

In the United States Court of Federal Claims

No. 08-745C
(Filed: January 10, 2012)

ROSA D. BONEWELL,
Plaintiff,
v.
THE UNITED STATES,
Defendant,
and
CARMEN TITONG-BONEWELL,
Defendant-Intervenor.

ORDER

Presently before the court is plaintiff’s renewed motion for judgment on the administrative record. The court has reviewed all of the materials submitted subsequent to its November 4, 2010 Opinion and Order. For the reasons set forth below, the court remands the case to the United States Air Force (“Air Force”) for the limited purpose of compliance with its regulation concerning the delegation of authority with respect to the correction of military records.

In its November 4, 2010 decision, the court denied the parties’ cross-motions for judgment on the administrative record. It remanded the case to the Air Force Board for Correction of Military Records (“AFBCMR”) to reconsider plaintiff’s application for the correction of the records of her ex-husband, Technical Sergeant Rodney L. Bonewell (“TSgt Bonewell”), instructing the AFBCMR to, among other things, obtain a new advisory opinion.

On remand, pursuant to the court’s direction, the AFBCMR solicited and obtained an advisory opinion from the Air Force Review Boards Agency. The legal advisor for that agency recommended that the AFBCMR should “find there was not substantial compliance with 10 U.S.C., Section 1448(b),” and “advise the court that the equities are in favor of the applicant, but that absent consent of the second spouse,” it “decline[s] to correct the record under the authority of 10 USC 1552.”

The AFBCMR did not follow the recommendations contained in the advisory opinion. Rather, it concluded that “[s]ufficient relevant evidence has been presented to demonstrate the existence of an injustice warranting relief” because, it believed, TSgt Bonewell’s “actions complied with the intent of the provisions of Title 10 U.S.C. 1448(b) and clearly indicate[d] his desire to provide former-spouse SBP coverage for the applicant.” It gave “great deference” to the advisory opinion and recognized the existence of contrary AFBCMR precedent. It stated, however, that justice dictated that it rule in plaintiff’s favor, and therefore recommended that TSgt Bonewell’s records be corrected “to show that on 12 May 2001, he elected to change his Survivor Benefit Plan (SBP) coverage from ‘spouse’ to ‘former-spouse’ based on full retired pay, naming Rosa D. Bonewell as the eligible beneficiary.” The decision of the AFBCMR panel was unanimous.

Thereafter, the Assistant Secretary of the Air Force (Manpower and Reserve Affairs) (“Assistant Secretary”) “decided to deny the application based upon [his] determination that granting it [was] not appropriate and would not be consistent with prior decisions of the AFBCMR in similar cases.” He indicated that he did not “fully agree with the conclusions” reached by the AFBCMR. More specifically, he did not “agree that TSgt Bonewell’s actions complied with the intent of the provisions of 10 U.S.C., Section 1448(b) and clearly indicate[d] his desire to provide former-spouse coverage for the applicant,” and instead adopted the rationale contained in the advisory opinion supporting the position that there was not substantial compliance. The Assistant Secretary further noted that he did not agree with the AFBCMR’s “determination that based upon the principles of equity, the AFBCMR should correct the record.”

The case then returned to the court for further proceedings. Plaintiff renewed her motion for judgment on the administrative record and the other parties filed briefs in opposition. One of the preliminary issues that emerged from the court’s review of the record and the parties’ briefs is whether the Assistant Secretary was the appropriate official to review the AFBCMR’s recommendation and issue a final decision rejecting that recommendation. The court determines that the Assistant Secretary does not, pursuant to the pertinent Air Force regulation, have the authority to overrule the recommendation of the AFBCMR.

The statute concerning the correction of military records, 10 U.S.C. § 1552, provides that “[t]he 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. . . . [S]uch corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department.” 10 U.S.C. § 1552(a)(1). It further provides that “[c]orrections under this section shall be made under procedures established by the Secretary concerned.” *Id.* § 1552(a)(3).

The Secretary of the Air Force (“Secretary”) implements 10 U.S.C. § 1552 in Air Force Instruction 36-2603, Air Force Board for Correction of Military Records (Mar. 1, 1996) (“AFI 36-2603”). In this instruction, the Secretary states that the AFBCMR acts on his behalf and “its

decision is final when” it denies an application or “[g]rants any application in whole or in part when the relief was recommended by the official preparing the advisory opinion, was unanimously agreed to by the panel, and does not involve an appointment or promotion requiring confirmation by the Senate.” AFI 36-2603, ¶ 4.10. In all other situations, the AFBCMR “sends the record of proceedings . . . to the Secretary of the Air Force or his or her designee for final decision.” Id. ¶ 4.10.1.

To determine whether the Assistant Secretary is the Secretary’s designee to render a final decision when the AFBCMR does not follow the recommendation contained in an advisory opinion, the court examines the applicable regulation describing the Secretary’s delegation of authority to the Assistant Secretary: HAF Mission Directive 1-24, Assistant Secretary of the Air Force (Manpower and Reserve Affairs) (Dec. 15, 2008) (“HAF Mission Directive 1-24”). In this regulation, the Secretary provides the following delegation of authority to the Assistant Secretary concerning the correction of military records:

*A1.40. Authority relating to the administration . . . for correcting any military record of the Military Department as delegated to the Secretary of the Air Force . . . , except for the authorities in the sub-paragraphs that follow:

*A1.40.1. Except for the authority to grant or deny any application . . . asking the Secretary, acting through a board of civilians, to correct military record(s) relating to or affecting a security clearance or access to classified materials.

*A1.40.2. Except for the authority to grant or deny any application or group or category of applications . . . asking the Secretary, acting through a board of civilians, for correction of military record(s) with respect to which the Secretary of the Air Force has reserved final decision authority.

*A1.40.3. Except for the authority to grant an application . . . asking the Secretary, acting through a board of civilians, for correction of a military record when denial has been recommended by a unanimous vote of a panel of the Board of Correction of Military Records; the authority to deny an application for correction of military record(s) when correction has been recommended by unanimous or majority vote of a panel of the Board of Correction of Military Records. This authority may not be re-delegated further.

HAF Mission Directive 1-24, Attach. 1, at 18.

In sum, in accordance with the plain language of AFI 36-2603, if the AFBCMR recommends the correction of military records in contravention of an advisory opinion, the AFBCMR must submit its recommendation to the Secretary or his designee for a final decision. Pursuant to the plain language of HAF Mission Directive 1-24, however, only the Secretary may

deny an application for correction of military records in cases, such as here, where the AFBCMR has recommended that the application be granted.¹

The plain language of HAF Mission Directive 1-24 notwithstanding, defendant contends that the Assistant Secretary had the authority to overrule the AFBCMR's decision and deny plaintiff's application, characterizing the delegation of authority in HAF Mission Directive 1-24 as "inartfully worded" and noting that the Air Force is currently preparing "a revised memorandum that better articulates the Secretary's longstanding delegation in this area" Def.'s Resp. 12 n.2. Defendant-intervenor, for her part, adopts defendant's interpretation of HAF Mission Directive 1-24. She adds that the delegation of authority to the Assistant Secretary has been clearly stated in prior decisions of the United States Court of Federal Claims ("Court of Federal Claims"), citing Ancman v. United States, 77 Fed. Cl. 368, 371 (2007) (noting that although the AFBCMR found in the plaintiffs' favor, "the Assistant Secretary . . . , the Secretary of the Air Force's designated representative to review the recommendations of the AFBCMR, exercised her discretion and rejected the findings of the AFBCMR"), Metz v. United States, 65 Fed. Cl. 631, 633 (2005) (remarking that the court "remanded the case to the Secretary" to find certain facts based on the court's determination that the plaintiff was entitled to relief, and that the report from the Secretary after remand was prepared by "[t]he Assistant Secretary . . . , who was delegated Secretarial authority to take final action"), and Tilley v. United States, 14 Cl. Ct. 451, 452 (1988) (indicating that the AFBCMR recommended that the plaintiff's application be granted, but that the recommendation was rejected by the Assistant Secretary). Neither parties' arguments are persuasive.

Most importantly, the court cannot ignore the plain language of the applicable regulations. Here, the Secretary has clearly delegated authority relating to the correction of military records to the Assistant Secretary, "except for . . . the authority to deny an application for correction of military record(s) when correction has been recommended by unanimous or majority vote of a panel of the Board of Correction of Military Records." HAF Mission Directive 1-24, Attach. 1, at 18. The court recognizes that prior to December 15, 2008, the delegation of authority to the Assistant Secretary relating to the correction of military records was broader. See HAF Mission Directive 1-24, Assistant Secretary of the Air Force (Manpower and Reserve Affairs) (July 16, 2007), Attach. 1, ¶ A1.15 (delegating, without enumerating any exceptions, the "[a]uthority . . . for correcting any military record of the Military Department as delegated to the Secretary of the Air Force"). At the time the court remanded this case to the AFBCMR, however, the older, broader delegation of authority had been superseded by the narrower delegation in HAF Mission Directive 1-24. Thus, the prior "longstanding authority" of the Assistant Secretary to overrule a recommendation of the AFBCMR to grant an application is irrelevant—the court can only apply the regulation currently in force. For this same reason, the statements in earlier Court of Federal Claims decisions concerning the Assistant Secretary's authority to overrule the AFBCMR are inapposite. Each of those earlier cases was decided

¹ The Assistant Secretary, however, has the authority to concur with a recommendation of the AFBCMR.

before the Air Force issued the current version of HAF Mission Directive 1-24 on December 15, 2008, and defendant-intervenor has provided no evidence that the language contained in the delegations of authority applicable in those cases is the same as the language in the delegation of authority applicable here. Indeed, defendant's representation regarding the Assistant Secretary's prior "longstanding authority" and the broader language of the superseded delegation of authority strongly suggest that the language was different.

For the reasons set forth above, the court concludes that to the extent an Air Force official was required to review the AFBCMR's recommendation in this case, the only official with the authority to overrule the AFBCMR's recommendation and deny plaintiff's application is, pursuant to HAF Mission Directive 1-24, the Secretary. Accordingly, the court directs the following:

- The case is **REMANDED** to the Air Force.
- Because the Assistant Secretary has indicated that he disagrees with the AFBCMR's recommendation and would deny plaintiff's application, the AFBCMR's decision and accompanying record shall, pursuant to AFI 36-2603 and HAF Mission Directive 1-24, be forwarded to the Secretary for a final decision.
- The remand period shall terminate on **Tuesday, July 10, 2012**. The court **STAYS** proceedings in the instant case during that time. If the Secretary has not issued a decision by July 10, 2012, the parties shall follow the procedures set forth in RCFC 52.2(d).
- Pursuant to RCFC 52.2(b)(1)(D), defendant shall file a status report every ninety days, with the first one due **no later than Monday, April 9, 2012**, indicating the status of the proceedings at the Air Force.
- When proceedings at the Air Force have concluded, the Air Force shall forward four copies of the Secretary's decision to the clerk of the Court of Federal Claims pursuant to RCFC 52.2(e). When the court receives the Secretary's decision, it will issue an order regarding further proceedings. The parties need not comply with RCFC 52.2(f).

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Judge