

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
No. 10-270C

(NOT TO BE PUBLISHED)
(Filed: October 13, 2010)

WILLIAM P. FREEMAN,
Plaintiff,
v.
UNITED STATES,
Defendant.

ORDER

Pending before the court is defendant’s motion to dismiss for lack of subject matter jurisdiction, which motion is premised on the argument that plaintiff’s primary claims are barred by the applicable statute of limitations, 28 U.S.C. § 2501. *See* Def.’s Motion to Dismiss at 1. Plaintiff, Major William Freeman, is currently a major in the Georgia Army National Guard and was previously qualified as a pilot. *See id.* He has responded in opposition to defendant’s motion to dismiss, and defendant is due to file a reply on October 21, 2010. The administrative record has not been filed in this case even though plaintiff’s claims turn on actions by entities within the Department of the Army. In an appendix to its motion to dismiss, the government attached copies of a limited set of documents related to the factual setting of plaintiff’s claim. The appended documents consisted of Major Freeman’s initial authorization for aviation career incentive pay, a portion of a transcript of Major Freeman’s proceedings before a first Flight Evaluation Board (“FEB”), a memorandum from the National Guard Bureau (“NGB”) regarding Major Freeman’s disqualification from aviation service, an order terminating Major Freeman’s aviation pay, and a letter from the NGB denying Major Freeman’s appeal from the FEB proceedings.

This documentation is manifestly insufficient to provide an administrative record that would enable the court properly to assess plaintiff’s claims in the context of the government’s motion. As specified by Rule 52.1 of the Rules of the Court of Federal Claims (“RCFC”), “[w]hen proceedings before an agency are relevant to a decision in a case, the administrative record of those proceedings must be certified by the agency and filed with the court.” RCFC 52.1(a). The requirements of this rule are mandatory, not optional. Based upon the complaint and the parties’ submissions to date, it is apparent that proceedings before the Army Board for Correction of Military Records as well as those before at least two FEBs and the NGB are pertinent to plaintiff’s claims. In addition, Major Freeman reportedly has shifted to an occupational specialty that does not involve piloting an airplane or helicopter, Compl. ¶ 24, and

he seems to have served on active duty in Iraq in 2005 and 2006, performing duties other than piloting an aircraft. Compl. ¶ 1.

Rule 52.1(a) places the responsibility for gathering and certifying the administrative record on the pertinent agency. That fundamental step should be accomplished before the court proceeds further with the case. Accordingly, the government is directed to gather, certify, and file the administrative record with the court within the time specified in the schedule set out below. That record shall, in addition to covering the administrative proceedings and events identified above, include any available documents or other records that reveal the basis for plaintiff's back-dated promotion to major, which appears to have occurred in December 2009 with a date of rank of October 19, 2001, *see* Compl. ¶ 24, and indicate whether any ancillary relief, including back pay, was ordered as a result of that promotion. As a courtesy, it would also be appreciated if the government would supply copies of the Army Regulations pertinent to this case, particularly any regulations indicating whether the appeal of a FEB's decision to the NGB is a permissive or mandatory administrative remedy.

In the circumstances, the government's motion to dismiss is DENIED without prejudice to renewal once the administrative record has been filed.

The administrative record and any ensuing motions and cross-motions shall be submitted in accord with the following schedule:

<u>Event</u>	<u>Deadline</u>
Administrative Record	November 12, 2010
Defendant's Motion	December 10, 2010
Plaintiff's Response and any Cross-Motion	January 14, 2011
Defendant's Response and Reply	January 28, 2011
Plaintiff's Reply	February 11, 2011

It is so ORDERED.

s/ Charles F. Lettow

Charles F. Lettow
Judge