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Military Law - Service Discharge - Judicial Review of Discharge Classifications

Edward M. Heppenstall
University of Michigan Law School

MILITARY LAW—SERVICE DISCHARGE—JUDICIAL REVIEW OF DISCHARGE CLASSIFICATIONS—In 1954 petitioners were discharged from the Army in form other than "honorable." Petitioner Harmon had previously been questioned by Army officials regarding alleged Communist affiliations. Since most of the charges against him were based on conduct antedating his induction into the Army and since his military record had been "excellent," petitioner Harmon was informed that he would not be discharged as disloyal or subversive pursuant to Army regulations,[1] but would be retained in his then present grade, assigned nonsensitive duties, and given a discharge at the end of his career appropriate to the character of the service he had rendered. Issuance of Directive 5210.9 shortly thereafter by the Secretary of Defense,[2] which applied to military personnel the criteria of the

[1] Army Reg. 615-370 (1950) authorizes the issuance of an undesirable discharge, inter alia, to one found to be disloyal or subversive.

[2] Executive Order 10450, 18 Fed. Reg. 2489 (1953), as amended by Executive Order 10491, 18 Fed. Reg. 6583 (1953). The directive stipulated that the standard for retention in the armed services would be "that on all available information it is determined that the . . . retention is clearly consistent with the interests of national security." Until recently the Army's policy under the program to prevent infiltration of security risks into its ranks had been to induct individuals despite a questionable security status, but the present program as embodied in the June 1956 amendment to Army Reg. 604-10 provides for more extensive screening of inductees.

civilian security program, resulted in review of petitioner Harmon's case and his discharge as undesirable. While the record is not clear, petitioner Abramowitz apparently was discharged as undesirable under similar circumstances.[3] After exhausting administrative remedies,[4] petitioners brought suit seeking a declaration that their discharges were void and an order that the discharges be changed to honorable. Concluding that it lacked jurisdiction to review the action, the district court entered summary judgment in favor of the Secretary of the Army,[5] and the court of appeals affirmed.[6] On certiorari to the United States Supreme Court, *held,* reversed, one justice dissenting. In a per curiam opinion the Court ruled that the district court had jurisdiction to determine whether the Secretary of the Army had exceeded his statutory authority in basing the discharge classification on conduct antedating induction, and petitioners had standing to bring this action. On the merits, the secretary may consider only a soldier's military record; hence the secretary's action was in excess of his statutory authority and the case should be remanded to the district court for relief to petitioners. *Harmon v. Brucker,* 355 U.S. 579 (1958).

A serviceman has a substantial interest in the classification of his discharge since in addition to the social stigma involved, a veteran who receives an undesirable discharge suffers direct pecuniary injury through denial of state and federal benefits and private and government employment.[7] Statutory authority to prescribe conditions under which a soldier shall be discharged is vested in the Secretary of the Army.[8] A series of Army regulations establishes five categories of discharges and describes the circumstances under which they shall be given.[9] Congress created the

[3] There is apparently no report of the Abramowitz case in the District Court for the District of Columbia. The cases were consolidated on certiorari.

[4] Petitioner Harmon initially appealed to the Army Discharge Review Board, but application to have his discharge changed was denied following a hearing. Subsequent application to the Army Board for the Correction of Military Records was also denied. Direct request to the Secretary of the Army for the award of an honorable discharge resulted in referral of the case to the Board for Correction, and the secretary accepted the Board's recommendation against changing the discharge classification.

[5] Harmon v. Brucker, (D.C. D.C. 1956) 137 F. Supp. 475. See also note 3 supra.

[6] Harmon v. Brucker, (D.C. Cir. 1957) 243 F. (2d) 613; Abramowitz v. Brucker, (D.C. Cir. 1957) 243 F. (2d) 834. After the decision in the district court the Army Discharge Review Board reviewed petitioner Harmon's case, changing the character of the discharge from undesirable to general under honorable conditions. The secretary's suggestion that the case had thereby become moot was rejected by the court of appeals.

[7] See, e.g., N.Y. Civ. Serv. Law §21 (employment preferences provided for honorably discharged veterans); N.Y. Educ. Law §§608 to 609 (scholarships provided for honorably discharged veterans); Universal Military Training and Service Act, 62 Stat. 614 (1948), as amended, 50 U.S.C. App. (1952) §459(b) (employment preferences provided for honorably discharged veterans). See also Schustack v. Herren, (2d Cir. 1956) 234 F. (2d) 134 at 135, n. 1.

[8] 41 Stat. 809 (1921), as amended, 10 U.S.C. (Supp. V, 1958) §3811.

[9] The five categories for enlisted men are: honorable, general (under honorable conditions), undesirable (under other than honorable conditions), bad conduct, and dishonorable.

Army Review Board to review discharge classifications, providing that its findings shall be final subject only to review by the secretary of the service involved.[10] On the basis of these statutes, the secretary contended that the administrative procedure is exclusive and that the clear congressional intent inferable from the language of finality in the statutes precluded judicial review. In seeking to avoid the constitutional issues raised by petitioners pertaining to an alleged denial of due process of law and lack of judicial trial, the Court confined its decision to a determination of the nature and extent of the secretary's statutory authority. Reference was made to Army regulations which indicate that a discharge classification is to be based on the character of service rendered during the period covered by the discharge,[11] and to a statute providing for military review based upon "all available records" of the Army.[12] It was concluded that judicial review is necessary to insure adherence to such standards, and that the discharge classification is to be determined from "all available records *of military service.*"[13] Thus the secretary had exceeded his authority in basing petitioners' discharges in part on conduct antedating their induction into the Army.[14]

Aside from congressional intent to preclude review inferable from the language of finality in the statute, the rationale supporting a policy of non-reviewability of discharge classifications appears to be twofold: first, the doctrine of separation of powers dictates that the military, a specialized community with its own unique disciplinary standards, be given unfettered discretion in the administration of its personnel; and second, granting judicial review of such matters would impose an appalling burden on the federal courts. Until the decision in the principal case, however, the Supreme Court had expressly left open the question of reviewability of administrative discharge classifications.[15] While in several recent cases lower federal courts have held that there could be no review,[16] these may be interpreted as merely narrowing the scope of review since questions of

10 58 Stat. 286 (1944), 38 U.S.C. (1952) §693h. By 60 Stat. 837 (1946), 5 U.S.C. (1952) §191(a), the Secretary of the Army is empowered to create a Board to Correct Military Records, to which petitioners applied in the course of their review.

11 Army Regs. 615-375(2)(b) and 615-360(7) (1951).

12 58 Stat. 286 (1944), 38 U.S.C. (1952) §693h.

13 In the course of his dissent Justice Clark argued that the majority's construction of "all available records" to mean solely those relating to petitioners' military record, thus reading "all" to mean "some," was "lacking of any justification." Principal case at 585.

14 It should be pointed out that the Solicitor General conceded that if the district court had jurisdiction to review the case and petitioners had standing to raise the question, the secretary's action was not sustainable.

15 Patterson v. Lamb, 329 U.S. 539 at 542 (1947).

16 Gentila v. Pace, (D.C. Cir. 1951) 193 F. (2d) 924 at 927, cert. den. 342 U.S. 943 (1952); Bernstein v. Herren, (S.D. N.Y. 1956) 141 F. Supp. 78 at 80, affd. (2d Cir. 1956) 234 F. (2d) 434, cert. den. 352 U.S. 840 (1956). *Contra,* Levin v. Gillespie, (N.D. Cal. 1954) 121 F. Supp. 726, order vacated on amendment of statute, Civil No. 33574, March 24, 1955.

fact were involved.[17] In its hesitancy to interpret a statute as denying all review, the Supreme Court has construed similar finality clauses as merely limiting the scope of review.[18] Indeed, a study of the cases demonstrates that the law of reviewability is governed more by general policy factors than a normal judicial inquiry into the legislative intent.[19] Moreover, there is precedent supporting judicial review when the military has exceeded its statutory authority.[20] While it may be argued that provision for adequate administrative review should permit the military to have otherwise unrestrained power to determine discharge classifications, when statutory standards for determination of the proper type of discharge have clearly been ignored the check provided by limited judicial review strengthens the administrative process. It is open to question, however, whether in order to avoid a consideration of constitutional issues by ruling on the basis of statutory authority, the Court should indulge in dubious statutory construction.[21]

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17 See Gentila v. Pace, note 16 supra. But see Bernstein v. Herren, note 16 supra. The Gentila case, relied on by both lower courts in the principal case, seems to be authority only for a refusal to review an allegedly erroneous finding of fact.

18 Estep v. United States, 327 U.S. 114 (1946).

19 See Davis, "Unreviewable Administrative Action," 15 F.R.D. 411 at 414 (1954): "The most important forces are the reactions of judges to reviewing or refraining from reviewing particular questions in particular cases."

20 Denby v. Berry, (D.C. Cir. 1922) 279 F. 317, revd. on other grounds, 263 U.S. 29 (1923). However, Justice Clark stated, "At no time until today have the courts interfered in the exercise of this military function." Principal case, dissenting opinion, at 584.

21 See note 13 supra.