



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

██████████  
Docket No. 5320-22  
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF ██████████, USN, ██████████

Ref: (a) 10 U.S.C. § 1552  
(b) ██████████ 3121.1C of 29 Dec 18, Standing Order Number Eleven  
(c) DODM 4500.36, Acquisition, Management, and Use of DoD Non-Tactical Vehicles, 7 July 2015  
(d) 10 U.S.C. § 624  
(e) DODI 1320.14, DoD Commissioned Officer Promotion Program Procedures, 16 December 2020  
(f) SECNAVINST 1420.3, Department of the Navy Commissioned Officer Promotion Program, 28 March 2019  
(g) MILPERSMAN 1611-020, Officer Detachment for Cause, 30 March 2007

Encl: (1) DD Form 149 w/enclosures  
(2) ALNAV 060/19, subj: FY-20 Active-Duty Navy Lieutenant Commander Line Selections, 231500Z Aug 19  
(3) NPC Memo 1420 Ser 833/0281, subj: Delay and Possible Removal of Your Permanent Promotion to Lieutenant Commander, 16 January 2020  
(4) ██████████ CO Memo 1621 ██████████ subj: Punitive Letter of Remand, 17 January 2020  
(5) NAVPERS 1626/7, Report and Disposition of Offense(s), 20 December 2019  
(6) Petitioner's Memo, subj: Acknowledgment of Promotion Delay and Intent to Submit a Statement, 21 January 2020  
(7) Petitioner's Memo, subj: Appeal of Nonjudicial Punishment, 24 January 2020  
(8) ██████████ ██████████ CO Memo 5800 Ser ██████████, First Endorsement of Enclosure (6), subj: Appeal of Non-Judicial Punishment Imposed on 17 January 2020 ICO [Petitioner], 19 February 2020  
(9) Petitioner's Counsel Memo, subj: Appeal of Nonjudicial Punishment ICO [Petitioner], 27 February 2020  
(10) ██████████ CO Memo 5812 Ser. N00J/061, subj: Denial of Appeal of Nonjudicial Punishment ICO [Petitioner], 1 May 2020  
(11) Petitioner's Memo, subj: Statement in Response to Punitive Letter of Reprimand, 5 May 2020  
(12) ██████████ CO Memo 1611 Ser ██████████, subj: Report of Nonjudicial Punishment and Request for Detachment for Cause ICO [Petitioner], 29 June 2020  
(13) Petitioner's Counsel Memo, subj: Report of Nonjudicial Punishment and Request for

Subj: REVIEW OF NAVAL RECORD OF [REDACTED], USN, [REDACTED] - [REDACTED] - [REDACTED]

- Detachment for Cause ICO [Petitioner], 14 July 2020
- (14) [REDACTED] CO Memo 1611 Ser [REDACTED], Second Endorsement on Enclosure (12), subj: Report of Nonjudicial Punishment and Request for Detachment for Cause ICO [Petitioner], 16 July 2020
  - (15) [REDACTED] CO Memo 1611 Ser N00/192, Third Endorsement on Enclosure (14), subj: Report of Nonjudicial Punishment and Request for Detachment for Cause ICO [Petitioner], 29 July 2020
  - (16) [REDACTED] CO Memo 1611 Ser N00J/183, Fourth Endorsement on Enclosure (14), subj: Report of Nonjudicial Punishment and Request for Detachment for Cause ICO [Petitioner], 14 August 2020
  - (17) Board of Inquiry Report in the case of [Petitioner], 16 November 2020
  - (18) NPC Action Memo, subj: Fourth Quarter FY-20 Ratification and Extension for Delay of Promotion, 13 November 2020
  - (19) BUPERS Memo 1611 BUPERS-00B/534, subj: Detachment for Cause ICO [Petitioner], 14 December 2020
  - (20) NPC Memo 1920 Ser 834/672, subj: Status in the U.S. Navy, 21 December 2020
  - (21) Petitioner's Memo, subj: Delay and Possible Removal of Promotion to Lieutenant Commander ICO [Petitioner], 4 January 2021
  - (22) [REDACTED] CO Memo 1420 [REDACTED], First Endorsement of Enclosure (21), 12 January 2021
  - (23) PERS-833 Head E-mail, subj: RE: PERS 833, sent Sunday, February 21, 2021 @ 7:53 PM (and preceding e-mail trail)
  - (24) [REDACTED] CO Memo 1420 Ser N00 040, Third Endorsement on Enclosure (21), 23 February 2021
  - (25) NAVPERS 1610/2, Fitness Report & Counseling Record (W2-O6) (20000201 – 20210121)
  - (26) [REDACTED] CO Memo 1420 Ser N00/108, Fourth Endorsement on Enclosure (21), 19 April 2021
  - (27) Petitioner's Memo, subj: Statement of Rebuttal Delay and Possible Removal of Promotion to Lieutenant Commander ICO [Petitioner], 14 May 2021 (with enclosures)
  - (28) CNO Action Memo, subj: Removal of Permanent Promotion to Lieutenant Commander ICO [Petitioner], 17 March 2022
  - (29) NPC Memo 1420 Ser 833/0398, subj: Removal of Your Name from the Fiscal Year 2020 Active-Duty Navy Lieutenant Commander Line (Unrestricted Line) (URL) Promotion List, 5 May 2022
  - (30) PERS-32 Memo 1610, subj: [Petitioner], 24 August 2022
  - (31) BUPERS-00J Memo, subj: Advisory Opinion ICO [Petitioner], 4 October 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 promotion to Lieutenant Commander (LCDR). Petitioner also requested the removal of his fitness report (FITREP) for the reporting period of 1 February 2020 to 31 January 2021, and the removal of all documents from his record which characterize his detachment from the [REDACTED] ([REDACTED]) as a detachment for cause (DFC).

Subj: REVIEW OF NAVAL RECORD OF ██████████, USN, ██████████

2. The Board reviewed Petitioner's allegations of error or injustice on 12 December 2022 and, pursuant to its regulations, determined that no corrective action is warranted. 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, finds as follows:

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

b. On 23 August 2019, the results of the Fiscal Year (FY) 2020 Active-Duty Navy LCDR (Line) Promotion Selection Board (PSB) were announced. Petitioner was among those officers selected for promotion to LCDR. See enclosure (2). Petitioner's projected promotion date pursuant to this selection was 1 August 2020. See enclosure (3).

c. On or about 11 December 2019, Petitioner was assigned to performance duties as the ██████████ Command Duty Officer (CDO). While on this duty and without proper relief or authority, Petitioner departed the ship for between 15 and 60 minutes to move his personal vehicle and to pick up food from McDonalds.<sup>1</sup> In doing so, he had the duty driver, an E-3, follow him in the duty vehicle so that he could park his personal vehicle in closer proximity to the pier at which the ██████████ was scheduled to dock upon its return to port. After parking his vehicle, Petitioner had the duty driver take him to McDonalds to pick up food. When the duty driver explained that he was unable to go through the drive-thru lane at McDonalds in a government vehicle, Petitioner had him stop so that he could get the food inside, and then had the driver take him back to the ship. Petitioner did not turn over his duties as CDO during this period, or inform his CDO under instruction or his superiors, of his departure. See enclosure (4).

d. By memorandum dated 16 January 2020, Petitioner was notified that his promotion to LCDR, scheduled for 1 August 2020, was immediately delayed based upon the report of potentially adverse or reportable information related to the events of 11 December 2019. He was further informed that if the Commander, ██████████ (██████), did not rescind the delay of his promotion in writing prior to 1 August 2020, the Secretary of the Navy (SECNAV) would determine whether the adverse information reported about him materially affects his qualification for promotion and whether his entire record makes him qualified for promotion. See enclosure (3).

e. On 17 January 2020, Petitioner received nonjudicial punishment (NJP) for the misconduct described in paragraph 3c above. Specifically, he was charged with being absent without leave from his duty as the CDO onboard the ██████████ in violation of Article 86, Uniform Code of Military Justice (UCMJ); failure to obey a lawful general order, to wit: reference (c), by wrongfully utilizing a Department of Defense non-tactical vehicle for non-official business as a

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<sup>1</sup> Other documentation in the record reflects that Petitioner sought to move his personal vehicle because the ship was scheduled to sail on the following day, and he realized that he would face a long walk to retrieve it upon return to the pier to which it was scheduled to dock. The length of this walk would reportedly have jeopardized Petitioner's ability to catch the flight that he had booked for holiday leave scheduled for the evening of the ship's return to port.

Subj: REVIEW OF NAVAL RECORD OF ██████████, USN, ██████████

means of personal conveyance, in violation of Article 92, UCMJ; and conduct unbecoming an officer and gentleman by wrongfully and dishonorably abusing and compromising his position of authority as an officer by ordering the ██████████ duty driving to drive him on a personal errand at McDonalds while both in were a duty status and utilizing the duty vehicle. He received a punitive letter of reprimand (PLOR) for this misconduct. See enclosure (5).

f. By memorandum dated 17 January 2020, Petitioner received the PLOR awarded at NJP. This PLOR described the misconduct described in paragraph 3c above. See enclosure (4).

g. By memorandum dated 21 January 2020, Petitioner acknowledged receipt of enclosure (3) and indicated his intention to submit a statement regarding this action. See enclosure (6).

h. By memorandum dated 24 January 2020, Petitioner appealed his NJP, asserting that his punishment was unjust and disproportionate under the circumstances. He explained that he departed the ship to move his personal vehicle because the ship was scheduled to sail on the following day and he realized that he would otherwise face a long walk from the pier to which it was scheduled to dock on 16 December 2020 to his parking location which might jeopardize his ability to making his flight for holiday leave. He also claimed that he interpreted the provisions of reference (b) pertaining to “watchstander liberty” to permit the CDO to leave the ship for brief periods of less than an hour to attend to personal matters which, if left unattended, could later interfere with the performance of official duties. As such, he claimed to believe his brief absence to be authorized. He further explained that his diversion to McDonalds was to retrieve food for his Section Leader, who had missed evening chow due to a work detail. See enclosure (7).

i. By memorandum dated 19 February 2020, Petitioner’s commander forwarded Petitioner’s NJP appeal to the appeal authority, strongly recommending its denial. In making this recommendation, Petitioner’s commander indicated that the circumstances of Petitioner’s CDO duty were not unique and that it was not the normal course of duty for the CDO to leave the ship without relief or authority to tend to personal matters. He stated that it was imperative that he have his direct representative (i.e., the CDO) on board and readily available to respond to any problems involving any one of the many evolutions that the ship goes through leading up to the underway, which in this case was scheduled for the following morning. Furthermore, the CDO is required to obtain and provide permission to complete evolutions and maintenance required to get underway, and that Petitioner failed in his duty to serve as this representative because he was absent from his post. Petitioner’s commander described Petitioner’s decision to leave his post because he was concerned about missing his flight to be “incredibly selfish, shortsighted, and not in line with the expectations of a Naval Officer of any rank, but especially a senior Department Head about to be promoted to [LCDR].” Petitioner’s commander also reported that this was not the first time that Petitioner had failed to perform his duties, as his predecessor for suspended Petitioner’s CDO qualifications and verbally counseled him for failing to execute his CDO duties just two months prior.<sup>2</sup> See enclosure (8).

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<sup>2</sup> Petitioner had failed to make a required report about a casualty that occurred during his watch.

Subj: REVIEW OF NAVAL RECORD OF ██████████, USN, ██████████

j. By memorandum dated 27 February 2020, Petitioner's counsel supplemented his NJP appeal to alleged legal deficiencies in the proceedings.<sup>3</sup> Specifically, he made the following allegations of legal error:

(1) The specification of absence without leave in violation of Article 86, UCMJ, was defective in that it did not specify that his absence was for a particular period of time. He asserted that such language is required by federal law. By failing to assert his absence for a particular period of time, Petitioner's counsel argued that the specification failed to state a crime and that the finding of guilty against him was therefore illegal.<sup>4</sup>

(2) The specification alleging a failure to obey a lawful order in violation of Article 92, UCMJ, morphed over time, asserting different violations at different times in a manner that violated Article 15, UCMJ. Specifically, he claimed that Petitioner was originally notified of two specifications of violations of Article 92, UCMJ. The first specification for which he was notified alleged a violation, but failed to identify the order violated, while the second specification alleged a violation of reference (c), without specifying the conduct constituting the violation. As such, he claimed that both specifications were legally insufficient, and that Petitioner's command must have recognized this deficiency since it issued enclosure (5) on the day of his NJP. Petitioner's counsel alleged further error in the revised specification of enclosure (5), in that the timing of its revision deprived Petitioner of sufficient notice.

(3) The specification of conduct unbecoming an officer and a gentleman, in violation of Article 133, UCMJ, is defective on its face as the conduct alleged is in no way comparable to the conduct legally considered sufficient to support such a charge. In support of this contention, Petitioner's counsel cited to the paragraph in the Manual for Court-Martial providing examples of offenses constituting conduct unbecoming an officer and gentleman to assert that the act of purchasing food at McDonald's does not compare with the kind of conduct which would constitute a violation of Article 133."<sup>56</sup>

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<sup>3</sup> As noted in enclosure (10), this supplement was not submitted in a timely manner. Petitioner was excused from a sailing of the ██████████ in the wake of his NJP so that he could seek legal counsel and submit a timely appeal.

<sup>4</sup> The specific statute cited by Petitioner's counsel was Article 86, UCMJ (10 U.S.C. § 886). That statute lists the elements of the offense, but does not establish any requirements for the drafting of specifications. The specification for this offense detailed on enclosure (5) mirrored the model specification for "failing to go or leaving place of duty" found in the Manual for Courts-Martial (2019 ed.), page IV-15, 10(e)(1).

<sup>5</sup> Manual for Courts-Martial (2019 ed.), page IV-135, paragraph 90(c)(3), regarding Article 133, UCMJ, states:

(3) Examples of offenses. Instances of violation of this article include knowingly making a false official statement; dishonorable failure to pay a debt; cheating on an exam; opening and reading a letter of another without authority; using insulting or defamatory language to another officer in that officer's presence or about that officer to other military persons; being drunk and disorderly in a public place; public association with known prostitutes; committing or attempting to commit a crime involving moral turpitude; and failing without good cause to support the officer's family."

<sup>6</sup> The Board notes that Petitioner's counsel grossly misstated the gravamen of the conduct alleged as unbecoming an officer and a gentleman. That conduct was obviously not the act of "purchasing food at McDonald's" as Petitioner's counsel suggested, but rather it was the "abuse and compromise [of] his position of authority as an Officer by ordering the ██████████ duty driver to drive [him] on a personal errand." The specific errand was irrelevant in

Subj: REVIEW OF NAVAL RECORD OF ██████████, USN, ██████████

See enclosure (9).

k. By memorandum dated 1 May 2020, the NJP appeal authority denied Petitioner's appeal.<sup>7</sup> This action referenced both enclosures (7) and (9), and indicated that the NJP was referred to his Staff Judge Advocate for advice prior to action. Although the appeal authority stated that the submission of and arguments made in enclosure (9) were waived as being untimely, he nonetheless found those arguments to be incorrect as to the law and facts. He made the following findings with regard to each offense:

(1) Petitioner's argument that his absence was authorized since he was on self-approved "watchstander liberty" was without merit because such liberty may only be authorized by the CDO "in an emergency." In the absence of an emergency, such liberty must be approved by the commander. As Petitioner claimed that he believed his absence to be authorized based upon his experience and "perceived authority as CDO," the NJP appeal authority rejected his assertion that this represented, at worst, "an aberrant, negligent error" as it "shows a level of calculus that is more than an unintentional or negligent error." The NJP appeal authority rejected the allegation of legal error made by Petitioner's counsel, as the actual violation of Article 86, UCMJ, alleged was "going from appointed place of duty," for which all of the elements were met.

(2) Regarding the Article 92, UCMJ, offense, the NJP appeal authority noted that Petitioner's counsel acknowledged in enclosure (9) that this was a proper charge. He further noted that enclosure (7) demonstrates that Petitioner was sufficiently on notice as to the charge to allow him to present a defense. Petitioner's counsel's argument that he was denied the opportunity to present a defense was rejected, as he was notified of the alleged violation on 8 January 2020, provided until 11 January 2020 to consult with an attorney, and did, in fact, consult with an attorney. Further, the revised specification provided on 17 January 2020 only synthesized the two separate specifications of which he had already been notified, and Petitioner had requested and was afforded addition time to consult with legal counsel after it was received. Finally, the NJP authority noted that service members embarked on a ship have no right to consult an attorney between the notification and imposition of NJP, and that the inability to consult with an attorney does not prejudice the NJP but rather denies the Government's ability to use such NJP at a subsequent court-martial. As such, the NJP appeal authority found that Petitioner was afforded all rights due to him.

(3) With regard to the Article 133, UCMJ, offense, the NJP appeal authority noted that Petitioner's counsel mischaracterized both the law and facts. He found that as a Surface Warfare-qualified, LCDR-select officer with 10 years of experience, Petitioner knew, or should have known, that the E-3 duty driver would interpret his "request" to be an order. Accordingly, Petitioner ordered the duty driver to follow him in a government vehicle on a personal errand to move his personal vehicle, and then to drive him to McDonalds to get food." This put the E-3 duty driver in a difficult position, and set a horrible example. He noted that this "violation was

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this regard, and the gravamen of the conduct alleged was not unlike the examples of such conduct provided in the Manual for Courts-Martial.

<sup>7</sup> The NJP appeal authority was the Commander, ██████████. This higher command was located remotely from the homeport of the ██████████.

Subj: REVIEW OF NAVAL RECORD OF ██████████, USN, ██████████

so obvious that even [the duty driver] recognized the error and had to correct [Petitioner].” Accordingly, the NJP appeal authority found sufficient evidence to support the alleged violation of conduct unbecoming an officer and gentleman in violation of Article 133, UCMJ.

After addressing the challenges made to each of the specific offenses, the NJP appeal authority found that the punishment was not disproportionate to the offenses, that Petitioner’s commander did not abuse his discretion, and that Petitioner’s requested alternative relief of a letter of instruction (LOI) in lieu of a PLOR was both inappropriate and unavailable.

See enclosure (10).

l. By memorandum dated 5 May 2020, Petitioner made a statement in response to his PLOR. The content of this response essentially mirrored the content of his NJP appeal, as discussed in paragraph 3h above.<sup>8</sup> See enclosure (11).

m. By memorandum dated 29 June 2020, Petitioner’s commander submitted a Report of NJP and request for DFC pertaining to Petitioner through the chain of command to NPC.<sup>9</sup> Within this request, Petitioner’s commander opined that Petitioner’s misconduct “warrants promotion delay or removal,” but that he “should not be required to show cause for retention in the naval service.” In arguing for Petitioner’s DFC, his commander cited to Petitioner’s “substandard performance over an extended period of time” in addition to the misconduct which was the basis his NJP. Specifically, he stated that “[f]rom approximately November 2018 until approximately January 2020, despite extensive efforts by the previous Commanding Officer, myself, and my command to rehabilitate and develop him, [Petitioner’s] performance remained substandard and would have, on its own accord, necessitated his detachment for cause.”<sup>10</sup> He cited the following specific failures in Petitioner’s role as Plans and Tactics Officer and Department Head:

(1) Failure to maintain a direct line of communication with the previous commanding officer, the current commanding officer, and the executive officer, while also failing to ensure that the commanding officer was fully informed regarding the condition of all of his equipment, personnel and noteworthy evolutions within his Department.

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<sup>8</sup> The Board presumes this response was provided simply for filing with the PLOR in order to provide Petitioner’s version of the events described in the PLOR.

<sup>9</sup> This memorandum also served as the command’s endorsement of Petitioner’s acknowledgement of his promotion delay.

<sup>10</sup> This assertion referenced Petitioner’s FITREPs covering the periods from 1 February 2019 to 8 November 2019 and from 9 November 2019 to 31 January 2020, as well as a LOI dated 9 September 2019. The LOI addressed Petitioner’s inability to maintain a direct line of communication with the commander, his deficient administrative reports, and his inability to properly plan for or meet administrative requirements or to carry out his responsibilities, despite engagement by both the commander and executive officer; unsatisfactory oversight of the Integrated Training Team (ITT) and Combat Systems Training Team (CSTT) and failure to develop a plan to ensure the tactical proficiency of watchstanders, resulting in lagging progress towards readiness for Crew Certification and Ready for Sea Assessments; failure to properly execute assigned duties as the Combat Systems Ship Qualification Trials (CSSQT) Coordinator, including keeping the executive officer and commander apprised of important decision and discussion during teleconferences and other planning meetings with outside entities; and failure to properly execute designated responsibilities.

Subj: REVIEW OF NAVAL RECORD OF ██████████, USN, ██████████

(2) Failure to execute routine administrative tasks in accordance with prescribed timelines while in charge of the ship's administrative executive department.

(3) Failure to prepare the CSTT and ITT for Crew Certification and Ready for Sea Assessment.

(4) Failure to ensure that the executive officer and commander were kept apprised of information received during the ship's preparation for CSSQT.

He also cited to verbal counseling delivered to Petitioner by the former commander on 8 October 2019, addressing Petitioner's inappropriate behavior towards subordinates;<sup>11</sup> failure to meet standards as a watchstander;<sup>12</sup> and failure to accomplish assigned tasks.<sup>13</sup> In addition to all of these specific instances of substandard performance, his commander asserted that Petitioner "has had an overall negative impact upon good order and discipline within his Department and ██████████ as a whole. In multiple instances, Sailors in his Chain-of-Command made comments to [the commander] or the Executive Officer regarding his ineffectiveness as a leader." Petitioner's commander deemed these comments to be credible based upon his knowledge of the complaining Sailors, his own observations, and Petitioner's performance. As such, Petitioner's commander expressed no confidence in Petitioner's ability to lead, motivate, or provide for a ship's good order and discipline. He also opined that Petitioner has not demonstrated the capacity to perform at the level of a LCDR, and therefore recommended his removal from the FY 2020 Active-Duty Navy LCDR (Line) promotion selection list. See enclosure (12).

n. By memorandum dated 14 July 2020, Petitioner, through counsel, provided a response to the Report of NJP and request for DFC described in paragraph 3m above. He asserted that the DFC request was "legally deficient, factually inaccurate, incomplete to the point of being misleading and lacking in required documentation," and therefore requested that the DFC request be denied and that Petitioner's promotion to LCDR be approved. First, he reiterated the version of the events of 11 December 2019 provided by Petitioner in his unsuccessful rebuttal to the PLOR at enclosure (7), asserting that the severity of this misconduct was exaggerated by the ██████████ commander and did not warrant DFC. Next, Petitioner's counsel challenged the claim of Petitioner's commander that Petitioner's performance of duty was substandard, challenging each of the specific bases for this claim with counter arguments and references to previous FITREPs.<sup>14</sup> See enclosure (13).

o. By memorandum dated 16 July 2020, Petitioner's commander forwarded the Report of NJP and Petitioner's response to it through the chain of his command, with the statement that his request and recommendations remained unchanged. See enclosure (14).

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<sup>11</sup> Petitioner used his positional authority over the ship's legal clerk to question her about legal matters not pertaining to him after viewing documents on the commander's desk that he erroneously believed pertained to him.

<sup>12</sup> Petitioner failed to inform the commander of an equipment casualty that had been incurred by ██████████ on 5 October 2019, in violation of the commander's standing orders.

<sup>13</sup> Petitioner failed to properly report for duty and execute his assigned responsibilities as the Visual Information (VI) Coordinator by not planning or conducting VI drills and training.

<sup>14</sup> Petitioner's counsel referred to the effort of Petitioner's commander in this regard as "shooting with blanks."



Subj: REVIEW OF NAVAL RECORD OF ██████████, USN, ██████████

p. By memorandum dated 29 July 2020, the next higher commander in Petitioner's chain of command endorsed the Report of NJP and DFC request package, to include Petitioner's response, concurring with his commander's recommendation.<sup>15</sup> See enclosure (15).

q. By memorandum dated 14 August 2020, the next higher commander in Petitioner's chain of command endorsed the Report of NJP and DFC request package, to include Petitioner's response, also concurring with his commander's recommendation that Petitioner be removed from the FY 2020 Active-Duty Navy LCDR (Line) promotion selection list and DFC request.<sup>16</sup> Despite the original recommendation that Petitioner not be required to show cause for retention, this commander exercised his delegated Show Cause Authority to direct that Petitioner be required to show cause for retention. See enclosure (16).

r. On 16 November 2020, a Board of Inquiry (BOI) unanimously found that the preponderance of the evidence supported the allegations that Petitioner violated a lawful general order in violation of Article 92, UCMJ, and engaged in conduct unbecoming an officer and gentleman in violation of Article 133, UCMJ.<sup>17</sup> By a vote of 2-1, the BOI found that the preponderance of the evidence did not support substandard performance of duty as a basis for involuntary separation. Despite its unanimous finding that the preponderance of the evidence supported the allegations of misconduct, the BOI voted to recommend Petitioner's retention by a vote of 2-1. See enclosure (17).

s. On 20 November 2020, the Commander, ██████████, exercised his delegated authority to ratify and extend Petitioner's promotion delay beyond six months in accordance with references (d) – (f).<sup>18</sup> See enclosure (18).

t. By memorandum dated 14 December 2020, the ██████████ approved the request for Petitioner's DFC due to misconduct and substandard performance of duty. See enclosure (19).

u. By memorandum dated 21 December 2020, Petitioner was notified that he was being retained in the naval service pursuant to the recommendation of the BOI. He was further notified, however, that this determination did not preclude or limit the use of the information and opinions contained in enclosure (12) in future administrative or other proceedings. See enclosure (20).

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<sup>15</sup> This individual was the Commander, ██████████. In concurring with the recommendation of the ██████████ commander, he stated "[Petitioner] demonstrated poor and declining performance on ██████████ [sic]. Following a positive first observed fitness report in January 2019, he received a letter of instruction in September 2019, and verbal counseling from the Commanding Officer (CO) in October 2019. He then received a declining performance fitness report in November 2019. Despite these intrusive attempts by the CO to improve his performance, [Petitioner] failed to respond with any noticeable effort. On the contrary, he demonstrated poor judgement, which led to CO's Non-Judicial Punishment in January 2020."

<sup>16</sup> This individual was the Commander, ██████████. He appears to have been the successor in command to the officer who denied Petitioner's NJP appeal in enclosure (10).

<sup>17</sup> It does not appear that the allegation of going from his appointed place of duty in violation of Article 86, UCMJ, was referred to the BOI.

<sup>18</sup> Per reference (d), "[a]n appointment of an officer may not be delayed ... for more than six months after the date on which the officer would otherwise have been appointed unless the Secretary concerned specifies a further period of delay." Per enclosure (17), this authority was delegated to the Commander, ██████████, on 2 November 2007.

Subj: REVIEW OF NAVAL RECORD OF ██████████, USN, ██████████

v. By memorandum dated 4 January 2021, Petitioner submitted his response to enclosure (3), requesting that the SECNAV approve his permanent promotion to LCDR effective on his previously scheduled promotion date of 1 August 2020. In this response, he admitted to his “error of judgment” on 11 December 2019, and claimed to have learned from it while reiterating his version of the incident that he had previously stated in enclosure (7) (see paragraph 3h above). In further support of his request, he cited to the BOI findings and recommendation, suggesting that the entirety of his service record rebutted the allegation of substandard performance of duty. See enclosure (21).

w. By memorandum dated 12 January 2021, the ██████████ commander endorsed and forwarded enclosure (21), maintaining his recommendation that Petitioner’s name be removed from the promotion list. See enclosure (22).

x. By e-mail dated 19 February 2021, Petitioner’s new command sought authority from NPC to promote him to LCDR subject to his “expired” promotion delay.<sup>19</sup> In a response dated 21 February 2021, the NPC Post Selection Board Matters Section (PERS-833) Head responded that Petitioner’s promotion delay had not expired and that he cannot be promoted until a final determination of his qualifications for promotion is made by the SECNAV. This response also indicated that the promotion determination could not be acted upon until his personal statement and command endorsement are received, indicating that enclosure (21) had not been received by PERS-833 with the required command endorsement as of that date. See enclosure (23).

y. By e-mail dated 23 February 2021, the Commander, ██████████, endorsed and forwarded enclosure (21), with his recommendation that Petitioner be promoted. In making this recommendation, he specifically withheld comment on Petitioner’s conduct and performance onboard the ██████████, but noted that Petitioner had performed admirably and at the level of his other LCDRs during his year of temporary duty on the ESG-3 staff. See enclosure (24).

z. On 24 February 2021, Petitioner received an adverse FITREP for the reporting 1 February 2020 to 21 January 2021 documenting his NJP and DFC. Petitioner indicated his intention not to submit a statement in response to this FITREP. See enclosure (25).

aa. By memorandum dated 19 April 2021, the Commander, ██████████, endorsed and forwarded enclosure (21) without further comment. See enclosure (26).

bb. By memorandum dated 14 May 2021, Petitioner supplemented his response to the possible removal of his name from the promotion list, noting the favorable endorsement at enclosure (24) and providing a copy of his favorable FITREP for the reporting period 6 February 2021 to 14 May 2021, and the certificate for a Navy and Marine Corps Commendation Medal, awarded to him by the same flag officer for his “meritorious service while serving as Deputy

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<sup>19</sup> Petitioner was temporarily assigned to ██████████ (██████) following his after his NJP while pending action on the DFC request.

Subj: REVIEW OF NAVAL RECORD OF [REDACTED], USN, [REDACTED]

Assistant Chief of Staff for Material and Readiness for [REDACTED] from February 2020 through May 2021, both of which were issued by the author of Enclosure (24).<sup>20</sup> See enclosure (27).

cc. By memorandum dated 17 March 2022, the Chief of Naval Operations (CNO) recommended that the SECNAV remove Petitioner's name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list. In making this recommendation, the CNO stated that "[a] promotion board should have the opportunity to consider [Petitioner's] misconduct and DFC" and that he did "not have the necessary trust and confidence to recommend [Petitioner's] promotion to [LCDR]." See enclosure (28).

dd. On 26 April 2022, the SECNAV approved the recommendation of the CNO and removed Petitioner's name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list. See enclosure (28).

ee. By memorandum dated 5 May 2022, Petitioner was notified of the SECNAV's decision to remove his name from the FY 2020 Active-Duty Navy LCDR Line promotion list, and that this action constituted a failure of selection (FOS) for promotion. See enclosure (29).

ff. Petitioner requests relief on the following bases:

(1) The removal of his name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list violated references (d) – (f) because he was not notified in writing of the further delay in his promotion beyond the initial six months and because the total period of delay exceeded that authorized by law.<sup>21</sup>

(2) The removal of his name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list based upon the conduct alleged constituted excessive punishment in violation of the Eighth Amendment to the U.S. Constitution and the "Law of Proportionality." He admitted to his mistake and lapse of judgment and was appropriately punished for it, but that conduct should not result in the removal of his promotion selection and the resultant FOS for promotion which may ultimately result in his discharge, especially considering the totality of his naval career.

(3) The decision to remove Petitioner's name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list was made without consideration of his performance in his subsequent temporary assignment to ESG-3 or his current assignment to [REDACTED] ([REDACTED]), or the favorable endorsements from members of the chain of command.

(4) Petitioner's misconduct was not of the type which typically warrants DFC. Specifically, he cites to reference (g), which provides that DFC requests based upon a significant event must show the officer's "disregard or gross negligence associated with the performance of

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<sup>20</sup> An e-mail message contained within the record reflects that these materials were added to Petitioner's promotion package upon receipt on 14 May 2021.

<sup>21</sup> Petitioner cited to 10 U.S.C. § 14311 in his application, but that statutory provision did not apply to his promotion status. Petitioner's promotion was governed by reference (d).

Subj: REVIEW OF NAVAL RECORD OF [REDACTED], USN, [REDACTED]

[the officer's] duties," and suggests that his reported conduct did not suggest gross negligence. Rather, he received NJP for misconduct which "was isolated, minor, occurred in a matter of minutes, and was neither malicious, nor violent, nor associated with substance abuse, nor blatantly criminal, nor inherently wrongful." He also disputed the substandard performance of duty basis for the DFC request, on the same bases as his attorney had challenged it in enclosure (13), and asserted that the substandard performance of duty basis for the DFC request was not adequately documented in accordance with reference (g).

(5) Finally, Petitioner asserts that this isolated incident should not outweigh his 13 years of honorable service.

See enclosure (1).

gg. By memorandum dated 24 August 2022, the NPC Performance Evaluation Section provided an advisory opinion (AO) regarding Petitioner's request to remove his FITREP for the reporting period 1 February 2020 to 31 January 2021 for the Board's consideration, finding no error in the FITREP given the finality of Petitioner's NJP and DFC.<sup>22</sup> See enclosure (30).

hh. By memorandum dated 4 October 2022, the NPC Office of Legal Counsel provided an AO for the Board's consideration, recommending that Petitioner's request for relief be denied.<sup>23</sup> This AO addressed Petitioner's contentions as follows:

(1) Petitioner's argument that relief is warranted because his promotion delay exceeded the maximum period fails because the constitutional process provides the President with complete discretion in choosing whether or not to appoint an officer for promotion and no statute can alter the President's discretionary authority by providing for an automatic promotion, even after a delay in said promotion. The AO also noted that the statutory provision upon which Petitioner relies clearly states that officer promotions are discretionary and that an officer does not have a right to promotion.<sup>24</sup>

(2) Petitioner's argument that his removal from the promotion list was unjust punishment and an abuse of discretion fails because officer promotions are discretionary and an officer does not have a right to promotion per reference (e). Further, the AO notes that it is DON policy "to ensure that officers recommended for promotion remain mentally, physicaly, morally, and professionally qualified for promotion." The SECNAV carefully considered the information adverse to Petitioner's promotion, the CNO's recommendation, and the matters submitted by Petitioner for his consideration.

See enclosure (31).

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<sup>22</sup> This AO was e-mailed to Petitioner on 14 October 2022 to provide him that opportunity to respond. No response was subsequently received from Petitioner.

<sup>23</sup> See footnote 22 above.

<sup>24</sup> As noted previously, the statute which Petitioner cited does not apply to Petitioner's promotion since he is not a Reserve Component officer.

Subj: REVIEW OF NAVAL RECORD OF ██████████, USN, ██████████

## CONCLUSION:

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

The Board notes from the outset that Petitioner does not dispute the misconduct for which he received NJP. While he disputes the substandard performance of duty described by the ██████████ commander in his DFC request, he has repeatedly admitted to a lapse in judgment on 11 December 2019. Accordingly, the controversy regarding that conduct involves its relative severity, and whether such misconduct warranted the consequences incurred. In this regard, the Board found the consequences to be appropriate under the circumstances. The Board found that Petitioner has minimized the severity of his misconduct throughout this process. As an experienced officer who had been selected for promotion to LCDR, he knew or should have known not to abandon his post without relief. Petitioner was the command's representative on-board the ██████████ when preparations were underway throughout the ship for sailing on the following day. Any number of things could have happened during this period which required his immediate attention and guidance. Yet, despite this responsibility with which he was entrusted, he left the ship and utilized government resources in the form of the ship's duty driver and a government vehicle to perform a clearly personal errand. Petitioner could have sought permission to leave the ship to perform this task on his own, or he could have ensured that his duties were adequately covered by other qualified personnel, but instead he elected to leave his post without ensuring adequate coverage of his responsibilities simply to avoid a long walk upon the ship's return to port. He exacerbated this misconduct by further utilizing the duty driver and the government vehicle to pick up food at McDonald's before returning to the ship. In doing so, he not only placed the duty driver in the untenable position of having to correct the behavior of a commissioned officer, but he also continued to demonstrate a blatant disregard for or ignorance of the urgency of his CDO duties. This conduct was far more egregious than Petitioner has repeatedly characterized it, as reflected in the rejection of his argument by every single senior leader who has considered his argument, to include the SECNAV. Despite the egregiousness of Petitioner's misconduct, the only actual "punishment" that he received was the PLOR issued through NJP. That was the minimum level of punishment that Petitioner should have expected under the circumstances. The other consequences suffered by Petitioner did not constitute his "punishment," but rather were the natural collateral consequences of NJP for such blatant and egregious conduct received by an officer with Petitioner's experience. That the Petitioner appealed the decision of the SECNAV to remove his name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list less than three months after that decision was made, without offering any new information which was not available to either the SECNAV or any of the other senior officials and legal advisors who would have reviewed the action before he acted upon it, validated the Board's conclusion in this regard.

The Board found no merit in Petitioner's contention that the removal of his name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list constituted disproportionate punishment for his offense. First, as stated above, Petitioner's conduct was far more egregious than he believes it to be. His failure to recognize the quality of his behavior alone not only calls into question his readiness to serve as a LCDR, but it also negates the credibility of his contention in this regard. Next, as also stated above, the denial of Petitioner's promotion was not a "punishment" per se,

Subj: REVIEW OF NAVAL RECORD OF ██████████, USN, ██████████

but rather is the natural collateral consequence of an officer of Petitioner's experience receiving NJP for such conduct. Petitioner's conduct on 11 December 2019 raised reasonable doubts regarding the determination of the FY 2020 Active-Duty Navy LCDR (Line) PSB that he was among the best qualified officers for promotion to LCDR. It also raised reasonable doubts regarding Petitioner's qualifications to effectively serve in the next grade. Petitioner's removal from the promotion list ensured that those qualifications could be assessed by a PSB in light of the conduct which drew them into question. This action did not foreclose the possibility of Petitioner's future selection by the next PSB (although the Board agrees with Petitioner that such selection is unlikely given the NJP in his record), but rather assures that Petitioner's entire record is considered against those of his peers to ensure that only the best qualified officers are promoted to LCDR. Finally, the Board did not find the overall consequences to be disproportionate to the misconduct. The PLOR received through NJP was the minimum punishment that Petitioner should have expected under the circumstances – he easily could have received worse. That he lost his promotion as a result of this misconduct was a natural consequence of that misconduct and NJP; Petitioner was never entitled to that promotion and it was denied to him because his conduct raised reasonable doubts regarding his qualification for it. The Navy cannot afford to promote officers into positions or grades for which they are not qualified. Finally, the removal of Petitioner's name from the promotion list does not preclude his selection by either a subsequent PSB or a selective continuation board. Accordingly, if Petitioner's misconduct truly did not warrant the denial of his promotion pursuant to his selection by the FY 2020 Active-Duty Navy LCDR (Line) PSB as he contends, then he should theoretically have no problem being selected for either promotion by the next LCDR PSB which considers him for promotion or for continuation in his current grade (if available) with the benefit of his more recent favorable performance records.<sup>25</sup>

The Board found no merit in Petitioner's contention that he was not properly notified of the delay to his promotion. Petitioner is correct that references (d) – (f) require an officer to be notified in writing of the grounds for a promotion delay. Petitioner was so notified by enclosure (3), and acknowledged receipt of that notification in enclosure (4), long before his projected promotion date. While those references require written notice of a promotion delay, they contain no such notification requirement when action is taken to extend an existing delay beyond the initial six month period. Petitioner's original promotion delay was properly extended beyond the six month period on 20 November 2020 per enclosure (18), less than four months after his projected promotion date of 1 August 2020. As there was no statutory or regulatory requirement to do so, the failure to provide Petitioner notice of this extension was not an error. Even so, Petitioner was clearly aware that his promotion delay had been extended, as he did not submit his response to that delay until 4 January 2021.

Petitioner was correct that the overall period of delay exceeded that permitted by references (d) – (f). Those references provide that the appointment of an officer may not be delayed more than 18 months after the date on which the officer would otherwise have been appointed, and action

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<sup>25</sup> The Board does not mean to imply that it believes Petitioner's selection by a subsequent PSB to be likely under the circumstances, but notes that the unlikelihood of such selection (which Petitioner himself acknowledges) highlights the error in his argument that he should have been promoted despite his misconduct. The fact that his misconduct makes his future selection for promotion unlikely validates the determination that the same misconduct rendered him unqualified for promotion pursuant to his previous selection.

Subj: REVIEW OF NAVAL RECORD OF ██████████, USN, ██████████

on Petitioner's promotion was not taken by the SECNAV until 26 April 2022, nearly 21 months after the date that he would otherwise have been appointed. The expiration of this maximum period of delay does not, however, trigger the automatic appointment of such an officer to the next higher grade. The constitutional appointment process requires an appointment to be tendered to the officer to be effective, and that requirement was not fulfilled in this case because the SECNAV never determined Petitioner to be mentally, physically, morally, or professionally qualified for the promotion after it was delayed. The Board also found that this excessive delay did not warrant equitable relief. While the Board does not condone the excessive delay in resolving Petitioner's case, that delay did not prejudice Petitioner in any way. The SECNAV ultimately decided to remove Petitioner's name from the promotion list, so he was not deprived of any benefit that he would have received if his promotion delay had been acted upon in a more timely manner. Additionally, the delay in this case actually worked to Petitioner's favor, as it enabled Petitioner to accrue more favorable material in his record for consideration by the next PSB which considers him for promotion. It also extended the time since Petitioner's misconduct until his next promotion consideration, thus limiting any "recency bias" against Petitioner in future PSB's deliberations. Ironically, the excessive length of Petitioner's promotion delay actually benefits Petitioner in the end, as it enhances the admittedly small likelihood of his promotion selection by a subsequent PSB.

Petitioner's contention that the decision to remove his name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list did not take into consideration his subsequent performance while temporarily assigned to ██████████ or the favorable endorsement provided is false. Petitioner was allowed to supplement his response to the potential removal of his name from the promotion list with evidence of this performance at ██████████ at enclosure (27), and the record reflects that those matters were incorporated into the promotion package prepared for SECNAV action. Further, the CNO referenced the favorable endorsement of Petitioner's promotion made by the ██████████ commander based upon his personal observation of Petitioner's performance in enclosure (28). Accordingly, the SECNAV did consider Petitioner's subsequent performance at ██████████ when he decided to remove Petitioner's name from the promotion list. Petitioner's performance at ██████████ obviously was not considered in this decision since no record of it was available at the time that the decision was made, and because it was irrelevant to the matter at hand. The Board considered all of the matters that Petitioner provided with his application, including character references from numerous senior officers, but did not find that these matters warranted the relief that Petitioner seeks. These matters may be used to influence the decision of a future PSB, but they are not sufficient to render the SECNAV's decision to remove Petitioner's name from the promotion list as an injustice warranting relief. The decision to remove Petitioner's name from the promotion list was based upon Petitioner's conduct on 11 December 2019, and his subsequent performance did not change the nature of that conduct.

Finally, the Board found no error or injustice in Petitioner's DFC. Step 3 of paragraph 5 to reference (g) requires the officer requesting DFC based upon a significant event to "[p]rovide a detailed statement describing the facts and circumstances, which support the basis for the request" and to "describe the event involved, the officer's duties, and the disregard or gross negligence associated with the performance of those duties." Petitioner claims that the ██████████ ██████████ did not comply with this requirement because enclosure (12) "failed to suggest that [he] showed utter disregard for [his] duty or committed an act of "gross negligence." Review of

Subj: REVIEW OF NAVAL RECORD OF [REDACTED], USN, [REDACTED]

enclosure (12) reveals, however, that the [REDACTED] commander did in fact describe the event involved, Petitioner's duties as a CDO, and Petitioner's disregard and gross negligence associated with the performance of those duties. In addition to providing a brief narrative of Petitioner's conduct on 11 December 2019, the [REDACTED] commander incorporated by reference Petitioner's NJP and PLOR. These documents provided a very detailed description of the event of 11 December 2019 and, contrary to Petitioner's contention, they demonstrate both a clear disregard for and gross negligence in the performance of Petitioner's duties. As discussed above, Petitioner has repeatedly minimized the severity of his misconduct throughout this process, and he does so again here in suggesting that his conduct this conduct did not warrant a DFC. Petitioner's conduct on 11 December 2019 was absolutely of the type which would warrant DFC.

Petitioner also claims that enclosure (12) did not support the claim of substandard performance of duty made by the [REDACTED] commander. Step 4 of paragraph 5 to reference (g) requires the officer requesting DFC based upon substandard performance of duty over an extended period of time to "indicate what corrective actions were taken to improve or correct the officer's performance and the results of those actions. A special report of fitness is not required to support a DFC request; however, the request should document a chronology of precipitating events and evidence of command counseling and guidance." Enclosure (12) clearly complied with this requirement, as it revealed that Petitioner received a LOI on 9 September 2019 regarding the deficiencies discussed in footnote 10 above, and was verbally counseled for the deficiencies discussed in paragraph 3m above on 8 October 2019. These events, along with Petitioner's conduct on 11 December 2019, clearly establish Petitioner's substandard performance of duty between November 2018 and January 2020, despite extensive but unsuccessful efforts by the command to improve his performance. Although the verbal counseling of 8 October 2019 was not documented in the record, it was documented in enclosure (12) in significant detail and Petitioner does not dispute that it occurred. Petitioner's contention that there is "no evidence set forth anywhere to the effect that [he] ignored the guidance offered therein or failed to take the corrective measures suggested" is belied by the fact that corrective measures continued to be necessary for an officer of his experience. Finally, Petitioner's contention that the evidence of his favorable performance while subsequently assigned to [REDACTED] and [REDACTED] is irrelevant, as such subsequent conduct has no bearing on whether he should have been DFC from the [REDACTED].

The Board found no relevance to the findings of the BOI with regard to Petitioner's DFC. Although the BOI found that the preponderance of the evidence did not support the allegation of substandard performance of duty over an extended period, that finding was not unanimous and was not supported by the multiple senior officers in the chain of command who either made or endorsed the DFC request. The BOI reviewed the evidence of Petitioner's alleged substandard performance over an extended period through a different lens and for a different purpose than did the chain of command which considered it for DFC purposes. Further, there was sufficient evidence for a reasonable person to find the substandard performance of duty over an extended period in the record, as evidenced by the fact that one BOI member and the entire chain of command did so. Accordingly, the Board did not find the conclusion of the BOI in this regard to be persuasive.



Subj: REVIEW OF NAVAL RECORD OF [REDACTED], USN, [REDACTED]

Having found no error or injustice in Petitioner's DFC, the Board also found no error in the adverse FITREP issued to Petitioner for the reporting period 1 February 2020 to 31 January 2021 which referenced that DFC or in the presence of other materials in Petitioner's record referencing that DFC.

#### 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.

2/3/2023



Executive Director

Subj: REVIEW OF NAVAL RECORD OF [REDACTED], USN, [REDACTED]

SECRETARY OF THE NAVY DECISION:

[REDACTED] Board Recommendation Approved (Deny Relief – I concur with the Board’s findings and recommendation, and therefore direct that no corrective action be taken on Petitioner’s naval record.)

— Petitioner’s Request Approve (Full Relief – Petitioner has demonstrated that his DFC and my previous decision to removal his name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list was an injustice under the circumstances. Accordingly, I do not concur with the Board’s findings and recommendation, and direct that Petitioner’s naval record be corrected to remove all references to his DFC, to include his adverse FITREP for the reporting period 1 February 2020 to 31 January 2021. I also direct the removal from Petitioner’s naval record of any reference to my previous decision to remove Petitioner’s name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list, and that he be promoted off of that list with an effective date of rank of 1 August 2020.)

— Petitioner’s Request Partially Approved (Partial Relief – I concur with the Board’s findings with regard to my previous decision to remove Petitioner’s name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list due to his misconduct, but do not concur with those findings as they pertain to Petitioner’s DFC. Petitioner has demonstrated that his DFC from the [REDACTED] was unjust. Accordingly, I direct that Petitioner’s naval record be corrected to remove all references to his DFC, to include his adverse FITREP for the reporting period 1 February 2020 to 31 January 2021. No corrective action is to be taken with regard to the removal of his name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list.)

— Petitioner’s Request Partially Approved (Partial Relief – I concur with the Board’s findings with regard to Petitioner’s DFC from the [REDACTED], but do not concur with those findings as they pertain to my previous decision to removal Petitioner’s name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list. Petitioner was demonstrated that this decision was unjust under the circumstances. Accordingly, I direct the removal from Petitioner’s naval record of any reference to my previous decision to remove Petitioner’s name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list, and that he be promoted off of that list with an effective date of rank of 1 August 2020. No corrective action is to be taken with regard to Petitioner’s DFC or his FITREP for the reporting period 1 February 2020 to 31 January 2021.

[REDACTED]

Secretary of the Navy

Date: APR 12 2023