

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JIM A. TURNER,

Plaintiff,

v.

Case No. 1:97CV01653(PLF)

UNITED STATES NAVY, et al,

Defendants.

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S CROSS-MOTION
FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

As plaintiff has effectively abandoned his many constitutional arguments, the sole issue remaining before the court on the parties' cross motions for summary judgment is the Administrative Procedure Act claim of whether the Secretary acted arbitrarily and capriciously in adopting the reasoning of the minority report of the Board for the Correction of Military Records. As this court has recognized,

"[s]ince the statute authorizing the Secretary to correct military records gives the Secretary a great deal of discretion, the arbitrary and capricious standard is even more difficult to meet than in other agency review cases.

Mudd v. Caldera, 26F.Supp.2d 113,120(D.D.C.1998). Specifically as the Secretary is entitled to rely on a "presumption of regularity" of actions of the Navy, plaintiff has the burden of pointing to "substantial evidence" of "material error or injustice" by the Navy in the proceedings which resulted in his discharge. 32 ~C.F.R. § 723.3(e)(2). The August 20, 1999 decision of Assistant Secretary Carolyn Becraft has cogently addressed all of

plaintiff's nonfrivolous arguments and points to substantial, if not overwhelming, evidence in the record in support of its

conclusions. See Mudd, supra at 120. Hence, summary judgment should be granted for

defendants.

Procedural Background

Plaintiff was disciplined through the imposition of nonjudicial punishment ("NJP") by his commanding officer ("CO") for violations of several sections of the Uniform Code of Military Justice (UCMJ). Administrative Record ("A.R.") 595-97, 688 & 690.1. Plaintiff was found guilty of 2 specifications of Indecent Assault, 4 specifications of Indecent Language, 4 specifications of Soliciting Another to Commit an Offense, 1 specification of False Official Statements, 1 specification of Assault with Intent to Commit Sodomy, and 1 specification of Conduct of a Nature to Bring Discredit Upon the Armed Forces, in violation of Articles 107 and 134, UCMJ, 10 U.S.C. §§ 907,934. A.R. 1602.

Subsequent to being found guilty at NJP, plaintiff was processed for administrative separation from the Naval Service. Plaintiff was afforded a full evidentiary hearing before an administrative discharge board ("ADB"), which recommended he be discharged on two independent grounds: (1) homosexual conduct in violation of 10 U.S.C. § 654, and (2) sexual harassment. A.R. 804-07, 811-12. Plaintiff unsuccessfully appealed the ADB's finding to both the Chief of Naval Personnel and the Secretary of the Navy. A.R. 815-20, 1766-88.

Following his discharge from the Navy, on December 20, 1994, plaintiff petitioned the

Board for Correction of Naval Records ("BCNR") to correct his service record by expunging

his NJP and reversing the ADB's determination that he had engaged in homosexual conduct.

A.R. 626-54. Plaintiff did not, however, challenge the ADB's independent recommendation

that he be

1/. The NJP proceedings were held pursuant to Article 15, UCMJ, 10U.S.C. § 815.

discharged by reason of sexual harassment. Id. 2/. The BCNR was unable to come to a unanimous recommendation as to the proper disposition of plaintiff's case and voted, 2-1, in favor of reversal of the NJP and ADB. The BCNR drafted two different reports that were "submitted for review and action" by the Secretary's designee. A.R. 615. Deputy Assistant Secretary of the Navy Karen Heath reviewed the BCNR reports and approved the Minority BCNR recommendation for the reasons articulated in that report and recommendation, in accordance with Navy regulations that allow her "to deny relief" by "adopt[ing] in whole" the "findings, conclusions and recommendations of... a minority report" of the board. 32 C.F.R. § 723.7(a); Becraft Mem. at 1-2.

On December 23, 1998, the Court vacated the Secretary of the Navy's decision regarding plaintiff's petition for relief before the Board for Correction of Naval Records, and remanded the case to the Secretary of the Navy for consideration and response to plaintiff's non-frivolous arguments, 3/ and articulation of "reasoned bases for his ultimate decision." Mem. Op. at 17--18.

2/. "The finding of sexual harassment could constitute a sufficient basis for his discharge regardless of the outcome of this case.

3/. The BCNR unanimously agreed that the following arguments presented by plaintiff were frivolous:

- (1) the actions of the CO were arbitrary and capricious;
- (2) plaintiff was denied due process;
- (3) he was denied an impartial and unbiased investigation into the allegations of homosexual conduct;
- (4) he was denied the opportunity to question witnesses at NJP;
- (5) denial of his NJP appeal was unjust;
- (6) the staff judge advocate who advised the appeal authority was unduly influenced by the CO;
- (7) the investigation was a 'witch hunt';
- (8) the statement by [Maurer) was unlawfully procured in violation of the new homosexual policy;
- (9) detailed counsel was ineffective;
- (10) the ADB was unduly influenced by the CO and rumors and innuendo;
- (11) the members of the ADB were selected to give an unfair advantage to the government;
- (12) the enlisted member of the ADB was appointed to influence the other inexperienced officer members and to support the actions of the CO;
- (13) the enlisted member tried to introduce a new offense in order

On remand, the matter was placed before Assistant Secretary of the Navy (Manpower and Reserve Affairs) Carolyn Becraft, the Secretary of the Navy's designee for final action on BCNR cases under 10 U.S.C § 5016. Becraft Mem. at 1. Assistant Secretary Becraft specifically considered and addressed Seaman Maurer's credibility and the reliability of his testimony and concluded that the ADB's decision below accepting his testimony was proper, and that the BCNR Minority report was correct in its analysis of Maurer's credibility. Becraft Mem. at 5-6. In addition, Assistant Secretary Becraft considered the following non-frivolous arguments: (1) the offenses for which plaintiff received NJP were not minor offenses and should have been referred to court-martial; (2) he was denied the right to consult with counsel prior to imposition of NJP; (3) the charges were not properly investigated in accordance with the new DOD policy on homosexual conduct; (4) new charges were improperly added to the Report of Disposition of Offenses during the NJP hearing; and (5) his discharge was based on suspicion and rumor and not on credible

evidence. Becraft Mem. at 2. Following a careful review of the BCNR's decision, and all evidence of record, on August 20, 1999, Assistant Secretary Becraft issued an eight-page written decision disapproving the Majority decision of the Board for Correction of Naval Records, adopting the Minority decision, and affirming plaintiff's discharge from the Navy. At a hearing held September 14, 1999, defendants renewed their Motion for Summary Judgment, previously filed December 15, 1997.

to justify the offenses previously asserted; (14) the key witness was discharged within a week after the ADB hearing; and (15) the post ADB comments widely dispersed in message traffic unduly influenced the case prior to final disposition.

A.R. 609,614.

ARGUMENT

THE SECRETARY OF THE NAVY'S REJECTION OF THE MAJORITY BCNR REPORT WAS NOT ARBITRARY AND CAPRICIOUS

A. The Presumption of Regularity was Properly Applied.

The BCNR "relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties." 32 ~C.F.R. § 723.3(a)(3). This presumption is grounded in case law as well. See, e.g., Smith v. Dalton, 927 F. Supp. 1, 4 (D.D.C. 1996) ("presumption that military administrators discharge their duties correctly, lawfully, and in good faith"); Sanders v. United States, 594 F.2d 804, 813 (Cl. Ct. 1979). The presumption cannot be overcome absent a showing of "cogent and clearly convincing evidence" to the contrary. Smith v. Dalton, 927 F. Supp. at 4.

In accordance with this standard, both the Majority and Minority BCNR reports explicitly agreed that the bulk of plaintiff's allegations "were either speculative or based on conjecture and are unsupported by the evidence of record." A.R. 609, 614. Plaintiff argues that, in certain instances, the presumption of regularity cannot be properly applied because alleged "irregularities" in the record constitute substantial evidence of a material error or injustice, and thus, Assistant Secretary Becraft's decision rejecting the Majority report is "arbitrary and capricious." *Plaint. Opp. and Cross-Mot.* at 14-16. However, the purported "irregularities" plaintiff provides either simply do not exist, or are a far cry from the necessary quantum of "substantial evidence."

1. Additional NJP Charges were not Improperly Added.

Plaintiff first claims that the presumption of regularity should not have been applied in addressing whether additional charges were added to his charge sheet after the NJP proceedings had begun. *Plaint. Opp. and Cross-Mot.* at 16; see also A.R. 645. Assistant Secretary Becraft rejected this contention because, other than plaintiff's bare assertion, there is no evidence to support his allegation. *Becraft Mem.* at 4.

The BCNR had two NJP "charge sheets" before it for consideration. One, labeled "Rough Draft," had many handwritten corrections and deletions, along with two additional handwritten charges. A.R. 684-85. Plaintiff signed this charge sheet, including the additional handwritten charges, on May 3, 1994. The other charge sheet is a final, fully typed and corrected version of the first, also signed on May 3, 1994. A.R. 686-87. There is no indicia on either charge sheet that they were signed by plaintiff after the NJP hearing, as he now contends.

The BCNR Minority report found that there is "no evidence, other than [plaintiff's] contention, that the 'draft copy' did not contain the two additional charges prior to the hearing, or that the smooth copy was retyped after [the NJP hearing]." A.R. 614. Likewise, the BCNR Majority report acknowledges that the Majority "cannot determine on the face of the evidence whether the additional handwritten charges on the 'draft copy' were done prior to, during, or after the NJP." A.R. 610. Furthermore, the Majority report recognizes that there had been "retyping of the charges and specifications," and that, "if the amendments had been made prior to the hearing they would have, or should have been, retyped prior to the hearing." A.R. 610 (emphasis added). Nonetheless, the Majority report concludes that "the retyping of the charges and specifications lends credence to [plaintiff 's] contention that additional charges were improperly, added after NJP proceedings began." Id. (emphasis added).4/

The Majority report's holding that "additional charges were improperly added after NJP proceedings began" was rejected by Assistant Secretary Becraft as "both factually and legally erroneous." Becraft Mem. at 4. Assistant Secretary Becraft correctly noted that plaintiff presented no substantial evidence to demonstrate that any charges were added after NJP proceedings had begun, other than his own bare assertion. Id. see also A.R. 614. Moreover, the record contains substantial evidence to the contrary. Plaintiff testified at his ADB that he was "taken to mast [ie, NJP] for these allegations." A.R. 135. Plaintiff also did not raise this issue in his NJP appeal, where the CO would have had an opportunity to rebut the contention as the BCNR Minority was correct to note. A.R. 614. Furthermore, plaintiff did not raise this allegation in the BCNR proceedings until his fifth amendment to his petition, prior to which he admitted that the ANTIETAM had "specified

and preferred (12) Article 134 and (1) Article 107 offenses" against him, a total of thirteen charges. A.R. 953. Significantly, thirteen charges appeared on the final NJP charge sheet, whereas only twelve charges appeared on the rough draft before it was amended.

Moreover, even if plaintiff 's allegations were correct, he received all the notice he was entitled to before his NJP. As the record reflects (, A.R. 837), the Manual for CourtsMartial requires only "a statement describing the alleged offenses -- including the article of the code -- which the member is alleged to have committed." MCM, Pt. V, ¶ 4.a.2. The record demonstrates that plaintiff received a sufficient description of his alleged offenses, including the

4/. The Majority report also states that plaintiff 's contention that "he was denied due process" was speculative or based on conjecture" and "unsupported by the evidence of record," but found that adding NJP charges "violated his due process rights." A.R. 610.

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articles of the UCMJ he was alleged to have violated and, therefore, his rights under applicable military justice regulations were not violated. Thus, Assistant Secretary Becraft did not err in rejecting the BCNR Majority report's findings in lieu of the better-reasoned Minority report, since plaintiff failed to present "cogent and clearly convincing evidence" that plaintiffs command acted improperly. Cf. *Smith v. Dalton*, 927 F. Supp. at 4.

2. The "Don't Ask, Don't Tell" Policy was not Violated.

Plaintiff next argues that because the defendants violated the "Don't Ask, Don't Tell" policy, the presumption of regularity cannot be applied in plaintiff's case. Plaintiff Opp. and Cross-Mot. at 17-18. This argument is also wholly without merit. First, both

the Majority and Minority BCNR reports agree that "there was~'no evidence that the command failed to comply with the new homosexual policy when it investigated the allegations." A.R. 611, 614. However, the Majority report nonetheless states that the CO in some way violated the "spirit of the policy, which directed CO's to exercise sound discretion as to whether the information was credible to warrant disciplinary action," during the course of the investigation. A.R. 611. Since there was no procedural error in the application of the "Don't Ask, Don't Tell" guidelines, plaintiff instead mounts a challenge to Assistant Secretary Becraft's rejection of the Majority report's decision that the "spirit" of the policy was violated. However, this Court already has stated that it will not second-guess plaintiff's CO's discretionary decision in initiating or conducting the investigation of plaintiff or in taking plaintiff to NJP for his misconduct:

It is inappropriate for a court to interfere in or attempt to supervise the military's decision to initiate an investigation and the investigative methods employed, particularly when the investigation is undertaken by the military of its own personnel with an eye towards potential discipline.

Op. at 9 (citing *Chappell v. Wallace*, 462 U.S. 296, 300 (1982); *Orloff v. Willoughby*

345 U.S. 83, 94 (1953); *Dilley v. Alexander*, 603 ~F.2d 914, 920 (D.C. Cir. 1979)).

Nevertheless, even if it were appropriate for the Court to address this issue, it is erroneous to conclude -- as the BCNR Majority did in this case -- that some vague violation of the "spirit" of the homosexual conduct investigative guidelines could overcome the presumption of regularity of the finding that a servicemember had violated the prohibition against homosexual conduct. Moreover, as the Court held with regard to the Department of Defense investigative guidelines:

From the very beginning, the Department of Defense has made clear its intent not to be substantively or procedurally bound by the 'Don't Ask, Don't Tell' investigative guidelines. The final paragraph of the guidelines states that [t]he procedures in this enclosure create no substantive or procedural rights,' . . . a position consistent with the legislative history of the statute by which Congress created the 'Don't Ask, Don't Tell' policy ... Since the Department of Defense has expressed its clear intent not to be bound by the investigative guidelines, Mr. Turner has no enforceable substantive or procedural rights under the guidelines that can be enforced by this Court.

Op. 12-13 (citations omitted). Just as a violation of the letter of the guidelines provides no basis for overturning a finding that a servicemember has violated the prohibition against homosexual conduct, neither could a violation of the "spirit" of the guidelines provide such a basis.

Accordingly, Assistant Secretary Becraft did not err in upholding the Minority report's finding that the requirements of the "Don't Ask, Don't Tell" policy were substantially met by plaintiff's command. Becraft Mem. at 3-4.

3. Plaintiff's NJP and Administrative Separation were Properly Conducted.

Plaintiff next argues that Assistant Secretary Becraft "ignored" the "irregularities" in the Commanding Officer's decision to initiate NJP and Administrative Separation ("ADSEP") proceedings. *Plaint. Opp. and Cross-Mot.* at 18-19. He claims that the CO's decision to initiate "duplicative" NJP and ADSEP proceedings concurrently "supports an inference of bad faith." at 19. Once again, however, plaintiff is asking the Court to review highly discretionary decisions made by his commanding officer during the investigation-- decisions that the Court already has declined to review. *See. Op.* at 9-10.

In addition to the general nonjusticiability of plaintiff's assertion, his argument fails on its merits as it ignores the separate and distinct purposes behind NJP and administrative separation proceedings. The purpose of NJP is disciplinary punishment for a violation of a punitive article of the Uniform Code of Military Justice, whereas ADSEP proceedings are held to determine fitness for further naval service. Compare 10 U.S.C. § 815 with MILPERSMAN 3610100.3.a-b (located at A.R. 1967-68). Thus, it was not "duplicative" or "bad faith" for plaintiff's CO to impose NJP in addition to processing plaintiff for administrative separation, since the two proceedings, although they may often go hand-in-hand, serve very different functions.

Moreover, plaintiff's command was procedurally required under the Navy's regulations to take disciplinary action on the sexual harassment offenses before initiating separation proceedings. MILPERSMAN 3630600.d(3) (located at A.R. 2002). Thereafter, the command was required under regulation to document the disciplinary action in plaintiff's service record on the date of the event. MILPERSMAN 5030200.6.b, 5030320 (attached hereto as Exhibit On the other hand, plaintiff's administrative board was empowered to give the NJP any weight it desired. MILPERSMAN 3640350.2.a (located at A.R. 2020). Additionally, the ADB was required to reach its own conclusions as to whether each allegation was supported by the preponderance of the evidence. 3640350.5.b (located at A.R. 2023). In plaintiff's case, it is clear that the ADB followed this mandate, since it found no misconduct as to most of the offenses of which the CO had found plaintiff guilty at NJP. 5/. This demonstrates the lack of merit in plaintiff's argument that the documentation of the NJP in his service record improperly influenced the ADB.

In short, plaintiff's allegation that the documentation of the NJP in his service record prior to the convening of his administrative board suggests "bad faith" is totally without merit. Not only does he lack any evidence of improper motivation on behalf of the command, the record reflects that the applicable administrative procedures were followed by the command in all respects. Notwithstanding plaintiff's contention to the contrary, Assistant Secretary Becraft did not "simply ignore ... irregularities" -- there was no irregularity in the first instance.

4. It Was Not Unreasonable to Credit Seaman Maurer's Testimony

Finally, in challenging Assistant Secretary Becraft's application of the presumption of regularity, plaintiff once again complains that she gave improper weight to Seaman Maurer's testimony. *Plaint. Opp. and Cross-Mot.* at 20-23. However, the Court has already opined that the ADB was neither arbitrary nor capricious in accepting Seaman Maurer's testimony:

While Maurer admitted to the ADB that he felt intimidated when interviewed and that he was seeking an early release from the Navy, he was firm in his denials that his testimony was fabricated, coerced or provided in exchange for an early release. *ADB Proceedings, A.R.* at 96, 100-01, 106-08. He explained his reluctance about coming forward, stating he hesitated "[b]ecause [he] was humiliated by the fact of what could have happened." *Id.* 107. As in any adversary proceeding, all of these factors go to assessing the witness' credibility, a matter for the fact-finder which in this case is the ADB, not this Court ... The Court cannot say that the ADB was arbitrary and capricious or abused its

5/ The ADB only accepted the NJP findings of plaintiff's guilt as to 3 of the 4 specifications of Indecent Language (communicated to SA Maurer and SA Poore), and 2

of the 3 specifications of Soliciting Another to Commit and Offense. A.R. 806--807, 809. In sum, the ADB rejected 8 of the 13 specifications from plaintiff's NJP.

discretion in concluding, as it did, that Maurer was a credible witness.

Op. at 14-15. Likewise, Assistant Secretary Becraft did not act arbitrarily or abuse her discretion in accepting SA Maurer's testimony.

Plaintiff further asserts the electronic mail message of July 2, 1996 allegedly sent to plaintiff by Seaman Maurer indicates that Maurer now desires to recant his testimony. Plaintiff. Opp. and Cross-Mot. at 21-22. As Assistant Secretary Becraft properly found, however, the contents of the e-mail message do not support his argument. Becraft Mem. at 7. While the message may indicate Maurer's distaste for the way plaintiff's case was handled, nowhere does it suggest Maurer's testimony was false, that his testimony was coerced, or that he now wishes to recant. Id.; A.R. 14. Plaintiff simply places far more weight on this document than it can bear.

Moreover, by plaintiffs own admission, Seaman Maurer was not willing to speak to him about his case, did not return his telephone calls, and changed his pager number after plaintiff contacted him. Becraft Mem. at 7; A.R. 642-43. Consistent with the Court's Opinion, 6/. Assistant Secretary Becraft considered all of these matters, together with the e-mail message, and found that plaintiff had not presented sufficient evidence to show that Seaman Maurer wished to recant his testimony. Becraft Mem. at 7.

B. Assistant Secretary Becraft's Decision is Supported by Substantial Evidence

Plaintiff next argues that Assistant Secretary Becraft's decision is not supported by substantial evidence. In support of his argument, he again asserts that Seaman Maurer's testimony was unreliable, and that the solicitation and indecent language findings regarding Seaman Poore are unsupported. *Plaint. Opp. and Cross-Mot.* at 24-3 1. With regard to the

6/. *SEE Op.* at 17.

reliability of Seaman Maurer's testimony, as discussed above, this Court already has considered and rejected plaintiffs argument. *Op.* at 15.

As for the allegations of plaintiff's conduct toward Seaman Poore, Assistant Secretary Becraft properly found substantial evidence to support the ADB's findings. *Becraft Mem.* at 5-6. Poore testified that, after he had won a hand of cards he had been playing with plaintiff while the two were alone in a hotel room, plaintiff stated, "it's time for me [ie, Turner] to pay up, I'm going to suck your [ie, Poore's] dick." A.R. 731. Poore stated that he pushed plaintiff away and left the room. *Id.* Poore also testified that he was "upset 'after plaintiffs solicitation, and that he "told [his] other friends on the ship. [He] told them to stay away from plaintiff -- this is what happened." *Id.* Moreover, Poore testified that plaintiff confronted him afterward, warning Poore, "Don't try to ruin my reputation. Don't tell nobody." *Id.*

Plaintiff attempts to discredit Seaman Poore's testimony through Barnett's testimony that Poore told Barnett that he had originally joked with plaintiff about the loser of the card game having to perform oral sex on the winner. *Plaint. Opp. and Cross-Mot.*

at 26. However, despite this one disconnect between Poore's and Barnett's testimony, other testimony from Barnett wholly supports Poore's allegations. Barnett testified that he saw Poore after he (Poore) had left the hotel room and that Poore "seemed really upset ... he seemed really embarrassed -- he seemed like he lost something in him --- he lost a spark in him at the time." A.R. 738. Similarly, Maurer testified, "Poore was pretty freaked out ... He said that Petty Officer Turner had made a move on him -- that he said he wanted to suck his dick." A.R. 743.

Plaintiff also tries to discredit Poore through Maurer's testimony that Poore told him that he [Poore] had uttered the oral sex joke first. *Plaint. Opp. and Cross-Mot.* at 26. However, this

is not helpful to plaintiff when considered in light of Maurer's other testimony regarding Poore's agitated mental state immediately after plaintiff's solicitation, stating that Poore "took the camera that was in the room and smashed the disposable camera," because "[h]e didn't want to remmnber the evening." A.R. 744. Joking around with crude remarks is one thing -- throwing one's shipmate on a bed while alone in a hotel room and soliciting him for sex is another. Seaman Poore's actions immediately following plaintiff's solicitation, as related by Barnett and Maurer, fully corroborate his testimony that plaintiff solicited him for sex, and that the solicitation was unwelcome.

Among the evidence that the ADB received and considered was Poore's sworn written statement, in which he stated that plaintiff "grabbed my arm and threw me on the bed. At first I thought that he was horseplaying But he was serious, he then stated 'It's time for me to pay up, and I'm going to suck your dick.' I immediately pushed him to the

side and left the hotel room." A.R. 181 (emphasis added). Poore confirmed this in his live testimony:

Q. What happened?

A. What happened was we were playing cards ... He grabbed my arm, threw me on the bed and said "It's time for me to pay up, I'm going to suck your dick." I said "No" and I pushed him away and I left.

A.R. 73 1. Barnett testified as to Poore's statements and state of mind immediately after the event, supporting Poore's testimony. AR 737-39. Thus, the record clearly supports the ADB's factual determination that plaintiff engaged in homosexual conduct as evidenced by his attempt to engage in or solicit Poore to engage in a homosexual act or acts.

Plaintiff claims that the ADB found that all of plaintiff's conduct toward Poore was perceived by Poore to be mere "horseplay." However, the evidence contradicts plaintiff's broad generalization. The evidence below demonstrates that the ADB determined that Poore perceived "horseplay" regarding only one aspect of plaintiff's conduct -- that plaintiff may have grabbed Poore and thrown him on the bed prior to stating he was going to "suck [his] dick" -- the ADB determined that the statement was, nonetheless, a solicitation to engage in homosexual conduct. On this point, the transcript of the ADB reads:

Senior Chief Wnorowski: I believe we agreed that the assault taking place with Petty Officer Poore --

President: Petty Officer Poore believed that it was horseplay at first and we considered that an assault needed to be perceived by the victim as an assault -- so we don't think he perceived it as an assault at the time --

Senior Chief Wnorowski: Somebody said that he was already on the bed and then somebody said that he was thrown on the bed and there was enough grey area in there that we couldn't come to say that he actually did that.

Counsel for Respondent: So now, I guess what we're left with is the solicitation for money on -- not King but Maurer and, that's it.

Senior Chief Wnorowski: There was one in there on Poore. We didn't find that he had been assaulted and thrown on the bed but I believe that he went in there and propositioned him for indecent sexual acts,

Counsel for Respondent: Okay. So, what is the charge that he was actually found guilty of?

Senior Chief Wnorowski: Indecent language and soliciting another to commit an offense were the ones --

Counsel for Respondent: Those two -- okay.

A.R. 806-07 (emphasis added). This portion of the transcript demonstrates that the ADB carefully distinguished plaintiff's alleged initial grabbing of Poore from plaintiff's subsequent statement to Poore. It is apparent from this passage that it was the ADB's determination that only plaintiff's alleged initial grabbing of Poore was perceived by Poore as "horseplay," A.R. 805, and that the ADB found that plaintiff "propositioned [Poore] for indecent sexual acts." A.R. 806.

Finally, plaintiff makes the bizarre argument that his statement does not constitute a "solicitation" under the UCMJ. Opp. at 30-31. In order to be guilty of Solicitation under the UCMJ, plaintiff must have (1) solicited or advised another person or persons to commit a certain offense under the UCMJ (in plaintiff's case, Sodomy 7/1); (2) done so with the intent that the offense actually be committed; and (3) the conduct must be prejudicial to good order and discipline in, or be of a nature to bring discredit upon, the

armed forces. MCM, 1984, pt. ¶ V, 105.b. Plaintiffs reliance on United States v. Asfeld, 30 M.J. 917 (A.C.M.R. 1990) and United States v. Hullett, 40 M.J. 189 (C.M.A. 1994) is misplaced. Asfeld involved an accused's conviction for Solicitation of Adultery based on vulgar telephonic statements he made to a co-worker indicating that he wanted to have sexual relations with her. 30 M.J. at 920. The Army Court of Military Review held that such statements were "nothing more than declarations of a lustful desire' and, when "[c]onsidered in the context of a superficially anonymous and obscene telephone call, the language has no 'tendency to incite lustful thought'; rather, it is simply offensive and shocking." Id. at 924. In the instant case, however, plaintiff's statement did not occur in an anonymous telephone call, but while he and Seaman Poore were alone on a hotel room bed after a night of drinking, thus placing it in a very different context from the Asfeld case:

7/. Sodomy is proscribed under Article 125, UCMJ. 10 U.S.C. § 925.

While words amounting to indecent language might justify an inference that the speaker intended to solicit an act of adultery by their "tendency to incite lustful thought," See MCM, 1984, paragraph 89c, the fact that a solicitation is uttered in the context of an obscene telephone call does not justify such an inference. As a matter of common sense, the act of whispering obscene and insulting language over a telephone is not calculated to procure participation in sexual activities. Such conduct is simply intended to shock and offend the recipient with vulgarity, See MCM, 1984, paragraph 89c, thereby harassing the recipient or gratifying the caller in some perverse way.

at 925. Likewise, United States v. Hullett is inapposite, as Hullett involved the validity of a soldier's conviction for Indecent Language, not Soliciting Another to Commit an Offense. 40 M.J. at 190.

Plaintiff also attempts to use Hullett to support his contention that he could not have committed the offense of communicating Indecent Language toward Seaman Poore because he was only joking when he told Poore he wanted to "suck his dick." *Plaint. Opp. and Cross-Mot.* at 31-32. This argument likewise fails on its merits. In Hullett, the accused's sexually suggestive comments, although arguably inappropriate in the workplace, were directed toward another consenting adult, who did not object to the language. 40 M.J. 190, 192. Because such sexually suggestive comments were spoken in a private conversation, common in the accused's workplace, and tolerated by the accused's commanders, the Court of Military Appeals found that the language "was not of a nature to bring discredit upon the armed forces," and did not operate "to the prejudice of good order and discipline." *Id.* at 191. Unlike the accused's statement in Hullett, plaintiff's statement to Seaman Poore was clearly unwelcome, as was established through Poore's testimony ("I said 'No' and pushed him away and I left"), and corroborated by Seaman Bamett's testimony (Poore came "running to [him]" and "seemed really upset" and really embarrassed"). A.R. 84-85, 91-92. Furthermore, unlike the accused's mixed-gender

Army unit in Hullett, there is no evidence that it was commonly accepted practice for the enlisted male Sailors aboard the USS ANTIETAM to engage in sexually suggestive banter. Indeed, far from the mere "sexual banter and bragging" in the Hullett case, the ADB found that plaintiff had "propositioned [Poore] for indecent sexual acts." A.R. 158--60.

C. The Navy Fully Complied with the Court's Order on Remand.

Plaintiff complains that, on remand, the Assistant Secretary merely relied upon the administrative record in rendering her decision and that "no new evidence was generated or considered." *Plaint. Opp. and Cross-Mot.* at 32. However, this Court's Opinion and Order of December 23, 1998 did not require the Navy to conduct additional fact-finding or consider arguments not already presented. See *Op.* at 17-18. Specifically, the Court directed, "After considering all non-frivolous arguments and the record evidence afresh, the Secretary must decide how he assesses the record and whether to accept or reject the arguments presented and then articulate reasoned bases for his ultimate decision." *Op.* at 18 (emphasis added). In rendering her decision on behalf of the Secretary, Assistant Secretary Becraft considered "all record evidence" and considered each and every one of plaintiff's non-frivolous arguments. *Becraft Mem.* at 1-2. Although plaintiff may disagree with the result, the decision was properly rendered and is based on substantial evidence.

CONCLUSION

WHEREFORE, the defendants respectfully request the Court grant defendants' Motion for Summary Judgment and deny plaintiffs Cross-Motion for Summary Judgment.

Respectfully submitted,

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February 16, 2000

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