



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
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ARLINGTON, VA 22204-2490

██████████
Docket No. 5675-20
Ref: Signature Date

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF ██████████ ██████████
██████████

Ref: (a) 10 U.S.C. § 1552
(b) JAGMAN 5800.7E
(c) BUPERINST 1610.10
(d) MILPERSMAN 1611-010

- Encl: (1) DD Form 149 w/enclosures
(2) Investigating Officer Memo 5830, subj: Investigation into the Collision at Sea between ██████████ and ██████████, on or about 17 June 2017, 28 July 2017
(3) USNH ██████████ Discharge Summary
(4) U.S. ██████████ Fleet CO Memo 5830 Ser N013/0104J, subj: Investigation into the Collision at Sea between ██████████ on or about 17 JUN 2017, 20 June 2017
(5) ██████████ 6010/33, Procedure/Hospitalization Command Approval Request, 3 July 2017
(6) ██████████ Msg, subj: ██████████ Temporary Change of Command, dtg 110600Z Jul 17
(7) NAVHOSP ██████████ JA Msg, subj: Assignment to Medical Transition Company ICO [Petitioner], dtg 181400Z Jul 17
(8) NAVHOSP ██████████ JA Msg, subj: First Period Limited Duty Notification ICO [Petitioner], dtg 200905Z Jul 17
(9) ██████████ Msg, subj: Notification of LIMDU ICO Officer Personnel, dtg 211635Z Jul 17
(10) Suspect's Rights Acknowledgement/Statement, 16 August 2017
(11) NAVPERS 1626/7, Report and Disposition of Offense(s), 10 August 2017
(12) ██████████ CO E-mail Msg, subj: Orders for Former ██████████ sent Thursday, August 17, 2017 @ 5:45:49 PM
(13) U.S. ██████████ Fleet CO Memo 1621 Ser N013/150J, subj: Punitive Letter of Reprimand, 18 August 2017
(14) Admiral's Mast Accused's Acknowledgement of Appeal Rights, undated
(15) ██████████ CO Memo 1621 Ser N013/155J, subj: Nonjudicial Punishment Report in the case of [Petitioner], 18 August 2017
(16) Petitioner's Letter 1611, 18 August 2017
(17) NAVPERS 1610/2, Fitness Report & Counseling Record (W2-O6) (20170312 – 20170512)

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- (18) NAVPERS 1616/23, Fitness Report/Enlisted Eval Memorandum Entry, 18 May 2018
- (19) Navy Office of Information Press Release, *US Navy Statement on [REDACTED] and [REDACTED] Consolidated Disposition Authority Accountability Actions*, Story Number: NNS180116-22, 16 January 2018
- (20) Defense Motion to Dismiss: Prior Article 15 Punishment, in the case of *United States v. [Petitioner]*, in the Navy-Marine Corps Trial Judiciary Northern Judicial Circuit, 7 September 2018
- (21) Defense Motion to Dismiss: Violation of Article 37, UCMJ, in the case of *United States v. [Petitioner]*, in the Navy-Marine Corps Trial Judiciary Northern Judicial Circuit, 2 November 2018
- (22) Defense Motion to Dismiss: Convening Authority Disqualification, in the case of *United States v. [Petitioner]*, in the Navy-Marine Corps Trial Judiciary Northern Judicial Circuit, 2 November 2018
- (23) Ruling on Defense Motion to Dismiss – Violation of Article 37, UCMJ, in the case of *United States v. [Petitioner]*, in the Navy-Marine Corps Trial Judiciary Northern Judicial Circuit, 20 December 2018
- (24) Ruling on Defense Motion to Disqualify the Convening Authority, in the case of *United States v. [Petitioner]*, in the Navy-Marine Corps Trial Judiciary Northern Judicial Circuit, Naval District [REDACTED] General Court-Martial, 22 January 2019
- (25) SECNAV Memo, subj: Secretarial Letter of Censure, 9 April 2019
- (26) Certificate of Withdrawal Referred Charges, in the case of *United States v. [Petitioner]*, in the Navy-Marine Corps Trial Judiciary Northern Judicial Circuit Special Court Martial, 12 April 2019
- (27) Petitioner's Memo, subj: Rebuttal to Secretarial Letter of Censure, 26 April 2019
- (28) Naval Nuclear Propulsion Program Memo 1611 Ser 08B-MP-058, subj: Report of Misconduct ICO [Petitioner], 15 May 2019
- (29) Petitioner's Memo, subj: Report of Misconduct ICO [Petitioner], First Endorsement on Enclosure (28), 3 June 2019
- (30) BUPERS Order: 3189, Official Retirement Orders for [Petitioner], 14 November 2019
- (31) OJAG Code 20 Memo 1070 Ser 20/4016, subj: Advisory Opinion in the case of [Petitioner], 16 December 2021
- (32) Petitioner's Memo, subj: Response to Advisory Opinion in the case of [Petitioner], 18 January 2022

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records, hereinafter referred to as the Board, requesting that his naval record be corrected by: (1) removing his 18 August 2017 non-judicial punishment (NJP) and the resulting punitive letter of reprimand (PLOR) and all associated documents; (2) removing his fitness report (FITREP) for the reporting period 12 March 2017 to 29 August 2017, or alternatively modifying the subject FITREP by changing blocks 33 and 39 from 1.0 to 3.0, deleting the comments in block 41 and inserting a specific

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statement;¹ (3) changing his characterization of transfer from “detachment for cause” (DFC) to “medical;” (4) removing his 9 April 2019 Secretarial Letter of Censure and 26 April 2019 rebuttal statement; and (5) removing his 15 May 2019 Report of Misconduct (ROM) and 3 June 2019 rebuttal statement.

2. The Board reviewed Petitioner’s allegations of error or injustice on 25 January 2022 and, pursuant to its regulations, determined that no corrective action is warranted. Documentary material considered by the Board consisted of the enclosures, relevant portions of Petitioner’s naval records, and applicable statutes, regulations, and policies.

3. The Board, having reviewed all of the evidence of record pertaining to Petitioner’s allegations of error or injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulation within the Department of the Navy.

b. On 13 May 2017, Petitioner assumed command of the [REDACTED]. See enclosure (2).

c. On 16 June 2017, the [REDACTED] departed her homeport of [REDACTED] to conduct operations. Liberty expired at 0600 for all hands, followed by a full training schedule. At approximately 2300, the [REDACTED] began an outbound transit to sea. Shortly after 2300 hours, both Petitioner and the Executive Officer (XO) departed the bridge for the night. See enclosure (2).

d. At approximately 0200 hours on 17 June 2017, the [REDACTED] collided with the civilian merchant vessel [REDACTED]. Seven Sailors died as a result of this collision, and three others, including Petitioner, required airlift to the U.S. Naval Hospital [REDACTED].² See enclosure (2).

e. On 18 June 2017, Petitioner was discharged from the [REDACTED] in stable condition, and placed on 14 days of convalescent leave. See enclosure (3).

f. By memorandum dated 20 June 2017, the Commander, U.S. [REDACTED] appointed an investigation pursuant to reference (b) to investigate the circumstances surrounding the collision involving the [REDACTED] and the [REDACTED]. The appointed investigating officer (IO), who was a flag officer in the rank of Rear Admiral, was specifically instructed to “[d]evelop opinions and recommendations with respect to issues of accountability, meritorious performance of duty, navigational issues and other areas [he] deem[ed] necessary.” See enclosure (4).

¹ Petitioner requests that the following statement be added to Block 41: “Issued upon Member’s medical transfer to National Capital Region for treatment at [REDACTED].”

² Petitioner was admitted to [REDACTED] for traumatic brain injury (TBI) (with brief loss of consciousness), back contusion, and lower extremity abrasions. See enclosure (3).

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g. On 3 July 2017, Petitioner's convalescent leave was extended for an additional 16 days. See enclosure (5).

h. On 11 July 2017, Petitioner was temporarily relieved of command of the [REDACTED] due to medical incapacity. See enclosure (6).

i. On 17 July 2017, Petitioner was temporarily assigned to the Medical Transition Company, USN [REDACTED] for 30 days. See enclosure (7).

j. On 17 July 2017, a Limited Duty (LIMDU) medical board convened and recommended a six-month period of outpatient LIMDU for Petitioner.³ See enclosure (8).

k. By message dated 21 July 2017, Navy Personnel Command (NPC) approved LIMDU for Petitioner from 17 July 2017 until January 2018. See enclosure (9).

l. By memorandum dated 28 July 2017, the IO discussed in paragraph 3f above issued the findings of his investigation. Among his findings was that Petitioner "was derelict in the performance of his duties and hazarded his vessel and the lives of the men and women entrusted to his care by abdicating his responsibility for safe navigation to the [Officer of the Deck (OOD)]."⁴ In making this finding, the IO commented that "[i]t is inexplicable that neither [Petitioner], nor his XO, were on the Bridge for his first outbound [REDACTED] transit as [Commanding Officer], at night, in close proximity to land, and expecting moderately dense fishing and merchant traffic." The IO further commented that Petitioner "should have been aware of the experience level of his Bridge watchteam,⁵ and that his watchstanders were at least as fatigued as he was from a long day of operations without sufficient rest. He not only failed to put mitigations in place to account for the prevailing circumstances and conditions, but doubled the leeway given to the OOD to maneuver left or right of track to avoid traffic."⁶ Finally, the IO stated that Petitioner's "decision to order 20 knots created a false sense of urgency, and was not in accordance with Rule 6 (Safe Speed) of the International Rules of the Road by failing to account for dynamic changes in the prevailing circumstances and conditions for safe speed as the ship approached the eastern end of the [REDACTED] Voluntary Traffic Separation

³ It is not readily apparent from the medical records available for review when this occurred, but at some point Petitioner was diagnosed with post-traumatic stress disorder (PTSD) as a result of the collision and was recommended for reassignment to the National Capital Region (NCR) so that he could receive medical treatment at [REDACTED] Medical Center.

⁴ The IO opined that the collision between the [REDACTED] and the [REDACTED] was avoidable, and attributed it to four factors: (1) Primarily the failures of the OOD; (2) the failures of the [REDACTED] Information Center watch teams; (3) Petitioner's decisions; and (4) the failures of the [REDACTED] second officer. The IO also noted several other contributing causes, including but not limited to: a poorly designed navigational track, crew fatigue, a lack of Commanding Officer and Executive Officer mentorship of the bridge and CIC watch teams, the fact that the [REDACTED] Quartermaster Chief billet had been gapped since 2015, and maintenance issues with the ship's equipment.

⁵ The OOD had previously served as OOD on a similar transit only once, during day time conditions.

⁶ Petitioner's night orders allowed the OOD to deviate from the navigational track by up to 1000 yards without calling him to avoid traffic. This allowance represented an increase from the 500-yard leeway that Petitioner had authorized in the past.

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Scheme].” Based upon this finding, the IO recommended “appropriate disciplinary and administrative action” for Petitioner. See enclosure (2).

m. On 16 August 2017, Petitioner was notified of his rights under Article 31, Uniform Code of Military Justice (UCMJ), and expressly waived his right to remain silent and to have a lawyer present during his interview.⁷ See enclosure (10).

n. On 17 August 2017, the Commander, U.S. [REDACTED] imposed NJP on Petitioner for two specifications of dereliction of duty in violation of Article 92, UCMJ,⁸ and one specification of negligent hazarding of a vessel in violation of Article 110, UCMJ.^{9,10} The “vessel exception” of Article 15, UCMJ, was applied in Petitioner’s case, so he did not have the right to demand a trial by court-martial. After finding Petitioner guilty of the charged offenses, the U.S. Seventh Fleet Commander determined that Petitioner’s NJP would consist of a PLOR. See enclosure (11).

o. By e-mail dated 17 August 2017, the Commander, U.S. [REDACTED] recommended that Petitioner be permanently relieved and DFC as Commander, [REDACTED]. He further requested that Petitioner receive permanent change of station orders to the [REDACTED] Navy Yard in a LIMDU status as soon as possible so that he could receive treatment for his medical condition. See enclosure (12).

p. By memorandum dated 18 August 2017, the Commander, [REDACTED], issued Petitioner the PLOR discussed in paragraph 3n above. This reprimand notified Petitioner of his right to appeal the action to the Commander, [REDACTED] and instructed Petitioner to notify the U.S. [REDACTED] of his intent in this regard within five days of receipt. See enclosure (13).

q. On 18 August 2017, Petitioner indicated that he did not intend to appeal his NJP or his PLOR. See enclosure (14).

⁷ Petitioner was notified that he was suspected of dereliction of duty in violation of Article 92, UCMJ, and negligently hazarding a vessel in violation of Article 110, UCMJ.

⁸ Specification 1 of Charge I stated that Petitioner was derelict in the performance of his duties as the [REDACTED] commanding officer in that “he negligently failed to ensure the safe navigation of his ship, as required by U.S. Navy Regulations, Section 857, as it was his duty to do, when his vessel collided with [REDACTED] and that such dereliction of duty resulted in the deaths of seven sailors.” Specification 2 of Charge I stated that Petitioner was derelict in the performance of his duties in that “he negligently failed to ensure that the officers and crew were properly organized, stationed and trained to cope effectively with any emergency that might arise in the normal course of scheduled operations, as required by U.S. Navy Regulations, Sections 802, 805, and 883, as it was his duty to do, and that such dereliction of duty resulted in his vessel colliding with [REDACTED] and the deaths of seven sailors.”

⁹ Enclosure (11) reflects that this the Admirals Mast occurred on 18 August 2017, but enclosure (12) suggests that it was conducted on 17 August 2017. The Board presumes that the U.S. Seventh Fleet commander conducted the Admiral’s Mast on 17 August 2017, and that Petitioner was notified of his findings on 18 August 2017.

¹⁰ The specification of Charge II stated that Petitioner “did negligently hazard the [REDACTED] by failing and neglecting to cause his officers and crew to drive his vessel in accordance with his Standing Orders, Night Orders and the International Rules of the Road, resulting in a collision of said vessel with [REDACTED] and damage to both vessels.

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r. By memorandum dated 18 August 2017, the Commander, U.S. Seventh Fleet, prepared a ROM to NPC reporting the results of Petitioner's NJP and requesting that Petitioner be DFC from the [REDACTED] by reason of loss of confidence in his ability to command. Despite this recommendation, the Commander, U.S. [REDACTED], specifically recommended that Petitioner not be required to show cause for retention in the Navy. See enclosure (15).

s. Before the ROM referenced in paragraph 3r above was forwarded to NPC, it was provided to Petitioner for comment. By letter dated 18 August 2017, Petitioner elected not to make a written statement in response to the ROM. See enclosure (16).

t. On 28 August 2017, Petitioner received a FITREP on the occasion of his detachment for the reporting period 12 March 2017 to 29 August 2017. This FITREP was adverse in that Petitioner's Reporting Senior (RS) rated Petitioner "Below Standards" for the performance traits of "Professional Expertise" and "Tactical Performance." Block 41 of the FITREP explained that the adverse ratings were based upon Petitioner's NJP. Despite the adverse ratings, the RS rated Petitioner's as "Promotable." Petitioner indicated that he intended to make a statement. See enclosure (17).

u. On 19 October 2017, the FITREP referenced in paragraph 3t above was returned to the RS for correction. Specifically, NPC noted that per reference (c), a "Promotable" promotion recommendation may not be assigned with any trait graded as "Below Standards." As of 18 May 2018, the FITREP had not been corrected. According, a memorandum entry was made in Petitioner's record in place of the adverse FITREP. See enclosure (18).

v. Three days after Petitioner's NJP was administered, the [REDACTED] was involved in a similar mishap in the [REDACTED] Fleet area of operations. This incident, following so soon after the [REDACTED] incident, raised significant questions in Congress and the media about Navy readiness and leadership, as well as accountability for these incidents. On 30 October 2017, the Vice Chief of Naval Operations (VCNO) appointed a Consolidated Disposition Authority (CDA) to review the accountability actions taken to date in relation to the [REDACTED] and the [REDACTED], and to take additional administrative or disciplinary actions as appropriate. See enclosure (19).

w. On 16 January 2018, long after Petitioner's NJP had been resolved and Petitioner had detached from the [REDACTED] and transferred to the NCR for medical treatment, the CDA preferred court-martial charges against Petitioner. In addition to the charges which had previously been disposed of through NJP, Petitioner was also charged with negligent homicide in violation of Article 134, UCMJ. Those charges were subsequently referred to a general court-martial (GCM). See enclosure (19).

x. On 7 September 2018, Petitioner, through counsel, moved the GCM to dismiss the offenses previously disposed of through NJP, arguing that his court-martial for the same offenses which had previously been disposed of through NJP exceeded the limited circumstances under which a court-martial for the same offenses that were previously disposed of through NJP is authorized. See enclosure (20).

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y. On 2 November 2018, Petitioner, through counsel, moved the GCM to dismiss the charges against him due to unlawful command influence (UCI) in violation of Article 37, UCMJ. See enclosure (21).

z. On 2 November 2018, Petitioner, through counsel, moved the GCM to disqualify the CDA from acting as the convening authority in his court-martial because the CDA had acted as an accuser in his case. See enclosure (22).

aa. On 20 December 2018, the Military Judge found that Petitioner's court-martial proceedings were tainted with the appearance of UCI due to the actions and statements made by the Chief of Naval Operations (CNO), the VCNO, and other senior Navy leaders. Although the Military Judge found that dismissal of the charges was "not yet" necessary to remove the taint of apparent UCI, he did order several curative steps to remove the appearance of UCI. See enclosure (23).

bb. On 22 January 2019, the Military Judge ruled that the CDA was disqualified to serve as the convening authority because he was so closely connected to the offense that a reasonable person would conclude that he had a personal interest in the matter.¹¹ Although the Military Judge disqualified the CDA from acting as the convening authority in Petitioner's court-martial, he did not find that dismissal of the charges was necessary to effect an appropriate remedy. See enclosure (24).

cc. By memorandum dated 9 April 2019, the Secretary of the Navy (SECNAV) issued a Secretarial Letter of Censure to Petitioner. See enclosure (25).

dd. On 11 April 2019, the court-martial charges referred against Petitioner were withdrawn by order of the CNO and dismissed without prejudice. See enclosure (26).

ee. By memorandum dated 26 April 2019, Petitioner submitted a rebuttal to the Secretarial Letter of Censure referenced in paragraph 3cc above. In this rebuttal, Petitioner asserted that the SECNAV's conclusion that his leadership was ineffective, his judgment poor, and his responsibility for his Sailors' deaths unequivocal were derived from factual errors and allegations not supported by the evidence. With regard to the criticisms of Petitioner's decision to retire to his cabin during the transit of the [REDACTED] on 16 June 2017, Petitioner asserted that he did not leave "an inexperienced watch team, lacking in confidence and technical experience," as was stated in the censure letter. In support of this contention, Petitioner cited the qualifications of his watch team and the basis for his trust and confidence in each of their abilities and competencies. Petitioner also disputed the statement in the censure letter that he was "disengaged and removed ... from the tactical control and supervision of [his] ship, while operating at night, in close proximity to land, and in an area with a high volume of maritime traffic." In this regard, Petitioner argued that the assertion that he "disengaged and removed"

¹¹ The defense alleged, and the Court agreed, that the CDA had improperly used previous NJP hearings that he had initiated against other Sailors involved in the [REDACTED] collision to develop evidence against the Petitioner unrelated to the cases against those Sailors. As such, he had abdicated his neutral role as a convening authority to act in a prosecutorial capacity.

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himself conceptually distorts the nature of command authority and control, and that the censure misstated the navigational circumstances of the [REDACTED] at the time of the collision except insofar as that the ship was "operating at night."¹² Finally, Petitioner contended that the statement that he "fail[ed] to implement any mitigation measures, such as ordering the Executive Officer or Navigator to supervise the team on the bridge," mistakes seniority as a safety mitigation measure and ignores the multiple safety mitigations measures that he ordered. Petitioner also explained in detail the risk assessment and mitigation measures that he implemented as the [REDACTED] commander, and further argued that other allegations of his deficient conduct before the collisions were without evidentiary basis. Specifically, Petitioner contended that the allegation that he "failed to approve an adequate watch bill that managed the fatigue of [his] watchstanders" has never been supported by an alternative, better watchbill. He also contended that the allegation that he "failed to revise standing orders or procedures to account for the operational circumstances and degraded equipment" is based on no instruction that would bind his judicious, practical discretion, nor did it account for his crew's performance. In response to the contention that the [REDACTED]'s navigational track was "poorly designed," Petitioner argued that this conclusion was derived from a mistaken representation by the IO of the track used and that the navigational track used remains in use by the [REDACTED] Fleet. Petitioner also disputed the statement that the [REDACTED] transited at a "faster than safe speed in a heavily trafficked area." Finally, Petitioner disagreed with the wholesale criticism of his 35-day command tenure, arguing that the evidence shows that he trained his crew to the maximum extent possible, and that the crew's achievements warranted his confidence in their capabilities. See enclosure (27).

ff. By memorandum dated 15 May 2019, the CDA prepared a ROM regarding the action taken in Petitioner's case in accordance with reference (d). In this ROM, the CDA recommended that Petitioner be required to show cause for retention in the naval service and that he be DFC. See enclosure (28).

gg. By memorandum dated 3 June 2019, Petitioner provided a statement in rebuttal to the ROM referenced in paragraph 3ff above. Through counsel, Petitioner argued that he should be permitted to retire at his current pay grade, without a board of inquiry, for the following reasons:

(1) The CDA had no authority to issue the ROM or to make his recommendation that Petitioner be required to show cause for retention.¹³

(2) There is no record of misconduct supporting a show cause hearing.¹⁴

¹² Petitioner contended that the [REDACTED] was not operating in close proximity to land or in "an area with a high volume of maritime traffic."

¹³ Petitioner argued that the CDA had exhausted the disposition authority which was delegated to him, and was not entitled to take administrative action after his disciplinary action resulted in no finding of misconduct. He further argued that the CNO had, through his own actions, withdrawn the CDA delegation based on the fact that the Navy publically announced that the above referenced censure letter was issued at the recommendation of the CNO and that the CNO withdrew and dismissed the referred court-martial charges against Petitioner.

¹⁴ Petitioner contends that there was no separate finding of misconduct against Petitioner since his NJP report, and that the Secretary did not censure Petitioner for misconduct. He also argued that the 2017 NJP proceedings were "so pocked with legal error that it likewise cannot serve as a basis for a show-cause hearing." Specifically, Petitioner

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(3) A show cause hearing is unnecessary because Petitioner was retirement eligible and had already voluntarily requested retirement in June 2018.

See enclosure (29).

hh. By orders dated 14 November 2019, Petitioner was transferred to the temporary disability retired list in his current grade, with retired pay for that grade, effective 29 December 2019. See enclosure (30).

ii. Petitioner asserts the following allegations of error or injustice:

(1) Petitioner contends that it was an error for the Commander, U.S. [REDACTED] to apply the "vessel exception" to Article 15, UCMJ, to deny him the right to demand trial by court-martial in lieu of NJP. Specifically, he contends that he was not attached to the [REDACTED] at the time that NJP was imposed, and that the [REDACTED] was not a "vessel" in the meaning of the exception in any case.¹⁵ Petitioner further contends that the Navy never obtained a valid waiver of his appeal rights.¹⁶ Accordingly, Petitioner argues that his NJP was invalid.

(2) Petitioner contends that the charges for which he received NJP failed to allege offenses under the UCMJ.

(3) The Secretarial Letter of Censure should be rescinded because the record demonstrates that his actions were well within the discretion the Navy gives its commanders at sea.

See enclosure (1).

jj. Upon the request of the Board, the Criminal Law Division of the Department of the Navy's Office of the Judge Advocate General (Code 20) reviewed Petitioner's naval record and application, and provided an advisory opinion (AO) for the Board's consideration regarding the application of the "vessel exception" of Article 15, UCMJ, to Petitioner's case. This AO concluded that the vessel exception did apply in Petitioner's case when Petitioner received NJP on 18 August 2017. It informed the Board that paragraph 0108(a) of reference (b) states that, for the purposes of NJP, "the term 'attached to or embarked in a vessel' means that the person is

asserted that it was an error to deprive Petitioner of the right to refuse NJP since the "vessel exception" did not apply, and that NJP was imposed for charges that failed to allege a violation of the UCMJ. He alleged further error in that Petitioner's right to appeal the NJP was constrained by conditioning the issuance of his transfer orders on the resolution of such an appeal. Finally, Petitioner asserted that he was factually innocent of any negligence charge.

¹⁵ In arguing that the [REDACTED] was not a "vessel" in the meaning of the word as it applies to the vessel exception to Article 15, UCMJ, Petitioner relies upon the definition in 1 U.S.C. § 3, which provides that the word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water. Petitioner cited to the case of *U.S. v. [REDACTED]*, 46 M.J. 41 (CAAF 1997), which relied upon this definition of the word "vessel" to conclude that the operational status of a ship is relevant to a factual determination whether it is "used or capable of being used, as a means of transportation on water."

¹⁶ Petitioner contends that his waiver of his appeal rights was not voluntary because the Navy conditioned his necessary medical treatment on the waiver.

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assigned or attached via written or oral orders, either permanent or temporary, to a vessel; is aboard for passage; or is assigned or attached to an embarked staff, unit, detachment, squadron, team, air group, or other regular organized body. The determination of whether a person is attached to or embarked on a vessel is based upon the totality of the circumstances.” The AO opined that Petitioner was attached to the [REDACTED] at the time of his NJP, finding the fact that Petitioner was still assigned to the [REDACTED] establishes prima facie evidence that the vessel exception applies and that military and federal cases both dictate that service members are “presumed attached” for the vessel exception. Citing to the case of [REDACTED] *v. Secretary of the Navy*, 155 F.3d 848 (7th Cir. 1998), the AO noted that even if Petitioner was on shore performing duties he was still attached to the vessel. It also noted that Petitioner remained assigned to the [REDACTED] until September 2017, continued receiving sea pay throughout this period, and that his assignment to the [REDACTED] was a sea tour. Accordingly, based upon the totality of the circumstances the Code 20 AO concluded that the evidence indicates that Petitioner was attached to the [REDACTED] at the time of his NJP. Having made this finding, the AO went on to opine that the [REDACTED] was, in fact, a “vessel” within the meaning of Article 15, UCMJ, at the time of Petitioner’s NJP. In making this finding, the AO suggested that the [REDACTED] court found the operability of a vessel to be only one factor to consider that weighs against usage of the vessel exception, and cited to the Supreme Court case of [REDACTED] *v. City of [REDACTED]* 568 U.S. 115 (2013), which found that “a structure can be a vessel even if it is temporarily not engaged in transportation over water.” It then went on to list the [REDACTED] circumstances which suggested that it was a “vessel” for purposes of the “vessel exception” to Article 15, UCMJ.¹⁷ Weighing these circumstances, the AO concluded that the [REDACTED] was, in fact, a “vessel” for purposes of the “vessel exception” at the time that Petitioner received NJP. See enclosure (31).

kk. By memorandum dated 18 January 2022, Petitioner provided a rebuttal to the above referenced AO for the Board’s consideration. In this rebuttal, Petitioner asserted that the AO misapplied settled law regarding the vessel exception by abandoning the required multifactorial test of the [REDACTED] case, and focused exclusively on a pair of narrow facts while overlooking every other consideration that weighed against application of the vessel exception. In response to the AO’s comment that Petitioner remained assigned to the [REDACTED] Petitioner asserted that that was true only because the Navy leadership withheld his reassignment orders, specifically so that he would not be entitled to demand trial by court-martial. Besides that fact, Petitioner asserted that “every other factor weighs against finding that [he] was ‘attached’ to [REDACTED] on 18 August 2017.”¹⁸ With regard to the AO’s conclusion that the [REDACTED]

¹⁷ Among the relevant circumstances was that the [REDACTED] was able to return to port under her own power after the collision, which the AO suggested negated the argument that she was nonoperational; that the [REDACTED]’s operational capability did not change while in dry dock to evaluate and repair the damage; that the [REDACTED] was still considered afloat, meaning the crew did not have any ashore facilities since the ship was their permanent assignment, and as a result Petitioner received credit for sea duty for the entire time he was attached to the [REDACTED]; that the [REDACTED] has been documented by the Naval Vessel Register as “active and in commission” since 1995; and that the [REDACTED] was an Afloat Destroyer and looking at the ship it is evident that the physical characteristics and activities would consider it designed to a practical degree for carrying people or things over water.

¹⁸ Petitioner notes that he had not set foot on the [REDACTED] since he was medically evacuated on 17 June 2017; that he had not duties onboard the ship since someone else had been placed in command; that he was

[REDACTED] was a "vessel" for purposes of the "vessel exception," Petitioner asserts that the AO cited only the condition of the ship on 17 June 2017, but not on the day of his NJP. Finally, Petitioner argues that the AO should be ignored in its entirety based upon its comments which suggested that Petitioner was assigned defense counsel to advise him during the NJP proceedings and that he could have objected at the time. See enclosure (32).

II. Article 15, UCMJ, provides that NJP may not be imposed upon any member of the armed forces if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment, "except in the case of a member attached to or embarked in a vessel."

CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Board found insufficient evidence of any material error or injustice warranting relief.

The Board found no merit in Petitioner's contention that there was insufficient evidence of any misconduct in either his NJP or in the investigation upon which it was based. The Board is not an investigative body. In the absence of evidence to the contrary, it relies upon the presumption of regularity to establish that naval personnel properly performed their assigned functions. In this case, there is no evidence to suggest that the IO did not properly perform his duties in conducting his investigation, or that his conclusions were based upon anything other than his assessment of the evidence, influenced by his own considerable experience as a flag officer in the Navy. Likewise, there is no evidence to suggest that an investigation of this magnitude did not receive a thorough legal review which would have compared the findings to the evidence to ensure that the former were supported by the latter, or to suggest that any of the other naval authorities who took action based upon the findings of the investigation failed to review and evaluate the evidence upon which the investigative findings were based. The Board notes that Petitioner made a compelling argument disputing the findings of the investigation, and that his contentions were available and considered in the filing of his Secretarial Letter of Censure. However, the military offense of dereliction of duty is a subjective one, and numerous highly experienced naval officers have found that Petitioner was derelict in his duty as the commander of the [REDACTED]. There was certainly evidence upon which the IO's conclusions in this regard could be plausibly based. Accordingly, the Board found no error or injustice in the findings of the investigation or the substance of Petitioner's NJP.

Having found no error or injustice in the substance of Petitioner's NJP or the findings of the investigation, the Board also found no error or injustice in the Secretarial Letter of Censure issued to Petitioner. Per paragraph 114a of reference (b), the SECNAV's authority to issue censures is inherent in his office, and "such censure is neither a nonpunitive measure nor a punitive sanction of the type that can be imposed as [NJP] or as the judgment of a court-martial." The Board finds no error in the fact that the CDA recommended that the SECNAV issue such a

placed on two consecutive convalescent leave periods, then "temporarily relieved" in the middle of medical assessments before being found unfit for sea duties; that his daily assignment for two months prior to his NJP was at the [REDACTED] where he began rehabilitation treatment while awaiting orders to the NCR for treatment.

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censure or in the format of such recommendation, as the CDA's action was merely a recommendation, the Board is not aware of any limitations upon who may make such recommendations to the SECNAV, and it was the SECNAV who ultimately issued the censure. The evidence reflects that Petitioner was provided and availed himself of the opportunity to rebut the Secretarial Letter of Censure, and his rebuttal remains in Petitioner's naval record. As such, Petitioner was provided the opportunity to dissuade the SECNAV from filing the censure in his naval record. Although this effort proved unsuccessful, Petitioner's rebuttal remains permanently filed in his naval record along with the censure, providing context and/or his version of events for anyone who may come across the censure in Petitioner's naval record for whatever reason. The Board also noted Petitioner's contention that his actions on 16-17 June 2017 were within the discretion accorded to commanders at sea, and does not dispute that commanders at sea are afforded significant discretion. However, such commanders are not free from accountability when their actions or decisions contribute to tragic consequences. In this case, senior and experienced Navy leaders have determined that Petitioner's actions and decisions at least contributed to an event that resulted in the death of seven Sailors. Accordingly, the Board found no error or injustice in the issuance of the Secretarial Letter of Censure filed in Petitioner's naval record.

The Board found Petitioner's contention that the charges for which he received NJP failed to state offenses under the UCMJ to be without merit. Dereliction of duty is an offense under Article 92, UCMJ. Likewise, negligently hazarding a vessel is an offense under Article 110, UCMJ. As discussed above, the Board found no error or injustice in the findings of the investigation upon which the NJP charges were based. The Board also notes that Petitioner did not appeal his NJP or submit a rebuttal to the PLOR resulting from that NJP to dispute the findings.

Finally, the Board determined that the vessel exception did apply in Petitioner's case. This determination was based primarily upon the analysis provided by the above referenced AO, but was also confirmed by the Board's own reading of the case law which Petitioner cited in support of his contention that the exception did not apply to his case. Specifically, the Board's review of the *Edwards* case confirmed the explanation provided by the AO that the operability of a ship is but one factor to consider in determining whether a ship is a "vessel" within the meaning of the vessel exception. The Board also noted that the [REDACTED] court specifically stated that its decision did not extend to the legality of the NJP imposed, but rather only to the admissibility of prior NJP in its court-martial proceedings, which tended to negate the relevance of the [REDACTED] decision in the present context. The Board had no doubt that Petitioner's was attached to the [REDACTED] at the time of his NJP. He was permanently assigned to and had not been detached from the [REDACTED], he continued receiving sea pay as a result of his attachment to the [REDACTED], and he was reporting to the [REDACTED] daily only for medical treatment. The Board further found Petitioner's contention that he remained attached to the [REDACTED] only because naval official refused to issue reassignment orders for the purpose of denying him the opportunity to demand trial by court-martial to be without merit and entirely unsupported by the evidence, as discussed further below. Finally, the Board agreed with the AO conclusion that the weight of the evidence suggested that the [REDACTED] was a "vessel" for purposes of the vessel exception in Article 15, UCMJ.

Accordingly, the Board determined that the vessel exception did apply in Petitioner's case, and therefore there was no error or injustice in its application.

In this regard, the Board found that Petitioner's reliance upon its previous decision in Docket No. 4284-14 to be misplaced.¹⁹ Not only were the circumstances present in Docket No. 4284-14 much more favorable for a finding either that the subject of that case was no longer attached to the ship or that the ship in question was not a "vessel" for purposes of the vessel exception, but the Board specifically found the NJP in question in that case to be invalid "as a matter of equity." The circumstances of Docket No. 4284-14 are not the same as those at issue in the present case, and therefore the Board did not agree with Petitioner's contention that Docket No. 4284-14 necessarily provides precedent for the relief sought by Petitioner.

Even if the vessel exception should not have applied in Petitioner's case, however, the Board still would find no error or injustice in its application for two reasons. First, Petitioner waived any objection to its application by not availing himself of the opportunity to appeal the NJP. In this regard, the Board rejected Petitioner's contention that his waiver of his right to appeal the NJP was involuntary because the evidence simply did not support his assertion that the Navy improperly conditioned the issuance of reassignment orders for medical treatment upon such a waiver. It is the routine, common practice of the Navy not to permanently reassign service members pending disciplinary action to another command jurisdiction until their action is complete. Further, enclosure (9) reflects that Petitioner should not have expected to receive immediate reassignment orders, as NPC notified his command that they should notify Petitioner's detailer if orders were not received within 30 days.²⁰ The evidence clearly reflects that naval authorities sought to expedite Petitioner's transfer to the NCR as rapidly as possible for his well-being, and does not reflect, as Petitioner contends, that his reassignment was conditioned upon the waiver of his NJP appeal rights. Further, Petitioner's assumption that exercising his NJP appeal rights would unreasonably delay his reassignment to the NCR was baseless and unfounded. Accordingly, the Board found no merit in Petitioner's contention that his NJP appeal waiver was involuntary.

In addition to finding that Petitioner waived his NJP appeal rights, the Board also determined that any error in the application of the vessel exception in Petitioner's case would be clearly harmless. Petitioner received only a PLOR as a result of the NJP for which he was denied the right to demand trial by court-martial pursuant to the vessel exception. The substance of this PLOR was essentially the same as the Secretarial Letter of Censure that he later received. He was not deprived of any liberty or property rights as a result of the NJP. His promotion potential was not adversely affected by the NJP, since the findings of the investigation alone would almost certainly have doomed any future promotion opportunities regardless of any disciplinary proceedings. Finally, Petitioner was ultimately voluntarily retired in grade, with full benefits. As such, the documents that he now seeks to have removed from his record have no potential to impact his military career, and can only be publically accessed via a request under the Freedom of Information Act (FOIA), which would be subject to analysis under both the FOIA and the

¹⁹ Petitioner did not cite to the Docket No. 4284-14 specifically, but rather to the name of the applicant associated with that docket number.

²⁰ Enclosure (9) was published on 21 July 2017, 29 days before NJP was administered.

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[REDACTED]

Privacy Act. Petitioner simply has suffered no real harm from the receipt of his NJP. In contrast, if the vessel exception had not been applied and Petitioner actually exercised his right to demand trial by court-martial, Petitioner could have suffered significant and life-long adverse effects. Any court-martial initiated pursuant to such a demand would not have suffered from the procedural and legal defects which ultimately rendered Petitioner's prosecution to be impractical in April 2019. The court-martial convictions of the [REDACTED] commander and Petitioner's own OOD illustrates that Petitioner could have suffered far more significant and life-long adverse effects if the vessel exception had not been applied in his case. Accordingly, the Board would not have found any error or injustice, even if application of the vessel exception was inappropriate.

Having found no error or injustice in Petitioner's NJP, the Board also found no error in Petitioner's adverse FITREP for the reporting period 12 March 2017 to 29 August 2017.²¹

RECOMMENDATION:

In view of the above, the Board recommends that no corrective action be taken on Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above titled matter.

5. The foregoing action of the Board is submitted for your review and action.

3/14/2022

[REDACTED]

Executive Director

²¹ Based upon enclosure (18), it was apparent to the Board that the subject FITREP remains in Petitioner's naval record.

Subj: [REDACTED] NAVAL RECORD OF [REDACTED], USN,

SECRETARY OF THE NAVY DECISION:

Board Recommendation Approved (Deny Relief) ✓

Petitioner's Request Approved (Grant Relief – Remove Petitioner's NJP and the resulting PLOR, and all associated documents, from Petitioner's naval record; Remove FITREP for the reporting period 12 March 2017 to 29 August 2017 from Petitioner's naval record; Remove Secretarial Letter of Censure, and its associated documents (i.e., initiating ROM and rebuttal statements) from Petitioner's naval record)

4/18//2022

[REDACTED]

Secretary of the Navy