UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EARLE A. PARTINGTON, Plaintiff, v. VICE ADMIRAL JAMES W. HOUCK, JAGC, USN, et al., Defendants.	)	Civil No. 10-1962(HHK)

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN PART AND TO DISMISS IN PART

In this case involving a decision made by the Judge Advocate General of the United States Navy ("NJAG") to suspend Plaintiff Earle A. Partington from practicing law in any and all proceedings involving Navy and Marine Corps personnel, after conducting an ethics investigation into plaintiff's representation of a client during a court-martial proceeding, defendants have moved for summary judgment in part and to dismiss in part ("Def. Mot."). Defendants moved for summary judgment on Counts One, Two and Three of the Complaint, on the grounds that the NJAG decision to suspend plaintiff was supported by statutory authority, did not violate plaintiff's Fifth Amendment rights, and did not violate the Administrative Procedure Act ("APA"). Defendants moved to dismiss plaintiff's claims against the individual defendants under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) ("Bivens"), for failure to state a claim.

Plaintiff responds by claiming that numerous factual issues are in genuine dispute and thus defendants' motion should be denied. However, plaintiff's alleged factual issues are, in fact, not genuine issues of material fact in this case.

In particular, plaintiff argues that a material facts exists as to the extent his co-counsel were investigated by the NJAG for the same conduct in which he engaged. This argument is specious. The complaint against plaintiff was not for any misrepresentations at the trial level, where military co-counsel were also actively involved. Rather, it was for misrepresentations in his appellate brief, which plaintiff does not deny that he wrote. Therefore, plaintiff's repeated assertions about his co-counsel at the trial level agreeing with his trial strategy, and the fact that no charges of misrepresentation were levied against them, completely miss the mark.

As to the Bivens claims, plaintiff merely argues that the APA does not preclude such claims. The cases upon which plaintiff relies, however, are easily distinguishable. Moreover, plaintiff does not dispute defendants' argument that the Complaint fails to allege any specific act taken by any individual defendant that shows that that defendant violated plaintiff's clearly established rights. Finally, plaintiff fails to counter defendants' argument that the individual defendants are entitled to qualified immunity.

Therefore, with respect to the legal issues raised in defendants' motion, as demonstrated below and in defendants' prior memorandum, defendants respectfully submit that their motion for summary judgment in part and to dismiss in part should be granted.

I. ARGUMENT

A. Plaintiff's First Cause of Action Should be Dismissed

In Plaintiff's Opposition to Defendants' Motions for Summary Judgment in Part and to Dismiss in Part ("Plt. Opp."), plaintiff argues that Articles 6 and 27 of the Uniform Code of Military Justice ("UCMJ")[1] fail to provide the NJAG the authority to discipline civilian attorneys. Plt. Opp. at 11-12. This argument, however, fails to respond to defendants' clear demonstration in their previous memorandum that both Rule 109 of the Rules for Courts-Martial ("R.C.M.") and 32 C.F.R. § 776[2] provide the NJAG with the requisite authority to discipline plaintiff. Def. Mot. at 11-14. Furthermore, both controlling authorities were repeatedly cited to plaintiff throughout the course of the ethics investigation regarding the appellate brief he filed with the Navy-Marine Corps Court of Criminal Appeals ("NMCCA"). Id.

[1] See 10 U.S.C. §§ 801-946.

[2] Navy JAG Instruction (JAGINST) 5803.1C.

Plaintiff argues R.C.M. 109 cannot serve as the basis for the NJAG to discipline him, because only "Congress has the power to make rules for the government and regulations of the armed forces . . . ." Plt. Opp. at 12-14 (emphasis added). On the contrary, in defendants' prior memorandum defendants demonstrated that the President of the United States, pursuant to Article II § 2 of the United States Constitution, in accordance with the authority granted him by Congress via the UCMJ[3], proscribed the Manual for Courts-Martial ("M.C.M."). Def. Mot. at 11-14.

Plaintiff concedes that Congress, pursuant to 10 U.S.C. § 836, provides the President the power to prescribe procedural rules regarding all phases of the courts-martial process. Plt. Opp. at 12-13. Part II of the M.C.M. consists of the R.C.M. The R.C.M. "govern the procedures and punishments in all courts-martial and, whenever expressly provided, preliminary, supplementary, and appellate procedures and activities." R.C.M. Rule 101. Thus, contrary to plaintiff's argument, the R.C.M., including Rule 109, are procedural rules proscribed by the President pursuant to the clear, unambiguous authority vested in him by Congress via 10 U.S.C. § 836. Therefore, R.C.M. Rule 109 can serve as a valid basis for the NJAG to discipline plaintiff in matters that fall under the NJAG's cognizance and control.

[3] See 10 U.S.C. § 836.

Furthermore, contrary to plaintiff's allegations that Rule 109's applicability to civilian defense counsel is only made explicit via the Analysis section of M.C.M. Appendix 21 (Plt. Opp. at 12), the plain language of the first line of the rule clearly establishes it applies to "...military trial and appellate military judges, judge advocates, and other lawyers who practice in proceedings governed by the code and this Manual." R.C.M. 109 (emphasis added). Clearly, plaintiff, while acting as a civilian defense counsel in a court-martial proceeding governed by the UCMJ and the M.C.M., would qualify as an "other lawyer[]." The Analysis to Rule 109 in M.C.M. Appendix 21 merely serves to reaffirm what the plain language of the rule already establishes, that the obvious intent of this procedural rule was that it also applies to civilian attorneys.[4]

Plaintiff also erroneously argues that the 1994 Amendments to the M.C.M. extended the NJAG's disciplinary authority over civilian attorneys, and such represents a substantive change in the law not authorized by Congress; thus, it is without effect. Plt. Opp. at 13-14. As demonstrated above, through 10 U.S.C. § 836, Congress clearly intended for the President to possess the

[4] The plain language of the Rule also grants each services' JAG the power to prescribe rules of professional conduct, which may include sanctions for violations of said rules, to include indefinite suspension from practice in courts-martial and Courts of Criminal Appeals. JAGINST 5803.1C represents the NJAG's rules of professional conduct implemented pursuant to R.C.M. Rule 109.

power to proscribe procedural rules related to all phases of a courts-martial proceeding. The R.C.M. represent those procedural rules. See R.C.M. Rule 101. Although various presidents have issued Executive Orders amending the M.C.M., the authority to discipline attorneys, including civilian attorneys, has remained constant since its first iteration in 1951[5]. Therefore, R.C.M.

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[5] See Executive Order 10214, 16 Fed. Reg. 1303 (Feb 10, 1951), ¶¶ 42 and 43:

> 42. COUNSEL: GENERAL PROVISIONS-a. Definition of terms. The term "counsel" as used in this manual will be interpreted to include, unless otherwise indicated by the context, the appointed trial counsel and defense counsel of a general or special court-martial and their assistants, if any, and any *individual counsel (civilian or military)*.... Whenever the terms "defense counsel" or "counsel for the accused" are used, they are to be understood to include, unless otherwise indicated by the context, the appointed defense counsel, appointed assistant defense counsel, if any, and any *individual counsel*. The term "*individual counsel*" shall be understood to refer to military counsel selected by the accused *or to civilian counsel provided by him.* [emphasis added].
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> 43. SUSPENSION OF COUNSEL. Rules defining professional or personal misconduct which disqualify a person from acting as counsel before courts-martial may be announced by the Judge Advocates General of the armed forces in appropriate departmental regulations which shall provide for notice and opportunity to be heard and will also establish procedures to provide for the suspension of persons from acting as counsel before courts-martial. When any person acting as counsel before a court-martial is guilty of professional or personal misconduct, action may be taken by a convening authority, in accordance with such regulations, to recommend suspension of the person affected from practice as counsel before courts-martial of the armed

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109 can and did serve as the legal basis for the NJAG to properly discipline plaintiff for his professional responsibility violations.

Although the United States demonstrated in Def. Mot., as well as in this reply, that the NJAG's actions in this case were well within the legal authority granted him by the President's constitutional and statutory authorities, defendants also demonstrated that plaintiff voluntarily consented to be bound by the very procedural rules he now attempts to argue are not applicable to him. Def. Mot. at 15; see also AR 1238-39. Plaintiff concedes as much, by his failure to even address the issue. See generally Plt. Opp. Having knowingly and voluntarily agreed to abide by JAGINST 5803.1C, plaintiff is not now free to escape its disciplinary provisions for violations of the conduct requirements. Accord Ghawanmeh v. Islamic Saudi Academy, 672 F. Supp.2d 3, 10 (D.D.C. 2009).

Since it is clear the NJAG possessed the legal authority to suspend plaintiff, and that plaintiff himself voluntarily consented to be bound by Navy JAG Instruction 5803.1C -- which

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[5](...continued)
force concerned. Suspension will not be effected except by the Judge Advocate General of the armed force concerned. The Judge Advocate General concerned may, upon good cause shown, modify or revoke a prior order of suspension.

included the possibility of being investigated and suspended for any ethical violations -- the subsequent decision by the CAAF to suspend plaintiff for one-year in accordance with its own rules of procedure was also a legally sound, permissible action.[6] Thus, plaintiff's first cause of action should properly be dismissed.

B. Plaintiff's Second Cause of Action Should be Dismissed

With respect to his second Cause of Action, plaintiff argues that he has adequately pled a violation of his Fifth Amendment due process rights. Plt. Opp. at 14-19. In particular, plaintiff alleges that an attorney's license to practice law is a property interest that cannot be taken away in a manner that contravenes the due process or equal protection clauses of the Fifth and Fourteenth Amendments. Id. Plaintiff cites to multiple cases in an attempt to strengthen his argument that his due process rights were somehow violated by the NJAG's actions. Id. at 15. However, the cases on which plaintiff attempts to rely are clearly distinguishable and, in fact, do not support plaintiff's arguments whatsoever.[7]

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[6] Plaintiff concedes CAAF possess the authority to discipline him and that it acted properly, but challenges the decision of the NJAG which serves as the basis for CAAF's action. Plt. Opp. at 14.

[7] The cases cited by plaintiff deal with the refusal to grant someone a license based on good moral character issues, Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); denial

(continued...)

Plaintiff does not dispute the fact that he is licensed to practice law in multiple state and federal jurisdictions. Compl. ¶ 1. However, contrary to his arguments, the NJAG has neither suspended nor revoked plaintiff's license to pursue his occupation and practice law. Instead, the NJAG merely suspended plaintiff's privilege to practice in one distinct jurisdiction which happens to fall under the NJAG's cognizance, and only after two through investigations were completed regarding alleged ethical misconduct committed by plaintiff. See Def. Mot. at 3-11 and the cites therein to the Administrative record in this case.

Defendants clearly demonstrated in their prior memorandum that a liberty interest to pursue or property interest in employment does not arise from the Fifth or Fourteenth Amendments of the U.S. Constitution itself, but, if at all, from "independent source[s] such as state law. . .." Def. Mot. at 20-

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[7](...continued)
of certification as a legal expert in an area of law (yet still retain license to practice law), Zisser v. Florida Bar, 630 F.3d 1336 (11th Cir 2011); new bar admission rules with no grandfather clause for attorneys previously admitted to practice in federal district court, Gallo v. United States District Court for the District of Arizona, 349 F.3d 1169 (9th Cir. 2003); refusal to exempt an attorney from maintaining an IOLTA account, Cassella v. Pennsylvania Interest on Lawyers Trust Account Board, 47 Fed. Appx. 193 (3rd Cir. 2002) (unpublished opinion); and that a Social Security Administration Judge in Hawaii cannot add licensing conditions for out-of-state attorneys when Congress specifically articulated licensing requirements in 42 U.S.C. § 406(a)(1), Reeves v. Shalala, (1999 U.S. App. Lexis 10363 (9th Cir 1999)(unpublished opinion). None of these cases is on point here.

22; see also Board of Regents v. Roth, 408 U.S. 564, 577 (1972); see also Wilkinson v. Austin, 545 U.S. 209, 221 (2005). Additionally, plaintiff's Complaint and his opposition brief completely fail to allege any state or federal law, constitutional right, or regulation whatsoever that creates an independent source for his underlying claim of entitlement to represent clients in courts-martial proceedings. Compare Def. Mot. at 21 with Plt. Opp. at 15-16. Thus, there is no basis in law to find that plaintiff had a protected liberty or property interest in continued employment as a defense counsel in the limited proceedings falling under the NJAG's cognizance.

Plaintiff also argues that defendants have failed to dispute that a significant portion of his practice involves representing Navy and Marine Corps clients at court-martial. Plt. Opp. at 15. This argument is beside the point. As defendants pointed out in their prior memorandum, and plaintiff does not dispute, it is well established that no person possesses any legal right to engage in the practice of law in any particular jurisdiction. See def. Mot. at 21. Plaintiff cites to no case that stands for the proposition that he has a constitutional right to engage in a particular type of legal practice. See Plt. Opp. at 15-16. The fact that plaintiff may prefer to practice a particular type of law grants him no constitutional right to continue with this preference. In this regard, plaintiff's mere reliance on his

Complaint as support for his claim that he has been deprived of a significant property interest, see Plt. Opp. at 15, gets him nowhere.

Defendants also pointed out that, assuming plaintiff was entitled to some procedural due process, plaintiff was provided exactly what the Supreme Court requires pursuant to its decision in Mathews v. Eldridge, 424 U.S. 319, 333 (1976). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " Mathews, 424 U.S. 319, 333 (1976) (*quoting* Armstrong v. Manzo, 380 U.S. 545 (1965)).

A formal written professional responsibility complaint was submitted to the Navy Rules Counsel by the Clerk of the NMCCA. AR 291-92, 318-25, 365-66. Plaintiff was provided notice of the charges and he responded by generally denying them. Compl. ¶ 45; AR 367-71. A preliminary inquiry and subsequently a formal ethics investigation were initiated by the Rules Counsel, to which plaintiff was provided notice of the 14 specifications of alleged professional misconduct, and again afforded the opportunity to, and did, submit numerous matters for consideration. Compl. ¶¶ 46, 49, 51, 52, 53, 58, 94; AR 276-371. Plaintiff was provided the right and opportunity to be heard in a non-adversarial hearing where he was advised he could present witnesses, present additional evidence, and present an argument

on his behalf or though counsel. Compl. ¶ 94; AR 250. However, plaintiff voluntarily refused to avail himself of the right to be heard and, even after being advised that CAPT Blazewick would still (and did) hold the hearing as scheduled, plaintiff elected not to appear. AR 237, 271. The material facts are abundantly clear and indisputable that, at each and every step of this process, plaintiff was afforded significant due process rights and protections, many of which he consciously chose not to exercise.

Plaintiff also argues that the lack of appellate review of the actions taken by the NJAG violated his procedural due process rights. Plt. Opp. at 15. However, the APA, which plaintiff cites in his complaint as a basis for this Court's jurisdiction (Compl. ¶ 7), provides plaintiff the independent, appellate review of the NJAG's actions that he alleges does not exist. His own act of filing a complaint under the APA disproves his own contention.

Since plaintiff has completely failed to cite to any legal authority that provides him a right or entitlement to practice in areas falling under the NJAG's cognizance, and considering there is no genuine dispute as to any material facts regarding whether he received adequate procedural due process as required by the Supreme Court in Mathews, plaintiff's Second Cause of Action should also be dismissed.

C. Defendant's Actions Were Neither Arbitrary Nor Capricious

Contrary to plaintiff's assertions, defendants complied with JAGINST 5803.1C. The NJAG received a formal complaint and neither CAPT Porzeinski nor CAPT Blazewick had "free rein" that hindered plaintiff's ability to make timely, meaningful responses. See Plt. Opp. at 19-20. When plaintiff failed to make timely responses, defendants accepted the responses. Def. Mot. at 4-5, AR 255. In one instance, defendant filed a second supplemental report. Def. Mot. at 4-5. Nor did CAPT Blazewick have a conflict of interest, as the only conduct for which plaintiff was under investigation was his conduct before the NMCCA. Def. Mot. at 3, AR 575. Interviewing other trial participants was not necessary as the record of trial and the appellate brief provided the necessary evidence. Plt. Opp. at 20. In making their findings, defendants appropriately equated the use of certain terms in plaintiff's appellate brief with their standard meanings. AR 79-274. Plaintiff then forfeited his hearing and refused to avail himself of the administrative process or to challenge CAPT Blazewick for cause. AR 213, 271. Contrary to plaintiff's unsupported claim, see Plt. Opp. at 22, defendants did not "steadfastly" refuse to provide plaintiff with the necessary parameters of such a hearing or notice of the alleged misconduct. Def. Mot. at 5-7; AR 30-34, 111-115, 212-271.

Plaintiff cites Mori v. Dep't of the Navy, 731 F. Supp.2d 43, 48 (D.D.C. 2010), for the proposition that JAGINST 5803.C1 failure to include standards of proof renders the instruction arbitrary. Mori does not stand for this proposition. The District Court in Mori held that "regardless of what standard of proof the Secretary applies to an allegation that a promotion board's decision was 'contrary to law', the standard of proof that the Secretary applies 'should be . . . the result of a conscious (and articulated) decision by the Secretary." Mori, 731 F. Supp.2d at 48-49. On December 24, 2009, CAPT Blazewick again informed plaintiff of the specific violations. AR 264. Shortly thereafter, he also informed him that the applicable standard of review was by clear and convincing evidence. AR 233-235, 109-110.

Thus, contrary to plaintiff's claims, defendants did not act in an arbitrary or capricious manner with respect to the decision to suspend plaintiff. Accordingly, plaintiff's Third Cause of Action should also be Dismissed.

D. Plaintiff has Failed to Adequately Establish a Bivens claim Against the Individual Defendants.

With respect to his Bivens claim, plaintiff argues mainly that the APA does not preclude this Court from recognizing the existence of a Bivens cause of action Plt. Opp. at 23-24. The cases cited by plaintiff, however, are distinguishable.

Unlike the plaintiff in Navab-Safavi, on which plaintiff heavily relies, Plt. Opp. at 23-24, plaintiff here has alleged a cause of action under the APA for equitable relief and this remedy can provide him meaningful relief. Navab-Safavi v. Broadcasting Board of Governors, 650 F. Supp.2d. 40, 74 (D.D.C. 2009); Compl. ¶ 7. Indeed, plaintiff's primary relief that he seeks is injunctive and declaratory relief. Compl. ¶ 131. This sort of equitable relief was not available in Davis v. Passman, 442 U.S. 228, 244 (1979), Navab-Safavi, 650 F. Supp.2d. at 73, or Davis v. Billington, No. 10-0036, 2011 U.S. Dist. LEXIS 33594, at *29 (D.D.C. March 30, 2011). The availability of this relief constitutes a special factor counseling against the creation of a Bivens cause of action. See Def. Mot. at 31-35.

But even if this Court finds that the APA does not provide an alternative statutory remedy, the Court of Appeals for this Circuit has held that Congress, not the Court, is "in a far better position" to create any "new species of litigation." Wilson v. Libby, 535 F.3d 697, 704-705 (D.C. Cir. 2008) (citing Wilkie v. Robbins, 551 U.S. 537, 562 (2007)).

But even if this Court finds that it is inclined to create this new species of litigation, defendants are entitled to qualified immunity. The Supreme Court has held that federal courts have the power to control admission to its bar and discipline the attorneys that appear before it. Chambers v.

NASCO, Inc., 501 U.S. 32, 43 (1991). This power must be exercised in consistent with the Due Process Clause. Schware v. Bd. of Bar Exam. of N.M., 353 U.S. 232, 238 (1957). Debarment proceedings are quasi-adversarial and quasi-criminal. In re Ruffalo, 390 U.S. 544, 551 (1968). In this setting, due process at a minimum requires fair notice of the charge and a hearing. In re Ruffalo, 390 U.S. at 550, Wilner v. Committee on Character and Fitness, 373 U.S. 96, 103 (1963). In some instances, it may also require confrontation of witnesses and cross examination. Wilner, 373 U.S. at 104. The JAG officials involved in this investigation adhered to JAGINST 5803.1C, which afforded plaintiff the requisite due process. See AR 225. Plaintiff declined the opportunity to avail himself of the due process afforded in JAGINST 5803.1C.

Because defendants adhered to JAGINST 5803.1C, they are entitled to qualified immunity because it is clear that they did not violate plaintiff's due process rights. Saucier v. Katz, 533 U.S. 194, 201 (2001), see Def. Mot. at 35-40. These are not "vengeful officers" such as the ones in Hartman v. Moore, 547 US 250, 256 (2006) (recognizing a Fifth Amendment Bivens action for retaliatory prosecution by public officials against a contractor who exercised his First amendment rights). Nor did these federal officials intentionally discriminate against a protected class of persons. Navab-Safavi, 650 F. Supp.2d at 64. The federal

officials here processed a complaint submitted by Mr. Troidl, the Clerk of the Navy-Marine Corps Court of Criminal Appeals as plaintiff intentionally misrepresented the record in an appellate brief. AR 76-133, 226.

* * *

Finally, plaintiff's attempt to create a genuine issue of material fact with respect to his claim that he was inappropriately singled out for punishment is wholly without merit. Plaintiff argues that "none of the detailed trial military defense attorneys at either the trial or appellate level were the subject of any such inquiry or charges, despite the fact that they were part of the team that formulated and implemented the trial strategy and submitted the Brief to the NMCCA." Plt. Opp. at 7. Plaintiff's argument in this regard ignores the fact that the inquiry and charges he faced were the result of his appellate brief, Compl., ¶¶ 34-35; AR 575, not what occurred at the trial. Also, plaintiff was the sole author of the appellate brief. AR 76; see Compl., ¶ 35 ("his brief"). Accordingly, he was properly held responsible for any misrepresentations made in that brief. Plaintiff's attempt to point the finger elsewhere in order to try and escape the consequences of the representations he made, in the appellate brief he wrote, should be rejected.

II. CONCLUSION

For the foregoing reasons, as well as the reasons set forth

in its motion for summary judgment in part and motion to dismiss in part, defendants respectfully request that this Court enter judgement in favor of defendants with respect to the First, Second and Third Causes of Action and dismiss the Fourth Cause of Action.

Respectfully Submitted,

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