

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

**JIM A. TURNER,**

**Plaintiff,**

**V.**

**Case No. 1:97CV01653 (PLF)**

**UNITED STATES NAVY, et al.,**

**Defendants.**

**DEFENDANTS'REPLY TO PLAINTIFF'S RESPONSE  
TO DEFENDANTS'LOCAL RULE 108(h) STATEMENT**

As discussed in the accompanying Defendants' Opposition To Plaintiffs Rule 56(0) Motion And Reply In Support Of Defendants'Motion For Summary Judgment ("Def Reply"), defendants submit that they are entitled to judgment as a matter of law. If the court nonetheless determines that facts are material to the disposition of defendants' pending summary judgment motion, defendants demonstrate below that Part I of plaintiffs opposition to defendants' Local Rule 108(h) statement indicates no genuine dispute as to any of the potentially material facts identified by defendants. Defendants also demonstrate that Part II of plaintiffs Local Rule 108(h) opposition does not identify any issue for which discovery is appropriate, even if plaintiff s complaint has presented viable legal claims for which a factual inquiry is appropriate.

**PART I**

Part I of plaintiff s opposition to defendants' Local Rule 108(h) statement does not demonstrate, as plaintiff claims, that "genuine issues of material fact persist." Rule 108(h) Opp., at 1. In making that claim, plaintiff generally argues that "[t]here is evidence" to the contrary with respect to various of defendants' statements of material fact not genuinely at issue. See, e.g., id at 1-6, 9-18, 20-22. Under the applicable standard of review, however, that contention falls to state a genuine issue sufficient to preclude the entry of summary judgment for defendants.

To demonstrates a genuine factual issue under Rule 56, plaintiff must make an

evidentiary presentation that is "significant[ly] probative" under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 & 251-52 (1986) ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient."). Because this case comes to the Court for judicial review of the final agency determination arrived at after the internal appellate procedures provided in 10 U.S.C. § 1552, the governing law for all of plaintiff's claims is "an unusually deferential application" of the substantial evidence standard "under § 706 of the Administrative Procedures Act." Kreis v. Secretary of the Air Force, 866 F.2d 1508, 1513-14 (D.C. Cir. 1989)-1 Frizelle v. Slater, 111 F.3d 172, 176 (D.C. Cir. 1997). See also Chappell v. Wallace, 462 U.S. 296, 303 (1983) (constitutional claims); Marsh v. Wolfe, 835 F.2d 354, 358 (D.C. Cir. 1987), reconsid, denied, 846 F.2d 782 (D.C. Cir.), cert, denied, 488 U.S. 942 (1988); Bois v. Marsh, 801 F.2d 462 (D.C. Cir. 1986); Blevins v. Orr, 721 F.2d 1419, 1421 (D.C. Cir. 1983).

Even under an application of the substantial evidence standard, a court "should accept the agency's factual findings if those findings are supported by substantial evidence on the record" -not, as plaintiff improperly suggests, "supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence." Arkansas v. Oklahoma, 503 U.S. 91, 113 (1992) (citing Universai Camera Corp. v. NLRB, 340 U.S. 474 (1951)). This Court has previously discussed the effect of the substantial evidence standard of review on summary judgment proceedings in Orfanos v. Department of Health and Human Servim, 896 F.Supp. 23 (D.D.C. 1995) (Friedman, J.) (granting government motion for summary judgment):

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When a federal district court is asked to review an administrative adjudication, it does not sit as a trier of fact, as it does in the typical civil case. It therefore is not called upon to isolate genuine issues of material fact that are to be tried before the court or a jury; the agency decision is reviewed, not tried, and it must be affirmed if supported by substantial evidence. Except in unusual circumstances, the Court

may not consider extra-record materials such as affidavits and depositions as it does in connection with summary judgment motions under Rule 56(e), Fed.R.Civ.P.; rather, it is bound by the administrative record. Finally, in reviewing an agency determination such as the one at issue here, the Court does not defer to the evidence of the non-movant or draw justifiable inferences in its favor. It must accept the decisions- findings and determinations of the administrative authority as final and conclusive unless they are unsupported by substantial evidence, or are arbitrary and capricious or otherwise contrary to law,

id. at 26 (citations omitted; emphasis supplied). Consequently, this Court has also observed that it "may not reweigh the evidence and replace the Secretary's judgment regarding the weight and validity of the evidence with its own." Dunn v. Shalala, 866 F. Supp. 595, 598 (D.D. C. 1994) (Friedman, J.). Particularly in subjective matters such as witness credibility, where the agency exercises particular "discretion as the fact-finder," this Court has stated that it "will not substitute its own findings and conclusions from the evidence for ... the Secretary's supported judgment concerning the weight and validity of the evidence in the record." a at 599. Rather, a court's "only task in reviewing substantial evidence questions is to determine whether there is such relevant evidence as a reasonable mind might accept as adequate to support the [Secretary's] conclusions. " Jim Walter Resources, Inc. v. Secretary of Labor, 103 F. 3 d 1020, 1023 -24 (D. C. Cir. 1997) (citation and quotation omitted).

Under these standards, it is clear that Part I of plaintiffs response to defendants' Local Rule 108(h) statement indicates no genuine dispute as to any of the potentially material facts identified by defendants under the substantive law governing this case. As to each potentially material fact, plaintiff has failed to indicate the absence of substantial evidence supporting the final

administrative determination of the § 1552 appellate procedures.

## **PART II**

Part II of plaintiff s Local Rule 108(h) opposition indicates eight categories of information on which he is attempting to gain discovery, but he is not entitled to any discovery at all with respect to either the pending summary judgment motion or the judicial review of the final agency action at issue in this case. As demonstrated in Defendants' Opposition To Plaintiffs Rule56(f) Motion And Reply In Support Of Defendants' Motion For Summary Judgment, there is no reason for the Court to depart in this case from the oft-quoted rule that "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. 138, 142 (1973). See also NTEU v. Seidman, 786 F. Supp. 1041, 1046 (D.D.C. 1992) (denying plaintiffs Rule 56(f) motion because "it would create a new administrative record for the purpose of second-guessing the agency"). "The fact finding capacity of the district court is thus typically unnecessary to judicial review of agency decisionmaking," and the Court should decide that issue "on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review." Florida Power & Light Co. v. Lorion, 470 US. 729, 743-44 (1985) ("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").

In any event, plaintiff has presented no legitimate reason for discovery on any of his eight categories of information. We discuss each in turn.

1. Plaintiff s Discovery Category "which versions of which regulations were actually

applied to plaintiff at each stage of the administrative proceedings in question."

Defendants' Responded Applicable regulations are already in the record, and therefore discovery would be impermissibly cumulative on this issue. See Paddington

Partners v. Bouchard, 34 F.3d 1132, 1138 (2d Cir. 1994) (citing Sundsvallsbanken v. Fondmetal, Inc., 624 F.Supp. 811, 815 (S.D.N.Y. 1985); Allstate Ins. Co. v. Administratia Asigurarilor De Stat, 948 F. Supp. 285, 294 (S.D.N.Y. 1996)). Plaintiff has already introduced into the record DoD Directive 1332.14, R.482-530 (Tab B of plaintiffs DD Form 149), NAVADMIN 033/94, R.420-26 (Tab A of same), and MILPERSMAN 3630600, which concerns sexual harassment, R.417-19 (same). Other documents also in the record also refer to the regulations applied to plaintiff at each stage of the administrative proceedings. See, e.g., R.61-63 (referencing regulations applied at NJP); R.66-68 (same regarding ADB) R. 163 & 164 (same); R.252-53 (same); R.260-64 (statement of plaintiffs counsel regarding same); R.265-68 (same); R.286 (statement of plaintiff regarding application of regulations to he desired BCNR to examine). Yet others demonstrate the application of specific regulations to plaintiff. See, e.g., R. 1369-70 (evidencing that investigation was for *quidpro quo* sexual harassment, through the "falsification of records" in exchange for sexual favors); R. 1349 (evidencing same, because, "[i]n an apparent attempt to ingratiate himself with two other servicemembers, [plaintiff] signed off qualifications which were, in fact, never adequately demonstrated"); R.391 (ADB convened to determine whether plaintiff committed "sexual harassment as evidenced by his nonjudicial punishment of 03 May 1994"); R.392 (same), R.61-62 (NJP appeal document, stating same); R.69 (ADB verbatim transcript, stating same), R.252 (ADB report, finding that plaintiff had committed same).

2. Plaintiff s Discovery Category: "what information was expressly considered by (i) the ANTIETAM's command during the NJP proceeding, (ii) the administrative discharge board

during its proceeding, and (iii) the Board for Correction of Naval Records during its proceeding (i.e., what constitutes the complete and discrete record for each of the three

administrative proceedings at issue)."

Defendants'Response: This information is contained in the 1,900 page administrative record, which is the complete administrative record in this case. The record is clear with respect to the information considered at each stage of the administrative proceedings in question. See, Vol. I, Tab 3, Enclosures (1) - (13) & (18) (various NJP and NJP appeal records); id., Enclosures (14) (ADB letter, also presenting other ADB records in its own Enclosures (1) & (2)), id., Enclosures (15) - (16) (ADB appeal records); R. 1766-1896 (same); Vol. I, Tab 6 (plaintiffs DD Form 149, initiating BCNR proceedings)- Vol. I, Tab 5 (plaintiff s BCNR correspondence)-Vol. I, Tab 4 (BCNR request to ANTEETAM CO)- Vol. I, Tab 3 (BCNR letter from ANTIETAM CO); Vol. II, Tabs 7-14 (additional BCNR documents).

Plaintiff has himself demonstrated that discovery beyond the record is unnecessary on this item. He has presented a complete discussion of the record evidence considered at each stage of the administrative proceedings in both Part I of his Local Rule 108(h) opposition and the counterstatement of material facts in his Memorandum.

3. Plaintiff s Discovery Category: "why defendants changed their sworn certification for Volumes III and IV of the current record between November 14, 1997 and November 20, 1997, why they have supplemented the record with 'other records regarding Mr. Turner;' and what those 'other records' are (see November 20, 1997 certification for Volumes III & IV)."

Defendants'Response: The difference between a draft and a final certification is not material to any issue in this case, and hence discovery is inappropriate on that issue. To the extent

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that plaintiff seeks discovery on this item in support of item 2's allegation that defendants have in bad faith excluded information from the administrative record, the 1,900 page administrative record that was finally certified and filed with the Court presents the

complete administrative record in this case, and plaintiff has indicated no evidence that he contends defendants relied on but have excluded. See generally Def Reply 30-39. The final certification of *more* records than was covered by a draft certification does not indicate the existence of such exclusion, but rather indicates the efforts defendants expended to include all record evidence.

4. Plaintiffs Discovery Category: "what information defendants considered or failed to consider in assessing whether they had 'credible information,' within the meaning of DoD Directive No. 1332.14, to pursue their charges against Plaintiff."

Defendants'Response: As discussed in Defendants'Opposition To Plaintiff s Rule 56(f) Motion And Reply In Support Of Defendants'Motion For Summary Judgment, discovery on this item is inappropriate. Plaintiff had a full and fair opportunity to develop the record on this item and introduce what he would claim is relevant evidence at his NJP, ADB, and in the § 1552 appellate procedures. While 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 Chief Mater-at-Arms ("MAC") as a witness at the ADB to ascertain whether there was any basis for the serious but unsubstantiated allegation of abusive interrogation, R. 132-34 & Rule 108(h) Opp., Part 1, Items 90-91 (not controverting defendants' statement of material facts in this regard) - information on this item is contained within the 1,900 page administrative record, which is the complete administrative record in this case. See- e.g., R.48-50 ("voluntary statements" regarding plaintiff s

"sexual advances," sworn to "of my own free will and without any threats or promises extended to me," and "true and complete to the best of my knowledge"); R. 60 (plaintiff s contentions at NJP appeal regarding alleged "inconsistencies" in "the statements of the

alleged victims"); R.63 (CO's statement explaining why he was "convinced" that complainants were "credible witnesses")- R.64 (NJP appeal decision, finding, inter alia, that plaintiff was "given ample opportunity to present any information you deemed appropriate regarding witness credibility"); R.96-109 (ADB testimony of Maurer); R.640-43 (plaintiff s BCNR submission regarding Maurer); R. 583 (plaintiff counsel's BCNR presentation), R. 14 (obviously redacted version of Maurer e-mail a sentence or more 'Is missing from the third and fourth lines - submitted by plaintiff to Sen. Dodd, who forwarded it to the Secretary of the Navy with request for reconsideration of § 1552 appeal). Consequently, the record also reveals that the defendants considered the substance of plaintiff's position, which alone suffices for purposes of judicial review. See generally DefReply38-39.

In any event, the discovery plaintiff seeks does not concern any material issue. Plaintiff s quote regarding "credible information" comes from the internal investigative "guidelines" contained in both Enclosure 4 to DoD Directive No. 1332.14 and NAVADMIN 033/94. Both state that their "legal effect" is to "create no substantive or procedural rights," and the NAVADMIN further provides that "[n]othing in this provision ... provide[s] the member with any basis for challenging the validity of any proceeding." See generally Def Reply 15-20.

Moreover, as discussed supra, plaintiff has demonstrated that discovery beyond the record on this item is unnecessary. He presents a complete discussion of the record evidence on this item in both Part I of his Local Rule 108(h) opposition and the counterstatement of material facts in his Memorandum. See.e.g.,Plf Mem.10-13.

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5. Plaintiffs Discovery Category: "to what extent the ANTEETAM's command suggested, coerced, or unduly influenced the allegations or testimony of Seaman Maurer (or plaintiff s other two accusers) -- whether by threats, intimidation, cajoling, or improperly promising favorable treatment (e.g., in the handling of Maurer's request for an early separation

from the Navy)."

Defendants'Response For the reasons discussed in the immediately preceding item, discovery on this item is inappropriate. The record reflects that plaintiff had a full and fair opportunity to develop the record on this item, and, as cited above, did in fact introduce such evidence at his NJP, ADB, and in the § 1552 appellate procedures.

6. Plaintiff s Discovery Category: "whether the ANTEETAM's command intentionally misrepresented the facts and state of the record to the NJP Appeal Authority, the ADB, or the BCNR (*see, e.g.,* R. 1233)."

Defendants'Response: This information is contained in the 1,900 page administrative record, which contains the ANTIETAM CO's letter of endorsement to plaintiff s NJP appeal, dated May 22, 1994. See R. 64-63. Because the evidence plaintiff indicates (R. 1233) is only an internal Cruiser Destroyer Group Three memorandum between its legal officer and its admiral, it contains no representations made by the ANTEETAMs command, as plaintiff seems to allege.

7. Plaintiff s Discovery Category: "whether defendants or the ANTEETAM's command excluded from the record material evidence that properly should be considered part of the record. "

Defendants'Response\* As discussed supra and in Defendants'Opposition To Plaintiff s Rule 56(f) Motion And Reply In Support Of Defendants'Motion For Sununary Judgment, plaintiff has indicated no evidence that he contends defendants relied on but have excluded, and

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hence discovery on this item is inappropriate. See Generally Def Reply 30-39. Defendants' 1,900 page administrative record presents the complete administrative record in this case.

8. Plaintiff s Discovery Category: "whether plaintiff has been treated in an even-handed manner without any discriminatory animus based on the fact that he was alleged to be gay."

Defendants'Response As discussed in supra and in Defendants' Opposition To

Plaintiffs

Rule 56(f) Motion And Reply In Support Of Defendants' Motion For Summary Judgment, discovery on this item is inappropriate. Plaintiff had a full and fair opportunity to develop the record on this item and introduce what he would claim is relevant evidence at his NJP, ADB, or in the § 1552 appellate procedures, and in fact attempted - but failed - to present such a case. See, R.79-81 (plaintiff counsel's ADB presentation regarding an alleged "climate of hysteria about homosexuality"); R.583 (plaintiff counsel's BCNR presentation regarding an alleged "witch-hunt").

In any event, the discovery plaintiff proposes in this item is also immaterial. Although plaintiff pleads that he was investigated and processed for "sexual harassment," Complaint || 31, except for this one mention, his complaint makes no allegation that the Navy's zero-tolerance policy against sexual harassment was applied to plaintiff in anything other than an even-handed manner.

Respectfully submitted,

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