

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

MAR 11 1998

NANCY MAYER-WHITTINGTON, CLERK.
U.S. DISTRICT COURT

TIMOTHY R. McVEIGH,

Plaintiff,

v.

WILLIAM S. COHEN, et al.,

Defendants.

Civil Action No. 98-116
Judge Stanley Sporkin**MEMORANDUM OPINION**

On March 5, 1998, the Court held a hearing in **this case** to determine **the** extent of compliance with this Court's Order entered on January 30, 1998, and on **the** reasonable award of attorneys' fees.¹ Plaintiff represented to this Court that Defendants are not in compliance **with** this **Court's** Order of January 30, 1998. Under this **Court's** Order, Defendants were "enjoined from taking any adverse action against Plaintiff, including discharging Plaintiff from the United States Navy or otherwise hindering Plaintiffs Naval Service, on the basis of his alleged sexual orientation so long as Plaintiff is in compliance with 10 U.S.C. § 654 and relevant regulations as **interpreted** by this Court in its January 26, 1998 opinion." Jan. 30, 1998 Order,

It is uncontested **that** Plaintiff has continued to be in compliance with 10 U.S.C. § 654. Plaintiff contends that "to date, more than a month **after** the Court's Order," **the** Defendants have failed to reinstate him in a position commensurate to that which he held prior to his unlawful

¹ Because additional information is required from **Plaintiff's** counsel with regard to **the** reasonableness of **the fees**, this matter will be heard again by the Court on March 26, 1998.

discharge. **Pl's**. March 6, 1998 Memorandum at I. Plaintiff states that **Defendants** have, and continue to, "hinder" Plaintiff's Naval Service in violation of the Court's January 30, 1998 Order.

In response, Defendants allege that on February 13, 1998, they made available to **Plaintiff** three alternative positions, or in military terms, "billets," **that** were commensurate with Plaintiff's "qualifications, his career progression, the Order of the District Court, and the needs of the naval service." Defs'. Ex. A at **1**. While Plaintiff contends that none of the three jobs offered **are** commensurate with his rank, **years** of service, and skills, Defendants maintain that they are. Moreover, Defendants allege that this dispute with Plaintiff over reinstatement is **beyond** the purview of this Court. As it concerns an internal military assignment of duty, Defendants rely upon Orloff v. Willoughby, 345 U.S. 83 (1953), and contend that the issue of redress in this case is a non-justiciable matter.

This Court finds that the Defendants' position is without merit. Orloff does not stand for the proposition that all military assignments of duty are beyond judicial review. Rather, the case stands for a much more narrow proposition **that** barring a statutory or constitutional violation, the exercise of military discretion is generally non-justiciable. In Orloff, the petitioner had not been given the specialized duties nor the commissioned rank he otherwise would have received as a physician because he failed to avow his loyalty to the United States. The petitioner alleged that he was entitled to such a position by reason of his having been drafted in a specialized category, *ie.* medical. He stated that if the Army refused to commission him as a medical **officer** he **was** entitled to discharge. The Supreme Court declined to grant *habeas corpus* review on the grounds that Orloff was not **entitled** to the commission he claimed. The Court reasoned that since there had been no violation of petitioner's rights and since he had been lawfully inducted, it was

without subject matter jurisdiction to review the Army's otherwise discretionary assignment of duty to **him**.

The case now before this Court is readily distinguishable **from Orloff** and **its** progeny as cited by Defendants such as Wilson v. Walker, 777 F. 2d 427,428 (8th Cir. 1985); Schlanger v. United States, 586 F. 2d 667,672 (9th Cir. 1978), cert. denied, 441 U.S. 943 (1979). Unlike those **cases**, the Court found that Defendants in this case had violated Plaintiffs **statutory** rights under both 10 U.S.C. § 654 and 18 U.S.C. § 2701 *er seq.* **See** Jan. 26, 1998 Order. Indeed, while this Court was considering the **substantive merits** of Plaintiff's claim, Defendants at no time raised the issue of **justiciability**. If Defendants had wished to challenge the authority of this **Court** to review a military personnel decision, that was the proper time in which to do so. **See Mindes v. Seaman**, 453 F.2d 197 (5th Cir. 1971).

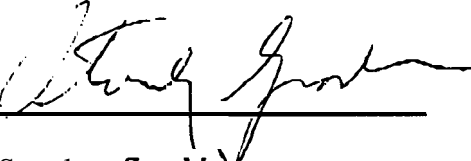
Given the traditional deference accorded to military **affairs**, courts are required to balance all competing interests in reviewing internal military determinations. **See id.** Where the military has violated a constitutional right, or as in this case, a **federal** statute, or its own regulations, the military is clearly subject to judicial review. **See, e.g., Shaw v. Gwatney**, 795 F. 2d 1351, 1357 (8th Cir. 1986) ("Determination of individual rights under military regulations is within the **role** envisioned for courts in **Mindes**"); **Knehans v. Callaway**, 403 F. Supp. 290,293 (D.D.C. 1975) ("Courts will not hesitate to review military action allegedly contrary to statute or regulation," citing **Mindes**, 453 F. 2d 197), **aff'd** 566 F. 2d 3 12 (D.D.C. 1975). **The** Court was **well** within **its authority** to issue **the Order** it did in this case and has not only the **right**, but the duty to enforce its compliance.

This Court's exercise of its remedial powers is not meant to suggest that deference should

not be afforded to Defendants' actions. Indeed, in the case of Taylor v. Jones, 495 F. Supp. 1285, 1292 (E.D. Ark. 1980) (Arnold, Cir. J., sitting by designation), the court in a similar set of circumstances granted the appropriate amount of deference all the while exercising its remedial authority. The court found that while reinstatement "is a normal incident of individual relief granted to successful . . . plaintiffs," the case was "unusual" because plaintiff was in an active-duty military post. "In deference to the customary leeway given by civilian courts to military authorities," the court did not require that plaintiff be reinstated in the job she previously held. Id. Despite its authority to do so, the court stated that it was "loath to intervene in matters of military assignment." Id. Nonetheless, the court found that it could well order plaintiff to be given a "comparable" position, one 'roughly equivalent in pay, benefits, status, and responsibility" to the post previously held. Id. In essence, deference to the military does not deprive courts of their authority to grant equitable relief.

Similarly, while this Court has no intention of making purely personnel decisions for the Navy, it must take steps to ensure that Plaintiffs military service is not adversely affected by the Defendants' misconduct in this case. Accordingly, an evidentiary hearing will be held on March 26, 1998 to determine whether Defendants have complied with this Court's January 30, 1998 Order. An appropriate Order follows.

3/10/98
Date


Stanley Sporkin
United States District Judge

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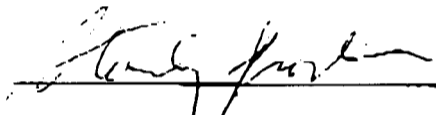
ORDER

For the reasons stated above, it is hereby

ORDERED that an evidentiary hearing will be conducted on March **26, 1998** at **10:00** a.m. to determine whether Defendants have complied with this Court's January **30, 1998** Order and to decide any contested issues applicable to Plaintiffs application for attorneys' fees.

3/10/98

Date



Stanley **Sporkin**
United States District Judge