

In the Supreme Court of the United States

CHRISTOPHER P. DOWNEY, PETITIONER

v.

DEPARTMENT OF THE ARMY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, in an administrative proceeding initiated by a soldier to correct military personnel records, an error in the application of the burden of proof automatically entitles the soldier to have the proceeding set aside under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, even when the error was harmless.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is not published in the Federal Reporter but is reprinted at 685 Fed. Appx. 184. The opinion of the district court (Pet. App. 19-59) is reported at 110 F. Supp. 3d 676. The decision of the Army Board for Correction of Military Records (Pet. App. 63-76) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 2017. A petition for rehearing was denied on June 12, 2017 (Pet. App. 77). The petition for a writ of certiorari was filed on September 11, 2017 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1552 of Title 10 of the United States Code governs the correction of military records across branches of the armed services. Under that provision, the Secretary of the Army may alter records when “necessary to correct an error or remove an injustice.” 10 U.S.C. 1552(a)(1). The Secretary acts through the Army Board for Correction of Military Records (Board), which considers applications for corrective action, holds hearings when appropriate, and recommends or directs relief. See 32 C.F.R. 581.3(a) and (c). Although the statute does not specify what showing an applicant must make to obtain modification of his record, implementing regulations state that the Board “begins its consideration of each case with the presumption of administrative regularity” and “[t]he applicant has the burden of proving an error or injustice by a preponderance of the evidence.” 32 C.F.R. 581.3(e)(2).

2. a. Petitioner is Army Lieutenant Colonel Christopher Downey. In April 2012, his squadron held a formal ball, which he attended as the event’s commanding officer. That evening, a soldier informed petitioner that two female officers were kissing on the dance floor. The soldier expressed his belief that others were photographing the pair. Pet. App. 2-3.

Petitioner approached the women and saw Specialist Jeremy Reuter holding a camera. Pet. App. 3. Petitioner reacted by pushing the camera down with his hand. *Ibid.* In so doing, petitioner knocked the camera into Reuter’s face, lacerating his nose and causing him to fall to the floor. *Id.* at 3, 21. Reuter was taken to a hospital and diagnosed with a concussion and broken nose, although petitioner later presented evidence that

Reuter's nose was not in fact fractured. *Id.* at 3-4; see C.A. App. 55-57, 498.

b. Petitioner's superior officer, Major General Mark A. Milley, initiated an investigation and then non-judicial disciplinary proceedings pursuant to Article 15 of the Uniform Code of Military Justice, 10 U.S.C. 815, for, among other offenses, assault consummated by battery. Pet. App. 4. An Article 15 proceeding is a non-adversarial, summary proceeding at which a commanding officer may impose discipline "for minor offenses without the intervention of a court-martial." 10 U.S.C. 815(b). The commanding officer must find the soldier guilty beyond a reasonable doubt. See Pet. App. 27; Army Reg. 27-10, para. 3-18(l) (2011). A soldier has the option to refuse an Article 15 proceeding and demand an adversarial court-martial. 10 U.S.C. 815(a). Petitioner, after consulting with counsel, elected to forgo a court-martial and submit to the Article 15 proceeding. Pet. App. 6, 26.

At the Article 15 hearing, General Milley found petitioner guilty of the assault offense, but acquitted him of other charges. Pet. App. 6, 27. Petitioner appealed to the next higher commander, but his appeal was denied. *Id.* at 74. Milley then issued a memorandum of reprimand and relieved petitioner from his position in command of the squadron. *Id.* at 6. Milley prepared a letter explaining his decision, to be placed in petitioner's personnel file, as required by Army regulations. *Id.* at 29-30. Milley stated that, in his judgment, although petitioner was "an otherwise quality officer" who "should retain his rank" of Lieutenant Colonel, petitioner's conduct reflected "a very severe lapse in judgement [sic]" and Milley had "los[t] * * * confidence in [petitioner]"

as a commander.” *Id.* at 30 (brackets original in third quotation).

c. An administrative elimination board subsequently convened to determine whether petitioner should be separated from the Army based on his misconduct. See Pet. App. 30. That board determined that the allegations against petitioner of derogatory activity and of conduct unbecoming an officer were not supported by a preponderance of the evidence. *Ibid.* Accordingly, the separation board recommended that petitioner be retained on active duty. *Ibid.*

3. In 2013, petitioner, through counsel, requested that the Army Board for Correction of Military Records remove the Article 15 record from his personnel file on the ground that removal was “necessary to correct an error or remove an injustice.” Pet. App. 31 (quoting 10 U.S.C. 1552(a)(1)). His petition faulted the Article 15 proceeding on multiple substantive and procedural grounds, *id.* at 7, and it included a 31-page self-authored statement and binder of 41 exhibits, including hospital reports, sworn statements by other personnel, letters attesting to his character, and legal arguments from an attorney, *id.* at 64-65.

The Board, in articulating the standard for its review of that evidence, incorrectly stated that, “to remove a document” from a personnel file, “there must be clear and convincing evidence showing the document is untrue or unjust.” Pet. App. 75. As explained above, the governing regulation requires that the Board evaluate claims of error and injustice “by a preponderance of the evidence.” 32 C.F.R. 581.3(e)(2). The Board reviewed all of the evidence, however, and found that it “confirms” petitioner violated the Uniform Code of Military Justice by “unlawfully striking a Soldier on his face.”

Pet. App. 74. Indeed, the Board held that “[t]here is *no evidence* of record and [petitioner] provides *no evidence* to show” that General Milley’s Article 15 record is “untrue or unjust.” *Id.* at 75 (emphases added). The Board therefore concluded that petitioner’s “proceedings were conducted in accordance with law and regulation and his Article 15 and allied documents are properly filed in the restricted portion” of his personnel file. *Ibid.*

4. Petitioner then brought this action in federal district court pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, alleging multiple defects in the Board’s decision. Pet. App. 20, 34-35. As relevant here, petitioner claimed that the Board had improperly applied a clear-and-convincing standard rather than a preponderance standard. *Id.* at 45. The district court concluded that the Board’s invocation of the wrong standard “was harmless error as the Board found that there was ‘no evidence’ of error or injustice.” *Ibid.* Because petitioner “could not have met his burden of proof even under the lower preponderance standard” in light of “the substantial evidence supporting his Article 15 [record],” the court concluded that there was no basis to set aside the Board’s decision. *Ibid.*

5. The court of appeals unanimously affirmed in an unpublished, non-precedential opinion. Pet. App. 1-19. The court acknowledged that the Board should have applied the preponderance-of-the-evidence standard required by 32 C.F.R. 581.3(e)(2). Pet. App. 14 n.6. The court concluded, however, that the error did not prejudice petitioner, as he would not have prevailed even under the correct standard. *Ibid.* (citing *Sea “B” Mining Co. v. Addison*, 831 F.3d 244, 253 (4th Cir. 2016)) (“The harmless error rule applies to agency action because if the agency’s mistake did not affect the outcome, it

would be senseless to vacate and remand for reconsideration.”). The court reasoned that the Board had extensively reviewed petitioner’s submissions and still found “no evidence” that the Article 15 assault record was unjust or untrue. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 9-23) that the Board’s failure to apply the correct standard at his record-removal proceeding requires a remand to the Board. The court of appeals correctly determined that a remand is not warranted, because the outcome would not have been different under the appropriate standard: the Board held that “[t]here is no evidence of record and [petitioner] provide[d] no evidence to show” that his Article 15 assault record should be removed from his personnel file. Pet. App. 75. Although petitioner disagrees with the Board’s assessment of the evidence, the Board’s opinion unambiguously shows that it would have rejected petitioner’s claim even if it had applied a preponderance standard rather than a clear-and-convincing standard to the evidence before it.

The decision below does not conflict with any decision of this Court or any other court of appeals. Petitioner cites cases (Pet. 16-20) considering prejudice, and declining to consider prejudice, in APA litigation over an agency’s failure to follow various types of rules. But none of those cases holds that this type of regulatory violation can never be harmless error, and thus that an appellate court invariably must remand to the agency, even when the agency’s decision makes clear that the violation had no effect on the proceeding. Moreover, the decision below is unpublished and does not establish binding circuit precedent. This Court’s review is not warranted.

1. The court of appeals correctly held that petitioner “has the burden of demonstrating that the Board’s error was prejudicial.” Pet. App. 14 n.6. Congress specified in the APA that, when reviewing agency action, “due account shall be taken of the rule of prejudicial error.” 5 U.S.C. 706. Under that provision, “the party attacking the agency’s determination” normally bears the “burden of showing that an error is harmful.” *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009); see *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (stating the “general principle” that an agency’s choice “to relax or modify its procedural rules * * * is not reviewable except upon a showing of substantial prejudice to the complaining party”) (citation omitted).

The lower courts correctly applied that rule here. See Pet. App. 14 n.6, 45. The Board’s opinion makes clear that the Board’s error in stating the burden of proof had no effect on the outcome of the proceeding, because the Board concluded that petitioner had “no evidence” that he did not actually commit assault consummated by battery. Pet. App. 75. That conclusion was correct: petitioner admitted to the Board that he purposefully pushed the victim’s camera down, causing injury. C.A. App. 55 (admitting to “us[ing] an open hand in a downward motion”); see *id.* at 73 (highlighting eyewitness account that petitioner “*str[uck] Specialist Reuter’s camera, about where the lens met the top of the camera, forcing it into his face*”). The Board therefore was right to determine that petitioner’s Article 15 record is neither untrue nor unjust: in the memorandum of reprimand, General Milley relied on his finding that petitioner committed assault in deciding that petitioner

should retain his rank, but should not continue to serve as a squadron commander. Pet. App. 29-30.

Petitioner argues (Pet. 12) that the Board's error was not harmless and in fact was "outcome determinative," relying on the *administrative separation board's* decision in his favor. But as the Board explained, the separation proceeding served a different purpose: to determine whether petitioner should be removed from the Army, not "to determine [petitioner's] guilt or innocence" of the assault charge. Pet. App. 74. Accordingly, the separation board's conclusion—that petitioner should remain on active duty—was perfectly consistent with General Milley's earlier conclusion that petitioner's guilt of assault (but not other charges) meant that he should retain his rank but not his command position. The separation board's weighing of the evidence for a different purpose did not undermine the Article 15 proceeding or establish an error that the Board needed to correct. See *id.* at 74-75. Regardless, the factbound question of whether the evidentiary standard mattered in petitioner's particular proceeding before the Board does not warrant this Court's review.

2. Petitioner contends (Pet. 9-12), relying primarily on *American Farm Lines*, that he has a fundamental due-process right to automatic remand where an incorrect standard is applied in an administrative proceeding, even if the administrative tribunal's own opinion shows that the error made no difference to the outcome.

a. As an initial matter, petitioner forfeited this argument by never raising it below. Petitioner did not argue to either the district court or the court of appeals that the administrative regulation setting the burden of proof for the Board's proceedings reflects a fundamental, constitutionally based procedural due-process right,

the misapplication of which requires mandatory reversal without any consideration of prejudice. As a result, the lower courts did not decide that question. Instead, petitioner argued in the court of appeals only that the Board's error breached the APA's statutory "requirement of reasoned decision-making." Pet. C.A. Br. 32 (brackets and citation omitted); see *id.* at 32-34; see also Pet. C.A. Reply Br. 21-22. This Court therefore should follow its "normal practice" of denying review of issues not raised below. *EEOC v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (per curiam); see *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397 (2015) (a party's argument for an exception "was never presented to any lower court and is therefore forfeited").

b. In any event, there is no merit to petitioner's contention that the Board's error in the burden of proof was so fundamental that it requires a remand even absent any prejudice. In *American Farm Lines*, this Court reiterated the "general principle" that an agency may "relax or modify its procedural rules * * * when in a given case the ends of justice require it," and the agency's action "is not reviewable except upon a showing of substantial prejudice to the complaining party." 397 U.S. at 539 (citation omitted). Applying that principle, the Court held that the agency's decision to deviate from a particular procedural rule did *not* require a remand. *Ibid.* The Court distinguished agency rules "intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion." *Id.* at 538 (citing *Vitarelli v. Seaton*, 359 U.S. 535 (1959)). But even with respect to such rules, the Court had no occasion to address whether a violation would invariably require a remand to the agency, even if the error had no impact on the proceedings.

Petitioner relies (Pet. 9-11) on a number of this Court's cases reviewing agency action. None of them is inconsistent with the APA's requirement that a challenger to agency action must establish "prejudicial error." 5 U.S.C. 706. In one of the cases petitioner cites, the Court explicitly required the plaintiffs to show identifiable harm. See *United States v. Caceres*, 440 U.S. 741, 752 (1979) (failure to follow a regulation had "no discernible effect in this case on the action taken by the agency and its treatment of respondent"). In the other cases, the prejudicial nature of the regulatory violation was readily apparent. See *Morton v. Ruiz*, 415 U.S. 199, 234-236 (1974) (Bureau of Indian Affairs' procedurally improper policy extinguished the entitlement of certain Indians to assistance benefits); *Vitarelli*, 359 U.S. at 536-540 (petitioner had been discharged on "national security" grounds after a hearing where the government introduced "no evidence" against him); *Service v. Dulles*, 354 U.S. 363, 386 (1957) (petitioner was discharged due to the Secretary of State's unauthorized review of a Loyalty Review Board decision); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-267 (1954) (habeas action claiming that the Board of Immigration Appeals failed to independently review petitioner's case).

Petitioner also relies (Pet. 10-12) on a number of cases involving the misapplication of a burden of proof at an initial civil or criminal proceeding. In that context, it may not be possible to determine how the factfinder would have resolved the ultimate issue under the appropriate standard, thus necessitating a remand. See *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998) (NLRB proceeding to review legitimacy of union election); *Santosky v. Kramer*, 455 U.S. 745, 757 (1982)

(proceeding to terminate parental rights); *Addington v. Texas*, 441 U.S. 418 (1979) (involuntary civil commitment proceeding). Here, by contrast, the Board engaged in collateral review of the Article 15 proceeding in which petitioner’s guilt was determined, and the Board’s own opinion conclusively demonstrates that its error in stating the standard of review had no effect on that collateral review. Petitioner does not point to any case requiring a remand in that circumstance, and he offers no explanation why principles of due process demand further administrative proceedings to correct non-prejudicial error.¹

3. Contrary to petitioner’s argument (Pet. 16-21), there is no division in the courts of appeals on the question presented here: whether an agency’s misapplication of a regulation prescribing the burden of proof in a collateral proceeding automatically requires a remand. Petitioner does not point to any court of appeals that has answered that question in the affirmative—and thus would have decided this case differently from the Fourth Circuit.

a. Petitioner contends (Pet. 16) that several courts of appeals have held that any violation of “fundamental procedural rules is automatically deemed prejudicial.”

¹ In a footnote (Pet. 12 n.1), petitioner cites *Ornelas v. United States*, 517 U.S. 690 (1996), where this Court vacated and remanded after concluding that the court of appeals had erred in applying a deferential standard of appellate review, as opposed to a de novo standard. But unlike the Board’s opinion here, the court of appeals’s opinion in *Ornelas* did not suggest that the court would have reached the same conclusion under the correct standard. On the contrary, that court had found the question there to be “close” even applying a deferential standard of review. *United States v. Ornelas-Ledesma*, 16 F.3d 714, 719 (7th Cir. 1994).

But the question here is not whether, as a general matter, an agency's procedural rule can be so fundamental that its violation may be deemed prejudicial; rather, the question is whether the particular rule at issue in this case—a regulation prescribing the burden of proof in a collateral proceeding—is so fundamental that petitioner did not need to show prejudice in the lower courts. None of the cases petitioner cites involved proceedings similar to the Board's assessment of whether military records should be corrected after the fact. And none involved the application of a regulatory evidentiary standard as in 32 C.F.R. 581.3(e)(2).² Petitioner has not shown that any court of appeals would treat an administrative board's misstatement of the evidentiary burden in a collateral proceeding as the type of fundamental violation that must be deemed automatically prejudicial.

b. Petitioner further contends (Pet. 16-20) that courts of appeals differ in the types of errors they deem prejudicial or presumptively prejudicial. But as explained above, the question is how courts treat *this* type of error. And even as a matter of verbal formulations, petitioner overstates any differences among the courts of appeals. As petitioner himself recognizes (Pet. 13

² See *Montilla v. INS*, 926 F.2d 162 (2d Cir. 1991) (right to counsel at immigration hearings); *Leslie v. Attorney Gen. of U.S.*, 611 F.3d 171 (3d Cir. 2010) (same); *Wilson v. Commissioner of Social Sec.*, 378 F.3d 541 (6th Cir. 2004) (regulation governing Social Security Administration's consideration of opinion of applicant's treating physician); *Martinez-Camargo v. INS*, 282 F.3d 487 (7th Cir. 2002) (rights of alien under arrest without a warrant); *Sameena Inc. v. United States Air Force*, 147 F.3d 1148 (9th Cir. 1998) (right to an evidentiary hearing); *Port of Jacksonville Maritime Ad Hoc Comm., Inc. v. United States Coast Guard*, 788 F.2d 705 (11th Cir. 1986) (internal rules on start date for bridge construction).

n.2), the Fourth Circuit has followed other circuits in adopting the language of *American Farm Lines*: courts should presume harm from the violation of a regulation “if the agency regulations were intended to confer important procedural benefits upon individuals.” *City of Fredericksburg v. FERC*, 876 F.2d 1109, 1112 (4th Cir. 1989) (citation and internal quotation marks omitted); see *United States v. Morgan*, 193 F.3d 252, 267-268 (4th Cir. 1999). Petitioner believes (Pet. 14 n.2) that the court of appeals here “abandon[ed]” this approach, but because petitioner did not raise his present due-process argument before that court, it had no occasion to decide whether a presumption of prejudice applies. In any event, any such presumption would have been readily overcome in the face of the Board’s opinion rejecting modification under *any* standard.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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DECEMBER 2017