

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

-----x
JOSEPH C. STEFFAN,

Plaintiff,

-against-

THE HONORABLE RICHARD CHENEY,
Secretary of Defense, et al.,

Defendants.
-----x

Civil Action No. 88-3669

(Judge O. Gasch)

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS'
MOTION FOR SANCTIONS AND STAY AND IN SUPPORT
OF PLAINTIFF'S CROSS-MOTION FOR PROTECTIVE ORDER

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TABLE OF CONTENTS

	<u>PAGE</u>
Preliminary Statement	1
Statement of Facts	4
A. The events leading to the administrative recommendation that Steffan be discharged.....	4
B. The Brigade Military Performance Board hearing.....	8
C. The Academic Board hearing.....	10
D. The initiation of this lawsuit.....	13
E. Defendants' motion to dismiss.....	14
F. The discovery disputes that give rise to the instant motions.....	16
G. Steffan's deposition.....	19
Argument	23
POINT I DEFENDANTS' MOTION SHOULD BE DENIED BECAUSE THE INFORMATION THAT THEY SEEK IS IRRELEVANT.....	23
A. Steffan's conduct is irrelevant in an action challenging a separation based on his status.....	26
B. Steffan's conduct is irrelevant to determining whether he is entitled to reinstatement	30
POINT II DEFENDANTS' MOTION SHOULD BE DENIED BECAUSE THE INFORMATION THAT THEY SEEK IS PRIVILEGED.....	35
Conclusion	40

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This memorandum of law is respectfully submitted on behalf of plaintiff Joseph C. Steffan in opposition to the defendants' motion for sanctions pursuant to Rule 37(b) of the Federal Rules of Civil Procedure and for a stay of proceedings and in support of plaintiff's cross-motion for a protective order pursuant to Rule 26(c). Submitted herewith are the affidavits of Joseph Steffan and Marc Wolinsky, both sworn to on October 16, 1989 (the "Steffan Aff." and "Wolinsky Aff."), to which the Court is respectfully referred.

Preliminary Statement

Joseph Steffan was compelled to resign from the United States Naval Academy six weeks before graduation be-

cause he stated that he is gay. Navy regulations require that a servicemember who makes such a statement be discharged, regardless of whether the individual has engaged in prohibited sexual conduct. This lawsuit challenges the constitutionality of that regulation.

Despite the fact that Steffan was separated on these narrow grounds, and despite the fact that the legal challenge here is similarly narrow, defendants have now moved for Rule 37(d) sanctions because plaintiff was directed not to answer questions concerning any homosexual conduct by plaintiff while at and since leaving the Academy. This is not a case where the plaintiff or his counsel has acted in bad faith. To the contrary, the Court was candidly advised before plaintiff's deposition was taken that plaintiff would be directed not to answer these questions.

At that time, the Court indicated that if the plaintiff were so directed, his lawsuit would be dismissed. That statement was made before the Court had an opportunity to consider briefing on the subject -- indeed, before any motion to compel the testimony had been made. Plaintiff respectfully submits that, on the basis of the authorities discussed below, the Court will recognize that no sanctions of any type can be imposed in these circumstances.

The essence of defendants' argument is that they are entitled to discharge a servicemember illegally and then defend a claim for reinstatement by using deposition discovery to come up with grounds for disqualification that were never asserted in the discharge proceeding itself. The absurdity of this position is revealed when one recognizes that in an administrative discharge proceeding, a servicemember has a right to remain silent. Thus, if defendants' position is accepted, they will be able to use civil discovery in a suit challenging an administrative proceeding to compel the disclosure of information that they would never have been able to secure in the administrative proceeding itself. There is nothing in law or logic to support defendants' contention.

At the heart of this discovery dispute, of course, is whether the information sought by the defendants is relevant to any claim or defense in this action. As discussed in greater detail below, defendants cannot show that the discovery they seek is relevant to any claim. Throughout the administrative proceedings that gave rise to this lawsuit, Steffan was never told that he was being discharged for engaging in homosexual conduct, was never alleged to have engaged in homosexual conduct, and was never asked if he had engaged in homosexual conduct. No evidence was ever presented that he had engaged in homosexual conduct and,

indeed, under the regulations challenged here, any such allegation or proof would have been unnecessary.

The information that defendants seek is equally irrelevant to any defense that they may have. Most telling is the fact that defendants' Answer in this action does not allege that plaintiff should be denied relief because he engaged in homosexual conduct.

Given the irrelevance of the information defendants are seeking, sanctions cannot properly be imposed in this case. See Point I, infra. In any event, even if the information sought has some tangential relevance, sanctions are inappropriate because it is not so "crucial" to the resolution of the issues in this case that plaintiff's right to due process and his Fifth Amendment privilege against self-incrimination can be overcome. See Point II, infra.

STATEMENT OF FACTS

A. The events leading to the administrative recommendation that Steffan be discharged

In the early Spring of 1987, Joseph Steffan was a First Class Midshipman enrolled at the United States Naval Academy enjoying a very successful career. He had been chosen to serve as a Midshipmen Battalion Commander with direct command over one-sixth of the Academy's Midshipmen, had been

ranked in the top ten percent of his class and had consistently received glowing evaluations from his superiors. If all went according to plan, he would graduate from the Academy that May, be awarded a Bachelor's degree, be commissioned as an officer and enter the Navy's nuclear submarine program. Wolinsky Aff. Ex. A at 47 (Steffan Dep.); Exs. B-E; Ex. F at ¶ 15. It was not to be.

In mid-March 1987, Steffan was informed by another Midshipman, Wes Wilson, that he had been interviewed by an agent of the Naval Investigative Service ("NIS") who was investigating an allegation that Steffan was a homosexual. Id. Ex. A at 74-75 (Steffan Dep.).* A few days after his conversation with Wilson, Steffan approached Chaplain Byron Holderby. Steffan told Chaplain Holderby that he, Steffan, was gay and that he believed that he was being investigated by the NIS. Holderby offered to intercede on Steffan's behalf and speak with the Commandant of the Academy to see if it would be possible for Steffan to be allowed to graduate. Id. at 76-77 (Steffan Dep.).

* In fact, discovery has revealed that Steffan's information was correct. Id. Ex G. Although substantial portions of the NIS report on its investigation have been withheld on a claim of privilege, an NIS investigation was apparently commenced when the NIS was informed by an unidentified Midshipman that Steffan had stated that he is gay. Although it conducted a number of interviews, the NIS did not secure any evidence that Steffan had engaged in homosexual conduct at the Academy. Id.

Thereafter, on March 23, Steffan approached Captain H.W. Habermeyer, the Commandant of Midshipmen. At the time, Steffan was in the process of routing a Special Request Form seeking a meeting with the Superintendent of the Academy. Habermeyer asked Steffan why he wanted to see the Superintendent. Steffan responded that it was about a personal matter. Habermeyer pressed. As Steffan earlier had been advised by Chaplain Holderby that the Chaplain had spoken with Habermeyer concerning the NIS investigation, Steffan said that it was about a matter that Habermeyer was aware of. Id. at 78-79 (Steffan Dep.).

Habermeyer then asked: "Are you willing to state at this time that you are a homosexual?" Steffan responded: "Yes, sir." Habermeyer then said that he would schedule a Brigade Military Performance Board* to review Steffan's performance in light of his statement. Steffan said, "I'm sorry it has to end this way." Habermeyer responded, "So am I." Id. Ex. A at 78-79 (Steffan Dep.).

Steffan then asked Habermeyer if he thought that Steffan would be permitted to graduate. Habermeyer answered

* The Brigade Military Performance Board is an administrative body charged under the Academy's regulations with considering and making recommendations concerning allegations of deficiencies in a Midshipman's military performance. The Board is required by regulation to make its recommendations solely on the basis of evidence presented in a formal hearing which must be tape recorded. Id. Ex. H at § 4.20.

that he could not be sure since it would be up to the Board, but that he did not think so. Habermeyer then asked Steffan what he would want to do if he were not allowed to graduate. Steffan responded: "Well, I guess I would have to leave the Naval Academy." Id. at 79-80 (Steffan Dep.).

Later that day, Steffan received a formal notice that a Brigade Military Performance Board would be convened the next day to review his military performance. Id. Ex. I. The notice was accompanied by a letter dated March 23 from the Sixth Battalion Officer to the Commandant of Midshipmen. The notice stated that the letter would be presented as "documentary evidence" to the Board. The letter itself states:

1. Midshipman Joseph C. Steffan has acknowledged that he is a homosexual, and as such, he should be separated from the Naval Academy. This condition would severely limit his assignability, aptitude and potential for commissioned service.

2. I consider Midshipman Steffan to be not suited for commissioning for reasons of inaptitude. (Id. Ex. J.)*

* Under Academy regulations, "homosexuality" is listed as grounds for separation because it "severely limit[s] a midshipman's aptitude and potential for commissioned service." "Homosexuality" is defined to include a "statement by a member that he or she is homosexual or bisexual". Id. Ex. H at 2.15.3.c. Under the Academy's Standards of Behavior, homosexuality is a form of "sexual misconduct." Sexual misconduct is a "Level 6000" offense which is defined to include "sexual acts" of any type, heterosexual or homosexual, performed on the Academy campus. Id. at 7.9.

Attached to the letter were memos from Habermeyer recounting Steffan's acknowledgment that he is homosexual and Habermeyer's conversation with Chaplain Holderby. Also attached was a Navy psychologist's evaluation reporting that Steffan's "self-identity is as a homosexual," that his homosexuality "appears to be a preferred orientation to which he has adjusted" and that he "has an excellent track record and appears to have adjusted quite well at the Academy." Id.

B. The Brigade Military Performance Board hearing

A Brigade Military Performance Board was convened the next day, March 24, Captain Konetzni presiding. Before Steffan entered the Board room, Konetzni threatened Steffan, stating that if he "did not go along with the proceedings of the performance board without taking an adversarial stance, that the Academy had within its means the ability to make life much more difficult for [him] than it already was." Id. Ex. A at 100 (Steffan Dep.).

His message conveyed, Konetzni convened the Board. In accordance with Academy regulations, he advised his fellow Board members that they could only consider "the documents and testimony presented to the board today in open session" and that "[e]ach case must be decided on its own merits based on the evidence before the board." Id. Ex. K at 1 (Board transcript).

Konetzni then dispensed with the requirement of Academy regulations that a resume of Steffan's record be presented, observing that Steffan's "performance here as a midshipman . . . has been outstanding." Id. Ex. K at 4. See also id. Ex. H at 4.20.2. He proceeded to read into the evidentiary record the recommendation of the Battalion Officer that Steffan be discharged because he had acknowledged that he is homosexual, Habermeyer's two statements, and the Navy psychologist's report. Id. Ex. K at 4-5.

This concluded, Konetzni asked Steffan one question concerning the substance of the charge against him:

Pres: I would like -- the board is obviously now open to questions by members of board -- and my first question is, I'd like your word, are you a homosexual?

Resp: Yes, sir.

Steffan was not asked whether he had engaged in homosexual conduct. Id. Ex. K at 6.

The Board then went into secret deliberations. When it reconvened, Konetzni reported that the Board had voted to forward Steffan's "case to the Commandant of Midshipmen with the recommendation for an 'F' in Military Performance and subsequent discharge from the Naval Academy." Id.

That same day, March 24, the Brigade Military Performance Board sent a letter to the Commandant of Midshipmen reporting that Steffan had admitted to the Board that he was homosexual. The report then states that "[b]ased on his own admission and the evaluation by the clinical psychologist, the Brigade Military Performance Board recommends that Midshipman Steffan be separated from the Naval Academy due to insufficient aptitude for commissioned service." Id. Ex. L.

Steffan was provided with a copy of the Board's report on March 24. Id. Ex. M. On March 26, Steffan met with a Performance Officer, Major R.C. Funk. Steffan informed Funk that he desired to transmit a statement to the Commandant indicating that he did want to graduate from the Academy. Funk told Steffan that he would have to wait until an Academic Board was convened to make the statement. Id. Ex. N at ¶ 7.

C. The Academic Board hearing

Habermeyer transmitted a letter dated March 26 to the Naval Academy's Academic Board* reporting the Brigade Military Performance Board's recommendation that Steffan be

* Pursuant to federal statute and the Academy's regulations, the Academic Board is the administrative body charged with the responsibility for acting upon all cases in which it is alleged that a Midshipman has insufficient aptitude to become a naval officer. 10 U.S.C. § 6962; Wolinsky Aff. Ex. O at 130302.1.

separated from the Academy. Habermeyer recounted that Steffan had admitted to the Board that he was a homosexual and concluded that "[b]ased on his own admission and the evaluation of the clinical psychologist, I recommend that Midshipman Steffan be separated from the Naval Academy." Id. Ex. P.

On the basis of this recommendation, an Academic Board was scheduled to convene on April 1. During the week prior to that hearing, a second threat was conveyed to Steffan: he was informed by a Professor at the Academy that a reliable source had informed him that the Navy was considering court-martialing Steffan if he did not resign. Id. Ex. N at ¶ 4; Ex. Q at ¶¶ 4-5.

On March 30, Steffan was given formal notice of the Academic Board hearing. Attached to the notice was Habermeyer's March 26 letter recommending discharge. The notice stated that the Board would consider the March 26 letter and "any additional written or oral evidence received in open sessions of the Board," as well as any evidence that Steffan might present. Id. Ex. CC.

The Academic Board convened to consider Steffan's case on April 1 as scheduled. The proceedings were tape recorded. Neither a copy nor a transcription of the tape can be located by the defendants, however. Steffan Aff.

¶ 4; Ex. A. The Superintendent of the Academy presided and, at the opening of the session, either read or summarized Habermeyer's March 26 letter recommending Steffan's discharge on the basis of his admissions of his homosexual orientation. Again, Steffan was not asked if he had engaged in homosexual conduct and no allegation was made or proof submitted that Steffan had done so. Id. ¶¶ 2-3.

Steffan then read a prepared statement in which he asked that he be permitted to complete the academic requirements to complete his diploma. The Superintendent responded that the regulations were very clear and that there was nothing that the Academic Board could do to allow Steffan to graduate. After Steffan protested that the Academic Board did have discretion, the Academic Board went into closed session. Wolinsky Aff. Ex. N at ¶ 10.

Barely five minutes later, Steffan was informed that the Academic Board had unanimously voted to recommend his discharge. Id. at ¶ 11. Steffan then met with Funk, who pressured Steffan to resign. Funk told Steffan that an appeal would be useless and that if he were discharged involuntarily, his discharge certificate would include a code that would indicate that Steffan was a homosexual. Id. Ex. A at 106-07; Ex. N at ¶ 12. Under the pressure of numerous threats, and faced with an Academic Board recommen-

dation from which an appeal would be futile, Steffan submitted an involuntary resignation from the Academy on April 1. Id. Ex. R.

D. The initiation of this lawsuit

Shortly after his separation from the Academy, Steffan moved to Fargo, North Dakota to live with his sister and enroll in North Dakota State University. Id. Ex. A at 11-12, 24-26 (Steffan Dep.). He attended the University on a part-time basis, supporting himself with a full-time job at a computer software company, and was awarded a Bachelor of Science degree in Economics in two years. After receiving his degree, he moved to New York City. He is currently employed as a computer operations manager and is planning on attending law school next Fall. Id. at 18-22, 24-27.

Within six months of his compelled resignation from the Academy, Steffan contacted Lambda Legal Defense & Education Fund to explore the possibility of filing suit. Id. Ex. N at ¶ 15. Thereafter, on December 9, 1988, Steffan wrote to the Secretary of the Navy requesting that his compelled resignation be deemed withdrawn and that he be awarded his diploma. The letter stated that Steffan would deem his request as denied if he did not receive a response by December 27. Id. Ex. S.

No response having been received, Steffan filed his Complaint in this action on December 29, 1988. The Complaint alleges, among other things, that Steffan was recommended for discharge from the Academy solely on the basis of his statements that he is gay and seeks a declaration that the regulations requiring his discharge are unconstitutional. Complaint ¶¶ 21-23, 30, 32, 34. The Complaint also seeks an order requiring the defendants to award Steffan his diploma and reinstate him in the service.

After the Complaint was filed, on January 10, 1989, the Superintendent of the Academy recommended to the Secretary that Steffan's request to withdraw his resignation be denied. In justifying his recommendation, the Superintendent stated that "Mr. Steffan admitted to being a homosexual, which constituted a basis for separation due to insufficient aptitude under the provisions of [Naval regulations]." Id. Ex. T. On February 8, the Secretary disapproved Steffan's request in accordance with the Superintendent's recommendation. Id. Ex. U.

E. Defendants' motion to dismiss

On March 20, 1989, defendants moved to dismiss the Complaint in this action on the ground that Steffan had "voluntarily" resigned from the Academy. While briefing on the motion was underway, plaintiff served defendants with a

deposition notice and document request. The motion to dismiss was argued and submitted to the Court on June 13.

While the motion was pending, on June 22, defendants moved for a protective order staying discovery pending decision on their motion to dismiss.

By Memorandum and Order dated July 21, this Court denied defendants' motion to dismiss. In its recitation of the facts, the Court observed that Steffan's resignation was precipitated by the admission of his homosexual orientation to Habermeyer. Slip op. at 3. The Court went on to hold that defendants' contention that the Court lacked subject matter jurisdiction because Steffan resigned voluntarily actually went to plaintiff's standing and that, under traditional Article III analysis, Steffan would have standing if he sufficiently alleged that his separation from the Academy had been caused by the defendants. Id. at 8-9.

The Court also held that Steffan did not have to seek an administrative remedy because "any such effort would be futile." Quoting the defendants' brief, the Court observed that "'requests for retention by servicemembers who openly admit their homosexuality are "undoubtedly" unsuccessful.'" Id. at 13. The Court further observed that even if Steffan were able to secure reinstatement by pursuing an administrative remedy, "plaintiff would again be asked to

resign or face discharge since the regulations giving rise to this action remain in effect." Id. at 12.

In conclusion, the Court stated that it "expresses no opinion today on the ultimate issue in this case, the lawfulness of the Navy's regulations." The Court then stated that that issue would be resolved on cross-motions for summary judgment and directed the parties to agree on a briefing schedule. Id. at 15.

Their motion denied, defendants served an Answer to the Complaint on August 9. Nowhere in that Answer do they assert as a defense that Steffan is not entitled to the relief that he seeks because he engaged in homosexual conduct. Id. Ex. F.

F. The discovery disputes that give rise to the instant motions

Following the entry of the Court's July 21 Order, counsel for the parties agreed on a briefing and discovery schedule. Plaintiff's understanding of that agreement was that all depositions would be deferred until the defendants submitted their opening brief on September 18. On August 21, counsel for the defendants telephoned and inquired whether Steffan would be available for deposition on one of three days the following week. After protesting that defendants were seeking to renege on their agreement, counsel for

plaintiff advised defendants that they would respond the next day. Id. Ex. V at 4.

Defendants did not wait for a response. Instead, they served a notice calling for the plaintiff's deposition on August 30. That same day, counsel for plaintiff advised defendants in writing that they would not be available to attend a deposition on August 30. Counsel for plaintiff further advised defendants that they would cooperate in scheduling the plaintiff's deposition on a voluntary basis if defendants reciprocated by cooperating in providing the discovery that plaintiff was seeking. Id. Ex. W.

After further communications in which counsel for defendants continued to refuse to cooperate in scheduling discovery of defendants, on August 28, counsel for defendants wrote plaintiff a letter threatening to move for sanctions if plaintiff failed to appear for deposition on August 30. Id. Ex. X. Plaintiff promptly moved for a protective order adjourning the August 30 deposition to a date on which plaintiff and his counsel would be available and directing defendants to confer in good faith with respect to all outstanding discovery disputes. Chambers was advised of the filing of the motion. Id. Ex. V.

Defendants did not respond to the motion. Instead, on September 5, they moved for sanctions pursuant to Rule

37(d) on the grounds that plaintiff failed to appear at the deposition noticed for August 30 and that counsel for plaintiff refused to cooperate in rescheduling the deposition unless defendants similarly agreed to cooperate in scheduling the discovery that plaintiff was seeking. Nowhere in the motion did defendants state what information they would seek to elicit from the plaintiff at his deposition.

After further discussions among counsel to resolve the discovery dispute proved to be futile, counsel for plaintiff telephoned Chambers and requested that either a conference be scheduled or that the parties be referred to a Magistrate. Id. Ex. Y at ¶ 7. A conference was scheduled for September 14.

At the conference, counsel for defendants stated for the first time that the defendants were seeking the deposition of the plaintiff to find out if "he participated in conduct while at the Academy." Transcript of September 14, 1989, Hearing at 9. To avoid any later misunderstanding, counsel for plaintiff advised the Court that counsel would direct the plaintiff not to answer questions concerning any sexual conduct by plaintiff at the Academy. The Court stated that it would direct the plaintiff to answer questions on the subject and that if the plaintiff did not answer the questions, the case would be dismissed. Id. at 17.

With respect to the plaintiff's discovery requests, the Court suggested that plaintiff file motions to compel the production of a document being withheld by defendants on a claim of privilege and the deposition of a Navy witness. Id. at 20, 24. Those motions were filed on September 19 and October 2, respectively.

G. Steffan's deposition

Steffan appeared for deposition on Saturday, September 16, as directed by the Court. After answering questions concerning his personal and educational background, employment and salary history, and the like, counsel for defendants embarked on a series of questions to determine whether the status of plaintiff's medical condition had changed since leaving the Academy, presumably to ascertain whether the plaintiff was physically able to return to Naval service. Id. Ex. A at 1-27, 29 (Steffan Dep.). After counsel for defendants agreed that plaintiff would not be deemed to be waiving his right to object to further questioning along this line, plaintiff testified that he continues to be in good health. Id. at 30-33.

While at the Academy, Steffan had tested negative for HTLV-III antibodies in a screening administered by the Navy. Id. Ex. Z. In the course of confirming his continued good health, Steffan testified that he had tested negative

for HTLV-III antibodies since leaving the Academy. Counsel for defendants then asked plaintiff why he had been tested for HTLV-III antibodies since leaving the Academy. In colloquy, counsel for defendants explained that the question was relevant because Steffan might have gotten tested "because he was required by his employer" or "he might have gotten these tests because he's involved sexually." Id. Ex. A at 33-35.

After further colloquy, counsel for defendants asked Steffan if the reason why he had been tested was related to any sexual conduct that he had engaged in. Id. at 36. At that point, counsel for plaintiff directed the witness not to answer, stated that the direction should not be taken to indicate one way or the other as to what the response might be, and explained that he was directing the witness primarily on grounds of relevance, as well as privilege. Id. at 37-39.

Counsel for defendants then proceeded to ask Steffan a series of questions concerning whether he had engaged in homosexual acts, whether he had been solicited to engage in homosexual acts, and whether he had passively permitted someone else to engage in homosexual acts with him. Although it had been represented to the Court that defendants would inquire about Steffan's sexual conduct while at

the Academy, counsel also asked Steffan whether he had engaged in such conduct both before entering and since leaving the Academy. Although Steffan was permitted to testify (after counsel reserved his objection) that he had not engaged in homosexual conduct prior to entering the Academy, plaintiff was directed not to answer the remaining questions on the grounds previously advanced. Id. at 40-45.

The deposition continued. Steffan answered questions concerning his career at and the circumstances surrounding his separation from the Academy. Id. at 46-126. Steffan also testified that he had disclosed his homosexuality to two other Midshipmen during his senior year. He was directed not to answer questions concerning whether he had engaged in homosexual acts with those Midshipmen. Id. at 127-29. Steffan was then asked how he knew that he was gay:

- A. I guess I know that I am a homosexual for the same reason that I assume you know that you're a heterosexual. Something must have led you to believe that. I guess something must have led me to believe that, too. I can't necessarily pinpoint [it].
- Q. You stated that you are a homosexual to Chaplain Holderby, and to Captain Habermayer, and to Tom Williams and Wes Wilson. . . . What was the basis for your statement?
- A. The basis of my statement was that I believed at that time, as I do now, that I am homosexual.
- Q. And what is the basis of that belief?

A. The basis of my belief that I am a homosexual?

Q. That's right.

A. [It] would be the same basis that you would believe that you're a heterosexual. It's something that can't necessarily be defined, other than one understands it to be true.

* * *

Q. What contributed to your understanding that you are a homosexual?

A. My understanding that I am homosexual was the result of an ongoing mental process that culminated in a self-identification of myself as a homosexual.

* * *

Q. What were the circumstances that led to this culmination?

* * *

A. I would not attribute my self-identification to a specific circumstance or event, other than it was the result of an ongoing mental process.

-- Id. at 132-34, 146.*

Counsel for defendants also asked Steffan whether he had been in contact with any gay Midshipmen at the Academy. Steffan was directed not to answer and defendants were advised that they could get another witness if they wanted

* Steffan's testimony is in full accord with scientific understanding in this area. See, e.g., Watkins v. United States Army, 875 F.2d 699, 726-27 (9th Cir. 1989) (Norris, J., concurring); Gay Rights Coalition v. Georgetown University, 536 A.2d 1, 33-35 (D.C. Ct. App. 1987). Plaintiff has further evidence to present on this subject on his motion for summary judgment.

"to conduct some sort of witch hunt." Id. at 142. Steffan was also directed not to answer questions concerning whether two of his friends are gay. Id. at 153.

Following the deposition, on October 3, defendants moved to "renew" their motion for Rule 37 sanctions. Defendants also moved to be excused, pending decision on their motion for sanctions, from the requirement that they respond to plaintiff's two outstanding discovery motions and comply with the Court's Order that defendants submit a motion for summary judgment on the merits of plaintiff's claim.

Argument

POINT I

DEFENDANTS' MOTION SHOULD BE DENIED BECAUSE THE INFORMATION THAT THEY SEEK IS IRRELEVANT.

The courts have held routinely that "where the information sought is not properly discoverable, it is axiomatic that a district court should not impose a Rule 37 sanction for a party's failure to comply with an order to reveal such information." Fonseca v. Regan, 734 F.2d 944, 948 (2d Cir.), cert. denied, 469 U.S. 882 (1984).* See also

* The holding of Fonseca points to a separate basis for denying defendants' motion. As the language of Rule 37(b) itself makes clear, sanctions may not be awarded absent a court order compelling the specific discovery improperly withheld. See, e.g., Markham v. Colonial Mortgage Service Co., 605 F.2d 566, 571 (D.C. Cir. 1979); Charter House

(footnote continued)

Black Panther Party v. Smith, 661 F.2d 1243, 1255 (D.C. Cir. 1981) ("sanctions can be imposed for failure to obey an order compelling discovery under Rule 37(a) only if that order was justified"), judgment vacated, 458 U.S. 1118 (1982); International Union v. National Right to Work Legal Defense and Education Foundation, Inc., 590 F.2d 1139, 1152 (D.C. Cir. 1979) ("The validity of the sanctions imposed under [Rule 37(b)] depends, in the first instance, on the validity of the discovery orders on which they were based."); Savola v. Webster, 644 F.2d 743, 747 (8th Cir. 1981); Dunbar v. United States, 502 F.2d 506, 509 (5th Cir. 1974) ("If the disputed information was not properly discoverable, it follows that the district court should not have imposed a Rule 37 sanction upon plaintiff for refusal to reveal such information.").

Of course, as the courts have recognized in passing on Rule 37(b) motions, dismissal is an "extremely harsh

(footnote continued)

Insurance Brokers, Ltd. v. New Hampshire Insurance Co., 667 F.2d 600, 603-04 (7th Cir. 1981). While defendants here did move to compel the plaintiff's deposition, defendants never moved to compel plaintiff to testify about any sexual conduct committed prior to entering, while in attendance at or since his separation from the Academy and no order was ever entered compelling that testimony. Thus, defendants' "renewed" motion for sanctions properly should be treated as a Rule 37(a)(2) motion. Of course, under Rule 37(a)(2), the Court may enter a protective order. It may not order sanctions.

sanction' which cannot be imposed absent 'willfulness, bad faith, or . . . fault' on the part of the plaintiff." Founding Church of Scientology v. Webster, 802 F.2d 1448, 1458, 1459 (D.C. Cir. 1986), cert. denied, 484 U.S. 871 (1987), quoting Trakas v. Quality Brands, Inc., 759 F.2d 185, 186 (D.C. Cir. 1985), and Societe Internationale v. Rogers, 357 U.S. 197, 212 (1958). Any sanction granted on a Rule 37(b) motion -- including an order stating that certain facts will be taken as established -- must, however, be based on a valid discovery order. See Black Panther Party, supra, 661 F.2d at 1255 n.82; National Right to Work, supra; Smith v. Schlesinger, 513 F.2d 462, 467 (D.C. Cir. 1975).

In applying these principles, the courts have not limited their application to disputes over the discovery of privileged information. To the contrary, the common sense notion that sanctions may not be awarded where discovery was properly resisted on grounds of relevance is well recognized. E.g., Fonseca, 734 F.2d at 950 (dismissal inappropriate where information sought in discovery "is not sufficiently relevant to the subject matter of the action"; information sought "'might have interesting answers, [but] they are not so germane to the conduct of the instant lawsuit that the plaintiff must answer them or face the sanctions of Rule 37.'").

Courts have also recognized that discovery concerning a plaintiff's sexual history has potential for mischief and should be limited absent clear relevance. E.g., Priest v. Rotary, 98 F.R.D. 755 (N.D. Cal. 1983) (discovery of sexual history of plaintiff precluded under Rule 26(c) given its marginal relevance and possibility that discovery would be used to annoy and harass plaintiff).

Thus, at the outset, in considering whether to award any sanctions, this Court must first determine that information concerning any sexual conduct engaged in before, during and since plaintiff's enrollment at the Academy is relevant to the instant dispute. Defendants contend that this information is relevant to determine, first, whether plaintiff's compelled discharge was justified and, second, whether plaintiff is entitled to reinstatement. As shown below, each contention is meritless.

A. Steffan's conduct is irrelevant in an action challenging a separation based on his status.

Defendants argue that the information sought is relevant because if plaintiff did engage in homosexual conduct at the Academy, their regulations must be upheld under the authority of Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), authority which is binding upon this Court. Alternatively, defendants argue that if plaintiff did not

engage in homosexual conduct at the Academy, their regulations should be upheld under the authority of Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), authority which is not binding upon this Court. Defendants' argument is erroneous.

As shown above, the sole evidence adduced at the Brigade Military Performance Board and the Academic Board consisted of Steffan's admissions that he is gay. The two notices that Steffan received informed him that this was the basis for the proceedings initiated against him. The only substantive question he was asked is "Are you a homosexual?" Given the record that defendants developed in compelling Steffan to resign, they simply cannot be heard to argue that they can use discovery to develop an alternate theory for justifying their illegal actions.

The applicable law is not open to debate. "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." SEC v. Chenery Corp., 318 U.S. 80, 87 (1943). See generally Federal Power Commission v. Texaco, Inc., 417 U.S. 380, 397 (1974); Burlington Truck Lines v. United States, 371 U.S. 156, 168-69 (1962); United States Lines v. Federal Maritime Commission, 584 F.2d 519 (D.C. Cir. 1978); American Meat Institute v. Environmental Protection Agency,

526 F.2d 442 (7th Cir. 1975) (court cannot uphold agency action on grounds other than those advanced by agency).

The Chenery doctrine is fully applicable in actions challenging military discharge proceedings. See, e.g., White v. Secretary of the Army, 878 F.2d 501 (D.C. Cir. 1989); Giles v. Secretary of the Army, 627 F.2d 554 (D.C. Cir. 1980); Vietnam Veterans of America v. Secretary of the Navy, 642 F. Supp. 154, 158-59 (D.D.C. 1986); Cohn v. United States, 15 Cl. Ct. 778 (1988).^{*} Applying these principles, the court in Long v. United States, 12 Cl. Ct. 174 (1987), held that discovery was "unnecessary" in an action challenging the factual basis for an administrative military discharge.

The Court of Appeals' recent decision in White, 878 F.2d 501, is particularly instructive and dispositive of defendants' contentions. White involved an Army serviceman who had gone AWOL on eight occasions. The plaintiff was given an undesirable discharge on the basis of his eighth

^{*} These principles are, of course, merely a corollary of the more general principle that a servicemember may only be discharged in accordance with the procedures set forth in valid regulations. E.g., Matlovich v. Secretary of the Air Force, 591 F.2d 852, 859 (D.C. Cir. 1978); VanderMolen v. Stetson, 571 F.2d 617, 624 (D.C. Cir. 1977); Sanders v. United States, 594 F.2d 804, 820 (Ct. Cl. 1979); Bray v. United States, 515 F.2d 1383, 1391 (Ct. Cl. 1975) (servicemen "only may be removed in the manner prescribed" by law and regulation).

offense. In the course of the plaintiff's challenge to his discharge, it was held that he had been denied certain procedural rights.

The Secretary argued that even if the discharge proceedings had been conducted improperly, the undesirable discharge should nonetheless be upheld because other information in the plaintiff's personnel file would have justified the discharge if the case had been presented to the appropriate body. The Secretary further contended that the undesirable discharge should be upheld because the plaintiff's record was so poor that it could be presumed that he would have been given an undesirable discharge on some other grounds at a later date. The district court accepted this reasoning.

Relying on Giles, supra, 627 F.2d 554, the D.C. Circuit reversed the district court, holding that "the Army may not retroactively justify an invalidated separation decision by relying on incidents of misconduct that may be found somewhere in a soldier's personnel file but were not charged in the original proceeding itself." 878 F.2d at 505. The White court then went on to observe that "the vice inherent in the proposed manner of proceeding is in this case even more serious. . . . The Army . . . seeks to postulate an entirely different proceeding, one that was not

even contemplated at the time of appellant's removal." This, in the Court's view, made the Army's position "even more problematic." 878 F.2d at 505.

The facts presented here are a fortiori of White. In White, the Army was seeking to rely on information contained in the plaintiff's personnel file but not presented in the discharge proceeding to justify its illegal action. Here, there is no information in Steffan's personnel file indicating that he had engaged in homosexual conduct. Indeed, defendants' Answer does not even allege conduct as a defense. And an NIS investigation (which was not introduced in evidence before either the Brigade or Academic Boards) found no evidence to support any such allegation. See p. 5 n.*, supra.

Thus, under the authority of White, defendants' attempt to uphold their actions by using deposition discovery to create a record that was never made at the administrative level and then "postulate an entirely different proceeding" "that was not even contemplated" at the time Steffan was compelled to resign must be rejected.

B. Steffan's conduct is irrelevant to determining whether he is entitled to reinstatement.

Defendants' second contention -- that Steffan's compelled answers to questions concerning homosexual conduct

are relevant to determine whether Steffan is entitled to reinstatement -- is equally frivolous.* It is hornbook law that an invalid separation "is a nullity" and that "not merely the character of the discharge but the fact of discharge is voided by the failure to accord the serviceman his material rights or to follow the required procedures."

Sullivan v. United States, 177 Ct. Cl. 518 (1966). See also Roberts v. Vance, 343 F.2d 236 (D.C. Cir. 1964); Middleton v. United States, 170 Ct. Cl. 36 (1965). For these reasons, courts have not hesitated to reinstate an unlawfully discharged servicemember. See, e.g., Lewis v. Marsh, 672 F. Supp. 14, 21 (D.D.C. 1987); Krzeminski v. United States, 13 Cl. Ct. 430 (1987); Sanders v. United States, 594 F.2d 804, 820 (Ct. Cl. 1979).

In none of these cases is there any suggestion that the government can use civil discovery as a tool to evade its own regulations and come up with grounds never advanced in the administrative process as a basis for arguing that reinstatement would be futile because the plaintiff would be discharged on separate grounds. Indeed, the D.C. Circuit implicitly rejected this convoluted reasoning in White v. Secretary, supra, 878 F.2d at 501 (the argument that plain-

* Of course, not even defendants contend that sexual conduct by plaintiff would bar Steffan from being awarded his diploma or from removing the stigma in his record that he has "insufficient aptitude" to serve as an officer.

tiff, given his record of going AWOL on eight occasions, would have been properly discharged when he went AWOL on some ninth occasion was rejected as "obviously not the law").

The court in Watkins v. United States Army, 551 F. Supp. 212, 223-25 (W.D. Wash. 1982), similarly rejected this reasoning. In that case, the district court had previously ruled that an Army Sergeant, Perry Watkins, had been illegally discharged on the basis of his homosexual orientation and ordered that he be reinstated. The Army thereafter convened an administrative hearing and sought to examine Watkins concerning whether he had engaged in homosexual conduct. Notably, as is the case here, the Army conceded that it was engaged in a fishing expedition and had no basis other than Watkins' statements concerning his sexual orientation for asking the questions. When Watkins exercised his right under military law to remain silent at the hearing, the Army denied reenlistment on the ground that he had refused to answer the questions.

The court soundly rejected the Army's contention that its actions were appropriate, holding that the Army could not "use plaintiff's homosexuality as an open door through which to probe for possible misconduct, when it has no grounds to believe such misconduct exists". 551 F. Supp. at 225. Importantly, in its en banc opinion ordering that

Watkins be permitted to reenlist, the Ninth Circuit went out of its way to endorse the district court's ruling. Watkins v. United States Army, 875 F.2d 699, 711 n.18 (9th Cir. 1989).

The only authority that defendants cite for the proposition that they advance is Matthews v. Marsh, 755 F.2d 182 (1st Cir. 1985). In that case, the plaintiff was discharged on the basis of her statement that she was a lesbian and an Army regulation requiring the exclusion of service-members who state that they are homosexual. The district court found the regulation unconstitutional following a trial on the merits before a Magistrate which included testimony from a military official who explained the rationale for the regulation. On the basis of this ruling on the merits, the court ordered the plaintiff's reinstatement.

While the appeal was pending, the plaintiff reapplied to the armed services and voluntarily stated on her reenlistment form that she had engaged in homosexual conduct. On the basis of this "new evidence of apparent homosexual conduct," the appellate court remanded the case so as to avoid "undertak[ing] a review of the serious constitutional issues presented in the district court opinion." 755 F.2d at 183-84.

Matthews is plainly distinguishable. In that case, the plaintiff voluntarily provided information which disqualified her from service. Steffan has not done so. To the contrary, he has properly refused to do so. The holding of Matthews thus serves to underscore an important point.* If Steffan prevails in this action and is reinstated, and the Navy seeks to discharge him for homosexual conduct, absent some proof, it will fail. Under binding Navy regulations, Steffan could not be compelled to testify at a discharge proceeding against himself. And he could not be discharged for exercising his right to remain silent.**

This is not a mere procedural nicety; it is a substantive protection that is afforded to all servicemem-

* The Matthews court in dictum did "note that during pretrial discovery the Army had sought information regarding Matthews' sexual conduct during her service" and wondered why the district court had denied the discovery since no written opinion had been issued on the question. 755 F.2d at 183. This was not the basis for the Court's holding, however. Indeed, an examination of the brief for the appellee in Matthews highlights why it is that courts are properly wary in relying on dictum. That examination shows that the plaintiff did not brief this issue to the court and that the discovery order had not been appealed from. Wolinsky Aff. Ex. AA.

** The Navy's Military Personnel Manual provides that in an administrative discharge proceeding:

The respondent may testify in his or her own behalf, subject to the provisions of Article 31, UCMJ. If the respondent elects-to remain silent, that fact shall not be considered by the Board for any purpose on any issue before it. (Wolinsky Aff. Ex. BB at 3640350.5.h; emphasis added.)

bers faced with an administrative discharge. It would be anomalous indeed for a court to hold that a servicemember can be illegally discharged and then denied reinstatement on the basis of a refusal to answer questions in a civil action that the member was not asked and could not have been compelled to answer in the underlying discharge proceeding. Such a holding would raise serious concerns under the Due Process Clause. Cf. Black Panther Party v. Smith, 661 F.2d 1243, 1271 (D.C. Cir. 1981) (dismissal of suit where information sought is not proper subject of discovery "raises serious due process questions"), judgment vacated, 458 U.S. 1118 (1982).

It is not surprising, then, that no court has ever reached the holding that defendants urge. This Court should not be the first.

POINT II

DEFENDANTS' MOTION SHOULD BE DENIED BECAUSE THE INFORMATION THAT THEY SEEK IS PRIVILEGED.

The Court of Appeals for this Circuit has held that automatic dismissal of a civil complaint when a plaintiff invokes the Fifth Amendment is inappropriate. See Attorney General v. Irish People, Inc., 684 F.2d 928, 953 (D.C. Cir. 1982), cert. denied, 459 U.S. 1172 (1983); Black Panther Party v. Smith, 661 F.2d 1243, 1271-72 (D.C. Cir. 1981),

judgment vacated, 458 U.S. 1118 (1982). See also Wehling v. CBS, 608 F.2d 1084, 1087 (5th Cir. 1979); Campbell v. Gerrans, 592 F.2d 1054, 1057-58 (9th Cir. 1979); Parker v. Baltimore & Ohio R.R., 555 F. Supp. 1177, 1179-80 (D.D.C. 1983); Bootz v. Childs, 627 F. Supp. 94, 101-02 (N.D. Ill. 1985). See generally Comment, "Plaintiff as Deponent: Invoking the Fifth Amendment," 48 U. Chi. L. Rev. 158, 162-64 (1981).

As the D.C. Circuit held in Black Panther Party:

In Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the Supreme Court recognized that penalizing assertion of the Fifth Amendment privilege effectively destroys the privilege. Thus it held that the judiciary may not impose sanctions that make assertion of the privilege "costly." . . . Requiring a plaintiff to choose between proceeding with his lawsuit and claiming the privilege clearly imposes a substantial cost. This cost cannot be justified on the sole ground that the plaintiff chose to initiate the suit and thus can be characterized as a voluntary litigant. Again, an individual "voluntarily" becomes a plaintiff only because he believes the courts provide the best means of protecting his rights. Indeed, as we noted in the First Amendment context, an automatic waiver rule raises serious due process questions; the plaintiff is in effect deprived of his day in court.

-- 661 F.2d at 771
(emphasis added;
footnotes and
citations omitted).

The rationale was further explained by the court in Bootz:

[D]ismissal for failure to comply with discovery, pursuant to Fed. R. Civ. P. 37, is inappropriate because Fifth Amendment testimony is privileged and Rule 26 explicitly excludes privileged matters from discovery. See Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged. . . ."). . . . Nor is it accurate to characterize a plaintiff's decision to file suit a "voluntary" waiver of Fifth Amendment rights, since plaintiffs are often "compelled" to initiate civil actions to protect their rights. . . . The Fifth Circuit noted that "a civil plaintiff has no absolute right to both his silence and his law suit. Neither, however, does the civil defendant have an absolute right to have the action dismissed anytime a plaintiff invokes his constitutional privilege."

-- 627 F. Supp. at 101
(emphasis added;
citations omitted).

Rejecting a per se rule, the D.C. Circuit has adopted a balancing test for the courts to apply in considering what course to take when they are confronted with competing claims for discovery, on the one hand, and a Fifth Amendment privilege, on the other. Under that test:

[T]he claim of privilege should be upheld unless the defendant can show that his need for the information in question is substantial. Even in circumstances where the defendant has demonstrated a strong interest in disclosure, an order requiring the plaintiff to choose between his Fifth Amendment rights and dismissal will not be proper, except where other, less drastic, remedies are not available.

-- Black Panther Party,
supra, 661 F.2d at 1272
(emphasis added; footnote
omitted).

In discussing the application of this balancing test elsewhere in its opinion, the D.C. Circuit held that "the interest in disclosure will be relatively weak unless the information goes to 'the heart of the matter,' that is, unless it is crucial to the party's case." 661 F.2d at 1268 (emphasis added). See also Adolph Coors Co. v. Wallace, 570 F. Supp. 202, 208-09 (N.D. Cal. 1983) (scrutiny heightened where litigant could misuse compulsory process "to cripple, or subdue, vocal opponents" for an "unpopular" cause).

Defendants simply cannot satisfy this test. As shown above, the information that defendants seek is wholly irrelevant to any claim or defense in this action. Even if the information sought has some tangential relevance, which it does not, defendants cannot show and have not shown that they have a "substantial interest" in the discovery or that it is "crucial" to their case. It is telling indeed that defendants' Answer does not even plead as a defense that plaintiff is not entitled to relief because he engaged in homosexual conduct. Wolinsky Aff. Ex. F.

Defendants' only argument in support of their attempt to avoid this well-established precedent is to recite that a Fifth Amendment privilege cannot be sustained where the risk of prosecution is "'fanciful at most'" without explaining why the risk to plaintiff here is, in fact,

"fanciful." See, e.g., In re Corrugated Container Antitrust Litigation, 662 F.2d 875, 883 (D.C. Cir. 1981).

Defendants' argument is quite ironic. The very regulation in issue is "justified" (albeit, without foundation) on the grounds that national security could be threatened by individuals blackmailed with a threat of criminal prosecution. See 10 U.S.C. § 925 (criminalizing heterosexual and homosexual sodomy in military context); Md. Ann. Code art. 27, §§ 553-54 (1982) (criminalizing heterosexual and homosexual sodomy).

In any event, the relevant authorities demonstrate that the liberal test applied by the courts in considering the assertion of a Fifth Amendment privilege has been met here. See generally Hoffman v. United States, 341 U.S. 479, 486 (1951) (privilege "not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant"); Maness v. Meyers, 419 U.S. 449, 462-64 (1975) (privilege can be asserted "'in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory'"); Parker v. Baltimore & Ohio R.R., 555 F. Supp. 1177, 1180 (D.D.C. 1983) (assertion of privilege upheld where defendant could not speak for state law enforcement officials).

Conclusion

For the reasons set forth herein, plaintiff submits that defendants' motion should be denied and plaintiff's cross-motion for a protective order pursuant to Rule 26(c) should be granted.

Respectfully submitted,

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