IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JIM A. TURNER,

Plaintiff,

Case No. 1:97CV01653 (PLF)

V.

UNITED STATES NAVY, *el al.*,

Defendants.

DEFENDANTS'OPPOSITION TO PLAINTIFF'S RULE 56(f) MOTION AND REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should deny plaintiff s attempt to forestall decision on

defendants' summary judgment motion. Plaintiff requests a continuance under Rule 56(f) for discovery to supplement the 1,900-page administrative record in this case, but defendants' motion explained that plaintiff has not presented any legal claims that are viable, even if the facts were as plaintiff alleged in his complaint. Although plaintiff has attempted to demonstrate the legal sufficiency of his claims, he still has not proven any of them viable, and hence there is no occasion for any factual inquiry of any sort. The facts underlying this case are not material to the legal analysis in defendants' pending motion, and neither is the discovery that plaintiff seeks prior to a decision of that motion Even if plaintiff had succeeded in proving his legal claims viable (he has not), plaintiff s other arguments for a Rule 56(f) continuance are also insufficient. First, plaintiff has failed to satisfy any component of the three-part test for stating *a primafacie* case for a continuance under Rule 56(f), even if facts were needed to resolve defendants'motion. For example, the first component of *a primafacie* Rule 56(f) showing requires plaintiff to demonstrate "why [he) cannot present facts in opposition" to the summary judgment motion. Richardson v, National Rifle Ass'n , 871 F.Supp. 499, 501 (D.C. Cir. 1994), reconsid, denied", 879 F.Supp. I (D.D.C. 1995) (Friedman, J.). Rather than demonstrating that inability, plaintiff has already presented facts in opposition, based wholly on the 1,900 page administrative record. Plaintiff has already opposed Defendants'Local Rule 108(h) statement in his "Response To Defendants' Statement Of Material Facts And Plaintiffs Statement Of Genuine Issues" (filed January 15, 1998 - hereinafter, "Rule 108(h) Opp."), arguing that "defendants' recitation of the facts is subject to dispute" and genuine issues of material fact persist." Rule 108(h) Opp. 1.

This filing demonstrates plaintiffs ability to marshal the record to mount the fact-based opposition to summary judgment that, to gain delay under Rule 56(f), he must demonstrate an inability to mount. Because plaintiff has already filed his factual opposition under Local Rule 108(h), he is not due a delay under Rule 56(f). White v. Fratemal Order of Police, 909 F.2d 5 12, 516 (D.C. Cir 1990) (affirming denial of Rule 56(f) motion because "White assert[ed] 'that there is already enough evidence to create a factual question"').

Second, plaintiff has also presented no legitimate reason for the court to disregard the ofl-repeated admonition that, under the arbitrary and capricious standard, the focal point of Judicial review should be administrative record compiled by the agency, "not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973). See also Florida Power & Lieht Co. v. Lorion, 470 U.S. 729, 743-44 (1985) (court should decide, "on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review"). Plaintiff has demonstrated no deficiency in the 1,900-page compilation that the agency has provided, which is the entire administrative record in this case. He is also wrong-when he asserts that constitutional claims arising ftom § 1552 appeals are not subject to Judicial review under the arbitrary and capricious standard. See, e.g., Chappell v. Wallace, 462 U.S. 296, 303 (1983) (ruling that constitutional claims are subject to § 1552 appellate procedures, and that resulting decisions are then "subject to judicial review and can be set aside if they are arbitrary, capricious or not based on substantial evidence"). In any event, because plaintiff has not proven that any of the constitutional claims asserted in his complaint are viable, there is no

occasion for separate discovery as to them.

Because plaintiff has failed to satisfy Rule 56(f), his motion for a continuance should be denied. The Court should not delay decision on defendants'pending motion, and it should enter

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summary judgment for defendants. Plaintiff has failed in his attempt to prove his legal claims viable, but even if they were viable, defendants have demonstrated that substantial evidence supports the Navy's final determination to deny plaintiff the relief he now seeks from the Court.

PROCEDURAL BACKGROUND

After a preliminary inquiry into his conduct, plaintiff was referred to nonjudicial punishment ("NJP") proceedings. He did not mount any defense at these proceedings, such as a claim that the complainants against him were allegedly not credible, and minor discipline was imposed on him. Plaintiff was also discharged from the Navy after a separate administrative discharge board ("ADB") proceeding, at which he was represented by counsel.

Plaintiff unsuccessfully sought to have the Secretary of the Navy reverse his discipline and discharge pursuant to the appellate procedures established in 10 U.S.C. § 1552, under which the Secretary may correct service records whenever he "considers it necessary to correct an error or remove an injustice." After plaintiffs § 1552 appeal failed, he sought this Court's review of the Navy's final agency action. He filed his complaint on July 22, 1997, and defendants answered on October 23.

In their Joint Rule 206 Report (filed October 30, 1997), the parties differed as to the propriety of discovery in this case. Defendants contended that "the review plaintiff seeks of defendants' administrative action is limited to the administrative record," id. at 3, while plaintiff contended that he "is entitled to discovery" because "the Federal Rules provide for discovery," id. at 2-3. Plaintiff also served defendants with twenty-one requests for production on November 5, 1997, instructing that "all responsive Documents are required to be produced ... as they are kept in the usual course of business." Plaintiffs Requests for Production, at 2 (Instruction 4).

The Court ordered discovery stayed at the November 6, 1997, status conference, after the parties argued the merits of their differing positions. In the course of that argument, plaintiff expressed concern that documents relating to plaintiff s Freedom of Information Act ("FOIA") requests would not be compiled by the agency and presented as part of the record. Transcript, at 9-1 0 (relevant portions attached hereto as Exhibit A). Plaintiff also expressed concern that he would not receive the administrative record until defendants filed a dispositive motion. Tr. 16. The Court asked defendants to compile and file the full administrative record on an expedited basis, by November 20, 1997, and defendants agreed. Tr.21.

The Court's November 7, 1997, scheduling order reflects the Court's determination both that discovery be stayed and that the compilation of the administrative record be expedited for filing by

November 20, 1997. The Court also established a bfiefing schedule for defendants' dispositive motion and for p laintiff s cross-motion, should he choose to file one. Finally, the Court admonished the parties that "[t]his schedule shall not be modified, even where all parties consent, except upon a showing of good cause and by leave of Court." Scheduling Order, T, 5 (citing Olgyay v. Society for Environmental Graphic Design, 169 F.R.D. 219 (D.D.C. 1996) ("the presumption should be firmly against the granting of continuances")).

With respect to the Court's order that defendants compile the administrative record on an expedited basis, counsel for plaintiff wrote counsel for defendants on November 12, 1997. That letter (attached hereto as Exhibit B) stated plaintiff s position that "we think that our recently served requests for production may provide helpful guidance in ensuring that the records that defendants certify are, in fact, 'complete' within the meaning of the law." As noted above, plaintiffs requests for production instructed that documents be produced "as they are kept in the

usual course of business."

On November 20, 1997, pursuant to the scheduling order, defendants filed with the Court and served upon plaintiff the entire administrative record in this case, compfised of four volumes (Volumes I through M that total more than 1,900 pages. Consistent with the request of plaintiffs counsel that documents in the record be compiled "as they are kept in the usual course of business," the certifications of these four volumes state that

documents are being reproduced as they are kept "in the ordinary course of official business" by the two Navy entities charged with keeping them. Thus, Volumes I & II are certified by the BCNR and Volumes III & IV are certified by the Navy JAG Corps. These separate certifications reflects the fact that extensive administrative processing preceded the final agency action in plaintiffs § 1552 appeal, and as a result, pertinent files are now being kept "in the ordinary course of official business" by each of these Navy entities.

Specifically, the administrative record reflects the following, among other administrative proceedings: (1) plaintiff s pre-NJP preliminary inquiry procedure, at which the US S ANTIETAM's Executive Officer ("XO") and Chief Master at Arms ("MAC") refined Uniform Code of Military Justice ("UCMJ") charges against plaintiff and referred those refined charges to the ANTIETAM's Commanding Officer ("CO"); (2) the NJP proceeding that the ANTIETAM's CO, Captain ("CAPT") Frank, conducted regarding the refined UCMJ charges against plaintiff, and at which plaintiff stood silent; (3) plaintiff s unsuccessful appeal of his minor NJP punishment to fleet command; (4) plaintiff s ADB, convened to determine whether plaintiff committed misconduct specified in that Naval Military Personnel Manual ("MILPERSMAN"), specifically, sexual perversion, sexual harassment, or violation of the policy concerning homosexuality in the

armed forces- (5) plaintiff s full participation with counsel in the ADB

proceedings- (6) the ADB's determination that plaintiff had not committed sexual perversion, but had committed sexual harassment and violated the policy concerning homosexuality; (7) plaintiff s two unsuccessful appeals of the ADB's determination, one each to the Chief of Naval Personnel ("CHNAVPERS") and the Secretary of the Navy; (8) plaintiff s filing of a DD Form 149 with the Board for the Correction of Naval Records ("BCNR"), to initiate a § 1552 appeal of both his NJP and ADB determinations; (9) plaintiffs eight formal amendments to his DD Form 149- (IO) plaintiff s numerous letters, facsimiles and other correspondence to BCNR staff, (I 1) his five FOIA requests and the Navy's consideration and action thereon; (12) his five FOIA appeals and the Navy JAG Corps's consideration and action thereon; (13) his request for reconsideration of final FOIA decisions and the Navy JAG Corps's consideration and action thereon; (14) the numerous letters, facsimilies and other correspondence that plaintiffs congressional representatives sent to the BCNR for consideration in the § 1552 appellate process, asking that "these letter[s] are made a part of the record," R.37, (15) plaintiffs success in having one of his congressional representatives ask the Secretary of the Navy for an additional round of review in plaintiffs § 15 52 appeal, and the Navy's subsequent additional review; and (I 6) plaintiffs filing of a separate suit also arising from the Navy's administrative action, captioned John D. Cadiz, Jim A. Turner, et al. v. U.S. Dep't of Defense, No. 94-12040 (D. Mass.).

On December 15, 1997, also pursuant to the scheduling order, defendants filed a motion for summary judgment along with a supporting Memorandum that demonstrated that "all causes of action plaintiff attempts to assert ... are legally deficient." Def Mem 19. As required by

the local rules, defendants also filed therewith a Local Rule 108(h) Statement of material facts not

genuinely at issue. The latter made clear that, by filing the required statement, defendants were not waiving the contention in their Memorandum that they "are entitled to judgement as a matter of law" on the face of the complaint, regardless of the record facts that underlie this case. Defendants'Local Rule 108(h) Statement, at 1.

The scheduling order required plaintiff to file papers responsive to defendants' motion for summary judgment by January 15, 1998. On that day, plaintiff filed several papers. First, plaintiff filed a detailed Local Rule 108(h) opposition, which contends that defendants are not entitled to summary judgment because the administrative record, plaintiff alleges, demonstrates that "defendants' recitation of the facts is subject to dispute" and "genuine issues of material fact persist." Rule 108(h) Opp. 1. Second, plaintiff filed three declarations: (a) one from plaintiff stating, inter alia, his contention that one of his accusers had been "pressured to present an accusation against me," (b) one from John R. Popish stating, inter alia, that the ANTIEETAM's "atmosphere became hostile" when CAPT Frank assumed its conunand, because the MAC had investigated Popish and strongly admonished him for a "prank in admittedly poor taste" that Popish had committed onboard the ANTIETAM, and (c) one from plaintiff s counsel stating, inter alia, that counsel has undertaken "a careful assessment of ... the current record" and presenting a document

from the record "annotated by undersigned counsel to reflect" other parts of the record. Third, plaintiff filed a Rule 56(f) Motion "request[ing] that the Court stay defendants' motion" and lift the stay of discovery.

Fourth, plaintiff also filed a Memorandum on January 15, 1998 to support his motion for a Rule 56(f) continuance and for "leave of court" to serve twenty-five unspecified requests for production and twenty-five unspecified interrogatories, and to take the depositions of five

unspecified deponents. Plf Mem. I & Moore Dec. || 4. Plaintiff s Memorandum recognizes that defendants' principal summary judgment contention is that "defendants are entitled to judgment as a matter of law," and it argues that "plaintiff has actionable substantive and procedural fights under the APA." Plf Mem. 31 & n.25. Plaintiff s Memorandum also presents a counterstatement of "Relevant Background and Material Facts," which largely reiterates his Lodal Rule 108(h) opposition and argues that the record is "contrary to defendants'understanding." Plf Mem.2.

STANDARD OF REVEEW

Under Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwitth" when a party establishes that there is "no genuine issue as to any material fact" and the party is "entitled to judgment as a matter of law." The Supreme Court requires that summary judgment be favorably viewed as "an integral part of the Federal Rules as a whole, which are designed'to secure the just, speedy and inexpensive determination of

litigation."' Celotex Corp. v Catrett, 477 U.S. 317, 327 (1986). The D.C. Circuit likewise requires that "summary judgment must be awarded" when a party satisfies Rule 56(c). White v. Fraternal Order of Police, 909 F.2d 512, 516 (D.C. Cir 1990).

"When the unresolved issues are primarily legal," summary judgment is "particularly appropriate."1/ It is also "the appropriate means" for "evaluation of an administrative record, such as whether the findings of an agency are supported by substantial evidence." William W Schwarzer, The Analysis and Decision of Summary Judgment Motions, 139 F.R.D. 441, 455-56

1/ "325-343 E. 56th Street v. Mobil Oil Corp., 906 F.Supp. 669, 674 (D.D.C. 1995) (citing Crain v. Board of Police Comm'rs of Metro, Police D, 920 F.2d 1402, 1405-06 (8th Cir. 1990)- 10A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure 2725, at 79-83 (2d ed. 1983)). See also Sheline v. Dun Bradstreet Corp., 948 F.2d 174, 176 (5th Cir. 199l)- Diamond Fruit Growers, Inc. v. Krack CoEp., 794 F.2d 1440, 1442 (9th Cir. 1986).

(1992) (citing Edwards v. Aguillard, 482 U.S. 578 (1987)-, Holley v. Seminole County School Dist , 755 F.2d 1492, 1499-1500 (I I th Cir.1985), rhn'g denied, 763 F.2d 399 (11 th Cir. 1985)). Even where there are alleged factual disputes, summary judgment is still appropriate when the disputed factual issues are neither "material" to the outcome of the suit nor "genuine." Mukherjee v. INS, 793 F.2d 1006, 1008 (9th Cir. 1986). Substantive law identifies which facts are material

Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), see also Beattie v. Trump Shuttle Inc., 758 F.Supp. 30, 32 (D.D.C. 1991). Similarly, because "the mere existence of *some alleged* factual dispute between the parties will not defeat an otherwise properly supported motion," a minor factual dispute is not "genuine" for purposes of Rule 56. Thomas v. Douglas, 877 F.2d 1428, 1431 (9th Cir. 1989) (emphasis in original). "The mere existence of a scintilla of evidence in support of the plaintiffs position will be insufficient." Anderson, 477 U.S. at 251-52 (court should enter summary judgment when, under governing law, evidence is sufficiently "one-sided that one party must prevail as a matter of law").

Following Supreme Court precedent, the D.C. Circuit has repeatedly stated the law governing judicial review of unsuccessful § 1552 appeals. Those appeals "are subject to review under § 706 of the Administrative Procedures Act," Frizelle v. Slater, 111 F.3d 172, 176 (D.C. Cir. 1997) (citing Chappell, 462 U.S. at 303), "albeit by an unusually deferential application of the 'arbitrary or capricious' standard." Kreis v. Secretary of the Air Force, 866 F.2d 1508, 1513-14

(D.C. Cir. 1989). 2/ As in all cases of APA review, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. at 142. See also NTEU v. Seidman, 786 F. Supp. 1041, 1046 (D.D.C. 1992) (denying plaintiff s Rule 56(f) motion because "it would create a new administrative record for the purpose of second-guessing the agency"). "The factfinding capacity of the district court is thus typically unnecessary to judicial review of agency decisionmaking, " and it is only in "rare circumstances" that the district court can disregard the rule that it decide, "on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review." Florida Power & Light, 470 U.S. at 743-44 ("reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry"). The D.C. Circuit requires a "strong showing" of such rare circumstances before discovery may be had to supplement the administrative record. James Madison Ltd.- by Hecht v. Ludwig, 82 F.3d 1085, 1096 (D.C. Cir. 1996) (affirming denial of discovery), cert.denied, 117 S.Ct. 737 (1997).

Whether a case concerns APA review or not, Federal Rule of Civil Procedure 56(f)

2/ Dickson v Secretary of Defense, 68 F.3d 1396, 1404 (D.C. Cir. 1995) (quoting § 706 and holding that the issue on judicial review of final agency action following § 15 52 review was "whether the decisions here were 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law"); Kendall v- Army Bd for Correction of Military Records, 996 F.2d 362, 367 (D.C. Cir. 1993) (following § 1552 review, "the applicable standard of review is whether the action of the military

agency conforms to the law, or is instead arbitrary, capricious or contrary to the statutes and regulations governing that agency"); Viles v. Ball, 872 F.2d 491, 495 (D.C. Cir. 1989) (under "[t]he standard for review of Board judgments ... it must be proved that such failure was arbitrary and capricious, or in bad faith, or contrary to law, or without rational basis, seriously prejudicial to plaintiff'); Ridgely v. Marsh, 866 F.2d 1526, 1528 (D.C. Cir. 1989) ("The controlling standard of review in this case is whether the action of the military agency conforms to the law, or is instead arbitrary, capricious or contrary to the statutes and regulations governing that agency.").

requires a party seeking a continuance to resist summary judgment to state the reasons why he "cannot for reasons stated present ... facts essential to justify the party's opposition." See also Strang v. United States Arms Control & Disarmament Agengy, 864 F.2d 859, 861 (D.C.Cir. 1989) (party opposing summary judgment under Rule 56(f) must "adequately explains why, at that timepoint, it cannot present ... facts needed to defeat the motion"). This Court has previously found that, to establish *a primafacie* Rule 56(f) case, the party resisting summary judgment must convincingly demonstrate three matters: (a) "why the non-moving party cannot present facts in opposition," (b) "how additional discovery will provide those facts," and (c) "how additional discovery will enable it to rebut the movant's allegations of no genuine issue of fact." Richardson, 871 F.Supp. at 501 (Friedman, J.). See also Schwarzer, 139 F.R.D. at 501 ("[a]n application must set out the nature of the discovery to be undertaken, the kinds of evidence likely to be uncovered, and how this new evidence will create a material factual dispute"). Even if these minima are satisfied, however, a court does not abuse its discretion when it denies a motion for a Rule 56(f) continuance either because (a) the motion

is "supported by no more than conclusory assertions that additional discovery will uncover material facts," (b) the Rule 56(f) movant has "failed to exercise due diligence," (c) "if the information on the allegedly disputed issue is actually in that party's hands," or (d) "if for any reason it does not appear plausible that the proposed discovery will yield material facts." Schwarzer, 139 F.R.D. at 500-01.

ARGUMENT

The Court should deny plaintiff s Rule 56(f) motion for a continuance to conduct discovery to supplement the 1,900-page administrative record in this case. Instead, it should decide the pending motion and enter summary judgment for defendants.

-II-

BECAUSE PLAINTEFF'S LEGAL CLAIMS ARE NOT VIABLE, HE HAS PRESENTED INSUFFICIENT ARGUMENTS TO JUSTIFY A CONTINUANCE UNDER RULE 56(f),

The Court should deny plaintiff s Rule 56(f) motion on the basis that "it does not appear plausible that the proposed discovery will yield material facts. 3/ Defendants'summary judgment motion focused primarily on the legal insufficiency of the claims asserted in plaintiffs complaint, regardless of the underlying facts. Plaintiff s motion for a Rule 56(f) continuance fails at its attempt to prove the complaint's claims legally viable, and it is therefore insufficient for delaying entry of summary judgment for defendants on wholly legal bases, to which facts are immaterial.

Defendants' summary judgment motion explained that the facts

underlying this case are immaterial because plaintiff has not presented any viable legal claims. It demonstrated that "all causes of action plaintiff attempts to assert ... are legally deficient." Def Mem. 19. Plaintiff thus acknowledges that defendants' principal summary judgment contention is that "defendants are entitled to judgment as a matter of law," and that "defendants assert that facts are immaterial to the disposition of their motion." Pif Mem. 31 & n.25. He also concedes that defendants have presented "purely legal arguments for which the content and state of the record are essentially irrelevant." a at 32 n.26.

Because of these purely legal arguments, facts are not material to the Court's determination of defendants' motion, unless plaintiff has succeeded in his attempt to prove his claims legally viable. That is because "the presence of a material fact is predicated on the

3/ Schwarzer, 139 F.R.D. at 500-01 (citing Barfield v. Brierton, 883 F.2d 923, 931-32 (I Ith Cir. 1989); Small Business Admin. v Light, 766 F.2d 394, 398 (8th Cir. 1985); Pfeil v, Rogers 757 F.2d 850, 857 (7th Cir.1985), cert, denied, 475 U.S. 1107 (1986)).

existence of a legal theory that is viable under the non-moving party's version of the facts." 4/ Any examination of evidence must occur "in the context of the legal issues involved," and even if the parties disagree on factual matters, summary judgment should still be granted if "none of the disputes is outcome determinative once put in legal context." Lower Brule Sioux Tribe v. South Dakota, 104 F.3d 1017, 1 021-1022 (8th Cir. 1997), cert, denied, 118 S. Ct. 64 (1997). By the same token, a Rule 56(f)

continuance is properly denied when the party seeking delay has not proven that his legal claims are viable. 5/

As we show separately below with regarding to both plaintiffs inadequate APA claims and his ill-founded constitutional claims, plaintiff has failed at his attempt to prove that his complaint's claims are legally viable. Indeed, plaintiff concedes that he is only able to muster enough legal support for his claims to argue that they raise "colorable issues." Plf Mem. I & n. 1; see also . 25, 30 & 38. Courts have long held that "merely colorable" arguments for continuing summary judgment proceedings are insufficient to satisfy Rule 56(f) That is because "remote possibilities

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4/ *325-343 E. 56th Street , 906 F.Supp. at 673-74 (citing Holloway v. Pigman, 884 F.2d 365, 366 (8th Cir. 1989); Park Center Inc. v. Champion Int'l Comp, 804 F.Supp. 294, 304 (S.D.Ala. 1992)- Dine v. Western Exterminating Co , No. 86-1857-OG, 1988 WL 2551 1, at *4 (D.D.C. Mar. 9, 1988)). See also Nguyen v. CNA Corp., 44. F3d 234, 243 (4th Cir. 1995) (nonrnovant "must offer a viable legal theory that can withstand a motion for summary judgment").

5/ See eg. , Licari v. Ferruzzi, 22 F.3d 344, 350 (Ist Cir. 1994) ("We find no abuse of discretion ' in [district court's denial of a Rule 56(f) continuance] because the evidence sought by Colonial is not the type that would render the § 1983 claims viable.").

6? 757 F.2d at 856- Md-South Grizzlies v. NFL, 720 F.2d 772, 779 (3d Cir. 1983), denied, 467 U.S. 1215 (1984); Robin Constr. Co. v. United States, 345 F.2d 610, 614 (3d Cir. 1965); Colby v. J.C. Penney Co., 128 F.R.D. 247, 249 (E.D. Ill. 1989), ad, 926 F.2d 645 (7th Cir. 1991); Froid v. Bemcf, 649 F. Supp. 1418, 1426 (D. N.J. 1986); Ezpeleta v. Sisters of Mercy Health Corp,, 621 F. Supp. 1262, 1276 (N.D. Ill. 1985), aff'd , 800 F.2d 119 (7th Cir.

1986).

do not warrant subjecting the parties and the judiciary to proceedings almost certain to be futile. 7/

A. Plaintiff's APA Claims (Count I. Subcounts a-o) Are Not Viable,

Plaintiff forwards an insubstantial legal argument when he contends, with regard to Count I of his complaint, that "plaintiff has actionable substantive and procedural rights under the APA. " Plf Mem. 3 1. Plaintiff s attempt at proving the viability of the APA claims he has asserted fails both with regard to his investigation (Subcounts a-d, f and i) and processing (Subcounts e, g, h, and j-o).

1. No Viable APA Claims Regarding Invesigation (Subcounts a-d. f and i). Plaintiff s main APA argument is that he can challenge the Navy's decision to investigate and initiate processing of him under Department of Defense (DoD) internal guidelines entitled "Guidelines For Fact-Finding Inquiries Into Homosexual Conduct," DoD Directive 1332.14, Enclosure 4, and the Navy's implementation thereof in NAVADMIN 033/94. His argument, however, does not address or otherwise account for defendants' demonstration that his APA claims are not viable because the internal DoD "guidelines" state that their "legal effect" is to "create no substantive or procedural rights, id. § G, and the Navy's implementation guidance make the

same statement and further provides that "[n)othing in this provision ... provide[s] the member with any basis for challenging the validity of any proceeding." NAVADMIN 033/94, §§ 9.C.3 & 9.C.7.

As defendants demonstrated in their motion for summary judgment, the Court of Appeals and the Supreme Court have both found that when agency regulations state that they contain no substantive and procedural rights, that language is to be enforced. Agencies that issue merely

7/ United States v. On Leong Chinese Merchants Ass'n Bldg., 918 F.2d 1289, 1294 (7th Cir. 1990) (quoting DF Activities Corp. v. Brown, 851 F.2d 920, 922 (7th Cir. 1988)), cert. denied, 112 S.Ct. 52 (1991).

internal guidelines do not act "at the peril of having a court transmogrify [them] into binding norms." Community Nutrition Institute v. Young, 818 F.2d 943, 949 (D.C. Cir. 1987) ("such statements are non-binding in nature"). See also United States v. Caceres, 440 U.S. 741, 755-56 (1979) (internal IRS electronic surveillance regulations could not be the basis for a court challenge to an IRS agent's failure to follow them). None of the cases cited by plaintiff in this regard (at Plf Mem. 32-33) are to the contrary. In contrast to the DoD and Navy investigative guidelines on which plaintiff relies in this case - whose "legal effect" is to 'create no substantive or procedural rights" - in all of the cases plaintiff

discusses, the judiciary was reviewing agency, compliance with a "procedural entitlement." Dilley v. Alexander, 603 F.2d 914, 924 (D.C. Cir. 1979) (finding that a "procedural entitlement" was granted by 10 U.S. C. § 266, regarding "appropriate number of Reserve[]" officers to be included on promotion boards, relying in large measure upon that statute's legislative history)- see also Marsh v. Wolfe, 835 F.2d 354, 358 (D.C. Cir. 1987) (explaining that Dilley concerned a "procedural entitlements" and that "[a]ny extension of Dilley beyond this context is unwarranted"), reconsid, denied, 846 F.2d 782 (D.C. Cir.), cert denied, 488 U.S. 942 (1988). 8/ Congress could not have been clearer that no such procedural or substantive entitlements were to be created in the DoD and Navy investigative guidelines.

I8/ Similarly, Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978), also cited and discussed by plaintiff (at Plf Mem. 32-33), is not applicable. The Court of Appeals in that case acted on DoD and Air Force directives that provided the procedural right to "a reasoned explanation ... for any detrimental action ordered," and the court found deficiencies only in this regard. id. at 855 & 859 ("it is impossible to tell on what grounds the Service refused to make an "exception"); see also Ashton v. Civiletti, 613 F.2d 923, 928 (D.C. Cir. 1979) ordered remand because agency had not "articulated adequately its reasons for dismissing" plaintiff). And in Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) (cited at Plf Mem. 32) the Court of Appeals found

that a previous policy regarding homosexuality in the armed forces did not violate the constitution. The constitution obviously provides substantive and procedural rights, but the internal guidelines on which plaintiff relies for his APA claims do not.

Congress found that "the discretion of commanders to initiate investigations" and competently complete them could only be preserved in the absence of "a whole set of legal obstacles that have to be adjudicated by a judge every time a commander makes a decision. " Senate Report No. 112, 103d Cong., I st Sess. 290-291 (1993). "It is important that the guidelines not be misinterpreted to establish new grounds for challenging administrative or disciplinary proceedings," Congress found, to preserve a military commander's "broad powers" over "inquiries, inspections, and investigations," which are "essential to the commander's authority to maintain morale, good order and discipline, and unit cohesion."

The same argument plaintiff forwards in this regard has been rejected in a number of similar instances regarding other internal guidelines that "create no substantive or procedural rights," and the Court should likewise reject it here. For example, the United States Attorney's Manual ("USAM") states that its internal guidelines do not, "and may not be relied upon to create any rights, substantive or procedural." USAM § 1-1.00. It was for that reason rejected as the basis of an APA claim in Nichols v. Reno, 931 F. Supp. 748 (D. Colo. 1996), aff d and reasoning

adopted in 124 F.3d 1376 (10th Cir. 1997). No APA claim was stated in Nichols because the internal agency guidelines on which they were based "expressly disclaims any intention to create any judicially enforceable substantive or procedural right." 931 F. Supp. 751-52. The DoD and Navy internal guidelines on which plaintiff attempts to base his APA claims likewise state that their "legal effect" is to "create no substantive or procedural rights," and the Navy's further provides that "[n]othing in this provision ... provide[s] the member with any basis for challenging

the validity of any proceeding." Consequently, plaintiff also fails to state APA claims. 9/

Plaintff has also failed to address defendants' additional demonstrations that his APA claims regarding his investigation are, for independent reasons, not viable. For example, the APA prohibits judicial review of agency action that is"committed to agency discretion by law." 5 U.S.C. § 701(a)(2). As defendants'previously demonstrated, See Def Mem. 29-32, plaintiff has for that reason not stated viable investigative subcounts, because "an administrative agency's decision to conduct or not to conduct an investigation is committed to the agency's discretion." Southern Union Gas, Co. v. FERC, 840 F.2d 964, 969 (D.C. Cir. 1988). See also Pittsburgh and

9/ As Nichols noted, courts have unifomly rejected parties' attempts to garner judicial review of agency action based on internal policies that explicitly provide that they create no "substantive of procedural" rights. See, e.g., Sullivan v. United States, 348 U.S. 170, 172-73 (1954) (internal policy prohibiting submission of evidence of tax violations to grand jury without prior approval of
the Attorney General); United States v. Piervinanzi, 23 F.3d 670, 682-83 (2d Cir.) (guidelines for
prosecutions under money laundering statute), cert, denied, 513 U.S. 904 (1994); United States v. Lorenzo, 995 F.2d 1448, 1453 (9th Cir.) (guidelines regarding recusal of government attorneys), cert, denied, 114 S. Ct. 225 (1993); In re Shain, 978 F.2d 850, 853-54 (4th Cir. 1992) (guidelines for issuance of subpoenas to the press); United States v. Michaud, 860 F.2d 495, 499 (I st Cir. 1988) (IRS guidelines for referral of fraud cases for prosecution), Matter of Klein, 776 F.2d 628, 634-35 (7th Cir. 1985) (guidelines regarding subpoenas of attorneys); United States v. Hinton, 719 F.2d 711, 716 n.9 (4th Cir. 1983) (guidelines regarding preservation of agents' rough notes of interviews), cert, denied, 465 U.S. 1032 (1984); United States v. Kaatz, 705 F.2d 1237, 1243 (10th Cir. 1983) (IRS guidelines for referral of fraud cases for prosecution); United States v. Ivic, 700 F.2d 51, 64 (2d Cir. 1983) (guidelines for RICO prosecutions); United States v. Myers, 692 F.2d 823, 845-46 (2d Cir. 1982) (guidelines regarding undercover investigations), cert, denied, 461 U.S. 961 (1983); United States v. Fritz, 580 F.2d 370, 375 (10th Cir.) (en banc) (USAM "is intended to be no more than self-regulation on the part of the Department of Justice ... [and] is an internal policy of self-restraint that should not be enforced against the government"), cert denied, 439 U.S. 947 (1978)- United States v. Thompson, 579 F.2d 1184, 1188-89 (10th Cir.) (en banc) (internal guidelines regarding successive prosecutions are "at most a guide for the use of the Attorney General and the United States Attorneys in the field"), cert, denied, 439 U.S. 896 (1978); United States v. Nelligan, 573 F.2d 251, 255 (5th Cir. 1978)-, United States v. Lockyer, 448 F.2d 417, 420-21 (10th Cir. 1971) (IRS policies regarding referral of tax fraud cases for prosecution)- Walker and Diaz v. Reno 925 F.Supp. 124 (N.D.N.Y. 1995) ("the U.S. Attorneys Manual, which expressly disclaims the creation of any rights, substantive or procedural may not serve as a basis for judicial review of DOJ actions").

Lake Erie R. Co. v. ICC, 796 F.2d 1534, 1537 (D.C. Cir. 1986) (agency's "threshold decision" of whether to investigate "is not subject to judicial review"); Cerro Wire & Cable Co. v. FERC, 677 F.2d 124, 128 (D.C. Cir. 1982); General Motors Corp. v. FERC, 613 F.2d 939, 944 (D.C. Cir. 1979); Union Mechling Corp. v. U. S., 566 F.2d 722, 724-25 (D.C. Cir. 1977); Kixmiller v, SEC, 492 F.2d 641, 645 (D.C. Cir. 1974). 10/

Plaintiff also does not deny that defendants were applying to him the Navy's zero-tolerance policy against sexual harassment, Def.Mem. 5-7, for the complaint specifically pleads that plaintiff was investigated and processed for, inter alia, "sexual harassment.'.' -Complaint || 31. As defendants demonstrated - and plaintiff has not denied - the Navy's zero-tolerance policy against sexual harassment required investigation and initiation of processing of plaintiff in the circumstances plaintiff has pled in his complaint. For example, plaintiff claims that defendants' should not have initiated investigation or processing of plaintiff because, he contends, two of the complainants against plaintiff had allegedly poor service records. Complaint, || 76, 82- see also Plf Mem. 6-8. However, to "underscore that sexual harassment will not be tolerated," SECDEF Memorandum (July 12, 1991), the Navy has ordered that (1) "[a]ll reported incidents of sexual harassment be investigated," and that conunanders in particular must "investigate and, to the extent authority is vested in them by law or regulation, take such action as they consider appropriate on all alleged violations of this instruction," SECNAVINST 5300.26B, §§ 7.d, 10.f

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10/ likewise, a complaint that an agency "failed to properly

investigate" also does not allege reviewable final agency action, but rather concerns only "nonreviewable administrative action under the Administrative Procedure Act, 5 U.S.C. § 704." Marinoff v HUD, 78 F.3d 64, 65 (2nd Cir. 1996); see also Territo v. U.S., 170 F. Supp. 855, 857 (D.N.J. 1958). Cf Southern Ohio Coal Co. v. Office of Surface Min., 20 F.3d 1418, 1427 (6th Cir.) (under the Clean Water Act, "district courts are without jurisdiction to review ... the investigatory work necessary to determine whether a violation exists"), cert, denied 513 U.S. 927 (1994).

(2) conunanders must also "[e]nsure that previous disciplinary action or poor judgment on the part of the complainant in no way invalidates or prejudices a discrimination complaint," which includes an harassment complaint, OPNAVINST 5354. IC, Encl. 1, § V.6.b, and (3) "[n]o individual in the DON shall ... [w]hile in a supervisory or command position, condone or ignore sexual harassment of which he has knowledge or has reason to have knowledge," SECNAVINST 5300.26B, § 8.b,4, and doing so by failing to investigate could itself constitute sexual harassment LL Encl. 1; OPNAVINST 5354.IC. Eric] 1, § IV.I.b.4." 11/

2. No Viable APA Claims Regarding Processing (Subcounts e. g, h. and i-o). Plaintiff has also failed to prove that his APA claims regarding his processing are viable. First, with respect to his NJP, plaintiff continues to raise with the Court his factual contention that "the charges on which Captain Frank ruled differed from the charges with which plaintiff had been served." Plf.Mem. 16. Although defendants have demonstrated that this factual contention is mistaken for several reasons - for example, it is contrary to both plaintiffs own sworn statement that he was "taken to mast for these allegations that [he was also] facing" at

ADB, R. 13 5, and his correspondence to the BCNR, R.953 - the point for the present is that plaintiff has failed to refute defendant's wholly legal contention that "plaintiff had no light to any more NJP notification

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11/ Judge Sporkin's recently reported decision in McVeigh v. Cohen, 1998 WL 34996 (D.D.C. 1998) is not to the contrary. Because McVeigh was not investigated or processed for sexual harassment, the Navy's zero-tolerance policy against sexual harassment was not implicated in that case. Moreover, Judge Sporkin did not address the language in the investigative guidelines that state that their "legal effect" is to "create no substantive or procedural fights," but he did find the Navy's investigation of McVeigh "likely illegal under the Electronic Communications Privacy Act of 1986 (ECPA')," 18 U.S.C. § 2701 *el seq.* 1998 WL 34996, *4-*5 ("Defendants allege that Plaintiff has no cause of action against the government on the basis of the ECPA," but "[u]nder the circumstances of this case, it is unlikely that the government will prevail on this argument."). In this case, plaintiff makes no ECPA claim.

than he has pled." Def Mem. at 43. Defendants demonstrated at length that "it is sufficient if the offense is described in such terms that the accused is apprised of the true nature of the alleged misconduct." U. S. v. Eberhardt, 13 M.J. 772, 774 (A.C.M.R. 1982) (citing United States v. Nordstrom, 5 M.J. 528 (N.C.M.R. 1978)). See also Wales v. United States, 14 Ci.Ct. 580, 587 (CI.Ct. 1988), affd, 865 F.2d 268 (Fed.Cir. 1988). As the wholly legal demonstration presented at pages 43 through 45 of defendants' memorandum in support of summary judgment has gone unchallenged by plaintiff, it will not be repeated here.

Second, plaintiff has also failed to attempt any answer to

defendants' demonstrations that plaintiff had no fight to NJP counsel (subcount g; Def Mem. 33), no right to a court-martial (subcount j; Def Mem. 33-3 5), no right to an ADB not preceded by NJP (subcount k, Def Mem. 35), and cannot raise new procedural objections not raised below (subcounts m, n h & l Def Mem. 36-39 & n. 19, citing United States v. L. A. Tucker Tuck Lines, 344 U.S. 33, 37 (1952), and Omnipoint Corp. v. F.C.C_, 78 F.3d 620, 635 (D.C. Cir. 1996)). Again, to avoid needless repetition, defendants will not repeat here these unchallenged demonstrations.

Third, plaintiff has not attempted to rebut defendants' demonstration that subcount o, which regards the choice between the two alternative BCNR reports, is "legally deficient" under the prevailing standard of review. Def Mem. 4 & 19. Defendants previously demonstrated -and plaintiff does not challenge - that the applicable review standard is "unusually deferential" and "substantially restrict[s] the authority of the reviewing court to upset the Secretary's determination," Kreis, 866 F.2d at 1513-14, such that the BCNR's referral of two alternative reports evidencing the "obvious difference of opinion amongst those [BCNR board members] who considered plaintiffs request" means that "[t]he Secretary could have followed either

recommendation without being arbitrary or capricious." Daleandro v. Dalton, 948 F. Supp. 95, 97 (D.D.C. 1996). See generally Def Mem. 16-19. Subcount o's claim that defendants "arbitrarily reject[ed]" a "decision by the Board for the Correction of Naval Records" is therefore

legally deficient, for plaintiff has alleged (and repeated in his Rule 56(f) memorandum) that "one member of the BCNR dissented from the majority opinion" and the Secretary's first delegate in this matter, Deputy Assistant Secretary Karen Heath, "approved the dissenting recommendation." Complaint, || || 203-04; see also Plf Mem. 21-22 ("the minority member of the Board found no fault with the proceedings and recommended that plaintiff s petition be denied" and "the Deputy Assistant Secretary of the Navy, Karen S. Heath, sided with the minority").

B. Plaintiff s Constitutional Claims (Counts II- III & IV) Are Not Viable,

Plaintiff is forthright about the manner in which defendants have addressed his constitutional claims, which are based on the first amendment, due process, and equal protection (Counts II, III & IV). Plaintiff s Rule 56(f) motion reviews defendants' demonstration that the complaint fails to state any legally viable constitutional claims, Plf Mem. 32 & n.26, and states that "these are purely legal arguments for which the content and state of the record are essentially irrelevant," id. Plaintiff, however, does not present analysis sufficient to rebut defendants' purely legal arguments that his claims are insufficient.

Plaintiff presents no rebuttal whatsoever to defendants' demonstration that his first amendment claims are not legally viable. Def Mem. 25-26. 12/ With regard to due process, plaintiffs only rejoinder concerns his ADB, and then only that "Military discharge proceedings

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12/ In any event, plaintiff concedes that there is no occasion for

discovery regarding his first amendment claims. Plf Mem. 34 n.29.

-21-

implicate due process rights. " Plf Mem. 40. But even if plaintiff s ADB implicated due process rights; he has still not countered defendants' demonstration that he has not sufficiently pled any alleged violations of due process rights in this case. Def Mem. 21-24. The fifth amendment requires nothing more than the procedural protections that plaintiff alleges that he received at his ADB, including notice of the charges, Complaint || 142, Navy-provided counsel, || 148, and presentation of defense witnesses, || ||161-7 1. See, e.g., Cleveland Bd. of Educ, v- Loudermill, 470 U.S. 532, 546 (1985) ("The essential requirements of due process ... are notice and an opportunity to respond. 13/

With regard to equal protection, plaintiff claims that the basis for his challenge is the manner in which the Navy applied its zero-tolerance policy against sexual harassment to him. Plf Mem. 38. The complaint, however, pleads in this regard only that plaintiff was investigated and processed for "sexual harassment." Complaint $ 31. Except for this one mention, it ignores the existence of the Navy's sexual harassment policy and makes no allegation that the policy was applied to plaintiff in anything other than an even-handed manner. As a consequence, the complaint fails to state a viable legal claim that this policy was applied in a manner that violates equal protection. See generally General Motors Corp. v. Tracy , 117 S. Ct. 811, 830 (1997) ("We have never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands. "); Associated Industries of Mo. v. Lohman, 511 U. S. 641,

13/ Moreover, plaintiff s claim that his "military discharge proceedings implicate[d] due process rights" does not address, much less rebut, defendants' separate demonstration that the Navy's investigation of plaintiff cannot be challenged as violative of due process, because the Supreme Court's jurisprudence "forecloses any constitutional argument" and "leaves no doubt" that "[t]he Due Process Clause is not implicated" by "an administrative investigation." SEC v. Jerry T.O'Brien- Inc,, 467 U.S. 735, 742 (1984). See Generally Def Mem. 20-21. Nor does it rebut defendants' demonstration that plaintiffs NJP comported with due process. id. at 21-23.

654 (1994)(same). 14/

II. EVEN IF PLAINTIFF'S LEGAL CLAIMS WERE VIABLE, PLAINTIFF HAS STILL PRESENTED INSUFFICIENT ARGUMENTS TO JUSTIFY A RULE 56(f) CONTINUANCE

Even if plaintiffs legal claims were viable (they are not, as discussed above), plaintiff has still failed to make the necessary Rule 56(o showing, that he "cannot for reasons stated present ... facts essential to justify the party's opposition" to summary judgment. See also Strang, 864 F.2d at 861. First, plaintiff has failed to state *aprima facie* case for a continuance under Rule 56(f). Second, plaintiff has also failed to make the "strong showing" that is required in this circuit before discovery may be had to supplement the administrative record that the agency has compiled. Madison, 82 F.3d at 1096. The denial of a 56(f) continuance has thus been upheld on appeal in a similar case that also concerned a servicemember's discharge for homosexual conduct, plaintiffs contrary representation notwithstanding. Jackson v. Air Force, No. C-95-20173-WAI (N.D. Ca., July 26, 1995), affd., No. 95cv 1 5949 (9th Cir., December 9, 1997) 15/

A. Plaintiff Has Failed to Satisfy Rule 56(f)'s Requirement That He Demonstrate Why He "Cannot for Reasons Stated Present ... Facts Essential to Justify the Party's Opposition" To Summary Judgment,

Plaintiffs Rule 56(f) filings fail to state a *primafacie* case for delaying resolution of the

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14/ "In any event, plaintiff does not appear to be proposing discovery relative to his equal protection claim. He concedes that no discovery is necessary for his first amendment claims and that, "[f]or his due process claims, he seek s the same discovery he has requested in support of his APA claims." Plf Mem. 34 & n.29. He does not state any discovery he is seeking relative to his equal protection claim, however. id. at 37-39 (discussing equal protection, but not specifying any discovery at all).

15/ The three § 654 cases cited by plaintiff as contrary (Plf Mem. 36) did not address or concern the Rule 56(f) standards for delaying decision on a pending motion for summary judgment.

pending summary judgment motion. *A prima facie* Rule 56(f) case requires that,the party resisting entry of summary judgment against him convincingly demonstrate three separate matters: (a) "why the non-moving party cannot present facts in opposition," (b) "how additional discovery will provide those facts," and (c) "how additional discovery will enable it to rebut the movant's allegations of no genuine issue of fact." Richardson, 871 F.Supp. at 501 (Friedman, J.). See also Schwarzer, 139 F.R.D. at 501. Plaintiff has not satisfied any of these three requirements, and other circumstances are also present that demonstrate that plaintiff should not be granted a continuance.

First, plaintiff does not set out "why [he] cannot present facts in opposition" to the motion for summary judgment, in light of the 1,900-page administrative record in this case. To the contrary,

plaintiffs Local Rule 108(h) opposition belies any contention that he cannot present such facts. That filing is based almost entirely on the administrative record, and it asserts that the record demonstrates that "defendants' recitation of the facts is subject to dispute" and "genuine issues of material fact persist." Rule 108(h) Opp. 1. Likewise, plaintiffs Memorandum presents an extensive counterstatement of material facts that also argue that the record demonstrates facts that are "contrary to defendants'understanding." Plf Mem. 2.

In an analogous case, the D.C. Circuit upheld the denial of a Rule 56(f) continuance because the party resisting summary judgment had already presented facts that he claims are essential to his opposition, and this Court should follow suit by denying plaintiff s similar motion. In White v. Fraternal Order of Police, 909 F.2d 512 (D.C. Cir 1990), discovery had been stayed when separate defendants filed motions for summary judgment. Plaintiff resisted the summary judgment motions in two ways. First, "White assert[ed] 'that there is already enough evidence to

create a factual question"' preventing the entry of summary judgment for defendants. id. at 517. Second, Whitte also sought a Rule 56(f) continuance during which the discovery stay would be lifted, arguing that "he was placed in an 'impossible position' in opposing the summary judgment motions'since all of the facts surrounding the [case] are in the sole possession of defendants."' id. In light of White's concession that he possessed sufficient information to resist summary judgment, the D.C. Circuit found

that "the record is adequate to determine whether the standards for the grant of summary judgment are met in this case." id. The Court of Appeals upheld the district court's denial of a Rule 56(f) continuance and held that "the district court did not err by, staying discovery prior to issuing the summary judgment rulings.

The D.C. Circuit's decision in Madison is to the same effect and provides further support for denying plaintiff s motion. As in this case, plaintiff opposed the defendant agency's motion for summary judgment on the merits and also asked the district court to vacate its stay of discovery. 82 F.3d at 1096 (requesting discovery if the district court "considered the examples of wrongful and arbitrary action" offered by plaintiff "insufficient"). The Court of Appeals found that plaintiffs presentation of these two alternatives to the district court "did not amount to the adequate explanation that Rule 56(f) requires":

> "At most, Madison invited the district court to expand its review beyond the administrative record if it found Madison's evidence insufficient. Such a request fell short of offering specific reasons why, absent discovery, Madison was incapable of contesting summary judgment based on the administrative record .... In declining to grant discovery, the district court thus did not abuse its discretion."

In this case, as in Madison, plaintiff does not attempt to reconcile his on-the-merits Local

Rule 108(h) opposition with his Rule 56(f) motion, and this Court should find, as did the Court of

Appeals in Madison, that plaintiff s Rule 56(f) motion falls short of the mark.

Second, plaintiff has not set out how additional discovery will provide facts in opposition. Plaintiff has stated the goal of his discovery - eight broad categories of information 16/ - but because plaintiff has not specified in any way the content of the discovery he is proposing, he has failed to demonstrate how additional discovery will provide that information. Rather than specifying the content of the discovery plaintiff seeks, plaintiffs counsel's declares that he seeks: (a) twenty-five requests for production, without specifying either what the proposed requests are or what their relationship is to the twenty-one requests plaintiff served on November 5, 1997, before the Court stayed discovery; (b) twenty-five interrogatories, without specifying the interrogatories he proposes; and (c) five depositions, without stating the potential deponents or what they will be asked. Moore Dec.|| 4. Thus, while plaintiff characterizes the discovery he seeks as "limited discovery," Plf Mem. 1, he in fact seeks the full measure of discovery available for this Standard Track case under Local Rule 207(b), without proposing any specific interrogatories, requests for production, or deposition questions that can be judged to advance the limitedgoalofdiscovefingonlyfacts"essentialtojustify[plaintiffs]opposition." Rule56(f) 17/ Because plaintiff s proposed discovery is so broad and unspecified, it constitutes no more

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16/ Plf Mem. 23-24 (alleging categories of information)- Moore

Dec. || 3 (same). Plaintiff has also set out the eight broad categories of information on which he seeks discovery as Part II of Local Rule 108(h) Opposition, and as a consequence, defendants respond more specifically to each of these eight categories in Part II of Defendants'Reply To Plaintiff s Response To Defendants'Local Rule 108(h) Statement.

17/ Nor can plaintiff s unspecified discovery be judged against other traditional prohibitions that hold even if he is allowed supplementation. For example, "inquiry into the mental processes of administrative decisionmakers is usually to be avoided." Overton Park, 401 U.S. at 420, 91 S.Ct. at 825 (citing United States v. Morgan, 313 U.S. 409, 422 (1941)); Community for Creative Non-Violence v Lujan, 908 F.2d 992, 998 n. I (D.C. Cir. 1990). Because plaintiff has not specified who his deponents or deposition questions might be, he prevents his request from being judged for violation of this rule.

than the "bare assertion' that the evidence supporting a plaintiffs allegation is in the hands of the defendant," which is "insufficient to justify a denial of a motion for summary judgment under Rule 56(f). 18/ Rule 56(f) discovery "does not permit a plaintiff to engage in a fishing expedition." Allstate Ins, Co. v. Administratia Asigurarilor De.Stat, 948 F.Supp. 285, 294 (S.D.N.Y. 1996)- Capital Imaging Assoc, v. Mohawk Valley Medical Assoc, - Inc., 725 F. Supp. 669, 680 (N.D.N.Y.1989), affd, 996 F.2d 537 (2d Cir.), cert, denied, 510 U.S. 947 (1993). The Court should therefore rule, as it did in Richardson, that it "cannot glean' from plaintiff s papers "what additional evidence might be discovered that will provide the support plaintiff needs to raise genuine issues of material fact." 871 F. Supp. at 501-02. Without specifying how and from whom the alleged information is likely to be uncovered, plaintiff presents an insufficient "mere hope" that he may obtain

through discovery new evidence not already in the record. Gray v. Town of Darien, 927 F.2d 69, 74 (2d Cir.), cert, denied, 502 U.S. 856 (1991) (quotations omitted). That is especially true here: there is no basis for disregarding the agency's compilation when the additionally sought information is cumulative of evidence already in the record, as demonstrated by the Local Rule 108(h) opposition plaintiff has already filed. Paddington Partners, 34 F.3d at 1138 (citing Sundsvallsbanken v. Fondmetal- Inc., 624 F.Supp. 811, 815 (S.D.N.Y. 1985); Allstate, 948 F.Supp. at 294).

Third, plaintiff has failed to demonstrate how any new evidence is essential to plaintiff s
attempt to demonstrate a material factual dispute. As noted, materiality is a function of the

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18/ Martin v. D.C. Metropolitan Police Dept , 812 F.2d 1425, 1430 (D.C. Cir.), reinstated en banc, 824 F.2d 1240 (1987)- Paddington Partners v. Bouchard, 34 F.3d 1132, 1138 (2d Cir. 1994) (quoting Contemporary Mission- Inc. v. U. S. Postal Service, 648 F.2d 97, 107 (2d Cir. 198 I))-United States v. Donlon, 355 F.Supp. 220, 225 (D.Del.), &d, 487 F.2d 1395 (3d Cir. 1973).

applicable substantive law, because "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson 477 U.S. at 248 ("Factual disputes that are irrelevant or unnecessary will not be counted."). However, plaintiff has failed in his attempt to rebut defendants' legal contentions on the merits. As a consequence, he has failed to clarify 'the scope of appropriate

discovery," if any were appropriate. Schwarzer, 139 F.R.D. at 496.

In any event, even had plaintiff stated *a prima facie* case for a Rule 56(f) continuance, he has otherwise failed to justify a delay in the summary judgment proceedings. It is appropriate to withhold a Rule 56(f) continuance 'if the information on the allegedly disputed issue is actually in that party's hands," id. at 500-01, and plaintiff s Local Rule 108(h) opposition demonstrates that the record has already put the facts on allegedly disputed issues in plaintiff s hands. Plaintiff s Rule 56(f) motion is also "supported by no more than conclusory assertions that additional discovery will uncover material facts," id., because plaintiff has neither shown with any particularity the nature of his proposed discovery nor demonstrated that he has viable legal claims concerning which facts would be material. And plaintiffs hint that he may have additional arguments that he has not brought to the Court's attention now, but may do so "at a later time," Plf Mem. I & n. 1, demonstrates that he has "failed to "exercise due diligence" in this case. Schwarzer, 139 F.R.D. at 500-01. The D.C. Circuit and other courts have held it appropriate for a Rule 56(f) continuance to be withheld in similar circumstances. See, e.g., Berkeley v. Home Ins, Co., 68 F.3d 1409, 1414 (D.C. Cir. 1995) ("Were that allowed, the rationale underlying the summary judgment procedure would be undermined, as counsel belatedly devised new theories to delay resolution of long-pending dispositive motions."), cert, denied, 116 S.Ct. 1825 (1996)- Ayala-Gerena v. Bristol

Myers-Squibb Co., 95 F.3d 86, 92 (I st.Cir. 1996) ("Rule 56(f) is designed to minister to the vigilant, not to those who slumber upon perceptible rights."); Hawaiian Rock Products Corp. v. A.E. Lopez Enterprises, 74 F.3d 972, 975 (9th Cir. 1996) (Rule 56(f) movant "failed to show how allowing additional discovery would have precluded sununaty judgment").

B. Plaintiff Presents Insufficient Arguments For Discovery to Supplement The Administrative Record.

Plaintiff states a mistaken basis for his Rule 56(f) motion when he premises that filing on his claim to an entitlement to supplement the administrative record in this case. First, his reliance on the standards set forth by the Court of Appeals in James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1095 (D.C. 1996), is misplaced. The Court of Appeals in Madison *affirmed* the district courts *denial* of supplementation, and this Court should likewise deny supplementation in this case. Second, plaintiff is mistaken when he claims that, because he has fashioned his allegations of administrative procedural defect as constitutional claims in addition to APA claims, he is entitled to disregard the administrative record of the proceedings he is challenging. The Supreme Court has squarely held that constitutional claims are subject to § 1552 appellate procedures and then judicial review under the "arbitrary, capricious or not based on substantial evidence" standard, which proceeds on the administrative record. Chappell, 462 U.S. at 303. The D.C. Circuit has strictly followed

this precedent.

1. Plaintiff Has Satisfied None Of The *Madison* Factors The Court should reject plaintiff s claim that four "circumstances are present here" justifying supplementation of the administrative record. Plf Mem. 26. Only in "rare circumstances" may a court look beyond the administrative record compiled by the agency. Florida Power & Light, 470 U.S. at 744. None of

the circumstances plaintiff indicates satisfies the requirement that plaintiff make a "strong showing' that such a circumstances are present here, and the Court should therefore deny plaintiff s requested supplementation of the record, as the Court of Appeals did in Madison. 82 F.3d at 1096.

First, the record is not incomplete. Plaintiff forwards an erroneous view of the administrative record when he contends that supplementation is in order because "it is not clear" to plaintiff "whether the record submitted by defendants" is complete, or whether defendants "have excluded evidence." Plf Mem. 26 & 30. Defendants affirmatively deny plaintiff s allegation that they have withheld documents on which they relied from the 1,900-page administrative record that defendants have compiled and filed. The Court ordered defendants to file on an expedited basis the entire administrative record, and defendants have complied in a timely manner. The 1,900-page administrative record that defendants compiled and filed is the complete administrative record. This statement alone defeats plaintiff s claim, National

Law Center on Homelessness and Poverty v. U.S. Dep't of Veterans Affairs, 736 F. Supp. 1148, 1153 (D.D.C. 1990), and the Court should deny supplementation on this basis alone.

Plaintiff has not substantiated his serious allegation that defendants have withheld documents with the required "'substantial showing'that an administrative record is incomplete." National Law Centcr, 736 F. Supp. at 1153 (quoting NRDC v. Train, 519 F.2d 287, 291-92 (D.C. Cir. 1975)). This standard requires plaintiff to indicate the documents he claims defendants relied on, but have not included in the record. Plaintiff, however, has not indicated even one such

item. 19/

Rather that substantiating his allegation that the administrative record is incomplete, plaintiff forwards three complaints of the exact opposite - that defendants have included too much in the record. Although these complaints of over-inclusion defeat plaintiff s allegation that defendants are withholding documents from the record, we note that none of plaintiff s three complaints are well-founded: (a) plaintiff erroneously complains that the record contains plaintiff s FOIA documents when he "is not seeking judicial review of his FOIA requests," Plf Mem. 28, for he does not even attempt to square this complaint with his statement at the status conference that the

record should include FOIA documents, Tr. 9 ("There are certain documents that [plaintiff.was] able to obtain through a FOIA request. These are documents that in our view would be part of the official administrative record . (b) plaintiff is similarly mistaken when he complains that a copy of an e-mail from Chad Maurer is included in the record, Plf.Mem. 29, because the copy of the e-mail was sent to the Secretary of the Navy by one of plaintiffs congressional representatives, at the behest of plaintiff himself, R. 10- 1 4, in the context of correspondence that those representatives asked be "made a part of the record" of

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19/ Madison cited Kent County v. EPA, 963 F.2d 391, 395-96 (D.C.Cir. 1992), to demonstrate that a party must substantiate his claim that an administrative record is incomplete by indicating missing documents on which the agency relied. In Kent County, the Court of Appeals allowed the record to be supplemented after petitioner submitted "documents that discuss what appeared to be a well-aired debate ... relating to the position of the agency's own expert on the question central to this case," which the respondent agency "was at least negligent in failing to discover." Here, in contrast, plaintiff has presented no such missing documents.

To the same effect are Esch v. Yeutter , 876 F.2d 976, 992 (D.C.Cir. 1989) and NRDC v. Train, 519 F.2d 287, 291-92 (D.C. Cir. 1975), both of which were predicated on the finding that, "[s]ince the [agency] now concedes that this document is part of the administrative record it should have been made available to

the District Court and to the plaintiffs in that court." Plaintiff here has indicated no such missing documents, and the Navy makes no such concession.

plaintiffs § 1552 appeal, R.37 and (c) plaintiff is equally misguided when he complains that the record contains the letter stating the results of the additional round of review in plaintiffs § 1552 process that plaintiffs congressional representative asked the Secretary of the Navy to undertake, Plf.Mem. 28-29, because the request for an additional round of review originated with plaintiff and his counsel, R. 10-28, and plaintiff does not now explain why the results of that additional review should be excluded from the record. 20/

Given plaintiffs failure to make the required "substantial showing" that the administrative record is incomplete, it is not surprising to find that the subsidiary arguments he forwards in this regard are also erroneous. Plaintiff s contention that "the record is confused" and "unclear" is contradicted by his detailed Local Rule 108(h) Opposition and the equally elaborate counterstatement of material facts in his Memorandum. Both of these factual representations to the Court are based almost exclusively on the administrative record, and in both, plaintiff

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20/ In a footnote, plaintiff alludes to the possibility that there may be "evidence in the record of a tape of the NJP proceeding." Plf Mem. 30 n.23 (citing only R.57a & R.583). It is clear why plaintiff has relegated this allusion to a footnote: neither of the record cites plaintiff presents demonstrates that the Navy either made an alleged tape of the NJP, considered one, or ever had one.

Plaintiffs first cite is to R.57a,a handwritten note concerning plaintiffs "administrative board," listing plaintiff s ADB counsel ("LT Waghom") and the Navy's counsel ("LT Tim Vasquez"), who is referred to in Navy parlance as the "recorder." The note also lists "suitable tape recorder," &, and in fact the Navy produced a verbatim transcript of the ADB proceeding. R.69-161
Plaintiffs secxond cite is to R.583, which is the first page of an affidavit from plaintiff s ADB counsel that was provided to the BCNR. In it, plaintiff s counsel contradicts plaintiff s current claim of an NJP tape by stating that "[t]he actual Mast hearing ... had not been recorded." R.583. Moreover, the affidavit makes clear that the tape that is said to have "surfaced" has always been in plaintiff s possession, not the Navys, and plaintiff did not put it in the record either at the BCNR with his counsel's affidavit or anytime before. As it was neither given to the Navy nor relied on by the Navy in coming to any of its decision, the alleged tape properly does not appear in the record. H & F Enterprises v. United States, 973 F. Supp. 170, 175 (D.D.C. 1996)- National Law Center, 736 F. Supp. at 1153. Moreover, the record affirmatively indicates that the ANTEETAM searched all of its files and has produced all materials concerning plaintiff, and no such tape were within those materials. R1316.

evidences that there is no confusion or lack of clarity that prevents him from presenting his reading of the record to the Court. In any event, the state of the record results from plaintiff having initiated and received a great deal of administrative consideration and review of his various claims. It cannot be the case that plaintiff can engender a great deal of administrative review and then legitimately complain that the resulting record is not a simple one.

Plaintiff is similarly mistaken when he attributes his purported confusion to the ordering of the record within two volumes, which he groundlessly complains is "misleading" because documents are reproduced as they are kept in the usual course of official business by two separate Navy entities.

Plf.Mem. 26-27. Again, that complaint is contradicted by plaintiff s Local Rule 108(h) Opposition and his Memorandum's counterstatement of material facts. It also cannot be squared with his earlier request - with which defendants complied - that defendants compile the documents in the record "as they are kept in the usual course of business." Attachment B; Plaintiffs Requests for Production, at 2 (Instruction 4).21

Plaintiff is also mistaken when he complains in a footnote that nine pages of the record are out of order. Plf.Mem. 27 n. 19. Plaintiff complains that these documents are "split or detached from their attachments," but all are reproduced in the order that they were attached to other documents. R.59 & R.60 (plaintiff s two NJP appeal cover letters - the first of which had to be refired for erroneously not going through proper channels - as attached by the ANTIETAM CO as Enclosures (10) & (11) to his letter to the BCNR reproduced at R.41-43; the CO separately attached the documents referenced in plaintiffs letters as Enclosures (2) & (9) of his letter, R.46 & 57); R.272 (BCNR's file copy of its letter to ANTIETAM CO, wherein BCNR did not also maintain a separate copy of the referenced enclosure, plaintiff s 300-page "DD Form 149 w/ attachment," which is reproduced at R.283-581); R. 555 (cover letter to a performance report that plaintiff submitted to the BCNR as Exhibit G to his DD Form 149; plaintiff submitted the performance report separately as Exhibit K, R. 5 66, see generally R. 291-92 (plaintiff s list of DD Form 149 exhibits)); R.909 (transmittal of NJP and ADB results, one of many enclosures to a letter from plaintiff reproduced at R.902); R.932 (copy of referral letter to JAG, as maintained by BCNR, with voluminous enclosures that the BCNR apparently was not separately copying for itself and therefore asked "that the enclosures be returned with your reply"); R. 1354 (fax cover sheet, which is followed by the faxed pages), R. 1369-70 (two-page handwritten note on USS

Plaintiff also fashions an ill-defined complaint concerning a draft certification for Volumes III & IV that was never filed with the Court, but that he claims to have obtained from defendants.

The exact nature of plaintiff s complaint is unclear, but in no event does it constitute the required substantial showing that the administrative record is incomplete. As plaintiff admits, in all material respects, the two versions of the record appear the same." Plf Mem. 28 n.2 1. The draft certification thus only serves to evidence the serious efforts made by defendants after they agreed on November 6 to compile on an expedited basis the full 1,900-page administrative record by November 20. Given the scope of the record and the expedited context, it is not surprising that the draft certification of November 14 - only a week after the Court's scheduling order - did not reflect the final compilation produced to the Court seven days later. Nor is it surprising that a draft certification concerning only FOIA documents would have to be changed to reflect that pertinent files were also discovered in the JAG Corps file on the other litigation plaintiff has filed for arising from his administrative proceedings, captioned John D. Cadiz. Jim A. Turner, et a], v. U.S. Dep't of Defense, No. 94-12040 (D. Mass.). 22/

Second, the certifications are not "facially incorrect." Plaintiff is mistaken when he contends that they are. He makes that contention only because the record contains the Maurer e-mail and the letter stating the results of the additional round of review that plaintiff s congressional

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ANTIETAM stationary ftom "Executive Officer," as maintained in a file referenced as "Enclosure (1)" in the letter

reproduced at R. 1319).

22/ Even if plaintiff were correct in his arguments that the record is somehow incomplete (he is not), he would still not be due supplementation. Rather, "should the Court find that the complete administrative record is factually deficient, the proper course is not to allow intervenors extensive discovery, but to reverse and remand the [agency's] decision for further factual development." National Law Center, 736 F. Supp. at II 53. See also Beach Communications, Inc. v. FCC, 959 F.2d 975, 987 (D.C-. Cir. 1992).

representative had requested for plaintiff s § 1552 appeal. Plf Mem. 28. As discussed above, both of these documents are properly included in the administrative record, and hence the certifications are not "facially incorrect."

In any event, plaintiff does not explain how the presence of additional documents in the administrative record would merit supplementation under any of the Madison factors. Whatever else may be said about plaintiff s argument in this regard, it can hardly be said that the defect he is alleging - the presence of too many documents - can be cured by adding yet more documents to the record.

Third, "background" discovery is neither necessary nor appropriate. Plaintiff is both factually and legally incorrect when he contends that supplementation of the record is appropriate because "essential background information is missing." Plf Mem. 9. Factually, plaintiff questions "which regulations defendants applied to plaintiff," id., but the record contains the applicable

version of the regulations, because they were submitted as Navy exhibits at plaintiff s ADB. R.420-26, 1535-56. Legally, plaintiff misapprehends the nature of the Madison factor regarding "essential background information." This case does not implicate that factor, which concerns only scientific information that a court may need to properly review a highly technical case. 23/

23/ The Court of Appeals in Madison ruled, "[n]or has Madison shown that the district court needed to supplement the record with 'background information' in order to determine whether the agency considered all of the relevant factors," citing Environmental Defense Fund, Inc. v. Costle, 657 F. 2d 275, 28 5 (D. C. Cir. 198 1), and Asarco Inc. v. EPA, 616 F.2d I 1 53, 1160 (9th Cir. 1980). In Environmental Defense Fund, the Court of Appeals recognized the possibility that a reviewing court might need "background information" to understand arcane scientific matters in a 'highly technical case," but it found that "the district court properly struck, upon defendants' motion, four litigation affidavits submitted by [the plaintiff] in support of its motion for summary judgment" because supplementation was "not necessary, where, as here, we find no need for further explanation of the record." 657 F.2d at 284-86. On the other hand, in Asarco, the district court did consider "background information" on technical issues, but the Ninth Circuit found that

Plaintiff has also not demonstrated materiality in this regard. All versions of the regulations state that their "legal effect" is to "create no substantive or procedural rights."

Moore Dec., Attachment C (final page); R. 1543, 15 5 5-56.

Thus, as defendants

demonstrated in their motion, defendants are due summary judgment as a matter of law regardless of the facts underlying this

case.

Fourth, the record was not compiled in "bad faith." Plaintiff misrepresents the record when he charges that it contains "evidence of bad faith and improper conduct on the part of the Navy command." Plf Mem. 30. Plaintiff presents no evidence whatsoever substantiating the serious allegation that the Navy conunand has in bad faith excluded evidence of improper conduct. But because "influence in the improper sense of the term is an easy charge to make," at a minimum such a threshold showing is required: "the mere making of that accusation though must not serve to allow those disappointed by regulatory activity to invoke all of the benefits of the rules of civil procedure for an extensive search into the agency's decisional processes." Envirorunental Defense Fund. Inc. v. Blum, 458 F.Supp. 650, 663 (D.D.C. 1978). In the absence of such a threshold showing, plaintiff has not "overcome the presumption that military administrators discharge their duties correctly, lawfully, and in good faith." Smith v. Dalton, 927 F.Supp. I,,4 (D.D.C. 1996). Consequently, his Rule 56(f) motion should be denied. Seidman, 786 F. Supp. at 1046 (denying Rule 56(f) motion "in the absence of evidence that the agency has

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it "went too far in its consideration of evidence outside the record," and the appellate court held that "we can only conclude that the extent of the scientific inquiry undertaken at trial necessarily led the district court to substitute its own judgment for that of the agency." 616 F.2d at 1 160-61.

given a false reason for its policy"). 24/

As noted above, plaintff has not identified a single item that was considered by the Navy but excluded from the record on any basis, much less in bad faith. Plaintiff does suggests that the inclusion of the Maurer e-mail evidences bad faith, but its *inclusion* in the record can hardly be said to evidence the bad faith *exclusion* plaintiff alleges. In any event, plaintiff misreads Maurer's e-mail: that document does not contradict Maurer's sworn testimony that he told the truth when he complained of plaintiff s repeated and unwanted sexual advances. R. 10 1, 107-08.

Finally, even had plaintiff been able to indicate a missing document (he has not), "[t]he record reveals that the [agency] considered the substance of [his] position," thereby defeating plaintiff s claim of bad faith exclusion. First National Bank & Trust v. Department of the Treasury, 63 F.3d 894, 898 (9th Cir. 1995), cert, denied, 116 S.Ct. 1875 (1996). 25/ Rather than

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24/ Sierra Club v. Slater, 120 F.3d 623, 638 (6th Cir. 1997) (even when missing items identified, "[s]upplementation with those items will not be ordered" because "[p]laintiffs have not made a sufficient showing of 'bad faith or improper behavior'"); Town of Norfolk v. U.S. Army Corps of Engineers, 968 F.2d 143 8, 1458-59 (I st Cir. 1992) (denying supplementation even when plaintiff was able to indicate excluded documents); Havasupai Tribe v. Robertson, 943 F.2d 32, 34 (9th Cir. 1991), cert, denied, 503 U.S. 959 (1992) (party whose only evidence of bad faith is pure speculation not entitled to extra-record discovery); City of Mount Clemens v. EPA, 917 F.2d 908, 918 (6th Cir. 1990) (when compared to record of EPA's reasoned project evaluations and careful certification procedures, city's unsubstantiated allegation of

bad faith does not warrant invocation of the bad faith exception); Church of Scientology of Boston v. Internal Revenue Service, 13 8 F.R.D: 9, 12 (D.Mass. 1990) (deposition of high-level IRS official not permitted because no showing that information he had was not otherwise available); Community Federal Sav, and Loan Ass'n v. Federal Home Loan Bank Bd, 96 F.R.D. 619, 621 (D.D.C. 1983) (because plaintiffs presented no evidence of bad faith and did not contend that administrative record was incomplete, -no extra-record discovery allowed).

25/ Franklin Savings Ass'n v. Office of Thrift Supervision, 934 F.2d 1127, 1140 (10th Cir. 1991) (rejecting argument that agency record was "one sided and fail[ed] to contain any of [plaintiffs own] documents" when "substance" of plaintiffs positions were considered by the agency), cert, denied, 503 U.S. 937 (1992); Woods v. Federal Home Loan Bank Bd, 826 F.2d 1400, (5th Cir. 1987) (rejecting claim that record was "unilaterally and secretly compiled" when

developing for the record what he claims is additional evidence on his claims, plaintiff made certain tactical decisions that withheld the purportedly additional evidence from the record - for example, standing silent at his NJP and presenting no defense, Complaint, || 130 & R.59, 62, 135-36, 1634, and not calling the MAC at ADB to ascertain whether there was any basis for the serious but unsubstantiated allegation of abusive interrogation, R. 132-34 & Rule 108(h) Opp., Items 90-91 (not controverting defendants' statement of material facts in this regard).

Consequently, the Court should attribute any apparent lack of record evidence to the fact that plaintiff "had ample opportunity to express [his] views" on the record, but did not fully avail himself of the opportunity. First National,,63 F.3d at 898.24 26/

2. Constitutional Claims Are Subject To § 1552 Appellate Procedures and The "Substantial Evidence" Judicial Review That Follows Thereafter- Plaintiff mistakenly contends that he is independently entitled to seek discovery in support of his due process claims because they are constitutional in nature. Plf Mem. 34. As plaintiff s presentation of these claims to the BCNR demonstrates, constitutional claims are among those subject to §

1552 appellate
plaintiff had opportunity to present its position to the agency), cert, denied, 485 U.S. 959 (1988)

26/ In any event, the § 1552 appellate procedures also allowed plaintiff to independently develop further record evidence outside of the Navy command of which he complains. Plaintiff has never complained that he was somehow prevented from doing so in that process, and it is well-established that a subsequent decision by an unbiased tribunal cures any alleged bias that may have infected a previous ruling. See- eg ., Perry v. Milk Drivers& Dairy Farmemployees Union Local 302, 656 F.2d 536, 539 (9th Cir. 1981) (holding that, after disciplinary proceedings before an allegedly biased union trial panel, subsequent proceeding before an unbiased Joint Council "cured any prior deprivation of appellants' right to a full and fair hearing")- United Retail and Wholesale Employees Teamsters Union Pension Plan v. Yahn & McDonnel, Inc 787 F.2d 128, 143 (3d Cir. 1986)
(holding that claims regarding a biased pension trustee were not valid because an "arbitrator's exercise of de novo review over the trustees' determination suffice[s] to meet the requirement of an impartial decision maker"), affd. , 481 U.S. 735 (1987).

procedures. R.286 (alleging due process violations at BCNR)- see also 32 C.F.R. § 723.3(e)(5) (BCNR reviews "constitutional, statutory and/or regulatory violations"). Moreover, both the Supreme Court and the Court of Appeals have held that

constitutional claims are judged under the traditional § 706 APA standard - that 'findings and determinations of the administrative authority [are] final and conclusive unless they are unsupported by substantial evidence, or are arbitrary and capricious or otherwise contrary to law," Orfanos v. Department of Health and Human Services, 896 F. Supp. 23 (D.D.C. 1995) (Friedman, J.) - on judicial review following a § 1552 appeal, and that such review proceeds on the administrative record.

The Supreme Court in Chappell v. Wallace, 462 U.S. 296 (1983), explained at length why constitutional claims are subject to § 1552 appellate procedures and then judicial review under the "arbitrary, capricious or not based on substantial evidence" standard. id. at 303. In Chappell, five enlisted men who served in the United States Navy on board a combat naval vessel brought an action against eight superior officers alleging violations of "rights under the Constitution and laws of the United States, including the right not to be discriminated against." id. at 297. The Supreme Court found that these constitutional claims were subject to review by the Secretary of the Navy under the § 1552 appellate procedures, whose "decisions are subject to judicial review and can be set aside if they are arbitrary, capricious or not based on substantial evidence." id. at 303. That review, of course, proceeds on the administrative record. Camp v. Pitts, 41 1 U.S. at 142. As the Court explained in Chappell, 462 U.S. at 300-04:

> "Many of the Framers of the Constitution had recently experienced the rigors of military fife and were well aware of the differences between it and civilian life. * * * Their response was an explicit grant of plenary authority to

Congress "To raise and support Armies"; "To provide and maintain a Navy"; and "To make Rules for the Government and Regulation of the land and naval Forces." Art. I, S 8, cls. 12-14. *** Congress has exercised its

plenary constitutional authority over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure. The resulting system provides for the review and remedy of complaints and grievances such as those presented by respondents. * * * The special status of the military has required, the Constitution contemplated, Congress has created and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel."

The D.C. Circuit has strictly followed the Supreme Court's Chappell precedent. For example, the plaintff in Wolfe, like the plaintiff here, complained that the military committed various alleged procedural irregularities that amounted to due process violations. Also like the plaintiff here, Wolfe first presented his constitutional claims to a military correction board pursuant to the § 1552 procedures, and then to court, whereupon the D.C. Circuit recognized that the § 1552 decision "is subject to judicial review for arbitrariness and capriciousness." 83 5 F.2d at 357. The Court of Appeals explained that "the Correction Board, and not the Courts, is the primary protector of individual members' fights against military over-reaching," and that "the availability of judicial review insures that individual fights will not be unduly trampled upon in the name of military efficiency, while

effectuating the considered judgment that undue judicial interference with military operations must be avoided." id. at 357 & n.4. To the same effect is Blevins V. Orr, 721 F.2d 1419, 1421 (D.C. Cir. 1983), where the D.C. Circuit also recognized that a due process challenge coming to court after § 1552 appellate procedures are subject to .judicial review under the arbitrary and capricious standard.

In fact, the D.C. Circuit specifically *rejected* the same claim that plaintiff forwards here -his contention that "the ability of a military service member to pursue collateral, constitutional challenge to a military policy or proceeding is well settled," Plf Mem. 36 - in Bois v. Marsh, 801

F.2d 462 (D.C.Cir. 1986). Plaintiff in Bois brought a collateral case seeking, inter alia, "a declaratory judgment that the Army violated her due process and equal protection rights under the Fifth Amendment." a at 467. The Court of Appeals recognized that, in establishing the § 1552 appellate procedures, 'the Congress has authorized the [Secretary acting through the Board] 'to correct any [military] record' in order to 'remove an injustice,"' which includes "claims based on 'constitutional, statutory and/or regulatory violation.' a; see also 32 C.F.R. § 723.3(e)(5) (same; BCNR regulation). On the other hand, "[t]he judicial intervention that Bois seeks poses a substantial threat to military discipline essential to the effective functioning of our Nation's Armed Forces," because it "would necessarily require a civilian court to examine in

detail the personnel and other command decisions which Bois claims were discriminatory" and would also "obviously require this court to intrude on the'peculiar and special relationship'of military personnel to their superiors." a at 467-68.

The Court of Appeals in therefore held that Bois's constitutional claims would have to first be considered through § 1552 appellate procedures, which "are subject to judicial review and may be set aside if they are arbitrary and capricious." a 467-68 & n.9. The Court of Appeals found that conclusion no more than a specific application of "settled principles of law requiring exhaustion of administrative remedies," which "can and should be applied to Bois's claims for declaratory relief'under the constitution. a at 467 (citation omitted). It also found that its conclusion "reinforces the well-established principle 'that a court should not review internal military affairs in the absence of... exhaustion of available intraservice corrective measures."' id. at 468 (citing Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 197 1), Sohm v. Fowler, 365 F.2d 915, 917-18 (D.C.Cir. 1966); Bolger v. Marshall, 193 F.2d 37, 39

(D.C.Cir.1951)). 27/

III. THE COURT SHOULD DECIDE THE MERITS OF THE PENDING MOTION

AND ENTER SUMMARY JUDGMENT FOR DEFENDANTS,

Because plaintiff s motion for a continuance should be denied, the Court should not delay resolution of defendants

pending motion for summaryjudgment. See- e.g., Madison, 82 F.2d at 1096 (entering summary judgment for defendants upon failure of plaintiffs Rule 56(f) motion); White, 909 F.2d at 516-17; H & F Enterprises, 973 F. Supp. at 175; National Law Center, 736 F. Supp. at 1153. Upon reaching the merits of that motion, the Court should enter judgment for defendants. Defendants have demonstrated that they are "entitled to judgment as a matter of law," and because plaintiff has attempted but failed to rebut that demonstration, the Court should therefore render summary judgment "Forthwith. " Rule 56(c). 28/

In particular, the Court should not delay entry of summary judgment for defendants merely because plaintiff hints that he may have additional arguments that he has not brought to the

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27/ Plaintiff is mistaken when he claims (Plf Mem. 36 n.32) that an earlier case is both applicable and to the contrary. First, the case on which he relies, Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969), cert, denied, 396 U.S. 1013 (1970), does not apply because it concerned only federal *habeas* review of a criminal court-martial conviction, not review following § 1552 appellate procedures. Homcy v. Resor, 455 F.2d 1345, 1349 (D.C. Cir. 1971) (Kauffman "properly read ... as authorizing [district court] jurisdiction over this review of the Correction Board's determination of the constitutionality of Homcy's court-martial conviction"). Second, Kauffman is not to the contrary because it does not free a service member from the requirement of exhausting intraservice remedies. New v. Cohen, 129 F.3d 639 (D.C. Cir. 1997) (citing Kauffman but affirming district court dismissal of *habeas* petition because "New has failed to exhaust his remedies for relief in the pending court-martial action").

28/ ln addition, should plaintiff s attempts to prove his claims colorable succeed, defendants have also demonstrated that there is

"no genuine issue as to any material fact" supporting summary judgment for defendants. Rule 56(c). To avoid needless repetition, defendants respectfully refer the Court to Defendants' Reply to Plaintiffs Response to Defendants' Local Rule 108(h) Statement (submitting herewith).

Court's attention now, but may do so "at a later time. " Plf Mem. I & n. 1. The piecemeal adjudication plaintiff hopes to gain is inappropriate in all contexts, and it is especially inappropriate to summary judgment. Summary judgment advances "an integral part of the Federal Rules" whose 'principal purpose[] ... is to isolate and dispose of' claims that are "unsupported" as soon as possible. Celotex Corp. v. Catrett, 477 U.S. 317, 327, 323-34 (1986).

CONCLUSION

The Court should deny plaintiff s Rule 56(f) motion for a continuance, grant defendants' motion for summary judgment, and dismiss this action with prejudice.

Respectfully submitted,

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