



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

██████████
Docket No. 3220-22
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) DoD 5500.7-4, Joint Ethics Regulation, August 1993
(c) 5 C.F.R. § 2635, Standards of Ethical Conduct for Employees of the Executive Branch
(d) 10 U.S.C. § 1370

Encl: (1) DD Form 149 w/attachments
(2) Memorandum of Non-Judicial Punishment Agreement, in the case of *United States v. [Petitioner]*, 25 January 2017
(3) NAVPERS 1626/7, Report and Disposition of Offense(s), 27 January 2017
(4) DD Form 214
(5) BUPERS-00J Memo, subj: Advisory Opinion ICO [Petitioner], 11 March 2020
(6) Response to Advisory Opinion, In the Matter of [Petitioner], Docket No. NR20200000681, 4 May 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 (Board), requesting the removal from his naval record of all adverse material related to his non-judicial punishment (NJP) and Board of Inquiry (BOI). Petitioner subsequently requested the additional relief of retirement in the grade of O-7 (along with back pay and allowances in that grade) in his rebuttal to the advisory opinion (AO) obtained for this case in enclosure (6).

2. The Board reviewed Petitioner's allegations of error or injustice on 30 June 2022 and, pursuant to its regulations, determined that no corrective action is warranted on Petitioner's naval record.¹ Documentary material considered by the Board included the enclosures, relevant portions of Petitioner's naval record, and applicable statutes, regulations, and policies.

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

¹ During the post-board review process, it was discovered that the Board did not address Petitioner's request for retirement in the grade of O-7 since that request was first made at the end of his rebuttal to the AO. Accordingly, the Board reconvened virtually on 24 August 2022, and unanimously found that this relief, like the other relief requested in his original petition, was not warranted by the evidence.

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

b. On 18 November 2016, Petitioner was charged with the following specifications in violation of Article 92, Uniform Code of Military Justice (UCMJ):²

(1) On or about 7 December 2011, Petitioner violated paragraph 2-100 of reference (b)³ at or near [REDACTED] by wrongfully accepting a gift of food and beverage for himself and his spouse, of a value exceeding permissible limits, from the owner of [REDACTED] a prohibited source, in violation of paragraph 202 of reference (c);⁴

(2) On or about 20 October 2012, Petitioner violated paragraph 2-100 of reference (b) at or near [REDACTED] by wrongfully accepting a gift of food and beverage for himself and his spouse, of a value exceeding permissible limits, from the owner of [REDACTED], a prohibited source, in violation of paragraph 202 of reference (c);

(3) On or about 13 June 2013, Petitioner violated paragraph 2-100 of reference (b) at or near [REDACTED], by wrongfully accepting a gift of food, beverage, and two bottles of wine, of a value exceeding permissible limits, from the owner of [REDACTED], a prohibited source, in violation of paragraph 202 of reference (c);

(4) On divers occasions between December 2011 and June 2013, Petitioner was derelict in the performance of his duties in that he willfully failed to report contacts with the owner of [REDACTED] a foreign national, to the Office of the Defense Attaché, as it was his duty to do; and

(5) On divers occasions between December 2011 and June 2013, Petitioner was derelict in the performance of his duties in that he willfully failed to report acceptance of gifts from the owner of [REDACTED] a prohibited source, to the Office of the Defense Attaché, as it was his duty to do.

See enclosure (2).

c. On 27 January 2017, Petitioner, with the advice of counsel, entered into a pretrial agreement (PTA) with the convening authority whereby he agreed to accept NJP for the charges preferred against him; to waive any appeal of NJP imposed; to plead guilty to all charges except that described in paragraph 3b(4) above; and to submit a voluntary request for retirement upon conclusion of the NJP proceedings.⁵ In exchange for this consideration, the convening authority agreed to dismiss the charges preferred against Petitioner at the conclusion of NJP proceedings;

² These specifications are summarized and not stated here verbatim.

³ Paragraph 2-100 of reference (b) incorporates by reference, reference (c).

⁴ Paragraph 202 of reference (c) is the general prohibition on the solicitation or acceptance of gifts from a prohibited source or those given because of the employee's official position.

⁵ The convening authority was the Commander, United States Fleet Forces Command, who was detailed as the Consolidated Disposition Authority (CDA) for all [REDACTED]-related cases.

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to suspend any restriction or arrest in quarters that may be awarded as NJP; to forward and recommend approval of Petitioner's retirement request; to recommend that Petitioner not be required to show cause for retention in the Naval service; and to recommend that Petitioner be retired in either paygrade O-6 or O-7.⁶ Petitioner acknowledged in this agreement that his defense counsel had fully advised him of the meaning and effect of NJP and its attendant effect and consequences, and that he was satisfied with his defense counsel in all respects. He also acknowledged that, by agreeing to submit to NJP, he was losing several rights that he would have enjoyed if his case had been referred to court-martial.⁷ See enclosure (2).

d. On 10 February 2017, Petitioner appeared at NJP and pled consistently with his PTA. See enclosures (1) and (3).

e. Following NJP, Petitioner made a voluntary statement to the CDA acknowledging that he had failed professionally by not reporting contact with the owner of [REDACTED] to his superiors at the Defense Intelligence Agency.⁸ See enclosure (1).

f. Petitioner asserts that he received a letter from the Chief of Naval Personnel (CNP) in April 2017 informing him that he was required to show cause for retention before a BOI; and that the BOI would determine whether misconduct occurred, if Petitioner should be retained in the Navy, and if not recommended for retention what grade and characterization of service is appropriate. See enclosure (1).

g. Petitioner asserts that he received a call in June 2017 from the DON Flag Matters office, informing him that a decision had been made to retire him in the grade of Rear Admiral (RADM) (Lower Half), and that the previous letter from the CNP had been cancelled but that the BOI would convene to determine if any misconduct had occurred. See enclosure (1).

h. In September 2017, the BOI unanimously concluded that the misconduct alleged against Petitioner was substantiated. By a vote of 2-1, the BOI determined that Petitioner should not be retained, but unanimously determined that his service should be characterized as honorable. See enclosure (1).

i. On 1 November 2018, Petitioner was retired in the grade of Captain. See enclosure (4).

j. Petitioner, through counsel, contends that relief is warranted for the following reasons:

⁶ Petitioner specifically acknowledged that the CDA's recommendations would not be binding on the show cause authority or separation authority.

⁷ Among the specific rights acknowledged by Petitioner that he was foregoing by accepting NJP were the right to have his case adjudicated by a panel of court-martial members; the right to impose a burden of proof beyond a reasonable doubt regarding his alleged misconduct upon the Government; the right to hold the Government to the requirements of the Rules of Evidence; the right to confront witnesses against him; and the right to compel production of his own relevant witnesses

⁸ Petitioner asserts that he believed it prudent to make such a statement since the CDA had agreed to recommend Petitioner's retirement as either an O-6 or O-7. The prudence of submitting such a letter for this reason was not apparent to the Board.

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(1) The preponderance of the evidence suggests that Petitioner did not violate a lawful order. Specifically, Petitioner's counsel asserts that the DON was never able to produce any specific evidence that the meals or wine that Petitioner received actually exceeded permissible limits under reference (b). He claims that he accepted NJP on faith that what he received exceeded the permissible limits. Petitioner's counsel also questions whether the owner of [REDACTED] was a prohibited source, noting that most of the individuals that Petitioner encountered as an attaché would meet the definition of a prohibited source in paragraph 203 of reference (c), while his training reinforced the need to report individuals from High Threat Countries only, and that paragraph 204 of reference (c) provides exceptions to the prohibition against accepting gifts from prohibited sources.⁹ Petitioner's counsel asserts that the exception cited in footnote 9 would have applied in Petitioner's case.

(2) All notions of equity and justice are affronted by Petitioner's "unarticulated acceptance" of NJP. Specifically, Petitioner contends that he accepted NJP only because he had been told that the value of the gifts he received exceeded the permissible limits and that he had a duty to report his contact with the [REDACTED] owner. He claims to have accepted NJP (and pled guilty) without full knowledge of the alleged "wrong" he was accused of committing, and that he did so under pressure. Petitioner contends that his contact with the owner of [REDACTED] did not meet any of the criteria for reporting listed under the State Department's Foreign Affairs Manual and DoD Manual. He further asserts that his failure to report his contact with did not meet the elements to establish a violation of Article 92, UCMJ, because it was not willful.

(3) Petitioner's punishment was unfair given his relative culpability when compared to similar cases. Specifically, Petitioner provided and cited to articles naming other officers accused of receiving gifts from the owner of GDMA who did not receive the same (or in some cases any) punishment.

In conclusion, Petitioner's counsel argues that Petitioner's career should not be tarnished by the Navy using him in an effort to mitigate media fallout from the [REDACTED] scandal, while protecting other officers. He further argues that it is evident that the Navy did not take into consideration Petitioner's mission.

See enclosure (1).

⁹ Petitioner specifically refers to paragraph 204(i) of reference (c), which provides that "[a]n employee assigned to duty in, or on official travel to, a foreign area ... may accept unsolicited food, refreshments, or entertainment in the course of a breakfast, luncheon, dinner, or other meeting or event provided: (1) The market value in the foreign area of the food, refreshments or entertainment provided at the meeting or event, as converted to U.S. dollars, does not exceed the per diem rate for the foreign area specified in the U.S. Department of State's Maximum Per Diem Allowances for Foreign Areas...; (2) There is participation in the meeting or event by non-U.S. citizens or by representatives of foreign governments or other foreign entities; (3) Attendance at the meeting or event is part of the employee's official duties to obtain information, disseminate information, promote the export of U.S. goods and services, represent the United States, or otherwise further programs or operations of the agency or the U.S. mission in the foreign area; and (4) The gift of meals, refreshments, or entertaining is from a person other than a foreign government..."

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j. By memorandum dated 11 March 2020, the Navy Personnel Command (NPC) Office of Legal Counsel (OLC) provided an advisory opinion (AO) for the Board's consideration, recommending that Petitioner's application be denied. This AO stated that Petitioner's arguments are not well founded in law, and that Petitioner's request fails to allege a legitimate error or injustice. The AO states that Petitioner's application "attempt[s] to frame [Petitioner's] GDMA interactions in a light most favorable to [Petitioner], however the petition fails to approach let alone overcome the presumption of regularity as it pertains to petitioner's case." It asserts that Petitioner's case, like all of those connected to [REDACTED] "was investigated extensively by multiple entities," and that Petitioner's request "broaches a 'whataboutism' argument concerning his treatment in relationship to the treatment of certain other flag officers." The AO states that this is not a legitimate argument or an appropriate yardstick to measure Petitioner's case, as each case is different.¹⁰ Finally, the AO commented that Petitioner specifically bargained for NJP, and that he received fair consideration for his agreement. It also noted that the BOI substantiated the misconduct alleged against Petitioner, and found that he should be separated from the naval service. See enclosure (5).

k. On 4 May 2022, Petitioner, through counsel, provided a rebuttal to the AO described in paragraph 3j above,¹¹ in which he asserted three errors in the AO. First, he asserts that the AO misapprehends the Board's mandate by suggesting that it was inappropriate to compare the disposition of Petitioner's case to that of other similarly situated naval officers. He also asserts that the AO's comment that Petitioner should not be allowed to "collaterally attack the process" ignores the purpose of the Board. Finally, Petitioner noted that the AO was incorrect in stating that he was allow to retire as a RADM.¹² In support of Petitioner's claim that his punishment was inequitable relative to that of other officers implicated in the [REDACTED] scandal, Petitioner noted that he was the only officer so implicated whose involvement was related to his duty to collect intelligence. In this regard, Petitioner again cited to paragraph 204(i) of reference (c) (see footnote 9 above) to demonstrate why this distinction was so critical. He also compared the gifts received by the other specific officers he identified and their lack of consequences relative to those received by Petitioner. Petitioner further asserted that he pled guilty because he naively trusted his attorneys that the Navy had actually found wrongdoing on his part, but that the Navy was never able to produce specific evidence that the gifts he received exceeded the guidelines of reference (b). Based upon this, he asserts that his guilty plea was not provident, and the charges must be set aside. He also claims that his due process rights were violated because he was not allowed to view all of the evidence that the Navy and/or Department of Justice claimed that they

¹⁰ The AO provided the specific circumstances for one of the cases cited by Petitioner for comparison, explaining that the officer in question was a junior officer at the time that she accepted gifts from the owner of [REDACTED] unlike Petitioner who was a senior officer with a presumably better understanding of ethical guidelines and the difference between them and security reporting protocols. It also noted that Petitioner's application made no comparison of his case to those of the several senior and flag officers who received significant punishment for their involvement in the GDMA case, to include several who received federal convictions.

¹¹ Petitioner's counsel had previously requested that his original case, which was assigned as Docket No. 0681-20, be administratively closed so that he could have more time to respond to the AO. The case was reopened with its present docket number upon receipt of Petitioner's response to the AO.

¹² The Board presumes that the AO author made this factual mistake because Petitioner erroneously stated as much in enclosure (1), when he stated that he "finally received his DD214 in October 2018, where he found out he was retired as an O-7." Petitioner also refers to himself as a RADM throughout enclosure (1), despite his reduced retired grade.

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had against him, in violation of the Manual for Courts-Martial. Finally, with regard to his retired rank, Petitioner asserts that he was informed by Flag Matters that a decision had been made to allow his retirement in the grade of O-7 and that he received a letter from the White House congratulating him on his retirement as a RADM.

CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Board found insufficient evidence of any probable material error or injustice warranting relief.

The Board found no merit in Petitioner's contention that the Navy failed to prove its case against him, because Petitioner relieved the Navy of that responsibility by pleading guilty at NJP. The Board also found no merit in Petitioner's claim that he naively relied upon the advice of his attorney in this regard. Petitioner was not a poorly educated junior enlisted Sailor who was unable to read a charge sheet or to understand the allegations against him. Rather, he was a highly educated and experienced flag officer, trusted as a defense attaché to represent the interests of the United States and the U.S Navy in an important foreign country. As such, Petitioner was well aware of the government's burden of proof at a court-martial, and the rights that he would be foregoing if he accepted NJP. He was also fully capable of assessing the government's case against him, as he knew better than anyone what gifts he had accepted from the owner of [REDACTED] and could therefore assess better than anyone whether the government actually had a case against him. This ability was proven by the fact that he negotiated for the right to plead not guilty to one of the charges against him. Despite this knowledge, Petitioner readily accepted the PTA in order to avoid a court-martial and receive favorable recommendations from the CDA, and pled guilty to the charges that he now claims were not supported by the evidence. He also agreed that the CDA could recommend that Petitioner be retired in the grade of O-6. Considering all that Petitioner had to lose from his actions and the fact that, as a flag officer, he was better informed of his rights than virtually anyone else subject to the UCMJ, his acceptance of NJP and plea of guilty to the charges against him is conclusive evidence of his guilt.

Petitioner's contention that his plea was improvident and must be set aside is without merit, because Petitioner accepted NJP. The case law he cites refers to guilty pleas at courts-martial, and not at NJP.

Besides the probative value of Petitioner's guilty plea, the Board also noted that a BOI unanimously substantiated the misconduct alleged against Petitioner, and recommended by a majority vote that Petitioner not be retained in the Navy. It also noted that Petitioner voluntarily submitted a statement to the CDA upon the completion of NJP acknowledging his professional failure in not reporting his contacts with the [REDACTED] owner. The Board found Petitioner's explanation for providing this voluntary statement to lack credibility, as the CDA had already agreed to make the recommendations listed in the PTA so this statement would serve no further purpose. These facts further established Petitioner's guilt to the offenses alleged against him.

Finally, the Board found no merit in Petitioner's claim that the Government failed to prove that the value of the gifts he received exceeded the permissible limits because Petitioner provided no



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evidence that they did not. While it was the Government's burden to establish this element at either court-martial or NJP, it is the Petitioner's burden to prove otherwise to this Board. In the absence of evidence to the contrary, the Board relies upon the presumption of regularity to establish that naval officials properly performed their duties and that Petitioner was charged in good faith based upon evidence supporting those charges. As the Petitioner did not provide any evidence to prove otherwise, he has not met his burden to prove any error or injustice.

The Board also found no merit in Petitioner's contention that the [REDACTED] owner may not have been a prohibited source. Per paragraph 203 of reference (c), a prohibited source is any person who is seeking official action by the employee's agency; does business or seeks to do business with the employee's agency; conducts activities regulated by the employee's agency; has interests that may be substantially affected by the performance or nonperformance of the employee's official duties; or is an organization a majority of whose members meet the other criteria described. There is no question that the [REDACTED] owner sought official action from and did business with the DON, and Petitioner is an employee of the DON, so there is no question that he was a prohibited source.¹³ Petitioner's contention that the majority of the people he dealt with as a defense attaché would meet this definition is irrelevant, as defense attachés are not exempted from the standards of ethical conduct. The Board also found no relevance in Petitioner's contention that he had a responsibility to gather intelligence. Petitioner has not proven that the value of the gifts he received did not exceed the relevant per diem rates in order to establish that the exception to the general prohibition against accepting gifts from prohibited sources in paragraph 204(i) of reference (c) applied in his case, and he knowingly waived the right to present this as a defense to the charges against him by agreeing to the PTA.

The Board did not agree with Petitioner's contention that "All Notions of Equity and Justice Are Affronted by [his] Unarticulated Acceptance of [NJP]." Again, Petitioner was a highly educated and experienced flag officer, with demonstrated intelligence sufficient to warrant selection as a defense attaché for an important and strategic foreign country. He clearly was not forced to accept the advice of his counsel to accept the PTA or to plead guilty to offenses of which he believed himself to be innocent. There was nothing "unarticulated" about his acceptance of NJP; the terms of the PTA were spelled out in significant detail. The charges alleged against Petitioner were not ambiguous. Further, as noted above, Petitioner sent a voluntary and unnecessary statement to the CDA admitting his professional failure in not reporting his contacts with the [REDACTED] owner to his superiors, which calls into question his current contention that he had no duty to do so. There was nothing inequitable or unjust about Petitioner's voluntary acceptance of NJP to escape the potential consequences of a court-martial.

Finally, the Board found nothing inequitable or unjust in the disposition of Petitioner's case relative to that of his peers. The Board notes that Petitioner chose only two out of the numerous [REDACTED]-related cases to compare the disposition with those of his own case. This Board is not privy to all of the facts surrounding these cases, or any of the numerous other [REDACTED]-related cases. It is, however, aware that other officers have suffered far more serious consequences than did Petitioner for their role in the [REDACTED] scandal. Regardless of the consequences suffered by

¹³ The Board is not persuaded by the fact that Petitioner was detailed to the Defense Intelligence Agency. He was a Navy flag officer employed by the DON.

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other officers implicated in the scandal, the Board found the consequences endured by Petitioner to be reasonable under the circumstances. He admitted to misconduct which easily could have resulted in a court-martial conviction and a dismissal from the Navy, but he was ultimately allowed to honorably retire from the Navy and retain the benefits associated with retirement in the last grade in which he served satisfactorily – a grade which he agreed that the CDA could recommend as his appropriate retirement grade.

Having found no error or injustice in Petitioner's NJP for offenses to which he pled guilty, the Board also found no error in Petitioner's retirement in the grade of captain. As noted above, Petitioner negotiated for an agreement that the CDA could recommend his retirement in this grade. Further, the Board noted that in accordance with reference (d), a commissioned officer "shall be retired in the highest permanent grade in which such officer is determined to have served on active duty satisfactorily." Considering that Petitioner admitted to significant misconduct while serving as a RADM at his NJP hearing, and that the BOI unanimously substantiated this misconduct, the Board found no error or injustice in the determination that captain was the highest grade in which Petitioner served satisfactorily.

RECOMMENDATION:

In view of the above, the Board recommends that no corrective action be taken on Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above titled matter.
5. The foregoing action of the Board is submitted for your review and action.

8/29/2022

[REDACTED]

[REDACTED]

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

 Board Recommendation Approved (Deny Relief)

Petitioner's Request Approved (Grant Relief – Remove from Petitioner's naval record his NJP and BOI, and all associated documentation; Restore Petitioner's retirement grade to RADM (Lower Grade); Issue Petitioner a new DD Form 214 and all appropriate retirement documentation reflecting his retirement in the grade of RADM; Refer this decision to the Defense Finance and Accounting Service to conduct an audit of Petitioner's finance records to determine what pay and allowances may be due to him as a result of this action.)

[REDACTED]