

ORIGINAL

In the United States Court of Federal Claims

No. 11-231

(Filed: March 6, 2012)

NOT FOR PUBLICATION

MICHAEL E. YOUNG,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

FILED

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U.S. COURT OF FEDERAL CLAIMS

Michael E. Young, Las Vegas, Nev., pro se.

Austin Fulk, Trial Attorney, Reginald T. Blades, Jr., Assistant Director, Jeanne E. Davidson, Director, Commercial Litigation Branch, Civil Division, Tony West, Assistant Attorney General, Department of Justice, Washington, D.C., for defendant. Imelda L. Paredes, Major, Lauren DiDomenico, Major, Lanourra L. Phillips, Captain, Military Personnel Litigation Branch, Joint Base Andrews, Md., of counsel.

OPINION AND ORDER

GEORGE W. MILLER, Judge

On April 11, 2011, plaintiff Michael E. Young initiated this wrongful discharge action challenging his discharge from the United States Air Force. Plaintiff also asserts related claims that he was improperly denied promotions and that his Enlisted Performance Reports were inaccurate (docket entry 1). Defendant filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Rules of the Court of Federal Claims ("RCFC") or, alternatively, for judgment on the administrative record pursuant to RCFC 52.1 (docket entry 21, Oct. 14, 2011). Plaintiff filed a response in opposition to defendant's motions and also filed motions for summary judgment, for judgment on the pleadings, or, in the alternative, for judgment on the administrative record (docket entry 22, Oct. 24, 2011). Defendant filed an opposition to plaintiff's motions and a reply in support of its motions (docket entry 23, Nov. 10, 2011). For the reasons set forth below, the Court GRANTS defendant's motion to dismiss plaintiff's wrongful discharge and improperly denied promotions claims for failure to state a claim upon which relief can be granted, DISMISSES plaintiff's claims for

equitable relief for lack of jurisdiction pursuant to RCFC 12(b)(1) and 12(h)(3),¹ **DENIES** as moot defendant's alternative motion for judgment on the administrative record, and **DENIES** plaintiff's motions for summary judgment, for judgment on the pleadings, and, in the alternative, for judgment on the administrative record.

I. Background

A. Selection of Plaintiff for "Permanent Change of Station"

Plaintiff enlisted for active duty in the United States Air Force ("AF") on April 1, 1987 and extended his enlistment or reenlisted on numerous occasions. Compl. ¶ 1, Attach. 1. In July 2002, plaintiff received a notification informing him that he had been selected for an overseas "Permanent Change of Station"² to Eielson Air Force Base ("AFB" or "AB"), Alaska, from Nellis AFB, Nevada, as the most eligible non-volunteer. Compl. ¶¶ 3–4; Administrative R. ("AR") 123–26 (docket entry 11, July 13, 2011). Plaintiff was assigned a "report not later than date" of January 30, 2003, over six months after his receipt of the notification. AR 123.

The notification stated that plaintiff's enlistment expiration and date of separation from the AF would be April 12, 2005 and plaintiff's projected tour length was thirty-six months. AR 126. The notification informed plaintiff that he was required to ensure compliance with Air Force Instruction ("AFI") 36-2110, which governs, *inter alia*, "retainability." *Id.* "Retainability is obligated active military service."³ AFI 36-2110 para. 2.29 (Feb. 1, 2000). Declining retainability for a Permanent Change of Station renders an airman ineligible to extend his enlistment, to be promoted, or to reenlist for a specified period following discharge. *See* AR 29–30; AFI 36-2110 para. 2.29.6.3.1. The notification also informed plaintiff that he was scheduled for a "relocation briefing" on July 16, 2002. AR 125.

¹ The Court dismisses the claims for equitable relief for lack of jurisdiction *sua sponte* pursuant to RCFC 12(h)(3) because defendant did not move to dismiss those claims for lack of jurisdiction pursuant to RCFC 12(b)(1); defendant moved to dismiss those claims for failure to state a claim pursuant to RCFC 12(b)(6) and for judgment on the administrative record with respect to those claims pursuant to RCFC 52.1. *See also infra* note 11.

² "Permanent Change of Station" generally means the movement of a service member to a different duty location for permanent duty. Def.'s Mot. 5 n.3.

³ The United States Department of Defense and the AF "prescribe minimum retainability requirements for [Permanent Change of Station] to ensure the AF receives repayment for the costs associated with [Permanent Change of Station], . . . to provide mission continuity at the gaining unit, to provide stability to members and their families after [Permanent Change of Station], or to satisfy some other AF requirement." AFI 36-2110 para. 2.29.

B. Plaintiff's Declination of Retainability on January 21, 2003, the Expiration of Plaintiff's Enlistment and Plaintiff's Honorable Discharge on April 12, 2005

Plaintiff appears to have completed the portion of the notification that required him to complete and return the notification to his commander in early July 2002. Plaintiff indicated that he did not agree with the data used to select him for the overseas assignment. AR 126. However, plaintiff indicated that he did not "intend" to decline retainability for the Permanent Change of Station. *Id.* Plaintiff stated that he read and fully understood the applicable provisions of AFI 36-2110 pertaining to retirement options and declining Permanent Change of Station. *Id.* Plaintiff also stated that he would comply with the time periods specified in AFI 36-2110. *Id.*

Plaintiff is relatively short on specifics as to what he did immediately following receipt of the notification other than complete and return the pertinent portion. It is not clear whether plaintiff attended his "relocation briefing." Plaintiff alleges that he "contested the assignment thru Nellis Military Personnel office due to discrepancies in [his] records." Compl. ¶ 2. The Military Personnel office, also referred to as the "Military Personnel Flight," assists service members in accepting or declining a Permanent Change of Station.

Plaintiff alleges that AFI 36-2110 required the Military Personnel Flight to conduct a "retainability interview" and to require plaintiff to obtain retainability within thirty days after he received the notification, and the Military Personnel Flight failed to do so. Compl. ¶¶ 2-3. Plaintiff alleges that after thirty days the Military Personnel Flight no longer had authority to conduct a retainability interview or to require him to obtain retainability. *Id.*

On January 14, 2003, according to a letter of reprimand issued on January 21, 2003, *see* AR 42, 2nd Lieutenant ("2nd Lt.") Darren H. Stephens ordered plaintiff (1) to contact the gaining unit's section superintendent and (2) to contact "outbound assignment"⁴ at Nellis AFB on January 15, 2003 and to report back on the status of plaintiff's pending Permanent Change of Station orders.

On January 17, 2003, plaintiff signed AF Form 1411, "Extension or Cancellation of Extensions of Enlistment in the Regular Air Force/Air Force Reserve," requesting a nine-month extension of his enlistment. *See* AR 28, 133. Lieutenant Colonel ("LTC") Arthur G. Hatcher, the squadron commander, recommended approval of plaintiff's request.

On January 21, 2003, according to responses to congressional inquiries from the AF and the Inspector General of the Department of Defense ("DoD"), *see* AR 31-32, 48-49, plaintiff requested that the AF change his "report not later than date" of January 30, 2003, but the AF declined to do so. Plaintiff alleges that AFI 36-2110 required the AF to change the "report not

⁴ It is not clear whether 2nd Lt. Stephens was referring to the Military Personnel Flight or to a different office when 2nd Lt. Stephens ordered plaintiff to contact "outbound assignment."

later than date.” Am. Compl. 2 (docket entry 20, Sept. 27, 2011). Paragraph 2.6 of AFI 36-2110 prohibits the AF from denying Permanent Change of Station “entitlements” when a military member is directed to a Permanent Change of Station. *See* AFI 36-2110 para. 2.6. Paragraph 2.33 provides that members “normally should” have Permanent Change of Station orders in hand at least sixty calendar days before the “report not later than date.” *See id.* para. 2.33.

On January 21, 2003, after the AF declined to change his “report not later than date,” plaintiff refused to proceed any further in obtaining retainability for the Permanent Change of Station. Moreover, plaintiff refused to sign AF Form 964, a form used to decline retainability for a Permanent Change of Station and to acknowledge the consequences that accompany declination. The Military Personnel Flight officials signed AF Form 964 and typed plaintiff’s statement as follows: “[Plaintiff] has refused to sign this document confirming his decision to decline to obtain retainability and acknowledging he is ineligible for promotion and ineligible to extend his enlistment or reenlist for a period of 93 calendar days after separation.” AR 30. The Military Personnel Flight officials also hand-wrote: “[Plaintiff] understands the above statement, so verbally stated by him . . .” *Id.* 2nd Lt. Stephens issued a letter of reprimand to plaintiff on January 21, 2003 for violating Article 92 of the Uniform Code of Military Justice for failure to obey the January 14, 2003 orders. AR 42.

On January 24, 2003, plaintiff responded to the letter of reprimand. *See* AR 33–35. In the letter, plaintiff alleged that LTC Hatcher had “indicated [plaintiff] would be Court Martialed if [he accepted the assignment and] did not make the [‘report not later than date’].” AR 33. Plaintiff also alleged that he explained to LTC Hatcher and others that he had met with Area Defense Counsel some time between January 17 and 21, 2003 and “was instructed by counsel not to do anything concerning the assignment.” AR 34. Plaintiff further alleged that LTC Hatcher “indicated that if [plaintiff] did not [‘]out process[’] for the assignment to Alaska he would sign discharge paper work that day.”⁵ *Id.* Plaintiff’s response also indicates that plaintiff had complained to some of his superiors about the AF’s handling of plaintiff’s need for retainability.

In August 2003, plaintiff was given a letter of counseling, informing him of procedures and standards for withdrawing AF Form 964, the Retainability Declination Statement. *See* AR 37–38. Plaintiff refused to sign the letter of counseling.

Because plaintiff declined retainability, he was not required to move to Eielson, AFB, Alaska. On April 12, 2005, plaintiff’s enlistment expired and plaintiff was honorably discharged. Compl. Attach. 1. Plaintiff alleges that his discharge on April 12, 2005 was involuntary because his declination of retainability on January 21, 2003, which rendered him

⁵ Plaintiff’s amended complaint alleges that LTC Hatcher “threatened” plaintiff with immediate discharge if plaintiff did not accept the assignment and “threatened” plaintiff with court-martial if he accepted the assignment and did not make the “report not later than date.” Am. Compl. 2–3. Plaintiff does not appear to rely on the first of these two alleged threats—that plaintiff would be immediately discharged if plaintiff did not accept the assignment—to show that his discharge was involuntary. In fact, plaintiff defied the alleged threat and did not accept the assignment.

ineligible to extend his enlistment or to reenlist, was involuntary. *See id.* ¶¶ 1, 3; Am. Compl. 2. At the time of discharge, plaintiff's rank was E-5.

C. Enlisted Performance Reports for 2002 to 2004 and Denial of Air Force Commendation Medal in 2002

In December 2002, plaintiff received an Enlisted Performance Report with a promotion recommendation rating ("rating") of "4" for October 10, 2001 to October 9, 2002 ("2002 Enlisted Performance Report"). AR 70–71. In December 2002, plaintiff submitted a rebuttal to the 2002 Enlisted Performance Report, claiming that he deserved a "5" rating, and a rebuttal to the denial of the Air Force Commendation Medal. AR 58.

Plaintiff received an Enlisted Performance Report with ratings of "4" for October 10, 2002 to October 9, 2003 and October 10, 2003 to October 9, 2004 ("2003 Enlisted Performance Report" and "2004 Enlisted Performance Report"). *See* AR 72–73, 97–98.

As addressed more fully below, the Enlisted Performance Reports for 2002 to 2004 are pertinent to the instant action because plaintiff alleges that they were inaccurate. *See* Compl. ¶ 5. Specifically, plaintiff alleges that the "4" ratings on the Enlisted Performance Reports were retaliation for plaintiff's complaining about his selection for Permanent Change of Station and for complaining about the AF's handling of his need for retainability.

D. Nellis AFB Installation Inspector General's Investigations

In December 2002, plaintiff filed two complaints with the Installation Inspector General at Nellis AFB. Compl. ¶¶ 1–2. The first complaint contained "allegations of unjust assignment selection process and noncompliance with DoD Directives." AR 129. On January 15, 2003, the Installation Inspector General concluded, "The preponderance of evidence revealed the assignment selection process used to select you for reassignment to Eielson AB to be both equitable and in compliance with directives and policy." AR 130.

In his second complaint, plaintiff alleged that he had endured "[r]eprisal" for complaints concerning his assignment. AR 136. Plaintiff also alleged that his 2002 Enlisted Performance Report rating of "4" was not justified and that the "accomplishments [didn't] match front and back ratings or comments." *Id.* Plaintiff's supervisor indicated on the 2002 Enlisted Performance Report that he had conducted a feedback session on July 8, 2002, AR 71, but plaintiff denied that any feedback session occurred. AR 136. Plaintiff contended that plaintiff's supervisor and indorser lowered plaintiff's 2002 Enlisted Performance Report rating from "5" to "4" in retaliation for his complaints concerning his assignment to Alaska. *Id.* Lastly, plaintiff alleged that his supervisor and indorser unjustifiably denied plaintiff an Air Force Commendation Medal. *Id.*

In April 2003, the Installation Inspector General responded to plaintiff's second complaint to the Inspector General.⁶ *See* AR 54–55. First, the Installation Inspector General

⁶ The response erroneously indicates that plaintiff's complaint was dated January 15, 2003.

found that the evidence was inconclusive with respect to whether a July 8, 2002 feedback session had occurred, noting that documentation showed that a feedback session had occurred on December 2, 2002 and that a rater's failure to conduct a required feedback session does not invalidate an Enlisted Performance Report rating. AR 54. Second, the Installation Inspector General found that a preponderance of evidence showed that the Enlisted Performance Report rating of "4" would not have been different even if protected communication—plaintiff's complaints about his assignment to Alaska—had not been made. *Id.* The Installation Inspector General also stated that a preponderance of evidence showed that the only report written or signed was marked with a "4" and that evidence confirmed that the only Enlisted Performance Report taken to the Military Personnel Flight for processing and inclusion in plaintiff's records was marked with a "4." *Id.* The Installation Inspector General noted the possibility that there could have been an administrative error by the Military Personnel Flight in updating the Enlisted Performance Report, but there was "no way to verify if the report in question was ever erroneously updated as a '5.'" *Id.* Third, the Installation Inspector General stated that plaintiff's supervisor had intended to recommend him for a decoration related to his pending Permanent Change of Station, but the decoration was cancelled when the Permanent Change of Station was cancelled. AR 55. Fourth, the Installation Inspector General determined that the evidence did not substantiate the claim that 2nd Lt. Stephens retaliated against plaintiff for filing the second complaint with the Installation Inspector General. *Id.*

E. DoD Inspector General's Investigation

The DoD Inspector General indicated in a January 2004 letter responding to a congressional inquiry that he had conducted a "preliminary inquiry" into plaintiff's allegation of retaliation. AR 48. The letter stated, "Our inquiry did not find sufficient evidence to support [plaintiff's] allegation that he was improperly selected for an involuntary overseas assignment and that the Military Personnel Flight processed his declination for the assignment in reprisal for making protected communications." *Id.* The DoD Inspector General also agreed with the Installation Inspector General's response to plaintiff's second complaint. AR 49.

F. Air Force Board for Correction of Military Records

1. Plaintiff's Petition and Amendment to the Petition

Plaintiff filed a September 2004 petition and a February 2005 amendment to the petition with the Air Force Board for Correction of Military Records ("correction board") before the expiration of plaintiff's enlistment and plaintiff's discharge on April 12, 2005. *See* AR 11, 142.

Plaintiff challenged his selection for the Permanent Change of Station as the most eligible non-volunteer, plaintiff's declination of retainability, and plaintiff's impending discharge as contrary to law, involuntary, inequitable, retaliatory, an abuse of authority, an abuse of power, biased, prejudicial, malicious, unjust, erroneous, or otherwise improper. Plaintiff requested (1) removal from his records of AF Form 964, the assignment availability code that accompanies declining retainability for a Permanent Change of Station, Enlisted Performance Reports for 2002 to 2004, the letter of reprimand for failure to obey an order, the letter of counseling relating to withdrawal of AF Form 964, and any other "derogatory" material relating to the assignment to Alaska; (2) reinstatement of his eligibility to reenlist, to extend his enlistment, or to be promoted;

and (3) award of a promotion to E-6 or E-7, back pay, allowances, interest, assignment to his base of preference, “5” ratings for the Enlisted Performance Reports for 2002 to 2004, and an Air Force Commendation Medal. AR 13, 142. Plaintiff also sought reinstatement to the position of non-commissioned officer in charge. AR 13.

2. Advisory Opinions from Offices of Primary Responsibility to the Correction Board

The Air Force Personnel Center, Directorate of Assignments, Airman Management Branch issued an advisory opinion finding that plaintiff’s assignment availability code was changed to the code that accompanies declining retainability for a Permanent Change of Station as the result of plaintiff’s voluntary action on January 21, 2003 and that no evidence suggested any error. AR 100.

The Air Force Personnel Center, Director of Force Operations issued an advisory opinion regarding the request to remove the letter of reprimand because it was retaliatory, unjust, and resulted from undue influence in processing AF Form 964. *See* AR 101. The advisory opinion found that the letter of reprimand was justified. *See id.*

The Air Force Personnel Center, Directorate of Personnel Program Management (“AFPC/DPPP”) issued an advisory opinion regarding the remaining claims. First, with respect to a print-out of the 2002 Enlisted Performance Report indicating a “5” rating, AFPC/DPPP noted that there was no evidence showing that a copy of the report was on file with a “5” rating. AR 103. Until filed, “an [Enlisted Performance Report] is considered a working copy and is not a matter of record.” *Id.*

Second, AFPC/DPPP stated that only the members in the rating chain could confirm if counseling was provided and that a “direct correlation” between the information provided in the feedback and the 2002 Enlisted Performance Report was not necessarily required. AR 104.

Third, with respect to the 2003 Enlisted Performance Report, AFPC/DPPP explained that plaintiff’s numerous letters of recommendation, appreciations, and awards did not mandate a “5” rating. *Id.* The advisory opinion also noted that plaintiff’s letter of reprimand may have affected the rating for 2003. *Id.*

Fourth, the advisory opinion addressed plaintiff’s claim that he was recommended for the Air Force Commendation Medal and non-recommended in retaliation for engaging in protected communication. *Id.* The advisory opinion found that there was no evidence to suggest that a decoration recommendation was submitted by plaintiff’s supervisor, recommended by the squadron commander, and placed into official channels. *Id.* The advisory opinion found that that there was “no supporting documentation to support [plaintiff’s] claim that the [Air Force Commendation Medal] recommendation was either non-recommended or denied based on cancellation of [plaintiff’s] pending [Permanent Change of Station] assignment.” *Id.*

3. Plaintiff's Response to Advisory Opinions

In December 2004, plaintiff responded to the advisory opinions received by the correction board. *See* AR 109. Plaintiff's response repeats the same arguments and allegations made in his petition and amendment.

4. Correction Board's Decision

On March 10, 2005, the correction board concluded:

Insufficient relevant evidence has been presented to demonstrate the existence of error or injustice [W]e do not find [plaintiff's] uncorroborated assertions sufficiently persuasive to override the rationale provided by the Air Force. We agree with the opinions and recommendations of the Air Force offices of primary responsibility and adopt their rationale as the basis for our conclusion that that the applicant has not been the victim of error or injustice.

AR 8.

First, the correction board explained, "After careful review of the evidence of record and [plaintiff]'s submission, we are not persuaded by his assertions that execution of the [Permanent Change of Station] Declination Statement was erroneous or unjust." AR 9.

Second, the correction board found "no evidence that the contested [Enlisted Performance Reports were] not an accurate depiction of [plaintiff's] rating chain's assessment of his performance and demonstrated potential during the periods in question." *Id.* The board continued, "Other than his own assertions, we see no evidence that his raters abused their discretionary authority, that the ratings were based on inappropriate considerations, or that the reports are technically flawed." *Id.*

Third, the board concluded, "[W]e agree with the opinions of the officials that previously reviewed this matter that his contention that the [letter of reprimand] was written in reprisal for stating that he was going to raise the issues at hand to the wing commander, [sic] is unsubstantiated." *Id.* The board agreed that the letter of reprimand was issued in response to plaintiff's failure to obey a lawful order. *Id.* The board noted that the letter of counseling was informational and not derogatory, and it could find no reason that the letter's removal would be warranted.

Fourth, the correction board was "compelled to note that commanders are the recommending officials" for Air Force Commendation Medals and that plaintiff had not provided evidence showing that his commander had recommended such a medal. *Id.*

Fifth, based on the foregoing, the correction board denied plaintiff's request that he be promoted to the rank of E-6 or E-7 and assigned to his base of preference. *Id.*

G. *Instant Action*

On April 11, 2011, plaintiff filed his complaint in this court. Plaintiff alleges wrongful discharge, improperly denied promotions, and inaccurate Enlisted Performance Reports. Plaintiff's September 27, 2011 amended complaint provides additional factual allegations⁷ that plaintiff relies upon to attempt to show the involuntariness of his discharge. The amended complaint also cited for the first time the Military Pay Act, 37 U.S.C. § 204, as the basis of his claims. Am. Compl. 1.

In this action, plaintiff seeks some of the same relief he sought from the correction board and additional relief he did not request from the board. Plaintiff seeks: (1) back pay and allowances retroactive to April 12, 2005 calculated up to E-7 rank; (2) back pay and allowances retroactive to January 21, 2003 calculated up to E-7 rank; (3) promotion to E-7 rank; (4) additional active duty service credit calculated to six years; (5) reinstatement to active duty if necessary; (6) "[r]etirement rank E-7 and pay status at 24 years high year tenure total active duty service credit & associated DD-214 to reflect status"; (7) removal of any reference or record of the assignment declination and the "associated re-entry code"; and (8) removal of the Enlisted Performance Reports for 2002 to 2004. Compl. Requested Relief.

II. Discussion

A. *Jurisdiction*

"Jurisdiction must be established as a threshold matter before the court may proceed with the merits of this or any other action." *OTI Am., Inc. v. United States*, 68 Fed. Cl. 108, 113 (2005). While defendant has not moved to dismiss for lack of jurisdiction, the Court has an obligation to examine plaintiff's claims and determine whether they are within the Court's jurisdiction. *Special Devices, Inc. v. OEA, Inc.*, 269 F.3d 1340, 1342 (Fed. Cir. 2001). The Court may raise jurisdictional considerations at any time *sua sponte*. *Id.* If the Court determines that it does not have jurisdiction over plaintiff's claims, it must dismiss them. RCFC 12(h)(3).

"The Tucker Act authorizes certain actions for monetary relief against the United States to be brought in the Court of Federal Claims." *Martinez v. United States*, 333 F.3d 1295, 1302 (Fed. Cir. 2003) (en banc). "The actions for which the Tucker Act waives sovereign immunity are actions pursuant to contracts with the United States, actions to recover illegal exactions of money by the United States, and actions brought pursuant to money-mandating constitutional provisions, statutes, regulations, or executive orders." *Id.* at 1302-03.

1. Wrongful Discharge Claim

"In the context of military discharge cases, the applicable 'money-mandating' statute that is generally invoked is the Military Pay Act, 37 U.S.C. § 204." *Id.* at 1303. To state a wrongful discharge case, "a plaintiff therefore must allege that, because of the unlawful discharge, the

⁷ The additional factual allegations in plaintiff's amended complaint are the same as the factual allegations plaintiff made before the correction board.

plaintiff is entitled to money in the form of the pay that the plaintiff would have received but for the unlawful discharge.” *Id.*

Here, based on the Tucker Act and the Military Pay Act, this Court has jurisdiction over plaintiff’s claim for back pay and allowances retroactive to April 12, 2005, the date plaintiff’s enlistment expired and he was discharged, calculated up to E-7 rank. *See id.* The Court has jurisdiction over the wrongful discharge claim even if plaintiff does not ultimately succeed in proving that his discharge on April 12, 2005 was involuntary, as required for plaintiff to succeed on the merits. *See Metz v. United States*, 466 F.3d 991, 998 (Fed. Cir. 2006). Plaintiff’s wrongful discharge claim was also filed within the six-year jurisdictional statute of limitations. *See* 28 U.S.C. § 2501; *Martinez*, 333 F.3d at 1310, 1316. Plaintiff’s action was commenced on April 11, 2011, within six years of plaintiff’s April 12, 2005 discharge.

2. Improperly Denied Promotions Claim

Plaintiff also alleges a claim for back pay and allowances retroactive to January 21, 2003 calculated up to E-7 rank. Plaintiff seeks the difference in pay and allowances for his actual rank of E-5 and for the ranks to which plaintiff would have been promoted, E-6 or E-7, had he not been rendered ineligible to be promoted on January 21, 2003, the date AF Form 964 was executed on his behalf. To avoid redundancy, the Court construes plaintiff’s second claim as seeking back pay and allowances for the period from January 21, 2003 to April 11, 2005, *before plaintiff was discharged*.

The Military Pay Act serves as a money-mandating statute for the improperly denied promotions claim. *See Tippet v. United States*, 98 Fed. Cl. 171, 178–79 (2011) (relying on *Fisher v. United States*, 402 F.3d 1167 (Fed. Cir. 2005) (en banc portion) and *Dysart v. United States*, 369 F.3d 1303 (Fed. Cir. 2004)); *see also Reilly v. United States*, 93 Fed. Cl. 643, 649 (2010) (dismissing improperly denied promotion claim for failure to state a claim, not for lack of jurisdiction). *But see Roberts v. United States*, 98 Fed. Cl. 130, 140–41 (2011) (dismissing improperly denied promotion claim for lack of jurisdiction); *Driscoll v. United States*, 67 Fed. Cl. 22, 26–27 (2005) (same).

A claim accrues on “the date on which the service member was denied the pay to which he claims entitlement.” *Martinez*, 333 F.3d at 1314. Petitioning a military board for correction of records does not affect the statute of limitations for an unlawful discharge claim. *See Chambers v. United States*, 417 F.3d 1218, 1224 (Fed. Cir. 2005). Here, plaintiff’s April 11, 2011 complaint may appear to be untimely as to the pay and allowances plaintiff seeks for the period from January 21, 2003 to April 11, 2005. However, the statute of limitations was tolled during plaintiff’s active military service. *See Chisolm v. United States*, 82 Fed. Cl. 185, 198 (2008) (citing 50 U.S.C. app. § 526(a)), *aff’d*, 298 F. App’x 957 (Fed. Cir. 2008); *Lowe v. United States*, 79 Fed. Cl. 218, 224–25 (2007). Thus, plaintiff’s pre-discharge denied promotions claim also accrued on April 12, 2005, the date of plaintiff’s discharge.

3. Claims for Equitable Relief

“To provide an entire remedy and to complete the relief afforded by the judgment, [this C]ourt may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records.” 28 U.S.C. § 1491(a)(2). Thus, to the extent plaintiff is entitled to a money judgment, the Court may provide additional equitable relief in order to provide an entire remedy. As explained below, however, the Court **DISMISSES** plaintiff’s claims for equitable relief for lack of jurisdiction because plaintiff has failed to state a claim for a money judgment. *See infra* Part II.D.

B. *Review of Decisions of Boards for Correction of Military Records*

Section 1552 of Title 10 delegates the power to correct military records to secretaries of the military departments, acting through boards of civilians, “to correct an error or remove an injustice.” 10 U.S.C. § 1552(a)(1). The Federal Circuit has “held that a service member need not seek relief from a military corrections board before suing in the Court of Federal Claims.” *Metz*, 466 F.3d at 998. However, when a service member chooses to seek relief from a military corrections board, the court “will not disturb the decision of [a] corrections board unless it is arbitrary, capricious, contrary to law, or unsupported by substantial evidence.” *Chambers*, 417 F.3d at 1227 (citing *Haselrig v. United States*, 333 F.3d 1354, 1355 (Fed. Cir. 2003)). The Court of Federal Claims does not sit as “a super correction board.” *Skinner v. United States*, 594 F.2d 824, 830 (Ct. Cl. 1979).

A plaintiff must show by “cogent and clearly convincing evidence” that the board’s decision is arbitrary, capricious, contrary to law, or unsupported by substantial evidence. *Wronke v. Marsh*, 787 F.2d 1569, 1576 (Fed. Cir. 1986) (quoting *Dorl v. United States*, 200 Ct. Cl. 626, 633 (1973)) (internal quotation marks omitted). “[M]ilitary administrators are presumed to act lawfully and in good faith like other public officers, and the military is entitled to substantial deference in the governance of its affairs.” *Dodson v. U.S. Gov’t, Dep’t of Army*, 988 F.2d 1199, 1204 (Fed. Cir. 1993); *see also Richey v. United States*, 322 F.3d 1317, 1326 (Fed. Cir. 2003) (noting “the presumption of regularity that attaches to all administrative decisions”).

When a service member chooses first to petition a correction board, the Court of Federal Claims’ review is limited to the administrative record. *Metz*, 466 F.3d at 998. A plaintiff also will be precluded from later making allegations in court not raised before the board. *Id.* at 999; *Murakami v. United States*, 398 F.3d 1342, 1354 (Fed. Cir. 2005).

C. *Plaintiff’s Wrongful Discharge and Improperly Denied Promotions Claims Must be Dismissed for Failure to State a Claim*

To survive a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to RCFC 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, ----, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When the court considers a motion to dismiss for failure to state a claim pursuant to

RCFC 12(b)(6), the allegations of the complaint must be construed favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

1. Wrongful Discharge Claim

“[N]o one has a right to enlist or reenlist in the armed forces unless specially granted one.” *Dodson*, 988 F.2d at 1208. Thus, “an enlisted serviceman who has been improperly discharged is entitled to recover pay and allowances only to the date on which his term of enlistment would otherwise have expired had he not been so discharged.” *Id.* A court will also not decide whether a department of the armed forces would have exercised its discretion to enlist or reenlist a service member had an alleged legal error not occurred because that decision is for the military departments, not the court. *Id.*; *see also id.* (“We can however remedy the legally defective process so as to put [the plaintiff] into the position that he would have been had the proper procedures been followed at the relevant times.” (citing *Doyle v. United States*, 599 F.2d 984, 996 (Ct. Cl. 1979))). Plaintiff had no right to enlist or reenlist in the armed forces unless specially granted such a right, which did not happen here.

Plaintiff appears to allege that he was legally entitled to extend his enlistment or to reenlist beyond the expiration of his enlistment on April 12, 2005. Plaintiff appears to rely on the fact that he was selected for a Permanent Change of Station that required retainability and LTC Hatcher recommended approval of plaintiff’s request for a nine-month extension of his enlistment. However, even if plaintiff were legally entitled to extend his enlistment or to reenlist beyond the expiration of his enlistment, the Court would reject plaintiff’s wrongful discharge claim on this basis for failure to state a claim pursuant to RCFC 12(b)(6).

Whether or not plaintiff was legally entitled to extend his enlistment or to reenlist, the involuntariness of a plaintiff’s separation remains a “necessary requirement for a separated-plaintiff’s case to fit within the scope of 37 U.S.C. § 204.” *Metz*, 466 F.3d at 998. “That is because if the service member’s separation from the service is voluntary, such as pursuant to a voluntary retirement, the Military Pay Act does not impose on the government any continuing obligation to pay the service member.” *Smith v. Sec’y of Army*, 384 F.3d 1288, 1295 (Fed. Cir. 2004).

A presumption of voluntariness generally exists when a service member tenders his resignation or retires. *Tippett v. United States*, 185 F.3d 1250, 1255 (Fed. Cir. 1999), *abrogated on other grounds by Fisher*, 402 F.3d 1167 (en banc portion); *Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975). “This presumption of voluntariness logically . . . extend[s] to a military service member’s honorable discharge upon the expiration of the terms of his enlistment where the member refuses to execute an authorized re-enlistment contract.” *Carmichael v. United States*, 298 F.3d 1367, 1372 (Fed. Cir. 2002).

“The presumption of voluntariness is not rebutted by showing that the service member faced an inherently difficult situation Under this view, a resignation is deemed voluntary even where offered to avoid a court-martial or other serious discipline.” *House v. United States*, 99 Fed. Cl. 342, 348 (2011); *see also id.* at 348 n.7 (citing *Christie*, 518 F.2d at 587; *Moody v.*

United States, 58 Fed. Cl. 522, 525–26 (2003) (finding voluntariness when the plaintiff accepted pretrial agreement and resigned in face of impending court-martial); *Scarseth v. United States*, 52 Fed. Cl. 458, 468 (2002) (finding voluntariness when the plaintiff resigned in face of impending court-martial); *Gallucci v. United States*, 41 Fed. Cl. 631, 645 (1998) (finding voluntariness when the plaintiff resigned in the face of a recommendation for administrative discharge); *Brown v. United States*, 30 Fed. Cl. 227, 229–30 (1993) (finding voluntariness when the plaintiff resigned “for the good of the service” following a recommendation of trial by court-martial), *aff’d*, 26 F.3d 139 (Fed. Cir. 1994) (unpublished table decision)).

Courts “have held that a resignation is involuntary if it is caused by . . . : (1) government duress or coercion; (2) mental incompetence . . . ; or (3) government deception or misrepresentation.” *Sinclair v. United States*, 66 Fed. Cl. 487, 492 (2005). In *Christie*, the Court of Claims held that a plaintiff seeking to show duress or coercion must show that (1) he involuntarily accepted the government’s terms; (2) circumstances permitted no alternatives; and (3) the government’s coercive acts caused the circumstances. 518 F.2d at 587, *cited in Carmichael*, 298 F.3d at 1372. The existence of duress or coercion is objective and based on all the facts and circumstances. *Carmichael*, 298 F.3d at 1372.

That the government acted wrongfully does not necessarily show duress or coercion. “The government’s failure to follow its own rules *may* constitute coercive action sufficient to result in an employee’s involuntary discharge.” *Id.* (emphasis added) (citing *Roskos v. United States*, 549 F.2d 1386, 1389–90 (Ct. Cl. 1977); *see House*, 99 Fed. Cl. at 348–51 (discussing how the courts have reconciled *Roskos*, which arguably suggested that wrongful conduct alone renders a resignation or retirement involuntary, with *Christie*’s three-part test and holding that “[u]nder a proper construction of *Roskos*, . . . a potential claimant cannot rest upon a showing that an agency or officer of the United States acted wrongfully”). In *Roskos*, the court held that a plaintiff-employee’s retirement following a wrongful reassignment to a new city was involuntary. 549 F.2d at 1389. Thus, while the government’s wrongful act does not always show duress or coercion, in *Roskos* the government’s wrongful conduct showed coercion because it involved the wrongful reassignment of the plaintiff-employee to a new city. *See id.* (“Because that reassignment was invalid rather than proper, it represented an unjustifiable coercive action by the Government against plaintiff which, taken together with the fact that he was a family man, directly produced his retirement. The case thus falls within the principle that a resignation or retirement is vitiated if it results from coercive acts of the Government which leave the employee with no practicable alternative.” (footnotes omitted)).

Here, plaintiff alleges that his discharge on April 12, 2005 was involuntary because his declination of retainability on January 21, 2003, which rendered him ineligible to extend his enlistment or to reenlist, was involuntary. Plaintiff relies on duress or coercion to support the claimed involuntariness of his declination of retainability.

First, plaintiff alleges that the AF violated AFI 36-2110 (1) by not conducting a retainability interview and requiring him to obtain retainability within thirty days of the notification; (2) by conducting a retainability interview and requiring plaintiff to obtain retainability after thirty days; (3) by not changing the “report not later than date”; and (4)

by not stating the required length of retainability required on AF Form 964.⁸ Second, plaintiff alleges that LTC Hatcher “threatened” that plaintiff would be court-martialed if he obtained retainability and did not make the “report not later than date.”⁹ Third, plaintiff asserts that AF officials abused their authority, and, fourth, that AF officials retaliated against him for engaging in protected communication in violation of a whistleblower statute, 10 U.S.C. § 1034.¹⁰ See Compl. ¶¶ 2–5.

Plaintiff’s claim that he was under duress or coercion when he declined retainability suffers from two principal flaws. First, plaintiff has not sufficiently pleaded that the AF violated AFI 36-2110 following the selection of plaintiff for a Permanent Change of Station. Thus, plaintiff may not avail himself of *Roskos*, in which the plaintiff-employee was improperly reassigned to a new city. Before specifically addressing why plaintiff has not sufficiently alleged that the AF violated AFI 36-2110, the Court recites the applicable provisions.

AFI 36-2110 paragraph 2.29.6, which governs retainability for airmen, begins:

There are a number of actions prescribed by this instruction which have a retainability requirement. Within the timeframe established for a particular action, the [Military Personnel Flight] will determine if airmen do or do not have the prescribed retainability; whether or not airmen want to accept the action; their eligibility to obtain additional retainability or decline to obtain retainability; what actions airmen must take in connection with acceptance or declination; schedule airmen for completion of those actions; and follow-up to ensure completion.

AFI 36-2110 para. 2.29.6.

⁸ Plaintiff does not allege that he did not know the required length of retainability.

⁹ Defendant argues that plaintiff is precluded from making allegations about coercion or duress caused by LTC Hatcher because he waived such claims by not making them before the correction board. See Def.’s Mot. 26. The Court rejects defendant’s waiver argument because, while the argument section of plaintiff’s petition did not expressly raise the allegations, the evidence attached to the petition before the correction board included the allegations. See AR 33–35.

¹⁰ By way of background, plaintiff’s amended complaint alleges that Area Defense Counsel told plaintiff to do nothing. Am. Compl. 2–3. However, plaintiff does not appear to rely on ineffective assistance of counsel to show involuntariness. See *Harris v. United States*, No. 09–421C, 2011 WL 5974409, at *28–30 (Fed. Cl. Nov. 21, 2011) (discussing a claim of involuntariness caused by ineffective assistance of counsel). Even if plaintiff had invoked this ground, it would be unavailing. Plaintiff has not sufficiently pleaded that he relied on the advice. See *id.* at *30 (explaining that the plaintiff did not make “any allegation or offer[] any evidence to support a contention that he relied exclusively or extensively on counsel’s advice or that his final decision not to face a Board of Inquiry and to resign rested with any individual other than himself”).

If an airman does not have retainability and *wants to obtain it*, the Military Personnel Flight “will determine if [he is] eligible and assist [him] with reenlistment or extension of enlistment Retainability must be obtained within the time prescribed for the action.” *Id.* para. 2.29.6.2. For continental United States-to-overseas Permanent Change of Station, the Military Personnel Flight “will conduct a retainability interview and require airmen to obtain retainability no later than 30 calendar days” after notification of the Permanent Change of Station. *Id.* para. 2.29.6.4.2.

A member is not permitted to use Permanent Change of Station “entitlements” until he obtains the prescribed Permanent Change of Station retainability. *See id.* para. 2.29.3.

If a career airman does not have retainability and *does not want to obtain it*, the Military Personnel Flight “will formally record [his] declination,” unless exceptions apply. *Id.* para. 2.29.6.3.1. An airman must read portions of AFI 36-2606 pertaining to extension, promotion, and reenlistment ineligibility and sign AF Form 964 within seven days of being notified of the need for retainability. *See id.* If a career airman declines to obtain retainability, the Military Personnel Flight will give the career airman an assignment availability code indicating that the airman declined retainability. *See id.* If the career airman refuses to sign AF Form 964, the Military Personnel Flight will administer the form on behalf of the career airman with an accompanying statement signed by the person who counseled the airman. *See id.*

AF 36-2110 paragraph 2.32, regarding Permanent Change of Station notification, reiterates the instructions regarding retainability:

Airmen who do not have the required retainability (see paragraph 2.29. [sic]) and who accept the assignment . . . and want to obtain retainability must sign and return the notification in person to the [Military Personnel Flight] within 7 calendar days. The [Military Personnel Flight] will schedule airmen to obtain retainability at the earliest possible date, but not later than 30 calendar days after the date airmen acknowledged selection. If an airman fails to obtain the required retainability within 30 days of notification, the [Military Personnel Flight] will reclaim the assignment and have the airman sign AF Form 964. If the airman refuses to sign AF Form 964, then the [Military Personnel Flight] will take action according to paragraph 2.29.6. The [Military Personnel Flight] will not execute the AF Form 964 without the member’s knowledge.

Id. para. 2.32.4.5. A career airman who does not have retainability and *does not want to obtain it* “must report in person to the [Military Personnel Flight] within 7 calendar days of notification and must sign a formal retainability declination statement when required by paragraph 2.29.” *Id.* para. 2.32.4.4.

AFI 36-2110 paragraph 2.6 governs Permanent Change of Station entitlements. The AF is prohibited from denying Permanent Change of Station entitlements when a military member is directed to a Permanent Change of Station. *See id.* para. 2.6.

AFI 36-2110 paragraph 2.33, regarding Permanent Change of Station notification and “orders in hand minimums,” provides that members “normally should” have Permanent Change of Station orders in hand at least sixty calendar days before the “report not later than date.” *See id.* para. 2.33.

Here, plaintiff’s allegations are insufficient to state a violation of AFI 36-2110. Nothing in the regulations suggests that the Military Personnel Flight loses the authority to conduct a retainability interview and to require a service member to obtain retainability beyond thirty days after notification. Moreover, nothing in the regulations suggests that the AF was required to change plaintiff’s “report not later than date” when it conducted the retainability interview and required him to obtain retainability beyond thirty days after notification. In light of plaintiff’s conduct following receipt of the notification, the Court cannot find that plaintiff stated a claim that the Military Personnel Flight violated applicable regulations by not conducting a retainability interview and requiring him to obtain retainability within thirty days of the notification. The Military Personnel Flight properly required plaintiff to acknowledge that he had read and fully understood the applicable provisions of AFI 36-2110 pertaining to retirement options and Permanent Change of Station declination. AR 126. Construing plaintiff’s allegations in the light most favorable to him, it appears that plaintiff refused to timely achieve retainability and that he contested the merits of his selection for the Permanent Change of Station and did nothing else. It is not even clear whether plaintiff attended a relocation briefing. There is no suggestion by plaintiff that he did not know that he needed to obtain retainability and that he needed to do so within thirty days. Plaintiff also has not alleged that he would have obtained retainability within thirty days had the Military Personnel Flight conducted a retainability interview within thirty days. Based on the foregoing, plaintiff’s allegation that he was under duress or coercion when he declined retainability is unavailing. Plaintiff has failed to allege any colorable claim that the AF violated AFI 36-2110.

The second principal flaw in plaintiff’s claim that he was under duress or coercion when he declined retainability is the fact that plaintiff in fact had an alternative to declination of retainability. Plaintiff could have obtained retainability and sought to comply with his “report not later than date.” *See House*, 99 Fed. Cl. at 348. In sum, plaintiff has not alleged facts plausibly suggesting that the AF violated AFI 36-2110 following the selection of plaintiff for the Permanent Change of Station or that plaintiff had no alternative to declination of retainability. Thus, even if plaintiff were legally entitled to extend his enlistment or to reenlist, the Court **DISMISSES** plaintiff’s wrongful discharge claim pursuant to RCFC 12(b)(6) because plaintiff does not plausibly allege that his discharge was involuntary.

2. Improperly Denied Promotions Claim

“As a general matter, a service member is entitled only to the salary of the rank to which he is appointed and in which he serves.” *Smith*, 384 F.3d at 1294 (citing *James v. Caldera*, 159 F.3d 573, 582 (Fed. Cir. 1998); *Dodson*, 988 F.2d at 1208; *Skinner*, 594 F.2d at 830). Thus, “in a challenge to a decision not to promote, the Military Pay Act ordinarily does not give rise to a right to the pay of the higher rank for which the plaintiff was not selected.” *Id.* (citing *Law v.*

United States, 11 F.3d 1061, 1064 (Fed. Cir. 1993); *Howell v. United States*, 230 Ct. Cl. 816, 817 (1982); *Knightly v. United States*, 227 Ct. Cl. 767, 769 (1981)). A recognized exception is when there is a clear-cut entitlement to the promotion. *Id.*

Here, plaintiff seeks the difference in pay and allowances for plaintiff's actual rank of E-5 and for the ranks to which plaintiff could have been promoted, E-6 or E-7, had he not been declared ineligible to be promoted. As construed by the Court to avoid redundancy, *see supra* Part II.A.2, this claim seeks back pay and allowances for the period from January 21, 2003 to April 11, 2005, before plaintiff was discharged. However, plaintiff has not alleged facts plausibly suggesting that he was entitled to a promotion. Thus, the Court **DISMISSES** plaintiff's improperly denied promotions claim pursuant to RCFC 12(b)(6).

D. The Court Dismisses Plaintiff's Claims for Equitable Relief for Lack of Jurisdiction Because Plaintiff Has Failed to State a Claim for a Money Judgment

"[T]here is no provision giving the Court of Federal Claims jurisdiction to grant equitable relief when it is unrelated to a claim for monetary relief pending before the court." *Nat'l Air Traffic Controllers Ass'n v. United States*, 160 F.3d 714, 716 (Fed. Cir. 1998). However, as noted above, *see supra* Part II.A.3, "[t]o provide an entire remedy and to complete the relief afforded by the judgment, [this C]ourt may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records." 28 U.S.C. § 1491(a)(2).

Here, the Court lacks the authority to grant the requested equitable relief because plaintiff has failed to state a claim for a money judgment. As the language in § 1491(a)(2) indicates, this Court "has no power 'to grant affirmative non-monetary relief unless it is tied and subordinate' to a money judgment." *Caldera*, 159 F.3d at 582 (quoting *Austin v. United States*, 206 Ct. Cl. 719, 723 (1975)). Accordingly, the Court **DISMISSES** plaintiff's claims for equitable relief for lack of jurisdiction pursuant to RCFC 12(b)(1) and 12(h)(3).¹¹

¹¹ "Precedent is somewhat mixed on th[e] issue" whether plaintiff's claims for equitable relief should be dismissed for lack of jurisdiction or for failure to state a claim. *Bevevino v. United States*, 87 Fed. Cl. 397, 403–04 (2009) ("A plaintiff's request for declaratory relief from this court may also pose a jurisdictional issue. This court has nonetheless had occasion to address requests for equitable relief under both RCFC 12(b)(6) [for failure to state a claim] and RCFC 12(b)(1) [for lack of jurisdiction]. Although precedent is somewhat mixed on this issue, the court believes that RCFC 12(b)(1) is the appropriate vehicle for considering a motion to dismiss a plaintiff's request for a declaratory judgment or other equitable relief." (citations omitted)).

Here, the Court is persuaded that plaintiff's claims for equitable relief should be dismissed for lack of jurisdiction pursuant to RCFC 12(b)(1) and 12(h)(3). *See Flowers v. United States*, 321 F. App'x 928, 933 (Fed. Cir. 2008) ("Because we have affirmed, *supra*, the trial court's judgment on the administrative record of [the plaintiff]'s military pay claim, to which equitable relief might conceivably have been tied, we likewise affirm its holding that the absence of money damages in this case divests the court of its ability to grant equitable relief."); *Caldera*, 159 F.3d at 581 ("[T]he matter of the bar to reenlistment would be entirely unrelated to the back pay issue. Thus, [the plaintiff's] challenge to the bar to reenlistment and his claim that

E. Plaintiff's Claims for Equitable Relief Also Lack Merit

Plaintiff seeks to void any reference to, or record of, the assignment declination and its consequences. Compl. Requested Relief. While not specifically requested by plaintiff, his complaint appears to also request equitable relief to remedy “procedural violations alleged to have occurred during the course of [his consideration for] promotion [before plaintiff’s discharge].” *Reilly*, 93 Fed. Cl. at 650; *see Hoskins v. United States*, 61 Fed. Cl. 209, 219–20 (2004) (discussing cases involving procedural violations). In this case, the alleged procedural violations related to the AF’s declaration that plaintiff was ineligible to be promoted because he declined retainability. Plaintiff also seeks equitable relief as follows: additional active duty credit calculated to six years, reinstatement to active duty if necessary, promotion to E-7 rank, and “[r]etirement rank E-7 and pay status at 24 years high year tenure total active duty service credit & associated DD-214 to reflect status.” Compl. Requested Relief.

Even if the Court had jurisdiction over plaintiff’s claims for equitable relief, these claims would have to be dismissed on the merits. Plaintiff voluntarily declined retainability, plaintiff does not have a right to enlist or reenlist in the AF, and claims attacking the substantive bases for promotion decisions are non-justiciable. *See Dodson*, 988 F.2d at 1208; *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002).

Plaintiff also seeks correction of his Enlisted Performance Reports for 2002 to 2004. However, plaintiff’s challenge to the decision of the correction board adverse to plaintiff must be rejected. Plaintiff fails to allege facts plausibly suggesting that the board’s decision with respect to the Enlisted Performance Reports for 2002 to 2004 was not supported by substantial evidence. Plaintiff merely alleges that the board’s decision lacked “credibility.” Compl. ¶ 5, Requested Relief. On the contrary, the board’s decision, with respect to this claim and the others pursued before it, was well reasoned, carefully considered, and fully supported by substantial, credible evidence of record.

F. The Court Declines to Transfer Plaintiff's Claims for Equitable Relief

Plaintiff has not requested transfer of any of his claims. Nonetheless, the Court of Federal Claims must transfer an action to a court in which the action could have been brought when the Court lacks subject matter jurisdiction over the action and the “interest of justice” requires transfer. 28 U.S.C. § 1631; *see id.* § 610 (defining “courts” for purposes of § 1631 as including the Court of Federal Claims).

“The interest of justice may be served if the statute of limitations in the appropriate court would run if the case is dismissed and the plaintiff must file anew in that court.” *Willis v. United States*, 96 Fed. Cl. 467, 471 (2011). The court may decline to transfer an action “[i]f such transfer ‘would nevertheless be futile given the weakness of plaintiff’s case on the merits.’” *Faulkner v. United States*, 43 Fed. Cl. 54, 56 (1999) (quoting *Siegal v. United States*, 38 Fed. Cl. 386, 390–91 (1997)).

he was denied the right to appeal the bar are claims for equitable relief that lie outside the Tucker Act jurisdiction of the Court of Federal Claims.” (citation omitted)); *see also supra* note 1.

Here, as discussed above, *see supra* Part II.E, plaintiff's claims for equitable relief lack merit. Thus, even assuming another court would have jurisdiction to hear those claims,¹² transfer of plaintiff's claims for equitable relief would, in this Court's view, be futile given the weakness of such claims on the merits. Accordingly, the Court declines to transfer plaintiff's claims for equitable relief.

CONCLUSION

The Court **GRANTS** plaintiff's motion for leave to proceed *in forma pauperis* to the extent necessary to permit him to litigate the pending motions (docket entry 4, Apr. 11, 2011). For the foregoing reasons, the Court **GRANTS** defendant's motion to dismiss plaintiff's claims for wrongful discharge and improperly denied promotions for failure to state a claim upon which relief can be granted pursuant to RCFC 12(b)(6), **DISMISSES** plaintiff's claims for equitable relief for lack of jurisdiction pursuant to RCFC 12(b)(1) and 12(h)(3), **DENIES** as moot defendant's alternative motion for judgment on the administrative record, and **DENIES** plaintiff's motions for summary judgment, for judgment on the pleadings, and, in the alternative, for judgment on the administrative record. The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.


GEORGE W. MILLER
Judge

¹² The Court need not, and does not, reach the question whether a district court would have jurisdiction to hear plaintiff's claims to the extent plaintiff's claims for equitable relief can be construed as claims based on the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–06. *Compare Reilly*, 93 Fed. Cl. at 650 (transferring APA claims), and *Roberts*, 98 Fed. Cl. at 143 (same), with *Remmie v. United States*, 98 Fed. Cl. 383, 387 (2011) (declining to transfer APA claims), and *Smalls v. United States*, 87 Fed. Cl. 300, 310 (2009) (same).