

Prior to filing the instant summary judgment motion, the Secretary filed the entire certified administrative record in this case. *See* Docket under dates of July 29, 2003 and August 15, 2003 (non-confidential version). However, as Leveris points out, the Secretary's statement of material facts in support of his motion for summary judgment relies nearly exclusively on citation to one seventeen-page section of that record: the report that is at the heart of the instant dispute. *See* Motion To Strike at 1; Defendant's Statement of Undisputed Material Facts ("Defendant's SMF") (Docket No. 23); Review of Naval Record of Ex-Ens Arthur J. Leveris, USNR (Dep't of Navy Bd. for Corr. of Naval Records Jan. 13, 2000) ("Board Report"), attached as Exh. A to Defendant's SMF. That report, authored by the chairman of the Board for Correction of Naval Records, presented two recommendations to the Secretary: a majority recommendation that the relief sought by Leveris be awarded, and a minority recommendation that it be denied. *See* Board Report at 14-17. By endorsement, the Secretary (through Assistant Secretary of the Navy Carolyn H. Becraft) adopted the minority recommendation without comment. *See id.* at 17. In his two-count complaint, Leveris challenges that final action as (i) arbitrary, capricious and unsupported by substantial evidence in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and (ii) rendered in violation of the statute governing correction of military records by civilian boards, 10 U.S.C. § 1552. *See* Complaint ¶¶ 33-43.

As Leveris points out, to the extent the Secretary relies on the Board Report's summaries of the underlying record evidence, the report is hearsay. *See* Motion To Strike at 1-2 ("The Secretary of the Navy relies on this report as first-hand support for the facts upon which his Motion rests. While the report may evidence the Board's understanding of the Record, it cannot be relied upon for the purpose of Summary Judgment to accurately state the underlying facts in this matter."); *see also generally* Plaintiff's Opposition Statement of Material Facts (Docket No. 26) (lodging numerous hearsay objections). He

objects to it both on grounds that it fails to comport with the evidentiary requirements of Federal Rule 56 and that it provides for less than adequate APA review. *See* Motion To Strike; Plaintiff’s Reply to Defendant’s Objection to Plaintiff’s Motion To Strike Exhibit A (“Strike Reply”) (Docket No. 32).

The Secretary rejoins, *inter alia*, that (i) in an APA case such as this, it is appropriate for the court to focus on the administrative record, (ii) the Board Report is part of the certified administrative record, (iii) it is particularly appropriate to rely on the Board Report inasmuch as it sets forth the factual basis and rationale for the administrative decision that Leveris challenges, and (iv) Leveris has not identified any statement in the Board Report that is incorrect or otherwise inconsistent with any other aspect of the administrative record. *See generally* Opposition to the Motion To Strike (Docket No. 31). Nonetheless, precisely because the court is tasked in an APA case to judge the challenged decision against the backdrop of the record as a whole, *see, e.g., NLRB v. Beverly Enters.-Massachusetts, Inc.*, 174 F.3d 13, 23 (1st Cir. 1999), I agree with the thrust of Leveris’s argument that the Secretary’s exclusive reliance on the Board’s summary of the evidence of record does not comport with APA review.¹

¹ Leveris also argues, *inter alia*, that summary judgment is not an appropriate procedural mechanism by which to decide the instant appeal. *See* Plaintiff’s Response to Defendant’s Motion for Summary Judgment, etc. (Docket No. 25) at 5; Strike Reply at 2. While, as Leveris posits, *see* Strike Reply at 2, some courts have indeed questioned the utility of summary judgment in the context of APA review, *see, e.g., Heber Valley Milk Co. v. Butz*, 503 F.2d 96, 97-98 (10th Cir. 1974); *Brooks v. Lynn*, 65 F.R.D. 78, 79-80 (W.D. Okla. 1974), others have discerned no problem in its use, *see, e.g., Girling Health Care, Inc. v. Shalala*, 85 F.3d 211, 214-15 (5th Cir. 1996). Inasmuch as appears, the First Circuit has not squarely addressed the issue whether summary judgment is an appropriate vehicle for the resolution of appeals of final agency decisions; however, both the First Circuit and this court have indicated (at least in dictum) that it is. *See, e.g., Bayside Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 674 (1st Cir. 1998) (“In the administrative law context, where we review directly the decision of the agency, the APA can serve as an overlay to the familiar de novo standard applicable to appeals from a district court’s grant of a summary judgment.”); *Maine v. Norton*, 257 F. Supp.2d 357, 363 (D. Me. 2003) (“Summary judgment is an appropriate procedure for resolving a challenge to a federal agency’s administrative decision when review is based upon the administrative record, even though the court does not employ the standard of review set forth in Rule 56. Notwithstanding the foregoing, the Court provides the factual materials, taken from the Statements of Material Facts submitted by the parties in support of their respective summary judgment motions, to highlight appropriate portions of the complex administrative record of this case.”) (citations omitted). Thus, were the issue squarely presented, the First Circuit likely would embrace summary judgment as an appropriate mechanism for resolution of these kinds of cases. Be that as it may, the better practice in a case such as this is for counsel to seek judgment on the basis of a stipulated record. *See, e.g., Boston Five Cents Sav. Bank v. Secretary of Dep’t of Hous. & Urban Dev.*, 768 F.2d 5, 11- (continued on next page)

That said, I decline to accept Leveris's invitation to strike Exhibit A to the Defendant's SMF (the Board Report) in its entirety. To the extent the Secretary cites the Board Report for purposes of reciting the Board's findings and recommendations, *see* Defendant's SMF ¶¶ 53-60, 62-63, there is no error. Two additional statements, paragraphs 61 and 64 of the Defendant's SMF, are not implicated by Leveris's objections. *See id.* ¶¶ 61, 64. The motion to strike accordingly is granted with respect to paragraphs 1 through 52 of the Defendant's SMF, *see id.* ¶¶ 1-52, and otherwise denied. In the absence of valid record support for the majority of paragraphs 1 through 52, the facts stated therein are not cognizable on summary judgment. *See* Loc. R. 56(c) & (e).² The Secretary accordingly falls short of demonstrating entitlement to summary judgment in his favor.

II. Conclusion

For the foregoing reasons, I **GRANT** in part and **DENY** in part Leveris's motion to strike and recommend that the Secretary's motion for summary judgment be **DENIED**. I further recommend that the parties be directed to file, within fourteen days of the court's action on this recommended decision, either cross-motions for summary judgment, properly supported in accordance with Federal Rule of Civil Procedure 56 and Local Rule 56, or preferably cross-motions for judgment based on the administrative record filed on July 29, 2003 and August 15, 2003, properly supported in accordance with Local Rule 7.

NOTICE

12 (1st Cir. 1985) (discussing difference between cross-motions for summary judgment and motion for judgment on stipulated record; noting: "The case seems to be one that the parties wished a magistrate or judge (not a jury) to decide on the basis of a written record. They did not stipulate, however, that the magistrate should do so; they filed cross-motions for summary judgment instead. The (sometimes unrecognized) difference between these two procedures is important; to stipulate a record for decision allows the judge to decide any significant issues of material fact that he discovers; to file cross-motions for summary judgment does *not* allow him to do so.") (emphasis in original).

² The Secretary provides alternative record citations for two of the paragraphs in question. *See* Defendant's SMF ¶¶ 1, 6.

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 26th day of February, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

ARTHUR J LEVERIS

represented by **JEFFREY W. PETERS**
PRETI, FLAHERTY, BELIVEAU,
PACHIOS & HALEY, LLC
P.O. BOX 665
30 FRONT STREET
BATH, ME 04530-0665
443-5576
Email: jpeters@preti.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

NAVY, US SECRETARY

represented by **EVAN J. ROTH**
OFFICE OF THE U.S. ATTORNEY
P.O. BOX 9718
PORTLAND, ME 04104-5018
(207) 780-3257
Email: evan.roth@usdoj.gov
LEAD ATTORNEY

ATTORNEY TO BE NOTICED