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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

IN REPLY
REFER TO: B-191837

OFFICE OF GENERAL COUNSEL.

MAY 22 1978

The Honorable Barbara Allen Babcock
Assistant Attorney General
Civil Division
Department of Justice

Attention: LeRoy Southmayd, Jr., Attorney
Court of Claims Section

Dear Ms. Babcock:

Subject: v. United States
Court of Claims No. 173-78

Reference is made to letter dated April 27, 1978 (file reference BAB:LS:els 154-173-78) in which a litigation report is requested on the petition filed in the above-entitled case on April 21, 1978. The plaintiff seeks a judgement for the active duty pay and allowances of a Captain (O-3) in the Air Force from March 30, 1975 the date of his discharge to the date of judgement, less any active duty pay and allowances received during that period resulting from his enlistment in the Air Force. He also seeks various orders directing the correction of his Air Force records to void certain administrative actions and discharge, and show that he was promoted to the grade of major.

There is no record of any claim having been filed with the General Accounting Office on account of the matters set forth in the petition and we have no information as to the facts in the case other than the allegations made in the petition.

The plaintiff alleges that various defects in his records presented to various selection boards considering him for promotion resulted in his non-selection for promotion to the rank of Major. Following administrative action to remedy these defects, he alleges that subsequent selection boards did not select him for promotion to Major because of the earlier non-selections. Subsequent attempts to have his records corrected by administrative process, including applications to the Air Force Board for the Correction of Military Records, were unsuccessful. As a result he was discharged from the Air Force on March 30, 1975 and enlisted in the Air Force on April 1, 1975.

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Plaintiff alleges that the administrative actions denying his application for correction of his records under 10 U.S.C. 1552, were arbitrary and capricious and not supported by substantial evidence and were contrary to law and regulation and deprived him of his Constitutional right to due process.

With regard to the allegations made in the petition, the action of the court in such cases depends wholly upon facts which the plaintiff must establish. The Court of Claims has held many times that in the absence of cogent and clearly convincing evidence of arbitrary and capricious action, it has no jurisdiction to review the actions of military boards or the Secretaries in legitimate military matters. See ____ v. United States 200 Ct. Cl. 626 (1973); ____ v. United States 175 Ct. Cl. 215 (1966); ____ v. United States 157 Ct. Cl. 235 (1962); and, ____ v. United States, 153 Ct. Cl. 557 (1961).

No record has been found of any claim or demand which would furnish the basis for a cross action against the plaintiff in this case.

Further inquiry concerning this case may be addressed to Mr. John J. Mitchell, Jr., telephone number 275-5422.

Please keep us advised of the progress of this case.

Sincerely yours,

Edwin J. Monsma

Edwin J. Monsma
Assistant General Counsel