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

[redacted]
Docket No: 1393-21
Ref: Signature Date

[redacted]

Dear [redacted]

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code, and the Order of the U.S. Court of Federal Claims (Case No. 18-549C), dated 10 March 2021, remanding your case to the Board for Correction of Naval Records (Board) for reconsideration of those portions of your previous application to the Board which were denied and original consideration of Part B of your Amended Complaint to the U.S. Court of Federal Court (CoFC). After careful and conscientious consideration of relevant portions of your naval record; your Amended Complaint to the CoFC and all exhibits attached thereto; the supplemental material you submitted to the Board pursuant to the above referenced Order of the CoFC, which were received by the Board on or about 8 April 2021 and 3 May 2021 respectively, to include the 25-page letter from your attorney dated 7 April 2021 and all accompanying enclosures; and the Board's previous decision in Docket No. 9075-18, along with all documents that were considered in its review of your previous application, the Board found insufficient evidence establish the existence of probable material error or injustice beyond that which the Board already identified in Docket No. 9075-18 which warrants relief. Consequently, the Board denied your request for relief.

A three-member panel of the Board, sitting in executive session, considered your case on 23 July 2021. Each panel member was different than those who previously considered your case in Docket No. 9075-18. The names and votes of the panel members will be furnished upon request. Your allegations of error or injustice were reviewed in accordance with administrative regulations and procedures applicable to the Board. Documentary material considered by the Board included the Order of the CoFC, dated 10 March 2021, remanding your case to the Board for consideration; your 57-page Amended Complaint to the CoFC, dated 17 February 2020, and all exhibits attached thereto; the supplemental material you submitted to the Board pursuant to the above referenced Order of the CoFC which were received by the Board on or about 8 April

2021 and 3 May 2021[1] respectively, to include the 25-page letter from your attorney dated 7 April 2021 and all accompanying enclosures to said letter; and the Board's previous decision in Docket No. 9075-18, along with all documents that were considered in the Board's review of your previous application; relevant portions of your naval record; and applicable statutes, regulations, and policies.

The Board determined that your personal appearance, with or without counsel, would not materially add to its understanding of the issues involved. Accordingly, the Board determined that your personal appearance was not necessary and considered your case based on the evidence of record.

This letter will address the two parts of your claim, as reflected in both your Amended Complaint to the CoFC and in your supplemental submission to the Board pursuant to the Order of the CoFC, in turn.

Before addressing each part of your claim, however, the Board first addresses what appears to be a fundamental misunderstanding regarding the relief that this Board is authorized to grant. This Board has no authority to direct payment of any sums of money, or to determine how much compensation you may be due, as a result of changes made to naval records under its authority. The Board is granted broad power under 10 U.S.C. § 1552(a) to direct any changes to naval records it determines to be necessary to correct errors or remove injustices. This authority, however, does not include or extend to the determination of whether or how much compensation is due as a result of such changes. That determination is made by qualified disbursing authorities, either upon their own volition upon receipt of our decisions[2] or upon a claim from the applicant.[3] This concept is codified in 32 C.F.R. § 723.10(c), which provides that "[s]ettlement of claims shall be upon the basis of the decision and recommendation of the Board, as approved by the Secretary or his designee. Computation of the amounts due shall be made by the appropriate disbursing activity." The provisions of 10 U.S.C. § 1552(c)(1), which you cited in your Amended Complaint as the authority for the Board to direct such payments, authorizes the Secretary concerned to pay, from applicable current appropriations, "a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under [10 U.S.C. § 1552], the amount is found to be due the claimant on account of his or another's service in the [armed services]." This provision permits the expenditure of funds from current appropriations to resolve claims that arise from records corrections directed by the Board consistent with the Appropriations Clause of the U.S. Constitution, but it does not empower the Board to determine whether or how much payment is due as a result of any changes that the Board may make.

[1] Your 3 May 2021 submission consisted of a Leave and Earnings Statement reflecting the compensations provided (and not provided) by the Defense Finance and Accounting Service (DFAS) pursuant to the corrections to your record directed by the Board in Docket No. 9075-18.

[2] Every Board decision granting relief which may affect an applicant's benefits or compensation is automatically provided to the DFAS to make such determinations.

[3] The Board notes that the first paragraph on page 10 of your submission to the Board, dated 7 April 2021, appears to reflect this understanding, but your continuing request that the Board direct payment for out-of-pocket medical expenses contradicts that apparent understanding.

Further, in accordance with 32 C.F.R. § 723.11(d), "[n]o expenses of any nature whatsoever voluntarily incurred by the applicant, counsel, witnesses, or by any other person on the applicant's behalf, will be paid by the Government." Accordingly, to the extent that your Amended Complaint demand for the costs of your legal action and attorney's fees has been remanded to the Board by the CoFC, that demand is denied. Such costs, if any are appropriate, must either be settled upon with the Navy's representatives in the pending litigation or be ordered by the CoFC upon the return of this case on remand.

Part A.

In Part A of your Amended Complaint to the CoFC, you essentially requested that the Court overturn those aspects of Docket No. 9075-18 for which the Board denied relief. With these matters having been remanded to the Board by the CoFC, the Board treated these matters as a reconsideration of its previous decision. As such, the factual background within the record of proceedings for Docket No. 9075-18, dated 12 November 2019, is incorporated by reference herein. You specifically requested that your record be corrected to reflect: (1) that you continued on active duty from 6 November 2012 to 6 December 2012 to reflect the active duty period required to out-process, travel, and take terminal leave after you returned to a fit for duty (FFD) status while on medical hold; (2) that you be reimbursed for $1,136.83 in medical expenses that you incurred during the period that the Board previously found that you should have been in a medical hold status, which would have been covered by military medicine but for the injustice that the Board had previously identified and corrected; and (3) that you were in a medical hold status for the period 28 April 2012 to 6 December 2012, with back pay, allowances, and benefits to which you were otherwise entitled for that period.

The Board found no merit in your contention that it failed to provide you with full and fitting relief in Docket No. 9075-18 by denying back pay and service credit for the period of 7 November 2012 to 6 December 2012. While the Board recognizes that Marines do not typically leave active duty on the same day that they are found to be FFD and removed from medical hold status, it also recognizes that Marines in this situation typically have not already been demobilized and returned to their home of record (HOR) as of the date that the medical hold status is removed. You were demobilized on 27 April 2012 and returned to your HOR. While the Board previously recognized that you should not have been demobilized on that date and took appropriate action in Docket No. 9075-18 to remedy that error, that recognition does not change the fact that you would have been provided all of the entitlements that you claim would have accrued from 7 November 2012 to 6 December 2012 when you were erroneously demobilized on 27 April 2012. You provided no evidence that you were not provided adequate time to out-process prior to your 27 April 2012 demobilization or to travel to your HOR, and the Board presumes that you would have raised this in your original complaint if you had not been compensated for your travel to your HOR upon your demobilization on 27 April 2012. Further, the Board finds your assertion that you should receive constructive service credit for the days of leave that would have accrued during the period from 26 May 2012 to 6 December 2012 to be without merit, as the Board's previous action to grant you constructive service credit should have resulted in the accrual of leave for which you could/should be compensated. If you have not been provided such compensation for the period approved by the Board in Docket No. 9075-18,

your proper remedy would be to make a claim with DFAS.[4] To grant you constructive service credit for the period from 7 November 2012 to 6 December 2012 due to the time it would have taken for you to out-process, travel to your HOR, and for the terminal leave that would have accrued, when in fact you had already out-processed and traveled to your HOR, would grant you a windfall by compensating you twice for the same entitlements. Your contention that the Board "did not examine, or certainly did not cite, any applicable regulations in determining that [your] active duty orders would have terminated on the date he was deemed fit for duty" is irrelevant, as the Board's mandate is to craft full and fair relief. This mandate was fulfilled in Docket No. 9075-18. Accordingly, the Board found no error or injustice in ending your constructive service credit on 6 November 2012, and validates the Board's previous decision in this regard in Docket No. 9075-18. The relief fashioned by the Board in this regard restored you to the position you would have been in but for the Marine Corps failure to provide you with a separation physical.

The Board denies your request that it direct that you be compensated for out-of-pocket medical expenses because such relief is beyond its authority. As discussed above, this Board is empowered to direct changes to naval records to correct errors or remove injustices. It did so in your case in Docket No. 9075-18 by granting your constructive service credit for a period that you were not actually serving on active duty. It does not, however, have the authority to direct specific payments. If TRICARE refuses to compensate you for such out-of-pocket expenses, your remedy in this regard is to make a claim for such compensation to DFAS pursuant to the record change that the Board already directed. This is what the Board essentially was instructing you to do in Docket No. 9075-18 when it suggested that you should seek relief through the claims process. Your reliance upon the case of *McCord v. United States*, 943 F.3d. 1354 (Fed. Cir. 2019), in this regard is misplaced, because it was the Federal Court, and not a service records correction board, which directed the payment of expenses in that case. Further, the *McCord* court overturned a lower court's instruction, rather than the action of a service records correction board.

Finally, the Board found no merit in your contention that its previous decision not to award you allowances for the period 29 April 2012 to 25 May 2012 was arbitrary, capricious, unsupported by substantial evidence and contrary to law, because that clearly was not what the Board did in Docket No. 9075-18. In Docket No. 9075-18, the Board directed that your record "be correct [sic] to reflect that [you were] in a Medical Hold status from 28 April 2012 to 6 November 2012." You contend in paragraph 71 of your Amended Complaint that the Board should "simply have corrected the record to reflect that [you were] on Medical Hold orders from April 28, 2019 [sic] to November 6, 2012." That is precisely what the Board did in Docket No. 9075-18. The effect that you claim in paragraph 74 of your Amended Complaint simply is not supported by any evidence or plain reading of the Board's previous decision. The Board did state that you should receive active duty pay and active duty service credit only for 28 April 2012, and for the period 26 May 2012 through 6 November 2012, because you actually were on active duty and had already received pay and service credit for the period 29 April 2012 to 25 May 2012 when

[4] The Board notes that the Leave and Earnings Statement that you provided on 3 May 2021 reflects that DFAS has taken action to compensate you pursuant to the Board's previous decision in Docket No. 9075-18. It also notes that Block 26 of the LES reflects a leave balance which was sold as of 6 November 2012, which was the date to which the Board previously granted constructive service credit.

you attended a course at the [redacted] Corps Base (MCB). This statement was obviously intended to express the Board's belief that you should not be compensated or credited again for active duty service for which you had already been paid and credited. It does not appear that you disagree with this obviously correct conclusion. The Board's decision in Docket No. 9075-18 did not, however, state that you should receive "no compensation" for this period or disqualify you from receiving Family Separation Allowance (FSA) for that period that your records now reflect you to have been in a medical hold status. FSA is not "active duty pay" of the type which the Board stated you should not receive twice. As discussed above, qualified disbursing authorities determine whether and how much compensation is due as a result of record changes directed by the Board. If DFAS has failed to accurately calculate the compensation due to you when the Board previously granted you precisely the relief that you now claim it should have, then your proper remedy is to submit a pay inquiry seeking such compensation. In any case, the Board agrees with and validates its previous decision in Docket No. 9075-18.

Part B.

In Part B of your Amended Complaint and the supplemental materials that you provided on or about 8 April 2021, you raise issues that were not previously raised or considered by the Board in Docket No. 9075-18.[5] This part of your complaint pertains to events subsequent to the issuance of Active Duty for Operational Support (ADOS) orders you received on 5 October 2015.

On or about 1 January 2013, you began a period of active duty with the Wounded Warrior Battalion [redacted] at Naval Medical Center [redacted] [redacted]. In August 2015, you submitted a sanctuary waiver to Headquarters Marine Corps (HQMC) for the period of 26 September 2015 through 23 March 2015. You returned to your HOR and demobilized on 26 September 2015. On 5 October 2015, the Marine Corps issued you ADOS orders for the period 7 October 2015 to 23 March 2016 (a period of 167 days), to again serve at the [redacted] These orders did not mention your sanctuary waiver, but it was obvious to the Board that they were issued pursuant to that waiver.[6] On 16 March 2016, seven days before the expiration of your ADOS orders, you advised the Executive Officer (XO) of the Deployment Processing Command at [redacted] of a service-connected shoulder injury that would require follow-up care. The Reserve Medical Entitlements Division (RMED) at HQMC's Wounded Warrior Regiment subsequently informed you and the XO that your shoulder injury should be treated as a "Medical Hold" rather than a Line of Duty (LOD) issue.[7] Pursuant to the conversation with the RMED representative and with your consent, your command submitted documentation to place you on a medical hold status and did not issue you a DD Form 214. On

[5] You had submitted an application to the Board pertaining to these matters, dated 27 March 2019, but by letter dated 18 February 2020 you withdrew this petition in order to pursue the matter in Federal court.
[6] The language in the orders indicating that you may become eligible for sanctuary protection under 10 U.S.C. § 12686(a) was clearly "boilerplate" language. These orders would not have been issued but for your sanctuary waiver.
[7] The distinction between these two statuses is that medical hold retains or continues a reservist on active duty to receive medical care for an injury incurred during their active duty service before returning to their civilian life, while LOD provides medical care and other assistance to reservists for an injury or illness that was incurred during their service after the reservist is returned to their civilian status.

21 March 2016, the [redacted] representative indicated, perhaps prematurely, that the Commandant of the Marine Corps (CMC) had authorized you to remain in a medical hold status effective 24 March 2016 to 24 June 2016, for an injury incurred during active duty. However, on or about 22 March 2016, HQMC refused to issue such orders, as doing so absent an approved waiver would cause you to enter sanctuary protection in accordance with 10 U.S.C. § 12686(a). You were then issued a DD Form 214 and returned to your HOR. On 23 March 2016, you were discharged from active duty pursuant to MARCORSEPMAN 1005. On 24 March 2016, while enroute to your HOR, you reportedly claimed sanctuary status outside of the period of your sanctuary waiver. After asserting your belief that your discharge was involuntary and your desire to remain on active duty, your Reporting Senior from the assignment you had just departed asked if you intended to submit a sanctuary waiver to obtain medical hold orders. On 26 April 2016, you submitted a sanctuary waiver for the period 1 May 2016 to 30 September 2016 so that you could receive medical treatment and recovery time, and scheduled a preoperative appointment at [redacted]. On 3 May 2016, you underwent orthopedic surgery at [redacted] On 17 May 2016, the [redacted] placed you in a limited duty status due to your surgery until 17 November 2016. On 13 June 2016, you were issued medical hold orders for the period of 14 June 2016 to 24 September 2016.[8] Again, these orders did not mention your sanctuary waiver, but it was again obvious to the Board that they were issued pursuant to your waiver. On 22 August 2016 and 26 August 2016, respectively, you submitted two sanctuary waivers for the period of 24 September 2016 to 22 March 2017, pursuant to a request from HQMC. On 16 November 2016, you received an email from the [redacted] Manpower Coordinator stating that you could only be extended on active duty to 22 March 2017 (i.e., the end date of your most recent sanctuary waiver) due to the expiration of that waiver, even though your medical hold was approved until 17 May 2017. This e-mail requested that you submit a sanctuary waiver for immediate processing. On 10 December 2016, you received new medical hold orders for the period 10 December 2016 to 22 March 2017.[9] On 16 February 2017, you emailed HQMC regarding Medical Hold and sanctuary rights; you stated "to have the orders extended, I must submit a waiver as soon as [sic] you all need appx 30 days to process it. Without that waiver, my medical hold orders will not be extended even if I am not FFD and have a medhold authorization that goes to 17 May 2017." HQMC responded the following day, asking that you submit another sanctuary waiver with the dates on the Statement of Understanding reflecting 23 March 2017 to 17 September 2017. On 17 March 2017, you stated that you would not execute any additional waivers, and asserted that the practice of requiring the sanctuary waiver to continue on orders in a medical hold was unlawful and an abuse of the waiver process. Absent such a waiver, your medical hold orders expired and you were honorably discharged from active duty on 22 March 2017 upon completion of those orders. On 28 March 2017, the Program Manager of [redacted] issued you a letter stating that the CMC transferred your case from medical hold status to the LOD benefits program effective 22 March 2017, for your injury incurred in the LOD. On 14 April 2017, you provided [redacted] a monthly medical update consistent with medical hold administrative requirements, and noted that your physical therapy had been disrupted by your involuntary release from active duty before the fitness determination was to occur or the medical hold authorization expired. On 15 May 2017, you appealed the termination of your medical hold status to the Office of the Judge Advocate General (OJAG). In September 2017, [redacted] issued a letter specifying that your medical hold

[8] These orders were later extended to 9 December 2016 (179 days from their start date) on 14 June 2016.
[9] The Board acknowledges that you objected to the use of back-to-back orders by e-mail dated 9 December 2016.

orders were terminated because you chose not to submit a sanctuary waiver, and that you therefore voluntarily ended your period of active duty. By memorandum dated 29 August 2018, OJAG responded to your appeal of the medical hold termination and denied relief. On 3 April 2019, you submitted a request to transfer to the Retired Reserve (Awaiting Pay). Your request to transfer to the Retired Reserve was approved on 1 May 2019, with a transfer date of 31 July 2019.

Part B of your Amended Complaint makes the following specific assertions of legal error:

(1) Department of Defense Instruction (DODI) 1241.01[10] mandated your retention on active duty until you were found fit for duty or separated or retired for disability. The USMC's conditioning of medical hold orders on submission of sanctuary waivers was contrary to law, and the manner in which the waivers were obtained and utilized was contrary to law and mandatory procedures.

(2) The Secretary of the Navy did not delegate authority to HQMC to "require" sanctuary waivers in your case. The required waivers were contrary to law and void *ab initio*.

(3) Sanctuary waivers under the authority of 10 U.S.C. § 12686(b) are only valid for orders to active duty of less than 180 days; and orders must be written to conform to that requirement.

(4) Sanctuary waivers are only permitted when a member is initially "ordered to" active duty, not when their orders must be extended "to retain" or "to continue" members on active duty.

(5) HQMC did not accept or approve your sanctuary waivers per Marine Corps Orders and procedures.

(6) A service member, by operation of law, is on active duty when travelling to, or from, a HOR on orders of more than 30 days. You claimed sanctuary while travelling to your HOR and outside of any sanctuary waiver period on 24 March 2017.

(7) HQMC unlawfully discharged you by failing to provide the statutorily required separation counseling, separation physical and before your medical condition had resolved or your case was adjudicated by the Disability Evaluation System.

Based upon these allegations of error, you requested that the Board correct your records to reflect: (1) that you entered sanctuary during your orders commencing 7 October 2015 and invoked your right to sanctuary before being released from active duty on 23 March 2016; (2) that you continued on active duty uninterrupted (with all pay, allowances, and benefits applicable to the orders under which you entered into sanctuary) until you qualified for active duty retirement in May/June 2017; (3) that you then continued in a qualifying reserve status with two satisfactory years of Select Marine Corps Reserve duty (i.e., 48 paid points/year) until electing to retire with an active duty retirement on 1 August 2019, as would have been your right under

[10] Reserve Component (RC) Line of Duty Determination for Medical and Dental Treatments and Incapacitation Pay Entitlements, 19 April 2016.

Marine Corps Order (MCO) 1800.11, Chapter 1, paragraph 14 (Post-Sanctuary Options); and (4) that you be provided all rights, privileges, and entitlements that you would have been afforded by those statuses (e.g., payment of medical expenses while in a retired status, final household goods move as a retiree, etc.).

Before addressing each of these allegations of error in turn, the Board unquestionably found no injustice in your case. It was Marine Corps policy that medical hold status was not to be used to enable RC members such as yourself to achieve sanctuary protection under 10 U.S.C. § 12686(a). As discussed further below, there was no legal or moral impediment to such a policy. By requiring you to submit sanctuary waivers as a precondition to orders that would keep you on active duty in a medical hold status, the Marine Corps was not attempting to circumvent the law with regard to sanctuary status. Rather, the Board found that the Marine Corps was bending over backwards to ensure that you had access to medical care for your in-LOD injury consistent with this policy and the law. As discussed below, the Board found no merit your contentions that the Marine Corps was obligated to maintain you in a medical hold status in accordance with DODI 1241.01 and that the requirement that you submit a sanctuary waiver as a precondition to receiving medical hold orders to remain on active duty for medical treatment was unlawful. It was not unlawful for the Marine Corps to require these waivers, and you voluntarily removed yourself from the obligatory language of DODI 1241.01 to retain you in a medical hold status when you refused to execute additional waivers. Further, the Marine Corps did not abrogate its responsibility to provide you medical care for your in-LOD injury when it failed to provide you medical hold orders without a sanctuary waiver, as you were transferred to the LOD benefits program to ensure that you could receive such care upon your departure from active duty.

In addition to finding no further injustice in your case beyond that which the Board already addressed in Docket No. 9075-18, the Board also found no error in the practice of preconditioning orders to extend you on active duty for medical reasons upon your submission of a waiver of the sanctuary protections of 10 U.S.C. § 12686(a); your discharge in March 2016 after you purportedly claimed sanctuary status; or in your discharge in March 2017 from the Marine Corps under the circumstances after your refusal to submit a sanctuary waiver. In fact, such actions were mandated by Marine Corps regulations in place at the time. Specifically, MCO 1001.61A,[11] Chapter 2, paragraph 5c, states that "[t]hose reserve Marines who have accrued, or will accrue, a minimum of 18 total active duty years are required to submit a [sanctuary] waiver… to the [Deputy Commandant for Manpower and Reserve Affairs (DC M&RA)] for decision for orders not to exceed 179 days," and that "[e]ach 179 day orders require a separate request, signed waiver and decision by the DC M&RA." Further, Chapter 3, paragraph 7, of the same regulation provides that "[i]f the situation arises when a reserve Marine's initial placement or subsequent extension, on medical hold will cause the member to exceed 18 years of total active duty service, the DC M&RA can withhold the issuance of ADOS orders if the reservist fails to execute a waiver of sanctuary eligibility as part of their consent to be continued on active duty for medical observation, evaluation or treatment." Contrary to your contention, this regulation is valid and lawful. You were clearly aware of the regulatory requirement, as HQMC had repeatedly informed you of the need for such a waiver to continue on active duty in a medical hold status, and because in August 2016 you had questioned a valid

[11] Policy and Procedures for Sourcing Personnel to Meet Individual Augmentation (IA) Requirements, 22 Feb 2013.

2012 legal opinion issued by the Judge Advocate Division, HQMC, upholding the legality of this practice. As discussed below, the Board did not agree with your legal analysis. The Board acknowledged that the dates on your active duty orders did not consistently align with the dates of your sanctuary waivers and/or medical hold authorizations. However, it found that the lack of administrative alignment of the various manpower and medical processes did not create an error or an injustice that warranted corrective action. The Board harbored no doubts about the validity or lawfulness of the Marine Corps regulations which preconditioned the issuance of active duty orders upon submission of a sanctuary waiver, even in circumstances such as yours to extend an RC member on active duty for medical reasons, or regarding the failure extend you on active duty beyond the end date of your AD orders after you refused to do so. Accordingly, the Board found no error in your case.

The Board did not agree with your contention that the Marine Corps' policy of conditioning the issuance of medical hold orders in cases such as yours upon the execution of a sanctuary waiver was contrary to law, or that DODI 1241.01 mandated your retention on active duty until you were found FFD or separated or retired for disability. The relevant portion of DODI 1241.01 which you cite for your contention that it mandates the issuance of medical hold orders reads, in relevant part, as follows:[12]

> (2) When an RC Service member is on active duty (AD) … for a period of more than 30 days and, at the scheduled end of that period, has an unresolved in-LOD condition that may render the member unfit for duty under the Disability Evaluation System (DES), but this has not yet been determined by the DES, the member:
>
> (a) *Will, with his or her consent*, be retained on AD … until:
>
> 1. Outstanding in-LOD conditions are resolved; or
>
> 2. He or she is either found fit for duty, separated, or retired as a result of a DES finding."
>
> (b) May elect to be released from active duty before resolution of the conditions or completion of the DES process.
>
> (*emphasis added*).

Your analysis focuses on the mandated language of this provision (i.e., "will") to support your contention that DODI 1241.01 mandated your retention on active duty until you were found FFD, separated, or retired as a result of a DES finding. The more relevant portion of this provision, however, is the part which caveats that mandatory language by requiring the member's consent. Consent is also required to execute active duty orders in accordance with 10 U.S.C. § 12301(d) or (h)(1), which provides the authority for the orders that you would have received but for your refusal to submit a sanctuary waiver. The Marine Corps could not give you medical hold orders without your consent, and you refused that consent when you refused to

[12] *Id*., paragraph 3a.

execute a sanctuary waiver. As discussed further below, the Board found that the Marine Corps was well within its rights to condition the issuance of such orders upon the submission of a sanctuary waiver. While the Board recognizes that created a record of consent by documenting your desire to remain on active duty at the time, you were well aware that Marine Corps regulations required the sanctuary waiver that you refused to provide. By refusing the valid precondition to the receipt of active duty orders, your actions denied the consent necessary to issue you such orders. Accordingly, you elected to be released from active duty before resolution of your in-LOD condition.

The Board was not persuaded by your suggestion, expressed in your 8 April 2021 submission to the Board, that the Under Secretary of Defense for Personnel and Readiness (USD (P&R)) must have intended for individuals extended for medical treatment to receive the benefit of sanctuary protection under 10 U.S.C. § 12686(a) since he did not say otherwise in DODI 1241.02. Given the very narrow scope of DODI 1241.02, it is extremely unlikely that the interaction of sanctuary protection and the directive to retain a RC member found unfit for duty was ever considered.[13] If the USD (P&R)'s intent was as you suggest, this would have been specified in the instruction. In any case, the USD (P&R) did specifically include a requirement for the RC member's consent before extending them on active duty, and as discussed below it was entirely appropriate to condition such extensions upon a sanctuary waiver.

Contrary to your contention, it was legal and proper for the Marine Corps to condition your medical hold active duty orders on the submission of a sanctuary waiver. In fact, the Marine Corps was required by regulation to do so, and as you stated in your supplemental submission to the Board, "[l]awfully promulgated military regulations have the force and effect of statute." Besides the aforementioned policy in MCO 1001.61A, MCO 1800.11,[14] Chapter 1, paragraph 4f, provided that "[t]he Marine Corps has no obligation by any existing law, rule, or regulation to issue an RC Marine orders or extensions to orders that may result in AD sanctuary." It further provided in paragraph 4k(1) that "[o]rders or extensions to orders resulting in 18 years or more of active duty *shall* not be issued to any RC Marine without a sanctuary request approved in accordance approved in accordance with [MCO 1800.11] (*emphasis added*)." Chapter 2, paragraph 3a, of MCO 1800.11 established that "[a] separate waiver is required for each set of [AD] orders beyond 16 years AD," and that the activation/extension of Reservists beyond 16 years of AD is a DC M&RA manpower function delegated by the Assistant Secretary of the Navy (Reserve Affairs)." MCO 1001.59A,[15] Enclosure (2), paragraph 3(a), which establishes ADOS eligibility requirements in the Marine Corps, provides that "[p]ermission for AD service

[13] The Board notes that a legal opinion, dated 16 March 2017, authored by the Deputy Branch Head, Military Personnel Law, HQMC, referenced an e-mail message from an attorney in the Department of Defense Office of General Counsel who was involved in the legal review of DODI 1241.01. This e-mail message indicated that he had no recollection of any consideration of the matter of sanctuary in its promulgation. The same legal opinion referenced an e-mail message from the Assistant Director, Medical Policy and Programs, Manpower and Reserve Affairs, Office of the Assistant Secretary of Defense, whose office is responsible for maintaining DODI 1241.02. This e-mail message also expressed no recollection of the matter of sanctuary being considered in its promulgation.
[14] Policy and Procedures for Reserve Component (RC) Member Service beyond 16 Years of Active Service, 27 October 2009. MCO 1800.11 has been superseded by MCO 1800.11A, effective 31 March 2020. All references herein refer to the now superseded MCO 1800.11, which was in effect at the time of the events in question.
[15] Active Duty for Operational Support (ADOS) in Support of the Total Force (Short Title: ADOS), 19 Jan 2011.

by a RC member beyond 16 years of AD is granted in accordance with [MCO 1800.11]." Obviously, Marine Corps regulations unambiguously require an approved sanctuary waiver as a precondition to the publication of orders (or extensions) to active duty when the AD would cause the RC Marine to exceed 18 years of AD for sanctuary protection, even when necessary for medical hold purposes.

The authority of the Marine Corps to establish such policies is derived from the Secretary of the Navy in SECNAVINST 1800.2.[16] This instruction states that "[o]rders directing members to 18 years of cumulative active duty service will not be issued without prior coordination with and authorization from … CMC(M&RA)."[17] It also states that the DC (M&RA) "may authorize Reserve personnel who possess unique or critical skills to exceed 18 years of active duty service to meet mission requirements." The authority to create preconditions upon the issuance of such orders in inherent in this delegation of approval authority. Further, by specifying the conditions by which the DC (M&RA) could authorize a RC to enter sanctuary protection, the Secretary of the Navy essentially limited the conditions under which such orders could be authorized in a manner that does not include medical hold. Finally, SECNAVINST 1800.2 also expressly recognizes that the "Marine Corps process, sanctuary considerations and manpower assignments are provided under CMC (M&RA) instruction." Accordingly, the Secretary of the Navy acknowledged and endorsed the "sanctuary considerations" set forth in the Marine Corps regulations discussed above. In addition to the authority derived from the Secretary of the Navy, the CMC, and by extension the DC M&RA, had independent and inherent statutory and regulatory authority to promulgate these policies in their respective capacities as the persons responsible for overseeing the Marine Corps as a whole and all reserve manpower considerations in the Marine Corps respectively.

For the reasons already discussed above, the Board found your contention that the Secretary of the Navy did not delegate authority to HQMC to "require" sanctuary waivers to HQMC to be without merit. First, the permissive language of 10 U.S.C. §12686(b) does not clearly limit the authority to condition the issuance of active duty orders to the Secretary. Even if such limitations exist, however, the Secretary of the Navy impliedly delegated this authority to HQMC in SECNAVINST 1800.2, when he provided that orders directing members to 18 years of cumulative active duty service could not be issued without prior authorization from the CMC (M&RA). The authority to establish preconditions to such authorization is inherent within the approval authority delegated by the Secretary of the Navy in this provision. Further, as stated above, the Secretary of the Navy has acknowledged and endorsed the sanctuary-related provisions of Marine Corps regulations. Accordingly, your contention that the Secretary did not delegate the authority to require sanctuary waivers in cases such as yours is without merit, and the requirement for such waivers was lawful.

[16] Policy and Procedures for Reserve Component (RC) Member Service beyond 16 Years of Active Duty Service. SECNAVINST 1800.2 has been superseded by SECNAVINST 1800.2A, effective 28 March 2019. All references herein refer to the provisions of SECNAVINST 1800.2, which was in effect at the time of the events in question.
[17] The acronym CMC (M&RA), referencing the Commandant of the Marine Corps for Manpower and Reserve Affairs, is synonymous with DC M&RA.

The Board agrees with your contention that sanctuary waivers under the authority of 10 U.S.C. § 12686(b) are only valid for orders of 180 days or less. However, every set of active duty orders issued to you was for 180 days or less, and each was predicated upon the sanctuary waiver that you submitted. The Board did not agree with your contention that HQMC violated its own rule regarding "back-to-back" orders, as such orders are specifically provided for in MCO 1001.61A. The final sentence of Chapter 2, paragraph 5c, which was referenced above, provides that if a sanctuary waiver is approved by the DC(M&RA), then each set of approved 179-day orders would be "back-to-back, and not extending the original set." As Marine Corps regulations specifically address the situation of "back-to-back" periods of active duty caused by successive orders, your contention that this action violates Marine Corps regulation is invalid. Accordingly, the required waivers and mandatory procedures were lawful.

The Board disagreed with your contention that sanctuary waivers are only permitted when a member is initially "ordered to" active duty, and not when their orders must be extended "to retain" or "to continue" members on active duty. As discussed above, MCO 1001.61A specifically addresses orders extending members on active duty for medical hold. Chapter 3, paragraph 7, states that "[i]f the situation arises where a reserve Marine's initial placement *or subsequent extension*, on medical hold will cause the member to exceed 18 years of active duty service, the DC M&RA can withhold the issuance of ADOS orders if the reservist fails to execute a waiver of sanctuary eligibility as part of their consent to be continued on active duty for medical observation, evaluation or treatment (*emphasis added*)." Also as discussed above, the Board has already established that it found the Marine Corps regulations in this regard to be valid and lawful. Those regulations have been acknowledged and endorsed by the Secretary of the Navy in SECNAVINST 1800.02, and 10 U.S.C. § 12686(a) specifies that sanctuary protection will be implemented under regulations prescribed by the Secretary concerned. Further, the Board does not accept the logic that Congress, by mentioning only orders "to active duty" in 10 U.S.C. § 12686(b), intended to exclude orders extending periods of active duty for unforeseeable circumstances from being so preconditioned. Such an interpretation would lead to the absurd result of obligating the Marine Corps to retain a reserve Marine on active duty for up to two years until they reach eligibility for an active duty retirement, regardless of need or mandated end strength limitations, due to unforeseeable circumstances that may occur while the Marine is serving on active duty pursuant to orders that were published pursuant to a sanctuary waiver specifically intended to avoid such a result. It would also have the effect of incentivizing RC service members to effectuate such unforeseeable consequences to escape the consequences of their sanctuary waiver.[18] Accordingly, the Board does not accept your theory that the Marine Corps may only condition sanctuary waivers upon orders to active duty, and not upon orders extending a Marine serving on active duty pursuant to such a waiver due to unforeseeable circumstances.

The Board found your fifth allegation of error, that HQMC did not accept or approve Petitioner's sanctuary waivers per Marine Corps Orders and procedures, to be without merit. While it is true that MCO 1800.11, Chapter 2(d), states that "[u]pon decision [on a waiver request], DC M&RA shall notify the Marine via naval message," it also states that "[i]f [the waiver request is]

[18] To be clear, the Board does not suggest that this is what you did. Rather, the Board mentions this as the natural consequence of the statutory interpretation that you wish for the Board to adopt.

approved, DC M&RA shall generate appropriate orders." The fact that orders were published, in every case subsequent to a notification to you that a waiver was required and your submission to a waiver, implies that your sanctuary waivers were approved. The failure to notify you of this via naval message or to mention the waiver within the orders themselves, does not render the approvals or the waivers invalid. Nor does it create any cause for action.

The Board rejects your contention that you claimed sanctuary on 24 March 2016, outside of the coverage of your sanctuary waiver. First, you had no orders extending your active duty status beyond 23 March 2016. As a Marine judge advocate with your experience, you are well aware that your period of active duty ended on the day that your orders ended. That you departed [redacted] later than was necessary to arrive at your HOR within the three days before the expiration of those orders does not automatically extend your period of active duty. Further, even if you were on active duty on 24 March 2016 when you purported to claim sanctuary, you would have been serving on active duty pursuant to the orders for which you had waived sanctuary protection in August 2015. We note that those orders brought you on active duty for only 169 days, so even if your active duty period was extended by your late departure from [redacted] it remained under the 179-day threshold for your sanctuary waiver.[19] Accordingly, you did not claim sanctuary while on active duty outside of the coverage of your sanctuary waiver, and your release from active duty upon the expiration of your ADOS orders in March 2016 was lawful.

Finally, with regard to your seventh allegation of error, the Board agrees that you were discharged without the benefit of your pre-separation counseling and physical examination in accordance with 10 U.S.C. §§ 1142 and 1145 respectively. However, unlike the situation addressed by the Board in Docket No. 9075-18, the failure to provide you with such counseling or physical examination did not harm you in any way. In Docket No. 9075-18, the Board granted you relief specifically because it found that you were harmed by the failure to provide the statutorily mandated separation physical since you likely would have been offered the opportunity to extend on active duty in a medical hold status if you had received the examination. In the present case, however, the absence of the required examination did not harm you in any way. The Marine Corps offered you the opportunity to extend on active duty pursuant to a sanctuary waiver, but you refused to accept the offer on these terms. Further, upon the expiration of your ADOS orders in March 2017 after you refused to submit the required sanctuary waiver for orders to extend you on active duty, the CMC approved a change in your status from the medical hold status to the LOD benefits program. This action ensured that you had the opportunity to continue receiving medical care for your in-LOD injury, even though you refused to remain on active duty for that purpose. As was stated in the OJAG advisory opinion provided for Docket No. 9075-18, a violation of the statutory requirements for separation does not invalidate your discharge from active duty, and the statutes do not contemplate a specific remedy for such a failure. Accordingly, while the Board acknowledges that you were not

[19] In paragraph 83 of your Amended Complaint, you acknowledged that your waiver submission covered "the maximum length of orders legally allowed to issue with a waiver under the law of 179 days." That your active duty period started 10 days later than you anticipated does not change the fact that you waived your sanctuary protection for the maximum period authorized by law.

afforded the statutorily required pre-separation physical and counseling, it also finds that this represents a harmless error for which no relief is warranted.

The Board disagrees with your contention that you were unlawfully discharged before your medical condition had resolved or your case was adjudicated by the DES. As discussed above, the Board found that you elected not to remain on active duty for medical purposes when you refused to submit the required sanctuary waiver upon the expiration of your ADOS orders in March 2017. In accordance with DODI 1241.01, paragraph 3a(2)(b), when a Service member elects to be released from active duty before resolution of the conditions or completion of the DES process, "the Secretary concerned will assign responsibility for completing the resolution of the conditions or completion of the DES process to the member's RC command (or other appropriate command) and provide an in-LOD determination to document the member's entitlement to medical and dental treatment comparable to that under [10 U.S.C. §1074a]." In your case, the CMC approved your transfer to the LOD program to ensure your entitlement to medical and treatment comparable to the afforded to AD service members while in your civilian status. You did not provide the Board with any evidence that your shoulder injury to suggest that you should have been referred to the DES for your shoulder injury.

The Board reviewed its previous decisions that you referenced and provided with your submission on or about 8 April 2021, but did not find them to have precedential value in your case. In each of the relevant cases for which the Board previously granted relief,[20] the Board found that the Petitioner had achieved sanctuary protection in accordance with 10 U.S.C. §12686(a). The Board made no such finding in your case, as it found each of the sanctuary waivers that you were required to submit to be valid and that you did not claim sanctuary status while on active duty outside of the waived period.

Finally, apart from any error or specific injustice, the Board considered the totality of the circumstances to determine whether relief that would qualify you for a regular retirement is warranted in the overall interests of justice. In this regard, the Board considered, among other factors, your long, faithful, and meritorious service in the Marine Corps, to include your voluntary service in combat and in applying your legal knowledge and expertise in support of our Nation's Wounded Warriors; that, as a result of the constructive service credit granted by the Board in Docket No. 9075-18, you were only a few months shy of the 20 years of active duty service required to qualify for a regular retirement; the injuries that you incurred in service to the Nation, including your contention that your 2011 spinal injury had "a severe and debilitating effect on your civilian life and career"; the fact that the Marine Corps erroneously failed to retain you in a medical hold status in 2012, as addressed by the Board in Docket No. 9075-18; and your sincerely held belief that the Marine Corps policies to which you were subject are contrary to law and Department of Defense regulations. Even considering these factors, however, the Board found that such relief is not warranted in the interests of justice. Your failure to complete the 20

[20] The Board did not find its decision in Docket No. 873-01, 3 January 2002, which you encouraged the Board to consider in your supplemental submission to be relevant. Its comment in footnote 2 regarding the Secretary's delegation of sanctuary waiver authority predated the publication of SECNAVINST 1800.2, as discussed above. The Board did not examine the predecessor of SECNAVINST 1800.2 to determine whether such a delegation previously existed, but it has no doubt that such a delegation existed at the time in question in the present case.

years of active duty service required of all Marines to qualify for a regular retirement was the result, at least in part, of your fully informed decision not to submit the sanctuary waiver required by Marine Corps regulations to extend you on medical hold orders. The Board is also unaware of any barriers, other than your aversion to further sanctuary waivers, which would have prevented you from volunteering for the additional active duty service time that would have qualified you for a regular retirement prior to your mandatory retirement date of 1 August 2019. Under the circumstances, the Board found that your meritorious service will be properly recognized and compensated upon commencement of your reserve retirement benefits.

Having found no error or injustice, apart from that already fully and fairly remedied in Docket No. 9075-18, in any of the claims raised in your Amended Complaint and/or supplemental submissions, to include the materials submitted in support of thereof, the Board denied all of your requests for relief in the present action. For purposes of your claim for allowances associated with the period from 29 April 2012 to 25 May 2012, the Board clarifies for the disbursing authority that its decision in Docket No. 9075-18 specifically changed your status to medical hold for the entire period from 28 April 2012 to 6 November 2012, to include the period from 29 April 2012 to 25 May 2012 that you were on active duty attending a course at [redacted] MCB, and it did not preclude the payment of any allowances that would have accrued as a result of this change other than those which you have already been paid.

You are entitled to have the Board reconsider its decision upon submission of new matters, which will require you to complete and submit a new DD Form 149. New matters are those not previously presented to or considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

8/9/2021

[redacted]

Deputy Director

Signed by: [redacted]