Back-Pay Issues in the Military: O'Callahan v. United States

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O'CALLAHAN V. UNITED STATES
(Ct. Cl. 1971).

INTRODUCTION

The growth in America of a vast military complex has left in its wake an increasing amount of litigation between disgruntled servicemen and the various branches of the armed forces. Less than honorably discharged individuals, disenchanted with the military's system of justice, have turned in increasing numbers to civilian courts for relief from what they assert are unjust military determinations. To cover all of the issues involved in these military determinations—ranging from military status and types of discharge to back-pay and disability retirement pay—would be an impossible task. Thus, this article will treat but one aspect of military law; an aspect which is most assuredly becoming of crucial significance in the lawsuits of many servicemen. It is the area relating to post-discharge situations, where back-pay is claimed to be due and owing, which constitutes the focal point of this article.

It might be advisable to very briefly develop how many of the issues concerning back-pay claims arise. A hypothetical situation probably best illustrates the typical sequence of events. Let us assume that Army Officer William Zam is charged with and convicted of attempted rape in a court-martial proceeding. Attached to the conviction are a dishonorable discharge from the military and a three-year prison sentence. Two years later, the United States Supreme Court, on writ of habeas corpus, voids both the conviction and the dishonorable discharge, basing its decision on a determination that Officer Zam had been denied important constitutional rights in the court-martial trial. The Supreme Court decision prompts Zam, who had forfeited all pay while serving his prison term, to file a second suit—this time in the United States Court of Claims—to recover from the government back-pay allegedly due.

It is readily apparent from the above example that the serviceman is often faced with two distinct problems:

(1) securing a reversal of his court-martial conviction; and
(2) demonstrating a right to back-pay.
The individual obviously cannot get to the second issue before first getting his conviction and discharge voided. The barriers facing the serviceman in his attempt to obtain a reversal are numerous, particularly if one avenue of relief he seeks is a civilian court.¹ And even if he overcomes these problems and obtains a reversal of his conviction, there is still no guarantee that he will recover a judgment for back-pay. Whether the individual will emerge successful in his claim for back-pay depends upon determinations of several factors. It is to these factors—and to their nature and significance in particular factual settings—that the following discussion is directed.

PARTICULAR PROBLEMS FACING THE SERVICEMAN IN POST-DISCHARGE CASES

The specific problems facing the serviceman in recovering upon his claim for back-pay will naturally depend in part upon the specific facts of his case. Yet many of the more important barriers that must be overcome are common to nearly all suits for back-pay. And by following the courtroom battles of a serviceman named James F. O'Callahan, these common problems can be isolated and analyzed.

On March 9, 1956, O'Callahan enlisted in the United States Army. His enlistment term extended for six years. On the night of July 20, 1956, while stationed in Hawaii, O'Callahan broke into the

¹ These barriers facing the plaintiff serviceman are in large part attributable to the continued application of the separation of powers doctrine. The deference given the autonomous nature of the military system by civilian courts often limits the practical availability of a civilian forum. The reviewability of both administrative and court-martial discharges, the scope of review exercised, and the requirement forcing the serviceman to exhaust his administrative remedies before appealing to a civilian court are all outgrowths of the separation doctrine. Consequently, the attacking serviceman must often face and overcome these problems before the court will agree to look at the merits. For a discussion of these and other roadblocks facing the individual attempting to reverse his court-martial conviction or administrative discharge, see Sherman, Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement, 55 Va. L. Rev. 483 (1969); Vaira, Extraordinary Relief of Punitive and Administrative Discharges from the Armed Forces, 7 Duquesne L. Rev. 384 (1969); Dougherty and Lynch, The Administrative Discharge: Military Justice? 33 Geo. Wash. L. Rev. 498 (1964); Note, Civilian Court Review of Court Martial Adjudications, 1969 Colum. L. Rev. 1259 (1969).
hotel room of a young girl. He was apprehended and later brought before a court-martial, where he was tried and convicted of assault, housebreaking, and attempted rape. He was sentenced to ten years imprisonment and given a dishonorable discharge. His appeals to the Army Board of Review and the Court of Military Appeals were unsuccessful. But the United States Supreme Court, on writ of habeas corpus, reversed the court-martial determination, holding that "[S]ince petitioner's crimes were not service-connected, he could not be tried by court-martial but rather was entitled to trial by the civilian courts." The decision voided both the conviction and the dishonorable discharge. On October 6, 1969, O'Callahan brought suit in the Court of Claims for backpay, proceedings in which were stayed for a determination of his military status. On January 12, 1971, the Undersecretary of the

2. Review Boards exist in all branches of the armed forces. Established by the Secretary of each department, these five-member Boards review at the serviceman's request the nature of the discharge, and have the authority, subject to review by the Secretary, "[T]o change, correct, or modify any discharge or dismissal, and to issue a new discharge in accord with the facts presented." 10 U.S.C. § 1553(b). It seems that Review Boards exert influence in at least two distinct areas: (1) Since often the serviceman is required to exhaust his administrative remedies before obtaining civilian judicial relief, he may be compelled to first take his case to the appropriate Board, or else the court will deny review; and (2) because the Boards and the Secretary, under 10 U.S.C. § 1552(a), must act harmoniously, the Secretary may at times find his otherwise extensive powers restricted by the decisions of the Boards. For a discussion of the Boards and their powers, see Everett, Military Administrative Discharges

3. This court was established in 1951. Uniform Code of Military Justice, Art. 67(a) (1), 10 U.S.C. § 867(a) (1) (Supp. IV, 1969). It sits as the Supreme Court of the military. United States v. Armbruster, 11 U.S.C.M.A. 596, 29 C.M.R. 412 (1960). While its functions are restricted to review of Review Board proceedings, it still represents a significant part of the structure of appeal available to the serviceman, since it has the power to reverse adverse Board determinations.


5. O'Callahan v. United States, 451 F.2d 1390 (1971) [hereinafter cited as O'Callahan].

6. The Secretary's authority to change or modify a discharge or dismissal is found in an oft-controverted section of Title 10 of the United States Code, which provides in part:

The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through Boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice.
Army, acting pursuant to the Correction Board's recommendation, changed the character of O'Callahan's discharge from dishonorable to honorable, and discharged him as of March 8, 1961, the expiration date of his enlistment term. O'Callahan argued that the Secretary's act of backdating his discharge to March 8, 1961, was arbitrary, capricious, and outside the discretion vested in his office. He asked that the court find: (1) that since he had never been properly dismissed, the date of discharge should have been January 12, 1971, the date when the Secretary ordered his honorable discharge; and (2) that as a result, he was entitled to all pay and allowances for the intervening time.

The court's opinion encompassed many of the problems facing servicemen who, after securing reversals of their convictions, have brought suits for back-pay and allowances. The court found that the backdating action taken by the Correction Board and the Secretary were not in abuse of their respective powers. Consequently, because the suit for back-pay was not brought within six years of the backdated discharge, the statute of limitations had run, thereby preventing the plaintiff from recovering under his claim. The court's treatment of the statute of limitations question rested on determinations of several key factors. The first such factor involved the enlistment status of the plaintiff. While the plaintiff contended that he was entitled to back-pay up to January 12, 1971, when an honorable discharge was issued, the government cited authority for the proposition that the cut-off point for pay and allowances was March 8, 1961, the expiration date of the enlistment contract. In one case relied on by the government, Clackum v. United States, the plaintiff had enlisted in the Air Force Reserve on March 18, 1950, for a three-year term. She was discharged in 1952, but in 1960 the Court of Claims invalidated the discharge. She was then given an honorable discharge and separated from the service on March 10, 1961. In her suit for

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7. O'Callahan at 1391.
8. The action was not brought until October 6, 1969, and the effective backdated discharge date was March 8, 1961.
9. 28 U.S.C. § 2501 provides in part as follows: "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."
10. O'Callahan at 1392.
back-pay, she argued that she was entitled to compensation up to the date of her honorable discharge. The court disagreed, stating:

... Plaintiff contends that she is entitled to recover the pay and allowances she would have earned to March 10, 1961, the date on which her only valid discharge was issued. We have twice before considered situations similar to plaintiff's, and it is our conclusion that a serviceman, illegally discharged, is entitled to recover pay and allowances only to the date on which his term of enlistment would otherwise have expired—in plaintiff's case, March 7, 1953.12

The court in O'Callahan agreed with the holding in Clackum.13 Thus, recovery based on a past illegal discharge extends only from the date of that discharge to the enlistment expiration date. There is, however, at least one situation in which the period of recovery varies. In cases where there is no enlistment expiration date, the period of recovery may extend to the date when the proper discharge is given.14 Plaintiff O'Callahan, because of his six-year enlistment term, obviously did not qualify under this exception. But in Garner v. United States,15 the court held that the plaintiff, whose contract had extended for an indefinite period, was entitled to pay up to the date of her only valid discharge. The court distinguished that case from Clackum by stating that the absence of a contractually fixed termination date precluded a determination of any other cut-off point. But for the illegal discharge, the plaintiff's active-duty contract would have continued to the date of the valid discharge.16

By differentiating between definite and indefinite expiration dates, the court in O'Callahan was able to reject the plaintiff's contention that he was entitled to pay and allowances up to the time when he was issued the honorable discharge. The effects of this decision are several. A fixed expiration date operates as a cut-off point for recovery, so illegally discharged servicemen with indefinite termination periods can often obtain much greater amounts than those with contractually set dates.17 This may be

12. Id. at 36. The two cases “similar to plaintiff's” were Smith v. United States, 155 Ct. Cl. 682 (1961), and Murray v. United States, 154 Ct. Cl. 185 (1961).
13. O'Callahan at 1392. The decision, said the court, “[T]his is based on sound, time-honored contract principles, namely that neither party is bound beyond that for which he has bargained.”
14. Id. at 1392.
15. 161 Ct. Cl. 73 (1963). This was a companion case to Clackum v. United States, discussed earlier.
16. Id. at 75. The plaintiff, illegally discharged on January 22, 1952, was awarded pay up to March 10, 1961, the date when her only valid discharge was issued.
17. Only commissioned officers now have indefinite enlistment contracts. Enlisted and drafted members are given contractually-fixed termination
true even if the second class of servicemen would have re-enlisted but for their invalid separations. Indeed, a fixed expiration date may provide the Secretary of the service branch concerned with a sufficient basis for denying an application for re-enlistment. This method of separation would not be available to the Secretary if there were no definite enlistment periods. Furthermore, the existence of a fixed expiration date gives the Secretary much broader authority in determining dismissal dates after the voided discharge. More than anything else, it was this extended authority that brought about the rejection of O'Callahan's claim.

The plaintiff argued that while the Secretary had the power to issue a new discharge, he could not retroactively backdate it to the date of enlistment expiration. The plaintiff felt that since he had not been legally dismissed from the service until 1971 (when the Secretary corrected his record), any action by the Secretary in backdating a dismissal date by its very nature had to be in excess of his authority. But as was mentioned above, the court rejected this argument, basing its decision on the differences between definite and indefinite contracts. Whether the Secretary should even be allowed to backdate, and in a sense validate a previously illegal discharge, is a sensitive question upon which courts have disagreed. By issuing retroactively a dismissal date, the Secretary can negate benefits for a period of time during which

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18. See Davis v. United States, No. 247-69, Court of Claims (decided November 12, 1971), where the court, in treating the same issue, said that "the evidence certainly does not warrant a finding that the Air Force would necessarily, or even probably, have regarded the plaintiff as an acceptable re-enlistee."

19. O'Callahan at 1392.

20. In two cases cited by the plaintiff, Motto v. United States, 348 F.2d 523 (1965), and Hamlin v. United States, 391 F.2d 941 (1968), it was ruled that the new discharges could not be backdated. The court in O'Callahan distinguished these cases from the present one on the theory that in the other situations the plaintiffs had indefinite expiration dates. The court then added: "The cases turned on the unique legal situation presented and do not establish any general rule that corrective honorable discharges cannot be backdated when it is reasonable and not arbitrary or capricious to backdate." O'Callahan at 1392.
the serviceman, had he not been illegally discharged, would have continued in his active-duty status. This in fact occurred in Shapiro v. United States.21 In that case the plaintiff brought suit in 1947 to void a court-martial conviction and discharge in 1944, and to recover back-pay from the date of that discharge. The court held the court-martial invalid because the plaintiff had not been given sufficient time to prepare his defense.22 The Secretary of the Army subsequently changed the plaintiff's records to show that he had been honorably separated as of the date of his invalid court-martial dismissal in 1944.23 It seems that here the action taken by the Secretary in backdating was clearly an abuse of his authority. Unlike O'Callahan, there was no basis in Shapiro for making the dismissal date effective retroactively. There was no mention in the case that between 1944 and 1947 an enlistment expiration date occurred. And since the plaintiff was not legally separated until the Secretary's issuance of an honorable discharge in 1947, there obviously was no other time at which the serviceman's military duty was terminated. The inescapable result is that the backdating by the Secretary of the date of discharge to the voided dismissal date was arbitrary and capricious.

Since recovery for back-pay when incident to a voided discharge is authorized not for services actually rendered while on active duty but rather for services that would have resulted from the military error not occurred,24 it can be contended that the Secretary's act of backdating in O'Callahan was justified. Again, the key issue in this respect is the serviceman's enlistment status. It is submitted that the plaintiff's enlistment expiration date served as a proper benchmark for cutting off back-payments. The court found that since the Secretary was not obligated to accept O'Callahan's re-enlistment application, there was no reason why the government should be compelled to pay the plaintiff for any period after the expiration of his term. While the plaintiff argued that he would have applied for re-enlistment had it not been for his invalid separation (and thereby would have been entitled to pay for services up to the date of his honorable discharge), the court held that the absence of a statutory right to re-enlist precluded the plaintiff from compelling his re-enlistment.25 The plaintiff failed to

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22. Id. at 207.
23. See Meador, Judicial Determinations of Military Status, 72 Yale L.J. 1293, 1310 (1963). The military still had to pay the active-duty payments, but for all other purposes the status was “considered terminated when it was first intended to be.” Id.
25. O'Callahan at 1393.
qualify under any statute providing for mandatory re-enlistment. Consequently, the Secretary was entitled to use his discretion in accepting or rejecting the application for re-enlistment. The plaintiff cited authority for the proposition that a serviceman had a statutory right to re-enlist, but the court held that only in specific situations did this right attach.\textsuperscript{26} It seems fair to permit the Secretary to exercise his discretion in re-enlistment situations where: (1) the applicant has not demonstrated a statutory right to re-enlist; and (2) the record indicates that the applicant may be unfit for the service. The court noted that the Supreme Court began its opinion "[B]y reciting that he (O'Callahan) committed the offenses charged."\textsuperscript{27} Thus, while the court-martial conviction was reversed, this did not detract from the established fact that the offenses had still been committed. To compel the Secretary to accept the plaintiff's re-enlistment petition in this situation would hardly seem fair. In \textit{Davis v. United States}\textsuperscript{28} the same argument confronted the court. The plaintiff, an enlisted serviceman in the Air Force, asked the court to find that he would have re-enlisted after the expiration of his term had he not been invalidly dismissed. The court denied the plaintiff's request, holding that the Secretary was not required to accept the plaintiff's application. The court then added that civilian courts lacked the power to extend the term of enlistment beyond the scheduled date of expiration, as well as the authority to retroactively re-enlist the serviceman for a succeeding term.\textsuperscript{29}

Because the Secretary holds the power in cases like \textit{O'Callahan} and \textit{Davis} to reject a serviceman's re-enlistment application, there is sufficient justification for not allowing the individual to recover for any period after his enlistment expiration date. One could only speculate as to whether the individual would in fact have attempted to re-enlist, or that his application would have

\textsuperscript{26} Id. In \textit{Diamond v. United States}, 344 F.2d 703 (1965), a statutory right to re-enlist was recognized for officers who applied within the prescribed time. In \textit{Smith v. United States}, 155 Ct. Cl. 682 (1961), another case cited by O'Callahan, a mandatory right to re-enlist in the Reserves was given those servicemen who had completed twenty years of active duty. The O'Callahan court held that neither case was applicable to the plaintiff's situation.

\textsuperscript{27} Id.

\textsuperscript{28} No. 247-269, Ct. Cl. (decided November 12, 1971).

\textsuperscript{29} Id. at 6.
been accepted had he not been illegally discharged prior to the end of his term. It is entirely possible that this speculative aspect alone discourages many courts from permitting recovery past a scheduled enlistment term.

When the *O'Callahan* court decided that the Secretary's act of backdating was neither capricious nor arbitrary, the plaintiff's hopes for recovery were over. The existence of an expiration date distinguished O'Callahan's case from others (i.e., those with indefinite expiration terms) where the cause of action accrued at the time of the Secretary's issuance of a proper discharge. Because of the six-year enlistment term, the plaintiff's cause of action began on the date of his previous dismissal—November 6, 1956. At that time the plaintiff knew he would not be entitled to pay or allowances accruing after the date of his court-martial. The court's choice of the invalid discharge date as the date the action accrued was decisive, for it meant that by the time the plaintiff had filed his petition in 1969, the six-year statute of limitations had run, thereby barring his claim. In *Mistretta v. United States*, the Court of Claims held that since the plaintiff's cause of action accrued at the latest on February 13, 1945 (when his court-martial sentence was confirmed), a suit filed on February 29, 1952, was barred for having been brought more than six years after his cause of action first accrued. In *Friedman v. United States*, the court again held that the cause of action accrued all at once upon the serviceman's release. Supported by these cases, the court in *O'Callahan* concluded that the plaintiff's cause of action began when he was originally discharged; and that since thirteen years had passed before the petition for back-pay was filed, the applicable statute barred the claim.

The theory that a cause of action accrues on the date of release has not been followed in every situation. It has already been noted that where a serviceman's termination date is indefinite, his cause of action accrues when the Secretary issues the proper discharge. This benchmark is also used in other situations. In *Proper v. United States*, the plaintiff attempted to recover disability retirement pay. The government contended that the

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30. *See discussion at note 20 supra.*
31. *O'Callahan* at 1393.
32. *See note 9 supra.*
33. 128 Ct. Cl. 41 (1954).
34. *Id.* at 44, 45.
35. 310 F.2d 381 (1962).
36. *Id.* at 387.
claim accrued when the plaintiff was released, and that since more than six years had elapsed before filing of the suit, the statute had run. This argument was very similar to the government's theory in O'Callahan. But while the O'Callahan court accepted this theory, the court rejected it in Proper. As in O'Callahan, the plaintiff's claim was based on the alleged arbitrary acts of the Secretary. Yet the Proper court held that since the action accrued when the Secretary acted, and not when the serviceman was released from active-duty status, the statute had not run:

[P]laintiff's cause of action is not based on the alleged arbitrary action of the Correction Board but rather on the alleged arbitrary action of the Secretary of the Army in 1955, acting not through the Correction Board but independently and in fact contrary to the findings, conclusions and recommendations of such Board. . . . Accordingly, we hold that the plaintiff's claim based on the alleged arbitrary action of the Secretary of the Army is not barred by the statute of limitations.38

It must be noted that Proper differs from O'Callahan in several respects. For example, while one case was brought for disability retirement pay, the other was based on a claim for back-pay. Also, the plaintiff in Proper was challenging the Secretary's action denying him disabled retirement status; while in O'Callahan the serviceman never contended that his severance was unfair. These and other reasons may account for the different accrual dates decided upon by the two courts. But the fact remains that if O'Callahan could have convinced the court that his claim accrued in 1971 when the Secretary backdated his discharge, he could have hurdled the statute of limitations barrier, and in all likelihood could have proceeded to recovery under his claim.

While O'Callahan's petition was dismissed on the basis of the running of the statute, other servicemen's claims have been rejected on a related ground—laches. It is reasonable to believe that the court could have accepted this defense against O'Callahan himself, since more than ten years had passed prior to his filing suit in the Court of Claims. Because back-pay suits by nature involve claims emanating from past administrative or court-martial proceedings, it is characteristically common for the defense of laches to be raised. This, obviously, is particularly true when

38. Id. at 318.
the statute of limitations is found inapplicable. The additional burdens placed on the defendant—such as a showing that the plaintiff was guilty of unreasonable and culpable delay in filing his suit—make this defense initially less attractive than the statute of limitations. But the doctrine of laches is nevertheless an important and oft-asserted defense in O'Callahan back-pay-type cases, and it therefore deserves attention.

As early as 1919 the Supreme Court held that a public employee must exercise diligence in establishing his rights based on an unlawful discharge. Since then the application of laches in both civilian and military back-pay suits has been continuously endorsed by federal courts. And as is the case whenever the statute of limitations is involved, the application of laches almost invariably brings the exhaustion of remedies requirement into focus. The serviceman usually contends either: (1) that pursuit of his administrative remedies was mandatory, so that in the event it takes him three years to exhaust his available military channels, those years should not be available for use in the defense of laches; or (2) that even if these remedies should be considered optional, they were reasonable steps to take for the protection of his rights in those circumstances. Thus, in both approaches it is contended that in fairness and in right laches should not encompass the period when administrative appeals are taken. On the other hand, the government normally asserts that because the military remedies are permissive, resort to such channels does not defer or excuse the plaintiff's delay in filing suit in a civilian court. In Jackson v. United States the court was confronted with these theories. The plaintiffs argued that their continuous administrative attempts to overcome their court-martial convictions rendered the defense of laches inappropriate. But the court rejected this claim and found that their unreasonable delay in filing suit for back-pay in the Court of Claims barred any consideration of the merits. The plaintiffs had waited three years after the final military action before suing in a District Court to obtain reversals of their convictions. Then, after the voiding of the convictions, they had

39. Arant v. Lane, 249 U.S. 367 (1919). The Supreme Court held that:

When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should take the action requisite to effectively assert his rights. . . . Id. at 372.


41. See Grisham v. United States, 392 F.2d 980 (1968).

42. 179 Ct. Cl. 29 (1967).
waited another eighteen months before suing in the Court of Claims. The court found that the three years which had passed before filing of the suit in the District Court, added to the time that had elapsed prior to the assertion of their claims in the present court, constituted an unwarranted and unreasonable delay. The determining factor, concluded the court, was that throughout these years the plaintiffs could have obtained full relief from their convictions and withheld back-pay in the present court.43 The authority of the Court of Claims to entertain suits for back-pay based on allegedly invalid separations had previously been established.44 In this situation, with the element of reviewability established—as well as the fact that the plaintiffs had taken their final military actions available to them nearly five years prior to their suit in the Court of Claims—it seems that the court's decision to apply the laches defense was appropriate.

CONCLUSION

In light of the foregoing discussion, it should now be clear that the problems confronting the serviceman in his attempt to recover back-pay and allowances are characteristically complex and always burdensome. Issues relating to definite and indefinite expiration dates, the statute of limitations and laches are all factors capable of bringing about the rejection of the serviceman's claim. Additionally, the claimant must contend with and overcome his greatest barrier—the unusually broad statutory and discretionary powers entrusted in the office of the Secretary of the service branch concerned. As evidenced by O'Callahan, the Secretary's authority to act extends to nearly all aspects of the typical back-pay suit. In all cases he holds the discretionary power, "when it

43. Id. at 38.
44. See Shaw v. United States, 357 F.2d 949, 953 (1966), where the court held that a court-martial conviction was "no bar to recovery" when that conviction included a denial of a fundamental constitutional right. See also, Shapiro v. United States, 69 F. Supp. 205 (1947), where it was held: That an egregious wrong had been committed against this plaintiff we have no doubt; our only concern is whether we have jurisdiction to right that wrong. We have no power to review the court-martial proceedings; we can give relief only if the verdict of the court-martial was absolutely void and, therefore, forms no foundation for plaintiff's dismissal. If it was void, it is settled that we have jurisdiction to render judgment for the pay of which he was illegally deprived. Id. at 207.
is reasonable and not arbitrary or capricious," to backdate the effective date of an honorable discharge to the termination date of the enlistment period. It is also his discretion that often determines whether an individual’s re-enlistment application will be accepted or rejected. With these and other powers the Secretary is frequently able to control the outcome of the serviceman’s case.

Thus, it is readily apparent that the serviceman, even after securing a reversal of his prior illegal discharge, is in no way assured of recovering on his claim for back-pay. Instead, he must encounter problems which never confronted him in his suit to reverse his dismissal. And if he fails at any level to overcome any of these defenses, his claim for back-pay will almost invariably be rejected.

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45. O'Callahan at 1393.