



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

[REDACTED]
Docket No. 6272-23
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]
[REDACTED] USMC

Ref: (a) 10 U.S.C. § 1552
(b) MCO 5800.16, Legal Support and Administration Manual (LSAM), Volume 15
(Officer Misconduct and Substandard Performance), 8 August 2018
(c) SECNAVINST 1920.6D, Administrative Separation of Officers, 24 July 2019
(Officer Administrative Separation)
(d) 10 U.S.C. § 8167
(e) SECNAVINST 1420.3, Department of the Navy Commissioned Officer Program,
28 March 2019
(f) USD (P&R) Memo, subj: Limitation on the Authority of Military Department
Correction Boards, 10 February 2015

Encl: (1) DD Form 149 with enclosures
(2) [REDACTED] CO Memo [REDACTED], subj: Report of No Misconduct in the case of
[Petitioner], [REDACTED]
(3) CMC Action Memo, subj: Promotion Recommendation In the Case of [Petitioner],
8 July 2022
(4) [REDACTED] CG Memo [REDACTED], First Endorsement on Enclosure
(2), subj: Report of Misconduct in the case of [Petitioner], [REDACTED]
(5) Petitioner's Memo 1621 C 472, subj: Acknowledgement of Receipt of Report of
Misconduct and Inclusion of Adverse Information in Official Military Personnel File,
undated
(6) NAVMC 118(11), Administrative Remarks, 23 October 2020
(7) Petitioner's Memo, subj: Response to Formal Counseling, 30 October 2020
(8) [REDACTED] CG Memo [REDACTED], Second
Endorsement on Enclosure (2), subj: Report of Misconduct in the case of [Petitioner],
[REDACTED]
(9) [REDACTED] Memo [REDACTED], subj: Administrative Separation in case of [Petitioner],
[REDACTED]
(10) [REDACTED] Memo [REDACTED], subj: Notification of Recommendation for
Administrative Separation in the case of [Petitioner], [REDACTED]
(11) Petitioner's Memo 1920 C 472, subj: Acknowledgment of Notification of Separation
Recommendation, 24 March 2021
(12) Petitioner's Memo, subj: Response to Administrative Separation, 10 April 2021
(with attached matters)
(13) [REDACTED] CG Memo [REDACTED], First Endorsement of Enclosure

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- (12), subj: Administrative Separation in the case of [Petitioner], [REDACTED]
- (14) [REDACTED] CG Memo [REDACTED], Second Endorsement of Enclosure (12), subj: Administrative Separation in the case of [Petitioner], [REDACTED]
- (15) [REDACTED] Memo [REDACTED], subj: Termination of Administrative Proceedings and Notification of Promotion Withhold in case of [Petitioner], [REDACTED]
- (16) Petitioner's Memo, subj: Promotion Request, 13 January 2022
- (17) [REDACTED] Memo [REDACTED], subj: Promotion Recommendation in the case of [Petitioner], [REDACTED]
- (18) DD Form 149 (2 November 2022) with enclosures
- (19) BCNR Letter WLR Docket No. 8307-22, 11 March 2023

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 removal from his naval record of a Report of Misconduct (ROM), dated 2 October 2020; removal of any and all adverse material from his naval record pertaining to the events associated with the aforementioned ROM; promotion to the rank of Captain (with back pay and allowances); and any other relief warranted.¹
2. The Board considered Petitioner's allegations of error or injustice on 8 August 2023 and, pursuant to its regulations, found insufficient evidence of any error or injustice warranting relief. Documentary material considered by the Board included the enclosures; relevant portions of Petitioner's naval records; and applicable statutes, regulations, and policies.
3. Having reviewed all of the evidence of record pertaining to Petitioner's allegations of error or injustice, the Board found 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.
 - b. On or about July 2013, while enrolled as a Midshipman at the United States Naval Academy (USNA), Petitioner was recorded having sex with what appeared on the video to be an unsuspecting woman by a camera surreptitiously placed in the room by a fellow male Midshipman. See enclosure (2).
 - c. In January 2020, a civilian USNA employee discovered the recording referenced in paragraph 3b above on a discarded external hard drive on the USNA grounds. See enclosure (3). An investigation of the incident was subsequently initiated by the Naval Criminal Investigative

¹ To the extent that Petitioner requests removal of the adverse information in his naval record, the present application constitutes a request for reconsideration of the Board's prior denial of relief in Docket No. 8307-22. Petitioner offers a new argument and additional letters of support as new material not previously considered by the Board in support of this reconsideration request. The present application, however, includes an original request to correct Petitioner's naval record to reflect his promotion to Captain. This request elevates the approval authority of this case to the SECNAV, as such relief involves review of an action previously taken by the SECNAV.

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Service (NCIS), during which Petitioner exercised his rights pursuant to Article 31, Uniform Code of Military Justice (UCMJ), and declined to provide a statement. See enclosure (2).

d. On 4 February 2020, the Fiscal Year 2021 (FY21) United States Marine Corps (USMC) Captain Promotion Selection Board (PSB) convened and selected Petitioner for promotion to Captain.² His projected promotion date to Captain was 1 March 2021, but his appointment was withheld pending resolution of the misconduct related to the contents of the video recording referenced above.³ See enclosure (3).

e. On 3 June 2020, the NCIS closed its investigation pertaining to the above reference recording after being unable to identify the woman in the video and determining that the conduct in question was beyond the statute of limitations. See enclosure (3).

f. On 9 July 2020, the Commanding Officer, [REDACTED] ([REDACTED]), prepared a Report of No Misconduct, in which he found that Petitioner did not commit any of the alleged misconduct.⁴ Specifically, he found that the preponderance of the evidence failed to prove that Petitioner knew the hidden camera was present and recording. Accordingly, he recommended that the case against Petitioner be closed. See enclosure (2).

g. By memorandum dated 2 October 2020, the Commanding General (CG), [REDACTED] ([REDACTED]), non-concurred with the determination made by the [REDACTED] commander that Petitioner did not commit any misconduct. Specifically, he prepared a ROM recording his conclusion that Petitioner violated Article 120c, UCMJ, by unlawfully and knowingly videotaping, filming, or recording by any means the private areas of another person, without that person's consent and under circumstances for which that person has a reasonable expectation of privacy; and Article 92, UCMJ, by violating the applicable USNA instruction in effect at the time of the misconduct by committing sexual misconduct on the USNA grounds.⁵ He stated that his conclusions "are based on a comprehensive review of the evidence," and cited the following instances from the video in question as being particularly compelling to his conclusion:

(1) Prior to the offense being committed, Petitioner's roommates implied an understanding of what was about to happen when one addressed the camera and stated, "Good luck, [Petitioner]."

(2) Petitioner glanced at the camera several times throughout the sexual activity in question;

² The convening date of the FY21 USMC Captain PSB was announced in MARADMIN 349/19, dtg 201500Z Jun 19.

³ The results of the FY21 USMC Captain PSB were published in ALNAV 057/20 on 19 May 2020, but Petitioner's name was withheld from this list.

⁴ The [REDACTED] Commander purported to submit this Report of No Misconduct in accordance with reference (b), but he was not a general court-martial convening authority (GCMCA) and reference (b) provides that it is the responsibility of the GCMCA to determine whether or not a Marine Officer actually committed reported misconduct.

⁵ The applicable USNA instruction was COMDTMIDNINST 1610.2E, dated 17 August 2010.

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(3) At the 18:27 mark in the video, Petitioner looked directly at the camera, smiled, and raised his eyebrows while the woman was performing fellatio upon him; and

(4) At the 33:45 mark in the video, Petitioner covered up the camera with what appeared to be a blanket or a sheet when the sexual activity was over.

He concluded that, taken as a whole, "the evidence conclusively demonstrates that [Petitioner] knew that his sexual acts with the woman were being videotaped, and that her private areas were included in this video without her consent." Since the statute of limitations had already expired, the [REDACTED] stated that he would issue Petitioner a formal counseling. He further stated this recommendation that Petitioner be retained in the USMC despite this misconduct. See enclosure (4).

h. On 23 October 2020, Petitioner acknowledged receipt of the ROM referenced in paragraph 3g above, and indicated his desire to submit a statement in response. See enclosure (5).

i. On 30 October 2020, the [REDACTED] CG formally counseled Petitioner for his misconduct. Specifically, this counseling documented that Petitioner knowingly and unlawfully filmed another person's private areas without their consent, and committed sexual acts on the USNA grounds, in violation of the UCMJ. Petitioner indicated his intent to submit statement in response to this counseling. See enclosure (6).

j. By memorandum dated 30 October 2020, Petitioner provided a response to the counseling referenced in paragraph 3i above. He expressed regret for his actions, describing himself as "much younger, immature, and spiritually adrift during [his] early college years." He further stated that he had since "consciously made and taken deliberate strides in becoming a better person in [his] personal, spiritual, and professional life." Finally, he claimed to have learned from his mistakes, and reaffirmed his dedication to demonstrating the standard that he was entrusted to uphold as a Marine officer. He concluded by asking to be judged on his performance and not on his mistakes from long ago. See enclosure (7).

k. The ROM referenced in paragraph 3g above, along with the resulting counseling statement and Petitioner's response thereto, was subsequently forwarded through the chain of command. By memorandum dated 16 December 2020, the CG, [REDACTED] [REDACTED] endorsed the ROM and recommended that the case against Petitioner be closed. Although Petitioner's actions were not in keeping with the high standards of conduct placed upon a naval officer, the [REDACTED] CG noted that the incident had occurred seven years prior while Petitioner was a Midshipman at the USNA and before his commissioning as an officer. He found that Petitioner demonstrated genuine remorse for his actions, and that the matter was appropriately addressed through administrative counseling. Although the [REDACTED] CG recommended that the case be closed, he also recommended that both the ROM and the counseling provided by the [REDACTED] CG be placed in Petitioner's Official Military Personnel File (OMPF). See enclosure (8).

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l. By memorandum dated 4 March 2021, despite the recommendations of the lower chain of command, the Deputy Commandant for Manpower and Reserve Affairs (DC (M&RA)), in his capacity as the USMC's Show Cause Authority (SCA), found sufficient information to separate Petitioner from the USMC for cause via notification procedures in accordance with reference (c). Accordingly, he directed the [REDACTED] CG to notify Petitioner, through separate correspondence, that administrative separation proceedings were being initiated due to substandard performance of duty; sexual misconduct or perversion; and misconduct or moral or professional dereliction. See enclosure (9).

m. By memorandum dated 23 March 2021, the [REDACTED] CG notified Petitioner that he was being recommended for separation from the USMC with a general (under honorable conditions). The specific bases cited for his proposed separation listed the notification memorandum were substandard performance of duty⁶ and misconduct, moral, or professional dereliction.⁷ The factual basis stated for the recommendation was a violation of Article 120c, UCMJ, for unlawfully and knowingly videotaping, filming, or recording by any means the private area of another person, without that person's consent and under circumstances in which that person has a reasonable expectation of privacy; and a violation of Article 92, UCMJ, for violating a lawful order by committing sexual misconduct on USNA grounds. Petitioner was also notified of his rights with regard to the administrative separation process. See enclosure (10).

n. On 24 March 2021, Petitioner acknowledged receipt of enclosure (10), and indicated his desire to submit matters in rebuttal to the recommendation that he be administratively separated from the USMC to the Secretary of the Navy (SECNAV). See enclosure (11).

o. By memorandum dated 10 April 2021, Petitioner provided a statement in response to the proposed administrative separation action. Included with this statement were matters provided by his attorney. In this statement, he described 8 March 2021 (i.e., the day that he learned that he was being recommended for an administrative separation) as "one of the worst days of [his] life." He referenced back to his statement at enclosure (7), and reiterated his regret for his actions in 2003. He asserted that his bad judgment was the product of his earlier immaturity, and acknowledged the gravity of it. He also assured his audience that he was a different person than he was in 2003. The matters provided by Petitioner's attorney asserted multiple legal and factual deficiencies in the case which warranted Petitioner's retention in the Marine Corps:

(1) Disparate Treatment. Petitioner's attorney asserted that Petitioner's USNA roommate at the time, who was identified by NCIS and had appeared at the opening of the video, was equally culpable for the act of recording the sexual acts, but faced no administrative consequences for his role in the event. He described this as "the quintessential example of disparate treatment."

⁶ Substandard Performance of Duty was defined as the "Inability of an officer to maintain adequate levels of performance or conduct as evidenced by one or more of the following reasons: (1) Failure to demonstrate acceptable qualities of leadership required of an officer of [his] grade; (2) Failure to conform to prescribed standards of dress, weight, personal appearance, or military deportment; [or] (3) Failure to properly discharge duties expected of officer of [his] grade and experience."

⁷ This basis for separation was stated to be "Performance or personal or professional conduct which is unbecoming an officer as evidenced by ... [c]ommission of a military or civilian offense which could be punished by confinement of 6 months or more and any other misconduct which would require specific intent for conviction."

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(2) Factual Insufficiency. Petitioner's attorney asserted that there is insufficient evidence to support the allegation that Petitioner violated Article 120c, UCMJ. Specifically, he asserted that there was no evidence of the woman's lack of consent to being recorded. NCIS did not interview the alleged victim, and she never provided any evidence that she did not consent to either the sexual activity or to being recorded. Rather, NCIS and the reviewing authorities made inferences to assume she did not consent.

(3) Due Process Failures. Petitioner's attorney asserted that Petitioner has been deprived of the ability to review all of the evidence, claiming that he had only been provided a portion of the NCIS investigative materials and denied the remainder which he had requested.

(4) Stale Allegations. Petitioner's attorney asserted that the Marine Corps was improperly adjudging Petitioner's continuation as an officer for actions that occurred before he was an officer. Specifically, he noted that Petitioner was not subject to reference (c) when he was a Midshipman. He also cited to the provision of reference (c) which provide that an administrative separation board may only consider evidence of pre-service misconduct for the purpose of deciding whether the officer should be retained, but cannot use such evidence in determining the appropriate characterization of service.⁸ Petitioner's attorney asserted that the legal issue presented here is that the evidence of Petitioner's pre-service misconduct was being used improperly as the basis for separation, not on the question of retention versus separation. He also cited to the substandard performance of duty basis for separation, noting that Petitioner was not an officer at the time of his misconduct, and has maintained a spotless record since becoming one. Finally, Petitioner's attorney noted that Petitioner was just one year out of high school when his alleged misconduct occurred, and had not yet received the training necessary to internalize the Sexual Assault Prevention and Response rules.

These matters also included a number of character statements advocating for Petitioner's retention in the Marine Corps. See enclosure (12).

p. By memorandum dated 7 June 2021, the [REDACTED] CG endorsed and forwarded the matters submitted by Petitioner for consideration. See enclosure (13).

q. By memorandum dated 13 October 2021, the [REDACTED] CG endorsed and forwarded the matters submitted by Petitioner for consideration, along with his recommendation that Petitioner be retained in the Marine Corps. In making this recommendation, he claimed to have reviewed the NCIS report of investigation, the ROM and all associated documents, and the matters submitted by Petitioner, and believed the counseling referenced in paragraph 3i above to be the appropriate remedy. The [REDACTED] CG also recommended that all adverse material be included in Petitioner's naval record, and that the case be closed. In the event that Petitioner was separated from the Marine Corps, the [REDACTED] CG recommended that his service be characterized as honorable. See enclosure (14).

r. By memorandum dated 16 December 2021, the DC (M&RA) determined that Petitioner would be retained in the Marine Corps and directed that the case against him be closed. In his

⁸ See paragraph 12(d) of Enclosure (7) to reference (c).

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notice of this decision to Petitioner, the DC (M&RA) informed Petitioner that the SECNAV may remove Petitioner's name from the FY21 USMC Captain promotion list if he determined that Petitioner was not qualified for promotion or that his conduct does not meet the exemplary conduct requirements of reference (d), and invited Petitioner to submit matters for the SECNAV's consideration in this regard.. See enclosure (15).

s. By memorandum dated 13 January 2022, Petitioner provided a statement in support of his request to be promoted pursuant to his selection by the FY21 USMC Captain PSB. This statement was very similar in content to his response to the counseling statement referenced in paragraph 3j above. Included with this statement were several letters of support from current or former Marine Corps officers, attesting to Petitioner's character and recommending that he be promoted. See enclosure (16).

t. By memorandum dated 8 July 2022, the Commandant of the Marine Corps (CMC) recommended that the SECNAV removed Petitioner's name from the FY21 USMC Captain promotion list.⁹ In making this recommendation, the CMC opined that Petitioner's actions fell below that expected of a naval officer and did not comply with the exemplary conduct requirements of reference (d). He also noted that the adverse information now included in Petitioner's naval record was not available to the PSB which selected Petitioner for promotion, so removal of his name from the promotion list would ensure the justness and fairness of the promotion process by allowing a future PSB to determine whether Petitioner was fully qualified for promotion. See enclosure (3).

u. On 1 September 2022, the SECNAV approved the CMC's recommendation, removing Petitioner's name from the FY21 USMC Captain promotion list. See enclosure (3).

v. By memorandum dated 14 September 2022, Petitioner was notified of the SECNAV's action referenced in paragraph 3u above. See enclosure (17).

w. On 2 November 2022, Petitioner submitted his first application for relief to this Board, requesting removal from his naval record of the ROM referenced in paragraph 3g above, along with any and all adverse materials in his naval record pertaining to the incident that was the subject of the ROM. In support of this request, Petitioner's attorney asserted the following errors and/or injustices:

(1) Petitioner's attorney argued that the adverse information in question should not be included in Petitioner's naval record based on the incident pursuant to reference (b). Specifically, he asserted that the misconduct in question did not meet the criteria of reference (b) for the submission of a ROM.¹⁰ Petitioner's attorney also cited to the limitations upon the use of

⁹ Enclosure (3) reflects that Petitioner had submitted matters in support of his promotion, that his chain of command recommended that he be promoted, and that these matters were available for review by the SECNAV. However, those documents are not present in the record for this case because they were not filed in his OMPF.

¹⁰ Reference (b) provides that officer misconduct must be reported to the CMC when the officer is "Alleged, suspected, or reported to have committed misconduct for which [nonjudicial punishment (NJP)], court-martial, civilian prosecution, or a recommendation to CMC [REDACTED] for administrative discharge proceedings is possible under existing statutes and regulations." Petitioner's attorney argued that the misconduct in question met none of these criteria.

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preservice misconduct in the context of administrative separation proceedings discussed in paragraph 3o(4) above.

(2) Petitioner is mentally, physically, morally and professionally qualified for promotion, and the inclusion of adverse information in his record is an injustice. In this regard, Petitioner's attorney noted that promotions to Captain are evaluated under a "fully qualified" standard pursuant to reference (e), as opposed to the "best and fully qualified" standard that applies for promotions to higher grades, and that Petitioner's record reflects that he was indeed fully qualified. He also noted that the SECNAV's decision to remove Petitioner's name from the promotion list was based, at least in part, upon the presence of the adverse information in Petitioner's naval record. His argument was essentially that only "relevant" information should be included in the OMPF, and the subject adverse information was not "relevant" to Petitioner's promotion qualifications under the "fully qualified" standard.

This application was also supported by a personal statement from Petitioner and several character statements. See enclosure (18).

x. On 21 February 2023, the Board denied Petitioner application for relief referenced in paragraph 3w above in Docket No. 8307-22. Specifically, the Board found that the ROM and its associated adverse materials were properly filed in Petitioner's naval record in accordance with references (b) and (c). Although Petitioner's immediate commander initially determined that Petitioner did not commit misconduct, the Board concurred with the conclusion made by the [REDACTED] CG that there was sufficient evidence of misconduct and that that was properly documented. The Board also essentially disagreed with Petitioner's argument that the adverse information filed in his OMPF was "irrelevant." See enclosure (19).

y. On 26 July 2023, Petitioner requested reconsideration of the Board's previous decision, while requesting the additional relief of promotion to Captain pursuant to his selection by the FY21 USMC Captain PSB.¹¹ In support of this reconsideration, Petitioner's new counsel made essentially the same argument that was made by his former counsel in support of Petitioner's retention in the Marine Corps regarding the sufficiency of the evidence (see paragraph 3o(2) above). Specifically, he asserted that the woman in the video was Petitioner's girlfriend at the time, and NCIS never established that she did not consent to being recorded. As such, he asserted that all of the reviewing authorities relied upon a "grossly incomplete and speculative NCIS report" when arriving at their respective decisions and recommendations in this case. He further asserted that the Board was unaware when it considered Docket No. 8307-22 that "NCIS failed to conduct even the most rudimentary and essential investigative steps, which should have included interviewing the girlfriend to determine whether she consented to participate in the video," and therefore relied upon the same unfounded speculation as the other decision makers in this case. In addition to this new argument, Petitioner also provided a statement from the former [REDACTED] commander who prepared the original Report of No Misconduct referenced in paragraph 3f above, detailing his careful review of the evidence and rationale for concluding that Petitioner had not committed misconduct. Among these factors that he cited was the fact that NCIS had not interviewed the alleged victim. He recommended that the adverse information be

¹¹ Petitioner's current application was prepared with the assistance of new counsel that than which represented him in Docket No. 8307-22.

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removed from Petitioner's record and that he be promoted to Captain. Petitioner's application was also supported by a letter from Petitioner's father, who is described as a seasoned litigator and a retired reserve Judge Advocate. He asserted that there is no evidence that Petitioner did anything illegal, and that the adverse information filed in Petitioner's naval record has the impact of a criminal conviction. Accordingly, he recommended that Petitioner's record be expunged and his promotion reconsidered and granted. See enclosure (1).

CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Board continues to find insufficient evidence of any error or injustice warranting relief.

As a preliminary matter, Petitioner's request to promote him to Captain pursuant to this selection by the FY21 USMC Captain PSB is beyond the Board's authority to grant. Per reference (f), the Board does not have the authority to appoint military officers. Only the Secretary of Defense (SECDEF) may appoint officers to the grade of Captain, pursuant to the exclusive authority assigned to him by the President. The SECNAV, acting through the Board, could theoretically correct Petitioner's record to negate his previous decision to remove Petitioner from the promotion list, thus restoring his name to the FY21 USMC Captain promotion list, and subsequently forward his nomination to the SECDEF. However, as discussed further below, that is not the Board's recommendation.

The Board found no error or injustice in the preparation and filing of the ROM in question, or in the filing of the associated adverse materials. Per reference (b), "[o]fficer misconduct must be reported to CMC [REDACTED] if a Marine Officer ... is ... [a]lleged, suspected, or reported to have committed misconduct for which NJP, court-martial, civilian prosecution, or a recommendation to CMC [REDACTED] for administrative discharge proceedings is possible under existing statutes and regulations."¹² Petitioner's alleged misconduct certainly met this criteria, as evidenced by the fact that the DC (M&RA) ultimately initiated administrative discharge proceedings. This initial report of alleged misconduct justified the withholding of Petitioner's promotion nomination, as reference (e) provides that a promotion withhold action may be conducted when "[a]n investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer."¹³ Reference (b) further provides that, for each allegation of misconduct reported, "the GCMCA must determine that the officer either did or did not commit the misconduct alleged." It further provides that the GCMCA must also forward the case to a SCA with a show cause recommendation.¹⁴ While the [REDACTED] commander reviewed the evidence and prepared a Report of No Misconduct, it does not appear from the record that he was a GCMCA. Accordingly, he was not empowered to make the official determination of whether or not Petitioner committed the alleged misconduct. As such, his Report of No Misconduct constituted only a recommendation in this regard to the GCMCA.¹⁵ The record reflects that the

¹² See paragraph 010403A(1) of reference (b).

¹³ See paragraph 2b of Enclosure (8) to reference (e).

¹⁴ See paragraph 010501 of reference (c).

¹⁵ Paragraph 010602 of reference (b) provides that the GCMCA will generate a Report of No Misconduct when he determined that misconduct did not occur. As the [REDACTED] Commander was not a GCMCA, the Report of No Misconduct that he prepared was not official.

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[REDACTED] CG was, in fact, a GCMCA, and he emphatically determined that Petitioner did commit misconduct in enclosure (4).

It is apparent from the record that the GCMCA carefully reviewed the evidence in reaching his conclusion. Enclosure (4) includes specific references to aspects of the video recording in question which he relied upon in reaching this conclusion, and those conclusions were endorsed at each subsequent level of command which reviewed the evidence. Having determined that misconduct occurred, the GCMCA was required to submit a ROM in accordance with reference (b).¹⁶ The ROM serves two purposes. First, it provides the SCA with sufficient information to make a decision regarding whether to process the officer for administrative separation. Second, and more importantly in this case, it provides a complete record of the misconduct and its disposition for inclusion in the officer's OMPF. Petitioner acknowledged receipt of the ROM at enclosure (5), which included acknowledgment that the DC (M&RA) could elect to include the ROM and its associated adverse materials in his OMPF. Petitioner was afforded and availed himself of the opportunity to respond to the ROM, so he was afforded his due process in this regard, but ultimately the DC (M&RA) determined that the adverse material would be filed in Petitioner's OMPF.

The Board found no merit in Petitioner's contention that there was no evidence of the alleged victim's lack of consent to being recorded. Petitioner's characterization of the NCIS investigative efforts are misleading in this regard. While Petitioner alleged that NCIS "failed to conduct even the most rudimentary and essential investigative steps" by failing to interview the alleged victim, it is apparent from the record that she was not interviewed because she could not be identified. Although her name is redacted in enclosure (2), it appears that NCIS was able to identify only her first name, as the redacted name in enclosure (2) is followed by the acronym for "no further information." Petitioner contributed to the inability of NCIS to identify the alleged victim in order to confirm her consent when he exercised his rights pursuant to Article 31b, UCMJ. While that was certainly his right, and neither was nor is a basis upon which his guilt was established, Petitioner cannot now legitimately complain that NCIS failed to confirm the alleged victim's consent when he refused to provide information which might lead them to this evidence.

Contrary to Petitioner's contention, there was in fact evidence in the record that the alleged victim did not consent to being recorded. Despite the fact that the [REDACTED] commander now contends that the failure to interview the alleged victim was the most important factor contributing to his conclusion that Petitioner committed no misconduct, even he observed in enclosure (2) that the woman in the video "appeared to be unsuspecting." Every official who reviewed the video in question apparently reached the conclusion that the woman captured in the video was unaware that she was being recorded. A person cannot consent to something of which they are unaware. The standard of proof for the actions taken in this case was simply the preponderance of the evidence, and the reviewing officials were more than qualified to make conclusions regarding whether the woman in the video was aware that she was being recorded.

¹⁶ See paragraph 010603 of reference (b). Per paragraph 010604, a ROM is required in all cases of misconduct described in paragraph 010603 in which a Report of NJP, Report of Court-Martial Conviction, or Report of Civilian Conviction is not applicable, where the first GCMCA in the chain of command determines that the officer committed the misconduct.

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Their decisions were not based upon "wild speculation, entirely concocted from thin air," as Petitioner suggests, but rather upon their own view of the video evidence. Further, at no point in this process did Petitioner ever suggest that the alleged victim consented. In fact, Petitioner does not even make that contention in his present application. To the contrary, after being counseled specifically for "knowingly and unlawfully film[ing] another person's private area without their consent," Petitioner all but admitted to doing so with his statement of remorse.¹⁷ The Board simply found no basis to doubt the conclusion of the GCMCA that Petitioner violated Article 120c, UCMJ. At the very least, Petitioner has failed to prove otherwise, which is his burden before this Board.

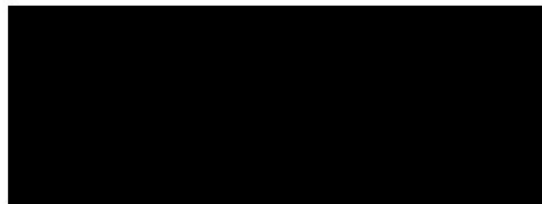
Having found no error or injustice in the inclusion of the ROM or its associated adverse material in Petitioner's naval record, the Board also finds no error or injustice in the SECNAV's decision to remove Petitioner from the FY21 USMC Captain promotion list. All due process related to this decision was provided to Petitioner, and he availed himself of these rights to ensure that the SECNAV's decision was fully informed. Petitioner's contention that this adverse material was "irrelevant" to his qualifications for promotion are without merit, as an officer's compliance with the exemplary conduct standards of reference (d) is the primary criteria for such qualification. The misconduct substantiated in this case reasonably called that criteria into question. Accordingly, the Board found no error or injustice in the SECNAV's decision to remove Petitioner's name from the FY21 USMC Captain promotion list.

RECOMMENDATION:

In view of the above, the Board recommends 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.

10/5/2023



¹⁷ The Board did not find credible the suggestion that the level of remorse expressed by Petitioner in enclosure (7) was related to simply engaging in sexual activity on the USNA grounds.

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SECRETARY OF THE NAVY DECISION:

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

— Board Recommendation Disapproved (Grant Relief – I do not concur with the Board’s conclusions. Specifically, I find the existence of an injustice in that Petitioner’s misconduct was not adequately proven. My previous decision to remove Petitioner from the FY21 USMC Captain promotion list was influenced by an erroneous assumption regarding the adequacy of the evidence. Accordingly, I direct that Petitioner’s naval record be corrected by removing the ROM, dated 2 October 2020, along with the other adverse material in Petitioner’s OMPF related to the contents of that ROM. I further direct that Petitioner’s naval record be corrected to remove my previous decision to remove his name from the FY21 USMC Captain promotion list, along with all associated documents referencing or advising that decision, thus restoring his name to this promotion list. Upon correction of Petitioner’s OMPF as directed herein, the CMC is to prepare the documentation necessary to properly appoint Petitioner to Captain pursuant to his selection by the FY21 USMC Captain PSB.

[REDACTED]