction is stated." *Id*.

> The process by which a plaintiff undertakes the required jurisdictional showing ordinarily will occur in the context of the initial pleading, a well-pleaded non-frivolous complaint. If the showing meets the test, nothing more need be done to establish the trial court's jurisdiction. Of course, plaintiff's initial showing is subject to challenge as a substantive matter, either by the Government in a timely motion for dismissal for lack of jurisdiction, or by the court sua sponte, since courts are responsible for their own jurisdiction. Either way, if the trial court adjudges that plaintiff does not have a money-mandating source that meets even the new low-threshold jurisdictional test, a dismissal under Rule 12(b)(1) for lack of jurisdiction is appropriate, and that is the end of the matter . . . .

Fisher, 364 F.3d at 1378.

B. Neither the Military Pay Act, the Corrections Board Statute, nor the Naval Regulations Cited by Plaintiff Satisfy the Money-Mandating Provision Requirement Because, On the Facts Alleged, They Are Not Reasonably Amenable to a Reading That They Mandate a Right to Recovery in Damages

Maj. Gethers cites and relies upon the Military Pay Act, 37 U.S.C. § 204 (2000), the Corrections Board statute, 10 U.S.C. § 1552 (2000), and 32 C.F.R. § 723.1 *et seq.* (2004), regulations governing the BCNR, to support his contention that he has identified a money-mandating provision as the basis for his claim. Pl. Supp. Br. at 2.

Defendant contends that neither the Military Pay Act, the Corrections Board statute, nor Naval regulations are money-mandating in this case – either individually or when taken together. *See* Def. Resp. to Pl. Supp. Br. at 3. Defendant also relies upon the proposition that "one is not entitled to the benefit of a position until one has been duly appointed to it." *Testan*, 424 U.S. at 402.[2] This proposition ("the *Testan* rule") first appeared in *United States v. McLean*, 95 U.S.

[2] *See Testan*, 424 U.S. 392, 402 (holding that two Defense Department attorneys failed to establish subject matter jurisdiction and failed to state a claim upon which relief could be granted in bringing an action in the Court of Claims under the Classification Act to reclassify their positions as a higher grade, a grade to which they had not been appointed).

750, 753 (1877). In *McLean*, a deputy-postmaster sued for a retroactive increase in salary. *McLean*, 95 U.S. at 751. The applicable statute required that the Postmaster-General make a "readjustment" before a deputy-postmaster received an increase in salary. *Id.* at 753. The statute only provided for a prospective change in salary. *Id.* The Court ruled that, though McLean could perhaps pursue a remedy via mandamus to compel the Postmaster-General to consider his petition for a raise, he could not enforce a right that is dependent on an executive duty that has not been fulfilled. *Id.* The Court could not "perform executive duties, or treat them as performed." *Id.*

The *Testan* rule is oft-repeated in retroactive promotion cases. *See*, *e.g.*, *Reeves v. United States*, 49 Fed. Cl. 560, 568-69 (2001) (refusing to retroactively promote and award back pay to an Army Reserve officer); *Mercer v. United States*, 52 Fed. Cl. 718, 722 (2002) (holding that an Air Force officer could not claim back pay for a rank to which he had never been duly appointed). "Only upon his illegal removal from a position to which he has been duly appointed may a service member sue in this Court to retroactively recover pay and allowances mandated by statute." *Rice v. United States*, 31 Fed. Cl. 156, 163 (1994) (refusing to retire an Air Force serviceman for disability, thereby placing him in a new "position," when the Air Force had found him fit for duty).

There has been some suggestion that, in the wake of *Dysart v. United States*, 369 F.3d 1303 (Fed. Cir. 2004), recent precedent has eroded the applicability of the *Testan* rule to retroactive promotion cases. *See Hoskins v. United States*, 61 Fed. Cl. 209, 215 (2004) ("While this jurisdictional issue is far from settled, recent precedent suggests that military promotion claims are within the jurisdiction of this court."). In *Dysart*, the Federal Circuit found that the *Testan* rule did not defeat a claim for promotion when the plaintiff, a rear admiral in the Navy, claimed he had been illegally removed from a promotion list. 369 F.3d at 1315 ("Because the Military Pay Act is a money-mandating statute, the general rule that one is not entitled to the benefit of a position until he has been duly appointed to it is inapplicable.").

However, since *Dysart*, the Federal Circuit has analyzed the applicability of the *Testan* rule to plaintiffs like Major Gethers: active duty officers who seek review of their failure of selection for promotion. *Smith v. Sec'y of the Army*, 384 F.3d 1288, 1294-95 (Fed. Cir. 2004). The court explained that, generally, "in a challenge to a decision not to promote, the Military Pay Act ordinarily does not give rise to a right to the pay of the higher rank for which the plaintiff was not selected." *Id.* at 1294 (citing *Law v. United States*, 11 F.3d 1061, 1064 (Fed. Cir. 1993); *Howell v. United States*, 230 Ct. Cl. 816, 817 (1982); *Knightly v. United States*, 227 Ct. Cl. 767, 769 (1981)).

The court, however, recognized two exceptions to the general rule.

> Under the first exception, an action for money arises under the Military Pay Act in the unusual case in which, on the plaintiff's legal theory, "there is a clear-cut legal

> entitlement" to the promotion in question, *i.e.*, he has satisfied all the legal requirements for promotion, but the military has refused to recognize his status.

Smith, 384 F.3d at 1294-95 (quoting *Skinner v. United States*, 219 Ct. Cl. 322, 594 F.2d 824, 830 (1979)) (citing *Dysart*, 369 F.3d at 1315-16; *James*, 159 F.3d at 582; *Law*, 11 F.3d at 1065 ("Law is not asking the Claims Court to order his promotion but to recognize that it had occurred.")).

Under the second exception, the court explained:

> An action for money arises under the Military Pay Act when the decision not to promote the service member leads to the service member's compelled discharge. If, in such a case, the effect of an order voiding the nonpromotion decision would be to give the service member a right to continue in the service at his previous rank, he would have a claim for the pay lost because of his improper separation. In that instance, the Military Pay Act would give the service member a right to back pay, because the Act "confers on an officer the right to pay of the rank he was appointed to up until he is properly separated from the service."

Smith, 384 F.3d at 1294-95 (quoting *Sanders v. United States*, 219 Ct. Cl. 285, 296, 594 F.2d 804, 810 (1979); *Roth v. United States*, 378 F.3d 1371, 1384 (Fed. Cir. 2004); *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (en banc)).

Maj. Gethers does not satisfy either of the *Smith* exceptions to the *Testan* rule. With regard to the first exception, Maj. Gethers has not "satisfied all the legal requirements for promotion." *Smith*, 384 F.3d at 1294. Maj. Gethers acknowledges this much in his complaint, requesting back pay "upon his selection *after* consideration of his Naval record by the special selection board for FY 2000 and/or FY 2001 *as corrected*." Compl. at 5 ¶ 2 (emphasis added). Maj. Gethers claims that, if the BCNR evaluates his record correctly, it will remove the failures of selection, then forward the record to a special selection board. The special selection board will then evaluate Maj. Gethers against a field of other candidates for promotion and, according to his complaint, select him for promotion. Unlike the plaintiff in *Dysart*, who had already been selected for promotion, there are a number of steps that Maj. Gethers must take before he has satisfied all the legal requirements for promotion. With regard to the second exception, it is clear that Maj. Gethers has not been involuntarily discharged from the Marine Corps. Because Maj. Gethers does not fit either of the *Smith* exceptions, the Military Pay Act is not a money-mandating statute in his case.

Maj. Gethers argues that the Military Pay Act, when considered in conjunction with the Corrections Board statute and pertinent Naval regulations, establish a present right to money damages and therefore satisfy the money-mandating requirement. Pl. Supp. Br. at 2.

Maj. Gethers cites 10 U.S.C. § 1552(c) to argue that the Corrections Board statute is money-mandating. Under § 1552(c), the Secretary "may pay, from applicable current

appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant." For reasons similar to those stated by the Federal Circuit in *Smith*, Maj. Gethers cannot rely on the Corrections Board statute as money-mandating. Even if the BCNR corrects Maj. Gethers's record, he will only be due back pay if he is selected for promotion by the SSB, a step in the promotion process that has yet to occur, and could only occur after the BCNR determined that such a board should be convened.

Maj. Gethers cites Naval regulations that direct the BCNR to correct military records if the Board perceives an injustice, and requires the Director, Defense Finance and Accounting Service, to settle monetary claims arising from those corrections. 32 C.F.R. § 723.10. Maj. Gethers again alleges that if the BCNR saw fit to correct his record, he would automatically be due back pay for a higher rank. That is incorrect. Maj. Gethers, would only be due back pay upon a finding of the SSB that he was entitled to a promotion during the FY 2000 or FY 2001 selection boards.

Under the Special Selection Board statute, 10 U.S.C. § 628(b)(1):

> if the Secretary . . . determines, in the case of a person who was considered for selection for promotion by a promotion board but was not selected, that there was material unfairness with respect to that person, the Secretary may convene a special selection board under this subsection to determine whether that person (whether or not then on active duty) should be recommended for promotion.

The basis for Maj. Gethers's claim is that there was unfairness within the meaning of 10 U.S.C. § 628(b)(1) with respect to his consideration for selection for promotion by the FY 2000 and FY 2001 selection boards. Under § 628(b)(1), the BCNR, acting for the Secretary, determines whether a special selection board should be convened. After that, the SSB

> shall consider the record of the person whose name was referred to it for consideration as that record, if corrected, would have appeared to the board that considered him. That record shall be compared with the records of a sampling of those officers of the same competitive category who were recommended for promotion, and those officers who were not recommended for promotion, by the board that considered him.

10 U.S.C. § 628(b)(2). The regulations that Maj. Gethers cites are unrelated to his claim. A correction of Maj. Gethers's record will not give rise to back pay. Only a determination by the SSB that Maj. Gethers should have been promoted by the FY 2000 or FY 2001 selection board would give rise to an entitlement to back pay. Therefore, the Naval regulations fail to provide Maj. Gethers with a money-mandating source of law.

Despite the fact that, individually, neither the Military Pay Act, the Corrections Board statute, nor the Naval regulations relating to the BCNR are money-mandating provisions with respect to his claim, Maj. Gethers asserts that they can be interpreted as money-mandating when considered together. Pl. Supp. Br. at 3. However, because Maj. Gethers is still an active duty member of the Marine Corps who is a number of steps away from receiving a promotion on the basis of his corrected record, the combination of statutes or regulations upon which Maj. Gethers relies are not "'reasonably amenable to the reading that [they mandate] a right to recovery in damages.'" *Fisher*, 364 F.3d at 1377 (quoting *White Mountain*, 537 U.S. at 472-73). As such, this Court lacks subject matter jurisdiction to consider Maj. Gethers's claim.

C. This Court May, in the Interest of Justice, Transfer Maj. Gethers's Claim to District Court

Maj. Gethers requested that his case be transferred to United States District Court for the District of Columbia if this Court found it lacked jurisdiction to hear his claim. Pl. Opp. to Def. Mot. to Dismiss at 4; Transcript of Proceedings, *Gethers v. United States*, No. 03-1955 at 7 (Fed. Cl. Apr. 20, 2004).

Under the federal transfer statute, 28 U.S.C. § 1631, a court lacking jurisdiction "shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed."

The Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et. seq.* (2000), provides for judicial review of agency actions in the United States district courts. Section 702 of title 5 provides that a person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" is entitled to judicial review of such action. *See Smith*, 384 F.3d at 1291.

The APA also waives sovereign immunity for a suit "seeking relief other than money damages." 5 U.S.C. § 702. In the absence of special statutory review proceedings, *see* 5 U.S.C. § 703, the general federal question statute, 28 U.S.C. § 1331, gives district courts jurisdiction to conduct the judicial review described in 5 U.S.C. § 702. *See Smith*, 384 F.3d at 1291(citing *Califano v. Sanders*, 430 U.S. 99 (1977)).

"The APA's waiver of sovereign immunity is limited, however, by 5 U.S.C. § 704, which provides that judicial review is available only in the case of 'agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.'" *Smith*, 384 F.3d at 1292 (quoting *Mitchell v. United States*, 930 F.2d 893, 895 (Fed. Cir. 1991)).

Under the APA, a district court of the United States would have jurisdiction to hear Maj. Gethers's claim. The BCNR's decision not to correct Maj. Gethers's record, or to send his record to the SSB is final agency action. *See Porter v. United States*, 163 F.3d 1304, 1311 (Fed. Cir. 1998) (holding that "in the Air Force, the Air Board acts for the Secretary and its decision is

final when it denies applications"). In addition, under 10 U.S.C. § 628(g)(1) (2000 ed. Supp. I), enacted in 2001, the decision of the BCNR not to convene a special selection board is subject to judicial review by "[a] court of the United States." The Court of Federal Claims is not a "court of the United States" within the meaning of 10 U.S.C. § 628(g). *See* 28 U.S.C. §§ 451, 460(a) (defining "court of the United States" and providing that certain provisions of title 28 applicable to such courts "shall also apply to the United States Court of Federal Claims"). For that reason and for the reasons stated earlier, there is no adequate remedy available to Maj. Gethers in the Court of Federal Claims.

The Court therefore believes it would be in the interest of justice to grant Maj. Gethers's request to transfer his claim to the United States District Court for the District of Columbia in view of the fact that this Court has determined "there is a want of jurisdiction" in the Court of Federal Claims and Maj. Gethers's action "could have been brought at the time it was filed," *see Homer v. Roche*, 226 F.Supp. 2d 222, 225 (D.D.C. 2002), in the District of Columbia district court. 28 U.S.C. § 1631.

CONCLUSION

For the foregoing reasons, Maj. Gethers's claim is DISMISSED for lack of subject matter jurisdiction. Plaintiff's Motion for Judgment on the Administrative Record; Defendant's Motion to Dismiss, or in the Alternative, for Judgment on the Administrative Record; and Defendant's Motion for Leave to File Notice of Supplemental Authority (drawing the Court's attention to the decision of the Court of Appeals in *Smith v. Sec'y of the Army*) are DENIED as moot.

The Clerk of the Court is directed to enter judgment dismissing plaintiff's complaint without prejudice pursuant to RCFC 12(h)(3). The Clerk of the Court is also directed to transfer this action to the United States District Court for the District of Columbia pursuant to 28 U.S.C.§ 1631.

IT IS SO ORDERED.

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GEORGE W. MILLER
Judge