



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

[REDACTED]
Docket No: 8917-20
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED] USN, XXX-XX [REDACTED]

Ref: (a) 10 U.S.C. § 1552
(b) BCNR ltr [REDACTED] Docket No. 8384-20 of 23 Dec 20

Encl: (1) DD Form 149 w/attachments of 30 Dec 20
(2) DD Form 149 w/attachments of 4 Jan 21
(3) BCNR ltr [REDACTED] Docket No. 4284-14/10521-12 of 8 Feb 16
(4) BCNR ltr [REDACTED] Docket No. 6603-18 of 15 Apr 19
(5) NPC memo 1610 PERS-32 of 5 Oct 20
(6) [REDACTED] ltr 5200 Ser OI-00 of 1 Nov 20
(7) [REDACTED] tr of 28 Oct 20
(8) [REDACTED] ltr of 30 Dec 20
(9) [REDACTED] ltr of 8 Nov 20
(10) BCNR ltr HD Docket No. 05078-99 of 19 Nov 99
(11) NPC ltr 5420 PERS-32 of 16 Oct 20
(12) CNPC (PERS-80) ltrs of 14 Dec 20
(13) [REDACTED] proposed memo 5420 PERS-32 undated
(14) [REDACTED] proposed memo undated

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 (Board), requesting that the Board reconsider its decision in Docket No. 6384-20 denying his request to replace the contents of the fitness report continuity letter currently present in his record (Enclosure (11)) with his proposed contents (Enclosure (13)). Petitioner subsequently filed enclosure (2) to supplement his request for consideration and to request further relief.¹

2. The Board reviewed Petitioner's allegations of error or injustice on 30 March 2021 and 28 April 2021 and, pursuant to its regulations, determined that the corrective action indicated below

¹ Petitioner's supplemental request referenced guidance for promotion selection board members on the Navy Personnel Command website to support his contention that his proposed language should be included in the fitness report continuity memorandum in his record. As the Board decided his case after 13 January 2021, he further requested that the Board direct that his record be corrected to reflect that the continuity memorandum was filed in his official record, and that he submitted his request for this memorandum, on or before 2 January 2021 (the published suspense for corrections to his official record before the Fiscal Year 2022 (FY22) Active-Duty Navy Captain Restricted Line (Special Duty (Public Affairs)) Promotion Selection Board), and that a Special Selection Board be convened to reconsider Petitioner for promotion by the FY22 Active-Duty Navy Captain Restricted Line (Special Duty (Public Affairs)) Promotion Selection Board.

should be taken.² Documentary material considered by the Board consisted of the enclosures, relevant portions of Petitioner's naval record, and applicable statutes, regulations, and policies.

3. The Board, having reviewed all of the facts of record pertaining to Petitioner's allegations of error or injustice, found as follows:

a. Except as stated below, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy before applying to this Board.

b. On 16 May 2007, Petitioner received non-judicial punishment (NJP) for two specifications of contempt toward officials in violation of Article 88, Uniform Code of Military Justice (UCMJ). Despite the fact that Petitioner's ship was in port, Petitioner's command invoked the "vessel exception" to Article 15, UCMJ, to deny Petitioner the opportunity to refuse NJP. He was awarded a punitive letter of reprimand.

c. On 25 June 2007, Petitioner's commander recommended that he be detached for cause (DFC), removed from the Fiscal Year (FY) 2008 Active-Duty Navy Commander Line Promotion List,³ and required to show cause for retention in naval service. On 2 January 2008, the Chief of Naval Personnel approved the request for DFC based solely upon the Petitioner's NJP. On 30 May 2008, Petitioner was notified that the Secretary of the Navy had approved the removal of his name from the FY 2008 Active-Duty Navy Commander Line Promotion List. This notification indicated that the decision was based solely upon Petitioner's NJP.

d. On 16 January 2008, Petitioner was notified that he would have to show cause for retention in the naval service based upon his NJP. Petitioner subsequently elected to appear before a Board of Inquiry (BOI). On 17 June 2008, the BOI recommended that Petitioner be separated from the Navy by a vote of 2-1.

e. On 10 February 2009, Petitioner was non-selected by the FY 2010 Active-Duty Navy Commander Line Selection Board. This constituted his second non-selection for promotion.

f. On 9 July 2009, the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN (M&RA)) approved Petitioner's separation from the naval service pursuant to the BOI recommendation. He was subsequently separated on 30 September 2009 with a general (under honorable conditions) characterization of service.

g. On 8 February 2016, the Board set aside Petitioner's NJP as a matter of equity after concluding that Petitioner's right to refuse NJP and demand trial by court-martial was improperly denied in Docket No. 4284-14. The Board also found that Petitioner's BOI was defective due to

² The Board originally convened to consider Petitioner's application on 30 March 2021. During that session, the Board decided to grant Petitioner partial relief with regard to the contents of the fitness report continuity memorandum, but determined that a decision regarding Petitioner's request for an SSB was premature absent the results of the FY22 Navy Captain Line PSB. Subsequent to the adjournment of the 30 March 2021 Board session but prior to the final approval of its results, the results of the FY22 Navy Captain PSB were published, revealing that Petitioner was not selected. Based on this new information, the Board reconvened virtually on 28 April 2021 to address Petitioner's request for an SSB.

³ Petitioner had been selected for promotion to the rank of Commander, but his name was withheld from the promotion scroll pending the then-open NCIS investigation.

composition errors, and that his DFC, separation, and removal from the FY 2008 Promotion list were administrative consequences of the NJP. Accordingly, the Board directed the removal of all references in Petitioner's record to the above referenced adverse actions, to include the NJP, BOI, promotion selection removal, discharge, and any other related material. The Board also directed that all rights, privileges, and property affected by virtue of the NJP be restored; that corrections be made to Petitioner's fitness report ending 31 October 2007; and that a fitness report continuity memorandum be inserted into Petitioner's record covering the period from 1 November 2007 to the appropriate end date.⁴ Finally, the Board directed Petitioner's discharge be set aside, to reinstate him in the Navy on active duty and the record be corrected to reflect continuous service, and that Petitioner be nominated and promoted to commander with an effective date-of-rank of 6 July 2016. See enclosure (3).

h. Pursuant to the Board's decision in Docket No. 4284-14, a memorandum was inserted into Petitioner's record in lieu fitness reports for the period 1 November 2007 to 20 June 2016. However, Petitioner was not reinstated on active duty until 13 February 2017, leaving another gap in fitness report continuity between June 2016 and February 2017. On 15 April 2019, the Board directed in Docket No. 6603-18 that another memorandum be inserted in Petitioner's record to cover this gap. Pursuant to the Petitioner's request, the Board directed that this memorandum include the following specific language:

"This memorandum is being filed in lieu of performance evaluations for the above period. By direction of the Secretary of the Navy and due to no fault of SNO, fitness reports for the period above are not available for inclusion in SNO's Naval Record and no adverse speculation or inferences as to the nature or contents of such reports may be made by Selection boards or other reviewing authorities. The overall performance of SNO should be evaluated from the material presently available."

See enclosure (4).

i. In Docket No. 6384-20, Petitioner requested that his record be corrected by removing his fitness reports for the reporting periods 5 August 2017 to 30 April 2018 and 1 May 2018 to 30 April 2019, and that they be replaced with corrected versions. He also requested the removal of the continuity memorandum that the Board directed to be inserted in Petitioner's record, and that it be replaced with another memorandum with specific language that he proposed. The Board directed that Petitioner's fitness reports be removed, but denied Petitioner's request to replace the memorandum. In doing so, the Board found that the memorandum in place, which had been directed for insertion in Docket No. 6603-18, was sufficient to remove any potential prejudice in Petitioner's promotion consideration. The Board also found that there was a means available for Petitioner to communicate with the Board, and that Petitioner should therefore exhaust this remedy. See reference (b).

⁴ The Board directed that this fitness report continuity memorandum state: "By direction of the Secretary of the Navy, fitness reports [for the relevant period] are not available for inclusion in [subject named officer's] Naval Record and no speculation or inferences as to the nature or contents of such reports may be made by selection boards or other reviewing authorities," or words to that effect.

j. Petitioner has requested reconsideration of the Board's decision in Docket No. 6384-20 denying his request for replacement of the memorandum. He makes the following contentions regarding this request in enclosure (1):

(1) His record cannot be portrayed accurately or completely if it does not explain that the absence of records resulting from the Navy's having erroneously discharged him and then returning him to duty following the determination that the discharge was improper. The current memorandum does not direct board members to consider his date-of-rank (DOR) for promotion zone purposes as 5 May 2017, to account for the gap between his official 1 August 2008 DOR and commissioning year group, and the dates of his observed O-5 performance.

(2) The current memorandum does not enable his record to fairly portray his career. His proposed memorandum, however, explains the divergence between his DOR, commissioning year group and the dates of his observed O5 performance; accounts for him not having been assigned according to normal career progression and development models; and requires consideration of his successful performance of assigned duties as equal and equivalent duty performance by officers whose careers were not affected by an unlawful discharge.

(3) The Board's conclusion that he must exhaust his administrative remedies and submit his own explanatory correspondence is utterly wrong. Once the Board accepts an application, regulations require the board to review it. Declining to grant relief on grounds that Petitioner failed to exhaust administrative remedies is counterintuitive and contrary to regulations. The Board cannot conclude that the current memorandum in his file is sufficient while claiming that he failed to exhaust administrative remedies. Petitioner argues that he did not request that the Board provide explanatory correspondence to the promotion board. The absence from his OMPF of a memorandum containing the explanation and guidance he outlined constitutes an error and an injustice, because there is no administrative agency within the Department of the Navy below the Board capable of correcting it. The Board has a statutory, regulatory, and judicially enforceable duty to consider and take corrective action on the application he submitted. ✓

(4) Materials were presented but not considered. Specifically, Petitioner contends that the Board failed to consider endorsements to his proposed language made by senior officers; a previous Board decision (Enclosure (10)) in which the Board granted relief to a similarly situated officer; an excerpt from MILPERSMAN 1301-100 which provides for the filing of a memorandum in an officer's official file when he or she is assigned outside of normal career progression in a way that might adversely impact career prospects;⁵ an excerpt from the FY 2021 Active-Duty Navy Captain Line Promotion Selection Board precept directing the board members to be "particularly vigilant in [their] evaluation of records to take care that no officer's promotion opportunity is disadvantaged by service utilization policies or practices"; excerpts from public affairs officer community management and briefing materials reflecting the typical career path of a public affairs officer and evidence of the approximate number of fitness reports and awards that are missing due to Petitioner's situation; Navy regulations requiring the Navy to assign officers to duty and to document their performance of assigned duties; and an internal Board document.

⁵ The excerpt from MILPERSMAN 1301-100 pertains to situations in which an officer is assigned to positions outside of the normal career progression due to the "needs of the Army." While it provides a basis for an explanatory memorandum, it is not precisely analogous to Petitioner's situation.

(5) The denial of his request as stated in the decision letter for Docket No. 6384-20 was arbitrary and capricious. Specifically, he cites back to his argument regarding the exhaustion of administrative remedies; asserts that the Board failed in Docket No. 6384-20 to make findings regarding the language of his current continuity memorandum, the evidence submitted, or “anything whatsoever dealing with this aspect of [his] request for relief”; that the Board failed to consider Navy regulations that provide for the treatment officers who have records that reflect interruption to or detraction from their normal career progression and require either memoranda to be filed in their records or secretarial direction to selection boards to ensure that they are not prejudiced; and the ignorance of certain evidence that he submitted as discussed above.

(6) In 1999, the Board recommended favorable action for a Navy officer who was discharged and reinstated to active duty (Enclosure (10)). Petitioner noted that the memorandum included language that the officer “was discharged by reason of error and through no fault of his own,” and that because the “discharge has been voided, it is directed that he not be penalized in any way by reason of his inability to serve while the discharge was in effect.”

(7) MILPERSMAN 1301-100 provides for the filing of a memorandum when a service member is assigned outside normal career progression in a way that might adversely impact career prospects. Petitioner asserts that the memorandum mandates that the assignment be viewed favorably and positively with regard to the officer’s overall performance record.

k. Petitioner makes the following contentions in the supplement to his application in enclosure (2):

(1) Petitioner points to published guidance for promotion selection board members on the NPC website which directs them to consider officers with anomalous records in a way that equitably places their work on par with that of their traditional counterparts. He contends that this is all that he is asking for with his reconsideration request.

(2) Petitioner also provided another copy of his proposed continuity memorandum with the rationale for each individual provision detailed.

(3) Petitioner supplemented his request for relief by also requesting that the Board correct his record to reflect that he requested the correction to his record prior to the deadline for the FY 22022 Active- Duty Navy Captain Restricted Line Promotion Selection Board, and that he be granted a Special Selection Board if not selected by the FY 2022 Active-Duty Navy Captain Restricted Line Promotion Selection Board.

l. On 26 April 2021, the Board learned from Petitioner that he had not been selected for promotion by the FY 2022 Active-Duty Navy Captain Restricted Line Promotion Selection Board.

CONCLUSION:

After careful review and consideration of all of the evidence of record and the Petitioner’s contentions, the Board found that partial relief is warranted in the interests of justice.



The Board carefully reviewed its decision in Docket No. 6384-20 with regard to the Petitioner's request to replace the contents of fitness report continuity memorandum currently in his file with the content that he proposed, as well as his contentions and arguments in enclosure (1) and (2). Except with regard to the limited context discussed below, the Board concurred with the decision published in Docket No. 6384-20, and found no merit in Petitioner's contention that the current contents of the continuity memorandum in his record represents an injustice or prejudices his promotion opportunity relative to his peers. While the Board recognizes that Petitioner has been subjected to numerous injustices arising from the circumstances of his NJP and subsequent discharge, as evidenced by prior corrective action directed by this Board, and that his file therefore reflects an anomalous career path, his circumstances are not unique. There is a mechanism in place to inform promotion selection boards of the circumstances of situations like this, and promotion selection boards are already provided detailed instructions regarding how to consider such files to ensure that individuals in such situations are not disadvantaged in the promotion selection process. As the Board stated in Docket No. 6384-20, Petitioner should avail himself of those processes in order to inform the promotion selection board of the circumstances of his anomalous career. The relief that Petitioner seeks with regard to the content of the continuity memorandum goes far beyond correcting any injustice or putting him on par with his peers; rather, it would represent extraordinary relief that is not afforded to anyone else in his situation, and would provide Petitioner with an obvious advantage relative to his peers in the promotion selection process. The relief that Petitioner seeks would provide him an advantage relative to his peers even if the continuity memorandum sought only to explain the gaps and anomalies in Petitioner's record, but his proposed memorandum goes far beyond that. His proposal would insert language into his record under the authority of the Secretary of the Navy highlighting his "sustained, superior performance of duties." See enclosure (13). As promotion selection boards are already provided authoritative guidance regarding how to consider anomalous records and career paths, it is not necessary to insert language into Petitioner's continuity memorandum reminding them of this responsibility and in so doing providing him with an obvious advantage relative to his peers. Further, allowing the Petitioner to draft the guidance to be published under the authority of the Secretary of the Navy regarding how his own record is to be reviewed by a promotion selection board would establish an unacceptable precedent.

For the reason stated above, the Board found no merit in Petitioner's argument that the Board was wrong in Docket No. 6384-20 by requiring Petitioner to exhaust his other administrative remedies. The Board's mandate is to correct errors or injustices, and in the Petitioner's case it has identified and corrected numerous injustices. However, the contents of the continuity memorandum in Petitioner's record do not present an injustice that requires a correction. There exists a mechanism for Petitioner to inform promotion board members of the specific circumstances of his anomalous career path if he chooses to do so. This is the same mechanism that has been utilized by the countless other individuals who have found themselves in similar situations to that of the Petitioner. Additionally, promotion board members are already provided the authoritative guidance that Petitioner seeks to have tailored to his particular situation regarding how to consider such records.

Petitioner's assertion in enclosure (1) that the Board had "no authority" to make this finding in Docket No. 6384-20 is simply wrong. It is neither contrary to regulations nor counterintuitive, as Petitioner suggests, to find that he should avail himself of the existing mechanism to inform promotion selection board of his anomalous career progression rather than rely upon this Board

[REDACTED]

to provide extraordinary relief that is not provided to anyone else. His interpretation of the regulation governing Board procedures was fundamentally flawed, as the Board clearly did consider his application and rendered its decision. The Board also found no merit in Petitioner's contention that the ability to communicate with the promotion board is "no remedy at all," as the relevant authoritative guidance that he seeks to have specially tailored for himself is already provided to promotion selection boards.

Finally, regarding Petitioner's contention that the Board improperly focused on his upcoming promotion board in Docket No. 6384-20, the Board notes that the same rationale for its determination that Petitioner's truly extraordinary request for relief is inappropriate in this case would apply equally to any future board which may consider Petitioner's record.

The Board found Petitioner's contention in enclosure (1) that it failed to consider materials previously presented to be without merit. A review of Docket No. 6384-20 reveals that that Board did, indeed, consider every argument, contention, and piece of evidence provided by Petitioner. Paragraph 2 of the decision docket for Docket No. 6384-20 states that "[d]ocumentary material considered by the Board consisted of the enclosures," and the enclosures included Petitioner's DD Form 149 with attachments that included every document that Petitioner erroneously contends was not considered.

First, contrary to the Petitioner's contention, the Board did consider the statements that he provided from senior officers expressing their respective *opinions* regarding the merit of Petitioner's request. The Board is not obligated to specifically address and refute every single non-authoritative opinion that the Petitioner may solicit to support his request to support its decision; the failure to do so does not render that decision arbitrary and/or capricious.

Second, the Board found no evidence to support Petitioner's contention that the previous Board failed to consider the documents that he provided to support the language that he requested to be included in the continuity memo.⁶ A review of these documents reflects that MILPERSMAN 1301-100 pertains to anomalous career paths caused by the "needs of the Navy," unlike the situation which resulted in Petitioner's own anomalous career path. The fact that the Navy has published regulations addressing the provision of memoranda in an officer's record explaining these anomalous career paths, but has not done so for situations like that of the Petitioner, actually supports the Board's position that the relief that he requests is not appropriate. Additionally, the excerpt that Petitioner provided from the FY 2021 Active-Duty Navy Captain Line Promotion Selection Board precept supported the Board's determination that promotion selection boards are already provided the authoritative guidance that Petitioner seeks to have tailored to his own record.

⁶ Specifically, Petitioner contends that the Board in Docket No. 6384-20 did not consider a previous Board decision (Docket No. 5078-99), an excerpt from MILPERSMAN 1301-100 that provides for filing a memorandum in an officer's official record when he or she is assigned outside of normal career progression; and an excerpt from the most recent Navy Captain Line Promotion Selection Board precept directing members to be "particularly vigilant in [their] evaluation of records to take care that no officer's promotion opportunity is disadvantaged by service utilization policies or practices" and noting that "the Navy has assigned some officers outside of traditional career development patterns" which may "have foreclosed to the officers so assigned opportunities available to other officers.

Third, the Board found no evidence to support Petitioner's contention that the previous Board did not consider its precedent in Docket No. 5078-99. The petitioner in Docket No. 5078-99 did not propose language to be inserted into his record which would provide him an obvious advantage relative to his peers as the Petitioner has done in the present case. Rather, he merely requested that his previous failures of selection be removed so that his record would reflect no break in service. In other words, the petitioner in Docket No. 5078-99 received relief essentially equivalent relief to what the Board has previously provided to the Petitioner. The Board finds very little substantive difference between the relief granted to the petitioner in Docket No. 5078-99 and what has already been granted to Petitioner in this case with regard to the contents of the fitness report continuity memorandum, but in the interests of consistency decided to change Petitioner's continuity memorandum to mirror the language discussed in Docket No. 5078-99, as discussed further below.

Fourth, the Board found no evidence to support Petitioner's contention that the previous Board failed to consider the evidence he provided regarding the typical career progression of a public affairs officer and of the gap in Petitioner's record; the regulations requiring the documentation of observation of assigned duties; and the nature and approximate number of fitness reports and awards that arguably would have been in his record but for the previous injustices that have already been remedied. The Board has already acknowledged that Petitioner has endured injustices and has taken appropriate and extensive action to correct these injustices. The Board determined that this information was irrelevant to the ultimate determination in this case, as the previous Board was correct in its determination that Petitioner should avail himself of the existing mechanism to inform the promotion selection board of his career anomalies and trust that the existing authoritative guidance provided by the Secretary of the Navy to the promotion selection boards will serve him in the same way that it has served so many other similarly situated officers.

Finally, Petitioner's contention that the Board ignored its own documented intention to place Petitioner in the position he would have been in had he not been discharged is clearly false considering that Docket No. 6384-20 granted Petitioner appropriate relief in other regards, and the Board has granted significant relief in the past. The relief that Petitioner seeks on reconsideration is not necessary to put him in the same position that he would have been in if he had not been discharged. Rather, it would provide him a distinct advantage in promotion consideration relative to his peers.

To be clear, Petitioner's contention that the previous Board did not consider evidence that he provided was unsupported by any evidence and contradicted by the plain language of the decision document in Docket No. 6384-20. Upon reconsideration, this Board considered every document submitted by Petitioner for Docket No. 6384-20, to include enclosures (6) – (10), as well as the new material that he submitted with this reconsideration request as listed in paragraph 7 of enclosure (1) and in enclosure (2), to include enclosure (14). This material did not persuade the Board that Petitioner is due the extraordinary relief that he seeks.

For the reasons stated above, the Board found Petitioner's contention that the Board's decision in Docket No. 6384-20 was arbitrary and capricious to be without merit. First, the previous Board was correct in its conclusion that Petitioner should avail himself of the mechanism for communicating to the promotion board. Second, Petitioner is mistaken in his contention that the previous Board made no findings with respect to the language of the current continuation

[REDACTED]

memorandum, the evidence submitted, or anything dealing with this aspect of his request for relief. As stated above, the Board was not required to specifically address or refute every non-authoritative opinion that Petitioner solicited to support his request for relief. The fact that Petitioner does not agree with the Board's rationale does not make it arbitrary and/or capricious. As has already been stated, this Board agrees with the conclusion of the previous Board that Petitioner should avail himself of the mechanism to communicate his unique circumstances to the promotion board. The Petitioner has requested extraordinary relief that is not afforded to any other individual. The Board believes that granting his request would create a bad and unsustainable precedent by permitting similarly situated officers to essentially draft the guidance to promotion boards in reviewing their records on behalf of the Secretary of the Navy, thus providing an obvious advantage in the promotion selection process.

The Board considered Petitioner's "final argument," as addressed in paragraph 9 of enclosure (1). The Board disagrees with Petitioner's contention that the Navy violated its regulations in failing to assign Petitioner to duties. He was out of the Navy. This Board previously granted Petitioner equitable relief that brought him back into the Navy, thus resulting in his anomalous career path, but it is inaccurate for Petitioner to assert that the Navy violated its regulations in this regard. This Board has taken all appropriate action to correct the injustices that resulted from Petitioner's discharge from the Navy. The fact that Petitioner has endured injustices that have since been corrected does not entitle him to the truly extraordinary relief that he is requesting in this reconsideration request. Further, the Petitioner misquoted SECNAVINST 1420.3 in his conclusion paragraph, as it directs the Chief of Naval Personnel or the Deputy Commandant (of the Marine Corps) for Manpower and Reserve Affairs to provide promotion selections boards with "all information in an eligible officer's official military record that is essential for a fair, substantially accurate, and complete portrayal of the officer's career as of the date the board convenes." It does not, as Petitioner suggests, direct that information be added to an eligible officer's official military record to complete the portrayal.

The Board agrees with Petitioner's contention in the final paragraph of enclosure (1) that "there is no requested language [in his proposal] that does not originate with a SECNAV promotion board precept, MILPERSMAN article, prior BCNR decision, or already extant PERS-32 memo in [his] OMPF." That is the point. It is not necessary to provide this information because it is already provided to promotion selection boards through other authoritative guidance. By tailoring this information to the Petitioner, the Board would be providing Petitioner with an obvious, undue advantage in the selection process relative to his peers, and setting a terrible precedent for the future.

Finally, the Board considered Petitioner's contention in enclosure (2) that his suggested language arguably does no more than reiterate what promotion selection boards are already instructed to do in other published authoritative guidance. As has been exhaustively discussed herein, Petitioner's request goes far beyond that. The fact that such authoritative guidance is already provided to promotion selection boards obviates the need for the language that Petitioner proposes which, by being tailored specifically for his situation, would provide him with an obvious advantage for promotion selection relative to his peers.

The only contention made by Petitioner that the Board found to be meritorious was that his case was treated differently than the Board treated a similarly situated officer in Docket No. 5078-99. The Board notes, as discussed above, that the petitioner in Docket No. 5078-99 did not request

any specific language in his continuity memorandum. While the Board sees little substantive difference between the content of the continuity memorandum directed in Docket No. 5078-99 and that which is presently in Petitioner's record, in the interests of consistency the Board determined that Petitioner's fitness report continuity memorandum should be modified to be consistent with the language granted to a similarly situated officer in 1999.

Having determined that Petitioner's continuity memorandum should be changed to be consistent with cited precedent and having learned that Petitioner was not selected for promotion by the FY 2022 Active-Duty Navy Captain Restricted Line Promotion Selection Board with his previous continuity memorandum in his record, the Board also determined that Petitioner should expeditiously be granted a Special Selection Board to reconsider his record for promotion for the FY 2022 Active-Duty Navy Captain Restricted Line Promotion Selection Board with the benefit of the altered continuity memorandum. Petitioner should be provided a reasonable opportunity to communicate with the Special Selection Board prior to its convening to provide an explanation for the anomalies in his record if he chooses to do so, just as any other similarly situated officer would be able to do prior to a regularly scheduled promotion selection board.

Having determined that a Special Selection Board should be convened to consider Petitioner's promotion with the altered continuity memorandum and directing that Petitioner be provided a reasonable opportunity to communicate with that board, the Board determined that the need for the other relief requested in enclosure (2) has been obviated.

RECOMMENDATION:

In view of the above, the Board directs the following corrective action:

That Petitioner's record be corrected by removing the memorandum at enclosure (11), and replacing it with a similar memorandum in lieu of a fitness report for the period 1 November 2007 through 12 February 2017 containing the following language:

"This memorandum is being filed in lieu of performance evaluations for the above period. The subject officer was discharged from the Navy effective 31 October 2007. Subsequently, this discharge was voided by order of the Secretary of the Navy. Since subject officer was discharged by reason of error and through no fault of his own, and since this discharge has been voided, it is directed that he not be penalized in any way for his inability to serve while the discharge was in effect. The overall performance of the subject officer should be evaluated from the material presently available."

That a Special Selection Board (SSB) be expeditiously convened to reconsider Petitioner for promotion by the FY 2022 Active-Duty Navy Captain Restricted Line Promotion Selection Board with the benefit of the altered continuity memorandum in his record.⁷ If Petitioner is

⁷ The Board originally recommended that the SSB be convened in time to prevent Petitioner's mandatory retirement if he is selected for promotion, and that his mandatory retirement date be delayed until the SSB decision could be rendered and approved. However, Petitioner reached his mandatory retirement date and was discharged before this decision was presented to the approval authority for action, rendering this recommendation impossible to implement.

Subj: REVIEW OF NAVAL RECORD OF [REDACTED], USN, XXX-XX [REDACTED]

selected for promotion by the SSB, he is to be restored to active duty and promoted to Captain with the same date of rank he would have had if selected by the FY 2022 Active-Duty Navy Captain Restricted Line Promotion Selection Board.

That Petitioner be provided a reasonable opportunity to communicate with the SSB prior to its convening date, in the same manner that any officer may communicate with a Promotion Selection Board.

That no further relief be granted.

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.

4/30/2021

[REDACTED]

Executive Director

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

Board Recommendation Approved (Partial Relief: Alter continuity memorandum as discussed above; expeditiously convene SSB and provide Petitioner a reasonable opportunity to communicate his unique circumstances to the SSB)

Petitioner's Request Approved (Full Relief: Replace existing continuity memorandum with Petitioner's proposed memorandum at Enclosure (13); expeditiously convene SSB and provide Petitioner a reasonable opportunity to communicate with the SSB)

Board Recommendation Disapproved (Deny Relief)

[REDACTED]
[REDACTED] Acting Assistant Secretary of the Navy
(Manpower and Reserve Affairs)