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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
Portland Division

DAMON J. CLAIBORNE

Plaintiff,

Civil No.

- versus -

COMPLAINT

JOHN M. McHUGH,
Secretary of the Army,

Defendant.

COMPLAINT

NOW comes Plaintiff, Damon J. Claiborne, U.S. Army (hereinafter “SSG Claiborne”) in the above-captioned action through his attorneys against Defendant John M. McHugh Secretary of the Army in his official capacity (hereinafter “the Army”) and alleges as follows:

NATURE OF THE ACTION

1. This is an *Administrative Procedure Act* action arising under 5 U.S.C. §701 asking the Court stop the Army from further processing SSG Claiborne for general discharge. This is also an action asking the Court to compel the Army pursuant to 28 U.S.C. §1391 (*mandamus*) to provide his wrongfully withheld 20 year active duty retirement.

2. SSG Claiborne has served over 20 years active duty in the Army to include tours in

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1 hostile fire and combat zones like Saudi Arabia, Iraq, Kuwait, Kosovo, and Afghanistan.

2 3. The Army published retirement orders on January 27, 2014 directing that SSG
3 Claiborne be placed on the retired list effective January 31, 2015.

4 4. In the interim, the Army suspended the approved retirement and instead began
5 processing SSG Claiborne for administrative discharge pursuant to the Secretary of the Army's
6 plenary authority.

7 5. But the Army already processed him for separation for the very same conduct
8 approximately 10 years ago.

9 6. In 2006, the Army processed SSG Claiborne for discharge based on a civilian
10 conviction in the state of Washington involving sexual assault.

11 7. As a result of the 2006 administrative separation process, the Army retained him on
12 active duty.

13 8. The Army determined that SSG Claiborne was a "[a] highly deserving Soldier [who
14 should be] given a probation period to show successful rehabilitation ..."

15 9. SSG Claiborne successfully completed the 12-month probation period.

16 10. Since 2006, SSG Claiborne has served in Iraq, Kosovo, Korea, and Afghanistan, has
17 been promoted in rank and pay, given greater responsibility with promotion to lead and be
18 responsible for soldiers, and reenlisted twice.

19 11. There is no "new" misconduct to form the basis of the current separation.

20 12. On July 1, 2015, the Army will separate SSG Claiborne with a general discharge: the
21 harsh result being total loss of his retired pay and the stigma of discharge as opposed retirement.

22 13. SSG Claiborne is married, responsible for eight dependent children, and delivers
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1 pizza for “Papa John’s” after duty to help support his family.

2 14. Presently 44 years old, he and his family stand to lose 31 years’ worth of retired pay
3 assuming SSG Claiborne lives to 75, and, assuming his wife survives him, her reduced portion of
4 that amount pursuant to the Survivor Benefit Plan.

5 15. The Army has wrongfully withheld SSG Claiborne’s approved retirement by means
6 of misinterpreting and misapplying its own regulations.

7 16. The Army’s decision to discharge SSG Claiborne: (1) subjected him to
8 “administrative double jeopardy” in violation of the applicable Army regulation; (2) deprived
9 him of due process, (3) was arbitrary and capricious, and (4) was an abuse of the Secretary's
10 discretion.
11

12 17. The Army’s decision wrongfully deprives a soldier and his family of rightfully earned
13 retirement benefits, earned in part, by service in combat zones. This is no way to treat a soldier
14 who has done his duty, accounted for a decade-old mistake, and carried-on in with honor, loyalty
15 in combat, in dangerous service, and in keeping with the traditions of the Army.
16

17 JURISDICTION AND VENUE

18 18. This Court has federal question jurisdiction. 28 U.S.C. § 1331. This Court also has
19 jurisdiction over this matter pursuant to the *Administrative Procedure Act*, 5 U.S.C. § 701.
20 Section 702 provides a general waiver of sovereign immunity where an individual seeks review
21 of “agency action.” A court may review a military discharge decision to determine if the decision
22 was arbitrary, capricious, in bad faith, unsupported by substantial evidence, or contrary to law,
23 regulation, or published procedure. 5 U.S.C. § 706(2)(A).

24 19. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e). A substantial part of
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1 the events or omissions giving rise to this claim occurred here and the Defendant, acting in his
2 official capacity, is an officer of the United States. Divisional venue is proper in this district for
3 the same reasons.

4 THE PARTIES

5 20. The Plaintiff SSG Claiborne is a resident of the state of Oregon. He lives in Salem,
6 Oregon with his wife and children. He is on active duty in the U.S. Army and holds the rank of
7 Staff Sergeant (SSG) or E-6.

8 21. SSG Claiborne has served over twenty years of active duty and is a veteran of
9 *Operations Desert Shield/Desert Storm*, Kosovo, and has served combat tours in *Operation Iraqi*
10 *Freedom* and most recently in Afghanistan as part of *Operation Enduring Freedom*.

11 22. Defendant John McHugh is the Secretary of the Army, and is sued in his official
12 capacity only.

13 THE FACTS

14 23. SSG Claiborne has served honorably for more than twenty years which makes him
15 eligible for active duty retired pay. Attached as Exhibit A and incorporated herein is a copy of
16 the Army's January 6, 2014 approval of voluntary retirement.
17

18 24. The Army published SSG Claiborne's retirement orders on January 27, 2014 noting
19 that he would be "released from active duty" and "placed on the retirement list" effective
20 January 31, 2015.

21 25. The orders also states, "[t]he people of the United States express their thanks and
22 gratitude for your faithful service. Your contributions to the defense of the United States of
23 America are greatly appreciated." Attached as Exhibit B and incorporated herein is a copy of the
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1 Army's January 27, 2014 approved and published retirement orders.

2 26. Because of a 10-year old civilian conviction that SSG Claiborne self-reported
3 pursuant to an order from the Secretary, the Army suspended SSG Claiborne's approved
4 retirement on November 25, 2014, two months before he was scheduled to retire, and held him
5 past his approved retirement date of January 31, 2015. Attached as Exhibit C and incorporated
6 herein is a copy of the November 25, 2014 memorandum suspending SSG Claiborne's approved
7 retirement.

8 27. Based on the 2005 civilian conviction, the Army did not court-martial SSG Claiborne,
9 but instead, processed him in 2005 for administrative separation pursuant to the controlling
10 regulation, *Active Duty Enlisted Separations*, Army Regulation (AR) 635-200.

11 28. Already a veteran of *Operations Desert Shield and Desert Storm* at the time, SSG
12 Claiborne's chain-of-command determined that he was "a highly deserving Soldier that should
13 be given a probation period to show successful rehabilitation." AR 635-200, Chapter 1-18a.

14 29. Consequently, the Commanding General of I Corps and Fort Lewis, Washington in
15 his capacity as the "separation authority" determined to retain SSG Claiborne on active duty in
16 the U.S. Army. Attached as Exhibit D and incorporated herein is a copy of Brigadier General
17 Oscar B. Hilman's decision to retain SSG Claiborne.

18 30. Since 2006, SSG Claiborne has served honorably with deployments to Kosovo, Iraq,
19 Korea, and Afghanistan, as well as his having been promoted in rank and pay and re-enlisted
20 twice. Attached as Exhibit E and incorporated herein is a copy of SSG Claiborne's most recent
21 Enlisted Record Brief.

22 31. Now, nearly 10 years later, the Army is again processing SSG Claiborne for
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1 administrative separation based on the very same conduct for which he was processed in 2006.

2 32. There are no “new” facts that may otherwise justify a “new” separation action.

3 Attached as Exhibit F is Assistant Secretary of the Army for Manpower and Reserve Affairs

4 Debra S. Wada’s June 16, 2015 memorandum informing SSG Claiborne of his separation with a

5 General under Honorable Conditions Discharge.

6 33. As Assistant Secretary Wada’s memorandum notes, the instant separation is based on

7 AR 635-200, Chapter 5-3a, which is reproduced here in full:

8
9 Separation under this paragraph is the prerogative of the Secretary
10 of the Army. Secretarial plenary separation authority is exercised
11 sparingly and seldom delegated. Ordinarily, it is used when no
12 other provision of this regulation applies, and early separation is
13 clearly in the best interest of the Army. Separations under this
14 paragraph are effective only if approved in writing by the Secretary
15 of the Army or the Secretary’s approved designee as announced in
16 updated memorandums.

17 34. The same regulation, AR 635-200, Chapter 1-17b, however, states that: “[s]eparation
18 per this regulation normally should not be based on conduct that has already been considered at
19 an administrative or judicial proceeding and disposed of in a manner indicating that separation
20 was not warranted.”

21 35. The rationale is for Chapter 1-17 is to avoid “administrative double jeopardy.”

22 36. Chapter 1-17b (3) goes further and uses mandatory language that, “[n]o soldier will
23 be considered for separation because of conduct that ... [h]as been the subject of an
24 administrative separation proceeding resulting in a final determination by a separation authority
25 that the Soldier should be retained.”

26 37. In 2006, SSG Claiborne was the “subject of an administrative separation proceeding

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1 resulting in a final determination by a separation authority that [he] should be retained.”

2 38. The Army’s 2015 discharge decision based on the identical 2006 issue violates
3 administrative double jeopardy.

4 39. Chapter 5-3a itself states that the Secretarial plenary authority is used “sparingly,”
5 “when no other provision of this regulation applies,” and “*early* separation is *clearly* in the best
6 interest of the Army.” (Emphasis added).

7 40. Chapter 1-17b is a provision of this regulation and applies.

8 41. Chapter 1-17b counsels against processing a soldier for separation twice based on the
9 same conduct, that is, to preclude “administrative double jeopardy.”
10

11 42. This is not an *early* separation as required under Chapter 5-3a. SSG Claiborne’s
12 original retirement date was January 31, 2015.

13 43. The Army suspended his approved retirement and kept him, that is, held him beyond
14 that retirement from active duty date to process him.

15 44. Separation is not *clearly* in the best interest of the Army.

16 45. The Army is not following its own procedural rules.

17 46. The Army has not articulated a rational basis connected to a legitimate interest in
18 holding this soldier past retirement, then processing him based on a stale conviction for which he
19 was already processed and retained, the result of which is the total loss of his retirement.
20

21 47. Some might look poorly on the Army for this decision regarding this particular
22 soldier.

23 48. The Army’s decision is to separate SSG Claiborne with a “General” discharge.

24 49. AR 635-200, Chapter 3-5(e)(2) states in part that, “[t]he characterization of service
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1 will be determined solely by the military record during the current enlistment or period of
2 service, plus any extension thereof, from which the Soldier is being separated."

3 50. SSG Claiborne re-enlisted twice following retention at a separation board a decade
4 ago.

5 51. SSG Claiborne's military record his last enlistment in 2010 has been honorable.

6 52. AR 635-200, Chapter 3-5(e)(2), if properly applied to SSG Claiborne's record, results
7 in a characterization of service as "Honorable."

8 53. SSG Claiborne's last re-enlistment was in 2010 as part of the Army's REDUX
9 program.

10 54. Pursuant to his REDUX program, SSG Claiborne, in exchange for his service,
11 received the Army's promise to, among other things, allow his service to at least 20 years for the
12 purposes of retirement.
13

14 55. The Army agreed to the terms of SSG Claiborne's 2010 reenlistment as part of the
15 REDUX program taking him to the 20-year mark, years after his civilian conviction,
16 determination to retain him, and his successful completion of the probation period.
17

18 56. The Army has dishonored the agreement by failing to retire.

19 57. The Army's misapplications of its own regulation are arbitrary, capricious, not in
20 accordance with law, and an affront to the trust the American people have reposed in military
21 leaders to respect those who have placed their lives on the line to defend our Nation.

22 58. Attempting to bring these administrative due process errors to the appropriate Army
23 decision-makers, on June 17, 2015, counsel for SSG Claiborne wrote Mr. Julian Edmonson,
24 noted in Assistant Secretary Wada's June 16, 2015 memorandum as the point-of-contact.
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1 59. Despite several e-mails, voice mails, and letters, Mr. Edmonson, presently the Deputy
2 Chief-of-Staff for the Army's G-1 (Personnel), has not responded. Attached as Exhibit G is
3 counsel's June 17, 2015 letter and attachment to Mr. Julian Edmonson explaining that this
4 separation does not comply with the Agency's regulation and sends the wrong message to
5 soldiers and the American people.

6 60. After these attempts to communicate with Mr. Julian Edmonson as the point-of-
7 contact noted for this action, on June 22, 2015, counsel for SSG Claiborne contacted Assistant
8 Secretary Wada directly via e-mail, noted the unsuccessful attempts to reach Mr. Edmonson, and
9 requested acknowledgment that no action would be taken without considering SSG Claiborne's
10 legal concerns. The entire substance of that June 22, 2015 email to Assistant Secretary Wada is
11 reproduced here:
12

13 Dear Secretary Wada –

14 I write to follow-up on the attached [June 17, 2015 letter and
15 exhibit] sent to Mr. Julian Edmonson last week. In an abundance
16 of caution, I write to you merely to seek confirmation that the
17 below and its attachments were indeed received. To date, despite a
18 couple of messages seeking confirmation, to date, none has been
19 forthcoming. Hoping to avoid any action taken without the benefit
20 of the below and its attachments, would you please be so kind to
21 let us know this important matter has been received on your end?

19 61. Because no response was forthcoming, between June 22 and 25, 2015 counsel for
20 SSG Claiborne left voicemails for attorneys within the Army's Office of the General Counsel,
21 Personnel Law Branch at the Pentagon, the Army's Litigation Division on Fort Belvoir, Virginia,
22 and with Assistant Secretary Wada's office.
23

24 62. On June 24, 2015, SSG Claiborne received orders directing him for transition
25 processing with an effective date of separation July 1, 2015. Attached as Exhibit H and
26

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1 incorporated herein is a copy of the June 24, 2015 orders.

2 63. Since that time, for unexplained reasons, the Army has assigned a soldier senior to
3 SSG Claiborne to escort him around Post.

4 64. SSG Claiborne and his family stand to lose the retirement he spent over 20 years
5 earning, in four different combat zones, because the Army is not following and/or
6 misinterpreting its own regulation.

7 65. Before filing this action, counsel again wrote Assistant Secretary of the Army for
8 Manpower and Reserve Affairs, Debra S. Wada and Mr. Julian Edmonson. Attached as Exhibit I
9 is counsel's June 25, 2015 letter.

10 66. To date, neither Mr. Edmonson nor Assistant Secretary Wada, the officials
11 responsible for this action, has responded to the reasonable and repeated requests made on behalf
12 of a non-commissioned officer who served our nation in harm's way overseas multiple times.

13 67. However, on June 26, 2015, US Army Colonel Michael Miller, in his capacity as the
14 Executive Officer to the Assistant Secretary of the Army for Manpower and Reserve Affairs sent
15 the following email:
16

17 Dear Mr. Maher:

18 As you know, your client SSG Damon Claiborne has been
19 discharged from the U.S. Army. That decision is administratively
20 final.

21 68. Colonel Miller's message is not correct. Exhibit H states that SSG Claiborne's
22 proposed discharge is effective July 1, 2015.

23 69. Colonel Miller then proceeded in his June 26, 2015 email to suggest that SSG
24 Claiborne file an Application for Correction of Military Records before the Army Board for the
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1 Correction of Military Records.

2 If your client believes his discharge was in error or unjust, he may apply to
3 the Army Board for Correction of Military Records (ABCMR). More
4 information about the ABCMR, as well as the DD 149, Application for
5 Correction of Military Records, can be found online at
6 <http://arba.army.pentagon.mil>

7 70. This information is misleading because SSG Claiborne remains on active duty.

8 71. That the Executive Officer to the Assistant Secretary of the Army for Manpower and
9 Reserve Affairs would tender incorrect and misleading information to legal counsel, after the
10 actual officials declined to respond at all, underscores the lack of attention and care Army
11 leadership has paid to properly applying its regulations when all but ruining a 20-year soldier and
12 his family.

13 72. The Army's reluctance or refusal to acknowledge and/or consider these important
14 matters as presented by counsel, pre-filing, is arbitrary, capricious, and in violation of due
15 process.

16
17 COUNT I

18 *(Administrative Procedure Act)*

19 73. SSG Claiborne reincorporates by reference the contents of the foregoing paragraphs,
20 and further states:

21 74. The Army's decision is judicially reviewable based on 5 U.S.C. § 702's waiver of
22 sovereign immunity and because there are sufficient standards against which this court may
23 rightly judge the Army's decision.

24 75. Defendant's failure to follow his own regulations, including but not limited to the
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1 following, are legal wrongs against SSG Claiborne entitling him to judicial review under the
2 *Administrative Procedure Act*, 5 U.S.C. § 702;

- 3 a. violating the “administrative double jeopardy bar” contained in AR 635-200,
4 Chapter 1-17;
- 5 b. misapplying the Secretary’s plenary authority in AR 635-200, 5-3a to override the
6 prohibition against “administrative double jeopardy”;
- 7 c. determining that holding a soldier beyond his previously approved retirement date
8 and suspending published retirement orders to administratively process him
9 constitutes *early* separation;
- 10 d. determining that processing SSG Claiborne for the very same conduct for which
11 he was already processed 10 years ago and now stands to lose his retired pay is
12 *clearly* in the best interest of the Army where this decision lowers the public’s
13 confidence that Army leaders treat soldiers generally and combat veterans
14 specifically with fairness, dignity, and in accordance with law and due process;
15 and
16 e. declining to consider meritorious legal and equitable information counseling
17 against discharge presented to decision-makers prior to this action.

18
19
20 76. It is well-settled that an Agency’s conclusions are not entitled to judicial deference
21 when it fails to follow its own regulations.

22 77. It is equally well-settled that an Agency’s conclusions are subject to judicial review
23 and correction where the result of the decision is counterproductive, contrary to fundamental
24 fairness and due process, and irrational.

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COUNT II

(*Mandamus* - 28 USCS § 1361)

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3 78. SSG Claiborne reincorporates by reference the contents of the foregoing paragraphs,
4 and further states:

5 79. 10 U.S.C. § 3914 states in relevant part that “[u]nder regulations to be prescribed by
6 the Secretary of the Army, an enlisted member of the Army who has at least 20, but less than 30,
7 years of service ... may, upon his request, be retired.”

8 80. SSG Claiborne’s voluntary request to be retired was granted on January 27, 2014 with
9 an effective date of January 31, 2015.

10 81. The Army unilaterally suspended his approved and published retirement orders
11 approximately two months before the effective date of transfer to the retired list.

12 82. The regulation the Secretary prescribed is AR 635-200, Chapter 12.

13 83. For the reasons set forth above, the Army has repeatedly misinterpreted and
14 misapplied its applicable regulation to SSG Claiborne resulting in the Army’s withholding of his
15 transfer to the retired list.
16

17 84. 28 USC § 1361 states that, “[t]he district courts shall have original jurisdiction of any
18 action in the nature of mandamus to compel an officer or employee of the United States or any
19 agency thereof to perform a duty owed to the plaintiff.”
20

21 85. This Court should compel the Army to transfer SSG Claiborne to the retired list as the
22 prerequisites have been fulfilled.

23 ///

24 ///

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PRAYER FOR RELIEF

WHEREFORE, SSG Damon J. Claiborne prays for the following:

1. That the Court enter judgment for him against Defendant:
 - a. Enjoining the Army from continuing this separation and setting aside the Army’s decision;
 - b. Compelling the Army to transfer SSG Claiborne to the retired list with an effective date to be determined given his creditable service;
 - c. Determining that the Secretary’s plenary authority under Chapter 5-3a does not trump Chapter 1-17b’s prohibition against administrative double jeopardy where soldiers have been issued retirement orders;
 - d. Determining that the Secretary’s plenary authority under Chapter 5-3a does not trump Chapter 1-17b’s prohibition against administrative double jeopardy on the facts of this specific case;
 - e. Determining that the Secretary’s plenary authority under Chapter 5-3a is limited by its own language to “early” separations; and
 - f. Determining that on the facts of this case, it is not “clearly in the best interest of the Army” to separate SSG Claiborne;
 - g. Awarding to SSG Claiborne, against Defendant, payment of all of his costs and attorney fees incurred in this action; and
 - h. Issue any other legal or equitable relief to which this Court deems proper.

DATED this 29th day of June, 2015.

Respectfully submitted,

/s/ John N. Maher
 John N. Maher, Illinois Bar No. 6237599
Of Attorneys for Plaintiff

/s/ Dana M. Mitchell
 Dana M. Mitchell, OSB No. 114637
Of Attorneys for Plaintiff

/s/ Lisa D. Wright
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