

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

GRANT HRDLICKA, ETNSN, United States
Navy,
2241 Donnegal Circle SW
Port Orchard, WA 98367,

Plaintiff,

vs.

CARLOS DEL TORO, in his official capacity
as Secretary of the Navy;
c/o Office of General Counsel
Room 4D652
1000 Navy Pentagon
Washington, DC 20350,

and

SEAN S. BUCK, Vice Admiral, USN, in his
official capacity as Superintendent, United
States Naval Academy,
121 Blake Road
Annapolis, MD 21401,

Defendants.

Civil Action No. _____

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

STATEMENT OF THE CASE

1. Plaintiff Electronics Technician (Nuclear) Seaman (“ETNSN”) Grant Hrdlicka is a 22-year-old, nuclear-trained Navy sailor of exceptional achievement and character who was singled out for expulsion from the Naval Academy Preparatory School (“NAPS”) in retaliation for exercising his constitutional right to defend himself against an alcohol-related administrative conduct charge by seeking advice of counsel. We say “singled out” because other midshipman candidates (“M/Cs”) similarly situated – including another prior enlisted who had a previous alcohol-related incident and was, like ETNSN Hrdlicka, charged with serving alcohol to a minor

– are all now midshipmen at the U.S. Naval Academy.

2. The moment ETNSN Hrdlicka made clear to his direct superior – HMC Andrew Ashcom, a Navy chief petty officer – that he intended to consult with counsel in connection with the administrative conduct charges against him, Ashcom told him that if he insisted on getting a lawyer involved, ETNSN Hrdlicka would instead be charged under the Uniform Code of Military Justice (“UCMJ”) and taken to “Captain’s Mast,” the traditional term used for non-judicial punishment (“NJP”) under Article 15 of the UCMJ. The retaliatory purpose of the threat – a threat that was ultimately carried out – could not have been more clear given the harsher penalties and severe consequences attendant to being taken to “Mast,” including the enormous damage to a young sailor’s promotion and career opportunities.

3. The unlawful command influence the NAPS command exerted over ETNSN Hrdlicka’s right to consult with counsel manifested itself yet again when ETNSN Hrdlicka was presented with pre-Mast documentation that advised him of the charges against him and of his due process rights. One of those due process rights was the right to consult with counsel. As he reviewed that part of the Mast documents entitled, “Election of Rights,” ETNSN was presented with three choices: 1) wishing to speak with a military lawyer before completing the rest of the form, 2) wishing to speak with a civilian lawyer before completing the rest of the form, or 3) “voluntarily, knowingly, and intelligently” giving up his right to talk to a lawyer. ETNSN looked up to see Ashcom glaring at him, sending a clear and unambiguous non-verbal message that if ETNSN Hrdlicka chose either option 1) or 2), he would suffer the consequences at Mast. ETNSN Hrdlicka was so intimidated by Ashcom’s actions that he chose option 3), waived his right to consult with counsel, and went so far as to explain in his written opening statement to his commanding officer, CAPT James Bahr, why, almost by way of apology, he had considered

consulting with counsel in the first instance, in the hope that CAPT Bahr would not hold it against him.

4. But hold it against him Bahr did, stating, during the course of the Mast, that ETNSN “should go back to the Fleet,” finding him guilty of both charges, and, worst of all, recommending to the Superintendent of the Naval Academy, Defendant Buck, that ETNSN be disenrolled from NAPS, ending his chance of matriculating as a midshipman at the U.S. Naval Academy, graduating from the Academy, and commissioning as an officer in the Navy.

5. The due process violations continued apace when ETNSN Hrdlicka determined to appeal his disenrollment to Defendant Buck. Pursuant to an express NAPS regulation, and consistent with fundamental notions of fair notice, ETNSN Hrdlicka had the right to review the entire separation package being forwarded to the Superintendent and to submit an appeal based on that review. But ETNSN Hrdlicka was never permitted to review the package and thus was wrongfully precluded from submitting a fully informed appeal, a deprivation that would prove to have dire consequences.

6. ETNSN Hrdlicka submitted his appeal to Defendant Buck on April 26, 2022. Defendant Buck denied the appeal the next day.

7. Defendant Buck’s written disposition of the appeal was wholly conclusory and provided no specific reasons or bases for the denial other than the usual platitudes about procedural rights and conduct inconsistent with the Naval Academy mission.

8. Subsequently, and through a former Master Chief Petty Officer of the Navy (“MCPON”), ETNSN Hrdlicka learned of the two actual reasons Defendant Buck had denied his appeal: 1) that the fellow midshipman candidate to whom he had provided alcohol became so ill that he had to be taken to the hospital and 2) that ETNSN Hrdlicka was performing poorly on the

restriction imposed on him as part of his NJP punishment.

9. Both of these purported bases were patently, demonstrably false. And ETNSN Hrdlicka was never given the opportunity to address and rebut those misrepresentations in the first instance because they either were contained in a separation package ETNSN Hrdlicka was never given the opportunity to review or were communicated by CAPT Bahr to Defendant Buck off the record. In either case, ETNSN Hrdlicka's due process rights were unquestionably violated.

10. That Defendant Buck would countenance this kind of retaliation against such a superlative sailor and midshipman candidate, and that he would attempt to gloss over such retaliation on the pretext of two blatant lies, may shock the outside observer, but is no surprise to any number of midshipmen and the lawyers who have sought to represent them. Defendant Buck promotes and presides over a command climate that is overtly hostile to midshipmen who try to defend themselves and the lawyers who try to defend them. Moreover, this pernicious, institutional bias has repeatedly been brought to the attention of Defendant del Toro and his delegees, but they have done nothing to address it, let alone stop it.

11. Time after time, Naval Academy midshipman are warned that any attempt to retain counsel will only conclusively demonstrate their guilt and will prove to the entire chain of command that such midshipmen are unwilling to "own it," even when the "it" is unsupported by the evidence, is the product of due process violations, or is subject to considerable factors in mitigation or extenuation. They are roundly criticized for exercising their rights of appeal. Adverse inferences are repeatedly drawn against them when they choose to invoke their right to remain silent, despite the fact that any such inferences are plainly unlawful. Midshipmen who seek out superiors to serve as character witnesses at conduct adjudications are flatly told that if

the midshipman is contemplating retention of counsel, the superior will not agree to serve as a character witness. Relatedly, midshipmen asked to serve as fact or character witnesses are threatened by members of the chain of command that those witnesses need to think long and hard about supporting the accused or suffer the consequences, consequences that have included conduct or honor charges against the witnesses themselves.

12. As the actions of both HMC Ashcom and CAPT Bahr make clear, the Naval Academy's institutional bias against due process generally and legal representation specifically has irreparably infected the NAPS culture as well.

13. Incapable of helping themselves, members of ETNSN Hrdlicka's chain of command at NAPS have continued to retaliate against him even after ETNSN Hrdlicka retained counsel and submitted a request for reconsideration to Defendant Buck and ultimately to the Assistant Secretary of the Navy for Manpower and Reserve Affairs ("ASN(M&RA)"). Upon learning of these requests, Ashcom approached ETNSN Hrdlicka and told him he was "a f***ing piece of sh**." And the NAPS Executive Officer retaliated against ETNSN Hrdlicka by downgrading him on a performance evaluation while not doing so for a similarly situated restrictee who had not even been present at NAPS for a portion of the grading period.

14. For his own part, as a glaring example of the personal animus, bias, and vitriolic hostility underpinning Defendant Buck's actions in this case, Defendant Buck, in a telephone conversation, exploded in anger and told the former MCPON who was seeking to assist ETNSN Hrdlicka, that the MCPON was a "total disgrace to the U.S. Navy's chief petty officers."

15. ETNSN Hrdlicka appealed the Defendant Buck's denial of his request for reconsideration to ASN(M&RA). The Assistant Secretary denied the appeal, providing no reasons or bases for doing so other than to say that he believed CAPT Bahr and Defendant Buck

were acting within their authority in disenrolling ETNSN Hrdlicka from NAPS and denying his appeal.

16. The actions summarized above and further set forth below demonstrate that the decisions of Superintendent Buck and the ASN(M&RA) fall far afield of any notion of “command discretion” and were instead arbitrary and capricious in violation of the Administrative Procedure Act (“APA”), denied ETNSN Hrdlicka due process and equal protection in violation of the Fifth Amendment to the U.S. Constitution, and violated the Military Whistleblower Protection Act (“MWPA”).

17. Through this Complaint, ETNSN Hrdlicka seeks a declaration from this Court that the Defendant Buck’s and the Assistant Secretary’s actions violated the APA, the due process and equal protection provisions of the Fifth Amendment, and the MWPA. ETNSN Hrdlicka further seeks an injunction reinstating him as a midshipman candidate at NAPS, awarding him his graduation from NAPS and an appointment to the Naval Academy.

PARTIES

18. Plaintiff, Grant Hrdlicka, is resident of the State of Washington.

19. Defendant Carlos del Toro is the Secretary of the Navy. By statute, the Secretary of the Navy is the Department of the Navy official vested with the ultimate authority over all personnel decisions involving Navy commissioned officers, warrant officers, midshipmen, and enlisted sailors.

20. Defendant Sean S. Buck, Vice Admiral, is the Superintendent of the Naval Academy. By regulation, the Superintendent is vested with separation authority over NAPS midshipman candidates.

JURISDICTION AND VENUE

21. The Court has jurisdiction under 28 U.S.C. § 1331.

22. The Court may award declaratory and injunctive relief under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.*, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, the Fifth Amendments to the United States Constitution.

23. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) and 1391(e).

STATEMENT OF FACTS

Background

24. Grant Hrdlicka is 22 years old and hails from Northern California. His permanent military residence is Port Orchard, Washington. At age 17, ETNSN Hrdlicka took the ASVAB test for enlistment in the Navy. His scores easily exceeded the 90th percentile and, as a result, he was selected for the Nuclear Propulsion Program. In boot camp, after his requisite interview, SN Hrdlicka was placed in the Electronic Technicians Nuclear (ETN) program to train as a reactor operator. In Nuclear Power A School, ETNSN Hrdlicka earned a 3.47 GPA and graduated with distinction. In Nuclear Power School (NPS), he earned a 3.27 GPA. Towards the end of his six months of NPS, ETNSN Hrdlicka was so impressed with the officers in the Program, particularly Naval Academy graduates, that he determined to begin the application process for admission to the Academy. Included in the application was a question concerning whether the applicant would be willing to attend NAPS. ETNSN Hrdlicka answered that question in the affirmative.

25. At nuclear propulsion prototype training, ETNSN Hrdlicka excelled in the qualification process and qualified well ahead of the progress curve. He was the first reactor operator to qualify early and was lauded by a senior supervisory ETN as the top enlisted student in his prototype class and by his shift engineer for being more than one month ahead of the six-month qualification schedule.

26. Prior to receiving his acceptance letter to NAPS, ETNSN Hrdlicka was stationed at Pearl Harbor, Hawaii. His work for his commanding officer and his chief on USS Charlotte (SSN 766) was so impressive that he received a citation from the CO and a special, customized plaque from the Chief.

27. Not surprisingly, ETNSN Hrdlicka excelled academically at NAPS. He was placed in the advanced (highest) classes in Physics, Math, and Chemistry and validated the SP 211 (Physics I) course taken by second-year midshipmen at the Naval Academy.

A Single, Alcohol-Related Incident

28. On the evening of Saturday, April 2, 2022, four NAPS midshipman candidates, including ETNSN Hrdlicka and M/C Z, went to M/C Z's room to watch a final four basketball game. At some point, ETNSN Hrdlicka advised M/C Z that ETNSN Hrdlicka was going to go on liberty and consume alcohol in downtown Newport. The two subsequently agreed that ETNSN Hrdlicka would not drink out in town but that the two would drink in M/C Z's room and watch the game. ETNSN Hrdlicka was over the age of 21; M/C Z was 19.

29. M/C Z was a Platoon Executive Officer and had TAPS-taking duties that evening. After the completion of those duties, M/C Z returned to his room and began to consume alcohol provided by SN Hrdlicka. M/C Z drank to excess and vomited.

30. Both ETNSN Hrdlicka and M/C Z self-reported to HMC Andrew Ashcom, 2nd Company Chief, the following morning.

Retaliation for ETNSN's Hrdlicka's Decision to Retain Counsel

31. On or about 9 April 2022, the Command presented ETNSN Hrdlicka with an acknowledgement of rights form he was required to sign in connection with the conduct adjudication that would hear and dispose of his alcohol-related incident. Among the rights

ETNSN Hrdlicka acknowledged on the form was the right to consult with military or civilian counsel. When ETNSN Hrdlicka was asked by the Preliminary Inquiry Officer (PIO) to provide a statement, ETNSN Hrdlicka indicated that he might consult with counsel before providing such a statement, as was his right.

32. When HMC Ashcom became aware that ETNSN Hrdlicka was thinking about consulting with counsel prior to providing a statement to the PIO, HMC Ashcom made clear to ETNSN Hrdlicka that if ETNSN Hrdlicka wanted to involve a lawyer, he would not go to a conduct adjudication but would instead be taken to Captain's Mast. He also called ETNSN Hrdlicka a "pussy" and derided him for being "unable to accept responsibility for [his] actions." The adjudication was then canceled, and SN Hrdlicka was charged under the UCMJ and processed for Captain's Mast.

33. ETNSN Hrdlicka was charged with violations of UCMJ Articles 92 (failure to obey a lawful order) and 134 (conduct prejudicial to good order and discipline). He was then ordered to report to the Administrative Officer's office to review and sign pre-Mast documentation. Among other things, the documents stated ETNSN Hrdlicka had the right to speak to a military or civilian attorney prior to proceeding further.

34. Although ETNSN Hrdlicka understood that he had that right, he felt forced to waive the right away, because the person required to be in the room to witness ETNSN Hrdlicka's signatures and initials on the documents was HMC Ashcom, the same person who told ETNSN Hrdlicka that if he insisted in getting an attorney involved, he would be taken to Mast instead of an administrative conduct proceeding. Ashcom glared at ETNSN Hrdlicka while he was signing the documents. ETNSN felt completely intimidated and did not want to be further punished more by speaking to an attorney. So coerced, he signed his right to consult with

counsel away.

35. ETNSN Hrdlicka felt so intimidated by Chief Ashcom's express and implied threats regarding advice of counsel, that he felt it necessary to explain in his formal written Mast statement (and implicitly apologize) why he had even considered the exercise of that right in the first instance, in the hope that CAPT Bahr would not use it against him. As subsequent events would quickly prove, any such hope was in vain.

36. At Mast, ETNSN Hrdlicka was found guilty of both charges and was awarded 60 days' restriction, 60 days' loss of privileges, one reduction in rank (from ETN3 to ETNSN), and half pay for 60 days. In the middle of the Mast, CAPT Bahr paused for a few seconds and then said, "I think you should go back to the Fleet."

ETNSN Hrdlicka's Appeal and the Purported Reasons for Its Denial

37. ETNSN Hrdlicka learned that he was being involuntarily disenrolled from NAPS by letter dated April 19, 2022. On or about that same day, ETNSN Hrdlicka communicated to the NAPS Legal Officer that, pursuant to the express provisions of NAPSINST 1610.1G, ETNSN Hrdlicka sought review of the memorandum to the Superintendent, Defendant Buck, CAPT Bahr had prepared recommending separation so that, as was his right under that instruction, ETNSN Hrdlicka could address, in his appeal, issues raised by CAPT Bahr in his forwarding memorandum.

38. The Legal Officer ignored ETNSN Hrdlicka's request. In an e-mail dated the same day, the Legal Officer responded that "while the CO will entertain you seeing his endorsement of your appeal, he won't do so until your appeal is submitted." SN Hrdlicka was thus precluded from reviewing CAPT Bahr's forwarding memorandum prior to submitting his appeal.

39. ETNSN Hrdlicka submitted the appeal on April 25, 2022. Defendant Buck denied the appeal the next day.

The Disparate Treatment of Similarly Situated NAPS Students

40. Numerous indisputable facts demonstrate that midshipman candidates found guilty of conduct similar to, and in some cases more egregious than, the conduct for which SN Hrdlicka was found guilty, received significantly less onerous punishments and, more importantly, were not disenrolled from NAPS without the opportunity to graduate from NAPS and obtain an appointment to the Naval Academy. The following examples are illustrative:

- a. Another prior enlisted midshipman candidate, M/C X, who is a minority female, was taken to Captain's Mast on October 29, 2021, charged with providing alcohol to a minor. CAPT Bahr recommended that she be separated. M/C X appealed the decision to Defendant Buck, and Defendant Buck granted the appeal. M/C X received her appointment to the Naval Academy on 6 May 2022 and is now a midshipman there.
 - i. M/C X was charged with a violation of UCMJ Article 92 but not with a violation of Article 134, despite the fact that she had provided alcohol to a minor.
 - ii. It took Defendant Buck 60 days to grant M/C X's appeal. It took Defendant Buck one day to deny ETNSN Hrdlicka's appeal.
 - iii. M/C X's appeal consisted of two paragraphs and contained no enclosures other than CAPT Bahr's disenrollment letter. ETNSN Hrdlicka's appeal was three pages long and included seven character reference statements from fellow NAPS students and

other Navy enlisted personnel lauding his leadership abilities, as well as five enclosures supporting his work ethic and military commitment (two letters from staff at the Naval Nuclear Prototype where he had trained, his graduation diploma with distinction from Nuclear Power A School, a commendation letter from the Commanding Officer of the USS Charlotte, and an award from his Chief at the same command).

- iv. Roughly 10 percent of NAPS students are enrolled in advanced classes. M/C X was enrolled in one advanced class. ETNSN Hrdlicka was enrolled in and completed all three fields of advanced classes (Physics, Math, and Chemistry) and had previously validated SP 211 (Physics I).
- b. M/C Y was charged with providing alcohol to a minor and drinking alcohol in the barracks. He was adjudicated by CAPT Bahr on October 29, 2021 and was awarded 45 days' restriction and 180 days loss of car privileges. But he was not recommended for separation and received his appointment to the Naval Academy on 6 May 2022 and is now a midshipman there.
- c. 13 other students were taken to administrative conduct adjudications at the end of October 2021 for various alcohol-related charges, all of which mirrored the charges against ETNSN Hrdlicka in one respect or another. All of the students were awarded roughly the same discipline: 45 days' restriction and loss of privileges. None of the 13 students was recommended for separation or deprived of the right to apply for appointment to the Naval Academy.

- d. In late April 2022, two NAPS students were taken to administrative conduct adjudications for alcohol-related incidents. It was the second conduct offense for both students. Both students were not immediately separated from NAPS, and were allowed to submit their admissions packages to the Academy. SN Hrdlicka was not allowed to submit his admissions package to the Academy.
- e. ETNSN Hrdlicka had an otherwise spotless conduct record. No other member of the NAPS Class of 2022 was denied admission to the Naval Academy for only a single conduct violation and no other disqualifying factors (such as academic deficiencies).
- f. No other member of the NAPS Class of 2022, in any disciplinary action occurring at any time during the academic year, raised the right to consult with counsel.
- g. The midshipman candidate who drank with SN Hrdlicka, M/C Z, was not taken to Captain's Mast, was given only 27 days' restriction (significantly less than any other alcohol-related punishment the entire year), and was recommended for appointment to the Academy. In fact, when M/C Z asked CAPT Bahr during his adjudication if his recommendation for appointment was in jeopardy, CAPT Bahr advised him that "he would take care of it for him." All despite the fact that M/C Z played an equal role in convincing ETNSN Hrdlicka not to go drinking in Newport, but to bring alcohol back to the barracks to be consumed while the two watched a basketball game, M/C Z convinced his roommate to go sleep somewhere else for the evening, to which the roommate agreed, and M/C Z, as a Platoon Executive Officer, was in a

duty status and had to complete TAPS before rejoining ETNSN Hrdlicka in M/C Z's room to consume alcohol. M/C Z received his appointment to the Academy on 6 May 2022 and is now a midshipman there.

- h. M/C W was adjudicated by CAPT Bahr for aiding and abetting the alcohol-related incidents of two fellow midshipman candidates. The punishment announced at the adjudication was 45 days' restriction and a recommendation for separation and no appointment to the Naval Academy. Subsequently, however, M/C W was not separated from NAPS, was allowed to submit his request for appointment to the Academy, received that appointment on 6 May 2022, and is now a midshipman there.
- i. Nine midshipman candidates were taken to adjudication in late April 2022 for unauthorized absences after signing TAPS, an inherently deceptive act. All nine received 30 days' restriction and an initial recommendation for separation and no appointment. Yet none were separated, and all nine were allowed to submit their requests for appointment to the Academy. Eight of the nine received their appointments on May 6, 2022. The only reason the ninth did not was because of academic deficiencies.

ETNSN Hrdlicka's Request for Reconsideration to CAPT Bahr and Defendant Buck

41. On May 24, 2022, ETNSN Hrdlicka, through undersigned counsel, submitted a request for reconsideration of CAPT Bahr's disenrollment recommendation and Defendant Buck's denial of ETNSN Hrdlicka's appeal. The request recited all of the facts recited above and presented legal arguments as to how those facts constituted violations of the APA and the Due Process and Equal Protection provisions of the Fifth Amendment.

42. Defendant Buck denied the request on June 7, 2022. In typical fashion, the denial ignored the facts, ignored the law, and invoked Defendant Buck's seemingly uncabined discretion to make arbitrary and capricious decisions in violation of the U.S. Constitution. Indeed, Defendant Buck's denial memorandum did not simply ignore the facts, it materially misstated them. The memorandum asserted in Paragraph 3 that the only "similarly situated" M/C who had engaged in the same misconduct [M/C X] "received the exact same findings and punishment at Mast and was similarly recommended for disenrollment by the NAPS CO." While that was true, what Defendant Buck failed to add is that the M/C in question appealed that recommendation to him, won her appeal 60 days later, and was given an appointment to the Naval Academy. Defendant Buck made the same materially incomplete statement in a written response to a Congressional inquiry.

ETNSN Hrdlicka's Appeal to ASN(M&RA)

43. ETNSN Hrdlicka, through undersigned counsel, submitted an appeal to ASN(M&RA) on June 24, 2022. The appeal once again laid out in detail all of the facts set forth above, with particular emphasis on the fact that Defendant Buck's decision evidenced such disparate treatment when compared to other similarly-situated NAPS students, that the only plausible explanation for the one-day denial was ETNSN Hrdlicka's efforts to seek assistance of counsel, a due process right for which Defendant Buck has no respect and views with disdain and contempt. The appeal further emphasized the fact that Defendant Buck's two pretextual reasons for the disparate treatment were based on patently false representations made by CAPT Bahr or someone under his authority.

44. On or about August 3, 2022, ASN(M&RA) sent a memorandum to Defendant Buck requesting that Defendant Buck review ETNSN Hrdlicka's appeal to ASN(M&RA),

“specifically the materials not included in his original appeal of 24 May 2022.”

45. Whether Defendant Buck in fact conducted any such review and provided any written evidence of that review to ASN(M&RA) is unknown. If Defendant Buck did so, neither ETNSN nor his counsel were provided with a copy, let alone any opportunity to respond to it. These are the kind of back-channel communications between the Office of the Secretary of the Navy and the Office of the Superintendent of the Naval Academy that violate due process and leave midshipmen at a distinct disadvantage in exercising their rights and advocating their positions.

The Pervasive, Institutional Bias Against Midshipmen Who Try to Defend Themselves and the Lawyers Who Defend Them

46. Despite the pronouncements of the highest military courts in the country that military servicemembers have an absolute right to defend themselves, to maintain their innocence, to be protected from adverse inferences when they exercise their right to remain silent, and freely to consult with counsel without fear that doing so will give rise to an implication of guilt, the officers and senior enlisted members of the Naval Academy command repeatedly trample these fundamental due process rights in both administrative conduct and honor cases. The following examples are illustrative but far from exhaustive:

- a. In her separation recommendation to the Superintendent in an administrative conduct matter, the battalion officer of a second class (junior) midshipman commented that the fact that the midshipman had retained counsel only served to demonstrate his bad character.
- b. That same battalion commander was later appointed to be the Naval Academy’s Sexual Assault Prevention and Response (“SAPR”) Officer. In an adjudication before another battalion officer, a first class female

midshipman, who had previously been sexually assaulted, had been charged with failure to use good judgment for posting a number of “body positive affirmation” videos on the Tik Tok platform. During the adjudication, the battalion officer told her that her videos were the reason male midshipmen mistreated female midshipmen at the Naval Academy. The midshipman, shocked and disturbed by the comment, went to meet with the SAPR Officer. During the meeting, the midshipman revealed that she had retained counsel to assist her with the adjudication. The SAPR Officer asked her why she would do something like that because all it proved was that she was guilty.

- c. A second class midshipman facing adjudication for a major conduct offense approached two officers to ask them if they would be willing to serve as character witnesses. Both officers made clear that if the midshipman sought the advice of counsel, they would refuse to serve as such witnesses.
- d. For his own part, Defendant Buck told a first class midshipman facing expulsion that the midshipman’s decision to appeal the findings of guilt in his first conduct adjudication was, in Buck’s “professional opinion,” the “wrong approach.” In the same interview, Buck also asked the midshipman what his counsel “told him to say” in the interview.

47. The same institutional biases underlying the examples above have both infected the culture of NAPS and played a central role in the wrongful and disparate treatment suffered by ETNSN Hrdlicka.

COUNT 1

(Violation of the Administrative Procedure Act)

48. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.

49. Under the APA's arbitrary and capricious standard of review, an agency's decision must give a reasoned analysis to justify the disparate treatment of regulated parties that seem similarly situated, and its reasoning cannot be internally inconsistent. *ANR Storage Company v. Federal Energy Regulatory Commission*, 904 F.3d 1020, 1024 (D.C. Cir. 2018).

50. Appeal denials that provide no reasons or bases for the denials are arbitrary and capricious *per se*. None of CAPT Bahr's forwarding memorandum, Defendant Buck's denial of ETNSN Hrdlicka's original appeal, Defendant Buck's denial of ETNSN Hrdlicka's request for reconsideration, or ASN(M&RA)'s denial of ETNSN Hrdlicka points to a single fact or legal principle in the articulation of reasons or bases for denying ETNSN Hrdlicka's graduation from NAPS and an appointment to the Naval Academy. The Superintendent's boilerplate recitation "finding" that the Commanding Officer "had a basis in regulation and fact for his recommendation" does nothing to cure that deficiency, particularly where, as here, the Commanding Officer's forwarding memorandum likely provided absolutely *no* discussion of applicable regulations or facts material to his decision.

51. The failure to provide any reasons or bases for these federal agency decisions is arbitrary and capricious as a matter of law. *See Casa de Maryland v. Trump*, 355 F.Supp.3d 307, 327 (D. Md. 2018) (To satisfy the arbitrary and capricious standard, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.") (citations omitted); *Stainback v. Mabus*, 671 F.Supp.2d 126, 136 (D.D.C. 2009) (entering summary judgment in favor of a midshipman wrongfully separated from the Naval Academy and holding that "a conclusion

without an articulated basis for it is the essence of arbitrariness.”); *Prochazka v. United States*, 90 Fed.Cl. 481, 491 (BCNR’s failure fully to explain the basis for its decision was *ipso facto* arbitrary and capricious.)

52. An appeal considered and denied in one day by an extraordinarily busy Superintendent is arbitrary and capricious *per se*. SN Hrdlicka’s original appeal is dated April 25, 2022. Defendant Buck’s appeal denial is dated April 26, 2022. It is simply impossible to believe that Defendant Buck “carefully reviewed and considered” the appeal in such an incredibly compressed time frame, particularly given the fact that it took him 60 days to grant the appeal of M/C X who, like ETNSN Hrdlicka, was a prior enlisted and was taken to Captain’s Mast for an alcohol-related incident.

53. The NAPS Command violated its own procedures in the handling of ETNSN Hrdlicka’s original appeal. Section 3.8 of NAPSINST 1610.1G sets forth the procedure for the Commanding Officer’s recommendation for separation and the midshipman candidate’s right to review the entire package to be forwarded to the Superintendent and to submit an appeal based on that review. Chief among the documents the midshipman candidate is entitled to review is the Commanding Officer’s memorandum recommending separation, *id.*, Section 3.8.a.(2) and (3), after which the midshipman candidate has five business days to submit an appeal. *Id.*, Section 3.8.a.(4). The process emulates a Naval Academy midshipman’s right to submit a Show Cause Statement within five business days of receiving a copy of the Superintendent’s Memorandum Report recommending separation to the Assistant Secretary of the Navy for Manpower & Reserve Affairs. *See* 10 U.S.C. § 8462(b) and USNAINST 1610.6, Paragraph 6.c.

54. ETNSN Hrdlicka was never permitted to review the Commanding Officer’s forwarding memorandum, a clear violation of the NAPS Instruction. Moreover, ETNSN

Hrdlicka was never given notice of the two bases underlying Defendant Buck's denial of his appeal: that the midshipman candidate with whom ETNSN Hrdlicka had been drinking had been taken to the hospital, and that ETNSN Hrdlicka had performed poorly in serving out his restriction. Had ETNSN Hrdlicka been given notice of these two bases prior to submitting his original appeal, he would have provided evidence to show that both bases were categorically false.

55. A federal agency's violation of its own regulations and procedures constitutes agency action that is arbitrary and capricious *per se*. See 5 U.S.C. § 706(2)(D); *Deese v. Esper*, 483 F.Supp.3d 290, 314 (D. Md. 2020) (granting summary judgment to service academy graduates who were barred from commissioning on HIV grounds and holding that the agency's actions were arbitrary and capricious because they violate their own regulations.).

56. This Court has the authority to review these actions under 5 U.S.C. § 702 and to enjoin and overturn them in accordance with 5 U.S.C. § 706(2)(A) and (B).

57. ASN(M&RA)'s denial of ETNSN Hrdlicka's final appeal constituted a final agency action within the meaning of the APA.

58. As a matter of law, ETNSN Hrdlicka is not required further to exhaust any administrative remedy potentially available to him through the Navy Board for Correction of Military Records.

59. The agency actions and violations at issue here are final because the harm to Plaintiff caused by these violations and actions is immediate, continuing, and irreparable. Other than the declaratory and injunctive relief requested, there exists no adequate remedy at law.

COUNT 2

(Deprivation of Procedural Due Process in Violation of the Fifth Amendment to the U.S. Constitution)

60. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.

61. Fundamental to the procedural due process protections afforded by the Fifth Amendment is the right to “notice and an opportunity to be heard . . . at a meaningful time and in a meaningful manner.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 596 (2004) (internal quotes and citation omitted).

62. In light of the glaring and otherwise inexplicable inconsistencies between the punishments meted out to ETNSN Hrdlicka and the graduation and USNA appointments given to many other midshipman candidates similarly situated, the only plausible and identifiable difference between ETNSN Hrdlicka and his peers is ETNSN Hrdlicka’s decision to retain counsel and to defend himself.

63. The Naval Academy has a long and infamous history of discriminating against midshipmen who attempt to defend themselves against unfair or overblown conduct or honor charges, particularly as to those midshipmen who retain counsel and exercise their appellate rights. Many midshipmen represented by undersigned counsel have been told by their chains of command that the reason the officers were recommending separation versus retention was because the midshipmen had retained counsel and were not “owning it.” This inexcusable, unconstitutional bias was center stage in the adjudication of ETNSN Hrdlicka’s alcohol-related incident. As set forth above, he was expressly advised by HMC Ashcom that were he to seek the assistance of counsel in defending himself at his conduct adjudication, the adjudication would change to Captain’s Mast, which is exactly what happened. Indeed, ETNSN Hrdlicka was made to feel so guilty about his consultation with counsel that he felt it necessary to explain his

decision in his written statement submitted prior to his Mast.

64. As a matter of due process, ETNSN Hrdlicka owed no explanation to anyone for the assertion of his rights.

65. CAPT Bahr and Defendant Buck used ETNSN Hrdlicka's assertion of his constitutional rights and his right to counsel against him, which constitute clear violations of procedural due process and cannot possibly justify, under any circumstance, the disparate treatment that lies at the core of this matter.

66. Moreover, ETNSN Hrdlicka was given no fair notice of the actual, ostensible reasons Defendant Buck denied his appeal, nor did he have fair notice of the contents of the package CAPT Bahr forwarded to Defendant Buck in recommending ETNSN Hrdlicka's separation.

67. The harm to Plaintiff caused by these violations and actions is immediate, continuing, and irreparable. Other than the declaratory and injunctive relief requested, there exists no adequate remedy at law.

COUNT 3
(Deprivation of Equal Protection in Violation of the Fifth Amendment to the U.S. Constitution)

68. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.

69. "The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws." *U.S. v. Windsor*, 570 U.S. 744, 774 (2013). In *Willis v. Town of Marshall, N.C.*, 426 F.3d 251 (4th Cir. 2005), the Fourth Circuit held that a plaintiff claiming that she had been singled out for disparate treatment compared to others similarly situated stated a claim under the Equal Protection Clause.

70. The particularized allegations of fact above set forth compelling evidence of the disparate treatment to which SN Hrdlicka has been subjected as to the draconian sanctions of

non-graduation and denial of appointment to the Naval Academy for conduct no more egregious, and in numerous instances far less egregious, than that of other midshipmen candidates who were permitted to graduate and who have received appointments to the Naval Academy.

71. The Commanding Officer's forwarding memorandum, Defendant Buck's denial of both ETNSN Hrdlicka's original appeal and his request for reconsideration, and ASN(M&RA)'s denial of his final appeal, set forth no rational basis for such disparate treatment. Once again, the only plausible explanation is that ETNSN Hrdlicka was the sole midshipman candidate who had the audacity to seek the advice of counsel in an effort to defend himself.

72. The harm to Plaintiff caused by these violations and actions is immediate, continuing, and irreparable. Other than the declaratory and injunctive relief requested, there exists no adequate remedy at law.

COUNT 4

(Violation of the Military Whistleblower Protection Act, 10 U.S.C. § 1034)

73. Plaintiff incorporates the preceding paragraphs as if fully set forth below.

74. Plaintiff's request for reconsideration to Defendant Buck and his appeal to ASN(M&RA) were protected communications under Sections (b)(B) (iii), (iv), and (vi) of the Military Whistleblower Protection Act (MWPA).

75. Following his disenrollment from NAPS and Defendant Buck's denial of his appeal, ETNSN Hrdlicka was assigned general administrative support duties under the direct supervision of DC1 N. K. Norris. On or about July 21, 2022, the NAPS Command, through its Executive Officer, issued ETNSN Hrdlicka a performance evaluation for the period he had been serving under DC1 Norris. Although DC1 Norris recommended a grade of 3.0 in the category of "professional knowledge," the Executive Officer downgraded the grade to a 2.0, a grade that will damage ETNSN's chances for advancement and success in the Navy. And yet, another former

midshipman candidate who had also been disenrolled and was also serving under DC1 Norris, was given a grade of 3.0 in the same “professional knowledge” category, despite the fact that the other disenrolled seaman had been on leave for 38 days of the reporting period.

76. Defendants’ adverse actions and inactions as fully set forth in the preceding paragraph were intended to, and did, retaliate against Plaintiff in violation of the MWPA.

77. ETNSN called this retaliation to ASN(M&RA)’s attention, but the Assistant Secretary chose to do nothing about it.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff seeks an order and judgment to

- a. Declare that Defendants’ denial of ETNSN Hrdlicka’s request for reconsideration and appeals violated the APA;
- b. Declare that Defendants deprived ETNSN Hrdlicka of his procedural due process and equal protection rights under the Fifth Amendment;
- c. Order that ETNSN Hrdlicka be re-instated to, and allowed to graduate from, NAPS;
- d. Order that ETNSN Hrdlicka be given an appointment to the U.S. Naval Academy;
- e. Award Plaintiff his attorneys’ fees under the Equal Access to Justice Act;
and
- f. Award all other relief that the Court deems just and proper.

Dated: September 12, 2022

Respectfully submitted,

/s/ Jeffrey E. McFadden

Jeffrey E. McFadden

(D. Md. Bar No. 08738)

LAW OFFICES OF JEFFREY E. MCFADDEN, LLC

312 Prospect Bay Drive East

Grasonville, MD 21638

(410) 490-1163

jmcfadden@jmcfaddenlaw.com

Counsel for Plaintiff