

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ARTHUR J. LEVERIS,)	
)	
Plaintiff)	
)	
v.)	Civil No. 03-85-P-H
)	
GORDON R. ENGLAND,)	
Secretary of the Navy,)	
)	
Defendant)	

**MEMORANDUM DECISION ON PLAINTIFF’S MOTION TO STRIKE
AND RECOMMENDED DECISION ON CROSS-MOTIONS
FOR JUDGMENT ON ADMINISTRATIVE RECORD**

Defendant Gordon R. England, Secretary of the Navy (“Secretary”), and plaintiff Arthur J. Leveris cross-move for judgment on the administrative record in this case challenging the Navy’s decision to discharge Leveris and seek recoupment of nearly \$75,000 expended in educating him at the United States Naval Academy (“Naval Academy”). *See* Defendant’s Motion for Judgment Based on the Administrative Record, etc. (“Defendant’s Motion for Judgment”) (Docket No. 34); Plaintiff’s Opposition to Defendant’s Motion for Judgment Based on the Administrative Record and Motion for Judgment Based on the Administrative Record, etc. (“Plaintiff’s Cross-Motion”) (Docket Nos. 37, 42); *see also* Complaint (Docket No. 1).

Relatedly, Leveris asks the court to strike a statement of material facts filed by the Secretary, and the Secretary opposes Leveris’s cross-motion in part on the basis that it was belatedly filed. *See* Plaintiff’s Motion To Strike Defendant’s Statement of Undisputed Material Facts in Support of Defendant’s Motion

for Judgment Based on the Administrative Record, etc. (“Plaintiff’s Motion To Strike”) (Docket No. 39); Defendant’s Response to Plaintiff’s Cross-Motion for Judgment Based on the Administrative Record (“Defendant’s Judgment Opposition”) (Docket No. 43).

For the reasons that follow, I deny the motion to strike, reject the invitation to disregard Leveris’s cross-motion on the basis of its untimely filing and recommend that the Secretary’s motion for judgment on the administrative record be granted and that of Leveris be denied.

I. Applicable Legal Standards

In his two-count complaint, Leveris challenges the Navy’s action discharging him and seeking recoupment of education expenses 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, 10 U.S.C. § 1552(a). *See* Complaint ¶¶ 33-43. In an APA case, the court is tasked 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). “Arbitrary and capricious review requires the court to consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *McDonnell Douglas Corp. v. United States Dep’t of Air Force*, 215 F. Supp.2d 200, 204 (D.D.C. 2002) (citation and internal quotation marks omitted). However, “[a] reviewing court does not substitute its judgment for the judgment of the agency under the arbitrary and capricious standard of review.” *Id.*

By cross-moving for judgment based on the administrative record filed in this case, the parties empower the court to adjudicate this case based on that record, resolving any factual as well as legal disputes. *See, e.g., Brotherhood of Locomotive Eng’rs v. Springfield Terminal Ry. Co.*, 210 F.3d 18,

31 (1st Cir. 2000) (“In a case submitted for judgment on a stipulated record, the district court resolves disputed issues of material fact.”) (citation omitted).

II. Motion To Strike; Tardy Filing of Cross-Motion

The current round of briefing represents the parties’ second attempt to present the merits of their dispute. On December 11 and 12, 2003, respectively, the Secretary filed a motion for summary judgment and an accompanying statement of material facts. *See* Defendant’s Motion for Summary Judgment, etc. (Docket No. 21); Defendant’s Statement of Undisputed Material Facts (Docket No. 23). Leveris moved to strike the exhibit upon which the Secretary’s statement of material facts heavily relied – a copy of the decision of the Board for Correction of Naval Records (“Correction Board”) in his case – arguing that the Secretary improperly cited to the Correction Board’s overview of the underlying facts rather than to the administrative record as a whole. *See* Plaintiff’s Motion To Strike Exhibit A to Defendant’s Statement of Material Undisputed Facts in Support [sic] of Defendant’s Motion for Summary Judgment, etc. (Docket No. 24).

I granted the motion to strike in part, as a result of which I recommended that the Secretary’s motion for summary judgment be denied. *See* Memorandum Decision on Plaintiff’s Motion To Strike and Recommended Decision on Defendant’s Motion for Summary Judgment (“Recommended Decision”) (Docket No. 33). I further recommended “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.” *Id.* at 4.

On March 16, 2004 Judge Hornby entered an order adopting the Recommended Decision. *See* Docket No. 36. Prior to that time – on March 11, 2004 – the Secretary filed the instant motion for judgment on the administrative record. *See* Docket No. 34. On April 1, 2004 Leveris filed a combined opposition to the Secretary’s motion and cross-motion for judgment on the administrative record. *See* Docket Nos. 37 & 42.

Leveris moves to strike the Secretary’s newly filed statement of material facts, *see* Defendant’s Statement of Undisputed Material Facts (Docket No. 35), on the ground that it has no place in the context of a motion for judgment on the administrative record, *see* Plaintiff’s Motion To Strike. The Secretary opposes the motion, explaining that inasmuch as there is no Local Rule specifically governing a motion for judgment on the administrative record, he took the precaution of filing a statement of material facts (which he cross-references in his brief) to assist the court and to meet an arguable filing requirement. *See* Defendant’s Response to Plaintiff’s Motion To Strike (Docket No. 41).

Leveris is right. Local Rule 56 does not pertain to a motion for judgment based on the administrative record, and no separate statement of material facts need have been filed. In accordance with Local Rule 7, the Secretary need only have summarized in his memorandum of law such facts as he wished to highlight (with supporting citations to the record). Nonetheless, no useful purpose would be served in striking his statement of material facts, which is cross-referenced in his brief, and directing him to refile his memorandum with supporting citations interpolated therein. I accordingly deny the Plaintiff’s Motion To Strike, choosing instead to construe the Secretary’s memorandum as though his cross-references to his statement of material facts were direct references to the underlying record material.¹

¹ I will disregard Leveris’s responsive statement of material facts, which he seemingly filed in an abundance of caution (*continued on next page*)

One further preliminary matter merits attention. The Secretary asks that Leveris's cross-motion be denied in part on the basis of its tardiness. *See* Defendant's Judgment Opposition at 1. I decline to do so. As the Secretary points out, Leveris's cross-motion was due by March 30 and was filed two days late, on April 1. *See id.* Nonetheless, as Leveris rejoins, not only was the Secretary not prejudiced by the tardiness but also the vehicle the Secretary chose for resolution of the dispute contemplates a final adjudication of all claims in the case. *See* Plaintiff's Reply to Defendant's Opposition to Plaintiff's Response to Defendant's Motion for Judgment Based on the Administrative Record and Motion for Judgment Based on the Administrative Record (Docket No. 44). Thus, had I recommended denial of the Secretary's motion for judgment, I necessarily would have recommended judgment in favor of Leveris. I accordingly consider Leveris's cross-motion on its merits.

III. Factual Context

In August 1997 former Navy Ensign Leveris was a student at the Navy's Surface Warfare Officers School ("SWOS") in Newport, Rhode Island. Certified Administrative Record ("Record"), filed by Secretary on July 29, 2003 (confidential version) and August 15, 2003 (non-confidential version), Vol. I at 310, 317. He had been appointed to the Naval Academy Preparatory School in 1992, *see id.* at 47, 77, after an outstanding high-school football career that included receipt in 1991 of the James J. Fitzpatrick Trophy, "the schoolboy Heisman Trophy of Maine," *see id.* at 71-73. He was courted by the football coaches of a number of institutions, including Cornell University, Williams College, Brown University and the University of Notre Dame, *see id.* at 113-52, before choosing to attend the Naval Academy, from which he graduated in May 1997, *see id.* at 318.

simply to ensure that he fully answered the Secretary's motion for judgment. *See* Plaintiff's Opposition Statement of (continued on next page)

Sometime prior to August 6, 1997 (the exact date is unclear from the medical note of record) Leveris sought treatment for stiffness and pain in his lower back radiating into his right leg, which he attributed to a weight-lifting injury sustained three weeks earlier. *See id.* at 235. He was diagnosed with lumbar strain with sciatica, prescribed Naproxen and Flexeril (one tablet of each to be taken three times daily)² and told to follow up on August 6, 1997 or sooner if his symptoms worsened. *See id.*

On August 6, 1997 a classmate of Leveris's reported to the SWOS academic director that during a Unit 5B ("Moboard") examination that morning he had witnessed Leveris talking with another student, Ensign Ma,³ and writing on his exam as he looked at that of Ensign Ma. *Id.* at 290, 294-96. The following day Lieut. Michael Gorman, a legal officer, confronted Leveris with the charges against him and advised him of his rights. *See id.* at 304-06. Leveris chose not to make a statement. *See id.* That day he was obliged to retake the Unit 5B examination. *See id.*, Vol. III at 1002. He did far worse on the retake than he had on the original examination. *See id.*, Vol. I at 179.

Another SWOS legal officer, Lieut. John B. Garry, conducted a preliminary inquiry, recommending by memorandum dated August 28, 1997 that Leveris's alleged violation of the Uniform Code of Military Justice ("UCMJ") Article 133 be processed for commanding officer's non-judicial punishment. *See id.* at 290.⁴ Lieut. Garry based his recommendation in part on a report by another officer, Lieut. Rebecca A. Moore, that comparison of the test papers of Leveris and Ensign Ma revealed "a questionable pattern of the same incorrect answers," with "many of ENS Leveris' answers on his first exam differ[ing] from [those of

Material Facts (Docket No. 38) at 1.

² The relevant medical note states that the Naproxen and Flexeril were prescribed "TID," *see* Record, Vol. I at 235, which is an abbreviation for the Latin phrase "ter in die," meaning three times a day, *see* Stedman's Medical Dictionary 1835 (27th ed. 2000).

³ In accordance with the protective order entered in this case, *see* Stipulated Protective Order (Docket No. 8), and the non-confidential version of the Record I have withheld the full names of certain individuals.

Ensign Ma] by (+/-) 1.” *See id.* at 290-91. Lieut. Garry also based his recommendation in part on a memorandum dated August 26, 1997 from Leveris’s student advisor stating in relevant part:

ENS Leveris is a barely average student with a current average of 3.31 and class standing of 171 of 196. He has failed two exams, navigation and maneuvering board. He has been counseled by me four times. His first counseling session was the initial check in. The following sessions were for poor performance on exams and failure to report to me when required. He is currently on 18 hours of night study and eligible for reduction to 12 hours.

Id. at 302; *see also id.* at 290.

The above-described counseling session for failure to report when required was held on August 8. *See id.* at 331. At that time, the student advisor reminded Leveris that he had been told to see him/her immediately upon learning that he had failed an examination. *See id.* The day after the student advisor penned the August 26 memorandum, he/she again counseled Leveris for failure to meet night-study hours. *See id.* at 332. Leveris was removed from night study on September 3; however, the student advisor again imposed twelve hours of mandatory night study on September 8 as the result of another exam failure. *See id.*

On or about September 5, 1997 Leveris was notified that the commanding officer intended to impose non-judicial punishment and that he had the right to choose to refuse imposition of non-judicial punishment but could face court-martial if he exercised that right. *See id.* at 307-08. After Leveris exercised his further right to confer with a military lawyer he elected to proceed by way of non-judicial punishment, listing witnesses and attaching a written statement. *See id.* at 308-09. A “captain’s mast” was held on September 23, 1997, *see id.* at 230, following which the SWOS commanding officer, Capt. E.C. McDonough, issued Leveris a punitive letter of reprimand dated September 25, 1997 stating, *inter alia*:

⁴ Article 133 of the UCMJ proscribes “conduct unbecoming an officer and gentleman,” which is expressly defined to (continued on next page)

During Commanding Officers nonjudicial punishment proceedings, it was determined that you did, by your own admission, on or about 6 August 1997, while undergoing a written examination on the subject of Unit 5B Surface Warfare Officers School Division Officer Course material, wrongfully and dishonorably receive unauthorized aid by copying answers from another student. Your lack of judgment and maturity in this matter are major points of concern. However, your failure to live up to your obligations as a naval officer, as outlined and agreed to in your oath of office, is the most disheartening aspect of this incident. Having failed to live up to the standards required of naval officers, you have disappointed a great many people.

Id. at 310. By memorandum dated September 25, 1997 Leveris appealed his punishment on the grounds that it was too harsh and that the captain did not have all pertinent information. *See id.* at 280. He stated, *inter alia*:

3. On the morning of the 5B Moboard Exam, 06AUG97, I had trouble getting out of bed do [sic] to the severe pain in my back and my legs. I proceeded to take my prescriptions that were prescribed to me by Navy Medical. I was told to take 1 tablet of Naproxin and Cyclobenzaprine by mouth 3 times a day. After getting out of bed, I proceeded to take 3 tablets of both Naproxin and Cyclobenzaprine because of the condition I was in. I took the test that morning in a state that is still not clear to me to this day. My actions on 06AUG97 are truly not characteristic of me, and are truly not something I am proud to talk about. The thing that upsets me the most is I knew all of the material the week and night before the exam. I also did exceptionally well on all the quizzes leading up to the exam. I took a practical exam the night before the exam and also did extremely well.

4. I have always taken the blame when I failed at something in my life. In this case, I blame my actions on the heavy narcotics I was on. Again, I am not one to make excuses or one to point the finger at someone else. However, I know I would never do something like this under my normal health. I am also concerned why I was not sick in quarters when the condition I was in was so severe.

5. On 07AUG97, my class section had firefighting school at 0630. Again, I had trouble getting out of bed because of the pain in my back and legs. I took 3 tablets of both Naproxin and Cyclobenzaprine and drove to firefighting school. I was not allowed to participate in the firefighting school because of the medication I was on. The Petty Officer at the school told me to go home. When I got home I went to bed. Later that afternoon, LT. Gomez called me and told me I had to come in to study. I was in no state to drive nor was I in any state to study. I took my medication as prescribed and reported to LT.

include cheating on an examination. *See* Record, Vol. I at 314.

Gomez. When I got to SWOSDOC, LT. Moore made me take a retake on the 5B exam. I did the first few problems and then proceeded to sit there in a confused state. I wrote down answers without working out any of the problems on the remainder of the exam so I could get back to my apartment and go back to bed.

6. In hindsight, I should have told the instructors and my student advisor about my back situation and the pain I was experiencing in my back and legs. I think one of the reasons I did not bother telling anyone in the instructor bay about my back is because I had the impression that they did not care about their people. Furthermore, I was not asked once by my student advisor if I had any problems whatsoever.

7. In closing, I feel that I had the courage to admit my inappropriate actions at Captain's Mast, which I feel says something about my honor in itself. I also feel that one isolated incident like this should not end a young officer's career. The Navy Core Values are concrete and I support them whole heartedly. I believe I have the honor, courage, and commitment to do this job effectively in order to support and defend the Constitution of the United States. I have always been in great physical shape besides this injury and I have always practiced and preached the importance of integrity. I feel that this incident is a direct result of the medication and narcotics I was on.

Id. at 280-81. Leveris attached, among other things, a copy of a page from the Physicians Desk Reference describing Flexeril (Cyclobenzaprine HCl). *See id.* at 281-82.

On or about October 27, 1997 the acting SWOS commanding officer, Capt. R.L. Etter (who, inasmuch as appears, succeeded Capt. McDonough), recommended to the commander of the Naval Education and Training Center that Leveris's appeal be denied. *See id.* at 279. Capt. Etter wrote, *inter alia*:

4. ENS Leveris' academic performance while assigned to the Division Officer Course was below average. His class standing was 164 of 193 after eleven weeks of study putting him in the bottom twenty-five percent of his class. His grades on the quizzes he referred to in his appeal letter were also below the class average.

5. ENS Leveris was awarded a Punitive Letter of Reprimand. Due to the seriousness of the offense, that cheating strikes at the very heart of a command whose primary mission is to train and prepare Surface Warfare Officers in a classroom environment for rigorous tasks they will encounter when they reach the fleet, I feel [that the] punishment was just and proportionate to the offense for which ENS Leveris was found guilty.

Id. at 279. On or about November 13, 1997 the commander of the Naval Education and Training Center,

R.C. Bogle, denied Leveris's appeal, stating, *inter alia*:

3. Reference (a) [Leveris's appeal letter] states that the reason you cheated on the exam was due to the fact that your judgement [sic] was impaired due to prescribed narcotics. I find it unbelievable that you simply did not notify your instructors or student advisor of the condition you claim you were in. I do not accept your statement that “. . . I had the impression that they did not care about their people.” You simply could have asked anyone in your chain of command to attend sick call. I find your decision to knowingly cheat on the Navy exam to be exceptionally poor judgment, and in direct contrast to the standards set for United States Naval Officers.

4. Furthermore, your student advisor . . . presented evidence to the preliminary investigating officer that your overall class performance was below average. You constantly required counselling concerning poor performance and failure to report. Your Commanding Officer confirms . . . that your comments . . . to me concerning your prior academic achievements are misleading. This once again strikes directly at the Navy Core Values you mention in your appeal. I must seriously question your honesty, character, and integrity.

Id. at 277.

By memorandum dated December 4, 1997 Leveris attached a statement to his punitive letter of reprimand again describing his medical circumstances on August 67, 1997. *See id.* at 312. By memorandum dated December 22, 1997 Capt. Etter recommended to the chief of naval personnel that Leveris be administratively separated from active naval service and obliged to repay costs of his Naval Academy education. *See id.* at 285-86. On or about January 8, 1998 Cdr. Bogle concurred with that recommendation. *See id.*, Vol. III at 992.

By memorandum dated March 10, 1998 the chief of naval personnel, W.F. Eckert, informed Leveris that the “Show Cause Authority” had reviewed his case and determined that there was sufficient evidence to separate him involuntarily from the Navy based on his non-judicial punishment on September 23, 1997. *See id.*, Vol. I at 272. Leveris was informed of rights that included the opportunity to submit a

rebuttal, *see id.* at 273, and he did so on or about March 20, 1998, *see id.* at 37-41. He expressed regret that he had cheated on his Unit 5B exam, noting, *inter alia*:

As I previously stated in my appeal from nonjudicial punishment, I took the 5B exam in a state that is still not clear to me this day. I was taking two extra pills for every pill I was prescribed to take. Why do I put a lot of the blame of my actions on the narcotic I was on? It is very simple. I have never in my life put my honor on the line for any of my closest friends, let alone for an exam. I have never cheated on an exam in my life, and why would I now after receiving this big burden of duty and loyalty to country that I am carrying on my shoulders? I myself would not. That is why I feel the narcotics made me react in a way I would have normally never acted. I am an honest person, I have a strict obedience to duty, and I believe in my job and the oath to serve and protect the people of this world. I am ashamed that I imparted poor judgement [sic], but I do believe in redemption and a second chance. One error in judgement [sic] should not determine my worth as a naval officer or a person.

Id. at 37. He enclosed, *inter alia*, material on Cyclobenzaprine. *See id.* at 37, 39-41.

In response to Leveris's rebuttal, on or about April 15, 1998 the SWOS commanding officer, Capt. T.M. Wittkamp (who, inasmuch as appears, succeeded acting commanding officer Capt. Etter), recommended that Leveris be discharged without a show-cause hearing inasmuch as he had not demonstrated that special consideration or further review of his case was warranted. *See id.* at 263. By memorandum dated April 28, 1998 Cdr. Bogle concurred, stating: "ENS Leveris exercised extremely poor judgment in overuse of a narcotic, and then used it as an excuse to cheat on an exam. I do not believe a show cause hearing is warranted." *Id.* at 262.

On or about April 30, 1998 Rear Adm. L. R. Marsh, deputy chief of naval personnel, recommended to the Secretary that Leveris be discharged and obliged to repay \$74,966.40 in Naval Academy expenses. *See id.*, Vol. III at 1007-08. He observed, among other things:

ENS Leveris' argument that the "drug made him cheat" ignores his real misconduct, that is, the fact he knowingly and willfully over-medicated himself. He demonstrated a severe lack of judgment by endangering his own health and the safety of those around him. If the over-medication did cause him to cheat, it shows the extent to which drugs,

prescribed or not, can alter behavior when abused. ENS Leveris' actions, if done while in the Fleet, could have endangered his ship and its entire crew.

Id. at 1008.

By letter dated May 15, 1998 Francis J. Flanagan, counsel for Leveris, contacted Assistant Secretary of the Navy for Manpower and Reserve Affairs Bernard Rostker, forwarding what he described as new and vital evidence proving that Leveris was the victim of naval medical malpractice and/or reverse discrimination. *See id.*, Vol. I at 251. Inasmuch as appears, Flanagan's enclosures included a May 13, 1998 report by psychologist Charles W. Heffner, Ph.D., touching on the subject of Leveris's decision to take an overdose of his medications. *See id.* at 43-47. Dr. Heffner noted, *inter alia*:

As [Leveris] relates, the pain was severe and the one tablet each as prescribed was not offering relief. He was scheduled to take the exam on the day indicated and instead of begging off due to the pain, he felt he had to do his duty and carry on, so he took extra medication thinking that would allow him to do so. What we speculate happened here in terms of the extra medication was a function of what we would take the liberty of defining as a 'Vince Lombardi Mentality' (of Green Bay Packers and Washington Redskins fame).

The often quoted statement attributed to Lombardi that, "Winning isn't everything, it's the only thing," has been and continues to be the defining stance in competitive sports. That is, that no matter what, you stay in the game and play to win; if severe injuries are sustained, you find a way of fixing it temporarily either by injecting an anesthetic and/or taping it up and get back in the game, and focus on playing, not your injury. Next to the Navy, his family and country, Ensign Leveris loves athletics. . . .

The points made here are for the obvious reason, of first acknowledging that it was not good judgment for Ensign Leveris to take more medication than prescribed but secondly and mitigating the first, that it is understandable when one considers where he comes from, in terms of the competitive/athletic mentality.

Id. at 45-46. Dr. Heffner also expressed the opinion that during the Unit 5B examination Leveris "was in what could be described as a chemically altered mental state during which his normal capacity for good judgment was seriously compromised." *Id.* at 46.

Rostker sought an advisory opinion from Surgeon General of the Navy Harold M. Koenig, who noted by memorandum dated June 22, 1998:

The usual dosage for Cyclobenzaprine is 10mg taken three times a day with a range of 20 to 40mg per day in divided doses. Higher dosages can lead to disturbed concentration, agitation, temporary confusion, and transient visual disturbances, upset stomach and other symptomatic complaints.

It is our opinion that the combination of these two medications may have contributed to Ensign Leveris' confusion and cheating on the examination.

Id., Vol. II at 394.

Rostker nonetheless approved the recommendation of the deputy chief of naval personnel that Leveris be discharged. *See id.*, Vol. III at 1008.⁵ He explained that despite taking into consideration Surgeon General Koenig's opinion:

When the facts of the case are examined, . . . the argument that medication, alone, caused ENS Leveris to cheat does not have merit. The fact that ENS Leveris' test answers were so close to [Ensign Ma's] (whose test answers he copied) shows that he was competent, even shrewd, enough to be accurate and meticulous in copying another's test, varying answers slightly but within the narrow tolerances allowed on the test.

Id. By letter dated July 24, 1998 Rostker also responded directly to Flanagan's letter of May 15, 1998, stating that after careful consideration of all facts of the case, including medical information and materials submitted by Leveris's father concerning his son's performance before and during his years at the Naval Academy, he had determined that Leveris's "decision to cheat on the exam was deliberate and not as a result of his prescription medication." *Id.*, Vol. I at 252. Leveris was to be discharged on August 31, 1998. *See id.*, Vol. II at 429.

⁵ As the Correction Board points out, *see* Record, Vol. I at 14, the Record indicates that Rostker's decision was made on May 21, 1998, *see id.*, Vol. III at 1008, but that date likely is a typographical error inasmuch as the Surgeon General's report is dated June 22, 1998, *see id.*, Vol. II at 394.

By letter dated August 6, 1998 Flanagan asked Rostker to reconsider the case on the basis that information had come to light that another ensign at SWOS (Ensign Mi, whom Flanagan indicated was of a different race than Leveris) had been treated more favorably for the same offense, having been retained by the Navy. *See id.*, Vol. I at 256.

With respect to Ensign Mi, the Record indicates that:

1. Ensign Mi (along with SWOS classmates) took a written examination on January 7, 1998. *See id.*, Vol. II at 341. Instructors graded the papers and then returned them to the class for review to ensure that the students understood the material and to provide them an opportunity to submit answers for re-grades if they felt they should have received additional credit. *See id.* Ensign Mi, who had failed the test, requested re-grading of three answers. *See id.* Upon reviewing the request the following day, one of Ensign Mi's instructors suspected that he had changed his answers by adding information given during the post-examination review. *See id.* at 356. The instructor explained that his suspicions were aroused by "the slightly different slant to the writing, the slightly larger size of the writing, and its position on the paper (after my grade marks)." *Id.* He further explained that he "had been the original grader of the test and distinctly remembered that info[rmation] not being there." *Id.*

2. On January 8, 1998 a SWOS legal officer, Lieut. Va, confronted Ensign Mi with the suspected violation of UCMJ Article 133 and informed him of his rights. *See id.* at 353. Ensign Mi confessed, waiving his rights to remain silent and to have an attorney present. *See id.* In his memorandum of the same date reporting this meeting, Lieut. Va wrote, *inter alia*:

[Ensign Mi] was forthright and honest in his admission to having cheated. He did not try to lie or cover-up the incident, but he seemed to want to come clean. He later told me in a private conversation that he did not get much sleep due to this incident weighing on his mind, and that he was truly sorry and was ready to atone for this integrity violation as

soon as possible. He was also regretful of the fact that he did not come forth earlier in the morning and confess to the wrongdoing on his own.

Id. at 353.

3. Ensign Mi handwrote a statement dated January 8, 1998 in which, *inter alia*, he described the conduct as uncharacteristic of him and concluded:

Now I must gain everyone's trust again and I must maintain my integrity. It cannot falter again and it won't. I have learned from this experience and from that knowledge I will build myself back up as a gentleman and, if given the opportunity to stay in the Navy, as a naval officer. This has been a very painful lesson for me to swallow. First of all though it should have never happened. There is only one thing that I can say to the Navy, my family and peers and that is, "I'm sorry and it will never happen again."

Id. at 362-63.

4. By memorandum dated January 10, 1998 Ensign M apologized to his steam-class instructors. *See id.* at 354.

5. On or about January 12, 1998 Ensign Mi was notified that the commanding officer intended to impose non-judicial punishment and that he had the right to choose to refuse imposition of non-judicial punishment but could face court-martial if he exercised that right. *See id.* at 364-66. After Ensign Mi exercised his right to confer with a military lawyer he elected to proceed by way of non-judicial punishment. *See id.*

6. In preparation for captain's mast proceedings, Lieut. Va submitted a memorandum dated January 21, 1998 to the commanding officer stating, with respect to matters in aggravation, extenuation and mitigation:

[Ensign Mi] has had an above average academic record since reporting to SWOS as a student. He had never failed a test at SWOS until the Unit 3 Examination of Basic Steam material, and afterwards, with NJP as a possibility, [Ensign Mi] doubled his efforts to succeed. He stayed late at school helping fellow classmates learn material for their final two tests in the Basic Steam curriculum. He graduated with the rest of SWOSDOC Class 126

last Friday. He has written an apology to the Engineering staff, which I do not get the impression is merely lip-service. I have spoken with him numerous times since the incident and I truly feel that he desires to make amends for what he has done. [Ensign Mi] has no previous NJP's or counseling entries in his service record.

Id. at 345-46. Lieut. Va opined that in view of “the seriousness of the offense and that the integrity and honor of a commissioned naval officer should always be above reproach,” imposition of non-judicial punishment was warranted; however, he stated that he “would like to hear more from [Ensign Mi] at the NJP proceeding” before being prepared to recommend that Ensign Mi be discharged with recoupment of the costs of his Naval Academy education. *Id.* at 346.

7. A captain's mast was held in Ensign Mi's case on January 22, 1998, following which the SWOS commanding officer, Capt. Wittkamp, issued Ensign Mi a punitive letter of reprimand stating, *inter alia*:

During Commanding Officer's nonjudicial punishment proceedings, it was determined that you did, by your own admission, on or about 7 January 1998, during a post-examination review of Basic Steam Engineering Unit 3 material, wrongfully alter your examination answers after hearing the proper answers given by the instructor and submit those altered answers for the purpose of receiving additional credit. Your lack of judgment and maturity in this matter are major points of concern. However, your failure to live up to your obligations as a naval officer, as outlined and agreed to in your oath of office, is the most disheartening aspect of this incident. Having failed to live up to the standards required of naval officers, you have disappointed a great many people.

Id. at 370.

8. Ensign Mi declined to appeal the imposition of non-judicial punishment. *See id.* at 368. He submitted a written statement dated February 3, 1998 in which he again apologized for his conduct and expressed an intention to build himself back up as an officer and a gentleman. *See id.* at 369.

9. In a February 1998 memorandum to the chief of naval personnel, Capt. Wittkamp stated, *inter alia*:

[Ensign Mi] was assigned as a student at Surface Warfare Officers School Command in September 1997 and was an above average student academically. His academic performance and dedication to classroom instruction has been steadily increasing since the incident, and he appears determined to atone for this grave breach [sic] of his personal integrity.

Id. at 341-42.

10. In April 1998 Ensign Mi was ordered to report to the USS Juneau at its home port in San Diego, California. *See id.* at 384. His final overall grade-point average was 3.5270, and he was ranked 115 in his SWOS class of 177, having completed both phase one and phase two of his studies. *See id.* at 378.

By letter dated September 4, 1998 Rostker responded, *inter alia*, to Flanagan's letter of August 6, 1998, stating in relevant part that he had found no evidence of racial discrimination in the processing of Leveris's case, that "[t]he commanding officer who reviewed the case of [Ensign Mi] found it to be materially different" and that he (Rostker) also had reviewed Ensign Mi's case and concurred with the commanding officer's assessment. *Id.*, Vol. I at 179-80.

Rostker also explained that after reviewing Surgeon General Koenig's report that the medications might have contributed to Leveris's confusion and cheating, he had looked closely at the answers from Leveris's first navigation exam compared with those of Ensign Ma. *See id.* at 179. He stated:

It was apparent to me that Ensign Leveris did not just copy [Ensign Ma's] answers directly, but was clever enough to alter them slightly so that his answers were different from [Ensign Ma's] but remained within the tolerances allowed on the test. I found it curious that even those questions [Ensign Ma] missed were also answered incorrectly by Ensign Leveris within the same tolerances as the correct responses. Ensign Leveris' effort was accurate, meticulous and, I believe, deliberate.

On the second navigation exam, Ensign Leveris' score was far worse than his first, even though it was the very same test. In some instances his answers showed compass values off by almost 180 degrees and speed values at twice the correct response. It was obvious that he simply did not know the material. It was clear to me, based on my review

of the two exams, that Ensign Leveris was cognizant of the fact that he was cheating on his first exam and was not so confused that he did not change his answers in a deliberate and calculating fashion. In my judgment, Ensign Leveris' self-reported overdose does not release him of responsibility for his act, and the unanimous recommendation of the chain of command that he be separated from the service.

Id. at 179-80.

By letters dated September 10 and 30, 1998 Flanagan made further requests for deferment of Leveris's separation and reconsideration of his case, providing among other things a letter dated September 2, 1998 from John E. Kazilionis, D.O., regarding the proper dispensation of Flexeril and its side effects, which he noted included disorientation, hallucinations, abnormal thinking and dreaming, anxiety and depressed mood. *See id.*, Vol. II at 432-33, 438-39, 450-51. By letter dated September 14, 1998 Rostker agreed to hold Leveris's separation in abeyance to permit submission of additional comments and materials. *See id.* at 396. By letter dated October 22, 1998 he informed Flanagan that he had found the new material cumulative and had not been persuaded to alter his decision. *See id.* at 398.

By letter dated October 30, 1998 Flanagan transmitted a further piece of evidence to Rostker in the form of a letter from Dr. Kazilionis commenting on Rostker's October 22, 1998 letter.⁶ *See id.* at 461-62.

Dr. Kazilionis wrote, in part:

My first comment concerns the report that Ensign Leveris was not confused as the result of a reported overdose of Flexeril[], but that he demonstrated "shrewdness and cunning" in providing test answers that were similar to those of another ensign. . . . Mr. Rostker appears to be making a judgement [sic] about Ensign Leveris' state of mind at the time of the test. This seems to fall into the realm of neuropsychological evaluation. However, determination as to the state of mind of an individual can only [be] made after a battery of neuropsychological tests have been applied and the interpreter has training in psychiatry or neuropsychology. Therefore, it is only if Mr. Rostker has training as a psychiatrist or

⁶ The Record indicates that Flanagan did not receive a copy of Rostker's October 22, 1998 letter until October 30. *See* Record, Vol. II at 461.

neuropsychologist and has applied such testing that he can authoritatively make a comment as to Ensign Leveris' state of mind during the test.

My second comment concerns Mr. Rostker's comments that he has determined that Mr. Leveris was not confused during the time the test answers were provided. This statement is not reasonable unless Mr. Rostker was present at the time the answers were provided and if he did a mental status examination that would allow him to render a clinical opinion as to Ensign Leveris' state of mind. . . . Furthermore, I am not aware if Mr. Rostker has the educational background or clinical experience to determine the possible effects of Flexeril[] on an individual who has taken an overdose.

There are a number of adverse reactions that can occur in the presence of an overdose of Flexeril[]. I believe an individual who had taken an overdose of that medication could have an alteration of behavior patterns but still be able to communicate in writing in a fashion that imparted information of a complex nature.

Id. at 463-64.

On or about October 27, 1998 Leveris was discharged from the Navy. *See id.*, Vol. I at 336. An Academic Grade Report dated July 29, 1999 indicates that he had a final grade point average of 3.3224, did not complete phase two of his studies and had a final class rank of 172 out of 177. *See id.* at 320.

On or about June 9, 1999 Leveris appealed the discharge decision to the Correction Board. *See id.* at 172. The Correction Board solicited further comment from the SWOS commanding officer, *see id.* at 226, and from Navy Personnel Command legal counsel, *see id.* at 32. By memorandum dated August 9, 1999 Capt. R.T. Moeller, then SWOS commanding officer, stated, *inter alia*:

3. ENS Leveris was a below average student, standing 167 out of 193 students at the time of the offense, with a grade point average of 3.35, only slightly above the minimum passing score of 3.2. He had failed an exam prior to taking Exam 5B, and was required to attend night study to correct his academic difficulties.

6. ENS Leveris made several gross errors in judgment. First, he took three times the prescribed dosage of Naproxin and Cyclobenzaprine prior to driving to school to take an exam, yet failed to tell any of his instructors he had done so, even though he admitted in his NJP appeal he was in no condition to drive, let alone take an exam. His reasoning for

failing to provide this information was his belief that the instructors did not care about their people. Ultimately, and most importantly, ENS Leveris admitted cheating on the exam, an admission to misconduct that was appropriately addressed with a punitive letter of reprimand.

8. Subsequent to ENS Leveris' non-judicial punishment [sic], [Ensign Mi] was also found guilty of violating the UCMJ, Article 133, for cheating on an exam. CAPT. T.M. Wittkamp, USN, CAPT McDonough's successor in command, also awarded a punitive letter of recommendation for this misconduct. CAPT Wittkamp, in his endorsement of the report of non-judicial punishment, did not recommend separating [Ensign Mi] from the naval service. He based this decision on his belief [Ensign Mi] had learned from his error, his strong academic performance, and his desire to atone for his mistake. Despite this grave breach of judgement [sic], CAPT Wittkamp believed [Ensign Mi] had the potential to overcome his misconduct and become a successful Naval Officer.

Id. at 226-27.

By memorandum dated November 22, 1999 ("NPC Advisory Opinion") Cdr. James F. Prothro of the Naval Personnel Command stated, in part:

1. [W]e conclude that the record does not reflect that [Leveris] was a victim of "reverse discrimination.[]" We also conclude that the record does not reveal any rational basis for the very different treatment of the two officers.

4. [T]he two officers received very disparate treatment from their command for the same offense. The record is devoid of any significant difference in the two young men's careers that would explain why they were so differently treated. Both men were age 23 and recent graduates of the Naval Academy. Both were having academic problems at the SWOS School. Both had failed exams, and neither was a strong student in SWOS. At the time of his mast, Leveris apparently had a grade point of 3.31 and his class rank was 171 out of 196. . . . [Ensign Mi], upon graduation from SWOS, had a final average of 3.527 and a class rank of 115 out of 177.

5. We note that ENS Leveris' commanding officer was CAPT McDonough. CAPT McDonough was succeeded in command at SWOS by CAPT Wittkamp. Apparently, CAPT Wittkamp viewed the [Ensign Mi] NJP case as not warranting administrative processing, even though the ENS Leveris discharge processing was still ongoing at the command at the time.

6. Our review of the file has revealed no errors or violations of applicable policies and regulations. However, it is difficult to discern a rational basis for the disparate handling of the NJP offenses of the two officers. We note that ENS Leveris appealed his mast punishment, while [Ensign Mi] did not. The disparate handling of the two cases after the masts raises an inference that ENS Leveris was being punished for appealing his mast, which was, of course, his legal right.

7. In the opinion of the undersigned officer, ENS Leveris was unjustly treated by his command. There is no rational distinction between his offense and [Ensign Mi's]. Both officers cheated on exams, later admitted the facts, asked for forgiveness and pledged that they would strive to do better. Neither . . . was a particularly good student. Each had academic problems that prompted them [sic] to cheat. It was appropriate for the command to punish both at a mast, to punish them with written reprimands, and to fully document their offenses in their Navy records. Given all of the similarities in their offenses and their service history, it is troubling that [Ensign Mi] was allowed to remain in the Navy, whereas ENS Leveris was discharged and sent home. Moreover, the Navy will attempt to recoup from ENS Leveris the cost of his education, some \$74,000.00.

8. We do not suggest that the Navy's administrative discharge procedures must always be perfectly fair, and that the use of discretion in applying them is not appropriate and necessary. Deciding who is processed for a discharge and who is retained on active duty is a matter of judgement [sic] for the command, and many facts will be considered in every case. The command followed the letter of the law in the ENS Leveris case. However[,] fair and even-handed application of the administrative law has been lost. The command's actions appear to be arbitrary. [The Correction Board] has the authority to correct a record if it contains unjust information or caused an injustice to a service member.

9. Given all of the above, we believe there is sufficient evidence to conclude that the actions taken against ENS Leveris have resulted in an injustice to him which may be corrected by granting his petition, and restoring him to active duty.

Id. at 32-35.

By decision dated January 13, 2000 two of the three members of the Correction Board ("Majority") recommended that the Secretary grant the relief Leveris requested while the third ("Minority") recommended that no relief be granted. *See id.* at 5, 18-21. The Majority rejected Leveris's contention that his overmedication and resultant side effects warranted relief on the ground that "voluntary over medication does not excuse misconduct any more than voluntary intoxication." *Id.* at 18. The Majority also

agreed with Rostker’s “perceptive analysis” of the examination papers and conclusion that Leveris “was sufficiently lucid not only to cheat, but to do so shrewdly” – a type of analysis that the Majority concluded necessitated no special training or expertise. *Id.* at 19. Finally, even taking into account Leveris’s status as a football player and the role the “Lombardi mentality” may have played in his decision to overmedicate, the Majority agreed with Rear Adm. Marsh that Leveris’s bad judgment in overmedicating was in itself sufficient cause for separation. *See id.*

Nonetheless, the Majority concluded that “given the favorable outcome in the case of [Ensign Mi, Leveris’s] discharge constitutes unjustly disparate treatment.” *Id.* at 18. The Majority adopted the reasoning of the NPC Advisory Opinion “to the effect that it was unjust to discharge [Leveris] but not [Ensign Mi].” *Id.* at 19. The Majority explained that it was “very much aware that no two fact patterns are ever exactly alike.” *Id.* “However, the majority believes that the cases of [Leveris] and [Ensign Mi] are far more similar than they are different, and the far more unfavorable treatment [Leveris] received was fundamentally unfair.” *Id.*

The Minority “fully agree[d] with the majority’s analysis of the issue concerning [Leveris’s] overmedication, but disagree[d] with the conclusion of the advisory opinion and the majority that [Leveris] was victimized by unjustly disparate treatment.” *Id.* at 20. The Minority reasoned:

[T]here is nothing wrong with treating similarly situated people differently so long as there are good and sufficient reasons for such treatment. Further, as the advisory opinion notes, decision makers such as the CO of SWOSCOLCOM are vested with considerable discretion in the administrative separation process. The minority believes that absent persuasive evidence to the contrary, such individuals should benefit from a strong presumption that their actions are proper. Further, two different CO’s acted on the cases of [Leveris] and ENS Mi, and the minority notes that such individuals may legitimately differ in their opinions concerning the disposition of certain cases.

The minority member then concedes that the cases of [Leveris] and ENS Mi are similar. Both were young officers who were struggling at SWOS and cheated on an examination.

However, there were also significant differences. Although neither individual had an exemplary academic record, ENS Mi's record was a good deal better than [Leveris's]. ENS Mi's GPA was 3.53 while [Leveris's] was only 3.32. More significantly, while ENS Mi's class rank of 115 out of 177 was unremarkable, it arguably was in the average range. On the other hand, [Leveris's] final class rank, either 164 out of 193 or 172 out of 177, was clearly below average. Further, ENS Mi completed both phases of DOC and failed only one examination – the one he cheated on. [Leveris] failed a total of three examinations in phase one alone.

It also appears to the minority that [Leveris] had a poor attitude as well as a poor academic record. He had to be counseled on several occasions, once for missing a mandatory study session that he obviously needed. This missed session and one of the examination failures occurred after he was caught cheating, when an individual who genuinely desired retention would have taken care to be especially conscientious. In contrast, ENS MI appears to have shown an excellent attitude, with the exception of the one instance of cheating. Unlike [Leveris], he redoubled his efforts after he was caught, obviously attempting to atone for his mistake.

Additionally, although both [Leveris] and ENS Mi cheated on an examination, the minority member notes that they reacted differently when confronted with their misconduct. ENS Mi forthrightly admitted he was wrong and pledged never to repeat this mistake. [Leveris], on the other hand, attempted to use his over medication not simply as a matter in mitigation, but as a way to evade accountability for his actions.

The minority member does not mean to imply that she necessarily would have processed [Leveris] for separation and retained ENS Mi. However, there were perfectly legitimate reasons for different treatment of these two different individuals. Along these lines, the minority specifically rejects the hypothesis of the advisory opinion that [Leveris] was processed for separation because he appealed his NJP and ENS Mi did not.

Id. at 20-21.

The bottom of the last page of the Correction Board report contained two lines, “MAJORITY RECOMMENDATION APPROVED:” and “MINORITY RECOMMENDATION APPROVED[.]” *Id.* at 21. Carolyn H. Becraft, then Assistant Secretary of the Navy for Manpower and Reserve Affairs, crossed off the top line and signed her name under the bottom one. *See id.* By letter dated May 17, 2000 the executive director of the Correction Board informed Leveris that his application had been denied, stating, *inter alia*: “In accordance with current regulations, the Assistant Secretary of the Navy for

Manpower and Reserve Affairs conducted an independent review of the Board's proceedings and approved the minority recommendation that your application be denied." *Id.* at 189. Leveris sought reconsideration, submitting an additional opinion of a clinical psychologist, Ralph M. Zieff, Ph.D. *See id.*, Vol. II at 565-68. By letter dated June 21, 2001 the executive director of the Correction Board denied the request. *See id.*, Vol. I at 22-23.

IV. Discussion

Pursuant to 10 U.S.C. § 1552, "[t]he Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1). Except in circumstances not here relevant, "such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department." *Id.* In the case of the Navy, the Correction Board is authorized to take final action on behalf of the Secretary on a petition for correction except, *inter alia*, when its recommendation is not unanimous. *See* 32 C.F.R. § 723.6(e)(1)(ii). In that circumstance, the Secretary must make the final decision. *See id.* § 723.7(a). If his "decision is to deny relief, such decision shall be in writing and, unless he or she expressly adopts in whole or in part the findings, conclusions and recommendations of the Board, or a minority report, shall include a brief statement of the grounds for denial." *Id.*

This statutory scheme – which authorizes correction of military records "when the Secretary considers it necessary" – has been described as "fairly exud[ing] deference" to the Secretary. *Kreis v. Secretary of Air Force*, 866 F.2d 1508, 1513 (D.C. Cir. 1989) (citation and internal quotation marks omitted). Thus, while such decisions have been held subject to review pursuant to the APA, the review is of a particularly deferential nature:

So long as the Secretary's exercise of that discretion [to correct a military record] is not to be utterly unreviewable, . . . he must give a reason that a court can measure, albeit with all due deference, against the 'arbitrary or capricious' standard of the APA. Perhaps only the most egregious decisions may be prevented under such a deferential standard of review. Even if that is all the judiciary can accomplish, in reconciling the needs of military management with Congress's mandate for judicial review, then do it we must; it is not for us but for Congress to say whether the game is worth the candle.

Id. at 1514-15; *see also, e.g., Cone v. Caldera*, 223 F.3d 789, 793 (D.C. Cir. 2000) (correction board decisions are to be reviewed "under an unusually deferential application of the 'arbitrary or capricious' standard" of the APA, "calculated to ensure that the courts do not become a forum for appeals by every soldier dissatisfied with his or her ratings, a result that would destabilize military command and take the judiciary far afield of its area of competence.") (citations and internal quotation marks omitted).

Against this backdrop, the Secretary seeks judgment in his favor on the basis that his adoption of the Minority recommendation was authorized by law and fully supported by the Record. *See generally* Defendant's Motion for Judgment. Leveris opposes the Secretary's motion and cross-moves for judgment in his favor on grounds that (i) Assistant Secretary Becraft lacked authority to take final action on his petition, (ii) the Minority recommendation was not based on substantial evidence and represented a clear error in judgment, (iii) Becraft's acceptance of the Minority recommendation without explanation was arbitrary and capricious and represented a clear error in judgment, and (iv) the decision to discharge him and recoup the cost of his completed Naval Academy education was arbitrary and capricious. *See generally* Plaintiff's Cross-Motion. Leveris's points encompass all issues in this case; accordingly, I consider each in turn, finding none to have merit.

A. Authority of Assistant Secretary

Leveris first contends that Assistant Secretary Becraft lacked authority to act for the Secretary inasmuch as (i) the Correction Board's implementing regulations, specifically 32 C.F.R. § 723.7(a), provide

for the Secretary alone to act, (ii) the relevant statute, 10 U.S.C. § 1552(a), does not allow for delegation, and (iii) even were delegation permitted, there is no Record evidence that such delegation was effectuated. *See id.* at 6-7. I find no procedural error in the handling of Leveris’s petition by Becraft.

As Leveris observes, *see id.*, the relevant statute and regulation contemplate that the “Secretary” will take final action on a petition for correction of a military record, *see* 10 U.S.C. § 1552(a)(1); 32 C.F.R. § 723.7(a). Nonetheless, as the Secretary suggests, these authorities cannot reasonably be construed in a vacuum. *See* Defendant’s Reply to Plaintiff’s Opposition to the Motion for Judgment Based on the Administrative Record (“Defendant’s Judgment Reply”) (Docket No. 40) at 2-3. As the Secretary argues, *see id.*, and as the United States Court of Federal Claims held when presented with a similar argument, *see Loeh v. United States*, 57 Fed. Cl. 743, 748-49 (Fed. Cl. 2003), the Assistant Secretary of the Navy for Manpower and Reserve Affairs is a civilian executive assistant, *see* 32 C.F.R. § 700.310(a)(3), and civilian executive assistants “are authorized and directed to act for the Secretary within their assigned areas of responsibility,” *id.* § 700.320(c).

Becraft, as Assistant Secretary of the Navy for Manpower and Reserve Affairs, was charged with overall responsibility for personnel matters and given express authority to supervise the Correction Board. *See* 10 U.S.C. § 5016(b)(2) (“One of the [four] Assistant Secretaries [of the Navy] shall be the Assistant Secretary of the Navy for Manpower and Reserve Affairs. He shall have as his principal duty the overall supervision of manpower and reserve component affairs of the Department of the Navy.”); 32 C.F.R. § 700.324(b) (“The Assistant Secretary of the Navy (Manpower and Reserve Affairs) is responsible for . . . [s]upervision of offices and organizations as assigned by the Secretary, specifically the Naval Council of Personnel Boards and the Board for Correction of Naval Records.”). Accordingly, she was both

authorized and directed to act on behalf of the Secretary with respect to Leveris's petition for correction of his Naval record.

B. Substantiality of Evidence Supporting Minority Recommendation

Leveris next asserts that the Minority recommendation is unsupported by substantial evidence of Record and represents a clear error in judgment inasmuch as:

1. The author admitted that she based her recommendation solely on her belief that the SWOS commanding officer had discretion to discipline Leveris as he saw fit, even if that discipline included unlawful, disparate treatment. *See* Plaintiff's Cross-Motion at 7.

2. The author failed (i) to address the NPC Advisory Opinion findings and conclusions or (ii) to explain how the commanding officer's exercise of discretion could excuse his unjust, disparate treatment of Leveris. *See id.* at 7-8.

As the Secretary rejoins, *see* Defendant's Judgment Reply at 1-2, this simply is not a fair reading of the Minority recommendation. The Minority did not suggest that discretion excuses unlawful disparate treatment; rather, she disagreed that Leveris had been subject to such treatment, as a result of which she concluded that Naval officials permissibly had exercised their discretion to treat Leveris and Ensign Mi differently. *See* Record, Vol. I at 20-21. In so doing, the Minority was careful to distinguish her findings and conclusions from those of the NPC Advisory Opinion that had swayed the Majority. *See id.*

As the Minority pointed out, she and the NPC Advisory Opinion were in fundamental agreement that officers necessarily must exercise discretion in judging whether any given case of misconduct warrants discharge. *Compare id.* at 20 (Minority's observation that "as the advisory opinion notes, decision makers such as the CO of SWOSCOLCOM are vested with considerable discretion in the administrative separation process.") *with id.* at 34 (NPC Advisory Opinion statement that "[w]e do not suggest that the

Navy's administrative discharge procedures must always be perfectly fair, and that the use of discretion in applying them is not appropriate and necessary. Deciding who is processed for a discharge and who is retained on active duty is a matter of judgement [sic] for the command, and many facts will be considered in every case.”).

Nonetheless, while the NPC Advisory Opinion perceived no “rational basis” for the differential treatment of Leveris and Ensign Mi, *see id.* at 32, and the Minority conceded that the cases were “similar” inasmuch as both individuals “were young officers who were struggling at SWOS and cheated on an examination,” *see id.* at 20, the Minority discerned “significant differences” between the two cases, *see id.* at 20-21. Each of the distinctions she listed is supported by the evidence of Record, namely, that:

1. Ensign Mi's grade point average was 3.53 while that of Leveris was 3.32. *See id.* at 20, 320; Vol. II at 378.

2. Ensign Mi's class rank was 115 out of 177 while Leveris's final class rank was either 164 out of 193 or 172 out of 177. *See id.*, Vol. I at 20, 279, 320; Vol. II at 378.

3. Ensign Mi completed both phases of his training and failed only one examination, the one he cheated on, while Leveris failed a total of three examinations in phase one alone. *See id.*, Vol. I at 20, 302, 320, 332; Vol. II at 345-46, 378.

4. Leveris had to be counseled on several occasions and missed a mandatory study session and failed an examination after he was caught cheating, while Ensign Mi redoubled his efforts after he was caught. *See id.*, Vol. I at 20, 302, 331-32; Vol. II at 342.

5. Upon being caught Ensign Mi admitted he was wrong and pledged never to repeat the mistake while Leveris sought to attribute his cheating to overmedication. *See id.*, Vol. I at 20-21, 280-81; Vol. II at 362-63.

Reasonable people could disagree whether these distinctions are or are not significant; indeed, that is the crux of the disagreement between the Majority/NPC Advisory Opinion and the Minority/Secretary. What bears emphasis here, however, is that the Minority/Secretary's view is entirely reasonable. The Record as a whole makes clear that the Navy's concerns about Leveris ranged beyond the original cheating incident, encompassing (i) Leveris's poorer academic performance, (ii) his continued academic struggles and need for counseling following the cheating incident, and, most importantly, (iii) the fact that he had chosen to overmedicate himself – a judgment call that, if made at sea, could have endangered his ship and crew – and then sought to absolve himself of responsibility for cheating on that basis.

Once one accepts the premise that the distinctions between the two cases are significant, the final conclusions of the Minority/Secretary – that “there were perfectly legitimate reasons for different treatment of these two different individuals” and that “the record fails to show that either of the SWOSCOLCOM CO's abused his discretion in the case of [Leveris] or ENS Mi,” *id.*, Vol. I at 21 – flow logically therefrom.

In short, the Minority recommendation (as adopted by the Secretary) represents a reasonable judgment rooted in substantial evidence of Record. The APA requires no more. *See, e.g., Kreis*, 866 F.2d at 1511 (in context of review of final action on Correction Board petition, court's task is “to determine only whether the Secretary's decision making process was deficient, not whether his decision was correct.”); *Mudd v. Caldera*, 134 F. Supp.2d 138, 143 (D.D.C. 2001), *appeal denied sub nom. Mudd v. White*, 309 F.3d 819 (D.C. Cir. 2002) (once the Secretary fairly considers all the evidence of record, he is “free to draw his own reasonable inferences and conclusions from the evidence before him.”).

C. Adoption of Minority Recommendation Without Comment

Leveris next presses three related points: that (i) Becraft's lack of explanation of her reason for choosing the Minority over the Majority recommendation rendered her decision arbitrary and capricious, (ii) that her lack of explanation raises an inference that she did not review the underlying Record, and (iii) in any event it is not clear that the entire three-volume Record was transmitted to the Secretary. *See* Plaintiff's Cross-Motion at 8-11. I consider each in turn.

Leveris first asserts that "[t]he fact that the Assistant Secretary accepted the minority recommendation simply by signing her name to the report without offering any explanation for her decision is, in itself, basis for finding that the decision is arbitrary and capricious" – a proposition for which he cites *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405-06 (D.C. Cir. 1995). *Id.* at 9.

As the Secretary points out, *see* Defendant's Judgment Reply at 4-5, *Dickson* is distinguishable. *Dickson* does not stand for the proposition that the Secretary must explain his choice to adopt or reject a Correction Board recommendation. Rather, the *Dickson* court held arbitrary and capricious three decisions by the Army's counterpart board (the Army Board for Correction of Military Records) denying relief on the strength of a conclusory paragraph that shed no light on its underlying reasoning. *See Dickson*, 68 F.3d at 1404-05 (noting that "the boilerplate language used by the Board ma[de] it impossible to discern the Board's 'path'" between the facts found and the choice made).

What is more, as the Secretary notes, *see* Defendant's Judgment Reply at 4, federal regulations specifically authorize the Navy to adopt wholesale the findings, conclusions and recommendations of a Correction Board minority recommendation without further comment or explication, *see* 32 C.F.R. § 723.7(a) ("If the Secretary's decision is to deny relief, such decision shall be in writing and, unless he or she expressly adopts in whole or in part the findings, conclusions and recommendations of the Board, or a minority report, shall include a brief statement of the grounds for denial."). In such circumstances, the

minority recommendation becomes, in effect, the decision of the Secretary and explains his reasoning. Becraft's adoption of the Minority recommendation without further comment accordingly did not render the decision arbitrary and capricious.⁷

Nor does Leveris make a persuasive case that Becraft either did not have available to her or did not review the entire underlying Record. As the Secretary correctly notes, *see* Defendant's Judgment Reply at 5, Leveris bears the burden of rebutting, by presentation of substantial evidence, the "presumption of regularity" attaching to official actions of public officers, *see, e.g.*, 32 C.F.R. §723.3(e)(2) ("The [Correction] Board relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties."); *Turner v. Department of Navy*, 325 F.3d 310, 318 (D.C. Cir. 2003) (plaintiff failed to overcome presumption of regularity attaching to Correction Board proceedings); *Abdulai v. Ashcroft*, 239 F.3d 542, 549-50 (3d Cir. 2001) ("A decisionmaker must actually consider the evidence and argument that a party presents. This Court has suggested that the [Board of Immigration Appeals] denies due process to an alien when it acts as a mere rubber-stamp. But because agency action is entitled to a presumption of regularity, Abdulai bears the burden of proving that the BIA did not review the record when it considered the appeal.") (citations and internal punctuation omitted).

Leveris does not meet this burden. He suggests that it is "not clear" that the entire three-volume Record was transmitted to the Secretary inasmuch as the Correction Board report merely references as an enclosure "Subject's Naval Record." *See* Plaintiff's Cross-Motion at 10; Record, Vol. I at 5. However,

⁷ I do not understand Leveris to argue that the Minority recommendation itself was too conclusorily reasoned to pass muster pursuant to *Dickson*, *see* Plaintiff's Cross-Motion at 9; however, assuming *arguendo* that he does, the contention lacks merit, *see, e.g.*, *Dickson*, 68 F.3d at 1404 ("A reviewing court will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.") (citations and internal quotation marks omitted).

that does not suffice to overcome the presumption that the entire Record was transmitted; indeed, it is not inconsistent with such a transmission. Apart from that, Leveris characterizes Becraft's absence of comment as "strong evidence that she did not review the Record before adopting the Board's minority recommendation." Plaintiff's Cross-Motion at 9-10. Yet that is not a particularly reasonable inference—let alone substantial evidence of procedural irregularity – in view of the fact that Becraft was authorized by regulation to adopt the Minority report without comment.⁸

In short, I find no reversible error with regard to this trio of points.

D. Arbitrariness of Decision To Discharge Leveris and Recoup Costs

In his fourth and final point of error, Leveris asserts that the decision to discharge him and recoup the costs of his Naval Academy education was arbitrary and capricious on several additional bases. *See id.* at 12-14. For the reasons that follow, I find each of these arguments to be without merit:

1. That his fate was predetermined at SWOS, as evidenced by the fact that Lieut. Garry, who conducted the preliminary investigation, was still collecting material-witness statements on August 28 (specifically, a statement from Leveris's instructor, Lieut. Moore), the same day he submitted his report, and no one subsequently conducted further independent investigation. *See id.* at 12. Leveris's argument notwithstanding, the Record reveals that Lieut. Garry took into account all evidence he collected through the date of his report (including the statement of Lieut. Moore) and expressed no opinion on the nature of the punishment that should be imposed. *See Record, Vol. I at 290-93.* What is more, the decision to separate Leveris from active service fairly can be attributed in part to information that came to light subsequent to the imposition of non-judicial punishment – namely, his abuse of his prescription medications and attempt to

⁸ In addition, as the Secretary observes, *see* Defendant's Judgment Reply at 3, there is evidence that Becraft reviewed the
(continued on next page)

blame his cheating on the resultant side effects. *See, e.g., id.*, Vol. III at 1008. In short, the Record provides scant solid footing for Leveris's predetermination theory.

2. That the SWOS commanding officer provided no explanation for his recommendation that Leveris be required to reimburse the government for the cost of his Naval Academy education, an omission Leveris characterizes as "extremely suspect" in view of the fact that he was being punished for a performance failure at SWOS, not at the Naval Academy. *See* Plaintiff's Cross-Motion at 13. While it is true that the commanding officer did not explain this particular recommendation, *see* Record, Vol. I at 285-86, I see nothing suspicious about the omission. The Record elsewhere indicates that Leveris was advised that, per 10 U.S.C. § 2005, he might be subject to recoupment of all or part of the cost of his Naval Academy education if he failed to complete postgraduate active-duty requirements as a result, *inter alia*, of misconduct, *see id.* at 272-75; *see also, e.g.*, 10 U.S.C. § 2005.

3. That Ensign Mi "enjoyed much better handling of his case" by SWOS than did Leveris inasmuch as (i) the SWOS commanding officer did not order an investigation of the matter, (ii) the command's legal officer submitted a memorandum that favorably portrayed Ensign Mi, giving him the benefit of the doubt that he had cheated only once (when caught) and ignoring his academic standing, which was close to that of Leveris, and (iii) Ensign Mi was ordered back to his ship, while Leveris was discharged and ordered to reimburse the cost of his Naval Academy education. *See* Plaintiff's Cross-Motion at 13. While it is true that no investigation was conducted in Ensign Mi's case (versus that of Leveris), this instance of "better handling" is attributable to the fact that Ensign Mi immediately confessed he had cheated, *see*

Record in the form of a statement by the Correction Board's executive director that Becraft "conducted an independent review of the Board's proceedings and approved the minority recommendation," Record, Vol. I at 189.

Record, Vol. II at 345, obviating the need for an investigation, while Leveris chose to exercise his right to remain silent, *see id.*, Vol. I at 290.

The command's legal officer did not ignore Ensign Mi's academic standing; rather, he noted that Ensign Mi had an above-average academic record and had not previously failed an examination. *See id.*, Vol. II at 345. In addition, inasmuch as appears, Leveris was given as much benefit of the doubt that he had only cheated once as was Ensign Mi. There is no indication in the voluminous Record that anyone suspected Leveris of having cheated on any occasion other than the one on which he was "caught."

Finally, while the outcome for Ensign Mi was far more favorable than that for Leveris, as discussed above, the Minority/Secretary found good reason for the differential handling of the two cases, and that opinion is rational and supported by substantial evidence of Record.

4. That (i) the Record presents a clear case of disparate treatment for the reasons elucidated in the NPC Advisory Opinion, (ii) "[l]ike the Navy Personnel Command's attorney and all members of the Board, the Court should conclude that Arthur Leveris was the victim of unjust disparate treatment" and (iii) "[l]ike the Navy Personnel Command's attorney and two of three members of the Board, the Court should find that the command acted arbitrarily and capriciously in handling Arthur Leveris' administrative case." *Id.* at 14. As the Secretary points out, this argument (again) hinges on an unfair characterization of the Minority recommendation. *See* Defendant's Judgment Reply at 1. As discussed above, the Minority did not conclude that Leveris was the victim of unjust disparate treatment. To the contrary, she disagreed with the Majority (and the NPC Advisory Opinion) that the disparate treatment of Leveris and Ensign Mi was unjust. *See* Record at 20-21. That conclusion was rational and supported by substantial evidence of Record, and the Secretary committed no error in adopting it.

V. Conclusion

For the foregoing reasons, I **DENY** Leveris's motion to strike and recommend that the Secretary's motion for judgment on the administrative record be **GRANTED** and Leveris's cross-motion for judgment on the administrative record be **DENIED**.

NOTICE

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 27th day of May, 2004.

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

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