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

Docket No. 0521-22
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF

Ref: (a) 10 U.S.C. § 1552
(b) The Joint Travel Regulation
(c) MCO 1900.16 Change 2, subj: Separation and Retirement Manual (Short Title: MARCORSEPMAN), 15 February 2019
(d) MCO P5800.16A, Marine Corps Manual for Legal Administration (Short Title: LEGADMINMAN)
(e) SECNAVINST 1920.6D, Administrative Separation of Officers, 24 July 2019
(f) 37 U.S.C. § 401
(g) SECNAVINST 5420.193, Board for Correction of Naval Records, 19 November 1997

Encl: (1) DD Form 149 w/enclosures
(2) NCIS Report of Investigation (Interim), Control: 26 February 2018
(3) Memo 5813 SJA, subj: Report of Nonjudicial Punishment ICO [Petitioner], 7 August 2018
(4) Lodging Receipts
(5) Anonymous Letter, 20 November 2017
(6) Petitioner's Retirement Preapplication Checklist, 11 May 2018
(7) Non-Judicial Punishment Agreement, 20 July 2018
(8) Memo 5812 SJA, subj: Notification of Intent to Impose Nonjudicial Punishment, 24 July 2018
(9) Verbatim Article 15 Hearing of [Petitioner], held at on 26 July 2018
(10) Memo 5812 SJA, subj: Punitive Letter of Reprimand, 26 July 2018
(11) Petitioner's Memo 5812 SJA, subj: Acknowledgment of Nonjudicial Punishment Appeal Rights, 27 July 2018
(12) Petitioner's Memo 5812 SJA, subj: Acknowledgement of Receipt of Report of Nonjudicial Punishment and Inclusion of Adverse Material in Official Military Personnel File, 7 August 2018
(13) NAVMC 10835A, USMC Fitness Report, FITREP ID
(14) HQMC Memo 1920 JPL, subj: Termination of Administrative Proceedings in the case of [Petitioner], 30 October 2018
(15) HQMC Memo 1811 JPL, subj: Notification of Retirement Grade Determination in the case of [Petitioner], 10 August 2020
(16) Petitioner's Memo 1811 JPL, subj: Notification of Retirement Grade Determination

Subj: REVIEW OF NAVAL RECORD OF

in case of [Petitioner], 5 October 2020

(17) Petitioner's Memo 1811 JPL, subj: Notification of Retirement Grade Determination in case of [Petitioner], 6 October 2020 (with enclosures)

(18) Marine Corps Memo 5800 SJA, First Endorsement on Enclosure (17), subj: Response to Notification of Retirement Grade Determination in case of [Petitioner], 16 November 2020

(19) Marine Corps Memo 1920 C 46, Second Endorsement on Enclosure (17), subj: Response to Notification of Retirement Grade Determination in case of [Petitioner], 28 January 2021

(20) HQMC Memo 1920 JPL, Third Endorsement on Enclosure (17), subj: Retirement Grade Determination in the case of [Petitioner], 15 March 2021

(21) DD Form 214

(22) HQMC Memo 1070 JPL, subj: Application for Correction in the case of [Petitioner], 1 September 2022

(23) Petitioner's Counsel's Letter, Re: Rebuttal to Advisory Opinion in the case of [Petitioner], 13 November 2022

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records, hereinafter referred to as the Board, requesting that his naval record be corrected by:

a. Setting aside the nonjudicial punishment (NJP) he received on 26 July 2018, to include the Punitive Letter of Reprimand (PLOR) imposed and the forfeiture of pay in the amount of $4502.00;

b. Setting aside the decision of the Secretary of the Navy (SECNAV) to retire Petitioner as a Major and correcting his record to reflect that he was retired in the grade of Lieutenant Colonel (LtCol) (with retroactive retirement pay commensurate with that grade);

c. Correcting Petitioner's military record to establish his entitlement to all proper travel allowances for the period from October 2017 to December 2017; and

d. Removing all references to misconduct in Petitioner's record, to include his adverse fitness report (FITREP) for the reporting period 1 June 2018 to 26 July 2018, and specifically the allegation that Petitioner committed "travel fraud."

2. The Board reviewed Petitioner's allegations of error or injustice on 27 March 2023 and, pursuant to its regulations, found insufficient evidence of any error or injustice warranting relief.[1] Documentary material considered by the Board included the enclosures, relevant portions of Petitioner's naval record, and applicable statutes, regulations, and policies.

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[1] The Board originally reviewed Petitioner's allegations of error or injustice on 22 December 2022, and found an error in that the Deputy Commandant (Manpower and Reserve Affairs) (DC (M&RA)) referred to Petitioner's conduct as "travel fraud" and his reimbursement as "fraudulent" in the memorandum he prepared to advise the SECNAV regarding Petitioner's retirement grade determination. However, the Board neglected to make a recommendation regarding corrective action, stating simply that SECNAV should be given the opportunity to

Subj: REVIEW OF NAVAL RECORD OF

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

a. Except as his application pertains to the removal of his adverse FITREP for the reporting period 1 June 2018 to 26 July 2018, Petitioner exhausted all administrative remedies available under existing law and regulation within the Department of the Navy before applying to this Board for relief.

b. During the time period in question in this case, Petitioner was assigned as a comptroller and was a Defense Travel System (DTS) Approving Official for Marine Forces Pacific (MARFORPAC) in See enclosure (2).

c. Petitioner was promoted to LtCol on 1 September 2017. See enclosure (3).

d. Petitioner performed temporary additional duty (TAD) in the National Capitol Region (NCR) from 6 October 2017 until 21 December 2017. While performing this TAD, Petitioner stayed with his father-in-law in the local area. See enclosure (3).

e. Upon completion of this TAD, Petitioner submitted a travel voucher through the DTS claiming $12,159.02 in travel expenses for which he was reimbursed. He claimed $9,820.50 in lodging expenses that he reported were incurred while staying in contracted lodging.[2] He also claimed and received $1,620 for per diem expenses for eight days that he stayed in the NCR for personal leave, and $718.52 more than what he was authorized in reimbursement for the cost of the rental car that he did not return while he was on personal leave. See enclosure (2).

f. Table 2-15 of reference (b) provides that "[i]f… a Service member *lodges* with friends or relatives … [t]hen… the Service member is not authorized lodging reimbursement" (*emphasis added*). Table 2-21 of reference (b) provides that if "a traveler is *staying* with friends and relatives, … the lodging portion of flat-rate per diem does not apply"[3] (*emphasis added*).

g. The subsequently received an anonymous letter dated 20 November 2017 reporting that author had overheard a LtCol, who he could not identify by name but for whom he provided sufficient information to identify Petitioner, telling others at a meeting in the

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reconsider his predecessor's decision. This omission was determined to be a legal error during the post-board review process, as it is the Board's responsibility to make a recommendation as to whether and/or what relief is warranted. Accordingly, the same Board members reconvened on 27 March 2023 to make such a determination. It was the Board's opinion that this error did not warrant relief.

[2] Petitioner documented his lodging expenses with two "Lodging Receipts," reflecting lodging costs of $100 per day. The first of these receipts, for which receipt was acknowledged by a signature dated 6 October 2017, reflected a total of $3,000 in lodging expenses for the period from 6 October 2017 to 15 November 2017 (there were no lodging expenses claimed from 7-15 October 2017, or for 7 November 2017), which was paid in full with a check signed by Petitioner on 16 October 2017. The second of these receipts, for which receipt was acknowledged by a signature dated 16 November 2017, reflected a total of $3,200 in lodging expenses for the period from 16 November 2017 to 18 December 2017 (there were no lodging expenses claimed on 7 December 2017), which was reportedly paid in full with a check provided by Petitioner and signed on 16 November 2017 in the amount of $3,000, and a cash payment of $200. The recipient of these payments is not included on the receipts. See enclosure (4).

[3] Table 2-21 has been removed from reference (b) since 2017.

Pentagon that he was staying with his in-laws while on TAD for training for a few months and that his family was staying with him.[4] This letter stated that Petitioner was "bragging" that he does this every time he comes on TAD and "makes about $200/day without really any expenses since his in-laws provide meals and a place for him and his family to stay while he is here for these long stints or short stints." It also stated that Petitioner said that "he provides fake receipts and claims it as his lodging so that he can collect the full amount." See enclosure (5).

h. On 11 December 2017, the informed the Inspector General (IG) of the suspected fraudulent DTS claim reported in the anonymous letter, which prompted the to initiate an investigation. See enclosure (2).

i. On 16 January 2018, the notified NCIS of Petitioner's suspected fraudulent DTS claim due to the high dollar amount of the claim. This report prompted NCIS to open a criminal investigation. See enclosure (2).

j. On 28 January 2018, NCIS interviewed Petitioner's father-in-law, who reported that he rented his home to Petitioner for most of October, November, and December 2017, and that he recalled Petitioner telling him that he would get a "reduced per diem rate" for the stay. See enclosure (2).

k. On 11 May 2018, Petitioner submitted a voluntary retirement request in accordance with reference (c), requesting a retirement date of 1 January 2019. See enclosures (3) and (6).

l. On 20 July 2018, Petitioner and his detailed defense counsel entered into a pretrial agreement with the convening authority, whereby Petitioner agreed to plead guilty at NJP to a violation of Article 92, Uniform Code of Military Justice (UCMJ), by submitting a claim for, and then receiving unauthorized reimbursements in the amount of $12,159.02 in violation of reference (b), and to provide restitution in the amount of $12,159.02, in exchange for the convening authority's agreement not to refer his misconduct to court-martial; to positively endorse his previously submitted request to be transferred to the Retired List, Fleet Marine Corps Reserve; and to recommend that Petitioner not be required to show cause for retention in the Marine Corps at a Board of Inquiry (BOI). See enclosure (7).

m. By memorandum dated 24 July 2018, the Commanding General (CG) provided formal notification to Petitioner of his intent to impose NJP for a violation of Article 92, UCMJ. See enclosure (8).

n. By signature dated 25 July 2018, Petitioner elected not to demand trial by court-martial. See enclosure (8).

o. On 26 July 2018, Petitioner appeared before the CG for NJP.[5] Pursuant to the terms of his pretrial agreement, Petitioner pled guilty to a violation of Article 92, UCMJ, for violating reference (b) by submitting a claim for and then receiving unauthorized

[4] The anonymous author identified himself only as a Marine Corps Captain.
[5] The at the time was then-Lieutenant General who currently serves as Commandant of the Marine Corps.

reimbursements in the amount of $12,159.02. During this hearing, Petitioner claimed ignorance of the relevant provision of reference (b) which prohibited reimbursement for lodging when staying with family or friends, and that he made bad assumptions regarding reference (b). At the conclusion of the hearing, the CG imposed punishment in the form of forfeiture of $4,502 per month for two months, with one month of those forfeitures suspended,[6] and a PLOR. See enclosure (9).

p. By memorandum dated 26 July 2018, the C CG issued the PLOR imposed through NJP, as discussed above. This PLOR stated that Petitioner violated reference (b) by submitting a claim for, and then receiving, unauthorized reimbursements in the amount of $12,159.02. This included staying with his father-in-law while performing TAD, then claiming a lodging expense he was not entitled to receive; and claiming reimbursement for per diem and a rental vehicle while he was on authorized leave. See enclosure (10).

q. By memorandum dated 27 July 2018, Petitioner acknowledged his right to appeal the results of his NJP, and indicated his intent not to exercise this right. See enclosure (11).

r. By memorandum dated 7 August 2018, the CG prepared a Report of NJP in accordance with reference (c), which reported the results of Petitioner's NJP. In accordance with the terms of the pretrial agreement, the CG recommended that Petitioner not be required to show cause for retention in the Marine Corps at a BOI. See enclosure (3).

s. By memorandum also dated 7 August 2018, Petitioner acknowledged receipt of the Report of NJP at enclosure (3). He elected not to submit a statement in response to the Report of NJP, and indicated his understanding that it would be included in his official record. See enclosure (12).

t. On 10 October 2018, Petitioner received an adverse FITREP for the reporting period 1 June 2018 to 26 July 2018 based upon the results of the NJP. See enclosure (13).

u. By memorandum dated 30 October 2018, the Deputy Commandant for Manpower and Reserve Affairs (DC (M&RA)) elected not to initiate show cause proceedings against Petitioner and directed that his case be closed. He also directed that the adverse material concerning this matter be included in Petitioner's official record. See enclosure (14).

v. On 7 July 2020, Petitioner submitted another retirement request. See enclosure (15).

w. By memorandum dated 10 August 2020, the DC (M&RA) notified Petitioner of his determination that Petitioner's retirement request must be forwarded to the SECNAV for a retirement grade determination in accordance with reference (e). This notification informed Petitioner of his rights in this regard, to include his right to submit matters for SECNAV's consideration. See enclosure (15).

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[6] CG stated that he was suspending one month of the forfeitures so as not to punish Petitioner's family.

x. By memorandum dated 5 October 2020, Petitioner acknowledged receipt of enclosure (15), and indicated his desire to submit matters for SECNAV's consideration. See enclosure (16).

y. By memorandum dated 6 October 2020, Petitioner provided matters for consideration by the SECNAV in the determination of his appropriate retirement grade. In addition to two favorable letters of recommendation, Petitioner provided a personal letter requesting retention of his grade of LtCol for retirement. He stated that he accepted NJP for violating a provision of reference (b) that he was not aware of, and that he took full responsibility and remedied the situation accordingly. He also noted that both the CG and the DC (M&RA) reviewed the misconduct and determined that his actions did not warrant show cause proceedings. He explained that he entered into an agreement with his father-in-law to rent his basement for 62 days, and that his then-pregnant wife and child accompanied him on the trip so that he could assist with their care. Finally, he claimed that he incorrectly assumed that the then-newly instituted flat rate lodging reimbursement for TAD of longer than 30 days would permit this arrangement. See enclosure (17).

z. By memorandum dated 16 November 2020, Petitioner's commander endorsed and forwarded Petitioner's matters for the SECNAV, recommending that he be retired in the grade of LtCol. See enclosure (18).

aa. By memorandum dated 28 January 2021, the next higher commander in Petitioner's chain of command endorsed and forwarded Petitioner's matters for the SECNAV, also recommending that he be retired in grade as a LtCol. In making this recommendation, this commander noted that Petitioner served honorably as a LtCol for three years prior to his misconduct. See enclosure (19).

bb. By memorandum dated 15 March 2021, the DC (M&RA) forwarded Petitioner's matters and the chain of command recommendations to the Acting SECNAV for action, recommending that Petitioner's retirement request be approved and that he be retired in the grade of LtCol given his 23 years of service, included three years of service in the grade of LtCol prior to his misconduct. In summarizing the case against Petitioner in this memorandum, the DC (M&RA) stated that Petitioner "committed travel fraud" and described his reimbursed payments as "fraudulent." See enclosure (20).

cc. On 27 April 2021, the Acting SECNAV approved Petitioner's retirement request, but, contrary to the recommendations of his chain of command and the DC (M&RA), directed Petitioner's retirement in the reduced grade of Major. See enclosure (20).

dd. On 1 October 2021, Petitioner was honorably retired after almost 24 years of service in the grade of Major. See enclosure (21).

ee. On 6 December 2021, just over two months following his retirement, Petitioner, through counsel, submitted the present application to the Board, asserting that he should have been retired in the grade of LtCol. He makes the following contentions of error or injustice in support of this claim:

(1) Table 2-15 of reference (b), which Petitioner was accused of violating, was not applicable to Petitioner's travel. As Petitioner was on a TAD of greater than 30 days, he was eligible only for "flat rate per diem." As such, Petitioner's counsel asserts that NCIS investigating Petitioner's case under a section of reference (b) that was not applicable to Petitioner's TAD. The rules applicable to Petitioner's travel were in Table 2-21 of the 2017 version of reference (b). It provided that lodging reimbursement is not authorized if "traveler is ***staying*** with friends or relatives (emphasis added)"[7] Petitioner's counsel asserts that the words "lodging" and "staying" are distinct and have separate meanings, with the latter implying that no costs are incurred.

(2) A father-in-law in not considered a family member or relative under reference (b).[8] Reference (b) understandably prohibits reimbursement for staying with a relative since no expense is incurred by the member in this transaction, but it silent in situations like this where the Petitioner incurred an expense by renting a basement apartment from his father-in-law. Petitioner's counsel asserts that NCIS and conflated "staying with a relative" with "renting from a relative," and asserts that the latter is not prohibited. Further, Petitioner's counsel asserts that if there was concern about Petitioner's choice of lodging, it should have been resolved by prior to the approval of Petitioner's TAD, or at the very least when Petitioner submitted his receipts for lodging.[9]

(3) Although Petitioner accepted NJP and agreed to pay $12,159.02 in restitution, he was informed when attempting to make restitution that he was overpaid only $10,256.89.

(4) It was legally impossible for Petitioner to violate Article 92, UCMJ, as he was charged. There are three distinct ways to violate Article 92, UCMJ: (1) Violating or failing to obey a lawful general order or regulation; (2) failing to obey a known lawful order issued by a member of the armed forces for which there was a duty to obey; or (3) dereliction in the performance of duties. He did not violate or fail to obey a lawful general order or regulation because reference (b) authorized to receive reimbursement for the transaction made with his father-in-law since expenses were actually incurred and his father-in-law was not a "relative" pursuant to reference (b). Further, Petitioner was not derelict in his duties in any way, as the record reflects his honest belief that he was entitled to claim expenses related to renting his father-in-law's basement. Accordingly, Petitioner's conduct did not constitute a violation of Article 92, UCMJ.

(5) The DC (M&RA)'s recommendation to the Acting SECNAV stated that Petitioner committed "travel fraud," despite the fact that he was never accused of or found to have

[7] The word "staying" was emphasized by Petitioner's counsel to highlight the difference in language used in the two tables. Petitioner's counsel contends that the word "stay" in Table 2-21, unlike the word "lodges" in Table 2-15, implies that remaining "at no cost." Note: Table 2-21 does not appear in the current version of reference (b).

[8] Petitioner's counsel notes that the 2017 version of reference (b) does not define the terms "relative," "family," or "friend," but it does follow reference (f) which does not consider an "in law" to be a family member. Review of reference (f), however, reveals that it also does not define any of these terms. Rather, it defines only the term "dependent."

[9] It is not clear from the record how or why anyone a would have recognized that Petitioner was claiming lodging expenses related to the his father-in-law's basement.

committed any type of fraud. Petitioner was charged with violating Article 92, UCMJ, for violating reference (b), which does not include any element of fraud. His only offense, if any, was negligence, as the record plainly reveals that he believed himself eligible for reimbursement for the rental apartment expenses.

(6) The entirety of Petitioner's honorable career in the Marine Corps, and the favorable character statements that he provided to the SECNAV, supports his retirement in the grade of LtCol.

See enclosure (1).

ff. By memorandum dated 1 September 2022, the Military Personnel Law Branch, Headquarters, U.S. Marine Corps (JPL), provided an advisory opinion (AO), recommending that Petitioner's request to set aside his NJP be denied but that the Board nonetheless recommend to the SECNAV that he reconsider the decision to retire Petitioner in the lesser grade of Major.

(1) In recommending against setting aside the NJP, the AO notes that Petitioner's argument fails to address the substantial benefit he received by entering into a pretrial agreement. Specifically, he avoided the risk of a court-martial and received favorable endorsements of his retirement request and possible BOI in exchange for his acceptance and guilty plea at NJP. Petitioner indicated that he entered into the pretrial agreement "freely and voluntarily" after "thorough consultation with [his] defense counsel." Only now, after reaping the benefits of the pretrial agreement, being retired, and essentially erasing any risk of criminal conviction, is Petitioner contesting the legal sufficiency of his NJP. The recommendation to deny Petitioner's request to set aside his NJP was also extended to the request to "remove all references to misconduct in [Petitioner's] record," as those references were derived from the NJP.

(2) The AO found that Petitioner met his burden to establish a probable material error or injustice in his record, in that the DC (M&RA) erroneously stated that Petitioner committed "travel fraud" in his memorandum to the Acting SECNAV. Although Petitioner was initially accused of and investigated for fraud, no official investigation or adjudicative body ever concluded that he had in fact committed fraud. If the Acting SECNAV acted in reliance upon this characterization of Petitioner's conduct in making his retirement grade determination, the error would have been material because it exaggerated the severity of Petitioner's misconduct. The favorable recommendations made by Petitioner's chain of command increase the likelihood that this error was material, as they suggest that none of the authors believed that Petitioner committed fraud. Only the Acting SECNAV was presented with the conclusion that Petitioner committed fraud, and only he determined that retirement in a lesser grade was appropriate. Without knowing the Acting SECNAV's reason for this decision, it is impossible to know whether he relied upon this characterization of Petitioner's misconduct. That being said, the AO found that the appropriate remedy is not to "set-aside" the SECNAV's retirement grade determination, but rather to recommend that the SECNAV reopen and reconsider this determination in light of the discovery of this error and a more accurate understanding that Petitioner did not necessarily commit "travel fraud."

See enclosure (22).

gg. By letter dated 13 November 2022, Petitioner, through counsel, provided a response the above referenced JPL AO. The contentions made in this response are summarized as follows:

(1) In response to the AO's assertion that Petitioner's NJP should not be set aside, Petitioner's counsel argues that any benefit received by Petitioner as a result of his pretrial agreement is irrelevant. She claims that the existence of this alleged benefit is unsupported, and the view of the AO author is "one sided and frankly jaded." Rather, she asserts that, when reviewing such matters, a case result should be deemed appropriate under the circumstances and in the interest of justice, with a proper outcome." She also asserts that the AO ignores the fact that any pretrial agreement potentially benefits both sides – the government and the accused. In any case, whether a benefit was conferred on either party does not negate the existence of an error. In response to the AO's commentary on Petitioner's failure to exercise his right to appeal the NJP, Petitioner's counsel equates the present application to this Board as the exercise of appeal rights, and suggests that the AO's argument implies that consent to NJP would strip an individual of the right to seek relief from the Board. Finally, Petitioner's counsel describes as "purely speculative" the AO's contention that setting aside the NJP in these circumstances would weaken the binding nature of pretrial agreements and discourage convening authorities from entering into such agreements in the future.

(2) Petitioner's counsel suggests that the AO's failure to comment on the Petitioner's assertion of error in the NJP lends credence to his claim in this regard.[10]

(3) Because the NJP should be set-aside on the basis of a legal error, the other references to misconduct in his record which are derived from that NJP and based upon the same erroneous allegation of misconduct, to include the adverse FITREP, should also be set aside.

(4) With regard to the retirement grade determination, Petitioner's counsel asserts that the "government" has conceded that there is a material error or injustice in Petitioner's record. She disagrees with the AO's suggested relief of having the SECNAV reopen and reconsider the retirement grade determination, however, because, "as the saying goes, 'you cannot un-ring a bell.'"[11] Petitioner's counsel described the DC (M&RA)'s description of Petitioner's conduct as "unconscionable," and that the AO's recommendation would deprive Petitioner of his right to have the SECNAV make a neutral and detached decision based upon the facts of his case.

See enclosure (23).

CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Board finds insufficient evidence of any material error or injustice warranting relief. It does note, however,

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[10] The Board found no basis for this argument.

[11] Petitioner's argument in this regard fails to recognize that the SECNAV is the approval authority in this case regardless of what this Board may recommend. This approval authority for any application seeking to change the decision of a previous SECNAV is withheld to the SECNAV himself. Further, the current SECNAV is a different person than the Acting SECNAV who made Petitioner's retirement grade determination, so Petitioner's claim that he would be denied a neutral and detached review if the case is sent back to the SECNAV is without basis.

that the SECNAV should make his final decision in this case with the understanding that Petitioner was never found to have committed a fraud-related offense.

The Board found no merit in any of Petitioner's arguments that the NJP should be set aside. While Petitioner's counsel was correct that Petitioner's TAD qualified for flat rate per diem, her argument is without merit because the Table 2-21 of the 2017 version of reference (b) prohibited the receipt of lodging expenses to the same extent as did Table 2-15. In this regard, the Board did not agree with Petitioner's argument that the words "staying" and "lodging," as used within the two tables, had distinct meanings. Table 2-21 provided that lodging reimbursement is not authorized for flat rate per diem travelers "staying" with friends and relatives. It did not caveat this provision with any exception for such stays which incurred an actual expense. In fact, if this were the intent of Table 2-21, the "friends and relatives" provision would be superfluous, as it was joined in Table 2-21 with the provision that lodging reimbursement is not authorized when "no lodging costs are incurred for any reason." If Table 2-21 actually had the meaning that Petitioner's counsel suggests, the "friends and relatives" provision would be unnecessary. The fact that it was included, however, implies that lodging reimbursement was not authorized for stays with friends and relatives even if expenses for such a stay was incurred. Contrary to the argument made by Petitioner's counsel, nothing about the word "stay" implies that no costs are incurred as a result of the transaction. One incurs expenses when "staying" at a hotel, just the same as they do when "lodging" at a hotel. There simply is no legitimate argument to be made that the 2017 version of reference (b) authorized Petitioner to be reimbursed for lodging expenses incurred while staying in his father-in-law's basement while on TAD, regardless of whether a rental agreement was created to justify such reimbursement or the duration of the TAD.

The Board also found no merit in Petitioner's argument that his father-in-law did not qualify as a "relative" per reference (b). As Petitioner's counsel notes, reference (b) did not define the term "relative." Reference (f), to which Petitioner directed the Board, also does not define the term, and the Board did not accept Petitioner's argument that it should apply the definition provided in reference (f) for "dependent." "Relative" and "family member," the latter of which Petitioner equated to "dependent," are not synonymous terms. A definition for the term "relative" was not needed in reference (b) because its meaning is not ambiguous. Petitioner's contention that he was not related to his father-in-law simply defies the plain meaning of a non-ambiguous term. There is good reason for the prohibition against reimbursement of lodging expenses incurred while staying with relatives, apart from the assumption that a relative would not charge the traveler and his accompanying family members for such arrangements. Specifically, this prohibition serves to avoid potentially fraudulent arrangements used to unjustly enrich either the traveler or the relative at government expense.[12] Further, even if the Board were to accept Petitioner's argument that his father-in-law was not a relative, his father-in-law certainly would have qualified as a "friend," for which reimbursement of lodging expenses would also have been prohibited. The Board found it highly unlikely that Petitioner would have contracted for lodging

[12] Petitioner correctly noted that if he had rented a basement apartment from his father-in-law's neighbor or a total stranger at the same rate, his lodging expenses would have been reimbursable. Such lodging arrangements, however, would not be fraught with the same potential for fraud or abuse as are such arrangements made with a relative or friend.

in his father-in-law's basement if he did not have a friendly, amicable relationship with the father of his spouse and grandfather of his child.

Petitioner's contention that any concern regarding his choice of lodging should have been addressed by the prior to the approval of his TAD or when he submitted his claim is without merit. Unless Petitioner made any approving authority aware that he made a rental agreement with his father-in-law, there was nothing in the lodging receipts submitted by Petitioner which would have alerted any approval authority of a potential issue. There is also no indication that he ever made anyone at aware of his lodging plans. To the contrary, Petitioner has maintained throughout that he simply made bad assumptions regarding what reference (b) authorized, which suggests that he never checked his assumption in this regard with anyone in authority. Finally, Petitioner was himself a high ranking officer and DTS approval authority within the In the absence of anything which would trigger any concerns with Petitioner's travel plans, it was entirely reasonable for the approval authorities to assume that he would not engage in conduct that an anonymous Marine Corps captain recognized immediately as being of questionable legality.

Petitioner's argument that reference (b) did not prohibit him from receiving reimbursement for lodging expenses paid to his father-in-law is further undermined, and the Board rejection of that argument is enhanced, by the actions taken by finance authorities after Petitioner's NJP. Petitioner highlighted the fact that although he agreed to repay the government $12,159.02 as part of his pretrial agreement, he learned when he attempted to repay that debt that he had actually been overpaid only by $10,256. While this may have revealed a miscalculation in the amount of unauthorized payments made to Petitioner, the fact that finance officials found $10,256 in overpayments after auditing Petitioner's records reflects that they agreed that Petitioner was not authorized to claim lodging expenses for staying in his father-in-law's basement. The difference of less than $2,000 in the calculation of his unauthorized reimbursements could not be attributed to the lodging expenses. As it is the responsibility of such officials to understand and apply reference (b), their conclusion that Petitioner was not entitled to reimbursement for such expenses reinforces the Board's conclusion in this regard.

Having found no merit in Petitioner's contention that he was authorized to claim and receive reimbursement for lodging expenses incurred while staying in his father-in-law's basement, the Board also found no merit in Petitioner's contention that it was legally impossible for him to violate Article 92, UCMJ. Reference (b) prohibited reimbursement for such lodging expenses, so Petitioner violated reference (b) by submitting a claim and then receiving reimbursement for such expenses. This conclusion is supported by the fact that Petitioner plead guilty to the offense and did not exercise his right to appeal the NJP, under the advice of counsel. While Petitioner's counsel is correct that such action does not prohibit this Board from finding an error or injustice worthy of correction, it does tend to undermine her argument that Petitioner could not be guilty of the offense and suggests that her legal theory in this regard is not widely held. Further, the fact that Petitioner avoided the jeopardy of a potential court-martial as a result of his conduct, and received the other benefits of his pretrial agreement which secured his retirement and honorable discharge, would significantly negate any potential injustice resulting from his guilty plea.

To the extent that Petitioner's NJP cites the wrong table in reference (b) or overstates the amount of unauthorized reimbursement that he claimed, the Board found these errors to be harmless. Unlike a court-martial conviction, NJP does not follow a service member into civilian life so there is no harm in what amounts to a scrivener's error. Further, for the same reason that the Board found no merit in Petitioner's argument that his NJP should be set aside, the Board also found no basis to remove the other references to misconduct in his record. The adverse FITREP was based upon the NJP, so it remains appropriate given that the NJP itself was appropriate. Likewise, because Petitioner was not entitled to reimbursement for lodging expenses incurred in his father-in-law's basement, the Board found no basis to correct his record to establish his entitlement to those travel expenses. That relief would require that the Board correct Petitioner's record to reflect that he stayed somewhere other than in his father-in-law's basement, and there was no basis for such correction.

The Board agreed with the AO conclusion that the DC (M&RA)'s recommendation to the Acting SECNAV (Enclosure (20)) should not have described Petitioner's conduct as "travel fraud" or his reimbursement as "fraudulent." Although the NCIS investigation was initiated on the basis of suspected violations of Article 132, UCMJ, for frauds against the United States, and Article 107, UCMJ, for false official statement, there is no record that such charges were actually substantiated, and they were not adjudicated. The only charge against Petitioner which was adjudicated was a violation of Article 92, UCMJ, for violating a general order or regulation, which does not include an element of fraud. Accordingly, it was presumptuous for the DC (M&RA) to describe Petitioner's conduct as such. The Board, however, found this error to be harmless, and therefore not warranting the relief requested by Petitioner, for the following reasons:

(1) It is highly unlikely that these two words, buried in the background paragraph of a two-page memorandum which ultimately recommended favorable action on Petitioner's request, was a deciding factor in the Acting SECNAV's determination that Petitioner should be retired in the reduced grade of Major. The Acting SECNAV had all of the factual background to Petitioner's case at his disposal, to include the matters submitted by Petitioner and the favorable recommendations of the entire chain of command, at his disposal, and presumably made his decision based upon the facts rather than two random words in the background paragraph. Further, as the Acting SECNAV disregarded the favorable recommendation made by the DC (M&RA) in determining that Petitioner should be retired in the grade of Major, it is unlikely that he afforded undue weight to the DC (M&RA)'s use of these words in the background paragraph. The Acting SECNAV's decision was rationally supported by the fact that Petitioner pled guilty to a violation of Article 92, UCMJ, which involved an overpayment involving thousands of dollars. There simply is no reason to believe that the Acting SECNAV would have made a different decision absent the presence of these two words in the DC (M&RA) memorandum.

(2) Regardless of what offense was actually charged or adjudicated, the facts could reasonably support the conclusion that Petitioner engaged in fraudulent conduct. Specifically, Petitioner was a comptroller and a DTS approval authority for As such, his claim of ignorance regarding the rules is questionable, especially since one does not need significant training or experience in such matters to know that claiming lodging expenses for renting your father-in-law's basement is, at the very least, ethically questionable. Further, the

letter from the anonymous Marine Corps captain described comments made by Petitioner which immediately lead him to believe that Petitioner was engaged in fraudulent conduct. Specifically, this anonymous individual reported Petitioner as stating that "he provides fake receipts and claims it as his lodging so that he can collect the full amount." Finally, it was reasonable to question the legitimacy of a rental contract which would essentially have a father charge his pregnant daughter and infant grandchild approximately $3,000 per month to reside in his basement for two months. Petitioner bargained for NJP alleging a violation of Article 92, UCMJ; based upon these facts, Petitioner may have been charged with a more severe fraud-based offense if he had not entered into a pretrial agreement to avoid such jeopardy. As such, the DC (M&RA) may have legitimately believed Petitioner's conduct to have been fraudulent, and the Acting SECNAV legitimately could have reached this conclusion on his own.

(3) The DC (M&RA)'s inclusion of these words in his memorandum to the Acting SECNAV was not nearly as egregious as Petitioner's counsel described it.[13] These words did not add new facts or distort the conduct that the Acting SECNAV had to consider in making determination of Petitioner's appropriate retirement grade. They merely described Petitioner's conduct in a manner that was reasonably supported by the evidence. Whether the DC (M&RA) intended to describe Petitioner's conduct as such was irrelevant, as the inclusion of those descriptive words would have had a negligible impact upon the Acting SECNAV's decision, if any.

Although the Board believes the DC (M&RA)'s use of the words "travel fraud" and "fraudulent" to describe Petitioner's conduct and reimbursement respectively in his recommendation memorandum to the Acting SECNAV to be a harmless error, and therefore recommends that no corrective action be taken on Petitioner's naval record, the current SECNAV is the decision authority in this case. Petitioner argument against the AO's recommendation to submit this matter to the SECNAV for reconsideration is without merit, as it reflects a misunderstanding of this Board's authority to correct such a record. Per reference (g), this Board does not have the authority to correct a naval record in a way that would overturn a decision previously made by the SECNAV. The approval authority for any such request is reserved to the SECNAV himself. Accordingly, the Board is without authority to grant relief in the manner requested by Petitioner, even if it were inclined to do so. However, as the SECNAV is the decision authority for this case regardless, the Board recommends that he consider it with the understanding that Petitioner was never charged or adjudicated for any fraud-related offense, and to take action as he deems appropriate.

Finally, the Board considered the totality of Petitioner's otherwise honorable career and service to the Marine Corps, but did not find these matters to warrant further relief. The only period of service which was relevant to his retirement grade determination was that in the grade of LtCol, which obviously included his misconduct which was adjudicated through NJP. This conduct alone provided a sufficient basis for the Acting SECNAV's determination that Petitioner's performance in the grade of LtCol was unsatisfactory, with or without a determination that such conduct included fraud. Further, the matters submitted by Petitioner to this Board for consideration, including the character references, were the same matters submitted to and presumably considered by the Acting SECNAV in his determination. Accordingly, Petitioner

[13] Petitioner's counsel described the DC (M&RA)'s action as "unconscionable" in enclosure (23). It was not.

did not provide this Board with any new information that was not already considered by the SECNAV in making his retirement grade determination. The Board therefore found no error or injustice in the result.

RECOMMENDATION:

In view of the above, the Board recommends that no corrective action be taken on Petitioner's naval record, but that SECNAV consider that Petitioner was never found to have engaged in any fraudulent conduct when acting on this request.

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.

4/6/2023

Subj: REVIEW OF NAVAL RECORD OF

SECRETARY OF THE NAVY DECISION:

Board Recommendation Approved (Deny Relief – I concur with the Board's conclusion and therefore direct that no corrective action be taken on Petitioner's naval record. In making this determination, I noted that Petitioner has never been found to have committed a fraud-related offense, and did not consider the DC (M&RA)'s description of Petitioner's conduct as "travel fraud" or his reimbursement as "fraudulent.")

___ Petitioner's Request Approved (Full Relief – I do not concur with the Board's conclusion or the decision of my predecessor. Specifically, I agree with Petitioner that he never should have been charged with a violation of reference (b), and therefore he never should have suffered any adverse consequences as a result of that charge. Accordingly, I direct that Petitioner's record be corrected to remove the NJP that was imposed on 26 July 2018, to include the PLOR imposed from this NJP. This action negates the forfeiture of pay imposed at the time. I further direct that all references to the misconduct which was adjudicated at the NJP be removed from Petitioner's record, to include the adverse FITREP for the reporting period 1 June 2018 to 26 June 2018, the Report of NJP, and all of the retirement grade determination documentation (including all endorsements). Finally, I direct that Petitioner's naval record be corrected to reflect that he was retired in the rank of LtCol. This decision is to be forwarded to the Defense Finance and Accounting Service (DFAS) to conduct an audit to determine what back pay and allowances may be due to Petitioner as a result of the corrections directed herein. In conducting this audit, I request that DFAS determine whether Petitioner was entitled to reimbursement of the lodging expenses he claimed, and based upon that determination, whether it was necessary and appropriate to require him to reimburse those expenses.)

___ Petitioner's Request Partially Approved (Partial Relief – I do not concur with the Board's conclusion or the decision of my predecessor as they pertain to Petitioner's retirement grade determination. Specifically, I believe that it was inappropriate to retire Petitioner in the lesser grade of Major. While I agree that Petitioner committed misconduct that warranted NJP, that misconduct was not sufficient to warrant his retirement in a lesser grade given his otherwise honorable service and the recommendations of his chain of command. Accordingly, I direct that Petitioner's record be corrected to remove all documentation regarding his retirement grade determination, to include all of the endorsements, and to reflect that he was retired in the rank of LtCol. This decision is to be forwarded to the Defense Finance and Accounting Service to conduct an audit to determine what back pay and allowances may be due to Petitioner as a result of the corrections directed herein.)