

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: March 20, 2008

Decided: October 7, 2008)

Docket No. 06-3307-cv

DONALD J. DIBBLE,

Plaintiff-Appellant,

v.

JOHN H. FENIMORE, Major General, New York Air National Guard,

Defendant,

SECRETARY OF THE AIR FORCE,

Defendant-Appellee.

B e f o r e: WINTER, STRAUB, and KATZMANN, Circuit Judges.

Appeal from a grant of summary judgment in favor of the Secretary of the Air Force, by the United States District Court for the Northern District of New York (Lawrence E. Kahn, Judge). We hold that the doctrine of intramilitary immunity does not preclude a federal court from reviewing a challenge under the Administrative Procedure Act to a decision by the Air Force Board for the Correction of Military Records. We also hold that the district court correctly found that the Board's decision was not

1 arbitrary, capricious, contrary to law, or unsupported by
2 substantial evidence. We therefore affirm.

3 DANIEL M. SCHEMBER, Gaffney &
4 Schember, P.C., Washington, D.C.,
5 for Plaintiff-Appellant.
6

7 PAULA RYAN CONAN, Assistant United
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9 United States Attorney for the
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11 the brief), Syracuse, New York, for
12 Defendant-Appellee.
13

14 WINTER, Circuit Judge:
15

16 INTRODUCTION

17 Donald J. Dibble is a former federal excepted service
18 technician with the New York Air National Guard ("Guard") who was
19 denied reenlistment. Alleging that this denial was retaliation
20 for Dibble's exercise of his constitutional and statutory rights,
21 including his advocacy as a union representative, Dibble applied
22 for administrative relief from the Air Force Board for the
23 Correction of Military Records ("Board"). When the Board denied
24 his application, Dibble filed the present action under the
25 Administrative Procedure Act, 5 U.S.C. § 702, against the
26 Secretary of the Air Force ("Secretary").¹ Judge Kahn granted
27 the Secretary's motion for summary judgment. Dibble v. Fenimore,

¹ Defendant John H. Fenimore was dismissed from this action by this Court's decision in Dibble v. Fenimore, 339 F.3d 120 (2d Cir. 2003).

1 488 F. Supp. 2d 149 (N.D.N.Y. 2006).

2 For the reasons stated infra, we conclude that the doctrine
3 of intramilitary immunity does not preclude judicial review of
4 the Board's decision and that the Board's decision was not
5 arbitrary or capricious, or unsupported by substantial evidence.
6 We therefore affirm.

7 BACKGROUND

8 Dibble was formerly a staff sergeant with the New York Air
9 National Guard, a reserve component of the United States Air
10 Force. 10 U.S.C. § 10101(5). His position was that of a
11 federal excepted service Guard-Technician -- a dual-status,
12 hybrid position in which civilian employment is contingent upon
13 continued military membership. 32 U.S.C. § 709(b)(2)
14 (providing that a civilian technician must be "a member of the
15 National Guard").² See also 32 U.S.C. §§ 709(a), (e) (defining
16 and authorizing Guard technicians). From 1989 until 1992
17 Dibble also served as a union steward for the Association of
18 Civilian Technicians at Stewart Air National Guard Base. In
19 May 1994 the Guard notified Dibble that he would not be allowed

² Guard-Technicians are uniformed servicemen and women who must hold the military grade specified by the service Secretary for their positions. 32 U.S.C. §§ 709(b)(3) & (4). Guard-Technicians were granted federal employee status by the National Guard Technicians Act of 1968, codified at 32 U.S.C. § 709, principally in order to provide them with uniform federal fringe and retirement benefits instead of benefits that varied from state to state. Singleton v. Merit Sys. Prot. Bd., 244 F.3d 1331, 1334 (Fed. Cir. 2001).

1 to reenlist when his enlistment expired in October 1994. The
2 Guard cited Dibble's "performance in a military capacity" as
3 the reason for this decision. This act terminated Dibble's
4 eligibility for civilian employment with the Guard.

5 a) Factual Disputes

6 The proper characterization of the events leading to the
7 denial of reenlistment is hotly disputed. The government
8 presented evidence to the Board that between 1990 and 1994
9 Dibble was involved in physical altercations with other Guard
10 members while on duty; sometimes intimidated other members of
11 his unit; threatened his superiors; propelled a knife across a
12 table at a fellow Guardsman; and committed various other
13 infractions. In one incident, Dibble was suspended for pushing
14 another staff sergeant while the two were working on a platform
15 twenty feet above the ground. Dibble successfully challenged
16 that suspension when a hearing examiner found that the physical
17 contact was not sufficiently forceful or malicious to cause
18 death or serious injury. Nevertheless, the hearing officer
19 observed that Dibble was "an aggressive individual with an
20 intimidating demeanor," who, when administered the oath prior
21 to testifying, "assumed a stance that gave the appearance of
22 impending hand to hand combat." Dibble's supervisors also
23 described him as running "hot and cold" with his ability to
24 handle authority or direction.

25 In May 1994, Dibble's immediate supervisor, Master

1 Sergeant John Maloney, strongly recommended that Dibble be
2 denied reenlistment. Maloney described Dibble as
3 anti-establishment, disruptive, and generally disobedient.
4 Based on personal observations of Dibble's commanding officer
5 and the recommendations of Dibble's past and present
6 supervisors, the Guard declined to allow Dibble to reenlist.
7 Dibble, by contrast, characterizes the Guard's version of the
8 facts as pretexts for an impermissible motivation -- namely,
9 retaliation for Dibble's success in vindicating his and others'
10 rights.

11 Dibble offers a number of instances during the period from
12 1990 through 1993 in which he allegedly received hostile
13 treatment as a result of representing the interests of union
14 members and challenging management practices. Among those
15 instances was an episode in which a supervisor allegedly
16 threatened to "get [Dibble] on the military side" because the
17 supervisor could not "get him" on the technician or civilian
18 side. Twenty-two fellow Guard members signed a document
19 stating that many other Guard members had committed worse
20 infractions than Dibble and yet had been allowed to reenlist.
21 The signees further stated that Dibble had not been allowed to
22 reenlist because of "his willingness to stand up and speak up
23 for himself and others, his highly effective service as a union
24 steward, and his success in defeating [an] attempt to suspend
25 him from his job." Dibble further claims that his supervisor

1 was aware of this hostility but told others that there was
2 nothing that could be done for Dibble's career.

3 Dibble himself claims that he was issued formal Letters of
4 Reprimand when others were merely orally counseled; that his
5 supervisors tried to suspend him for thirty days for conduct
6 that was less serious than that usually tolerated by management
7 (the alleged shoving of a co-worker on a platform twenty feet
8 in the air); and that his supervisors told other Guard members
9 to lie so that Dibble could be singled out for not complying
10 with safety regulations that, he claims, other Guard members
11 routinely ignored.

12 After being denied reenlistment, Dibble requested relevant
13 records concerning his performance. He received twenty-five
14 documents recording transgressions which Dibble asserts were
15 only minor -- e.g., tardiness, unexcused absences, and
16 infractions of uniform requirements. According to Dibble, the
17 fact that these incidents were even recorded indicates an
18 improper motive, because, he claims, such incidents usually
19 were either dealt with through discussion or ignored
20 altogether. Dibble also alleges that his supervisors started
21 cracking down on him only after his union activities
22 accelerated. He maintains that prior to 1990, if he was late
23 or missed work due to illness, his supervisors would simply ask
24 him what had happened, but that this practice changed after he
25 became a union steward.

1 Dibble also cites two instances of forgery in which the
2 men involved were punished but not denied reenlistment.

3 Finally, Dibble asserts that the government has produced no
4 document indicating that any other Guard member was denied
5 reenlistment for military performance comparable to Dibble's.

6 b) Procedural History

7 Dibble properly exhausted his intramilitary administrative
8 remedies. He first requested an investigation by the Air Guard
9 Inspector General, who upheld the denial of reenlistment as a
10 proper exercise of "command prerogative." Dibble next sought
11 relief through two separate channels -- the federal courts and
12 the Air Force Board for the Correction of Military Records.

13 Dibble brought suit in the Northern District against John
14 H. Fenimore, the Commander of the New York Air National Guard,
15 asserting that the denial of reenlistment was in retaliation
16 for his constitutionally and statutorily protected activities
17 as a union steward.³ On an interlocutory appeal, we held that
18 the doctrine of intramilitary immunity rendered Dibble's claim

³ Dibble claimed that he was denied reenlistment "as a result of his exercise of (1) his right under 5 U.S.C. § 7102 to assist and act for a labor organization; (2) his right under 32 U.S.C. § 709(e)(5) (since recodified as 32 U.S.C. § 709(f)(4)) and Technician Personnel Regulation (TPR) 752 § 2-17, Element 6(b), to appeal (successfully) his thirty-day suspension from employment; and (3) his First Amendment right to associate in a union and to speak freely in furtherance of his and fellow employees' rights." Dibble v. Fenimore, 339 F.3d 120, 122 n.3 (2d Cir. 2003) ("Dibble I").

1 against the military commander non-justiciable. Dibble I, 339
2 F.3d at 125, 128. While declining to adopt a categorical rule
3 regarding the justiciability of intramilitary suits, we refused
4 “to insert the federal courts into military decisionmaking in
5 such an intrusive manner.” Id. at 128. Because Dibble’s claim
6 challenged a military personnel decision about fitness for
7 service, we concluded that adjudicating the claim would require
8 that the district court “make a particularized inquiry into the
9 mindset of his superior officers, determining whether their
10 various disciplinary actions were motivated by proper military
11 concerns or by the unconstitutional desire to stifle Dibble’s
12 protected First Amendment activity.” Id. Pursuant to Dibble
13 I, the district court dismissed Dibble’s claims against
14 Fenimore.

15 Dibble also applied to the Air Force Board for the
16 Correction of Military Records for relief. The Board is a
17 civilian review board with the authority to grant relief to
18 applicants who, inter alia, have “demonstrated the existence of
19 a material error or injustice that can be remedied effectively
20 through correction of the applicant’s military record.” 32
21 C.F.R. §§ 865.2(a), 865.4(1)(4); see also 10 U.S.C. § 1552(a)
22 (authorizing the Secretaries of the military departments,
23 acting through civilian review boards, to correct military
24 records when necessary to correct an error or remove an

1 injustice).⁴

2 Dibble's application claimed that he had been denied
3 reenlistment in retaliation for his "proper outspokenness," his
4 "effectiveness as a technician union steward," and his having
5 defeated an "improper effort" to suspend him. He requested a
6 correction of his records to "show that he was not denied
7 reenlistment; he was not discharged; he served continuously to
8 the present; he is entitled to back pay, benefits, and credit;
9 and he is eligible to reenlist." The Board denied his
10 application, finding "insufficient evidence of error or
11 injustice to warrant corrective action."

12 Dibble filed a supplemental complaint in the Northern
13 District against the Secretary, seeking review of the Board's
14 decision under the Administrative Procedure Act ("APA"), 5
15 U.S.C. § 706. Based in significant part on a document stating
16 that the Guard had found Dibble eligible to reenlist, a
17 document that only later was discovered to have been erroneous,
18 the district court held that the Board's decision was arbitrary
19 and capricious and remanded the case to the Board for further
20 administrative proceedings. Dibble v. Fenimore, 84 F. Supp. 2d
21 315, 321-22 (N.D.N.Y. 2000); Dibble v. Fenimore, 488 F. Supp.

⁴ "[The Board] is not an investigative body." 32 C.F.R. § 865.2(c). Normally, it determines cases on the record established prior to the application. "However, the Board may, in its discretion, hold a hearing or call for additional evidence or opinions in any case." Id.

1 2d 149, 157 (N.D.N.Y. 2006) (noting that the relevant document
2 was the result of an "administrative error").

3 The district court also instructed the Board to answer the
4 following five questions on remand:

5 (1) Whether Plaintiff's Air Guard superiors
6 were hostile toward him because of his past
7 union activities;

8
9 (2) Whether Plaintiff's Air Guard superiors
10 punished Plaintiff, but not other Air Guard
11 members, for minor transgressions;

12
13 (3) Whether Plaintiff's Air Guard superiors
14 sought to suspend Plaintiff for purported
15 misconduct that was far less serious than
16 misconduct by other Air Guard members that
17 they ignored;

18
19 (4) Whether Plaintiff's Air Guard superiors
20 desired to retaliate against Plaintiff
21 because he defeated their attempt to suspend
22 him; and

23
24 (5) Whether Plaintiff's Air Guard superiors
25 denied Plaintiff reenlistment in the Air
26 Guard, and thus terminated his employment,
27 for pretextual reasons that would apply to
28 many Air Guard members who were *not* denied
29 reenlistment -- pretextual reasons that were
30 "far less significant than misconduct by
31 others" who were not barred from
32 reenlistment.

33
34 Dibble, 84 F. Supp. 2d at 322. The district court directed the
35 Board to make "specific and numbered findings of fact, and

1 conclusions of law based on such factual findings," as to each of
2 Dibble's claims, taking special care to enunciate a reason for
3 its decision that the district court would be able to evaluate
4 under the APA's "arbitrary and capricious" standard. Id.

5 On remand, a majority of the Board again voted to deny
6 Dibble's application for relief. The Board made five specific
7 findings:

8 First, even though Dibble's superiors may have had some
9 hostility to him on account of his union activity, in light of
10 all the evidence the Board was not convinced that this hostility
11 motivated the denial of reenlistment. Given Dibble's "numerous
12 infractions of military discipline," the Guard's decision that
13 Dibble "was not suitable for military service" was "neither
14 arbitrary nor capricious."

15 Second, the Board was not convinced that Dibble's superiors
16 had punished him but not others for minor transgressions. That
17 Dibble had received a Letter of Reprimand when some others might
18 not have was, in the Board's view, more plausibly the consequence
19 of the fact that Dibble had a pattern of disciplinary
20 infractions.

21 Third, it found that the Guard's attempt to suspend Dibble
22 for the incident on the elevated scaffold was not untoward, even
23 in light of the disciplinary handling of other Guard members.
24 Dibble's actions were inappropriate and in violation of
25 established safety procedures, while the incidents involving

1 other Guard members, "unlike the applicant's repeated actions,
2 were not caused by the same individuals."

3 Fourth, the Board was not convinced that Dibble's superiors
4 had sought to retaliate against him because he had successfully
5 appealed his suspension for the incident on the elevated
6 platform. The Board noted that the Guard's preparation of most
7 of the documentation about Dibble's infractions had occurred
8 before the results of the appeal had been released, and Dibble
9 did not allege that those documented infractions had not in fact
10 occurred.

11 Fifth, the Board did not find that the Guard's denial of
12 reenlistment was pretextual. It found instead that Dibble was
13 denied reenlistment "because his conduct was not consistent with
14 that required of a military member." The Board also said that
15 there was no evidence suggesting that other Guard members with
16 "extensive record[s] of bearing and behavior problems" comparable
17 to Dibble's had been allowed to reenlist.

18 The Board concluded that Dibble had failed to demonstrate
19 that he had been "the victim of an error or injustice." (One
20 Board member dissented, stating that he felt Dibble was denied
21 reenlistment "in retaliation for his actions as a shop union
22 steward and/or to prevent his continued employment in his
23 civilian job.")

24 After the Board issued this decision, Dibble filed a second
25 supplemental complaint in district court seeking to overturn the

1 decision. The district court found that the Board had complied
2 with its instructions on remand. Dibble, 488 F. Supp. 2d at 156-
3 58. The court also concluded that the administrative record
4 demonstrated numerous instances of misconduct and infractions of
5 military discipline occurring after Dibble's activity as a union
6 steward and before he was denied reenlistment, and thus that
7 denial of Dibble's reenlistment had a factual basis "that has all
8 to do with military deportment and behavior, and little or
9 nothing to do with constitutionally protected activity." Id. at
10 158-59.

11 The court declined to address Dibble's claims that other
12 Guard members who had committed acts of insubordination or
13 misconduct had not been denied reenlistment, refusing to "place
14 itself in the position of reviewing an entire series of military
15 personnel decisions from over a decade ago, and then presume to
16 tell military officials of the Executive Branch how best to hire,
17 retain, discharge or promote members of the United States Armed
18 Forces." Id. at 161. The court, however, both noted that the
19 Board addressed Dibble's claims with respect to this issue and
20 explained why another Guard member, who was specifically
21 identified by Dibble, was stripped of supervisory authority and
22 reassigned as opposed to denied reenlistment. Id. at 161 n.6.
23 The court also noted that the Board found that Dibble did not
24 present any evidence, nor was any contained in the record, that
25 the individuals about whom Dibble complained had records of

1 behavioral problems that matched or exceeded his. Id. at 161
2 n.7. Dibble then brought this appeal.

3 DISCUSSION

4 a) Justiciability and Intramilitary Immunity

5 We first address the threshold question of whether the
6 doctrine of intramilitary immunity bars us from reviewing the
7 Board's decision to reject Dibble's application for relief.

8 The doctrine of intramilitary immunity emerged from the
9 Supreme Court's holding, in Feres v. United States, 340 U.S. 135
10 (1950), that the Federal Tort Claims Act ("FTCA") does not permit
11 military personnel to sue the United States government for
12 compensation for injuries that "arise out of or are in the course
13 of activity incident to service," even if those injuries would be
14 otherwise actionable under the FTCA. Id. at 146. The Court's
15 reasoning in Feres was confined to the FTCA, but, as we noted in
16 Overton v. New York State Division of Military & Naval Affairs,
17 373 F.3d 83 (2d Cir. 2004), subsequent judicial decisions have
18 significantly expanded the intramilitary immunity doctrine and
19 "it now generally protects the government from suit for injuries
20 arising from 'activit[ies] incident to [military] service.'" Id.
21 at 89 (quoting United States v. Stanley, 483 U.S. 669, 681
22 (1987)); see also Chappell v. Wallace, 462 U.S. 296 (1983)
23 (holding that enlisted servicemembers could not bring Bivens-
24 style suits seeking damages from their superior officers for
25 alleged constitutional violations); Jones v. N.Y. State Div. of

1 Military & Naval Affairs, 166 F.3d 45, 50-52 (2d Cir. 1999)
2 (holding the intramilitary immunity applies to suits for damages
3 under 42 U.S.C. § 1983).

4 In Dibble I, we held that the doctrine is not limited to
5 actions for damages but applies also to some claims for equitable
6 relief. Dibble I, 339 F.3d at 127-28. We thus ordered dismissal
7 of Dibble's suit against his military commander. Id. at 128.
8 However, we also noted that the doctrine's scope "is not
9 precisely defined," id. at 125, and we "decline[d] to adopt a
10 categorical rule on the justiciability of intramilitary suits."
11 Id. at 128.

12 The question here is whether the doctrine applies also to
13 suits for review of decisions of civilian review boards with
14 respect to military personnel decisions. Arguably it might. The
15 doctrine appears to be both an application of justiciability
16 concerns and a canon of construction that limits the reach of
17 statutes of general applicability into military affairs when
18 Congress has not explicitly provided for application to the
19 military. Cf. Stanley, 483 U.S. at 683 ("The special factor that
20 counsels hesitation [before allowing Bivens actions for injuries
21 incident to military service] is . . . the fact that
22 congressionally uninvited intrusion into military affairs by the
23 judiciary is inappropriate.") (internal brackets and quotation
24 marks omitted). The APA contains no explicit provision for
25 review of agency decisions involving military affairs. However,

1 we are bound by ample precedent that the intramilitary immunity
2 doctrine does not universally bar judicial review of decisions by
3 Boards for the Correction of Military Records.

4 In Falk v. Secretary of the Army, 870 F.2d 941 (2d Cir.
5 1989), we reviewed an Army Board for the Correction of Military
6 Records decision not to alter the officially stated reason for a
7 reservist's discharge. In Blassingame v. Secretary of the Navy,
8 866 F.2d 556 (2d Cir. 1989), we reversed dismissal of a former
9 Marine's claim against the Board for the Correction of Naval
10 Records concerning a petition to upgrade his military discharge
11 from "undesirable" to "honorable." See also Kreis v. Sec'y of
12 the Air Force, 866 F.2d 1508, 1511-12 (D.C. Cir. 1989) (although
13 a claim for retroactive promotion was a non-justiciable military
14 personnel decision, alternative claims for the correction of
15 military records were justiciable); Watson v. Ark. Nat'l Guard,
16 886 F.2d 1004, 1008 n.10 (8th Cir. 1989) (action taken by the
17 Army Board for the Correction of Military Records was reviewable
18 under the "arbitrary and capricious" standard); Neal v. Sec'y of
19 the Navy, 639 F.2d 1029, 1037 (3d Cir. 1981) (decisions of boards
20 for the correction of military records can be reviewed judicially
21 for arbitrariness and capriciousness).

22 This caselaw takes note of the facts that the Board is made
23 up of civilians and that it is authorized, with minor exceptions,
24 only to correct military records. 10 U.S.C. § 1552(a)(1); 32

1 C.F.R. §§ 865.1, 865.2(a).⁵ Thus, it has limited power and
2 interferes only minimally with the cohesiveness and efficiency of
3 existing military hierarchies and operations. Moreover, courts
4 do not review the Board's decisions de novo, but only under the
5 deferential standard of whether the decisions were arbitrary,
6 capricious, or unsupported by substantial evidence. Chappell, 462
7 U.S. at 303.

8 The Secretary suggests that "[i]t was arguably beyond even
9 the broad authority of the Board to undertake such a
10 particularized review of the New York Air National Guard's
11 decisions" involved in denying Dibble reenlistment. The
12 Secretary also argues that the Board's detailed analysis of the
13 facts of this dispute, conducted pursuant to the district court's
14 instructions on remand, in essence required that the Board
15 "inquire into 'the mindset of [Dibble's] superior officers,' and
16 . . . determine whether their actions 'were motivated by the
17 unconstitutional desire to stifle Dibble's protected First
18 Amendment activity' -- precisely the inquiry this Court later
19 found to be non-justiciable by federal courts in Dibble I."

⁵ The Board also has limited additional authority in the special case of whistleblowers. "When an applicant alleges reprisal under the Military Whistleblowers Protection Act, 10 U.S.C. 1034, the Board may recommend to the Secretary of the Air Force that disciplinary or administrative action be taken against those responsible for the reprisal." 32 C.F.R. § 865.2(b). Because Dibble is not invoking this Act, this additional Board authority is irrelevant to the case before us.

1 The Board's statutory authority to correct military records
2 includes "injustice[s]" as well as clerical errors. While the
3 inquiry ordered by the district court may be near the edge of the
4 Board's authority, it did not exceed that authority as recognized
5 in the caselaw discussed earlier. See, e.g., Blassingame, 866
6 F.2d at 559-60. At this stage of the proceeding, Dibble does not
7 seek reinstatement, and, given the facts that the Board denied
8 relief and we leave that denial in place, there is no reason for
9 us to explore further the scope of the Board's authority.

10 b) Merits of Dibble's Claim

11 1) Standard of Review

12 As noted, rulings of a Board for the Correction of Military
13 Records can be set aside only if they are arbitrary, capricious,
14 or unsupported by substantial evidence. Chappell, 462 U.S. at
15 303; see also 5 U.S.C. § 706(2). In determining whether the
16 Board's decision was arbitrary or capricious, "a court may not
17 assess the wisdom of an agency's choice; inquiry is limited
18 instead to whether the Board has made a clear error of judgment."
19 Falk, 870 F.2d at 945. And in determining whether the Board's
20 decision was not supported by substantial evidence, if "there is
21 such evidence as a reasonable mind might accept as adequate to
22 support a conclusion" then "the agency's decision must be
23 accepted even when the court would have drawn a different
24 conclusion from the evidence." Id. (internal quotation marks
25 omitted). The deference that courts must show the agency's

1 decision increases when, as here, the decision involves a
2 military context. Id.

3 2) Claims

4 Our own review of the Board's decision cures two grounds for
5 reversal asserted by Dibble: (i) the district court improperly
6 relied on grounds that had not been asserted by the Board; and
7 (ii) the district court erred by not reviewing the Board's
8 conclusion that no punishment imposed on the grounds of enforcing
9 military discipline was actually based on a retaliatory motive.
10 We turn therefore to Dibble's claims that the Board applied the
11 incorrect legal standard in its review and that the Board's
12 rejection of Dibble's application was arbitrary and capricious,
13 unsupported by substantial evidence, and contrary to law.

14 The Code of Federal Regulations requires that applicants
15 before the Air Force Board for the Correction of Military Records
16 provide "sufficient evidence" of "probable material error or
17 injustice." 32 C.F.R. § 865.4(a). Dibble contends that the
18 Board's review of the Guard's decision erred in applying an
19 "arbitrary and capricious" standard rather than reviewing for
20 "probable material error and injustice."

21 The Board's report states that the Guard's conclusion that
22 Dibble was unfit for military service was "neither arbitrary nor
23 capricious," from which Dibble concludes that the Board applied
24 the incorrect legal standard. However, despite the isolated use
25 of the term "arbitrary [and] capricious," the Board's overall

1 analysis was fully consistent with the "sufficient evidence of
2 probable material error or injustice" standard. The Board
3 concluded that it was "not persuaded that [Dibble's] superiors
4 punished him, and not other [Guard] members for minor
5 transgressions"; concluded that it was "not convinced the
6 applicant's superiors sought to retaliate against him because of
7 his successful appeal [of his suspension for shoving a co-
8 worker]"; and declared that it did "not find that the applicant
9 was denied reenlistment for pretextual reasons that would apply
10 to many Air Guard members who were not denied reenlistment."

11 In discussing that final point, the Board referred to yet
12 another standard of review, asserting that "[a]bsent a showing of
13 evidence that the denial of [Dibble's] reenlistment was an abuse
14 of the commander's discretionary authority, we find no basis to
15 overturn this decision." However, once again the Board's actual
16 analysis is the equivalent of an examination for material error
17 or injustice. The Board stated that Dibble was denied
18 reenlistment "because his conduct was not consistent with that
19 required of a military member." The Board added that both the
20 administrative actions taken against Dibble and the decision not
21 to permit him to reenlist "were based upon his repeated
22 violations of military standards." The Board also noted a lack
23 of "any evidence that suggests that any [Guard] member with an
24 extensive record of bearing and behavior problems comparable to
25 the applicant, was permitted to reenlist in the [Guard]." And,

1 in summarizing its findings and stating its recommendation, the
2 Board explicitly invoked the proper standard twice: "In summary,
3 based on the additional documentation provided, we do not find
4 that the applicant has substantiated that he has been the victim
5 of an error or injustice," and "A majority of the Board finds
6 insufficient evidence of error or injustice and recommends the
7 application be denied." Accordingly, we find that the Board did
8 not apply an incorrect legal standard when conducting its review.

9 Dibble's contention is that the Guard denied him permission
10 to reenlist because his superiors wanted to retaliate for
11 Dibble's exercise of his constitutional and statutory rights and
12 that the reasons of military suitability that the Guard gave were
13 pretexts for this impermissible motive.

14 Dibble asserts that because pretext is at issue, we should
15 determine whether the Board complied with the analytical approach
16 described in Mt. Healthy City School District Board of Education
17 v. Doyle, 429 U.S. 274, 287 (1977), for dealing with suits
18 alleging that termination of the plaintiff's employment was
19 retaliation for constitutionally protected conduct.⁶

⁶ The Secretary argues that because Mt. Healthy dealt with suits by civilian plaintiffs against civilian employers it should not be imported into a military context. The Secretary's contention about the general inapplicability of Mt. Healthy in a military context conflicts with MacFarlane v. Grasso, 696 F.2d 217 (2d Cir. 1982). In that case, we explicitly applied the Mt. Healthy analysis to a suit by an Army reserve officer who claimed that his application for an open position as a stock control officer in the Connecticut Army National Guard had been rejected in retaliation for his exercise of his First Amendment rights.

1 However, Dibble's Mt. Healthy argument is a red herring.
2 The Mt. Healthy procedure consists of three steps. In the first
3 step, the complainant must show that his conduct was
4 "constitutionally protected." In the second step, the
5 complainant must show that this protected conduct "was a
6 'substantial factor' -- or to put it in other words, that it was
7 a 'motivating factor'" in the adverse employment decision. If
8 the complainant successfully shoulders both of these burdens,
9 then in the third step the employer has the burden of showing, by
10 a preponderance of the evidence, that it would have arrived at
11 the same employment decision "even in the absence of the
12 protected conduct." Mt. Healthy, 429 U.S. at 287.

13 In the present case, the Board found against Dibble in the
14 second step. It stated that Dibble's "reenlistment was denied
15 because his conduct was not consistent with that required of a
16 military member. In addition, all of the administrative actions
17 taken against him and the denial of his reenlistment were based
18 upon his repeated violations of military standards." Step two is
19 indistinguishable from the requirements of 32 C.F.R. § 865.4(a):
20 "The applicant has the burden of providing sufficient evidence of
21 probable material error or injustice." Mt. Healthy's
22 significance is in step three, which establishes a defense
23 available to employers who have been found to have acted on an

1 impermissible motive. Because Dibble never got beyond step two,
2 and what Mt. Healthy says about step two adds nothing to the
3 pertinent law applicable to Dibble, Mt. Healthy has no
4 independent significance in this matter.

5 Dibble offers a fusillade of unpersuasive arguments that the
6 Board's judgment was arbitrary, capricious, or unsupported by
7 substantial evidence. The Board's findings with respect to
8 Dibble's military performance were supported by "such evidence as
9 a reasonable mind might accept as adequate to support a
10 conclusion" that Dibble had failed to demonstrate probable
11 material error or injustice in the denial of permission to
12 reenlist. Falk, 870 F.2d at 945 (internal quotation marks
13 omitted). Among the considerations that the Board explicitly
14 noted were evidence that Dibble: (i) was disrespectful to his
15 superiors, (ii) manifested a lack of judgment, (iii) was
16 aggressive and belligerent, and (iv) had committed repeated
17 infractions of Air Force regulations and military discipline.

18 Dibble challenges the sufficiency of this evidence on two
19 grounds: the Board failed to consider significant, "undisputed"
20 evidence that favored Dibble, and the adverse evidence upon which
21 the Board had relied was a record created by Dibble's superiors
22 to provide a pretext.

23 Dibble supports these propositions principally with
24 assertions by various people that Dibble was disciplined for
25 actions that other Guard members were not disciplined for, and

1 that other Guard members who committed infractions that were at
2 least as serious as Dibble's were nevertheless permitted to
3 reenlist. Dibble also recounts remarks made to him -- for
4 example, a superior threatening to "get" Dibble, and a colleague
5 saying that he had heard that Dibble's superiors were hostile to
6 him.

7 Dibble's arguments depend upon three assumptions, each of
8 which is wrong. The first is that the Board must state in
9 writing each matter that it considered with an accompanying
10 analysis. Dibble asserts that failure "to consider and make
11 written findings on all significant points" is sufficient to
12 render a Board decision arbitrary and capricious, and Dibble
13 considers each one of the pieces of "undisputed" evidence
14 mentioned earlier to be significant and to have gone
15 unconsidered. However, the Board was not required to provide
16 "written findings" about every piece of evidence that it
17 considered. Agencies need only "articulate a rational connection
18 between the facts found and the choice made," and a court "will
19 uphold a decision of less than ideal clarity if the agency's path
20 may reasonably be discerned." Bowman Transp., Inc. v. Arkansas-
21 Best Freight Sys., Inc., 419 U.S. 281, 285-86 (1974) (internal
22 quotation marks omitted); see also New England Health Care
23 Employees Union v. NLRB, 448 F.3d 189, 194 (2d Cir. 2006);
24 Frizelle v. Slater, 111 F.3d 172, 176-77 (D.C. Cir. 1997). Nor
25 do policy considerations favor such a rule. Requiring agencies

1 to give explicit notice of every piece of evidence that they
2 consider and find unpersuasive would merely multiply the length
3 of agency decisions, and the time taken in rendering them, with
4 no significant increase in clarity or utility.

5 Dibble's second erroneous assumption is that the Board's
6 deliberations did not include anything other than the results of
7 the Inspector General's inquiry, memoranda of records showing
8 Dibble's lack of judgment, and Dibble's own "admitted lack of
9 military deportment." Dibble appears to have made this
10 assumption on the ground that those three items were the only
11 items mentioned in a list that the Board introduced with the
12 words "in consideration of all the evidence in this case
13 collectively, i.e." Because the Board used the Latin
14 abbreviation "i.e." ("that is") rather than "e.g." ("for
15 example"), Dibble reads the list as exhaustive and therefore as
16 indicating that the Board ignored all other evidence.

17 We disagree. Although "i.e.", when used properly, would
18 indicate an exhaustive list, Dibble puts more weight on this
19 abbreviation than it can bear. An unfortunate fact of modern
20 American linguistic practice is that many Americans confuse
21 "i.e." and "e.g." See, e.g., Bryan A. Garner, Garner's Modern
22 American Usage 421 (2003) ("I.e. is frequently confounded with
23 e.g. . . ."); H.W. Fowler, A Dictionary of Modern English
24 Usage 146 (Ernest Gowers ed., 2d ed. 1965) ("Non-latinists are
25 apt to think that it does not matter whether e.g. or i.e. is used

1").⁷ That the Board's use of "i.e." rather than "e.g."
2 was merely a slip becomes evident upon examination of the
3 surrounding text, where the Board immediately goes on to discuss
4 evidence that was not mentioned in that list -- e.g., evidence of
5 Dibble's physical confrontation with a fellow Guard member on an
6 elevated scaffold and evidence of historical practices in issuing
7 Letters of Reprimand. Thus, the fact that an evidentiary item
8 did not appear in the Board's list or receive explicit mention
9 elsewhere in the Board's report does not show that the Board
10 failed to consider it.

11 Dibble's third erroneous assumption is that "undisputed"
12 evidence is inherently weighty and persuasive. But the mere fact
13 that a piece of evidence is undisputed reveals nothing about how
14 relevant or probative it is. Undisputed speculation is still
15 speculation, and evidence of meager persuasive force remains weak
16 even if undisputed. In Dibble's case, there was ample
17 justification for giving many of the "undisputed" pieces of
18 evidence little weight. Many were speculation, unsubstantiated
19 generalizations, or hearsay, e.g., Dibble's account of being told
20 by a second person that a third person had said that he was
21 unable to help Dibble's career because "[t]he pressure is way too

⁷ This error is not limited to amateurs. Bryan Garner notes:
"In two editions, Black's (5th & 6th) misused i.e. for e.g. in
its entry for layman" Bryan A. Garner, A Dictionary of
Modern Legal Usage 307 (2d ed. 1995).

1 tough on the top on [Dibble]." Much of the evidence at issue
2 consists of general and conclusory statements made in a document
3 of unspecified origin signed by twenty-two Guard members. And
4 the "undisputed" evidence indicating that Dibble's superiors had
5 a negative attitude toward him does not indicate whether the
6 cause of that disapproval was Dibble's exercise of his
7 constitutional rights or rather simply a belief that Dibble's
8 poor military performance was detrimental to his unit's
9 effectiveness. In sum, the "undisputed" evidence is anything but
10 dispositive. In light of the tenuous quality of this evidence,
11 finding it to be of little import is neither arbitrary nor
12 capricious. And when this "undisputed" evidence is weighed
13 against the evidence cited in the Board's report, we find no
14 reason to conclude that the Board's decision lacked "such
15 evidence as a reasonable mind might accept as adequate to support
16 [the Board's] conclusion." Falk, 870 F.2d at 945 (internal
17 quotation marks omitted).

18 We have considered Dibble's several other arguments and find
19 them to be without merit.

20 CONCLUSION

21 For the foregoing reasons, the judgment of the district
22 court is affirmed.