



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
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ARLINGTON, VA 22204-2490

██████████
Docket No: 7095-22
0980-22
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF ██████████ (RETIRED) ██████████
██████████, USMCR, XXX-XX ██████████

Ref: (a) 10 U.S.C. § 12686
(b) 10 U.S.C. § 1552
(c) MCO 1800.11A, Policy and Procedures for Reserve Component (RC) Member Service Beyond 16 Years of Active Duty (AD) Service, 27 March 2020
(d) USD (P&R) Memo, subj: Limitation on the Authority of Military Department Correction Boards, 10 February 2015
(e) MCO 1800.11, Policy and Procedures for Reserve Component (RC) Member Service Beyond 16 Years of Active Duty Service, 27 October 2009
(f) 10 U.S.C. § 14502
(g) SECNAVINST 1402.1, Special Selection Boards, Supplemental All-Fully-Qualified-Officers Lists, and Special Boards, 29 April 2019
(h) MARADMINS 154/17, subj: FY19 U.S. Marine Corps Officer Promotion Selection Boards, dtg 291040Z MAR 17
(i) ASN (M&RA) Memo, subj: Delegation of Authority to the Board for Correction of Naval Records (BCNR) to Direct the Convening of a Special Selection Board (SSB), Supplemental All-Fully-Qualified Officers List (AFQOL), and Special AFQOL, 28 November 2017

Encl: (1) Opinion and Order, in the case of *[Petitioner] v. The United States*, in the United States Court of Federal Claims, Case No. ██████████, filed 1 November 2021
(2) Order, in the case of *[Petitioner] v. The United States*, in the United States Court of Federal Claims, Case No. ██████████, filed 6 January 2022
(3) DD Form 149 (w/enclosures)
(4) Petitioner's Counsel Letter, RE: Correction of the Military Records of [Petitioner] in Accordance with the Opinion and Order of the United States Court of Federal Claims, Case No. ██████████, 7 February 2022
(5) BCNR Memo 0980-22, subj: Review of Naval Record of [Petitioner], 13 July 2022
(6) Order, in the case of *[Petitioner] v. The United States*, in the United States Court of Federal Claims, Case No. ██████████, filed 23 September 2022

1. On 1 November 2021, the United States Court of Federal Claims (COFC) found that the Marine Corps could not lawfully require Petitioner to waive sanctuary protection pursuant to reference (a) as a condition for extending him on active duty for completion of the Disability

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

Evaluation System (DES) process. Having made this determination, the COFC also found that Petitioner would have remained on active duty and achieved the sanctuary protection of reference (a) on 25 March 2017, but for the Marine Corps' unlawful use of its waiver authority. See enclosure (1).

2. On 6 January 2022, the COFC remanded the case filed by the Subject, hereinafter referred to as Petitioner, to the Board for Correction of Naval Records, hereinafter referred to as the Board, with instructions to address four specific questions in accordance with enclosure (1).¹ See enclosure (2). Pursuant to reference (b) and in accordance with enclosure (2), Petitioner submitted enclosure (3) for consideration on 7 February 2022 via two separate e-mails. Due to a clerical error during the process of receiving Petitioner's matters however, a nine-page brief dated 7 February 2022 and signed by Petitioner's counsel was not included among the documents provided to the Board for review.² See enclosure (4).

3. The Board originally reviewed Petitioner's allegations of error or injustice in accordance with the COFC's Order at enclosure (2) on 9 June 2022, and recommended in Docket No. 0980-22 that Petitioner's record be corrected to reflect that he remained on active duty until 17 April 2017.³ In making this determination, the Board found that the Secretary of the Navy (SECNAV) would have (and should have) exercised his authority under reference (a) to release Petitioner from active duty if he had mistakenly been permitted to enter sanctuary status without a waiver.⁴

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

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

² An internal review of this matter concluded that Enclosure (4) was accidentally excluded from the matters presented to the Board because the Board's administrative staff mistakenly believed Petitioner's matters to be complete and the two e-mails to be duplicative. The first e-mail received included Petitioner's signed DD Form 149 and included the URL for a secure transfer site to obtain the exhibits listed on the DD Form 149, while the second e-mail, received several hours later, included the nine-page brief at Enclosure (4). As both of these e-mails had the same subject line and the only appreciable difference in their content was in the file name of the attached .pdf document, the employee who opened the two e-mails, overlooking the file name discrepancy, mistakenly presumed the second e-mail to be duplicative with the first. When Petitioner's matters were subsequently received via FEDEX, they were discarded when the Board's administrative staff found the DD Form 149 to match that already received and added to Petitioner's case file.

³ This was the date that Petitioner was notified that the Physical Evaluation Board (PEB) found him fit for continued service.

⁴ The Board also disagreed with the COFC conclusion that the Marine Corps could not lawfully require Petitioner to waive sanctuary protection pursuant to reference (a) as a condition for extending him on active duty for completion of the DES process, but presumed that Petitioner remained on active duty and entered the sanctuary protection of reference (b) in deference to the COFC's ruling.

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

On 3 August 2022, the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN (M&RA)) approved the Board's findings and recommendation in Docket No. 0980-22. See enclosure (5).

4. By Order dated 23 September 2022, the COFC remanded Docket No. 0980-22 to the Board to reconsider its prior decision in light of the matters submitted by Petitioner but not previously considered by the Board in Docket No. 0980-22.⁵ See enclosure (6).

5. Pursuant to the Order of the COFC at enclosure (6), the Board reconsidered its decision in Docket No. 0980-22 on 19 October 2022 in light of the contents of enclosure (4), and confirmed its previous decision. Nothing contained within enclosure (4) changed or raised any doubt for the Board regarding its previous decision. Documentary evidence considered by the Board included the enclosures, to specifically the nine-page brief not previously considered by the Board at enclosure (4); the entirety of the case file for Docket No. 0980-22, which included Petitioner's DD Form 149 and Exhibits A-I which were referenced within it; relevant portions of Petitioner's naval record; and applicable statutes, regulations, and policies. As the Board confirmed its previous decision, the conclusion of Docket No. 0980-22 is adopted and incorporated by reference herein. This decision document should be read in conjunction with enclosure (5).

6. With the exception of the second sentence in subparagraph 4nn, which erroneously stated that Petitioner did not submit additional argument with his matters, the findings stated in paragraph 4 of the decision document for Docket No. 0980-22 are adopted and incorporated herein. Except for Petitioner's characterization of his discharge on 21 March 2017 as involuntary, improper, illegal, and/or unlawful, and his statement that the Marine Corps "unlawfully terminated" his active duty orders, the factual background provided by Petitioner in enclosure (4) is not in dispute. As stated in the decision document for Docket No. 0980-22, the Board found that Petitioner's active duty orders expired on 21 March 2017, so they were not "terminated" as Petitioner claims.

7. Petitioner made the following arguments in enclosure (4):

a. He remains on active duty pursuant to the constructive service doctrine to this day. Specifically, Petitioner asserts that he met the requirements for application of the constructive service doctrine because he was on active duty orders exceeding 30 days; his active duty orders were unlawfully and involuntarily terminated; and he demonstrated that he was ready, willing, and able to return to active duty. Accordingly, Petitioner argued that the Board must correct his record to reflect that he remained on active duty through the date on which he is offered and accepts further active duty orders or the date that the Marine Corps properly processes his retirement.

⁵ The exhibits attached to Enclosure (4) were considered by the Board in Docket No. 0980-22, as the link to retrieve them was included with the DD Form 149 submitted in the first e-mail described in footnote 2 above.

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

b. The Board must apply the post-sanctuary procedures in reference (c) to allow Petitioner to continue on active duty orders or process his retirement.⁶ He asserts that since he intends to continue on his current active duty orders, the Board is obligated to inquire of the Marine Corps whether a validated requirement exists that cannot be met by the active component. If such a validated requirement exists, and he qualifies for it, Petitioner asserts that he must have the opportunity to elect to fulfill the requirement under reference (c). Alternatively, if no such validated requirement exists, then the Marine Corps must arrange for Petitioner's retirement in accordance with all appropriate laws, regulations, and orders. He further asserted that if the Board elected to retire Petitioner that it "must adjust [his] retirement pay (taking into account [Petitioner's] promotion and adjusted credit for active duty service), conduct a retirement physical, arrange for a retirement [permanent change of station], conduct a retirement ceremony, and fulfill all other statutory and regulatory requirements for retirement."⁷

c. The Marine Corps cannot utilize Secretarial removal authority under reference (a) because Petitioner has served 20 years on active duty. He asserts that the two-year period in which the Marine Corps could have sought to remove Petitioner notwithstanding sanctuary under reference (a) has passed. He further asserts that the Marine Corps could have utilized the Secretarial removal procedure instead of unlawfully terminating his orders, but deliberately elected not to do so, and that the Court's phrasing suggests that the Marine Corps' opportunity to exercise this option has long since passed. Finally, Petitioner suggests that Secretarial removal is inappropriate in this case because those procedures are typically reserved for cases of service member misconduct.

⁶ The post-sanctuary procedures cited by Petitioner are found in paragraph 14 of enclosure (1) to reference (c), which provides that:

Once a [reserve component (RC)] Marine has completed 20 years [active duty (AD)] and is entitled to a regular retirement... the following options apply:

- a. retire at 20 years AD in the highest grade satisfactorily served on AD;
- b. retire at 20 years AD in the highest grade satisfactorily served and request to be retired/retained or retired/recalled on AD to fill an open validated requirement per paragraph 15 [of reference (c)];
- c. release from AD orders and defer regular retired pay to continue service on the [Reserve Active Status List (RASL)], thus retaining promotion eligibility, and ability to attain [time in grade] Reserve retirement requirements. Once the RC Marine reaches service limitations or elects to retire, the Marine has two options:

- (1) Request a regular retirement (AD) in the highest grade satisfactorily served on AD. Retirement pay shall begin immediately;
- (2) Request a Reserve retirement awaiting pay at age 60 (or reduced eligibility age...) in the highest grade satisfactorily served on the RASL;

- d. continue on current AD orders as per assignment practices... Follow-on AD orders shall only be approved by [the Deputy Commandant (of the Marine Corps) for Manpower and Reserve Affairs (DC M&RA)] to meet a validated requirement that cannot be met by the active component.

⁷ The Board notes that this assertion grossly misstates its responsibility and authority under any circumstances.

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

d. Petitioner must be awarded back pay and allowances. Specifically, he asserts that he is entitled to back pay in an amount equal to what he would have been paid if he remained on active duty service from 21 March 2017 through the date on which the Marine Corps complies with the post-sanctuary procedures cited in footnote 6 above. He further asserts that these amounts should be further adjusted according to the date upon which the Board directs his promotion to O-6.

e. The Secretary and the Marine Corps must convene promotion boards to consider Petitioner's promotion to O-6. He asserts, erroneously, that it is well-settled that the Board may direct promotion where a service member has been unlawfully separated, and that the Board should therefore correct his record to reflect a promotion to O-6 in 2017, with a date of rank of 1 August 2018. He claims that the Marine Corps' unlawful termination of his active duty orders deprived him of the opportunity generate fitness reports, attend professional military educational programs, earn awards, and undertake other professional activities that would have weighed in favor of his promotion. Although Petitioner admits that it is impossible as a practical matter for a promotion board to fairly consider his record for promotion given the favorable matters that he claims to have been denied, he asserts that he should nonetheless be promoted based upon his service records and the favorable fitness reports and recommendations that he attached as exhibits to enclosure (3).

f. Petitioner must be reimbursed for out-of-pocket medical expenses he incurred because of the Marine Corps' unlawful termination of his orders. Specifically, he asserts that he should be reimbursed for the medical expenses that he has incurred beyond TRICARE coverage since the Marine Corps' unlawful termination of his active duty orders. In making this assertion, Petitioner misquotes reference (b) with regard to the Board's ability to make such payments.⁸

CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Board reaffirms its decision from Docket No. 0980-22. The conclusions stated in the decision document for Docket No. 0980-22 are adopted and incorporated herein.

The Board found no merit in Petitioner's claim that he was entitled to constructive service credit (CSC) from the date of his discharge through the date that the Marine Corps complies with the post-sanctuary procedures of reference (c). The post-sanctuary procedures of reference (c) cited by Petitioner presume that the RC Marine in question has completed 20 years of AD and is entitled to a regular retirement. Contrary to Petitioner's contention, he did not meet this requirement. The Board has already directed that Petitioner receive CSC from the date of his actual discharge through the date that he would have been properly discharged if allowed to enter

⁸ Petitioner states that paragraph (c) of reference (b) empowers the Board to pay "a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits." This provision is actually the appropriation which empowers the SECNAV to make such payments, and it restricts such payments to losses incurred as a result of the correction of a record by the Board. The Board does not make or direct such payments; its authority is limited to the correction of errors or injustices in naval records. Per 32 C.F.R. § 723.10(c), the "[s]ettlement of claims shall be upon the basis of the decision and recommendation of the Board, as approved by the Secretary or his designee. Computation of the amounts due shall be made by the appropriate disbursing activity."

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

into sanctuary status. As stated in Docket No. 0980-22, that date was 17 April 2017. This conclusion was based upon the more applicable procedures of reference (c), which provide that "RC Marines who inadvertently execute orders or extensions to orders that place them in sanctuary without DC M&RA approval are advised that DC M&RA may involuntarily release the RC Marine from AD during the sanctuary period."⁹ Petitioner was a RC Marine who inadvertently reached sanctuary status without approval of the DC M&RA, in this case due to the COFC's ruling. As such, the Board, which acts on behalf of the SECNAV in every action it takes, determined that the Secretary would have (and should have) exercised his authority to remove Petitioner from active duty while in a sanctuary status. Although this determination was within the Board's authority to make alone, the decision authority for Docket No. 0980-22 was elevated to the Acting ASN (M&RA) to ensure that the Board's judgment in this regard matched that of the official who would actually make such a decision.¹⁰ The Acting ASN (M&RA) confirmed on 3 August 2022 that the Board's assessment was correct in this regard. As such, Petitioner's record was corrected to reflect that he was properly removed from active duty while in a sanctuary status pursuant to Secretarial authority effective 17 April 2017. Therefore, Petitioner did not reach 20 years of service, so the procedures of reference (c) that he cites were inapplicable to his case.

The Board also found no merit in Petitioner's contention that the Secretarial removal authority of reference (a) is no longer an option because he has served 20 years on active duty. As discussed above, Petitioner did not reach 20 years of active duty service. Based upon the correction of his record reflected in Docket No. 0980-22, he was properly discharged from active duty, pursuant to the Secretary's removal authority, effective 17 April 2017, nearly two years shy of 20 years of active duty service. Given the circumstances, Petitioner's contention that his entry into sanctuary status was a deliberate act by the Marine Corps is disingenuous at best. It was also disingenuous for Petitioner to assert that the Marine Corps chose not to pursue the option of a Secretarial removal at the time, as it was only due to the Order of the COFC, more than four years after the fact, that Petitioner was retroactively entered into sanctuary status. As Petitioner has not reached 20 years of active duty service, his contention that the two-year period in which the Marine Corps could have removed him from active duty despite his sanctuary status has passed is false. The Board also did not concur with Petitioner's contention that the Court's phrasing indicated that the opportunity to exercise the Secretarial removal authority has passed. Enclosure (2) informed the Board that the Court rejected a remand order proposed by the Petitioner which would have prevented the Board "from effectively addressing in the first instance issues that by statute are left to the discretion of the Secretary of the Navy."

⁹ Paragraph 4(l) of enclosure (1) to reference (e), which was in effect during the period in question, provided that RC Marines who inadvertently receive orders or extensions to orders that place them in sanctuary without DC M&RA approval are advised that the DC M&RA may request that the SECNAV involuntarily relieve the RC Marine from active duty during the sanctuary period.

¹⁰ Section 6e of Enclosure (1) to SECNAVINST 5420.193 delegates authority to the Executive Director of the Board to take final corrective action on behalf of the SECNAV on all petitioners for relief properly before it, except under certain stated circumstances. One of those circumstances is when the petitioner is in a category which has been reserved for decision by the SECNAV, and one of those categories so reserved are "[s]uch other petitions as, in the determination of the Office of the Secretary or the Executive Director [of the Board], warrant Secretarial review." As the Board's finding in Docket No. 0980-22 represented a hypothetical finding of what the ASN (M&RA) would have done under the circumstances, the Board's Executive Director determined that it warranted such review to confirm that the Board's finding was accurate in this regard.

Subj: REVIEW OF NAVAL RECORD OF ██████████ (RETIRED) ██████████
██████████, USMCR, XXX-XX-██████████

Considering that the Court had already determined that Petitioner entered into sanctuary protection, the only remaining issue reserved by statute to the discretion of the SECNAV that the Board could identify was whether the Secretary's removal authority would have or should have been exercised. As stated previously, the Board determined that it would have, and the Acting ASN (M&RA) concurred. Finally, Petitioner's statement that Secretarial removal authority is typically reserved for cases of service member misconduct is simply false. Reference (c) provides that Secretarial removal may be used, and should be expected, in cases such as this one where a RC Marine inadvertently reaches sanctuary status absent proper approval to do so. Accordingly, the Board was not persuaded by Petitioner's argument that the Secretarial removal authority of reference (a) was not an option.

As the Board stated in Docket No. 0980-22, Petitioner's back pay and allowances due for the CSC provided between 21 March 2017 and 17 April 2017 will be determined and paid by the Defense Finance and Accounting Service (DFAS). The Board's decision in Docket No. 0980-22 directed that DFAS conduct an audit of Petitioner's finance records for this purpose.¹¹ It is not the Board's function to determine what, if any, back pay and allowances may be due as a result of the corrections made upon the Petitioner's naval record.

The Board is not empowered to direct the reimbursement for out-of-pocket medical expenses incurred by Petitioner during the period that he otherwise would have been on active duty. The Board notes, however, that Petitioner was transferred to the Line of Duty benefits program upon his release from medical hold status, so he had the ability to have his medical expenses for the condition(s) which were pending review by the PEB covered since he refused to consent to a sanctuary waiver to remain on active duty for such treatment. Petitioner may submit a claim for reimbursement of his out-of-pocket medical expenses from the Defense Health Agency.

Finally, contrary to Petitioner's contention, the Board does not have the authority to grant Petitioner the promotion relief that he requests. Per reference (d), the Board is explicitly prohibited from correcting records to show that an officer has been appointed to a certain grade when the officer has not been appointed to that grade by the President or the Secretary of Defense. Accordingly, the Board could not direct the promotion relief requested by Petitioner even if it believed such relief to be warranted.

Although not specifically requested by Petitioner, the Board considered whether it would be appropriate to direct the convening of a special selection board (SSB) to consider Petitioner for promotion to colonel. References (f) and (g) provide that an SSB may be convened in the case of an officer who was not considered by a regularly scheduled promotion selection board (PSB) due to an administrative error or who was unfairly considered and not selected for promotion. According to reference (h), the next PSB that would have considered Petitioner for promotion to colonel was scheduled for 3 October 2017. Since the Board has corrected Petitioner's record to reflect that he was discharged on 17 April 2017, Petitioner did not miss any regularly scheduled PSB due to his premature discharge. There is also no evidence Petitioner's record was unfairly considered by any of the five PSBs which had previously considered and failed to select Petitioner for promotion to colonel. Accordingly, there was no basis in statute or regulation to

¹¹ It is the Board's understanding that this process has been placed on hold pending resolution of the present litigation.

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

grant Petitioner a SSB. Per reference (i), the Board must fully comply with the statutory and regulatory requirements and limits related to SSBs when exercising its delegated authority to convene a SSB on behalf of the SECNAV. As there was no statutory or regulatory basis for a SSB in Petitioner's case, the Board could not direct such relief even if it believed it to be warranted.

Even if it was within the authority of the Board to grant the promotion relief sought by the Petitioner (or to direct the convening of an SSB), the Board did not find such relief to be warranted. Petitioner asserted that his premature discharge from active duty deprived him of the opportunity to generate certain records which may have been favorably considered in future PSBs. As the Board granted Petitioner only 27 days of CSC, the Board found it highly unlikely that Petitioner would have generated sufficient additional matters to warrant his promotion. The Board also did not find Petitioner's record or his letters of recommendation to warrant such relief, as none of the previous five, or subsequent four, PSBs which considered Petitioner for promotion to colonel believed his record warranted such consideration. Finally, the Board is aware of nothing which would have prevented Petitioner from seeking another period of active duty subsequent to his discharge pursuant to a sanctuary waiver. Such additional active duty service could have provided him the opportunity to earn the favorable promotion consideration (as well as the additional time necessary to qualify for a regular retirement) that he now seeks from this Board.

RECOMMENDATION:

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

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

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

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

That a copy of this record of proceedings (and that for Docket No. 0980-22) be added to Petitioner's naval record.

That no further corrections be made to 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.

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

5. The foregoing action of the Board is submitted for your review and action.

11/7/2022

X

[REDACTED]
Executive Director

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

Board Recommendation Approved (Partial Relief – I reaffirm the Board’s findings and my previous approval of the Board’s findings and recommendation for Docket No. 0980-22. Accordingly, I approve the Board’s findings and recommendations, and direct the corrections to Petitioner’s record reflected in the Board’s recommendation above.)

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

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

Date: 12-02-2022