



that the Equal Opportunity (EO) complaint upon which the charge of substandard performance was based, was granted on appeal by █. You further contend that:

1. The investigation and evidence it bore was inconsistent, unfair, and unlawful. The appropriate procedures were not followed during the preliminary inquiry (PI). Specifically, the PI should have resulted in a command investigation (CI) subject to General Court-Marital Convening Authority (GCMCA) review and the Investigating Officer (IO) was in your chain of command, which made him inherently bias.

2. The evidence was proved false by at least one witness after being contacted by your civilian counsel. The summaries of interviews were suspect because the initial investigation failed to include any written statements from the witnesses and alleged victims. You noted that there are no official statements and you acknowledge that official statements are not required. However, you contend that the summaries of interviews were insufficient to provide viable evidence for charges of such gravity.

3. You were denied mandatory and guaranteed rights, because you did not sign the “Accused Notification and Election of Rights for an Accused Attached to or Embarked in a Vessel” and you were not permitted to examine all the documents considered as evidence against you.

4. There was no assault or battery by definition of Article 128, Uniform Code of Military Justice (UCMJ) and the alleged offenses occurred in the engineering space during a qualification board.

5. The members of the BOI highlighted the fore mentioned legal errors and found no basis for misconduct or substandard performance. If there is no basis for the charges, then the charges should not stand and the DFC has no foundation.

The Board, however, substantially concurred with the AOs. In this regard, the Board noted that previous complaints of harassment were filed against you, an investigation was conducted, and, although the IO did not substantiate harassment, the IO did find evidence of general harassment, perceived verbal abuse and an environment that did not foster teambuilding. The Board also noted that you were issued two Letters of Instructions (LOIs) counseling you regarding poor communication skills and treatment of subordinates. The Board noted, too, that subsequent complaints of harassment were made against you, the PI substantiated allegations of harassing and belittling comments made towards junior officers, as well as allegations of assault consummated by a battery. As a result, you received NJP for violating UCMJ Article 93 (Cruelty and maltreatment, two specification) and Article 128 (Assault, four specifications). The Board further noted that you acknowledged your Article 31, UCMJ Rights, you appealed your Commanding Officer’s (CO’s) finding of guilt, and your appeal was reviewed and denied by the █.

Concerning your contentions that the investigation was improper and that the IO was bias, the Board, however, substantially concurred with the AO that the investigation was valid. In this regard, the Board concurred with the AO’s assessment that the PI essentially morphed into a CI. The Board noted that the IO was the executive officer, but found no evidence of bias or that the

IO's conduct during the investigation was improper. The Board determined that the IO was required to be senior in grade to you, there is no requirement for an IO to be someone outside the chain of command, and in this case, to do so would have been unduly burdensome and impractical. The Board also determined that according to the Manual of the Judge Advocate General (JAG) a PI or CI is not a requirement for a CO to impose NJP.

Concerning your contentions that the evidence was proved false by at least one witness and the summaries of interviews were suspect because the initial investigation failed to include any written statements. The Board noted that a witness recanted her statement, the Board, however, determined that her statement does not obviate the validity of statements by other witnesses. The Board also determined that the JAG Manual does not require sworn statements for PIs or CIs. The Board found your evidence insufficient to invalidate the evidence collected during the investigation.

Concerning your contentions that you did not sign the Accused Notification and Election of Rights for an Accused Attached to or Embarked in a Vessel, the Board noted that the CO acknowledged the procedural oversight, and that you were advised of your rights throughout the investigation and NJP process. In addition, according to your NJP appeal and the CO's endorsement to your appeal record of NJP you understood your rights from discussing the matter with your counsel. The Board determined that your chain of command's failure to ensure you signed the Accused Notification and Election of Rights for an Accused Attached to or Embarked in a Vessel was an error. However, the Board also determined that the error was harmless since it did not alter the outcome of your NJP nor did it substantially prejudiced your rights.

Concerning your contention that you were not permitted to examine all the documents considered as evidence against you, the Board noted that you acknowledged having the opportunity to examine some of the evidence. The Board also noted that your CO indicated that prior to NJP, he provided you ample opportunity to examine the evidence used against you. The Board determined that the JAG Manual entitles the accused to examine the documents and evidence on which the CO has relied at the NJP proceedings. The accused is not entitled to examine all evidence. The Board found your evidence insufficient to conclude that you were not permitted to examine the appropriate evidence as provided in the JAG Manual. Furthermore, the Board also concluded that your exercise of your NJP appeal rights eliminates any injustice issues related to your allegation of denial of due process.

Concerning your contention that there was no assault or battery by definition of Article 128, UCMJ, the Board substantially concurred with the AO that the elements of the offense have been met and it was within your CO's prerogative to find that your conduct constituted assault and maltreatment at NJP. The Board noted that your contentions were also duly noted in your appeal, your CO provided a comprehensive response to justify his finding, and after review and consideration by the █, the NJP was upheld. The Board determined that when making the decision to impose NJP, the CO relied on the investigation that substantiated the allegations of misconduct and your CO had the discretionary authority to determine whether you committed misconduct. The Board also determined that your CO acted within his discretionary authority and your NJP was conducted according to the *Manual for Courts-Martial* (2019 ed.).

The Board noted that your BOI unanimously found that the preponderance of evidence did not support the basis for separation. The Board also noted the statement furnished by the BOI member. The Board, however, determined that according to 10 U.S.C. § 1182, BOIs are convened to make findings and recommendations as to whether an officer should be retained on active duty. The BOI also allows a respondent to present matters favorable to their case. The BOI does not determine guilt or innocence and the findings of your BOI are not binding on the CO, just as the CO's determination at NJP was not binding on the BOI. The Board also determined that awarding NJP is separate and distinct from the BOI results. Moreover, each were independent fact-finding bodies entitled to come up with their own conclusions based on the facts. The fact that the BOI came to a different conclusion does not in any way detract from the validity of the CO's decision.

Concerning your request to remove your DFC, the Board noted that the CO provided substantive justification to support the request for DFC and the Deputy, Chief of Naval Personnel (CNPC) independently reviewed the evidence and determined that DFC was appropriate. The Board found no evidence of material error or injustice related to the processing of your DFC. The DFC is a process separate from NJP and the BOI with the purpose of maintaining operational readiness. Thus, the authority to reassign personnel does not hinge on any particular outcome of the NJP or BOI.

Concerning the removal and modification of your fitness reports. The Board substantially concurred with the AO that your fitness reports are valid and shall be retained as filed. In this regard, the Board noted that your fitness report for the reporting period 1 November 2020 to 9 August 2021 documented your NJP. The Board also noted that you acknowledged the basis for the fitness report and indicated that, "I do not intend to submit a statement." The Board determined that the Navy Performance Evaluation System Manual allows the reporting senior (RS) to document concluded NJP cases where there has been a finding of guilt and the awarding of punishment. The Board noted, too, that your fitness report for the reporting period 10 August 2021 to 31 October 2021 is on file, but is not adverse, nor does it reference your NJP or DFC. The Board further noted that your purported concurrent fitness report ending 31 October 2021 is not on file. The Board concluded that your RS properly prepared and submitted the fitness reports according to regulations.

In conclusion, the Board is not an investigative body and relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties. The Board carefully considered the totality of available evidence, however, the Board found that you have not met your burden to overcome the presumption of regularity attached to the official actions of the Navy. Accordingly, the Board concluded that there is no probable material error, substantive inaccuracy, or injustice warranting the corrective action you requested. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

You are entitled to have the Board reconsider its decision upon submission of new matters, which will require you to complete and submit a new DD Form 149. New matters are those not previously presented to or considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when

applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely, \_\_\_\_\_

11/6/2022

