

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 99-958C  
(Judge Futey)

DAVID ALAN CARMICHAEL,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S  
CROSS-MOTION FOR SUMMARY JUDGMENT ON THE SECOND AND THIRD COUNTS  
OF HIS COMPLAINT.

HERBERT WILLIAM TITUS  
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David Alan Carmichael

March 28, 2005

**TABLE OF CONTENTS**

	<b>Page</b>
I. On February 11, 1997 Admiral Marsh Did Not Have Full and Final Authority to Deny Plaintiff's Religious Accommodation Request for A Change in His MPIN .....	2
A. On February 11, 1997, Rear Admiral Larry Marsh was not "the Acting Deputy Chief of Naval Personnel" .....	2
B. As One Acting in the "Stead" of the DCNP Who Was Away for the Day, Admiral Marsh Did Not Have Authority to Act on Plaintiff's Religious Accommodation Request for a Change of MPIN .....	3
C. Admiral Marsh's Assessment of Plaintiff's Religious Accommodation Request for a Change of MPIN Could Not Have Been Final .....	6
II. Defendant Cannot Sustain Its Burden That It Followed "Proper Procedures" Solely on the Grounds of Captain Benkert's and Admiral Marsh's 2004 Deposition Testimony .....	9
III. Defendant Has Not Shown That It "Would Have Taken the Same Action" Separating Plaintiff from the Navy Prior to the End of His Obligated Service .....	18
CONCLUSION .....	20

**TABLE OF AUTHORITIES**

**CASES**

**Page (s)**

*Carmichael v. United States*,  
298 F.3d 1367 (Fed. Cir. 2002).....10,11,12,13,14

**Navy Regulations**

U.S. Navy Regulations (NAVREGS)

Chapter 10. Section 2, Article 1022..... 7,8  
Chapter 10, Section 2, Article 1026 .....3,5,6  
Chapter 11, Section 5, Article 1150 .....8,9,18

Secretary of Navy Instructions (SECNAVINST)

1730.8 .....2, *passim*  
1730.8(4) ..... 11,12,13,14  
1730.8(9) .....12,13  
1730.8(9)(a) .....9,10,12,13,14,18,20  
1730.8(9)(b) .....2,14,19,  
1730.8(10) .....15  
1730.8(11) .....15,16

Military Personnel Manual (MILPERSMAN)

4610100.1 .....7,8,11,16

Bureau of Naval Personnel Instructions (BUPERS)

BUPERS Instruction 5400.6E .....4,6  
BUPERS Instruction 5000.27 .....7

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Plaintiff,	)	
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v.	)	No. 99-958C
	)	(Judge Futey)
THE UNITED STATES,	)	
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PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO  
PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT  
ON THE SECOND AND THIRD COUNTS OF HIS COMPLAINT

Pursuant to Rule 5.2(a) of the rules of this Court, and to the Court's Order dated October 5, 2004, Plaintiff replies to Defendant's Response to Plaintiff's Cross-Motion for Summary Judgment on the Second and Third Counts of his Complaint.

At the heart of Defendant's response to Plaintiff's Cross-Motion are three claims, proof of which is essential to carry its burden to show that the Navy would have denied Plaintiff's religious accommodation request for a change of his MPIN, and involuntarily separated Plaintiff from the service, after having followed proper procedures.

(1) On February 11, 1997, the date upon which Rear Admiral Larry Marsh reviewed Plaintiff's religious accommodation request for a change of Plaintiff's MPIN, Mr. Marsh had **full** and **final** authority to deny Plaintiff's request. See Defendant's Response to Plaintiff's Cross-Motion for Summary Judgment and Reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgment (hereinafter "Df. Rsp."), pp. 3-8.

(2) On April 6 and 7, 2004, by Admiral Marsh's and Captain

Joseph Benkert's deposition testimony, the Navy "followed proper procedures" in conducting its assessment whether Plaintiff's request for religious accommodation should have been granted under SECNAVINST 1730.8. See Df. Rsp., 2-3, 5-12, 29-30.

(3) By the April 2004 deposition testimony of Admiral Marsh and Captain Benkert, the Navy has **proved** that it would have involuntarily separated Plaintiff from the Navy in the same manner as it did in March 1997, without regard to the procedure for separation set forth in SECNAVINST 1730.8(9)(b). See Df. Rsp., pp. 13-32.

In its opening Brief in Support of its Motion for Summary Judgment, in its Response and Reply to Plaintiff's Cross-Motion, and in its Supplemental Authority filed on March 15, 2005, Defendant has sustained none of these claims. Indeed, Defendant has not even addressed the issue of separation as required by SECNAVINST 1730.8(9)(b).

**I. ON FEBRUARY 11, 1997, ADMIRAL MARSH DID NOT HAVE FULL AND FINAL AUTHORITY TO DENY PLAINTIFF'S RELIGIOUS ACCOMMODATION REQUEST FOR A CHANGE IN HIS MPIN.**

**A. On February 11, 1997, Rear Admiral Larry Marsh was not "the Acting Deputy Chief of Naval Personnel."**

In its Response to Plaintiff's Cross-Motion, Defendant has asserted that, on February 11, 1997 – the date upon which Rear Admiral Marsh first considered Plaintiff's religious accommodation request for a change of his MPIN, Admiral Marsh was "the Acting Deputy Chief of Naval Personnel." Df. Rsp., p. 4. See also Defendant's Motion for Summary Judgment ("Df. Mo.

Sum. J."), p. 16; Defendant's Response to Plaintiff's Proposed Findings of Uncontroverted Fact ("Df. Resp. Pl. Facts"), p. 18; Defendant's Motion for Leave to File Supplemental Authority ("Df. Mo. Supp. Auth."), p. 1 and 2. The documentary evidence – produced by Defendant in response to Plaintiff's Request to "produce any document evidencing the title and office of Rear Admiral Marsh on February 11, 1997" – proves otherwise.

From June 1994 to July 1997, Admiral Marsh was the Assistant Chief of Naval Personnel ("ACNP") for Personal Readiness and Community Support, PERS-6," not "the Acting Deputy Chief of Naval Personnel." See Plaintiff's Cross-Motion for Summary Judgment ("Pl. Cross-Motion"), Appendix G, p. 2. Thus, Admiral Marsh signed the February 1997 memorandum denying Plaintiff's religious accommodation request, "Acting," thereby indicating that he had signed the correspondence only as one "temporarily succeeding" the DCNP while the DCNP was out-of-town. See U.S. Navy Regulations (NAVREGS), Ch. 10, Sec. 2, Art. 1026(c). Indeed, Defendant has admitted that Admiral Marsh acted in the DCNP's absence solely because Admiral Marsh, as "the next ranking member of the CNP's staff[, ] would assume the position of DCNP in that individual's absence." Df. Resp. Pl. Facts, p. 20.

**B. As One Acting in the "Stead" of the DCNP Who Was Away for the Day, Admiral Marsh Did Not Have Authority to Act On Plaintiff's Religious Accommodation Request for a Change of MPIN.**

As one who "temporarily succeeded" to the "position" of the

DCNP while the latter was away for the day, Admiral Marsh did not have the "full authority" of that office, much less the office of the CNP, as Defendant has assumed in its Response. See Df. Resp., pp. 5. Nor, as Defendant has contended in its Motion for Leave to File Supplemental Authority, did BUPERS Instruction 5400.6E confer upon ACNP Marsh "full" authority to act in the place of the DCNP upon Plaintiff's religious accommodation request for a change in his MPIN. See Df. Mo. Supp. Auth., pp. 2. By its plain language, BUPERS Instruction 5400.6E states that the Deputy Chief of Naval Personnel "[a]cts with full authority" **only "in the absence** of [the Chief of Naval Personnel]." See *Id.*, App., pp. 3, 7 (Emphasis added). While Admiral Marsh testified that the DCNP was absent on February 11, 1997, he did not testify that the CNP was also absent, so the provision of BUPERS Instruction 5400.6E upon which Defendant has relied is clearly inapposite. Even if BUPERS Instruction 5400.6E could be construed to mean that the DCNP is the CNP's alter ego, on February 11, 1997, Admiral Marsh was neither the DCNP, nor the Acting DCNP, but rather the Assistant Chief for Personnel Readiness and Community Support, and thus, not within the reach of BUPERS Instruction 5400.6E, as the organizational chart appended to Defendant's Motion clearly shows. See Df. Mo. Supp. Auth., App. 6. Instead, for Admiral Marsh to climb into the organizational box containing the both "CHNAVPERS" and "DEPCHNAVPERS" (*id.*) he must do so by some other regulation.

To be sure, Navy regulations do provide that one, like Admiral Marsh, may step into the shoes of a temporarily absent DCNP to handle "routine" and other like matters "in the usual

manner." See NAVREGS, Ch. 10, Sec. 2, Art. 1026 (1) and (2). By his own testimony, however, Admiral Marsh conceded that Plaintiff's religious accommodation request for a change in his MPIN was not routine. Rather, he testified that, on February 11, 1997, he was not even aware of SECNAVINST 1730.8 and its five-factor formula (Pl. Cross-Motion, Marsh Apr. 7 Tr. 108-09, App. E, E-28)), indicating thereby that such a request was not a matter that regularly came before him either in his capacity as ACNP for Personal Readiness and Community Affairs or on any previous occasion when he substituted for the DCNP. See also Pl. Cross-Motion, Marsh Apr. 7 Tr. 31, App. E, E-9.

Also, Admiral Marsh testified that he did not handle Plaintiff's request "in the usual manner," in that, at his deposition, he admitted that he assessed Plaintiff's religious accommodation request without the benefit of PERS-3 staff review which was the "usual" practice. See Pl Cross-Motion, pp. 29-30 and testimony cited therein. But the absence of the usual staff review did not deter Admiral Marsh from testifying that he would have denied Plaintiff's request.

In sum, neither requests for religious accommodation, nor requests for changes in a service member's MPIN were "routine" matters in the office of the Chief of Naval Personnel. Nor did Admiral Marsh handle Plaintiff's request "in the usual manner." Therefore, Defendant has not carried its burden of proving that Admiral Marsh - in his capacity as a temporary substitute for the DCNP who was away from the office for a day - either had authority on February 11, 1997, to address Plaintiff's religious accommodation request for a change of his MPIN, or if he did,

that he exercised his authority in accordance with Navy regulations. See NAVREGS, Ch. 10, Sec. 2, Art. 1026(2).

**C. Admiral Marsh's Assessment of Plaintiff's Religious Accommodation Request for a Change of MPIN Could Not Have Been Final.**

Defendant has not only mistakenly assumed that BUPERS Instruction 5400.6E conferred full authority of the CNP upon Admiral Marsh, but it has also **mistakenly** assumed that Admiral Marsh's decision to deny Plaintiff's request was **final**, binding even upon the Chief of Naval Personnel.

First, Defendant has erroneously argued that Admiral Marsh had such final authority because he "ha[d] delegated authority from the Chief of Naval Personnel to make **final** Bureau of Naval Personnel decisions in all cases **falling under the purview of his department.**" Df. Rsp., pp. 4-5 (emphasis added). Admiral Marsh admitted at his deposition, however, that, as ACNP for Personal Readiness and Community Support, he had no authority over any request for a change of a service member's MPIN. Pl. Cross-Motion, Marsh Tr., p. 31, App. E, E-9. See also Pl. Cross-Motion, p. 40.

Second, as pointed out in Plaintiff's Cross-Motion, MILPERSMAN 4610100.1 expressly authorizes only the CNP to change a service member's MPIN. Pl. Cross-Motion, p. 41. As is also demonstrated in his Cross-Motion, BUPERS 5000.27.4040.2.b. requires that any communication of any decision denying or granting a change of a service member's MPIN must be signed by the CNP.

Third, even if BUPERS Instruction 5400.6E could be construed to dispense with this signature requirement when the decision to deny such a change is made by the DCNP, Acting DCNP – or anyone acting in the place of the DCNP or Acting DCNP, as Admiral Marsh would have done in this case – the CNP would not thereby have been relieved of his ultimate responsibility to make the decision personally. NAVREGS, Ch. 10, Sec. 2, Art. 1022 states that “[t]he delegation of authority ... by a person in the naval service shall not relieve such person from any responsibility imposed upon him or her. He or she **shall ensure** that the **delegated authority** is **properly exercised** ....” (Emphasis added). As Admiral Marsh testified, in making any decision on Plaintiff’s religious accommodation request to change his MPIN, he “would have abided by ... instruction from higher authority.” See Pl. Cross-Motion, Marsh Apr. 7 Tr., pp. 63 (beginning line 16) – 65 (ending with line 18). According to MILPERSMAN 4610100.1, that “higher authority” would clearly have included the CNP, the only person expressly authorized to change an MPIN. And, according to NAVREGS, Ch. 10, Sec. 2, Art. 1022, the CNP could not have been “relieve[d]” of his responsibility under MILPERSMAN 4610100.1 by “delegation of [that] authority,” to Admiral Marsh, but would have been obliged to “ensure” that such authority was “properly exercised.”

Notwithstanding the CNP’s nondelegable duty to ensure the proper application of MILPERSMAN 4610100.1 to Plaintiff’s request, Defendant has maintained that Plaintiff could not have taken an appeal from Admiral Marsh’s denial of his request to the CNP because Plaintiff “cannot point to a Navy regulation or

instruction that allows him to appeal the decision of ... the CNP ... delegate under MILPERSMAN 4610100." Df. Rsp., p.8. Again, Defendant is mistaken.

NAVREGS, Ch. 11, Sec. 5, Art. 1150 provides that "**any** person in the naval service [who] considers himself wronged by any act [or] decision of a person who is superior in rank or command ... may report the wrong to the proper authority for redress...." And that is precisely what Plaintiff attempted to do in March 1997. On March 3, 1997, he submitted a memorandum to Admiral Marsh for reconsideration. AR 224-25. Then, on March 4, 1997, in compliance with the procedures set forth in Section 1150, Plaintiff submitted an appeal to the CNP from the Marsh denial via his Officer-in-Charge (AR 243) who, in turn, refused to forward it on the ground that "Chiefs do not argue with admirals." AR 042-043.

As was the case then, so it is now. Although the Administrative Record documents that Plaintiff attempted to appeal Admiral Marsh's February 1997 denial to the CNP, the Navy did not then afford, and has not at any time thereafter afforded, Plaintiff access to the CNP to review Admiral Marsh's decision had he treated Plaintiff's request for a change of his MPIN as a religious accommodation request under SECNAVINST 1730.8. This undisputed fact alone demonstrates that the Navy has failed to carry its burden that it would have denied Plaintiff's request "after following proper procedures," having failed to afford Plaintiff any right of appeal - as provided for in NAVREGS, Ch. 11, Sec. 5, Art. 1150 - from Admiral Marsh's "decision" that he would have denied Plaintiff's request for a

change of MPIN after applying the five-factors set forth in SECNAVINST 1730.8(9)(a).

**II. DEFENDANT CANNOT SUSTAIN ITS BURDEN THAT IT FOLLOWED "PROPER PROCEDURES" SOLELY ON THE GROUNDS OF CAPTAIN BENKERT'S AND ADMIRAL MARSH'S APRIL 2004 DEPOSITION TESTIMONY.**

According to Defendant's interpretation of the issue before this Court, the Navy has met its burden of "following proper procedures" solely by "the testimony of Captain Benkert and Admiral Marsh" that they would have denied Plaintiff's request for a religious accommodation by applying the five factors set forth in Subsection 9(a) of SECNAVINST 1730.8. See Df. Rsp., pp. 1-2, 3, 9-12. Indeed, Defendant has asserted that the Court of Appeals for the Federal Circuit has "**presupposed**" that, if Captain Benkert and Admiral Marsh would have applied the five factors set forth by SECNAVINST 1730.8(9)(a), then the Navy would have followed all of the procedures set forth in SECNAVINST 1730.8. See Df. Rsp., pp. 29-30. This contention is patently false.

In stating the issue now before this Court, the Court of Appeals did **not presuppose** that the only procedure that the Navy need follow was for Captain Benkert and Admiral Marsh to apply the five-factor formula in SECNAVINST 1730.8(9)(a). Rather, it instructed this Court to determine "whether the Navy can show that it would have taken the same action **after following proper procedures**, without any express language limiting those procedures to SECNAVINST

1730.8(9)(a). *Carmichael v. United States*, 298 F. 3d at 1376 (emphasis added). To meet its burden, then, the Navy must show that any decision that it claimed that it would have made, must, in fact, have been made "**after following proper procedures,**" not just whether Captain Benkert and Admiral Marsh applied the five-factors of SECNAVINST 1730.8(9)(a) to Plaintiff's religious accommodation request.

Not only is there no language in the Court of Appeal's statement of the issue to limit this Court's procedural inquiry to SECNAVINST 1730.8(9)(a), there is language in the opinion indicating that the Navy must show compliance with **all** of the procedures set forth in SECNAVINST 1730.8, including all general Navy procedures related to the application of SECNAVINST 1730.8 and MILPERSMAN 4610100.1. See *Carmichael v. United States*, 298 F. 3d 1367, 1373-76 (Fed. Cir. 2002).

The Court of Appeals took special note of subsection (4) of SECNAVINST 1730.8, including its statements: (1) favoring accommodation when a service member's request would not have an "adverse impact on military readiness, individual or unit readiness, unit cohesion, health, safety or discipline" (*id.* at 1372; (2) deferring to the "determination if military necessity" by the "commanding officer" of the requesting service member; and (3) providing that "[t]he guidelines **in this instruction shall be used** in the exercise of command discretion concerning

the accommodation of religious practices." *Id.* (emphasis added).

In determining whether accommodation of Plaintiff's request that he be assigned a number other than a SSN would have an the adverse impact spelled out in SECNAVINST 1730.8(4), both Captain Benkert and Admiral Marsh testified that they would have sought advice from their staffs and others before making any decision under the five-factor formula. See Pl. Cross-Motion, pp. 29-30 and Benk. Apr. 6 Tr., pp. 54-56, 58, 64, 68-69, 72-73, 95-96, App. C, pp. C-15-C-19, C-25; Benk. Apr. 7 Tr., pp. 20-23, 27-30, 39-40, App. D., C-6, D-9, D-11; Marsh Apr. 7 Tr., pp. 79, 106. Yet neither followed the usual procedure of seeking and obtaining any staff input before testifying how they would have assessed Plaintiff's request. Instead, both made their assessments of "military necessity" without benefit of the usual staff reviews!

Moreover, Admiral Marsh testified how he would have applied SECNAVINST 1730.8(9)(a)'s five factors **without having received any input from Captain Benkert, Plaintiff's commanding officer**, even though the Court of Appeals, citing SECNAVINST 1730.8(4)(a), concluded that "the Navy determined that the generally appropriate level of command for approval for requests for religious accommodation is the commander or commanding officer." See *Carmichael v. United States*, 298 F.3d at 1373. Instead of following this procedure, Admiral Marsh testified how he would have

applied the five factors **without knowledge** of how Captain Benkert would have applied them, a process that was specifically rejected by the Court of Appeals. See *id.* at 1375.

Not only did Admiral Marsh make his decision without knowledge of Captain Benkert's assessment, he testified that Captain Benkert's appraisal would not have made any difference in his assessment, despite: (1) the express provision in SECNAVINST 1730.8(4) (a) that "the determination of [military] necessity" in relation to an accommodation request "**rests entirely** with the commanding officer" (emphasis added) and (2) the express provision in SECNAVINST 1730.8(9) that the five-factor provision of subsection (9) (a) is specifically addressed to "commanders and commanding officers," not to their superiors.

Yet, Admiral Marsh testified that, even though he was not Plaintiff's commanding officer, he could not think of anything that Plaintiff's commanding officer would have done that would have changed his application of the five-factor formula to Plaintiff's religious accommodation request. Such a cavalier attitude towards the commanding officer directly contradicts the above-quoted language of SECNAVINST 1730.8(4) (a) and (9). See also *Carmichael v. United States*, 298 F.3d at 1375.

Indeed, there is nothing in the text of SECNAVINST 1730.8 to indicate that Admiral Marsh, or anyone else in the office of the CNP, has any authority whatsoever to make

any discretionary decision applying the five-factor formula. However, Defendant has attempted to shoehorn Admiral Marsh into SECNAVINST 1730.8(9) by claiming that the Court of Appeals "held" that the "CNP" had "authority to decide religious accommodation requests." Df. Rsp., p. 5. But the very passage relied upon by Defendant belies this claim, in that the role of the CNP is stated in the court of appeals opinion as an "even if" hypothetical, following the court's initial finding that subsection (4) indicates that the initial decision is for the commanding officer. See *Carmichael*, 298 F.3d at 1375.

Not only did the Navy ignore the procedures and policies of SECNAVINST 1730.8(4)(a), but it also ignored Subsection 4(b) which – as the Court of Appeals pointed out on page 1373 of its opinion – states that "the **guidelines in this instruction,**" not just the five factors in subsection (9)(a) of SECNAVINST 1730.8, "**shall be used** in the exercise of command discretion concerning the accommodation of religious practices." As the Court of Appeals expressly noted, subsection (4)(b) would require the Navy, "where requests for accommodation cannot be granted, [to take] administrative action against a member, including but not limited to reassignment, reclassification or separation," as provided under SECNAVINST 1730.8(9)(b). *Carmichael*, 298 F.3d at 1373.

To be sure, Defendant has attempted to refute Plaintiff's contention that the Navy failed to show that it

complied with SECNAVINST 1730.8(9)(b), contending that Plaintiff did not "request" a reassignment or reclassification and that Captain Benkert did not know of any possible reassignment or reclassification and had no duty to find out. See Df. Rsp., pp. 14-15, 28-29. But SECNAVINST 1730.8(9)(b) does not require that a service member request a reassignment or a reclassification. Nor does that subsection excuse Captain Benkert from compliance because he did not know of any possible reassignment or reclassification. Rather, according to SECNAVINST 1730.8(4)(b), it was Captain Benkert's duty to "use" the guideline in subsection (9)(b) in the exercise of his "command discretion concerning [Plaintiff's request] for accommodation of [his] religious practices." See *Carmichael v. United States*, 298 F.3d at 1373.

Additionally, as pointed out in Plaintiff's Cross-Motion, there are several other procedures contained in SECNAVINST 1730.8 that apply to request for religious accommodation, including: (1) SECNAVINST 1730.8(10)(a) which obligates the Chief of Naval Operations ("CNO") "to provide the statement of [Navy] policy on accommodation of individual religious practices and military requirements in paragraphs 4 and 4a of this instruction to applicants for ... enlistment and reenlistment, and require a signature acknowledging [Navy] policy"; (2) SECNAVINST 1730.8(10)(b) requiring the CNO to have "incorporate[d] relevant materials on religious traditions, practices and policies,

this instruction and [Department of Defense policy], in curricula for command, judge advocate, chaplain, and similar courses and orientations"; and (3) SECNAVINST 1730.8(11) and (11) (a) which provide that the "ASN (M&RA) is responsible for overall policy control and program execution" and "[t]he CNO ...[is] responsible for implementing the policies and procedures in this instruction."

Significantly, Defendant has made no effort in its Response to refute the Plaintiff's claim that the Navy has failed to show that it complied with the mandatory procedures set forth in SECNAVINST 1730.8(10) (a) or (b). See Pl. Cross-Motion, pp. 37-38. Defendant has, however, attempted to refute Plaintiff's contention that SECNAVINST 1730.8(11) and (11) (a) support his claim that he would have had a right of appeal to the ASN (M&RA) and CNO from any adverse decision on his religious accommodation request. Compare Pl. Cross-Motion, pp. 35-36 with Df. Rsp., pp. 7-8, 15-16. In support of its contention, Defendant has stated that: (1) Plaintiff "cannot point to a Navy regulation or instruction that allows him to appeal the decision of either his commanding officer ... or CNP or his delegate under SECNAVINST 1730.8" (*id.* at 7-8); (2) "the Federal Circuit [did not] acknowledge an authority higher than the CNP or his delegate to decide such a request, [but instead] "recognized the inconsistency between SECNAVINST 1730.8 and MILPERSMAN 4610100.1" (*id.* at 8); (3) "[n]either

[SECNAVINST 1730.8 nor MILPERSMAN 4610100.1 provides for a right to appeal an adverse decision" (*id.*); (4) "[n]either [regulation] allows the CNO to decide a religious accommodation request or a request to change a MPIN" (*id.*); (5) Plaintiff confuses SECNAVINST 1730.8's requirement that the CNO implement the policies and procedures in that instruction with decision-making capacity to address a request" (*id.* at 8, n. 2) and (6) Captain Benkert "stated that he did not know whether an adverse decision on a religious accommodation request could be appealed to the CNO." *Id.* at 15-16.

Conspicuously absent from this itemized list is Admiral Marsh's testimony, produced in response to Plaintiff's counsel's questions concerning the meaning of SECNAVINST 1730.8(11) (a):

Q. [W]hat would be the relationship of the chief of naval operations to the chief of naval personnel with regard to the administration of [the religious accommodation] policy?

A. [T]he chief of naval personnel works for chief of naval operations.

Q. So the chief of naval operations would have the ultimate say so?

A. Mm-hmm (indicating an affirmative).

Q. Is that what is reflected in 11-A?

A. It does. It says the CNO ...[is] responsible for implementing the policy and procedure of this instruction. So the chain of command [goes] from the secretary of the navy ... down from the chief of naval operations ... and then he delegates ... it down....

Q. ...[W]ith respect to the administration of this policy, [a]s I understand your testimony, the chief of naval operations is over the chief of naval personnel, is that correct?

A. That's correct.

...

Q. [I]f you would have received a review of a religious accommodation in relationship to a change of [MPIN], would you have consulted the CNO?

A. There's no requirement. This goes back to the delegation of authority we were talking about earlier. [S]uch decisions get delegated down to be made by the -- we're all part of the CNO staff....

Q. [T]he CNO had authority to reverse that decision, wouldn't he?

A. He would, yes, he would.

[Pl. Cross-Motion, Marsh Apr. 7 Tr., pp. 81 (beginning with line 21) - 83 (ending with line 2); and pp. 85, beginning with line 20) - 86 (ending with line 9); App. E, E-21 - 23].

In sum, Defendant has not shown that, by applying the five-factor formula of SECNAVINST 1730.8(9), Captain Benkert's and Admiral Marsh's testimony established that the Navy - **after following proper procedures** - would have taken the same action on Plaintiff's religious accommodation request that it did in February and March of 1997, having not only failed to follow the procedures contained within SECNAVINST 1730.8, having denied to

Plaintiff any opportunity of appeal as provided in NAVREGS, Ch. 10. Sec. 2, Art. 1022 and Ch. 11, Sec. 5, Art. 1150.

**III. DEFENDANT HAS NOT SHOWN THAT IT WOULD HAVE "TAKEN THE SAME ACTION" SEPARATING PLAINTIFF FROM THE NAVY PRIOR TO THE END OF HIS OBLIGATED SERVICE.**

As noted above, the issue before this Court is not just whether the Navy, applying the five-factors of SECNAVINST 1730.8(9)(a) would have granted his religious accommodation request for a change of MPIN, but whether the Navy would also have taken the "same action," after denial of that request, and separating him from the Navy prior to the end of his obligated service in the same manner in which it did in March 1997. It is undisputed that Plaintiff's separation and discharge prior to the end of his obligated service was occasioned by the denial of his request for a change of MPIN, and that such separation and discharge violated Plaintiff's "firm right" to an extension of enlistment to at least January 17, 1999. See Opinion and Order dated October 7, 2003, p. 13, attached to Pl. Cross-Motion, App. B, p. B-13. There is nothing in SECNAVINST 1730.8 indicating that Plaintiff's right to an extension of enlistment would have been automatically vitiated by a denial of Plaintiff's religious accommodation request; nor is there anything in SECNAVINST 1730.8 mandating that, upon denial of Plaintiff's request, Plaintiff would automatically be separated from the Navy.

To the contrary, SECNAVINST 1730.8(9)(b) provides that "[w]hen requests for accommodation are not in the best interest of the unit but continued tension between the unit's requirements and the individual's religious beliefs is apparent, administrative action is authorized." The subsection further states that "[a]dministrative action may include, **but is not limited to**, reassignment, reclassification, or separation **consistent with SecNav and service regulations**" (emphasis added).

Neither Captain Benkert nor Admiral Marsh testified that Plaintiff would have been separated from the service, much less testified how Plaintiff could have been separated from the service on March 17, 1997 "consistent with SecNav and service regulations," including the obligation of the Navy to honor Plaintiff's firm right to an extension of enlistment to January 17, 1999. Nor did either testify that he had determined that there was no "reclassification" or "reassignment" that would have accommodated Plaintiff's religious accommodation request. To the contrary, Defendant, in its Response, faulted Plaintiff for having failed to "request" a "reassignment" or a "reclassification," thereby excusing Captain Benkert from any obligation to ascertain whether such a "reassignment" or "reclassification" existed. See Df. Rsp., pp. 14-15.

In sum, the Navy has failed to show that it would have taken the same action and separated Plaintiff from the Navy even if it would have determined that Plaintiff's request

for a change of MPIN would have been denied under  
SECNAVINST 1730.8(9)(a).

**CONCLUSION**

For the reasons stated herein, and in Plaintiff's  
Cross-Motion, Plaintiff's Motion for Summary Judgment on  
Counts II and III of his Complaint should be granted.

Respectfully submitted,

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David Alan Carmichael

March 28, 2005

**CERTIFICATE OF SERVICE BY MAIL**

I hereby certify under penalty of perjury that on this 28th day of March 2005, I caused to be placed in the United States mail (first-class, postage prepaid) a true and correct copy of the foregoing Plaintiff's Reply to Defendant's Response to Plaintiff's Cross-Motion for Summary Judgment on the Second and Third Counts of his Complaint, addressed as follows: Lauren S. Moore, Esq., Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Attn: Classification Unit, 8th Floor, 1100 L Street, N.W., Washington, D.C. 20530.

Herbert William Titus