



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
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[REDACTED]
Docket No: 0980-22
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED] (RETIRED) [REDACTED]
[REDACTED], USMCR, XXX-XX [REDACTED]

Ref: (a) 10 U.S.C. § 1552
(b) 10 U.S.C. § 12686
(c) 10 U.S.C. § 12301
(d) 10 U.S.C. § 12731
(e) SECNAVINST 1770.3D
(f) MCO 1800.11, Policy and Procedures for Reserve Component (RC) Member Service Beyond 16 Years of Active Duty (AD) Service, 27 October 2009
(g) MCO 1001.61A, Policy and Procedures for Sourcing Personnel to Meet Individual Augmentation (IA) Requirements, 22 February 2013
(h) DODI 1241.01, Reserve Component (RC) Line of Duty Determination for Medical and Dental Treatments and Incapacitation Pay Entitlements, 19 April 2016
(i) 10 U.S.C. § 1074
(j) SECNAVINST 1800.2, Policy and Procedures for Reserve Component (RC) Member Service Beyond 16 Years of Active Duty Service, 22 June 2008

Encl: (1) Opinion and Order, in the case of *[Petitioner] v. The United States*, in the United States Court of Federal Claims, Case No. [REDACTED], filed 1 November 2021
(2) Order, in the case of *[Petitioner] v. The United States*, in the United States Court of Federal Claims, Case No. [REDACTED], filed 6 January 2022
(3) DD Form 149 (w/enclosures)
(4) DD Form 214 (19930729-20021230)
(5) CMC Memo [REDACTED], subj: Notification of Entitlement to Retired Pay at Age 60 and Eligibility to Participate in the Reserve Component Survivor Benefit Plan (RCSBP), 9 December 2013
(6) Marine Forces Reserve [REDACTED] CO Memo [REDACTED] subj: Ordered to PCS; Case of [Petitioner], 23 September 2015
(7) OJAG Memo [REDACTED], subj: Request for Appeal of Removal from Medical Hold Status ICO [Petitioner], 28 December 2018
(8) Marine Forces Reserve (MCIRSA) CO Memo [REDACTED] subj: Modification to PCS; Case of [Petitioner], 18 April 2016
(9) Petitioner' Memo, subj: Memorandum ICO [Petitioner] Sanctuary Waiver, 17 August 2016
(10) Marine Forces Reserve [REDACTED] CO Memo [REDACTED] subj: Modification to PCS; Case of [Petitioner], 23 August 2016

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- (11) Joint DoD/VA Disability Evaluation Pilot Referral
- (12) HQMC [REDACTED] Memo [REDACTED], subj: Medical Hold Extension Authorization, 19 September 2016
- (13) Marine Forces Reserve [REDACTED] CO Memo [REDACTED] ACO, subj: Modification to PCS; Case of [Petitioner], 20 September 2016
- (14) MMIB-2 e-mail, to [Petitioner], subj: RE: Timeline Update, sent Tuesday, September 20, 2016 @ 9:39AM
- (15) Email traffic between Petitioner and MMIB-2
- (16) Marine Forces Reserve [REDACTED] CO Memo [REDACTED] ACO, subj: Modification to PCS; Case of [Petitioner], 30 January 2017
- (17) HQMC [REDACTED] Memo [REDACTED], subj: Medical Hold Extension Authorization, 24 February 2017
- (18) Marine Forces Reserve [REDACTED] CO Memo [REDACTED] ACO, subj: Modification to PCS; Case of [Petitioner], 27 February 2017
- (19) HQMC Memo [REDACTED], subj: Sanctuary Waivers for Reservist on Medical Hold, 17 March 2017
- (20) Petitioner's Memo, subj: USMC Requirement to Extend Orders for Medical Hold ICO [Petitioner] until PEB Processing is Complete, 17 March 2017
- (21) DD Form 214 (20151001-20170321)
- (22) HQMC email to [Petitioner], subj: MCMEDS [REDACTED], sent 21 March 2017 @ 14:15:30 GMT
- (23) HQMC email to [Petitioner], subj: MCMEDS [REDACTED], sent 3 April 2017 @ 10:30:34 GMT
- (24) HQMC [REDACTED] Memo [REDACTED], subj: Medical Hold Deactivation, 3 April 2017
- (25) HQMC [REDACTED] Memo [REDACTED], subj: Medical Hold Transfer to Line of Duty Benefits, 3 April 2017
- (26) SECNAV Council of Review Boards Memo 1850 PEB Index [REDACTED], subj: Notification of Decision, 17 April 2017
- (27) Petitioner's Memo, subj: Appeal, 30 June 2017
- (28) HQMC [REDACTED] Memo [REDACTED], subj: Removal from medical hold status, 29 September 2017
- (29) Petitioner's Memo, subj: Response to BIA Denial of Medical Hold Appeal, 6 October 2017
- (30) Petitioner's Marine Corps Personnel Database Screenshot

1. On 1 November 2022, the United States Court of Federal Claim (COFC) found that the Marine Corps could not lawfully require Petitioner to waive sanctuary protection pursuant to reference (b) as a condition for extending him on active duty for completion of the Disability Evaluation System (DES) process. Having made this determination, the COFC also found that Petitioner would have remained on active duty and achieved the sanctuary protection of reference (b) 25 March 2017, but for the Marine's unlawful use of its waiver authority. See enclosure (1).

2. On 6 January 2022, the COFC remanded the case filed by the Subject, hereinafter referred to as Petitioner, to the Board for Correction of Naval Records, hereinafter referred to as the Board,

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with instructions to address four specific questions in accordance with enclosure (1).¹ See enclosure (2). Pursuant to reference (a) and in accordance with enclosure (2), Petitioner submitted enclosure (3) for consideration on 6 February 2022.²

3. The Board reviewed Petitioner's allegations of error or injustice in accordance with the COFC's Order at enclosure (2) on 9 June 2022 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on Petitioner's naval record. Documentary material considered by the Board consisted of the enclosures, Petitioner's naval records, and applicable statutes, regulations and policies.

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

a. Petitioner served on active duty as a pilot in the U.S. Marine Corps Reserve (USMCR) from 29 July 1993 until the completion of his required active service on 30 December 2002. See enclosure (4).

b. After his release from active duty, Petitioner attended law school in a civilian capacity and graduated in 2006. In August 2007, Petitioner completed the Naval Justice School and was designated as a Judge Advocate in August 2007. See enclosure (1).

c. After being designated as a Judge Advocate, Petitioner accepted a series of sequential mobilization orders pursuant to reference (c) that kept him on active duty continuously through 2014.³ See enclosure (1).

d. By memorandum dated 9 December 2013, Petitioner was notified by the Marine Corps that he was entitled to retired pay upon reaching the age of 60 in accordance with reference (d).⁴ See enclosure (5).

¹ Based upon its findings in enclosure (1), the COFC specifically directed the Board to address the following issues:

- Determine what, if any, changes are warranted in [Petitioner's] naval records in light of the COFC's conclusion that the Marine Corps erred in requiring Petitioner to execute a sanctuary waiver as a condition on the further extension of his orders to active duty and that, but for this error, Petitioner would have remained on active duty beyond March 25, 2017, at which point he would have reached "sanctuary status" pursuant to reference (b).
- Determine and explain the duration of the period that [Petitioner] would have remained on active duty following March 25, 2017, absent the error the Court identified above.
- Determine and explain whether [Petitioner] is entitled to any further relief, including but not limited to correction of records, active duty pay, and/or retirement pay, based upon the Board's conclusions to the questions above; and
- Consider any issues, argument, or evidence that [Petitioner] submits in writing to the Board within 30 days of the COFC's remand order, along with his DD Form 149.

² This is the first time that the Board has considered this case, as Petitioner did not petition the Board for relief prior to filing suit in the COFC.

³ Petitioner served as a DES Attorney and as the Officer-in-Charge of the USMC [REDACTED] among other assignments, pursuant to these mobilization orders.

⁴ This memorandum also informed Petitioner that in accordance with reference (c), members of the Ready Reserve called to active service after 28 January 2008 may have their entitlement to retired pay eligibility age reduced from age 60 by three month for each aggregate of 90 days served on active duty, but no lower than age 50, subject to the restrictions of reference (c).

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e. On 23 September 2015, Petitioner received orders to active duty to serve as a DES Attorney at [REDACTED] [REDACTED] for the period 1 October 2015 to 31 March 2016. This was a period of 183 days. See enclosure (6). Petitioner claims that the issue of a sanctuary waiver was discussed prior to this mobilization, but it was determined that such a waiver was not necessary.⁵

f. On or about 30 March 2016, Petitioner was placed in a medical hold status for injuries reportedly incurred while on active duty.⁶ See enclosure (7).

g. On 18 April 2016, Petitioner's active duty orders referenced in paragraph 4e above were modified to reflect an end date of 1 September 2016 due to his medical hold status. See enclosure (8).

h. By memorandum dated 17 August 2016, Petitioner requested that the Judge Advocate Division (JAD) of Headquarters, U.S. Marine Corps (HQMC), provide cautionary notice to all relevant parties that no sanctuary waiver was required to extend his active duty orders beyond 21 September 2016. He asserted that his current orders were only extended to 1 September 2016, ostensibly because this date would mark approximately 17.5 years of active duty and therefore necessitate the execution of a sanctuary waiver for any subsequent periods of active duty, and that this theory was incorrect and not in compliance with relevant laws or regulations. Specifically, he claimed that the language of reference (b) permitting sanctuary waivers limited the waiver authority only to orders to active duty specifying a period of less than 180 days.⁷ He also claimed that the assertion in reference (f) that "there are no laws binding upon the USMC which could compel the issuance of orders into sanctuary" was false.⁸ In support of this argument, Petitioner claimed that the provisions in reference (c) are inapplicable to orders for retention for medical hold/evaluation. See enclosure (9).

i. On 23 August 2016, Petitioner's active duty orders referenced in paragraph 4e above were again modified to reflect an end date of 21 September 2016. This change to his orders was directed so that Petitioner's active duty orders would match the end date of his medical hold status. See enclosure (10).

j. On 9 September 2016, Petitioner was referred to the DES for lumbar spondylosis and patella femoral disorder. See enclosure (11).

⁵ An e-mail from Petitioner, dated 6 August 2015, reflects his understanding that a sanctuary waiver was not required at the time because he was more than a year away from reaching 18 years and would not reach that status subject to the orders.

⁶ According to enclosure (9), Petitioner injured his spine while preparing for the Combat Fitness Test in December 2015.

⁷ Paragraph (b) of reference (b) provides as follows:

(b) Waiver.—With respect to a member of a reserve component who is to be ordered to active duty (other than for training) under [reference (c)] pursuant to an order to active duty that specifies a period of less than 180 days and who (but for this subsection) would be [eligible for sanctuary status], the Secretary concerned may require, as a condition of such order to active duty, that the member waive the applicability of [sanctuary status] to the member for the period of active duty covered by that order. In carrying out this subsection, the Secretary concerned may require that a waiver under the preceding sentence be executed before the period of active duty begins.

⁸ See paragraph 4f of enclosure (1) to reference (f).

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k. By memorandum dated 19 September 2016, Petitioner's medical hold status was extended through 21 March 2017. See enclosure (12).

l. On 20 September 2016, Petitioner's active duty orders referenced in paragraph 4e above were again modified to reflect an end date of 1 February 2017 due to his continuing medical hold status. See enclosure (13). Concurrently with this extension, the HQMC Manpower Management Division (MMIB-2) sent Petitioner an email which noted that this extension would take him to "17.8 years" of active duty time, "which is about as close to the 18 year mark we will allow folks without a sanctuary waiver." Accordingly, MMIB-2 advised Petitioner that "[i]f there is any indication that [his] MEDHOLD will be extended beyond 21 March 2017, then please put together your waiver of sanctuary package and submit as early as possible. We will not be able to extend you beyond the March date without the package." See enclosure (14).

m. By e-mail dated 11 January 2017, Petitioner notified MMIB-2 that his PEB would not be forwarded until February, so another extension would be required, and requested information regarding the need for a sanctuary waiver. See enclosure (15).

n. By e-mail dated 12 January 2017, MMIB-2 responded to Petitioner's e-mail discussed in paragraph 4m above, attaching reference (f) for guidance. This response informed Petitioner that reference (g) was the authority for the sanctuary waiver requirement for medical hold,⁹ and informed him that his orders would not be extended past 21 March 2022 if the waiver is not completed and received by that date. See enclosure (15).

o. On 18 January 2017, MMIB-2 informed Petitioner via a telephone call that his active duty orders would not be extended beyond 1 February 2017 without a signed Statement of Understanding (SOU) waiving his sanctuary protection. See enclosure (15).

p. By e-mail dated 19 January 2017, Petitioner informed his chain of command that he refused to sign a SOU waiving sanctuary, as he believed that such a waiver was not required by law or regulation. Specifically, he stated that reference (f) was factually inapplicable and based on a "legally deficient" JAD memorandum.¹⁰ Accordingly, he requested assistance in initiating a HQMC review of the MMIB-2 policy requiring a sanctuary waiver for medical hold in his case. See enclosure (15).

q. On 25 January 2017, Petitioner's DES case was sent to the Medical Evaluation Board (MEB). See enclosure (11).

r. By e-mail dated 30 January 2017, Petitioner informed MMIB-2 that he would not sign a sanctuary waiver because he was "convinced it is legally not required & would just end up

⁹ Paragraph 7 of Chapter 3 to reference (g) provides 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 total active duty service, the [Deputy Commandant (Manpower and Reserve Affairs) (DC M&RA)] can withhold the issuance of [Active Duty for Operational Support] 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."

¹⁰ Petitioner was referring to a JAD Memo, dated 19 November 2012.

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kicking the issue down the road for the Marine Corps (and doing so would do real damage to [his] case if [he had] to go to [this Board] to get this sorted out.” See enclosure (15).

s. On 30 January 2017, Petitioner’s active duty orders reference in paragraph 4e above were again modified to reflect an end date of 28 February 2017 due to his continuing medical hold status.¹¹ See enclosure (16).

t. By e-mail dated 8 February 2017, MMIB-2 again informed Petitioner that further orders to remain on active duty beyond 28 February 2017 would require a signed sanctuary waiver. Petitioner was also informed that he would be able to seek all medical care through the Line of Duty (LOD) process if he did not remain on active duty. See enclosure (15).

u. By e-mail dated 9 February 2017, Petitioner again informed MMIB-2 that he would not sign a sanctuary waiver. He stated that “I am sure enough that I’m right on this that for the benefit of my clients (past, present, and future) I’m willing to risk my active duty status as well as the income that my family depends on – I won’t sign the SOU.” He also suggested that MMIB-2 seek a legal opinion on the issue, and that he would sign a waiver (and learn something) if he was wrong. See enclosure (15).

v. On 24 February 2017, the Benefits Issuing Authority (BIA) approved Petitioner’s medical hold extension request with an end dated of 21 September 2017. See enclosure (17).

w. On 27 February 2017, Petitioner’s active duty orders referenced in paragraph 4e above were again modified to reflect an end date of 21 March 2017 due to his continuing medical hold status. This date was calculated to take Petitioner up to the latest date that he could continue to serve without reaching sanctuary status pursuant to reference (b). See enclosure (18).

x. On 7 March 2017, the MEB referred Petitioner’s DES case to the Physical Evaluation Board (PEB) for a fitness determination. See enclosure (11).

y. By memorandum dated 17 March 2017, the Military Personnel Law Branch of the HQMC JAD issued a legal opinion finding that the Marine Corps may require sanctuary waivers for a reservist on medical hold, and that the provisions of reference (h) did not abrogate that authority.¹² See enclosure (19).

¹¹ Per enclosure (15), the orders were modified in order to coincide with Petitioner’s authenticated ADOS-CO orders end date.

¹² The focus of this opinion was whether the provisions of paragraph 3a(2) of reference (h), which provides that “[w]hen an RC Service members 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-[Line of Duty] condition that may render the member unfit for duty under the [DES], but this has not yet been determined by the DES, the member... [w]ill, with her or her consent, be retained on AD... unit: (1) Outstanding in-LOD conditions are resolved; or (2) He or she is either found fit for duty, separated, retired as a result of a DES finding.” In reaching this legal opinion, the HQMC JAD noted that reference (b) vested the authority to require sanctuary waivers in the Secretary of the Navy (SECNAV), rather than in the Secretary of Defense, and that there is no statutory right to medical hold. Accordingly, the authority is entirely within SECNAV’s discretion. The opinion also described conversations with the proponent of reference (h), which confirmed that reference (h) did not contemplate sanctuary issues and was not intended to abrogate the SECNAV’s authority. Finally, the opinion noted that the other services interpret their authority to require a sanctuary waiver for medical hold similarly.

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z. By memorandum also dated 17 March 2017, Petitioner informed the HQMC JAD that MMIB-2 would not extend his orders on active duty for medical hold pursuant to its legal advice (see paragraph 4y above), and asserted that this advice was “not only legally inapplicable to the facts of [his] case, but fundamentally legally insufficient.” He asserted that “there is no legally valid requirement for [him] to execute a Sanctuary Waiver in order to continue on Medical Hold. Should [his PEB] result in a finding of ‘fit for continued Naval service,’ if it chooses to do so then the proper recourse for the Marine Corps is to go to the [SECNAV] to have [him] removed from Sanctuary.” He cited again to reference (e), which he asserted provides the Service member with the option to remain on active duty for medical hold. He also noted that he was mobilized on orders for 183 days, so the waiver authority of reference (b) does not apply. See enclosure (20).

aa. Because Petitioner refused to execute a sanctuary waiver to remain on active duty for purposes of continued medical treatment and DES processing, the Marine Corps did not extend his active duty orders further. According, Petitioner’s orders expired on 21 March 2017 and he was released from active duty.¹³ See enclosure (21).

bb. On 21 March 2017 and 3 April 2017, Petitioner received an e-mail confirmation that his medical hold request was approved in the Marine Corps Medical Entitlements Data System (MCMEDS).¹⁴ See enclosures (22) and (23).

cc. By memorandum dated 3 April 2017, Petitioner was notified that the Commandant of the Marine Corps (CMC) had directed the deactivation of his medical hold status, effective 21 March 2017. See enclosure (24).

dd. By separate correspondence also dated 3 April 2017, Petitioner was transferred from his medical hold status to the LOD benefits program, effective 21 March 2017, to ensure his continued access to medical care following his release from active duty. See enclosure (25).

ee. By memorandum dated 17 April 2017, Petitioner was notified that the PEB determined that he was fit to perform the duties of his office, grade, rank, or rating on active duty. See enclosure (26).

ff. By memorandum dated 30 June 2017, Petitioner appealed the termination of his medical hold status, alleging that it was improper and requesting that it be reversed and that he be returned to active duty with an effective date coinciding with the end of his orders on 21 March 2017. He asserted that his medical hold request was approved on 21 March 2017, but his active duty orders were not extended to match his approved/extended medical hold, and that none of the

¹³ The MCMEDS entry for 21 March 2017 states, in relevant part:

As the member has not submitted a High Active Duty Time Waiver w/ waiver of Sanctuary Eligibility to MMIB-2, his medical benefits have expired as of 21 March 2017. NEXT ROUTING IS A CHANGE STATUS INACTIVE request to properly close the case in MCMEDS. Ensure this request is submitted immediately to allow the member to continue receiving medical treatment via LOD benefits. The LOD benefits request will be initiated by MCIRSA once the medical hold request is properly closed. Ensure all administrated discrepancies are corrected prior to submitting the change status inactive request.

¹⁴ Enclosure (7) suggest that MCMEDS may have automatically generated these two e-mails based on the medical hold extension approved on 24 February 2017 (see paragraph 4v above).

conditions of reference (e) were met.¹⁵ He further asserted that as of the date of his appeal, his PEB case had not been finalized and therefore he should still be in a medical hold status as of that date. Since this occurred after Petitioner had reached 18 years of active duty service, he asserted that he had the right to remain on active duty for 20 years in accordance with reference (b). Anticipating that the Marine Corps would explain the termination of his medical hold status in the context of his pending sanctuary status, Petitioner claimed that this would miscast the subject matter of the appeal of his medical hold status. See enclosure (27).

gg. By letter dated 29 September 2017, the BIA informed Petitioner that the CMC had disapproved his continued medical hold status because of his decision not to adhere to Marine Corps policy set forth in references (e) and (f), which required him to submit a waiver of sanctuary eligibility in order to remain on active-duty orders. See enclosure (28).

hh. By memorandum dated 6 October 2017, Petitioner responded to the BIA's denial of his medical hold appeal (see paragraph 4gg above), stating that his response confirmed that his medical hold was improperly terminated in violation of reference (e). Specifically, he asserted that in accordance with reference (e), a medical hold cannot be terminated with a pending PEB. He again asserted that the USMC's "attempt to recast this as a sanctuary issue is inappropriate, and improperly uses Medical Hold as a tool to accomplish ulterior purposes." He further accused the USMC of "improperly circumvent[ing] the requirements of [reference (e)] in an attempt to prevent [him] from entering Sanctuary." See enclosure (29).

ii. By memorandum dated 28 December 2018, the Office of the Judge Advocate General (OJAG) denied Petitioner's appeal of the termination of his medical hold status. OJAG addressed each of Petitioner's claims as follows:

(1) Petitioner's separation from active duty on 21 March 2017 was voluntary, proper, and a direct consequence of his lack of consent to orders that would have retained him on active duty with a sanctuary waiver. OJAG found that "[a]s a matter of law and regulation, [Petitioner's] entitlement to DoD medical care and to IDES processing in a medical hold status as a member of the Marine Corps Reserve Component (RC) are predicated on [his] consent to be ordered to, or retained on, active duty." It further found that reference (c) is the only statutory authority which authorizes the [SECNAV] (or his designee) to order or retain Petitioner on active duty so that he may be legally entitled to receive DoD medical care, and this authority is both discretionary and predicated upon Petitioner's consent. OJAG further noted that reference (h) afforded Petitioner two options regarding his pending DES determination: (1) consent to remain on active duty until the outstanding conditions were resolved or until he was either found fit for duty, separated, or retired as a result of the DES finding; or (2) elect release from active duty before resolution of the conditions or completion of the DES process. By refusing to submit the sanctuary waiver to remain on active duty in a medical hold status, as required by Marine Corps policy and requested by MMB-2, OJAG found that Petitioner refused consent to remain on active duty and elected to be released before resolution of the conditions of completion of the DES process. In support of this finding, OJAG noted that nothing in the law or references (e) and (h) prohibited the Marine

¹⁵ Petitioner had not yet been found "fit for duty" and he had not signed a request to be released from active duty.

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Corps from conditioning Petitioner's active-duty orders on the submission of a voluntary waiver of sanctuary eligibility.

(2) The Marine Corps BIA explained the reasons for the termination of Petitioner's medical hold.¹⁶

(3) Petitioner's active-duty status terminated because he did not consent to orders that would have retained him on active duty with a sanctuary waiver. In this regard, OJAG found that Petitioner's claim that there are only three circumstances in reference (e) for which the BIA could terminate his medical hold status, none of which applied in this case, to have ignored the law. Specifically, OJAG found that per reference (i), a member must be on active duty in order to be statutorily eligible to receive medical care and be placed in a medical hold status, and per reference (c) a member must consent to orders to be retained on active duty. It was Petitioner's refusal to consent to orders that would have retained him on active duty in a medical hold status which provided the legal basis for the termination of his active-duty status.

(4) The BIA determination that the requirement of reference (e) to complete the NAVPERS Form 1070/613 was a harmless error. In finding this error to be harmless, OJAG observed that Petitioner stated in his appeal that he "would not have signed such a document had it been offered" since he believed that his release from active duty was involuntary.

Upon review, OJAG determined that Petitioner's separation from active duty on 21 March 2017 was "voluntary, proper, and a direct consequence of [Petitioner] not consenting to orders that would have retained [him] on active duty with a sanctuary waiver." See enclosure (7).

jj. Petitioner retired from the USMCR effective 1 January 2021. See enclosure (3).

kk. Petitioner filed suit in the COFC on 27 April 2020. On 21 August 2020, he motioned the COFC for judgment on the administrative record, arguing that the COFC should reverse the termination of his medical hold, restore him to active duty in the Marine Corps, declare that he would have properly entered sanctuary but for his unlawful separation, and award him all retroactive pay and allowances to which he would have been entitled had his medical hold not been terminated. See enclosure (2).

ll. On 1 November 2021, the COFC ruled in favor of the Petitioner, finding that the Marine Corps was not authorized to condition the issuance of further orders to remain on active duty for medical hold upon the execution of a waiver of sanctuary protection.¹⁷ Specifically, the Court found that the sanctuary waiver authority of reference (b) was inapplicable in Petitioner's case

¹⁶ Petitioner had claimed in his appeal that the BIA did not explain the reasons for the decision to terminate Petitioner's medical hold status. The BIA explained these reasons subsequent to Petitioner's appeal in enclosure (28).

¹⁷ Before finding that the Marine Corps could not condition the issuance of orders to extend Petitioner on active duty upon the execution of a sanctuary waiver, the Court agreed with the government's contention that Petitioner refused consent to remain on active duty by refusing to execute a sanctuary waiver.

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because his orders exceeded the 179 day temporal limitation that Congress imposed.¹⁸ The Court found that Petitioner would have obtained sanctuary status but for the Marine Corps unlawfully conditioning further extension of his active duty orders on the requirement that he execute a sanctuary waiver. See enclosure (2).

mm. By order dated 6 January 2022, the COFC remanded Petitioner's case to the Board for consideration in accordance with enclosure (1). In doing so, the Court specifically directed the Board to:

(1) Determine what, if any, changes are warranted in Petitioner's military records in light of the Court's conclusion that the Marine Corps erred in requiring Petitioner to execute a sanctuary waiver as a condition on the further extension of his orders to active duty and that, but for this error, Petitioner would have remained on active duty beyond 25 March 2017, at which point he would have reached sanctuary status pursuant to reference (b);

(2) Specifically, determine and explain the duration of the period that Petitioner would have remained on active duty following 25 March 2017, absent the error the Court identified above;

(3) Determine and explain whether Petitioner is entitled to any further relief, including but not limited to correction of records, active duty pay, and/or retirement pay, based upon the Board's conclusions; and

(4) Consider any other issues, argument, or evidence that Petitioner submits in writing to the Board within 30 days of the remand order.

See enclosure (2).

nn. On 6 February 2022, Petitioner submitted additional matters for the Board's consideration, along with a signed DD Form 149, in accordance with enclosure (2). Petitioner did not submit additional argument, but he did provide several letters of recommendation, two fitness reports, and documentation of his medical insurance costs (along with the administrative record).¹⁹ See enclosure (3).

CONCLUSION:

Upon careful review and consideration of all of the evidence of record and the Order of the COFC at enclosure (2), the Board fundamentally disagreed with the COFC's finding regarding the authority of the Marine Corps to condition Petitioner's extension on active duty for medical

¹⁸ Petitioner's original orders to active duty were for 183 days. The various extensions to those orders for medical hold, which the Court interpreted as a continuous period of active duty on the same orders, totaled 538 days of active duty.

¹⁹ Among the letters of recommendation was a letter from [REDACTED] (Retired) [REDACTED] former Staff Judge Advocate to the CMC, who in addition to praising Petitioner's competence, character, and dedication to supporting wounded warriors, also stated that the Marine Corps attempted to incorrectly apply the sanctuary waiver policy to Petitioner's situation and described his separation as "unlawful."

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hold upon the execution of a sanctuary waiver. Despite finding no error or injustice in this action, the Board nonetheless recommends that the action described below be taken on Petitioner's naval record in deference to the Court's findings.

The Board agreed with the Court that the waiver authority of reference (b) could not be applied to the 183-day orders which brought Petitioner on to active duty on 1 October 2015 and which were repeatedly extended to keep him on active duty until 21 March 2017. Those orders, however, were scheduled to expire on 21 March 2017, so they were irrelevant to the question at hand. The only orders which were relevant in this regard were the orders that would have been issued to keep him on active duty if Petitioner had executed a sanctuary waiver as was required by Marine Corps regulations. The Court seemed to assume that Petitioner, if extended on active duty for medical hold, would do so on the same orders on which he was serving at the time, which had already exceeded 179 days, pursuant to another extension of those orders. If that were the case, then this Board would have agreed with the Court's conclusion in this regard. That assumption, however, was supported neither by the record nor by the Marine Corps' normal practice pursuant to its regulatory scheme.²⁰ In its e-mail to Petitioner dated 12 January 2017, MMIB-2 informed Petitioner that the sanctuary waiver (if submitted and approved) would be valid for a maximum of 179 days, and that any extension beyond that period would require an additional waiver. More importantly, reference (g) provides that "[e]ach 179 day orders require a separate request, signed waiver and decision by the DC M&RA. *If approved, orders would be back-to-back, and not extending the original set (emphasis added).*" Accordingly, if Petitioner had submitted the sanctuary waiver as was clearly required by Marine Corps regulations in order to remain on active duty beyond 18 years for medical hold and that waiver was approved, his existing orders would have expired and he would have been issued new orders. Those orders, by regulation, would have been of no more than 179 days in duration, which would have complied with reference (b). As the Court stated on page 24 of enclosure (1), by refusing to execute a sanctuary waiver as a condition to the issuance of active duty orders, Petitioner did not consent to remaining on active duty, and without that consent the Marine Corps had no obligation to keep him on active duty for medical hold.

Despite the Board's disagreement with the COFC decision, it is bound by the Court's findings and order in this case. Accordingly, in deference to the Court the Board recommends that Petitioner's naval record be corrected to reflect that he remained on active duty until 17 April 2017.

If Petitioner remained on active duty after 25 March 2017, he would have reached sanctuary status pursuant to reference (b). The protection of reference (b), however, is not absolute, as its prohibition to the involuntary release from active duty of a member of the RC who reaches 18 years of active duty service is limited by a provision that the Secretary may approve such

²⁰ The Board acknowledges that MMIB-2 personnel used language which could lead a layperson to reasonably believe that this was the Marine Corps' intent (i.e., the language discussing the intent to ensure that Petitioner did not "fall off of orders"). Such language, however, merely referred to the Marine Corps' efforts to avoid a gap in service which might financially harm Petitioner. In practice, his existing active duty orders would have expired, and new orders with a duration of less than 180 days would have been issued to keep him on active duty pursuant to a sanctuary waiver with no gap in service.

Subj: REVIEW OF NAVAL RECORD OF [REDACTED] (RETIRED) [REDACTED]
[REDACTED] USMCR, XXX-XX-[REDACTED]

release.²¹ The Board has no doubt that the Secretary would have (and should have) exercised his authority to release Petitioner from active duty if he had mistakenly been permitted to enter sanctuary status without a waiver. The Marine Corps' intent to prevent Petitioner from reaching sanctuary status due to his medical hold status is clear from both its actions in this case and by Marine Corps regulations. The Department of the Navy's intent in this regard is also clear from reference (j), which provides that the screening of active duty orders is necessary to "[ensure] that Reserve personnel who meet or exceed 18 years of active duty do so by designed and are planned, budgeted additions to the Total Force," and that "[o]rders directing members to 18 years of cumulative active duty service will not be issued without prior coordination and authorization from... [DC M&RA]."

The Marine Corps' intention to pursue such a release under these circumstances is also made clear from reference (f), which provides that "RC Marines who inadvertently receive orders or extensions to orders that place them in sanctuary without DC M&RA approval are advised that the DC M&RA may request that the SECNAV involuntarily release the RC Marine from active duty during the sanctuary period."²² Finally, Petitioner acknowledged in enclosure (20) that the Marine Corps could Petitioner the SECNAV to remove him from sanctuary once he was found fit from continued naval service by the PEB, and the Court acknowledged on page 39 of enclosure (2) that this was an available method to rectify a situation where a RC Marine inadvertently enters sanctuary status.

In addition to finding that the SECNAV would have exercised his authority to remove Petitioner from active duty after he entered sanctuary status, the Board also believes that the SECNAV should have done so. The Navy and Marine Corps policies intended to prevent a member of the RC from entering sanctuary status due to unexpected medical hold status serve a critical purpose. Not only are they necessary to enable the Navy and Marine Corps to exercise control of its manpower and budgeting, as the Court acknowledged, but they also remove an incentive for such members to mangle as they approach sanctuary status in order to ensure entitlement to a regular retirement which they otherwise would not earn. To be very clear, the Board is not questioning the validity of Petitioner's injury or suggesting that this was Petitioner's intent; rather, it is merely commenting on the necessity and prudence of the policies which Petitioner finds to be repugnant. Permitting Petitioner to remain in a sanctuary status after his refusal to execute a sanctuary waiver as required by Marine Corps regulations would undermine these critical policies and establish an unsustainable precedent for the Marine Corps. Accordingly, the Board believes that the SECNAV should have exercised his authority to remove Petitioner from active duty if he had entered sanctuary status without a waiver.

The Board finds that Petitioner would have been permitted to remain on active duty into the sanctuary period of until 17 April 2017. Per enclosure (26), this was the date that Petitioner was notified that the PEB found him fit for continued naval service. Reference (h) provides that a RC Service member "[w]ill, with her or her consent, be retained on AD... until... [h]e or she is

²¹ Reference (b) provides that "...a member of a reserve component who is on active duty (other than for training) and is within two years of becoming eligible for retired pay or retainer pay under a purely military retirements system..., may not be involuntarily released from that duty before he becomes eligible for that pay, *unless the release is approved by the Secretary (emphasis added).*"

²² See reference (f), paragraph 4(l).

Subj: REVIEW OF NAVAL RECORD OF [REDACTED] (RETIRED) [REDACTED]
[REDACTED], USMCR, XXX-XX-[REDACTED]

found fit for duty.” Petitioner never consented to remain on active duty pending the completion of the DES process since he refused to execute a sanctuary waiver, but the justification for his extension on active duty would have expired on this date. Likewise, so would the Marine Corps’ obligation to keep him on active duty if he had consented. To be clear, the Board is exercising its equitable authority in establishing this date in deference to the Court’s finding that Petitioner’s involuntary release from active duty was wrongful, as Petitioner’s release from active duty pursuant to action by the SECNAV immediately upon entering sanctuary status would have been justified for the reasons stated above. The Board considered whether to grant additional time on active duty for travel and other miscellaneous days typically associated with the release from active duty, but in the absence of evidence that Petitioner was denied such benefits upon his actual release from active duty the Board was not inclined to grant such additional relief.

The Court also instructed the Board to “[d]etermine and explain whether [Petitioner] is entitled to any further relief, including but not limited to... active duty pay, and/or retirement pay, based upon [its] conclusions.” This portion of the Court’s Order reflects a misunderstanding of the Board’s function and capabilities. This Board has no authority, or even the ability, to determine how much, of even if, compensation may be due to Petitioner as a result of changes made to naval records under its authority. Reference (a) authorizes the Board to direct changes to naval records that it determines 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 dispersing authorities, either upon their own volition upon receipt of the Board’s decision,²³ or upon a claim from the applicant. 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.” Besides the fact that it is not the Board’s function to determine the back pay and allowances due to an applicant as a result of any changes that it may direct to a naval record, it would be impossible for the Board to make such a determination on its own since the Board is not privy to previous payments made to applicants. Such payments may result in offsets to the pay and allowances that would otherwise be warranted by changes to naval records. Accordingly, the Board is unable to comply precisely with the Court’s instructions in this regard. The Court’s intent in this regard, however, will be satisfied upon the correction of Petitioner’s record by subsequent action taken by DFAS as a result of any changes to Petitioner’s record made pursuant to this record of proceedings. The Board presumes that Petitioner will be entitled to some additional active duty pay for the day between his release from active duty (21 March 2017) to the corrected date of his release from active duty (17 April 2017), but leaves that determination to DFAS.

Finally, the Board considered the additional evidence submitted by Petitioner in enclosure (3), but found that it did not provide any additional bases for relief. This evidence clearly established Petitioner’s favorable character, competency, and work ethic, but none of those factors were at issue, or relevant to the issues presented in this case. Petitioner also provided evidence of medical insurance payments, but the relevance of this evidence was unclear to the Board.

²³ Every Board decision granting relief which may affect an applicant’s benefits or compensation is automatically provided to the Defense Finance and Accounting Service (DFAS) to make such determination.

Subj: REVIEW OF NAVAL RECORD OF [REDACTED] (RETIRED) [REDACTED]
[REDACTED], USMCR, XXX-XX [REDACTED]

Further, the Board does have authority over private medical insurance decisions or reimbursements. The Board did note, however, that Petitioner was transferred to the LOD benefits program upon his release from medical hold.

RECOMMENDATION:

In view of the above, the Board recommends that the following corrective action be taken on Petitioner's naval record:

That Petitioner be issued a DD Form 215 (Correction to DD Form 214, Certificate of Release or Discharge from Active Duty) reflecting that he was released from his most recent period of active duty on 17 April 2017 (vice 21 March 2017).

That HQMC make other applicable adjustments to Petitioner's naval record to reflect that he served on active duty until 17 April 2017 (vice 21 March 2017), to include the adjustment of reserve retirement points if applicable.

That the DFAS conduct an audit of Petitioner's finance records in light of the changes to Petitioner's naval record discussed herein, and make any appropriate payments that may arise from these changes.

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.

7/13/2022

X

[REDACTED]

[REDACTED]

Executive Director

Subj: REVIEW OF NAVAL RECORD OF [REDACTED] (RETIRED) [REDACTED]
[REDACTED] USMCR, XXX-XX-[REDACTED]

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

Board Recommendation Approved (Partial Relief – I concur with the Board’s findings, and direct the relief recommended above. As the official responsible for this decision, I affirm that I would have involuntarily removed Petitioner from active duty if he had inadvertently achieved sanctuary status absent an approved waiver.)

Board Recommendation Approved (modified) (Partial Relief – While I do not adopt the Board’s findings with regard to the accuracy of the Court’s decision, as the official responsible for the decision I affirm that I would have involuntarily removed Petitioner from active duty if he had inadvertently achieved sanctuary status absent an approved waiver. Accordingly, the Board’s recommended relief, as stated above, is approved.)

Board Recommendation Disapproved (Deny Relief – As the official responsible for this decision, I affirm that I would have involuntarily removed Petitioner from active duty if he had inadvertently achieved sanctuary status absent an approved waiver. I do not, however, believe that the equitable relief recommended by the Board is warranted, however, as this decision would have been made immediately upon my knowledge of it.)

Petitioner’s Complaint Approved (Full Relief – Given the Court’s determination that the Marine Corps could not lawfully condition the extension of Petitioner’s active duty service upon the execution of a sanctuary waiver, and that he would have entered sanctuary status but for his unlawful release from active duty, I direct that Petitioner’s naval record be corrected to reflect that he continued to serve on active duty until he qualified for a regular retirement, at which time he was transferred to the retired list. DFAS should conduct an audit of Petitioner’s finance records, and make payments to Petitioner consistent with this decision.

[REDACTED]
9.3.2022
Acting Assistant Secretary of the Navy
(Manpower and Reserve Affairs)

