



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

██████████
Docket No. 7637-20
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD ICO ██████████ USN,
XXX-XX ██████████

Ref: (a) 10 U.S.C. § 1552
(b) 10 U.S.C. § 611
(c) 10 U.S.C. § 637
(d) 10 U.S.C. § 688
(e) 10 U.S.C. § 632
(f) SECNAVINST 1920.7C, subj: Continuation on Active Duty of Regular
Commissioned Officers and Reserve Officers on the Reserve Active Status List in the
Navy and Marine Corps, 22 January 2019

Encl: (1) DD Form 149 w/attachments
(2) BCNR Memo ██████████ Docket No. 7637-20, subj: Review of Naval Record ICO
[Petitioner], 27 May 2021
(3) NPC Memo 1400/0429 PERS-801, subj: Request for Advisory Opinion ICO
[Petitioner], 22 December 2020
(4) PERS-801 E-mail, subj: RE: FOUO: BNR Docket No. 7637-20, sent Monday,
April 19, 2021, @ 4:26 PM
(5) NAVPERS 1000/4, Officer Appointment Acceptance and Oath of Office,
4 September 1997
(6) DD Form 214 (19971004 – 20040131)
(7) NAVPERS 1800/1, BUPERS Statement of Service (Retirements), 12 August 2020
(8) NAVPERS 1000/4, Officer Appointment Acceptance and Oath of Office,
20 December 2011
(9) PERS-801 E-mail, subj: RE: Correction ICO [Petitioner], sent Monday,
October 24, 2022 @ 3:28 PM
(10) PERS-801 E-mail, subj: RE: FOUO: BCNR Docket No 7637-20, sent Monday,
April 19, 2021 @ 2:48 PM
(11) NAVADMIN 283/15, subj: Notice of Convening FY-17 Officer Continuation
Selection Boards and Announcement of Continuation Policy, dtg 10 1844Z Dec 15
(12) ASN (M&RA) Memo, 15 June 2016
(13) NAVADMIN 072/20, subj: Postponement of Selection Board Schedule,
dtg 182232Z Mar 20
(14) NAVADMIN 105/20, subj: Expanded Opportunity for Retention on Active-Duty in
a Retired Status for Active-Duty Officers with Pending Statutory Retirements,
dtg 091846Z Apr 20.
(15) Petitioner's Memo, subj: Retention on Active Duty in a Retired Status Request ICO

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[Petitioner], 13 April 2020

- (16) NPC Memo 1920 Ser 835/272, subj: Request for Retention on Active Duty in a Retired Status, 22 April 2020
- (17) NAVADMIN 144/20, subj: Recommencement of Selection Boards and Announcement of Revised Schedule, dtg 152131Z May 20
- (18) DD Form 214 (20000619 – 20200930)
- (19) ALNAV 087/20, subj: FY-21 Active-Duty Navy Commander Staff Corps Selections, 081239Z Oct 20
- (20) 116th Congress, PN2326-Navy, accessed at <https://www.congress.gov/nomination/116th-congress/2326>
- (21) DFAS E-mail, subj: RE: Correction ICO [Petitioner], sent Friday, October 7, 2021, @ 8:01AM

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 to permit his return to active duty.

2. The Board originally reviewed Petitioner's allegations of error or injustice on 4 May 2021, and granted relief. See enclosure (2). This decision was based primarily upon an advisory opinion (AO) provided by Navy Personnel Command (NPC).¹ Specifically, by memorandum dated 27 May 2021, the Board directed that Petitioner's naval record be corrected to reflect that Petitioner's request to remain on active duty in a retired status was approved until 1 November 2020 (vice 1 October 2020); to reinstate Petitioner on active duty in the Navy in the rank of CDR; and to reflect that Petitioner served continuously on active duty without being retired. Subsequent to the issuance and execution of this decision, however, the Defense Finance and Accounting Service (DFAS) General Counsel (GC) made the Board aware of concerns with the legality of this decision. Specifically, the DFAS GC raised legitimate concerns regarding the legality of Petitioner's promotion to CDR pursuant to a PSB which convened after his MRD.² Because the Board's decision of 4 May 2021 was not legally supportable, that decision is hereby revoked.

¹ The AO, dated 22 December 2020, advised that Petitioner was eligible for the Fiscal Year (FY) 2021 Active-Duty Navy Commander (CDR) Staff Corps (AO5S) Promotion Selection Board (PSB) that was originally scheduled to convene on 24 March 2020, and that NAVADMIN 072/20, which delayed the convening date until 5 July 2020 due to COVID-related concerns, stated that officers eligible at the time of the original board convening date would remain eligible on the rescheduled convening date. It further opined that if the FY 2021 AO5S PSB had convened as scheduled, Petitioner would have been on the promotion list prior to his scheduled mandatory retirement date (MRD), and therefore not required to retire. Accordingly, the AO recommended approval of Petitioner's request for relief, and further recommended that he be promoted to the grade of CDR pursuant to his selection by the FY 2021 AO5S PSB. See enclosure (3). NPC subsequently confirmed Petitioner's eligibility for the FY 2021 AO5S PSB, convened 5 July 2020, in response to an inquiry from the Board, stating that the Secretary of the Navy "had approved a plan that officers eligible as of the originally scheduled board date would remain eligible in order to minimize the impact caused by COVID-19." See enclosure (4). While relying upon NAVADMIN 072/20 to establish that Petitioner was eligible for consideration by the FY 2021 AO5S PSB convened on 5 July 2020, the AO did not address the statutory requirement of reference (b) that members must be on the active-duty list to be eligible for promotion consideration. This statutory requirement superseded any service-level effort to maintain the eligibility criteria for the originally scheduled PSB.

² Per reference (b), officers must be on the active-duty list in order to be considered by a PSB for promotion to the next higher grade. As Petitioner's MRD had passed as of the convening date of the FY 2021 AO5S PSB, he was not then eligible for consideration.

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3. The Board reconsidered Petitioner's allegations of error or injustice on 31 October 2022 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on Petitioner's naval record. Documentary material considered by the Board included the enclosures, relevant portions of Petitioner's naval record, and applicable statutes, regulations and policies.

4. Having reviewed all of the evidence of record pertaining to Petitioner's allegations of error or injustice, the Board makes the following findings:

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

b. Petitioner was appointed as a Chaplain Corps officer in the U.S. Navy Reserve (USNR), and served continuously on active duty in this capacity from 4 October 1997 until the completion of his required active service on 31 January 2004. His net active service during this period was six years, three months, and 27 days. See enclosures (5) and (6).

c. Petitioner reentered the USNR on 16 October 2006 and served on active duty in this capacity until 19 December 2011. See enclosure (7).

d. On 20 December 2011, Petitioner was appointed as a Lieutenant Commander (LCDR) in the Regular Navy. See enclosure (8). There was no break in his active duty service during his transition from the USNR to the Regular Navy.

e. Petitioner failed for selection (FOS) for promotion to CDR by the FY 2013 and FY 2014 AO5S PSBs. Upon his second FOS, he was selected for continuation on active duty in the grade of LCDR for a period of three years by the FY2014 Active-Duty Navy LCDR Staff Corps (AO4S) Continuation Selection Board (CSB) pursuant to reference (c).³ See enclosure (9).

f. Petitioner subsequently FOS promotion to CDR by the FY 2015, 2017, 2018, 2019, and 2020 AO5S PSBs.⁴ See enclosure (10).

g. On 10 December 2015, the FY 2017 AO4S CSB and Continuation Policy was announced.⁵ The Navy's Continuation Policy for this CSB stated that two-time FOS LCDRs with between 14 and 18 years of active service selected for continuation would be continued only until eligible for retirement upon the completion of 20 years of service.⁶ See enclosure (11).

h. On 15 June 2016, the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN (M&RA)) approved the results of the FY 2017 AO4S CSB, which had recommended Petitioner for continuation on active duty, thus further continuing Petitioner on active duty in the

³ The period of extension was to expire effective 1 January 2017. Note: This information was not available to the Board on 4 May 2021.

⁴ There was no FY 2016 AO5S PSB convened for the Chaplain Corps.

⁵ The FY 2017 AO4S CSB was announced to convene on 16 May 2016.

⁶ As of the scheduled convening date for the FY 2017 AO4S CSB, Petitioner had 15 years, 10 months, and 27 days of active service.

grade of LCDR until he reached eligibility for retirement.⁷ See enclosure (12). Because Petitioner was to achieve 20 years of active service in June 2020, his MRD absent a further period of continuation was 1 July 2020.

i. The FY 2021 AO5S PSB was originally scheduled to convene on 24 March 2020. See enclosure (3). However, on 18 March 2020, all PSBs scheduled to convene on or after 24 March 2020 were postponed until further notice due to the COVID-19 pandemic.⁸ See enclosure (13).

j. On 9 April 2020, the Navy announced that it would accept applications from active-duty officers with a MRD between the date of the message and 1 December 2020 who desire to be retained on active duty in a retired status, and that the requirements for such requests would be relaxed, due to the uncertainty regarding the duration of the COVID-19 pandemic.⁹ See enclosure (14).

k. By memorandum dated 13 April 2020, Petitioner requested to be retained on active duty in a retired status for a period of three months beyond his MRD of 1 July 2020.¹⁰ See enclosure (15).

l. By memorandum dated 22 April 2020, Petitioner's request to be retained on active duty in a retired status was approved until 1 October 2020. See enclosure (16).

m. On 15 May 2020, the rescheduled FY 2021 AO5S PSB was announced for 6 July 2020.¹¹ See enclosure (17).

n. Having not been further continued on active duty, Petitioner was placed on the retired list effective 1 July 2020. Petitioner continued serving on active duty in a retired status pursuant to enclosure (17). See enclosure (18).

o. On 6 July 2020, the FY 2021 AO5S PSB convened as scheduled.

p. On 30 September 2020, Petitioner's departed active duty upon the end of his approved retention in a retired status. See enclosure (18)

q. On 8 October 2020, the results of the FY 2021 AO5S PSB were announced. Despite Petitioner's ineligibility for consideration due to his retired status as of the PSB's convening date, Petitioner was among those selected for promotion. See enclosure (19).

r. On 22 October 2020, after learning of his selection by the FY 2021 AO5S PSB, Petitioner applied to this Board requesting to be returned to active duty service. He asserted that, but for the delay in the convening date of the FY 2021 AO5S PSB necessitated by the COVID-19 pandemic, his name would have appeared on a promotion list prior to 1 July 2020 and he would

⁷ Petitioner's selection by the FY 2017 AO4S CSB was not known by Board on 4 May 2021.

⁸ This announcement stated that all candidates eligible at the time of the board's originally scheduled date would remain eligible when the board was rescheduled.

⁹ The authority to retain a member on active duty in a retired status is reference (d).

¹⁰ This request referenced enclosure (14).

¹¹ This date is five days after Petitioner's 1 July 2020 MRD.

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not have been required to retire.¹² He further asserted that such relief would be in the best interest of the Navy due to current Chaplain Corps manning requirements. See enclosure (1).

s. The FY 2017 AO5S promotion selection list, including Petitioner's name, was subsequently forwarded through the confirmation process. On 14 December 2020, Petitioner was confirmed for appointment to the grade of CDR by the Senate. See enclosure (20).

t. Subsequent and pursuant to the Board's now-revoked decision of 27 May 2021, Petitioner was restored to active duty and wore the rank of CDR. He was also paid as a CDR. See enclosure (21).

CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Board finds a clear injustice warranting relief.

But for the delay in the convening date for the FY 2021 AO5S PSB necessitated by the COVID-19 pandemic, Petitioner's name very likely would have appeared on the list of officers recommended for promotion by that Board prior to his MRD of 1 July 2020. It took 94 days for the officers ultimately selected by that PSB on 6 July 2020 to appear on the list of officers recommended for promotion published on 8 October 2020, so it is reasonable to assume that Petitioner's name would have appeared on such a list prior to 1 July 2020 if the PSB had convened as scheduled on 24 March 2020. Further, the fact that Petitioner was considered eligible for the FY 2021 AO5S PSB as of its original convening date, despite his known MRD of 1 July 2020, suggests that the Navy anticipated processing the PSB's recommendation and publishing the list of officers recommended for promotion to CDR by the PSB prior to that day (i.e., within the 90-day rule traditionally applied to PSB eligibility criteria). Since Petitioner was ultimately selected for promotion by the FY 2021 AO5S PSB on 5 July 2020 under the same criteria as his record would have been considered if the PSB had convened as originally scheduled, his inability to continue serving in the advanced grade for which he was fairly selected due only to the unforeseeable circumstances of a worldwide pandemic represents a clear injustice warranting relief.

Petitioner's MRD was set as 1 July 2020 only because the Navy decided to limit the effective duration of continuation on active duty in the grade of LCDR pursuant to selection by the FY 2017 AO4S for officers with between 14 and 18 years of service until they became eligible for retirement at 20 years. However, per references (b) and (f), the Navy could have permitted a LCDR selected for continuation by the FY 2017 AO4S CSB, such as Petitioner, to remain on active duty until he reached 24 years of service.¹³ As the duration of Petitioner's continuation pursuant to his selection by the FY 2017 AO4S CSB was limited to the date upon which he attained eligibility for retirement was based only upon Navy policy, and not upon statute or a higher controlling policy, an exception to that policy could and should have been granted to avoid the injustice caused by the delay to the convening of the FY 2021 PSBs. If Petitioner had

¹² Per reference (e), the appearance of the name of a LCDR on a list of officers recommended for promotion to CDR negates the requirement that such officer be separated following two FOS for promotion.

¹³ See paragraph (a)(3) of reference (b) and paragraph 2e(2) of enclosure (2) to reference (f).

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known that the delayed convening date of the FY 2021 AO5S PSB would render him ineligible for consideration, the Board finds it likely that he would have made a request for such an exception given his willingness to be retained on active duty in a retired status for apparently that purpose. Further, given the lengths that the Navy went to in an effort to minimize the unfair consequences of such delays and the desire reflected in enclosure (3) to ensure that Petitioner did not suffer adverse consequences as a result of that delay, the Board also believes it likely that such a request would have been favorably considered. Accordingly, to remove the injustice to Petitioner caused by the delay of his final (and ultimately successful) opportunity for promotion due to the COVID-19 pandemic, the Board determined that Petitioner's record should be corrected to reflect that he requested and was granted a timely exception to the policy that his continuation on active duty pursuant to his selection by the FY 2017 AO4S CSB was effective only until he reached retirement eligibility, and that he therefore did not have a MRD of 1 July 2020 and did not retire effective 1 July 2020. This correction restores Petitioner's eligibility for consideration by the FY 2021 AO5S PSB that selected him for promotion, and negates any need for him to have been retained on active duty in a retired status.

RECOMMENDATION:

In view of the above, the Board recommends that the following corrections be made to Petitioner's naval record in the interest of justice:

That all corrections made pursuant to the Board's previous and now revoked decision in this case, dated 27 May 2021, be reversed.

That Petitioner's record be corrected to reflect that he requested an exception to the policy which limited his continuation on active duty pursuant to his selection by the FY 2017 AO4S CSB only until he reached retirement eligibility, and that such request was approved by the Navy prior to 1 July 2020. The date approved for Petitioner's continuation on active duty shall be some date after his name appeared on the list of officers recommended for promotion to CDR on 8 October 2020, so long as such date would not have extended his eligibility to remain on active duty beyond 24 years.

That all references to Petitioner's mandatory retirement on 1 July 2020, to include his request and approval to remain on active duty in a retired status and the DD Form 214 currently in Petitioner's record, be scrubbed and removed from his record. Petitioner's record is to reflect that he did not retire on 1 July 2020 and that his subsequent active duty service was not in a retired status, but that he continued to serve on active duty and remained on the active duty list with no break in service pursuant to his selection by the FY 2017 AO4S CSB and the above referenced exception to policy which permitted to him continue serving pursuant to that selection beyond his retirement eligibility date.

That a continuity memorandum be placed in Petitioner's record reflecting that the absence of any matters between 1 October 2020 and whatever day he was restored to active duty pursuant to the Board's now revoked decision was due to an injustice remedied by this Board on behalf of the Secretary of the Navy, and that no adverse inferences are to be made by the absence of such materials.

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If necessary, that Petitioner was promoted to CDR pursuant to his selection by the FY 2021 AO5S PSB and subsequent Senate confirmation, with the same date of rank he would have had but for his now removed retirement date.

That DFAS conduct an audit of Petitioner's finance records to determine what, if any, pay and allowances may be due Petitioner as a result of the corrections reflected herein, as well as any offsets that this decision may entail.

That a copy of this record of proceedings be retained in Petitioner's naval record.

That no further corrections be made to 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.

11/1/2022

[REDACTED]

ACTING ASSISTANT SECRETARY OF THE NAVY (MANPOWER AND RESERVE AFFAIRS) DECISION:

[REDACTED] Board Recommendation Approved (Full Relief – I concur with the Board and direct the relief recommended above.)

____ Board Recommendation Disapproved (Relief Denied – I do not concur with the Board's recommendation for the following reason(s): _____

_____)

Date: 11-18-2022

[REDACTED]