No. 10-404

In the Supreme Court of the United States

MALCOLM G. SCHAEFER, PETITIONER

v.

JOHN MCHUGH, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an individual must demonstrate prejudice in order to prevail in an action under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, challenging the Department of the Army's alleged violation of internal procedural regulations governing the revocation of authority to issue discharge papers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 608 F.3d 851. The opinion of the district court (Pet. App. 8a-31a) is reported at 607 F. Supp. 2d 61.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2010. The petition for a writ of certiorari was filed on September 20, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. In 2000, petitioner was in the fourth year of a six-year commitment to the United States Army, serving as an Army lawyer in the Judge Advocate General's Corps (JAG) at Fort Benning, Georgia. Petitioner sought a

medical discharge from the Army because of knee injuries, but he hid his actions from his superiors. In early July 2001, petitioner obtained orders setting a discharge date of September 14, 2001. Pet. App. 2a.

In late July 2001, a JAG employee learned of petitioner's pending discharge while updating records. The next month, after the JAG personnel office informed the Army's Physical Disability Agency (USAPDA) that petitioner's injuries would not preclude his service as a military lawyer, USAPDA revoked the authorization for petitioner's discharge and issued a new medical determination deeming petitioner fit for duty. The Army informed petitioner of that determination on September 5, 2001, but petitioner nevertheless arrived to obtain his discharge on September 14. As a result of an administrative error, the clerk issued petitioner a discharge certificate. Petitioner's superiors did not learn of the error until they found his office empty on the following Monday. Pet. App. 2a-3a.

The Army conducted an investigation and promptly sent petitioner a letter directing him to report back to Fort Benning. After petitioner unsuccessfully sought to enjoin the Army from taking action against him, *Schaefer* v. *White*, 174 F. Supp. 2d 1374, 1384 (M.D. Ga. 2001), he resumed work as a JAG attorney. Pet. App. 3a.

After petitioner's return, the Army issued him a highly critical Officer Evaluation and a Memorandum of Reprimand for wrongfully obtaining his discharge certificate. The Army also charged him with violating the Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*, by obtaining a fraudulent discharge. Rather than undergo trial by a court-martial, petitioner voluntarily resigned, and he left the Army on October 1, 2002. Pet. App. 3a.

Approximately two years later, petitioner filed a request with the Army Board of Correction for Military Records (Board) to remove certain entries in his official military personnel files. Specifically, petitioner sought to validate his September 2001 discharge; nullify his October 2002 discharge; expunge the adverse Officer Evaluation, Memorandum of Reprimand, and resignation from his record; and prevent the Army from recouping his severance pay associated with his 2001 discharge. The Board denied his request, concluding that his 2001 discharge orders lacked legal effect because the authority to issue them had been properly revoked. The Board also determined that petitioner had failed to show that his Officer Evaluation, Memorandum of Reprimand, or resignation should be removed from his service record. Pet. App. 4a.

2. Petitioner then brought this action under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, arguing that the Board's decision was arbitrary, capricious, and contrary to law. The district court granted summary judgment to the government. Pet. App. 8a-31a.

3. The court of appeals affirmed. Pet. App. 1a-7a. Petitioner argued that the revocation of his discharge violated Army regulations because it was carried out by USAPDA rather than a different entity, the Total Army Personnel Command (PERSCOM). The court rejected that argument, concluding that petitioner had "failed to show that he suffered any prejudice from the Army's alleged error regarding which entity could technically revoke the authorization for his discharge." *Id.* at 6a. The court therefore found it unnecessary to consider the Board's alternative holding "that the Army did not commit procedural error" in any event. *Ibid.* Because the authority to issue a discharge had been revoked, the

court saw "no persuasive grounds on which to second-guess the Correction Board's conclusion" that petitioner's September 2001 discharge was invalid. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 14-28) that he should not have been required to show prejudice in order to prevail on his claim that the revocation of his discharge from the Army violated Army procedural regulations. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Although petitioner identifies some disagreement among the courts of appeals concerning when a showing of prejudice is necessary in an APA action, he has not shown that any court of appeals would have decided his case differently. In addition, this case would be a poor vehicle for considering the question presented because petitioner's underlying claim—that the Army failed to comply with its regulations—lacks merit. Further review is not warranted.

1. The court of appeals correctly held that petitioner "must demonstrate some form of prejudice" to obtain relief based on his claim that the Army failed to comply with its procedural regulations. Pet. App. 6a. Congress specified in the APA that, when agency action is challenged in court, "due account shall be taken of the rule of prejudicial error." 5 U.S.C. 706; see *Shinseki* v. *Sanders*, 129 S. Ct. 1696, 1704 (2009). Accordingly, when an agency has committed a legal error, "the burden of showing that [the] error is harmful normally falls upon the party attacking the agency's determination." *Id.* at 1706; see *American Farm Lines* v. *Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (stating that, as a "general principle," an agency has discretion "to relax or modify its

procedural rules," and its decision to do so "is not reviewable except upon a showing of substantial prejudice to the complaining party") (internal quotation marks and citation omitted).

Petitioner cites no decision of this Court that rejects or limits the prejudice requirement in this context. None of the cases that petitioner cites even mentioned prejudice—except for those, such as *American Farm Lines*, that required some showing of prejudice. Petitioner cites (Pet. 25-26) various cases in which the Court granted relief without expressly considering the issue of prejudice, but in most of those cases the prejudicial nature of the violation was apparent without discussion. See, *e.g.*, *Service* v. *Dulles*, 354 U.S. 363, 386 (1957) (Secretary of State violated regulation by overturning Deputy Under Secretary's approval of a decision clearing petitioner of disloyalty charges); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 266-267 (1954) (Board of Immigration Appeals allegedly violated regulation by failing to conduct an independent review of petitioner's case). The authorities on which petitioner relies stand only for the proposition that agencies are required to follow their own regulations, and that their failure to do so constitutes legal error. That proposition is entirely consistent with a prejudice requirement, under which courts ordinarily grant relief only where the agency's error has actually caused identifiable harm to the plaintiff.

2. Petitioner contends (Pet. 14-20) that this Court's review is warranted because the courts of appeals disagree about whether a party must establish prejudice in order to successfully challenge an agency's failure to follow its regulations. In particular, petitioner cites cases in which other courts of appeals stated that a party

challenging an agency's violation of a regulation need not make a specific showing of prejudice if the regulation at issue is "designed to protect constitutional and statutory rights," Pet. 16 (citing *Leslie* v. *Attorney Gen.*, 611 F.3d 171 (3d Cir. 2010), *Martinez-Camargo* v. *INS*, 282 F.3d 487 (7th Cir. 2002), and *Waldron* v. *INS*, 17 F.3d 511 (2d Cir. 1993), cert. denied, 513 U.S. 1014 (1994)), or "confers important procedural rights and benefits," Pet. 18 (citing *Wilson* v. *Commissioner of Soc. Sec.*, 378 F.3d 541, 547 (6th Cir. 2004)). In the cited cases, the courts did not consider the potential relevance of 5 U.S.C. 706, which requires that "due account shall be taken of the rule of prejudicial error." And in two of the cases, the courts ultimately required prejudice to be shown, concluding that the exception to the prejudice requirement did not apply to the particular regulations at issue. See *Waldron*, 17 F.3d at 518-519; *Martinez-Camargo*, 282 F.3d at 492.

Contrary to petitioner's argument, the cited cases do not squarely conflict with decisions of other circuits, such as the decision below, that have required a showing of prejudice in cases concerning violations of certain regulations. The various cases on which petitioner relies involved different regulations, and petitioner identifies no case in which a court has held, as a categorical matter, that there are no circumstances in which a party challenging the violation of an agency regulation might prevail without making a specific showing of prejudice. Whatever tension might exist in the abstract statements of the various circuits, there is no direct conflict warranting this Court's review.

More importantly, petitioner cannot show that any court of appeals would have resolved this case differently. The specific Army regulations at issue here ad-

dress a technical question of internal management: the role of a specific Army sub-entity—PERSCOM—in transmitting the revocation of authority to issue particular discharge papers. Petitioner cannot show that those regulations either protect fundamental constitutional or statutory interests or confer important procedural rights and benefits, such that any court would deem their violation to be a basis for reversal without regard to an assessment of prejudice. Petitioner argues (Pet. 21-22) that the overall system of personnel-discharge regulations is designed "to ensure the precise line between soldier and civilian" because the scope of certain constitutional rights is narrower for soldiers than for civilians. But the regulations give PERSCOM no meaningful role in drawing that line, because PERSCOM is not authorized to decide whether a soldier should be converted to civilian via discharge; it has only a ministerial role in transmitting and publishing such decision. Pet. App. 25a-26a; Army Reg. 635-40, ¶¶ 4-24(b), 2-3(b).

In addition, in arguing that the system is designed to "ensur[e] that the rights and interests . . . of the soldier are protected," Pet. 23 (quoting Army Reg. 635-40, ¶ 1-1(c)), petitioner overlooks the system's concerns for the "rights and interests of the Government," as well as the concerns for "an effective and fit military organization" and "prompt disability processing," Army Reg. 635-40, ¶ 1-1(a) and (c). In any event, petitioner fails to establish that the specific procedural regulations alleged to have been violated were intended "primarily to confer important procedural benefits," rather than "adopted for the orderly transaction of business before [the agency]," such that substantial prejudice would be required in any circuit. *Wilson*, 378 F.3d at 547.

3. Even if the question presented otherwise warranted review, this case would be a poor vehicle for considering it because petitioner cannot demonstrate that the Army violated its regulations in the first place. As the Board and the district court correctly concluded, PERSCOM's only role under the regulations was the ministerial transmission and publication of decisions issued by USADPA, and any regulatory "requirement for PERSCOM to authorize reconsideration [of a discharge] was not triggered" since the initial decision to authorize discharge had not been transmitted through PERSCOM. Pet. App. 91a, 89-90a, 26a-28a; Army Reg. 635-40, ¶¶ 2-3(b), 4-24(b), 4-22(b)(3) and (c)(2), App. E-9(e). The court of appeals had no occasion to consider that holding of the district court, but it would provide an alternative ground for affirming the judgment below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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