

In the United States Court of Federal Claims

No. 03-2470C
(Filed March 29, 2006)

ANTHONY J. BROOKS,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

ORDER

The Court has reviewed the papers submitted by the parties concerning the plaintiff's motion for remand instructions. As was discussed during the status conferences held on January 5 and February 2, 2006, and as the parties agreed in their February 1, 2006 Joint Status Report, a second remand of this matter is necessary. This Court indicated in the April 18, 2005 opinion that the matter was being remanded so that the Deputy Assistant Secretary for Program Support ("Deputy Assistant"), the Secretary's delegate, could seek further consideration of plaintiff's appeal by the Board for Correction for PHS Commissioned Corps Records ("Board"). *Brooks v. United States*, 65 Fed. Cl. 135, 151 (2005). Perhaps the Court was not as clear in its opinion as it should have been, but the expectation was that the Board would obtain the additional information requested and, in light of the legal rulings of the Court, make a further recommendation to the Deputy Assistant. *See, e.g., id.* at 150 (explaining that if the letter of reprimand caused the chain of events preventing plaintiff's appointment, the Board "might well decide" to remedy this by recommending that his record be corrected). The Deputy Assistant, in turn, was expected to either approve or disapprove the recommendation (or, if need be and if time permitted, again remand the matter).

As was explained in the aforementioned opinion, the Deputy Assistant was in error in disapproving the Board's recommendation, as he wrongly believed that the appointment power rested with the Secretary, instead of with the Surgeon General. *Id.* at 141-43, 151; *see* Admin. R. 289 (Deputy Assistant states that a "unique set of circumstances" resulted in no record to correct, because the appointment "required the Secretary's approval"). The Board, on the other hand, correctly concluded that the decision was in the hands of the Surgeon General, *see* Admin. R. 18 (recommendation d.), but did not order any correction to Capt. Brooks' records, apparently due to its failure to recognize that only ministerial actions remained to make his appointment

effective. *See Brooks*, 65 Fed. Cl. at 150. The remand was designed to give the Board the opportunity to reconsider the appeal in light of these legal rulings, and to give the Secretary (acting through the Deputy Assistant) a second chance at deciding what corrective action, if any, was warranted. The Board has already concluded that the letter of reprimand “resulted in an error and an injustice.” Admin. R. 18. Since the Board had not appreciated the legal consequences of the selection of Capt. Brooks by the Surgeon General, it did not initially consider whether the Surgeon General revoked the appointment. Nor did the Board initially determine whether a revocation, if done, was a response to the letter of reprimand; or whether other actions in the appointment process, such as expanding the pool of candidates and convening a new selection board, were caused by the letter of reprimand’s derailment of Capt. Brooks’ appointment. The Court raised these matters, to focus the Board’s attention on the consequences of the letter of reprimand -- given the Surgeon General’s appointment power -- and the appropriate corrective actions.

Rather than recommend corrective action to the Deputy Assistant, the Board instead used the opportunity to complain “that the five questions posed by the Judge were beyond the authority granted to the Board,” “that the Court-ordered remand exceeded the scope of the Board,” and that complying with this Court’s order risked “a fundamental shift in the Board’s charter from identifying and correcting errors in the record to investigating and determining the merits of personnel actions.” Admin. R. 290-91.¹ It is impossible to reconcile these complaints with the Board’s own procedures. *See, e.g.*, Admin. R. 213 (Section I.2., Personnel Instruction 1, subchapter CC49.9 of the Commissioned Corps Personnel Manual) (stating “the board may obtain, such further evidence as it may consider essential”); *id.* 216 (Section K.2.b. of same subchapter) (stating “board may request the office responsible for the administrative operations of the PHS Commissioned Corps to submit any additional pertinent facts”); *see also* Pl.’s App. to Cross-Motion at 221 (PHS General Administrative Manual, section 16-00-70(B)) (providing that the Board “may request that the Board Staff obtain further information”).

Nor does there appear to be anything about the particular information sought that made it beyond the Board’s jurisdiction. Three of the five issues concerned the impact of the letter of reprimand on the appointment process, which was not only the heart of the matter before the Board, but was already the subject of the Board’s prior investigation. *See* Admin. R. 61-62 (Nov. 19, 2001 memorandum from Board to Division of Commissioned Personnel, posing four questions, including: “Please advise the board members of the influence of the Letter of Reprimand on CAPT Brooks’ promotion prospects and on the promotion activities.”). The first issue, concerning the effective revocation of the appointment, is particularly relevant to a correction of Capt. Brooks’ records concerning when, if ever, he held the Chief Pharmacist Officer position. This was a matter that the Board may not have previously reflected upon, uncertain as it was of the effect of the Surgeon General’s selection of Capt. Brooks. And the

¹ The Administrative Record filed by defendant is actually missing page 291, but it evidently would be the second page of the undated memorandum sent to the Deputy Assistant, which was attached to the December 16, 2005 Joint Status Report.

fifth issue, concerning the presence of the selection memo in Capt. Brooks' record, was specifically mentioned in the first recommendation of the Board. *See* Admin. R. at 18 (recommendation c.). Since the composition of the Board has entirely changed since Capt. Brooks' initial appeal was heard, *compare* Admin. R. 14 *with* Admin. R. 290, the Court will merely assume that the current Board was unfamiliar with its powers, procedures, and past practices when it considered the first remand.

In initially remanding this matter, the Court was cautious to avoid instructing the Board in a manner that could be misconstrued as dictating how the Board should do its work. In retrospect, this over-caution may have come at the price of clarity. The Court had hoped that the Board would, with the benefit of the Court's determinations that Surgeon General had the power to appoint Capt. Brooks to the position in question and effectively did so via his September 18, 2000 memorandum, review again Capt. Brooks' application. On remand, the Board should use its judgment to assess the impact of the letter of reprimand, which it already recognized as "result[ing] in an error and an injustice," and recommend the appropriate corrective action -- which would then be acted upon by the Deputy Assistant.

The Court previously highlighted the additional issues it felt were relevant to the crafting of any corrective action, given that the appointment power was in the hands of the Surgeon General. In response, the Board has discovered that, prior to the start of the term of Capt. Brooks' office, the Surgeon General rescinded the appointment. Admin. R. 301, 378. Even if the Surgeon General wanted to obtain approval from the Secretary for the appointment -- whether this was because he thought it necessary or merely prudent -- the Board also determined that the letter of reprimand was the reason this approval was not sought. Admin. R. 301. The Court believed that the information pertaining to the second competition for the position would be helpful in the Board's determination of its recommended remedy -- as, for instance, the Board might be less willing to recommend the correction of his records to show that Capt. Brooks served a full four-year term as Chief Pharmacist Officer, if the second competition was necessitated by considerations other than the letter of reprimand. But this remains a matter for the Board and, ultimately, the Deputy Assistant, to decide in the first instance.

Once more, the Court **ORDERS** that proceedings in this Court be stayed and that the case be remanded for further proceedings. Given that the Board has already determined that the letter of reprimand "resulted in an error and an injustice," Admin. R. 18, and that the Court has determined that the Surgeon General possessed the authority to appoint Capt. Brooks to be the Chief Pharmacist Officer ("CPO"), *Brooks*, 65 Fed. Cl. at 142-43, the matter is remanded to the Secretary's delegate for a decision concerning the scope and impact of this error and injustice and the appropriate corrective remedy. In making its recommendation to the Deputy Assistant, the Board shall consider the impact of the letter of reprimand on the CPO selection process, including the Surgeon General's decisions to rescind the appointment of plaintiff, to not seek Secretary approval of plaintiff's appointment, to re-open competition for the position, to expand the pool of eligible candidates, and to convene a new selection board. The Board shall also consider whether the letter of reprimand resulted in an injustice to Capt. Brooks in the second selection process, including the consideration of whether the memoranda appointing him and

rescinding the appointment were present in his file or known to the selection board. In making its recommendation of a corrective action, the Board shall specifically address the following questions:

1. Why was a new selection board convened rather than reconvening the 2000 selection board?
2. Were either the September 18, 2000 memorandum appointing Capt. Brooks, or the September 29, 2000 memorandum rescinding the appointment, known to the 2001 selection board? If so, did this result in an error and an injustice that materially prejudiced plaintiff's chance to be selected?
3. Was the Surgeon General's decision to rescind the appointment of Capt. Brooks an error and an injustice, since it was based on the letter of reprimand?
4. Did the Surgeon General express any reason, other than the misconduct alleged in the letter of reprimand, for either rescinding the appointment of Capt. Brooks or not seeking Secretary approval for his appointment?
5. If the letter of reprimand -- the presence of which in Capt. Brooks' records was previously found to be an error and an injustice -- was the only reason that the Surgeon General rescinded his selection of plaintiff, should not the record be corrected to indicate that Capt. Brooks was appointed to the CPO position, effective October 1, 2000 (given the Surgeon General's possession of both the power and the intention to appoint Capt. Brooks)?
6. If the 2001 CPO selection process was effectively the result of the letter of reprimand having blocked plaintiff's assumption of the CPO position, would it be an error and an injustice for plaintiff's records to reflect that his service in that position was terminated by the appointment of a new CPO through that process?
7. Does the record contain any evidence supporting a reason for the Secretary to disapprove the selection of Capt. Brooks, other than the allegations in the letter of reprimand?

In light of the above, and the information previously discovered during the first remand, the Board shall report a new recommendation of corrective action to the Deputy Assistant for action consistent with this order and the Court's prior opinion. The matter is, pursuant to RCFC 56.2(a), **REMANDED** for seventy days to the HHS Secretary's delegate, the Deputy Assistant Secretary for Program Support, for action consistent with this order. Under RCFC 56.2(a)(2)(C), the Court **STAYS** consideration of the remainder of the plaintiff's motion for seventy days from the date this order is filed, pending further action by the Deputy Assistant and the Board. Defendant shall comply with RCFC 56.2(b)(3) no later than ten calendar days from completion of agency action on this remand.

IT IS SO ORDERED.

VICTOR J. WOLSKI
Judge