

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOSHUA YOUNG,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
SECRETARY OF DEFENSE,	:	
FRANCIS JOSEPH HARVEY, and	:	
F.L. HAGENBECK,	:	NO. 06-5273
Defendants.	:	

MEMORANDUM

Schiller, J.

January 17, 2007

In response to his involuntary separation from the United States Military Academy (“USMA”), Plaintiff Joshua Young filed this action seeking temporary and permanent injunctive relief. Plaintiff sought to restrain the Army from placing him on active duty at the enlisted level. The Court held a hearing on Plaintiff’s requests for injunctive relief on Friday, December 22, 2006. Because time was of the essence, the Court issued an Order without an accompanying opinion denying injunctive relief and dismissing the case for lack of jurisdiction. This Memorandum explains the Court’s December 22, 2006 Order.

I. BACKGROUND

Plaintiff, formerly a Cadet at the USMA, was dismissed on July 10, 2006 for violating the Honor Code following an admission of intentional plagiarism. (Compl. ¶ IV.1; Pl.’s App. at 58, 121; Defs.’ Resp. in Opp’n to Pl.’s Emergency Mot. for TRO at 3.) Pursuant to Army policy, the Army ordered Plaintiff to report for two years of active duty commencing on January 4, 2007, at Fort Benning, Georgia. (Compl. ¶ IV.3.) Plaintiff filed this action on December 1, 2006 to stay

implementation of the Army's orders pending Army Board for Correction of Military Records ("ABCMR") review of the Army's decision to separate Plaintiff from the USMA. The ABCMR is a board of high-ranking civilian employees inside the Department of the Army. *See* 10 U.S.C. § 1552 (2007); 32 C.F.R. § 581.3 (2007). The Secretary of the Army, acting through the ABCMR, has the authority to correct any record when it believes the Army has acted improperly. This authority includes the power to order a cadet in Plaintiff's position reinstated to the USMA.

The Army opposes a stay and asserts that this Court lacks subject matter jurisdiction over this action.

II. STANDARD OF REVIEW

To obtain preliminary injunctive relief, a plaintiff must show both: (1) that he is likely to succeed on the merits of the underlying litigation; and (2) that he is likely to experience irreparable harm without the injunction. *See Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484 (3d Cir. 2000). If the party seeking the injunction demonstrates the first two criteria, then the court considers: (3) the likelihood of irreparable harm to the nonmoving party; and (4) whether the injunction serves the public interest. *Id.*

III. DISCUSSION

A. Subject Matter Jurisdiction

Plaintiff asserts that the Court has jurisdiction over this action pursuant to the federal question statute, 28 U.S.C. § 1331 (2007), the Declaratory Judgment Act, 28 U.S.C. § 2201 (2007), and the habeas statute, 28 U.S.C. § 2241 (2007). Because of the unique nature of this case, none of

these jurisdictional alternatives apply. Initially, the Declaratory Judgment Act does not provide an independent ground for jurisdiction; its application depends on the existence of jurisdiction by other means. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). Habeas jurisdiction is unavailable because Plaintiff fails to assert that the Army is unlawfully detaining him; indeed, Plaintiff wishes to remain in the military. *See Kamara v. Attorney General of the U.S.*, 420 F.3d 202, 215 n.11 (3d Cir. 2005) (“[The] singular focus on the legality of detention . . . constrains the scope of a habeas court’s review . . .”). Thus, the sole potential source of subject matter jurisdiction is the general federal question statute, presumably in conjunction with the Administrative Procedure Act’s waiver of sovereign immunity. *See NVE, Inc. v. Dep’t of Health & Human Serv.*, 436 F.3d 182, 189 (3d Cir. 2006); 5 U.S.C. § 701 et seq. (2007). The Complaint is silent, however, as to how the Army allegedly violated the law by separating Plaintiff from the USMA and ordering him to active duty.

Instead, Plaintiff tries to convince the Court to excuse his failure to exhaust administrative remedies. *See Nelson v. Miller* 373 F.2d 474, 478-81 (3d Cir. 1967) (providing general rule that soldiers are required to exhaust administrative remedies before proceeding to federal courts).¹ Plaintiff fails to appreciate, however, that the Court cannot consider whether to excuse Plaintiff’s failure to exhaust administrative remedies absent an underlying basis to exercise subject matter jurisdiction. Because Plaintiff has not alleged the illegality of any military decision, there is no action – final or otherwise – placed in issue by Plaintiff.² Rather, Plaintiff is only asking the Court

¹ What Plaintiff characterizes as the “jurisdictional” requirement that soldiers exhaust administrative remedies is actually a prudential issue. *See Nelson*, 373 F.2d at 478-81.

² “[T]he petitioner requests this Honorable Court to stay his Orders pending the outcome of a determination in his case by ABCMR.” (Compl. ¶ VI.1.) Plaintiff does not presently seek

to order a stay pending review by the ABCMR.

Federal courts do have jurisdiction to review decisions of the Army to determine whether its actions were arbitrary, capricious, or an unlawful exercise of discretion. *Neal v. Sec'y of the Navy*, 639 F.2d 1029, 1036; 5 U.S.C. § 706; *see also Chappell v. Wallace*, 462 U.S. 296, 303 (1983). This Court's research did not reveal a single case in which a federal court ordered a stay pending review by a board for correction of military records absent an accompanying request that the court remedy an allegedly unlawful military action.³ Only after a plaintiff asserts that the military has acted illegally can a court consider whether it should excuse a plaintiff's failure to exhaust his administrative remedies and order a stay of the military's orders to protect the plaintiff from irreparable harm pending review by either the court itself or the appropriate military records board. *See Nelson*, 373 F.2d at 478-81; *Wilburn v. Dalton*, 832 F. Supp. 943, 946 (E.D. Pa. 1993). If a court stayed military orders absent an allegation that the Army has acted unlawfully, it would be doing so without a basis for subject matter jurisdiction and would be intruding into provinces exclusively occupied by the executive and legislative branches. *See Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953).

Accordingly, the Court dismisses this action for lack of subject matter jurisdiction.

review of the Army's decision to separate him from the USMA; this is underscored by the fact that his legal argument does not even address the applicable standard for judicial review of Army decisions.

³ While it is theoretically possible that a plaintiff could assert that the Army's decision not to wait until completion of ABCMR review before carrying out its orders was itself an improper action, Plaintiff's Complaint cannot be construed to assert such an argument here. Absent general allegations of irreparable harm if the orders are carried out, at no point does Plaintiff state that the Army is violating any statutes, regulations, or procedures in declining to wait until after ABCMR review to order Plaintiff to active duty.

B. Standard for Issuing an Injunction

Even assuming the Court has jurisdiction to hear this case, Plaintiff's request for an injunction is denied because he has failed to demonstrate that he is likely to succeed on the merits.

There is disagreement among the parties over the precise meaning of "the merits" in this case. "The merits" certainly does *not* mean, as suggested by Plaintiff, the result of the ABCMR proceeding, because the "merits" refers to an "estimate of the ultimate *judicial* result." *Nelson*, 373 F.2d at 478 (emphasis added); (Compl. ¶ IV.7.) Thus, it is Plaintiff's likelihood of success before this Court that is the crucial inquiry. *Id.*

Because Plaintiff has not specified the Army's allegedly unlawful action, the Court is left to surmise that he is challenging either the Army's decision to involuntarily separate him from the USMA or the decision to order him to active duty without waiting for ABCMR review. Construed in this way, an analysis of the likelihood of success on the merits requires an inquiry into whether the Army has acted in an arbitrary or capricious fashion or has abused its discretion by taking these actions. *See Neal*, 639 F.2d at 1036.

As noted above, however, Plaintiff did not mention the concept of arbitrary or capricious action until questioned directly by the Court on that issue during oral argument. At best, Plaintiff has suggested that the ABCMR is likely to reinstate him to the USMA. That may be true, but it is irrelevant to the Court's analysis unless the *reason* the ABCMR is likely to do so is that the Army has acted arbitrarily or capriciously in separating him from the USMA. Because there is no evidence to suggest that is the case, the Court finds that Plaintiff has not demonstrated a likelihood of success on the merits as to his "claim" that the Army improperly separated him from the USMA.

With respect to any alleged impropriety in the Army's decision to order Plaintiff to active

duty before ABCMR review, Plaintiff points to no rule, and the Court has found none, requiring the Army to await ABCMR review before issuing such orders. Thus, even if the Court construes the Complaint as an attack on merely the timing of the Army's orders, Plaintiff is still unlikely to succeed in demonstrating that those orders were unlawfully issued. The Court's determination that Plaintiff is unlikely to succeed on the merits obviates the need to assess whether he will be irreparably harmed if ordered to active duty before the ABCMR completes its review of his case. *See Adams*, 204 F.3d at 484. Accordingly, Plaintiff's request for an injunction is denied.

IV. CONCLUSION

In accordance with the Court's Order of December 22, 2006, and because the Court lacks jurisdiction over this action, and, in the alternative, refuses to enjoin the Army from ordering Plaintiff to active duty, the Court has ordered this case dismissed.⁴

BY THE COURT:



Berle M. Schiller, J.

⁴ The Court would be remiss not to note the enormous waste of taxpayer money associated with Plaintiff's placement in active duty as an entry level private. The Army has spent three years training and educating Plaintiff at the USMA. Presumably he has acquired skills and knowledge during that time that warrant consideration for higher placement. If the Army believes that Plaintiff remains capable of being soldier, it seems a poor choice to squander the training and education he received at one of the world's premier academic and military institutions. It is a disservice to the Army, the taxpayers, and the Plaintiff.