

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

NATIONAL VETERANS LEGAL)
SERVICES PROGRAM,)

Plaintiff,)

v.)

Civil Action No. _____

UNITED STATES DEPARTMENT OF)
DEFENSE; MARK T. ESPER, in his)
official capacity as Secretary of)
Defense; RYAN D. MCCARTHY, in)
his official capacity as Secretary of the)
Army; THOMAS B. MODLY, in his)
official capacity as Acting Secretary of)
the Navy; BARBARA BARRETT, in)
her official capacity as Secretary of the)
Air Force; CHAD WOLF, in his official)
capacity as Acting Secretary of)
Homeland Security,)

Defendants.)

COMPLAINT

1. Plaintiff National Veterans Legal Services Program (NVLSP) seeks declaratory and injunctive relief pursuant to 5 U.S.C. § 706 against the United States Department of Defense; Mark T. Esper, in his official capacity as Secretary of Defense; Ryan D. McCarthy, in his official capacity as Secretary of the Army; Thomas B. Modly, in his official capacity as Acting Secretary of the Navy; Barbara Barrett, in her official capacity as Secretary of the Air Force; and Chad Wolf, in his official capacity as Acting Secretary of Homeland Security, because they are violating federal statutes and regulations that require them to publish or make available to the

public each of the decisions made by Defendants' Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCMRs) (collectively, "the Boards").

2. Each of the Defendants oversees DRBs and BCMRs.

3. Defendants have mandatory statutory and regulatory requirements to ensure that the decisions of the Boards are made available to the public. As part of these mandatory statutory and regulatory requirements, Defendants must ensure that all decisions of the Boards are available to the public and that decisions are indexed to allow the public to find relevant cases.

4. Before April 2019, Defendants violated their legal requirements by failing to publish all of the decisions made by the Boards and failing adequately to index the decisions they did publish.

5. Since April 2019, Defendants have violated their legal requirements by preventing the public from inspecting all previously published decisions of the Boards and failing to publish for public inspection any subsequent decisions of the Boards. Virtually all decisions made by the Boards are now unavailable to the public.

JURISDICTION AND VENUE

6. This Court has jurisdiction under 28 U.S.C. § 1331 (federal question for violating a federal statute); 28 U.S.C. § 1346 (United States as a defendant); and 28 U.S.C. § 1361 (action to compel an officer of the United States to perform his duty). This Court has remedial authority under 28 U.S.C. § 2201, and this Court may grant declaratory relief, injunctive relief, and other relief pursuant to 28 U.S.C. §§ 2201-2202 and 5 U.S.C. § 706.

7. The removal of and continued failure to make available to the public the Boards' past decisions and an adequate index of these past decisions constitutes final agency action under the APA. 5 U.S.C. §§ 704, 706. NVLSP has suffered legal wrong due to Defendants' actions and

is adversely affected or aggrieved by Defendants' actions within the meaning of the APA. 5 U.S.C. § 702.

8. Venue is proper in this district under 28 U.S.C. § 1391(e) both because the defendants reside within this district and because a substantial part of the events or omissions occurred in the district.

PARTIES

9. NVLSP is a § 501(c)(3) non-profit organization located in Washington, D.C. As part of its mission, NVLSP assists veterans in applying to Defendants' DRBs and BCMRs to correct their military records in order to secure the benefits that they have earned as a result of their military service. NVLSP accomplishes this mission by providing free legal representation to veterans applying to the DRBs and BCMRs, training lawyers to represent veterans before these agencies, and developing training and advocacy publications on representation of veterans before the DRBs and BCMRs. NVLSP relies on access to the Boards' decisions to, among other things, determine how the Boards interpret key military directives and regulations and the circumstances under which they have granted various types of relief.

10. Respondent United States Department of Defense (DoD) is an executive branch agency of the U.S. federal government that is responsible for coordinating and supervising the United States Armed Forces and the military services' DRBs and BCMRs.

11. Respondent Mark T. Esper is the Secretary of Defense and is sued in his official capacity. As Secretary of Defense, Dr. Esper is responsible for coordinating and supervising the United States Armed Forces and the military services' DRBs and BCMRs.

12. Respondent Ryan D. McCarthy is the Secretary of the Army and is sued in his official capacity. As Secretary of the Army, Mr. McCarthy serves as the designated Department

of Defense Lead and Department of Defense-wide focal point for matters regarding DRBs. In addition, as Secretary of the Army, Mr. McCarthy is responsible for the operation of the Army's BCMR and DRB.

13. Respondent Thomas Modly is the Acting Secretary of the Navy and is sued in his official capacity. As Acting Secretary of the Navy, Mr. Modly is responsible for the operation of the Navy's BCMR and DRB.

14. Respondent Barbara Barrett is the Secretary of the Air Force and is sued in her official capacity. As Secretary of the Air Force, Ms. Barrett is responsible for the operation of the Air Force's BCMR and DRB.

15. Respondent Chad Wolf is Acting Secretary of Homeland Security and is sued in his official capacity. As Acting Secretary of Homeland Security, Mr. Wolf is responsible for the operation of the Coast Guard's BCMR and DRB.

FACTUAL ALLEGATIONS

16. NVLSP is a nonprofit veterans service organization, and part of its mission is to assist veterans in effectively applying to a DRB or BCMR to correct errors or injustices contained in their military records. Among the errors or injustices that these veterans wish to address in their DRB and BCMR applications are an erroneous or unjust discharge or reason for an involuntary discharge from military service, issuance of an erroneous or unjust less-than-honorable discharge certificate, and an erroneous or unjust discharge from the military without the requisite medical disability processing.

17. NVLSP accomplishes its mission in part by screening the merit of the cases of veterans who wish to apply to a DRB or BCMR with the assistance of a pro bono attorney, pairing veterans with potentially meritorious cases with NVLSP-trained pro bono attorneys, and

mentoring these pro bono attorneys to effectively represent the veteran before the DRB or BCMR.

18. To determine which cases to accept for representation and to identify the most effective arguments to present to the DRB or BCMR, NVLSP and its network of pro bono attorneys rely on their ability to review the previous decisions of the Boards to, among other things, determine how the Boards interpret key military directives and regulations and the circumstances under which they have granted various types of relief.

19. NVLSP also publishes and annually updates a 2,200-page *Veterans Benefits Manual* and develops other training materials for veterans and pro bono advocates, which are meant to provide comprehensive guidance on the legal issues that advocates may encounter.

20. To keep the *Veterans Benefits Manual* and training materials updated, NVLSP monitors the Boards' decisions to determine how each Board interprets key military directives and regulations and the circumstances under which they have granted various types of relief, identify systemic issues in the Boards' decision-making process and evaluate how new policies are being implemented and interpreted in the Boards' decisions.

21. Access to Board decisions is essential for the daily operations of NVLSP, because the effectiveness of NVLSP's services depends on understanding the reasoning behind the Boards' decisions.

A. Public access to BCMR decisions before April 2019.

22. Under 10 U.S.C. § 1552, Defendants must make each BCMR decision "available to the public in electronic form on a centralized Internet website."

23. Under Department of Defense Directive 1332.41, Defendants must publish “all the decisional documents since 1996 for each Department’s boards” in the DoD Electronic Reading Room website (“Reading Room”), located at <http://boards.af.mil>.

24. Before April 2019, the Reading Room contained many, but not all of the BCMRs’ decisions.

25. Defendants’ failure to publish all BCMR decisions hindered NVLSP in accomplishing its mission, because it limited the information needed to identify key issues and develop effective arguments to make in support of a BCMR application.

26. Before April 2019, the BCMR decisions in the Reading Room were also not indexed in a usable and concise form to allow the public to search for relevant cases.

27. The poor organization of the website further hindered NVLSP in accomplishing its mission, because it made finding all relevant BCMR decisions necessary to best assist veterans impossible.

B. Public access to DRB decisions before April 2019.

28. Under 32 C.F.R. § 70.8, Defendants must make all DRB decisions available for public inspection and copying.

29. 32 C.F.R. § 70.8 requires that DRB decisions be “indexed in a usable and concise form so as to enable the public, and those who represent applicants before the DRBs, to isolate from all these decisions that are indexed, those cases that may be similar to an applicant’s case and that indicate the circumstances under or reasons for (or both) which the DRB or the Secretary concerned granted or denied relief.”

30. Under Department of Defense Directive 1332.41, Defendants must publish “all the decisional documents since 1996 for each Department’s boards” in the Reading Room, located at <http://boards.af.mil>.

31. Before April 2019, the Reading Room contained many, but not all of the DRB decisions.

32. Defendants’ failure to publish all DRB decisions hindered NVLSP in accomplishing its mission, because it limited information needed to identify key issues and develop effective arguments to make in support of a DRB application.

33. Before April 2019, the DRB decisions in the Reading Room were also not indexed in a usable and concise form to allow the public to search for relevant cases.

34. The poor organization of the website further hindered NVLSP in accomplishing its mission, because it made finding all relevant DRB decisions necessary to best assist veterans impossible.

C. Public access to the Boards’ decisions after April 2019.

35. In April 2019, Defendants removed the Boards’ decisions from the Reading Room without any warning.

36. Since April 2019, the gutted Reading Room has contained a notice that states, “The Army, Air Force, Navy/Marine Corps, and Coast Guard Review Boards decisional documents normally published in the Department of Defense Reading Room have been temporarily removed to conduct a quality assurance review. We will update this webpage when we have a better estimates [*sic*] of when the decisional documents will again be available.”

37. Although this removal was allegedly temporary, Defendants have not republished the Boards’ decisions, nor have they provided an estimate of when they will be republished.

38. As of the filing of this suit, none of the Boards' decisions is accessible through the Reading Room.

39. There is no alternative public means of accessing all previous Board decisions.

40. Without access to previous Board decisions, NVLSP cannot evaluate the potential success of appeals or develop strategies to assist veterans in filing their applications to the Boards. This lack of information prevents NVLSP from effectively carrying out its mission of advocating for veterans so that they may receive the benefits they deserve.

41. As a result of the Defendants' failure to publish decisions of the Boards, NVLSP has been severely limited in its ability to assist veterans in the correction of their military records, thus frustrating its mission as a nonprofit.

**FIRST CAUSE OF ACTION:
Defendants' Failure to Make All BCMR Decisions Publicly Available and Indexed
(Violations of 10 U.S.C. § 1552, DoD Directive 1332.41, and
the APA, 5 U.S.C. § 706)**

42. NVLSP re-alleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this complaint.

43. Under the APA, 5 U.S.C. § 706, a "reviewing court shall ... compel agency action unlawfully withheld or unreasonably delayed."

44. A plaintiff may bring a claim under § 706(1) by asserting that an agency "failed to take *discrete* agency action that it is *required to take*." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis in original).

45. 10 U.S.C. § 1552(a)(5) provides that "each final decision of [the BCMR] ... shall be made available to the public in electronic form on a centralized Internet website."

46. 10 U.S.C. § 1552(a)(5) does not grant discretion over which BCMR decisions are made publicly available.

47. Defendants violated the plain language of 10 U.S.C. § 1552(a)(5) by failing to publish all BCMR decisions prior to and after April 2019.

48. Defendants have not provided the public an alternative means of accessing all of the decisions of the BCMRs on the internet.

49. DoD Directive 1332.41 requires that the Reading Room “shall contain all the decisional documents since 1996 for each Department’s boards.”

50. DoD Directive 1332.41 does not grant discretion over which decisions are posted in the Reading Room.

51. Defendants violated the plain language of DoD Directive 1332.41 by failing to publish all BCMR decisions prior to and after April 2019.

52. In not publishing all of the decisions prior to and after April 2019, Defendants have unlawfully withheld actions in violation of 5 U.S.C. § 706.

53. The decisions published prior to April 2019 were not published in a usable and concise form to allow the public to search for cases.

54. NVLSP has suffered and will continue to suffer harm as a result of Defendants’ violations of 10 U.S.C. § 1552, DoD Directive 1332.41, and 5 U.S.C. § 706.

55. NVLSP seeks declaratory and injunctive relief to prevent future injury caused by Defendants’ violation of 10 U.S.C. § 1552, DoD Directive 1332.41, and 5 U.S.C. § 706.

**SECOND CAUSE OF ACTION:
Defendants’ Unlawful Removal of Certain BCMR Decisions Made Publicly Available
Before April 2019
(Violations of 10 U.S.C. § 1552, DoD Directive 1332.41, and
the APA, 5 U.S.C. § 706)**

56. NVLSP re-alleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this complaint.

57. Under the APA, 5 U.S.C. § 706, a “reviewing court shall ... compel agency action unlawfully withheld or unreasonably delayed.”

58. A plaintiff may bring a claim under § 706(1) by asserting that an agency “failed to take *discrete* agency action that it is *required to take*.” *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis in original).

59. 10 U.S.C. § 1552(a)(5) provides that “each final decision of [the BCMR] ... shall be made available to the public in electronic form on a centralized Internet website.”

60. 10 U.S.C. § 1552(a)(5) does not grant discretion over which BCMR decisions are made publicly available.

61. Defendants’ removal of the BCMR decisions from the Reading Room in April 2019 violates the plain requirement of 10 U.S.C. § 1552(a)(5).

62. Defendants have not provided the public an alternative means of accessing the decisions of the BCMR on the internet.

63. DoD Directive 1332.41 requires that the Reading Room “shall contain all the decisional documents since 1996 for each Department’s boards.”

64. DoD Directive 1332.41 does not grant discretion over which decisions are posted in the Reading Room.

65. Defendants violated the plain language of DoD Directive 1332.41 by removing all BCMR decisions from the Reading Room in April 2019.

66. Defendants violated the plain language of DoD Directive 1332.41 by failing to publish all BCMR decisions prior to April 2019.

67. In removing the decisions of the BCMR from the Reading Room, Defendants have unlawfully withheld actions in violation of the 5 U.S.C. § 706.

68. NVLSP has suffered and will continue to suffer harm as a result of Defendants' violation of 10 U.S.C. § 1552, DoD Directive 1332.41, and 5 U.S.C. § 706.

69. NVLSP seeks declaratory and injunctive relief to prevent future injury caused by Defendants' violation of 10 U.S.C. § 1552, DoD Directive 1332.41, and 5 U.S.C. § 706.

**THIRD CAUSE OF ACTION:
Defendants' Failure to Make All DRB Decisions Publicly Available and Indexed
(Violations of 32 C.F.R. § 70.8, DoD Directive 1332.41, and
the APA, 5 U.S.C. § 706)**

70. NVLSP re-alleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this complaint.

71. 32 C.F.R. § 70.8(*l*) requires that DRB decisions be "made available for public inspection and copying promptly after a notice of final decision is sent to the applicant."

72. 32 C.F.R. § 70.8(*l*) does not grant discretion over which decisions are made publicly available.

73. Defendants violated the plain language of 32 C.F.R. § 70.8(*l*) by failing to publish all DRB decisions prior to and after April 2019.

74. Defendants have not provided alternative public means of obtaining all decisions of the DRB.

75. DoD Directive 1332.41 requires that the Reading Room "shall contain all the decisional documents since 1996 for each Department's boards."

76. DoD Directive 1332.41 does not grant discretion over which decisions are posted in the Reading Room.

77. Defendants violated the plain language of DoD Directive 1332.41 by failing to publish all DRB decisions prior to and after April 2019.

78. 32 C.F.R. § 70.8(*l*) requires that the decisions of the DRB be indexed in a “usable and concise form so as to enable the public, and those who represent applicants before the DRBs, to isolate from all these decisions that are indexed, those cases which may be similar to an applicant’s case.”

79. Prior to the total removal of the decisions from the Reading Room in April 2019, the DRB decisions were not posted in a “usable and concise form.”

80. In not publishing all of the DRB decisions in a usable and concise form prior to April 2019, Defendants have unlawfully withheld actions in violation of 5 U.S.C. § 706.

81. NVLSP has suffered and will continue to suffer harm as a result of Defendants’ violations of 32 C.F.R. § 70.8, DoD Directive 1332.41, and 5 U.S.C. § 706.

82. NVLSP seeks declaratory and injunctive relief to prevent future injury caused by Defendants’ violations of 32 C.F.R. § 70.8, DoD Directive 1332.41, and 5 U.S.C. § 706.

**FOURTH CAUSE OF ACTION:
Defendants’ Unlawful Removal of Certain DRB Decisions Made Publicly Available Before
April 2019
(Violations of 32 C.F.R. § 70.8, DoD Directive 1332.41, and
the APA, 5 U.S.C. § 706)**

83. NVLSP re-alleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this complaint.

84. 32 C.F.R. § 70.8(*l*) requires that DRB decisions be “made available for public inspection and copying promptly after a notice of final decision is sent to the applicant.”

85. 32 C.F.R. § 70.8(*l*) does not grant discretion over which decisions are made publicly available.

86. Defendants removal of the DRB decisions from the Reading Room in April 2019 violates the plain language of 32 C.F.R. § 70.8(*l*).

87. Defendants have not provided alternative public means of obtaining all decisions of the DRB.

88. DoD Directive 1332.41 requires that the Reading Room “shall contain all the decisional documents since 1996 for each Department’s boards.”

89. DoD Directive 1332.41 does not grant discretion over which decisions are posted in the Reading Room.

90. Defendants violated the plain language of DoD Directive 1332.41 by removing all DRB decisions from the Reading Room in April 2019.

91. In removing the decisions of the DRB from the Reading Room, Defendants have unlawfully withheld actions in violation of the 5 U.S.C. § 706.

92. NVLSP has suffered and will continue to suffer harm as a result of Defendants’ violations of 32 C.F.R. § 70.8, DoD Directive 1332.41, and 5 U.S.C. § 706.

93. NVLSP seeks declaratory and injunctive relief to prevent future injury caused by Defendants’ violation of 32 C.F.R. § 70.8, DoD Directive 1332.41, and 5 U.S.C. § 706.

PRAYER FOR RELIEF

WHEREFORE, NVLSP respectfully requests that this Court:

A. Issue a declaratory judgment that Defendants’ removal and continued failure to electronically publish the decisions of the Boards is unlawful withholding of an agency action.

B. Issue a declaratory judgment that Defendants’ failure to publish all of the decisions of the Boards to a publically accessible, electronic database is unlawful withholding of an agency action.

C. Issue a declaratory judgment that Defendants’ failure to properly index DRB decisions in a usable and concise form is unlawful withholding of an agency action.

- D. Issue a preliminary injunction requiring Defendants to:
 - a. immediately restore public, electronic access to the database of decisions of the Boards that existed before April 2019; and
 - b. update the database to include all of the Boards' decisions, both issued before April 2019 and after April 2019, within 60 days of entry of the preliminary injunction or within 60 days of a decision being rendered by the Boards, whichever is later.

- E. Issue a permanent injunction requiring Defendants to:
 - a. continue to publish all decisions of the Boards electronically within a reasonable time after the decision; and
 - b. maintain an index of decisions that allows users to easily find relevant decisions.

- F. Award NVLSP its costs, expenses, and reasonable attorneys' fees under the Equal Access to Justice Act.

- G. Award such other relief as the Court deems just and proper.

Respectfully submitted,

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