

2016 WL 10721864

Only the Westlaw citation is currently available.
United States District Court, District of Columbia.

Harold B. GILBERT, et al., Plaintiffs,

v.

Deborah Lee JAMES, Secretary
of the Air Force, Defendant.

Civil Action No. 14-1364 (BAH)

Signed January 4, 2016

Attorneys and Law Firms

Gary R. Myers, Gary Myers, Daniel Conway & Associates,
Weare, NH, for Plaintiffs.

Marsha Wellknown Yee, Wynne Patrick Kelly, U.S.
Attorney's Office for the District of Columbia, Washington,
DC, for Defendant.

MEMORANDUM AND ORDER

BERYL A. HOWELL, United States District Judge

*1 Eleven former Air Force officers (collectively, “the plaintiffs”) challenge the denial of their petitions for retrospective promotion by the Air Force Board of Correction of Military Records (“AFBCMR”), alleging that their non-selection for promotion while on active duty was the result of improper consideration of their race and gender. Am. Compl., ECF No. 11. The plaintiffs acknowledge that their petitions were not filed within the three-year limitations period provided by 10 U.S.C. § 1552(b), but claim that the AFBCMR erred when it declined to waive this limitation period, despite previously granting such waivers to similarly situated petitioners as a matter of course, and denied their petitions as untimely. *Id.* They seek a declaratory judgment to that effect and a remand to allow for reconsideration of their petitions. *Id.* ¶ 49.

On September 22, 2015, this Court held that the decision not to waive the limitations period is subject to judicial review, pursuant to 10 U.S.C. § 628(g). *Gilbert v. James*, No. CV 14-1364 (BAH), 2015 WL 5611340, at *13 (D.D.C. Sept. 22, 2015). With this preliminary issue resolved, pending before

the Court is the defendant's request to stay further proceedings to allow for a *de novo* reconsideration of the plaintiffs' petitions by the AFBCMR. Def.'s Mot. Stay (“Def.'s Mot.”), ECF No. 22. For the reasons set out below, the defendant's motion is granted.

“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 880 n.6 (1998) (alteration in original) (internal quotations omitted) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936)); see also *Kidwell v. F.B.I.*, 813 F. Supp. 2d 21, 26 (D.D.C. 2011). Accordingly, courts have “broad discretion in granting or denying stays so as to ‘coordinate the business of the court efficiently and sensibly.’” *McSurely v. McClellan*, 426 F.2d 664, 671 (D.C. Cir. 1970) (quoting *Landis*, 299 U.S. at 255).

Here, the defendant requests a stay to allow the AFBCMR to consider fully the plaintiffs' asserted bases for waiving the applicable limitations period and, if warranted, to review the merits of the plaintiffs' petitions for retrospective promotion. Def.'s Mot. at 2. In particular, in this litigation, the plaintiffs assert that the AFBCMR abused its discretion and acted arbitrarily and capriciously in modifying its prior policy of summarily waiving the limitations period for petitioners in the plaintiffs' position. Am. Compl. ¶ 48. According to the defendant, however, the plaintiffs raised this argument only after their petitions were initially denied as untimely, and only in their respective requests for reconsideration. Def.'s Mot. at 1 (citing Am. Compl. ¶ 46), Ex. 1. Because these requests were summarily denied, however, the AFBCMR “has not addressed the specifics of [the plaintiffs'] precedent arguments as presented” before this Court. *Id.* Thus, to enable judicial review of the AFBCMR's substantive consideration of this argument, the defendant proposes a “*de novo* reconsideration [of the plaintiffs' petitions], permitting [the plaintiffs] to submit any additional matters they might want to place before the [AFBCMR] and leaving the [AFBCMR] free to reach conclusions differing from those it earlier reached.” *Id.* at 2.

*2 Opposing the motion, the plaintiffs argue that a stay is both unnecessary and prejudicial to their present claim. Specifically, contending that the AFBCMR “fully considered and explained” its findings and the basis for its denial of the plaintiffs' petitions, the plaintiffs suggest that immediate reconsideration by the AFBCMR is unnecessarily

duplicative. Pls.' Mem. Opp'n Def.'s Mot. Stay ("Pls.' Opp'n") at 1, ECF No. 23. at 1–2. Moreover, the plaintiffs suggest that the defendant's proposed course would place them in a "no win position." *Id.* at 2. Should they choose to submit additional evidence to bolster their waiver requests, they fear this additional evidence would distinguish their cases from prior instances in which the AFBCMR summarily granted waiver requests without requiring submission of any supporting evidence. *Id.* (citing *Wilhelmus v. Geren*, 796 F. Supp. 2d 157 (D.D.C. 2011) (holding that military review boards must consider relevant precedent in order to avoid deciding similar cases differently)). According to the plaintiffs, any resulting distinction between their petitions and prior petitions for which waivers were granted would prevent them from arguing that the AFBCMR must waive the limitations period here as it has in the past. *Id.* On the other hand, should they decline to provide additional evidence, they believe the AFBCMR may view this failure as an admission that they are not entitled to a waiver. *Id.* In either event, the plaintiffs suggest that the proposed stay would simply "give the AFBCMR another bite at the apple to shore up its rationale for denying each [p]laintiff's request." *Id.* at 2.

These concerns notwithstanding, the plaintiffs' opposition to the instant motion is perplexing. In large measure, the defendant's proposed stay would appear to provide the precise relief sought in the plaintiffs' Complaint. Indeed, in challenging the AFBCMR's waiver declination decisions before this Court, the plaintiffs ask the Court to: (1) "[d]eclare that the denial of relief ... on grounds of untimeliness was arbitrary and capricious, an abuse of discretion and contrary to law or regulation;" and (2) "[r]emand this matter to the AFBCMR with instructions to properly consider precedence and to act in conformance with the Court's opinion." Am. Compl. ¶ 49. By comparison, the defendant now proposes to allow the plaintiffs to present anew their grounds for seeking a waiver before the AFBCMR, and even to supplement the record with additional evidence favorable to the plaintiffs. Def.'s Mot. at 2. As such, any relevant distinction between this *de novo* reconsideration and the plaintiffs' own request for a remand to allow the AFBCMR "to properly consider precedence" is difficult to discern.

Overall, the plaintiffs' objections appear to stem from a misapprehension of the effect of the defendant's requested stay, as well as the potential relief available to the plaintiffs, should the Court deny the present motion. First, as noted above, the gravamen of the plaintiffs' claim is that the AFBCMR arbitrarily broke from its prior precedent when

it declined to waive the limitations period and denied the plaintiffs' petitions as untimely. Opposing the present motion, the plaintiffs appear to believe that reconsideration by the AFBCMR would alter the character of their petitions and jeopardize their claim that these petitions should be treated similarly to petitions submitted in prior years. Pls.' Opp'n at 2. On the contrary, however, allowing the AFBCMR to consider thoroughly the plaintiffs' waiver requests under its current standard does nothing to undermine the plaintiffs' claim that their petitions should be considered instead under the standard formerly applied to similar petitions. Put simply, even assuming the requested reconsideration allows the defendant to bolster its reasoning for declining to grant the requested waivers, the plaintiffs are still free to argue in this Court that their petitions, like those in years past, should have been considered without regard to the date on which they were filed.

Second, the plaintiffs appear to believe that, absent a stay, they will be entitled to immediate reconsideration of their qualifications for promotion should they prevail in the present litigation. Pls.' Opp'n at 2 ("The Defendant appears to have forgotten that Plaintiffs are requesting [reconsideration of their qualifications for promotion] and that the AFBCMR has previously granted many similar requests"). In fact, absent a stay, should the plaintiffs prevail before this Court, the more likely outcome would be a remand to the AFBCMR paralleling the *do novo* reconsideration now proposed by the defendant. As the D.C. Circuit has emphasized, in reviewing the AFBCMR's waiver declinations, the Court's role is to determine whether " 'the decision making process was deficient, not whether [the] decision was correct.' " *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1405 (D.C. Cir. 1995) (alteration in original) (quoting *Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1511 (D.C. Cir. 1989)). Thus, where boards responsible for correcting military records fail to adequately address an argument raised by a petitioner, this Court has routinely remanded proceedings to allow these boards to consider more fully previously overlooked arguments. See *Magneson v. Mabus*, 85 F. Supp. 3d 221, 228–29 (D.D.C. 2015) (collecting cases); see also *Jackson v. Mabus*, No. 14-5224, 2015 WL 9466192, at *4 (D.C. Cir. Dec. 29, 2015) (cautioning "boards for correction of military records that they must sufficiently explain their reasoning in order to have their decisions sustained," and urging these boards "to take care to sufficiently address each non-frivolous claim raised by an applicant for record correction").

*3 Here, the defendant has thus far largely failed to address the plaintiffs' contention that the AFBCMR improperly deviated from its past practice of summarily waiving the limitations period for petitioners, like the plaintiffs, whose non-promotion may have been influenced by consideration of their race and gender. As a result, denial of the defendant's present offer to reconsider immediately the plaintiffs' petitions raises the significant possibility of a later remand to allow for much the same reconsideration. Such an outcome is neither efficient nor sensible and risks delaying further the resolution of the plaintiffs' claim.

Accordingly, it is hereby

ORDERED that the defendant's Motion to Stay, ECF No. 22, is granted; and it is further

ORDERED that this matter be STAYED, temporarily, to allow for reconsideration *de novo* by the Air Force Board for Correction of Military Records, of the plaintiffs' petitions for correction of their military records, pursuant to 10 U.S.C. § 1552; and it is further

ORDERED that the parties shall file, by March 31, 2016, and every ninety days thereafter, a joint status report describing the progress of the consideration of the plaintiffs' petitions.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2016 WL 10721864

End of Document

© 2024 Thomson Reuters. No claim to original U.S. Government Works.