



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

JSR

Docket No: NR722-13

13 June 2013

5 U.S.C. 552(b) (6)

Dear 5 U.S.C. 552(b) (6)

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

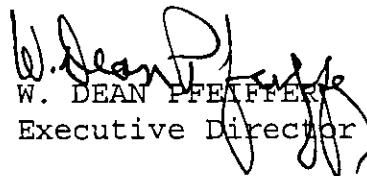
A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 13 June 2013. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinion from Headquarters Marine Corps dated 3 April 2013 with enclosure, a copy of which is attached.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinion. The Board was unable to find that the findings of the investigating officer (IO) in your case were inaccurate, notwithstanding your allegations of improprieties in his conduct of the investigation. Specifically concerning your request for a seat at the resident Fiscal Year 2013 Professional Intermediate-Level School, it is noted that as a matter of policy, the Board does not interfere in assignments, however, reference (1) to your application shows you were selected for such assignment. In view of the above, your application has been denied. The names

and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,


W. DEAN PFEIFFER
Executive Director

Enclosure



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3000 MARINE CORPS PENTAGON
WASHINGTON, DC 20350-3000

IN REPLY REFER TO:

5800

JAR5

3 APR 2013

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL
RECORDS

Subj: APPLICATION FOR CORRECTION OF NAVAL RECORD IN THE CASE OF
5 U.S.C. 552(b) (6) U.S. MARINE CORPS

Ref: (a) 5 U.S.C. 552(b) (6) DD Form 149 of 28 Dec 12
(b) "Brief in Support of Application for
Correction of Naval Records"
(c) MARADMIN 385/08
(d) ALNAV 006/09
(e) MARADMIN 418/10
(f) MARADMIN 367/12
(g) ALNAV 073/12
(h) MARADMIN 644/12
(i) 10 U.S.C. § 1552
(j) SECNAVINST 5420.193
(k) 10 U.S.C. § 611
(l) USD (P&R) memo of 12 Feb 07 (NOTAL)
(m) SECNAVINST 1420.1B
(n) 10 U.S.C. § 5947
(o) 10 U.S.C. § 624
(p) 10 U.S.C. § 629
(q) E.O. 12396
(r) SECDEF memo of 12 Jan 83 (NOTAL)
(s) 10 U.S.C. § 628
(t) 10 U.S.C. § 632
(u) MCO P1900.16F CH-2
(v) 10 U.S.C. § 1034
(w) CMC ltr 1412 JAMP of 25 Oct 11 (NOTAL)
(x) CMC ltr 1420 JAMP of 5 Aug 10 (NOTAL)
(y) CG, 2nd MarDiv, ltr 1920 CG of 4 May 10 (NOTAL)

Encl: (1) 5 U.S.C. 552(b) (6) History of Lineal Establishment

1. Issue. In references (a) and (b), 5 U.S.C. 552(b) (6) (the petitioner) alleges: (1) "Judge Advocate Division drafted an unjust recommendation based on false and incorrect information that the Commandant of the Marine Corps . . . and the Secretary of the Navy endorsed . . . for [my] removal from the FY10 Major Promotion List"; and (2) "I was notified after my promotion date of 1 August 2010 . . . that my promotion would be on hold" As relief, the petitioner requests the Board for Correction of Naval Records (BCNR) grant or recommend the following:

REC'D APR 08 2013

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a. Promotion to the rank of major with a date of rank of 1 August 2010, and to have his OMPF amended accordingly.

b. Payment in the rank of major retroactively to 1 August 2010.

c. That the Secretary of the Navy (SECNAV) convene a special selection board (SSB) "to consider [him] for selection to major, based on a corrected date of rank as a captain of 1 February 2004, and my personnel file as it existed on the date on which the Fiscal Year 2010 major's selection board was convened[.]"

d. To attend Fiscal Year 2013 resident Marine Corps Command and Staff College (resident school).

e. A "determination as to the applicability of the Whistleblower Protection Act (10 U.S.C. § 1034), because [he has] subjected [himself] to substantial scrutiny within [his] occupational community for raising this claim[.]"

f. "That any action necessary be taken to prevent negative inferences being drawn on future selection boards due to any perceived gaps in [his] service record resulting from these adjustments[.]"

g. "Such other further relief as may be deemed necessary or appropriate"

2. Opinion. The BCNR should deny the petitioner's requests.

3. Background. The facts relevant to the petitioner's request are as follows.

a. The Fiscal Year 2010 Major Promotion Selection Board (the FY10 board) convened on 3 September 2008. Reference (c). The FY10 board selected the petitioner for promotion. Reference (d).

b. On 9 October 2008, the Commanding Officer, 8th Marine Regiment (8th Marines CO), appointed an investigating officer (IO) to conduct an inquiry into the petitioner's alleged misconduct.¹ The resulting inquiry focused on whether the petitioner and his then-wife were "swingers". Two witnesses informed the IO they viewed the petitioner's and his wife's profile ("NCSEXTERS") on the website www.swingers.com. One witness provided the IO with five photographs of the petitioner and his wife and of the petitioner's wife alone, which depicted her in underwear and with an exposed areola; the witness refused to disclose the source of the photographs. Numerous

¹ This inquiry is variously referred to as a "preliminary inquiry", a "preliminary investigation", and a "command investigation". This distinction is irrelevant for purposes of the petitioner's request and this opinion.

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witnesses told the IO it was well known the petitioner and his wife were swingers, but none had direct knowledge. Based on his inquiry, the IO concluded the petitioner was untruthful about

Forward to Release Authority: Headquarters, US Marine Corps

Forward to Release Authority: Headquarters, US Marine Corps The IO submitted his report to the Commanding Officer, 2nd Marine Regiment (2nd Marines CO), and the Commanding General, 2d Marine Division (2nd MarDiv CG), both of whom concurred with the IO's conclusion that the petitioner

Forward to Release Authority: Headquarters, US Marine Corps; nevertheless, both concluded there was

Forward to Release Authority: Headquarters, US Marine Corps that the petitioner was

Ultimately, the Commanders determined the witnesses' claims were

Forward to Release Authority: Headquarters, US Marine Corps

c. On 14 August 2009, the Commanding Officer, Regimental Combat Team 3 (RCT-3 CO), appointed an IO to conduct a preliminary inquiry into an alleged inappropriate relationship between the petitioner and 5 U.S.C. 552(b) (6).² During the course of the inquiry, the IO discovered the following:

(1) The petitioner and his ex-wife informed 5 U.S.C. 552(b) (6), who was then 5 U.S.C. 552(b) (6) husband, they wanted to engage in sexual acts with 5 U.S.C. 552(b) (6).

(2) The petitioner told 5 U.S.C. 552(b) (6) via e-mail

Forward to Release Authority: Headquarters, US Marine Corps

(3) The petitioner called 5 U.S.C. 552(b) (6) approximately 60 times from Afghanistan between 12 June 2009 and 5 October 2009.³

(4) 5 U.S.C. 552(b) (6) typed the following e-mails:

(a) **Forward to Release Authority: Headquarters, US Marine Corps**
Forward to Release Authority: Headquarters, US Marine Corps 5 U.S.C. 552(b) (6) is the petitioner's ex-wife.

(b) **Forward to Release Authority: Headquarters, US Marine Corps**

(5) The petitioner's ex-wife sent him an e-mail in which she stated, **Forward to Release Authority: Headquarters, US Marine Corps**

Forward to Release Authority: Headquarters, US Marine Corps

² 5 U.S.C. 552(b) (6) is also referred to as 5 U.S.C. 552(b) (6), her unmarried name.

³ The IO stated **Forward to Release Authority: Headquarters, US Marine Corps**
Forward to Release Authority: Headquarters, US Marine Corps The petitioner, however, indicated "I made 66 phone calls to the numbers in question; including both attempts and connections." The petitioner made two calls to 5 U.S.C. 552(b) (6).

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5 U.S.C. 552(b) (6) [REDACTED] U.S. MARINE CORPS

d. Despite these findings, the IO opined there was [REDACTED] between the petitioner and Ms. Wombolt, and although [REDACTED] Forward to Release Authority: Headquarters, US Marine Corps [REDACTED] Based on these opinions, the IO recommended no further investigation. The RCT-3 CO concurred with the IO's findings, opinions, and recommendation. The Deputy Commander, Marine Expeditionary Brigade-Afghanistan (MEB-A DC), concluded the RCT-3 CO [REDACTED] Forward to Release Authority: Headquarters, US Marine Corps [REDACTED] The MEB-A DC reasoned that although the [REDACTED] Forward to Release Authority: Headquarters, US Marine Corps [REDACTED]

[REDACTED] In the final endorsement of the IO's report, the 2nd MarDiv CG stated, [REDACTED] Forward to Release Authority: Headquarters, US Marine Corps [REDACTED] Forward to Release Authority: Headquarters, US Marine Corps [REDACTED] Forward to Release Authority: Headquarters, US Marine Corps [REDACTED] The 2nd MarDiv CG concluded that although the findings did not [REDACTED] Forward to Release Authority: Headquarters, US Marine Corps [REDACTED] Forward to Release Authority: Headquarters, US Marine Corps [REDACTED]

e. On 4 May 2010, the 2nd MarDiv CG submitted a report of misconduct (the misconduct report) to the Commandant of the Marine Corps (CMC). In the report, the 2nd MarDiv CG detailed the two inquiries' findings and recommended the petitioner be required to show cause for retention in the Marine Corps at a board of inquiry (BOI).

f. On 29 July 2010, the Acting Director, Manpower Management Division, Headquarters, Marine Corps (CMC (MM)), delayed the petitioner's promotion to major [REDACTED] Forward to Release Authority: Headquarters, US Marine Corps [REDACTED] See enclosure (1). As a result, CMC (MM) did not include the petitioner's name in reference (e), which listed officer promotions for August 2010. The petitioner would have been promoted on 1 August 2010 if CMC (MM) had not delayed his promotion.

g. On 5 August 2010, the Military Law Branch, Judge Advocate Division, Headquarters, Marine Corps (CMC (JAM)) notified the petitioner his promotion was delayed [REDACTED] Forward to Release Authority: Headquarters, US Marine Corps [REDACTED] Forward to Release Authority: Headquarters, US Marine Corps [REDACTED]

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h. Also on 5 August 2010, the Commanding General, II Marine Expeditionary Force (II MEF CG), conducted a non-judicial punishment (NJP) hearing for the petitioner's alleged violations of Article 133 of the Uniform Code of Military Justice to which the petitioner pleaded not guilty. After reviewing evidence and hearing from witnesses, the II MEF CG stated:

Forward to Release Authority: Headquarters, US Marine Corps

i. Despite these and other similarly-toned comments, the II MEF CG found the petitioner not guilty of both allegations.

j. On 6 August 2010, the II MEF CG endorsed the misconduct report, but recommended the petitioner not be required to show cause at a BOI. Also on 6 August 2010, the petitioner acknowledged his promotion delay.

k. On 4 October 2010, the Deputy Commandant, Manpower and Reserve Affairs (DC, M&RA), referred the petitioner's case to a BOI.

l. The BOI convened on 5 January 2011. The BOI found the petitioner did not demonstrate substandard performance or commit misconduct, and that separation was unwarranted.

m. On 25 October 2011, the CMC recommended to the SECNAV that the SECNAV remove the petitioner from the FY10 Major Promotion Selection List (FY10 list).

n. On 23 January 2012, the SECNAV removed the petitioner from the FY10 list. As a result, the FY10 board constitutes the petitioner's first non-selection for promotion to major.

o. The Fiscal Years 2011, 2012, and 2013 Major Promotion Selection Boards did not consider the petitioner for promotion.

p. On 21 August 2012, the Fiscal Year 2014 Major Promotion Selection Board (the FY14 board) convened. Reference (f). The FY14 board did not select the petitioner for promotion, which constitutes

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the petitioner's second non-selection for promotion to major.
Reference (g).

q. On 2 October 2012, the Fiscal Year 2013 Commandant's Professional Intermediate-Level Education Board (FY13 CPIB) convened. Reference (h). The FY13 CPIB selected the petitioner. *Id.* As a result, the petitioner is scheduled to attend resident school.

r. The petitioner is scheduled to retire on 1 July 2013 as a result of his two non-selections for promotion to major.

4. Discussion of Applicable Guidance

a. BCNR

(1) Reference (i) grants SECNAV the authority to establish procedures to correct any Naval record when SECNAV considers it necessary to correct an error or remove an injustice. Such corrections shall be made by SECNAV acting through boards of civilians of the executive part of the Navy. *Id.* Reference (j) establishes the BCNR.

(2) BCNR may take corrective action on SECNAV's behalf, when authorized, or make appropriate recommendations to SECNAV. Paragraph 3(a) of reference (j).

(3) Section 3(e)(2) of enclosure (1) to reference (j) states, in relevant part:

The Board may deny an application in executive session if it determines that the evidence of record fails to demonstrate the existence of probable material error or injustice. The Board relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties. Applicants have the burden of overcoming this presumption

(3) In administrative law, including military personnel cases, there is a presumption of administrative regularity. *Id.* Under this principle, it is well settled that a service member must "overcome the strong, but rebuttable, presumption that administrators of the military, like other public officers, discharge their duties correctly, lawfully, and in good faith." *Golding v. U.S.*, 48 Fed. Cl. 697, 728 (2001). It takes "well-nigh irrefragable proof" to overcome the presumption of administrative regularity. *Smith v. U.S.*, 19 Cl. Ct. 19, 26 (1989).

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b. Promotion Standard. To be promoted, officers must be "fully qualified" and "among the best qualified for promotion to meet the needs of the Armed Force concerned consistent with the requirements of exemplary conduct." Paragraph (a) of reference (k); reference (l); see also paragraph 15(a) of reference (m). Reference (n) defines exemplary conduct within the Department of the Navy as:

a good example of virtue, honor, patriotism, and subordination; to be vigilant in inspecting the conduct of all persons who are placed under their command; to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Navy, all persons who are guilty of them; and to take all necessary and proper measures, under the laws, regulations, and customs of the naval service, to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.

c. Promotion Delay. An officer's promotion may be delayed in any case in which there is cause to believe he has not met the requirement for exemplary conduct in reference (n). Paragraph (d) (2) of reference (o).

The appointment of an officer may not be delayed . . . unless the officer has been given written notice of the grounds for the delay, unless it is impracticable to give such written notice before the effective date of the appointment, in which case such written notice shall be given as soon as practicable. An officer whose promotion has been delayed under this subsection shall be afforded an opportunity to make a written statement to the Secretary concerned in response to the action taken. Any such statement shall be given careful consideration by the Secretary.

Paragraph (d) (3) of reference (o); see also paragraph 23(c) of reference (m).

d. Removal. The President may remove the name of any officer from a list of officers recommended for promotion by a selection board. Paragraph (a) of reference (p). The President delegated this authority to the Secretary of Defense (SECDEF) for officers of any grade below O-7. See section 1(b) of reference (q). SECDEF redelegated this authority to the Secretaries of the Military Departments, including SECNAV. See reference (r); paragraph 17(a) of reference (m).

e. Special Selection Boards

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(1) SECNAV Authority. Reference (s) and paragraph 24(b) of reference (m) authorize SECNAV to convene a SSB to consider cases of officers who were considered for selection for promotion by a promotion selection board but were not selected if SECNAV determines the board lacked some material information for consideration.

(2) Material Information. Paragraph 24(e)(3)(d) of reference (m) defines "material information" as "[a]ny information that, when properly recorded in . . . an officer's record[,] would have been essential to a substantially accurate, complete, and fair portrayal of the officer's career"

(3) Applicant's Burden. Officers have a duty to review their military records to ensure they are complete and accurate. Paragraph 24(e)(4) of reference (m); paragraph 4(a) of reference (f). A SSB will not be convened to consider any officer who, through the exercise of reasonable diligence, might have discovered and corrected the error in his record prior to the convening of a promotion selection board. Paragraph 5(e) of reference (m).

f. Involuntary Retirement. Each active duty Marine captain who has twice failed of selection for promotion to major and whose name is not on a list of officers recommended for promotion to the next higher grade shall, if he is eligible for retirement under any provision of law, be retired under that law on the date he requests and SECNAV approves, which date shall be not later than the first day of the seventh calendar month beginning after the month in which the President approves the report of the board that considered him for the second time. Paragraph (a)(2) of reference (t); paragraph 2005.2(e) of reference (u).

g. 10 U.S.C. § 1034. Paragraph (a) of 10 U.S.C. § 1034, reference (v), prohibits any person from restricting a service member from communicating with a Member of Congress or an Inspector General (IG); paragraph (b) prohibits any person from taking or threatening to take an unfavorable personnel action as a reprisal against a service member for making or preparing to make a communication to a Member of Congress or an IG.

5. Analysis

a. CMC's 25 October 2011 Memorandum. The petitioner alleges CMC's 25 October 2011 memorandum, reference (w), is inaccurate and unjust, which resulted in SECNAV removing him from the FY10 list. Each alleged inaccuracy will be addressed in turn.

(1) "JAM recognized when drafting the memorandum for the CMC and SECNAV that I should have been promoted on August 1, 2010." The petitioner is correct; in reference (w), CMC (JAM) notes 5 U.S.C.

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5 U.S.C. scheduled promotion date was 1 August 2010." This statement, however, is accurate; it is not inaccurate or unjust.

(2) "The CMC of the Marine Corps acknowledged that the promotion hold occurred after my promotion date." In reference (w), CMC (JAM) explains that reference (x) Forward to Release Authority: Headquarters, US Marine Corps

Forward to Release Authority: Headquarters, US Marine Corps

Forward to Release Authority: Headquarters, US Marine Corps

Contrary to the petitioner's assertion, reference (w) does not indicate the promotion delay occurred after 1 August 2010; it merely notes the petitioner received notice of the delay after 1 August 2010.

(3) "The potentially adverse information being referred to was previously investigated and determined to be unsubstantiated 11 months beforehand." "An Allegation of adultery never occurred. Allegations that did occur were determined to be unsubstantiated by Investigating Officers and Commanding Officers." The "potentially adverse information being referred to" was the 2nd MarDiv CO's memorandum of 4 May 2010, reference (y), which reported the petitioner's misconduct and recommended a BOI. The II MEF CG did not endorse the 2nd MarDiv CO's memorandum until 6 August 2010; the report of misconduct and BOI recommendation, therefore, were still pending when CMC (MM) delayed the petitioner's promotion on 29 July 2010. As noted above, the IOs' opinions notwithstanding, there was evidence the petitioner engaged in an inappropriate, perhaps adulterous, relationship with 5 U.S.C. 552(b).

(4) "JAM decidedly elaborated on the content on the allegations and briefly captured the findings, facts, and opinions of the IOs and failed to reference the endorsements by 5 U.S.C. 552(b) (6) and 5 U.S.C. 552(b) (6) " "The allegations were false and produced by individuals with extreme dislike as described by 5 U.S.C. 552(b) (6) " "Each individual making an allegation clearly had a different motivation that was not captured in the memorandum, which was drafted to persuade the CMC and SECNAV to endorse against my promotion in accordance with the FY10 Major Promotion List." After reviewing reference (w) and the materials the petitioner provided, including both inquiries, it does not appear that CMC (JAM) misrepresented the facts the IOs discovered. The 2nd MEB-A DC and the II MEF CG both disagreed with 5 U.S.C. 552(b) (6) endorsement. 5 U.S.C. 552(b) (6) endorsement does not state the allegations were false; it states the allegations were personal attacks against the petitioner rather than reflective of professional opinions of him.

(5) The petitioner cites several more excerpts from reference (w) that he claims are inaccurate. After reviewing reference (w) and the materials the petitioner provided, including both inquiries, the petitioner has not shown by a preponderance of the evidence that reference (w) is erroneous or unjust.

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b. Deficient Notice. The petitioner alleges CMC's notice that his promotion was delayed was deficient because it occurred after his scheduled promotion date.

(1) As noted above, an officer's promotion may be delayed in any case in which there is cause to believe he has not met the requirement for exemplary conduct in reference (n). Paragraph (d)(2) of reference (o). The appointment may not be delayed, however, unless the officer has been given written notice of the grounds for the delay, unless it is impracticable to give such written notice before the effective date of the appointment. Paragraph (d)(3) of reference (o); see also paragraph 23(c) of reference (m). If prior written notice is impracticable, such written notice shall be given as soon as practicable. *Id.* An officer whose promotion has been delayed under this subsection shall be afforded an opportunity to make a written statement to SECNAV in response to the action taken. *Id.* Any such statement shall be given careful consideration by SECNAV. *Id.*

(2) CMC (MM) delayed the petitioner's promotion prior to 1 August 2010, the scheduled promotion date. See enclosure (1). It was impracticable to notify the petitioner of the delay before 1 August 2010 because the delay occurred on 29 July 2010, just one working day before the scheduled promotion date. Further, although CMC notified the petitioner after the scheduled promotion date, the petitioner did not suffer any prejudice, as subsequently he was given an opportunity to and did submit a written response to the promotion delay. See *Barnes v. U.S.*, 473 F.3d 1356, 1363 (Fed. Cir. 2007). Moreover, neither CMC nor SECNAV took action against the petitioner or made any decision to do so before the petitioner submitted a written response regarding the promotion delay. Even assuming, for the sake of argument, the notice was procedurally defective, providing notice on 5 August 2010 was harmless because it did not adversely affect the petitioner. See *id.*

c. Reinstatement and Back-Pay. The petitioner requests to be reinstated to the FY10 list and awarded back-pay in the rank of major from 1 August 2010. For the reasons stated above, however, the petitioner was properly removed from the FY10 list; contrary to the petitioner's assertions, reference (w) was not inaccurate, CMC (MM) delayed his promotion prior to the scheduled promotion date, and he was properly notified of the promotion delay. The petitioner, therefore, should not be reinstated to the FY10 list or given back-pay in the rank of major retroactive to 1 August 2010.

d. SSB. The petitioner requests SECNAV convene a SSB "to consider [him] for selection to major, based on a corrected date of rank as a captain of 1 February 2004, and my personnel file as it existed on the date on which the Fiscal Year 2010 major's selection board was convened[.]" It is unclear after reading references (a) and

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(b) for which FY board the petitioner wishes SECNAV to convene a SSB. Assuming the petitioner is requesting a SSB for the FY14 board—the only promotion selection board that considered, but did not select, him—the petitioner has not indicated why his date of rank for captain should be changed from 1 August 2004, as is indicated on his master brief sheet and numerous fitness reports, to 1 February 2004. Even assuming the petitioner's correct date of rank for captain is 1 February 2004, the petitioner had a duty to review his military records to ensure they were complete and accurate. Paragraph 24(e) (4) of reference (m); paragraph 4(a) of reference (f). Given that numerous fitness reports as early as 2004 and his master brief sheet listed his date of rank for captain as 1 August 2004, he should have discovered the error years before the FY14 board convened. The petitioner has not demonstrated by a preponderance of the evidence either that the FY14 board lacked material information or that he exercised reasonable diligence to correct his record prior to the date the FY14 board convened.

e. Resident School. The petitioner requests to attend resident school. Each active duty Marine captain who has twice failed of selection for promotion to major and whose name is not on a list of officers recommended for promotion to the next higher grade shall, if he is eligible for retirement under any provision of law, be retired under that law on the date he requests and SECNAV approves, which date shall be not later than the first day of the seventh calendar month beginning after the month in which the President approves the report of the board that considered him for the second time. Paragraph (a) (2) of reference (t); paragraph 2005.2(e) of reference (u). The petitioner is an active duty Marine captain who has twice failed of selection for promotion to major: first, by the FY10 board; and second, by the FY14 board. Pursuant to paragraph (a) (2) of reference (t) and paragraph 2005.2(e) of reference (u), therefore, he should be retired on 1 July 2013, the first day of the seventh calendar month beginning after the month in which the President approved the report of the FY14 board, the board that considered him for the second time. *Id.* Consequently, the petitioner's retirement will prevent him from attending resident school.

f. 10 U.S.C. § 1034

(1) The petitioner requests a "determination as to the applicability of the Whistleblower Protection Act (10 U.S.C. § 1034), because [he has] subjected [himself] to substantial scrutiny within [his] occupational community for raising this claim[.]" Paragraph (a) of reference (v) prohibits any person from preventing a service member from communicating with a Member of Congress or an IG; paragraph (b) prohibits any person from taking or threatening to take an unfavorable personnel action as a reprisal against a service member for making or preparing to make a communication to a Member of Congress or an IG.

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(2) Strictly speaking, reference (v) applies to the petitioner. The petitioner, however, has not provided any information that implicates reference (v); there is no indication that anyone has prevented or attempted to prevent him from speaking to a Member of Congress or an IG, nor has he indicated that anyone has taken or threatened to take unfavorable personnel action against him or withheld or threatened to withhold from him favorable personnel action as a reprisal for making or preparing a communication to either, or for any other reason. Even assuming the petitioner has "subjected [himself] to substantial scrutiny within [his] occupational community for raising this claim", this alone does not trigger relief under reference (v).

6. Conclusion. The BCNR should deny the petitioner's requests.

7. This advisory opinion contains privileged attorney-client work product and is provided solely to BCNR. Please contact the Judge Advocate Research and Civil Law (JAR) branch of Judge Advocate Division (JAD) at 5 U.S.C. 552(b) (6), if you seek to release this memorandum. However, JAR has no objection to any of this document being used by the PERB or the BCNR in their respective opinions.

5 U.S.C. 552(b) (6)

J. P. HARLOW
Lieutenant Colonel
U.S. Marine Corps
Branch Head, JAR
By direction of the
Staff Judge Advocate to the
Commandant of the Marine Corps

**APPLICATION FOR CORRECTION OF MILITARY RECORD
UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552**
(Please read instructions on reverse side BEFORE completing this application.)

OMB No. 0704-0003
OMB approval expires
Oct 31, 2014

The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Executive Services Directorate, Information Management Division, 4800 Mark Center Drive, Suite 02G09, Alexandria, VA 22350-3100 (0704-0003). Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE ABOVE ORGANIZATION. RETURN COMPLETED FORM TO THE APPROPRIATE ADDRESS ON THE BACK OF THIS PAGE.

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. 1552, and E.O. 9397, as amended (SSN).

PRINCIPAL PURPOSE(S): To initiate an application for correction of military record. The form is used by Board members for review of pertinent information in making a determination of relief through correction of a military record. Completed forms are covered by correction of military records SORNs maintained by each of the Services or the Defense Finance and Accounting Service.

ROUTINE USE(S): The DoD Blanket Routine Uses found at: http://privacy.defense.gov/blanket_uses.shtml apply to this collection.

DISCLOSURE: Voluntary; however, failure to provide requested information may result in a denial of your application. An applicant's SSN is used to retrieve these records and links to the member's official military personnel file and pay record.

1. APPLICANT DATA (The person whose record you are requesting to be corrected.)

a. **BRANCH OF SERVICE** (X one) ☐ ARMY ☐ NAVY ☐ AIR FORCE ☒ MARINE CORPS ☐ COAST GUARD

b. **NAME** (Print - Last, First, Middle Initial)

5 U.S.C. 552(b) (6)

c. **PRESENT OR LAST PAY GRADE**
Captain

d. **SERVICE NUMBER** (If applicable)

5 U.S.C.

e. **SSN**

5 U.S.C.

2. **PRESENT STATUS WITH RESPECT TO THE ARMED SERVICES** (Active Duty, Reserve, National Guard, Retired, Discharged, Deceased)
Active Duty

3. **TYPE OF DISCHARGE** (If by court-martial, state the type of court.)
Reserve 19910 N/A

4. **DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY** (YYYYMMDD)
20130701

5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED: (Entry required)

a. An immediate formal promotion to major under references (a) through (i); b. Adjustment of my date of rank; c. Any back pay and allowances which may result from those corrections; d. A seat at resident FY13 Professional Intermediate-Level School under reference (l); e. That the Board make a determination as to the applicability of the Whistleblower Protection Act (10 U.S.C. §1034), because I have subjected myself to substantial scrutiny within my occupational community for raising this claim;

6. **I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST FOR THE FOLLOWING REASONS:** (Entry required)
a. This request is being made less than one year after the original deficiency was identified; b. The error and injustice which form the basis for this complaint occurred on 23 January 2012 after the CMC and SecNav were presented false and incorrect materials by the Judge Advocate Division which resulted in a denial of my administrative request for reconsideration for and delivery of promotion to major;

7. **ORGANIZATION AND APPROXIMATE DATE** (YYYYMMDD) **AT THE TIME THE ALLEGED ERROR OR INJUSTICE IN THE RECORD OCCURRED** (Entry required) 23 January 2012

8. DISCOVERY OF ALLEGED ERROR OR INJUSTICE

a. **DATE OF DISCOVERY** (YYYYMMDD)
20121228

b. **IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THE APPLICATION.**

9. **IN SUPPORT OF THIS APPLICATION, I SUBMIT AS EVIDENCE THE FOLLOWING ATTACHED DOCUMENTS:** (If military documents or medical records are pertinent to your case, please send copies. If Veterans Affairs records are pertinent, give regional office location and claim number.)

This case presents an opportunity to correct both error and injustice in the promotion of officers selected for advancement in grade. The current method of applying a promotion hold after one's date of promotion violates statute, regulation and fundamental principle of equity demanded by both Congressional and cabinet executive leadership.

10. **I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C.** (At no expense to the Government) (X one)

☒ **YES. THE BOARD WILL DETERMINE IF WARRANTED.**

☐ **NO. CONSIDER MY APPLICATION BASED ON RECORDS AND EVIDENCE.**

11. a. **COUNSEL** (If any) **NAME** (Last, First, Middle Initial) and **ADDRESS** (Include ZIP Code)
N/A

b. **TELEPHONE** (Include Area Code) 5 U.S.C.

c. **E-MAIL ADDRESS**
5 U.S.C. 552(b)(6)

d. **FAX NUMBER** (Include Area Code) N/A

12. **APPLICANT MUST SIGN IN ITEM 15 BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, indicate the name (print) and relationship by marking one box below.**

☐ SPOUSE ☐ WIDOW ☐ WIDOWER ☐ NEXT OF KIN ☐ LEGAL REPRESENTATIVE ☐ OTHER (Specify)

13. a. **COMPLETE CURRENT ADDRESS** (Include ZIP Code) **OF APPLICANT OR PERSON**

5 U.S.C. 552(b) (6)

b. **TELEPHONE** (Include Area Code)

c. **E-MAIL ADDRESS**

d. **FAX NUMBER** (Include Area Code)

14. **I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM.** (U.S. Code, Title 18, Sections 287 and 1001, provide that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)

CASE NUMBER
(Do not write in this space.)

15. **SIGNATURE** (Applicant must sign here.)

5 U.S.C. 552(b) (6)

16. **DATE SIGNED** (YYYYMMDD)
20121228



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

JSR
Docket No: NR3970-13
27 June 2013

5 U.S.C. 552(b) (6)

Dear 5 U.S.C. 552(b) (6)

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 27 June 2013. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the report of the Headquarters Marine Corps Performance Evaluation Review Board (PERB), dated 25 April 2013, a copy of which is attached, and your letter dated 7 May 2013.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the report of the PERB. The Board was not convinced that Marine Corps Order 5000.12E did not require you to notify your reporting senior of your pregnancy. Further, the Board noted that the reporting senior's written counseling of 4 May 2012, enclosure (5) to your application, did not include the word "pregnancy" at all, but rather counseled you that "you failed to inform your chain of command about your limited duty status." In view of the above,

your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

5 U.S.C. 552(b) (6)

W. DEAN PFEIFFER
Executive Director

Enclosure

Copy to:

5 U.S.C. 552(b) (6)



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2008 ELLIOT ROAD
QUANTICO, VA 22134-5030

1610
MMER/PERB

25 APR 2013

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
5 U.S.C. 552(b) (6), USMC DOCKET NO. 908-12

Ref: (a) 5 U.S.C. 552(b) (6) DD Form 149 of 5 Nov 12
(b) MCO P1610.7F

1. Per MCO 1610.11C, the Performance Evaluation Review Board, with three members present, met on 27 March 2013 to consider 5 U.S.C. 552(b) (6) petition contained in reference

(a). Removal of fitness report 20111101-20120430 (SA) was requested. Reference (b) is the performance evaluation directive governing submission of the report.

2. 5 U.S.C. 552(b) (6) petitions to have this report removed arguing that the Reporting Senior (RS's) marks on the report were inappropriately modified after the report had been submitted in Automated Performance Evaluation System (APES), but prior to the report being finalized, and that this was done as a reprisal for her decision not to report her pregnancy to her legal chain of command.

3. In its proceedings, the Board concluded that the contested report is administratively correct and procedurally complete as written and filed. The following is offered as relevant:

a. The Board acknowledges that the marks on the report were changed after its initial submission into APES; however, the Board found nothing inappropriate about this. The petitioner argues that the only thing that had changed from the original submission of the report, was her "... status as a pregnant female and how that information was shared with my legal chain of command." The Board notes that if truly the only change was the knowledge that she was pregnant, this situation might be viewed differently. However, by her own admission, the idea of "...how that information was shared..." was also new information. In considering this aspect of the situation, the Board found that the RS apparently learned new information that affected his evaluation of the Marine Reported On (MRO's) performance during

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
5 U.S.C. 552(b) (6), USMC DOCKET NO. 908-12

the reporting period, and since the report had not yet been finalized in APES, he appropriately modified the report to reflect his changed evaluation.

b. The Board notes that the attributes that were changed appear to correspond with the RS' newfound knowledge that the MRO had not appropriately notified her chain of command. The RS lowered his evaluative mark in the attributes for Judgment and Communication Skills. It is the opinion of the Board that the RS appropriately modified this report prior to its final submission, based on new information that had only come to light after the end of the reporting period, but occurred during the reporting period.

c. The Board found no evidence of reprisal in this fitness report. The report is an overall positive report, with no indication that the MRO's performance was unsatisfactory. The lowered marks do not indicate unsatisfactory performance, but simply indicate a lower level of satisfactory performance. The Board found that the RS' actions do not "smack of" reprisal as argued by the petitioner, but instead reflect due diligence as a reporting official.

d. The petitioner also claims that this report was used as a counseling tool. However, the Board found no evidence of counseling statements in the Section I or Section K comments. 5 U.S.C. 552(b)(6) supports this claim by arguing that this fitness report was her first indication that her performance was unsatisfactory. However, the Board notes that nothing about this report indicates unsatisfactory performance. There are no negative comments or adverse markings. It is further noted that the MRO was counseled by the RS about her failure to inform her chain of command about her pregnancy, and for asking a Senior Non-Commissioned Officer (SNCO) to withhold information from the chain of command. This counseling could not have occurred during the reporting period because the information was not known to the RS until after the end of reporting period.

e. 5 U.S.C. 552(b) (6) also discusses her believe^f that she was denied a position as a Defense Counsel solely because she was pregnant, and she provided two, third party letters as evidence to support this claim. The Board notes that being denied a billet is an entirely separate issue from this performance

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
5 U.S.C. 552(b) (6), USMC DOCKET NO. 908-12

evaluation. Whether or not the petitioner was unfairly denied a billet assignment has no direct relevance to this performance evaluation. If indeed, the RS unfairly made assignment recommendations based solely on the fact that the MRO was pregnant, it does not indicate that he acted inappropriately in fulfilling his responsibilities as a reporting official for this performance evaluation.

4. In summary, the Board found that the petitioner failed to meet the burden of proof necessary to establish an inaccuracy or injustice warranting the removal of this report. The Board's opinion, based on deliberation and majority vote is that the contested fitness report should remain a part of 5 U.S.C. 552(b) (6) official military record.

5. Point of contact for this matter is 5 U.S.C. 552(b) (6),
5 U.S.C. 552(b) (6).

5 U.S.C. 552(b) (6)

CALVIN F. SWAIN
Deputy Director
Manpower Management Division
Manpower and Reserve Affairs
Department
By direction of the Commandant
of the Marine Corps

240

**APPLICATION FOR CORRECTION OF MILITARY RECORD
UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552**
(Please read instructions on reverse side BEFORE completing this application.)OMB No. 0704-0003
OMB approval expires
Oct 31, 2014

The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Executive Services Directorate, Information Management Division, 4800 Mark Center Drive, Suite 02G09, Alexandria, VA 22350-3100 (0704-0003). Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE ABOVE ORGANIZATION. RETURN COMPLETED FORM TO THE APPROPRIATE ADDRESS ON THE BACK OF THIS PAGE.**PRIVACY ACT STATEMENT**

AUTHORITY: 10 U.S.C. 1552, and E.O. 9397, as amended (SSN).
PRINCIPAL PURPOSE(S): To initiate an application for correction of military record. The form is used by Board members for review of pertinent information in making a determination of relief through correction of a military record. Completed forms are covered by correction of military records SORNs maintained by each of the Services or the Defense Finance and Accounting Service.

ROUTING
<http://p>**DISCLOSURE**
information
SSN is
military

NR20130003970

5 U.S.C. 552(b)(6)
Section.
ed
ant's
s official**1. APPLICANT DATA** (The person whose record you are requesting to be corrected)

a. BRANCH OF SERVICE (X one) ☐ ARMY ☐ NAVY ☐ AIR FORCE ☒ MARINE CORPS ☐ COAST GUARD
b. NAME (Print - Last, First, Middle Initial)
5 U.S.C. 552(b)(6)
c. PRESENT OR LAST PAY GRADE
O3
d. SERVICE NUMBER (if applicable)
None
e. SSN
5 U.S.C. 552(b)(6)

2. PRESENT STATUS WITH RESPECT TO THE ARMED SERVICES (Active Duty, Reserve, National Guard, Retired, Discharged, Deceased)
Active Duty**3. TYPE OF DISCHARGE** (if by court-martial, state the type of court.)
N/A**4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY** (YYYYMMDD)**5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED:** (Entry required)

I request that my fitness report dated 20111101 - 20120430 be removed from my Official Military Personnel File. Please see attached documentation.

111101-120430 (SA)

6. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST FOR THE FOLLOWING REASONS: (Entry required)

See attached.

7. ORGANIZATION AND APPROXIMATE DATE (YYYYMMDD) AT THE TIME THE ALLEGED ERROR OR INJUSTICE IN THE RECORD OCCURRED (Entry required) 20120504**8. DISCOVERY OF ALLEGED ERROR OR INJUSTICE**

a. DATE OF DISCOVERY (YYYYMMDD)
20120615
b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THE APPLICATION.

9. IN SUPPORT OF THIS APPLICATION, I SUBMIT AS EVIDENCE THE FOLLOWING ATTACHED DOCUMENTS: (If military documents or medical records are pertinent to your case, please send copies. If Veterans Affairs records are pertinent, give regional office location and claim number.)
See attached.**10. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C.** (At no expense to the Government) (X one)☒ YES. THE BOARD WILL DETERMINE IF WARRANTED.☐ NO. CONSIDER MY APPLICATION BASED ON RECORDS AND EVIDENCE.**11.a. COUNSEL** (If any) NAME (Last, First, Middle Initial) and ADDRESS (Include ZIP Code)
5 U.S.C. 552(b)(6)**b. TELEPHONE** (Include Area Code) **5 U.S.C. 552(b)(6)****c. E-MAIL ADDRESS**
5 U.S.C. 552(b)(6)**d. FAX NUMBER** (Include Area Code) **5 U.S.C. 552(b)(6)****12. APPLICANT MUST SIGN IN ITEM 15 BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, indicate the name (print) and relationship by marking one box below.**☐ SPOUSE ☐ WIDOW ☐ WIDOWER ☐ NEXT OF KIN ☐ LEGAL REPRESENTATIVE ☐ OTHER (Specify)**13.a. COMPLETE CURRENT ADDRESS** (Include ZIP Code) OF APPLICANT OR PERSON
5 U.S.C. 552(b)(6) (Forward notification of all changes of address.)**b. TELEPHONE** (Include Area Code) **5 U.S.C. 552(b)(6)****c. E-MAIL ADDRESS**
5 U.S.C. 552(b)(6)**d. FAX NUMBER** (Include Area Code)**14. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM.** (U.S. Code, Title 18, Sections 287 and 1001, provide that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)**15. SIGNATURE** (Applicant must sign here)
5 U.S.C. 552(b)(6)**16. DATE SIGNED**
(YYYYMMDD)
20121105**CASE NUMBER**
(Do not write in this space.)

DEC 27 2012

DD FORM 149, APR 2012

PREVIOUS EDITION IS OBSOLETE.

URGENTpending
ANB JanBCNR 8/1/13
MCH 7/08

From: 5 U.S.C. 552(b) (6) XXX XX 5 U.S.C. 552(b) (6)
USMC

To: Board for the Correction of Naval Records

Subj: REQUEST FOR THE REMOVAL OF ADVERSE FITNESS REPORT FOR THE
REPORTING PERIOD 20111101-20120430 ICO 5 U.S.C. 552(b) (6)
5 U.S.C. 552(b) (6), XXX XX 5 U.S.C. 552(b) (6) USMC

Ref: (a) MCO 1610.11D, Performance Evaluation Appeals
(b) MCO P1610.7F, Performance Evaluation System (PES)
(c) MCO 5000.12E, Policy Concerning Pregnancy and
Parenthood
(d) MCO 5354.1D, Equal Opportunity Policy

Encl: (1) Fitness Report for the Reporting Period 20111101-
20120430 signed by RS on 20120615
(2) Fitness Report for the Reporting Period 20111101-
20120430 signed by RS on 20120430
(3) Statement by 5 U.S.C. 552(b) (6) dtd 15 Oct 12
(4) Statement by 5 U.S.C. 552(b) (6)
(5) Written Counseling by 5 U.S.C. 552(b) (6)
(6) Letter of Appreciation from IRS
(7) Statement by 5 U.S.C. 552(b) (6) dtd 10 Oct 12

1. Per references (a) and (b), I request removal of the subject fitness report.

2. I request expedited action on this case because I hope to have this situation resolved prior to my upcoming FY13 Career Designation Board which will convene in January 2013.

3. The fitness report in question, attached as enclosure (1), was originally entered into the APES system and digitally signed by 5 U.S.C. 552(b) (6) my RS, on 20120430 (See Enclosure (2)) before being changed and resubmitted on 20120615 as a reprisal for my decision not to report my pending pregnancy to my RS or others in my legal chain of command. Although the fitness report is not adverse, two of the marks were changed inappropriately from D to C lowering the overall average in my RS's profile from the top of his scale to the 80th percentile. Reasons for why this action by 5 U.S.C. 552(b) (6) is a reprisal and completely inappropriate given the circumstances is set forth in detail below.

a. I worked for 5 U.S.C. 552(b) (6) and received a semi-annual fitness report from him during the reporting period prior to the subject reporting period. The fitness report I received during the period from May to October 2011 placed me as the highest report for First Lieutenant's in his RS profile.

Subj: REQUEST FOR THE REMOVAL OF ADVERSE FITNESS REPORT FOR THE
REPORTING PERIOD 20111101-20120430 ICO 5 U.S.C.
5 U.S.C. 552(b) (6) XXX XX 5 U.S.C. USMC

b. In November of 2011, the command assigned me as the OIC of the Volunteer Income Tax Assistance (VITA) program but also informed me that at the conclusion of the tax season, I would be reassigned to the Defense section at MCRD. The move to a trial billet, either prosecuting or defending Marines, is viewed as a more challenging assignment and is something we seek as judge advocates, so I looked forward to that opportunity.

c. My performance throughout my time in the VITA program was consistent with my performance during the previous reporting period as evidenced by the first version of the fitness report closed out on 20110430 and attached as enclosure (2). The ONLY thing that changed between the submission of the subject report I am seeking to have removed and the report attached as enclosure (2) is my status as a pregnant female and how that information was shared with my legal chain of command.

d. Sometime in late November 2011, a mass was discovered in my right lung and I had an enlarged lymph node that caused the doctors to refer me to the specialists at Balboa. After two consults and a procedure in which they caused one of my lungs to collapse, the final diagnosis was sarcoidosis, an auto-immune disease, and possible lymphoma. I share this information only as background for what occurred in April when the doctors informed me I was 8 weeks pregnant.

e. At the time my pregnancy was discovered, the doctors informed me that due to the other medical issues we were already treating, my pregnancy was "high-risk" and it would still be several weeks or months before they would be able to determine whether I could carry the baby to term. It was for this reason I was extremely uncomfortable sharing the news of my pregnancy with anyone much less my legal chain of command or other officers at the law center.

f. I immediately informed my Headquarters Company Commander, 5 U.S.C. 552(b) (6), about my pregnancy and we reviewed reference (c) together to determine what my obligation was to my legal chain of command. Together we determined, reporting my pregnancy to him as my Company Commander complied with the order and that I would inform my legal chain of command only after my medical issues were resolved in such a way as to know whether the pregnancy could be carried to term.

g. Prior to this conversation, I was still scheduled to go to Defense and I actually participated in Defense training with all of the other regional defense counsel the last week of April.

Subj: REQUEST FOR THE REMOVAL OF ADVERSE FITNESS REPORT FOR THE
REPORTING PERIOD 20111101-20120430 ICO 5 U.S.C. [REDACTED]
5 U.S.C. 552(b) (6) [REDACTED] XXX XX 5 U.S.C. [REDACTED] USMC

I also submitted my fitness report information in MROW at the end of April and enclosure (2) reflects that 5 U.S.C. [REDACTED] completed his markings and comments on 30 April.

h. The day after my conversation with the Company Commander, 5 U.S.C. 552(b) [REDACTED] learned of my pregnancy. 5 U.S.C. 552(b) (6) [REDACTED], the senior defense counsel at MCRD, informed me 5 U.S.C. [REDACTED] told him "5 U.S.C. [REDACTED] is not going to defense if she is pregnant" or words to that effect. (See Enclosure (3)).

i. I was very upset by the reaction from 5 U.S.C. [REDACTED] and believed it was inappropriate for him to use my pregnancy, particularly in light of all the other factors surrounding this issue, as a basis to possibly remove me from a future billet. I consulted the Equal Opportunity (EO) Representative, 5 U.S.C. 552(b) [REDACTED] about the possible actions being taken by 5 U.S.C. [REDACTED] to determine whether I should file an EO complaint. We reviewed reference (d) and he advised me he believed this would be best resolved informally by me simply approaching 5 U.S.C. [REDACTED] and discussing it with him. (See Enclosure (4)). I took his advice and talked with 5 U.S.C. [REDACTED]. During that conversation, 5 U.S.C. [REDACTED] denied telling 5 U.S.C. 552(b) (6) [REDACTED] my pregnancy would prevent me from going to defense and told me I should have informed the legal chain of command. He disagreed with 5 U.S.C. 552(b) [REDACTED] and my interpretation of reference (c) and said I should have known to use my legal chain vice the admin chain.

j. On or about 4 May, 5 U.S.C. [REDACTED] called me into his office and counseled me about not using my chain of command and berated me again for not telling my legal chain of command I was pregnant. (See Enclosure (5)). Knowing that I had complied with the requirements of reference (c), I went back to the EO representative and together with 5 U.S.C. [REDACTED], we reviewed reference (c) again at which time 5 U.S.C. [REDACTED] called 5 U.S.C. 552(b) (6) [REDACTED], my OIC and RO on the subject report. At the time, LtCol Sullivan agreed the counseling was inappropriate and said he'd address it with 5 U.S.C. [REDACTED].

k. Shortly after this conversation, I logged into MOL to review the status of my fitness report, I saw that it had been resubmitted to the RO with the lower marks reflected in the subject report. I returned to the EO advisor and once again discussed the options of filing an official EO complaint or whether requesting Mast would be a viable alternative. I also spoke with 5 U.S.C. [REDACTED] again about these options and he called 5 U.S.C. 552(b) (6) [REDACTED] again. It was during this conversation that 5 U.S.C. [REDACTED] told him, "I am fucking sick of her going over there and

Subj: REQUEST FOR THE REMOVAL OF ADVERSE FITNESS REPORT FOR THE
REPORTING PERIOD 20111101-20120430 ICO 5 U.S.C.
5 U.S.C. 552(b) (6), XXX XX 5 U.S.C. USMC

complaining and making 5 U.S.C. seem unprofessional," or words to that effect.

j. Sometime after this conversation, it is my understanding that Col Sinclair, the H&S Bn CO, spoke with 5 U.S.C. 552(b) (6) and came to the conclusion there was no evidence of wrongdoing on the part of my RS and RO but that if there was wrongdoing "it would be on the RS's conscience" or words to that effect.

l. On or about 8 June, 5 U.S.C. talked to me for approximately one hour. During the course of that conversation, he informed that I was "disloyal" and that going to our administrative chain of command vice the legal chain of command was "embarrassing" to him. He also said that "even if you didn't technically violate the MCO [reference (c)], the 'officer thing' to do would have been to tell me you were pregnant." He also told me that if I was "disloyal" again, he would have me removed from the law center and it would damage my career. He also said the lower marks reflected accurately the work I did as the VITA program OIC. This is the only time he discussed the subject fitness report with me. I was never counseled on the previous fitrep, nor was I given any other feedback on the subject report midterm or at any other time but only after the issues above were revealed and AFTER the initial report was submitted to the RO on 30 April 2012.

m. The VITA program for which I was the OIC finished in the top 5 in the region. I received a letter of appreciation from the IRS for the work done during the tax season and the letter was endorsed by the CG, 5 U.S.C. (See Enclosure (6)). At no time from January to April did I ever receive anything but positive comments about my work with the VITA program.

n. After leaving the tax center, I was not allowed to go into the Defense billet as had been promised. I was also not placed in a trial billet at all but instead was sent to an administrative billet as the review officer. At no time was I given any other explanation than I was pregnant and would not be allowed to go into defense. 5 U.S.C. 552(b) (6), the Senior Defense Counsel at the time ultimately was given the choice to take a more senior Captain in my place but his statement supports that my pregnancy was the reason stated by 5 U.S.C. 552(b) (See Enclosure (3)). Likewise, my husband who is also a Marine Corps Judge Advocate was told I'd be going to Defense by my OIC and RO, 5 U.S.C. 5 U.S.C., prior to me becoming pregnant. (See Enclosure (7)).

Subj: REQUEST FOR THE REMOVAL OF ADVERSE FITNESS REPORT FOR THE
REPORTING PERIOD 20111101-20120430 ICO 5 U.S.C.
5 U.S.C. 552(b) (6), XXX XX 5 U.S.C. USMC

4. Except for the brief conversation that I had with my Reporting Senior (RS) on 8 June 2012, I was never counseled about any wrongdoing or poor performance. In fact, I was counseled only after completing a successful tax season and receiving the letter of appreciation. The conversation of 8 June was based solely on the information the RS had at the time which proved to be personally embarrassing to him, as noted above. Section 1007.6 of reference (b) clearly states that "[t]he fitness report is not a counseling tool." In my case, the first and only indication I had that my performance was not perceived to be satisfactory was the receipt of this fitness report. Although the report is not adverse, lowering my marks and using the fitness report as a counseling tool violates the spirit and intent of reference (b). Consequently, this report should be removed from my OMPF.

5. Likewise, lowering my marks in the subject report smacks of a reprisal as defined in reference (d). I complied with reference (c) and sought out assistance at every turn to deal with a complicated pregnancy in a way to respect my privacy and still be able to uphold my commitment to the Marine Corps and Judge Advocate community. Reference (c) defines reprisal as "the taking or threatening to take unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, or any act of retaliation against a military member for making or preparing a protected communication." In hindsight, I wish I had filed a formal EO complaint but at the time I believed the EO advisor was correct in trying to resolve this at the lowest level possible by talking directly to my RS. Instead, my efforts to use the resources available to me were held against me and resulted in lower marks on the subject report. For this reason, the subject report should be removed from my OMPF.

6. The subject fitness report is not in compliance with the spirit and intent of reference (b) and is being used as a reprisal as defined in reference (d). It is based on information that ultimately is not substantiated by my actual performance or the record. As such, the report should be removed from my OMPF.

7. I request the following:

- a. Removal of the subject fitness report.
- b. Expeditionary processing of this case due to the upcoming FY13 Career Designation Board in January 2013.

Subj: REQUEST FOR THE REMOVAL OF ADVERSE FITNESS REPORT FOR THE
REPORTING PERIOD 20111101-20120430 ICO 5 U.S.C.
5 U.S.C. 552(b) (6) XXX XX 5 U.S.C. USMC

9. If there are any questions regarding this request, please do
not hesitate to call me at 5 U.S.C. 552(b) (6)

5 U.S.C. 552(b) (6)



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

SJN
Docket No: 1753-15
28 October 2015

5 U.S.C. 552(b) (6)

Dear 5 U.S.C. 552(b) (6):

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 9 October 2015. The names and votes of the members of the panel will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record, and applicable statutes, regulations, and policies. In addition, the Board considered the advisory opinion furnished by the Navy Personnel Command, dated 29 May 2015, a copy of which was previously provided to you and is enclosed. Further, the Board considered the reply to your 23 January 2015 reprisal complaint addressed to the Inspector General of the Marine Corps that dismissed your complaint.

After careful and conscientious consideration of the entire record, the Board found the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this regard, the Board substantially concurred with the comments contained in the advisory opinion. Specifically, that the report is valid, you were in a one of one summary group on your previous and contested report by the same reporting senior (RS), and prepared in accordance with Navy directives. Additionally, that it is not uncommon for servicemembers to disagree with their RS's appraisal, and the comments and performance trait marks assigned are at the discretion of the RS. The Board concluded that your reporting senior's decision to submit the report was appropriate, it was administratively and procedurally correct as written and filed, and should remain a part of your official record.

Finally, regarding your request for a personal appearance, Board regulations state that personal appearances before the Board are not granted as a right, but only when the Board determines that such an appearance will serve some useful purpose. In your case, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record. Accordingly, your application has been denied.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence within one year from the date of the Board's decision. New evidence is evidence not previously considered by the Board prior to making its decision in your case. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

5 U.S.C. 552(b) (6)

SCOTT F. THOMPSON
Executive Director

Enclosure



DEPARTMENT OF THE NAVY

NAVY PERSONNEL COMMAND

5720 INTEGRITY DRIVE

MILLINGTON TN 38055-0000

1610

PERS-32

29 May 2015

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Via: PERS/BCNR Coordinator (PERS-3C)

Subj: 5 U.S.C. 552(b) (6) [REDACTED], USN, XXX-XX-5 [REDACTED]

Ref: (a) BUPERSINST 1610.10C (EVALMAN)

Encl: (1) BCNR File NR 1753-15 wo/Service record

1. Enclosure (1) is returned. The member requests the removal of her evaluation report for the period of 13 March 2013 to 15 March 2014.

2. Based on our review of the material provided, we find the following:

a. A review of the member's headquarters record revealed the evaluation report in question to be on file. It was signed by the member acknowledging the contents of the evaluation report and her right to submit a statement. The member indicated on the evaluation report that she intended to submit a statement, the member's statement and reporting senior's endorsement are on file.

b. The evaluation report in question is a Periodic/Regular report ending 15 March 2014. The member alleges the evaluation report is an injustice as the promotion recommendation is lower than previous evaluation with no justification, there are numerous errors and inaccuracies within the evaluation report and should be removed.

c. The evaluation report is a valid report. The report does contain an error in block 14 (From Date) which may be corrected administratively. Evaluation reports are unique to period evaluated. A decline in performance is defined as decline in the promotion recommendation or a decline of two or more trait grades by the same reporting senior. If decline was due to forced distribution limits, explain as such (Chapter 13, page 13-4, subparagraph 13-9h). Member was in a one of one summary group on previous and current report with same reporting senior and promotion recommendation declined from "Early Promote" to Significant Problems".

d. Reference (a), Chapter 3, page 3-1, paragraph 3-3, required the reporting senior to submit an evaluation report for the member's scheduled periodic date. The evaluation report was accurately prepared and submitted by the reporting senior in accordance with Reference (a). Reference (a), Chapter 1, page 1-17, block 45 - COMMENTS ON PERFORMANCE, requires a reporting senior to comment on a "Significant Problems (SP)" promotion recommendation.

RECEIVED 12-13

Subj: 5 U.S.C. 552(b) (6), USN, XXX-XX-5

Reference (a), Chapter 13, page 13-5, paragraph 13-11, authorizes a reporting senior to comment on a member's particularly strong or weak performance. In this case, the reporting senior cited member's failure to qualify as Enlisted Fleet Marine Force Warfare Specialist (FMF) and violation of Navy Core Values.

e. The member within her petition cites policy requirements to qualify FMF and disputes the cause of failure to qualify within the required time. She also alleges she was unaware of changes to her primary duties, command's employment and achievements and was not informed at mid-term counseling of her decline in performance. Reference (a), has no stipulation that a member obtain a warfare qualification, that requirement is per the OPNAVINST 1414.1C. PERS-32 has no authority over local command policy or supplements to the instructions by local headquarter elements and cannot comment on mid-term counseling as it is not part of our purview.

f. PERS-32 cannot comment on 5 U.S.C. intent for the evaluation report in question just the foundational elements of the evaluation report as they apply to the instruction. The reporting senior is charged with commenting on the performance or characteristics of each member under his/her command and determine what material will be included in an evaluation report. It is not uncommon for members to disagree with their reporting senior's appraisal. The comments and performance trait marks assigned on a report are at the discretion of the reporting senior. The evaluation of a member's performance and making recommendations concerning suitability for appointment and assignments are the responsibility of the reporting senior.

g. In reviewing petitions that question the exercise of the reporting senior's evaluation responsibilities, we must determine if the reporting senior abused his/her discretionary authority. For us to recommend relief, the petitioner has to show that either there is no rational support for the reporting senior's action or that the reporting senior acted for an illegal or improper purpose. Nothing in the member's petition indicated the reporting senior acted for illegal or improper purposes or that the evaluation report lacked rational support.

h. If the member believed the reporting senior prepared the report for reprisal or in retaliation she could have filed a complaint of wrongful treatment under one of the processes set up for that purpose, e.g. Article 138, Navy Hotline, etc.

i. The member does not prove the evaluation report to be unjust but does prove that block 14 is in error which may be corrected with an administrative change letter.

3. We recommend the member's record remain unchanged except as noted above.

5 U.S.C. 552(b) (6)

CLARENCE E. CARVER
By Direction

240

**APPLICATION FOR CORRECTION OF MILITARY RECORD
UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552**
(Please read instructions on reverse side BEFORE completing this application.)OMB No. 0704-0003
OMB approval expires
Oct 31, 2014

The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Executive Services Directorate, Information Management Division, 4800 Mark Center Drive, Suite 02G09, Alexandria, VA 22304-3100 (0704-0003). Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE ABOVE ORGANIZATION. RETURN COMPLETED FORM TO THE APPROPRIATE ADDRESS ON THE BACK OF THIS PAGE.**PRIVACY ACT STATEMENT**

AUTHORITY: 10 U.S.C. 1552, and E.O. 9397, as amended (SSN).
PRINCIPAL PURPOSE(S): To initiate an application for correction of military record. The form is used by Board members for review of pertinent information in making a determination of relief through correction of a military record. Completed forms are covered by correction of military records SORNs maintained by each of the Services or the Defense Finance and Accounting Service.

ROUTINE USE
<http://privacy.d>**DISCLOSURE**
information ma
SSN is used to
military person

NR20150001753

5 U.S.C. 552(b) (6)

1. APPLICANT DATA (The person whose record you are requesting to be corrected.)

a. BRANCH OF SERVICE (X one)	<input type="checkbox"/> ARMY	<input checked="" type="checkbox"/> NAVY	<input type="checkbox"/> AIR FORCE	<input type="checkbox"/> MARINE CORPS	<input type="checkbox"/> COAST GUARD
b. NAME (Print - Last, First, Middle Initial) 5 U.S.C. 552(b)	c. PRESENT OR LAST PAY GRADE HM2		d. SERVICE NUMBER (If applicable)		e. SSN 5 U.S.C. 552(b) (6)
2. PRESENT STATUS WITH RESPECT TO THE ARMED SERVICES (Active Duty, Reserve, National Guard, Retired, Discharged, Deceased) Active Duty		3. TYPE OF DISCHARGE (If by court-martial, state the type of court.) N/A		4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY (YYYYMMDD) 20160128	

5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED: (Entry required)

The evaluation from 13 March 13 to 17 Jun14 to be removed from my record.

6. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST FOR THE FOLLOWING REASONS: (Entry required)

I was given a SP evaluation without having gone to NJP or any other form of punishment within the last year. I was given an EP evaluation the year prior. I completed my FMF PQS and sent it through my chain of command; however due to fiscal constraints at the command I was not provided the opportunity to complete my FMF. The rater who signed my evaluation is not attached to my command's UIC. I was told I received the adverse evaluation because I was facing an admin sep board I was retained on 4 Sept 14.

7. ORGANIZATION AND APPROXIMATE DATE (YYYYMMDD) AT THE TIME THE ALLEGED ERROR OR INJUSTICE IN THE RECORD OCCURRED (Entry required) 20140617**8. DISCOVERY OF ALLEGED ERROR OR INJUSTICE**

a. DATE OF DISCOVERY (YYYYMMDD) 20140616	b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THE APPLICATION. N/A
--	---

9. IN SUPPORT OF THIS APPLICATION, I SUBMIT AS EVIDENCE THE FOLLOWING ATTACHED DOCUMENTS: (If military documents or medical records are pertinent to your case, please send copies. If Veterans Affairs records are pertinent, give regional office location and claim number.)

please see the enclosures 1-13

10. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. (At no expense to the Government) (X one)☒ YES. THE BOARD WILL DETERMINE IF WARRANTED.☐ NO. CONSIDER MY APPLICATION BASED ON RECORDS AND EVIDENCE.**11.a. COUNSEL** (If any) **NAME** (Last, First, Middle Initial) and **ADDRESS** (Include ZIP Code)**b. TELEPHONE** (Include Area Code)**c. E-MAIL ADDRESS****d. FAX NUMBER** (Include Area Code)**12. APPLICANT MUST SIGN IN ITEM 15 BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, indicate the name (print) 5 U.S.C. 552(b)(6) and relationship by marking one box below.**

<input type="checkbox"/> SPOUSE	<input type="checkbox"/> WIDOW	<input type="checkbox"/> WIDOWER	<input type="checkbox"/> NEXT OF KIN	<input type="checkbox"/> LEGAL REPRESENTATIVE	<input checked="" type="checkbox"/> OTHER (Specify) self
---------------------------------	--------------------------------	----------------------------------	--------------------------------------	---	--

13.a. COMPLETE CURRENT ADDRESS (Include ZIP Code) **OF APPLICANT OR PERSON IN ITEM 12 ABOVE** (Forward notification of all changes of address.)

5 U.S.C. 552(b) (6)

b. TELEPHONE (Include Area Code) 5 U.S.C.**c. E-MAIL ADDRESS**

5 U.S.C. 552(b) (6)

d. FAX NUMBER (Include Area Code) 5 U.S.C. 552(b) (6)**14. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM.** (U.S. Code, Title 18, Sections 287 and 1001, provide that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)**CASE NUMBER**
(Do not write in this space.)**15. SIGNATURE** (Applicant must sign here.)

5 U.S.C. 552(b) (6)

16. DATE SIGNED
(YYYYMMDD)

2015 01 27



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

JSR:ks
Docket No: 7351-14
8 July 2015

From: Chairman, Board for Correction of Naval Records
To: Commander, Navy Personnel Command

Subj: REVIEW NAVAL RECORD OF 5 U.S.C. 552(b) (6) USN,
(RET), XXX-XX-5

Ref: (a) 10 U.S.C. 1552

Encl: (1) Copy of approved Report of Proceedings w/o
attachments
(2) Copy of letter to Subject

1. In accordance with reference (a), the Board for Correction of Naval Records has reviewed allegations of error and injustice in Subject's naval record.
2. The designated representative of the Assistant Secretary of the Navy for Manpower and Reserve Affairs has reviewed the proceedings of the Board and approved the recommendation for corrective action as set forth in enclosure (1).
3. Regulations approved by the Secretary of the Navy require that Subject's naval record be corrected, where appropriate, in accordance with the approved recommendation of the Board.
4. It is requested that this Board be furnished a copy of any correspondence relating to the approved recommendation.

5 U.S.C. 552(b) (6)

By direction

Copy to:
DODIG



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

JSR

Docket No: NR7351-14

6 July 2015

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

Subj: REVIEW OF NAVAL RECORD **5 U.S.C. 552(b) (6)**, MC, USN
(RET), XXX-XX-**5 U.S.C.**

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 dtd 26 May 14 w/attachments
(2) PERS-80 memo dtd 16 Apr 15
(3) PERS-834 memo dtd 4 May 15
(4) PERS-32 memo dtd 7 May 15
(5) Counsel's ltr dtd 25 Jun 15 w/enclosures

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected by removing references to improper mental health examinations (MHE's) performed at Naval Health Clinic Cherry Point (NHCCP) and Naval Medical Center (NMC) Portsmouth (these appear in his medical record, but not in his Official Military Personnel File (OMPF)), removing documents referencing the Plan for Improvement dated 7 September 2007, or referring to him as an impaired provider (no such documents appear in his OMPF), removing the fitness report for 1 November 2006 to 31 October 2007, and promoting him to commander retroactive to the promotion board date in March 2010 (he has failed of selection by the Fiscal Year 11, 12, 13, and 14 Staff Commander Selection Boards; the FY 11 promotion board convened on 23 March 2010).

2. The Board, consisting of **5 U.S.C. 552(b) (6)** and **5 U.S.C.**, reviewed Petitioner's allegations of error and injustice on 6 July 2015, and pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations, and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

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

b. Petitioner contends that he was the victim of reprisal for his protected communications to his supervisors, starting in November 2006, reporting a pattern of substandard patient care. The contested fitness report on his performance as a physician at NHCCP is adverse, in that it was marked "Significant Problems" (lowest of five possible marks) in block 42 ("Promotion Recommendation - Individual") and block 41 ("Comments on Performance") included derogatory comments. Petitioner notes that his subsequent report from NMC Portsmouth, for 14 January to 23 June 2008, was entirely favorable, marking him "Must Promote" (second highest) in block 42. Under Article 138 of the Uniform Code of Military Justice, he submitted a complaint about the MHE's and the adverse fitness report, which resulted in no relief. He later submitted a complaint about the MHE's to the Bureau of Medicine and Surgery Inspector General (BUMED IG). The BUMED IG found this complaint to be partially substantiated. Specifically, the BUMED IG found that the referrals of 16 November and 12 December 2006, to NHCCP for MHE's and the associated MHE of 25 January 2007, as well as the referral of December 2007, to Navy Medicine East (NME) Portsmouth and NMC Portsmouth and the associated MHE at NMC Portsmouth on or about 14 January 2008 were procedurally improper. The Department of Defense (DoD) IG concurred with the BUMED IG findings.

c. In enclosure (2), PERS-80, the Navy Personnel Command (NPC) office with cognizance over officer promotions, commented to the effect that if it is determined that documents from Petitioner's service record should be removed, corrected or modified in any way, he should request a special selection board under Secretary of the Navy Instruction 1420.1B.

d. In enclosure (3), PERS-834, the NPC office with cognizance over officer performance, commented to the effect that office has no record of any request to process Petitioner for performance related issues or to submit any adverse

information into field code 17 (adverse or punitive matters) of his OMPF.

e. In enclosure (4), PERS-32, the NPC office with cognizance over performance evaluations, commented to the effect that Petitioner's request concerning the fitness report at issue should be denied.

f. Enclosure (5) is the response from Petitioner's counsel and Petitioner to the NPC advisory opinions.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board finds the existence of an error and injustice warranting partial relief, specifically, correcting Petitioner's medical record to remove all reference to the referrals for MHE and the MHE's that the BUMED and DoD IG found to be improper. The Board substantially concurs with enclosure (4) in finding that the fitness report in question should stand. In this regard, the Board is not persuaded that this report was in reprisal for Petitioner's protected communications, noting that the more favorable report for a later period was from a different duty station. Finally, the Board finds that Petitioner's request for promotion should be denied, as he has not been selected by a duly constituted officer promotion selection board; and medical records are not provided to such promotion boards, so the information about Petitioner's improper MHE's would not have been a factor in any of his failures of selection. In view of the above, the Board directs the following limited corrective action:

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing, from his medical record, all reference to his referrals of 16 November and 12 December 2006, to NHCCP for MHE's and the associated MHE of 25 January 2007.

b. That his naval record be corrected further by removing, from his medical record, all reference to his referral of December 2007, to NME Portsmouth and NMC Portsmouth and the associated MHE at NMC Portsmouth on or about 14 January 2008.

JSR

Docket No: NR7351-14

c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

d. That the remainder of Petitioner's request be denied.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) 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 entitled matter.

5 U.S.C. 552(b) (6)



Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

5 U.S.C. 552(b) (6)



✓ ROBERT J. O'NEILL
Executive Director



DEPARTMENT OF THE NAVY
NAVY PERSONNEL COMMAND
5720 INTEGRITY DRIVE
MILLINGTON TN 38055-0000

1610
PERS-32
7 May 2015

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Via: PERS/BCNR Coordinator (PERS-3C)

Subj: 5 U.S.C. 552(b) (6), USN (RET), XXX-XX-5

Ref: (a) BUPERSINST 1610.10A (EVALMAN)

Encl: (1) BCNR File NR 7351-14 wo/Service record

1. Enclosure (1) is returned. The member requests the removal of his fitness report for the period of 01 November 2006 to 31 October 2007.

2. Based on our review of the material provided, we find the following:

a. A review of the member's headquarters record revealed the fitness report in question to be on file. The fitness report was signed by the member acknowledging the contents of the fitness report and his right to submit a statement. The member indicated on the fitness report that he intended to make a statement. The member's statement and the reporting senior's endorsement are present in the file.

b. The fitness report in question is a Periodic/Regular report ending 31 October 2007. The member alleges the fitness report is an incomplete and inaccurate characterization of his performance, including final recommendations against promotion and retention on active duty and should be removed.

c. The fitness report is a valid report. The reporting senior was required to submit the fitness report for the member's Periodic report period. Reference (a), Chapter 1, page 1-17, block 41 – COMMENTS ON PERFORMANCE, requires a reporting senior to comment on a "Significant Problems (SP)" promotion recommendation. Reference (a), Chapter 13, page 13-5, subparagraph 13-11 (b) – Leadership, addresses how a reporting senior may document details of particularly strong or weak performance on a member's evaluation report. It is not uncommon for members to disagree with their reporting senior's appraisal. In this case the reporting senior commented on the member's inability to perform tasks on time, to the standard and failure to maintain a level of proficiency as a Physician. The member within his statement acknowledged and accepted responsibility for his inability to keep up with his workload and backlog.

d. The member exercised his rights to file an Inspector General Complaint, pertaining to reprisal by the reporting senior which was investigated and reviewed through a General Court-Martial

RECEIVED MAY 13 2015

Subj: 5 U.S.C. 552(b) (6) USN (RET), XXX-XX5

Convening Authority (GCMCA), Article 138 hearing. Per Enclosure (1), the GCMCA concluded that the member's complaint lacked merit and no relief was warranted. The Assistant Secretary (Manpower and Reserve Affairs) concurred with the GCMCA that no relief was of the Navy (Manpower and Reserve Affairs) concurred with the GCMCA that no relief was warranted. PERS-32 also agrees that "No relief is merited" as the fitness report was prepared in accordance with reference (a).

e. In reviewing petitions that question the exercise of the reporting senior's evaluation responsibilities, we must determine if the reporting senior abused his/her discretionary authority. PERS-32 cannot comment on 5 U.S.C. 552(b) (6) intent of the fitness report comments or what input she received just the foundational elements of the fitness report as they apply to the instruction. The reporting senior is charged with commenting on the performance or characteristics of each member under his/her command and determine what material will be included in a fitness report. The comments and performance trait marks assigned on a report are at the discretion of the reporting senior. The evaluation of a member's performance and making recommendations concerning suitability for appointment and assignments are the responsibility of the reporting senior. For us to recommend relief, the petitioner has to show that either there is no rational support for the reporting senior's action or that the reporting senior acted for an illegal or improper purpose. Nothing in the member's petition indicated the reporting senior acted for illegal or improper purposes or that the fitness report lacked rational support.

f. The member does not prove the fitness report to be in error.

3. We recommend the member's record remain unchanged.

5 U.S.C. 552(b) (6)

CLARENCE E. CARVER
By Direction

Phd
240/209/310

APPLICATION FOR CORRECTION OF MILITARY RECORD
FORM 149, FEBRUARY 1999 EDITIONS OF TITLE 10, U.S. CODE, SECTION 1552
(Please read instructions on reverse side BEFORE completing this application.)

OMB No. 0704-0003

The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Executive Services Directorate, Information Management Division, 1155 Defense Pentagon, Washington, DC 20301-1155 (0704-0003). Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE ABOVE ORGANIZATION APPROPRIATE ADDRESS ON THE BACK OF THIS PAGE.

5 U.S.C. 552(b)(6)
NR20140007351

PRIVACY ACT STATEMENT
AUTHORITY: Title 10 US Code 1552, EO 9397.
PRINCIPAL PURPOSE: To initiate an application for correction of military record. The form is used by Board members for review of pertinent information in making a determination of relief through correction of a military record.
ROUTINE:
DISCLOSURE: voluntary; however, failure to provide identifying information may impede processing of this application. The request for Social Security number is strictly to assure proper identification of the individual and appropriate records.

1. APPLICANT DATA (The person whose record you are requesting to be corrected.)

a. BRANCH OF SERVICE (X one)	ARMY	<input checked="" type="checkbox"/> NAVY	AIR FORCE	MARINE CORPS	COAST GUARD
b. NAME (Print - Last, First, Middle Initial)	c. PRESENT OR LAST PAY GRADE		d. SERVICE NUMBER (If applicable)	e. SSN	
5 U.S.C. 552(b)(6)	O4			5 U.S.C. 552(b)(6)	

2. PRESENT STATUS WITH RESPECT TO THE ARMED SERVICES (Active Duty, Reserve, National Guard, Retired, Discharged, Deceased)
Retired

3. TYPE OF DISCHARGE (If by court-martial, state the type of court.)
Honorable

4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY (YYYYMMDD)
20130701

5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED: (Entry required)
See attached.
Failed FT 11, 12, 13 + 14 Staff COR 501845

6. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST FOR THE FOLLOWING REASONS: (Entry required)
See attached.

7. ORGANIZATION AND APPROXIMATE DATE (YYYYMMDD) AT THE TIME THE ALLEGED ERROR OR INJUSTICE IN THE RECORD OCCURRED (Entry required) Naval Health Clinic Cherry Point, 20071113.

8. DISCOVERY OF ALLEGED ERROR OR INJUSTICE

a. DATE OF DISCOVERY (YYYYMMDD) 20121104	b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THE APPLICATION. See attached.
---	--

9. IN SUPPORT OF THIS APPLICATION, I SUBMIT AS EVIDENCE THE FOLLOWING ATTACHED DOCUMENTS: (If military documents or medical records are pertinent to your case, please send copies. If Veterans Affairs records are pertinent, give regional office location and claim number.)
See attached.

10. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. (At no expense to the Government) (X one)
☒ YES. THE BOARD WILL DETERMINE IF WARRANTED.
☐ NO. CONSIDER MY APPLICATION BASED ON RECORDS AND EVIDENCE.

11. a. COUNSEL (If any) NAME (Last, First, Middle Initial) and ADDRESS (Include ZIP Code)
5 U.S.C. 552(b)(6)

b. TELEPHONE (Include Area Code) 5 U.S.C.

c. E-MAIL ADDRESS
5 U.S.C. 552(b)(6)

d. FAX NUMBER (Include Area Code) 5 U.S.C.

12. APPLICANT MUST SIGN IN ITEM 15 BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, indicate the name (print) and relationship by marking one box below.

<input type="checkbox"/> SPOUSE	<input type="checkbox"/> WIDOW	<input type="checkbox"/> WIDOWER	<input type="checkbox"/> NEXT OF KIN	<input type="checkbox"/> LEGAL REPRESENTATIVE	<input type="checkbox"/> OTHER (Specify)
---------------------------------	--------------------------------	----------------------------------	--------------------------------------	---	--

13. a. COMPLETE CURRENT ADDRESS (Include ZIP Code) OF APPLICANT OR PERSON IN ITEM 12 ABOVE (Forward notification of all changes of address.)
5 U.S.C. 552(b)(6)

b. TELEPHONE (Include Area Code) 5 U.S.C.

c. E-MAIL ADDRESS
5 U.S.C. 552(b)(6)

d. FAX NUMBER (Include Area Code)

14. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM. (U.S. Code, Title 18, Sections 287 and 1001, provide that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)

15. 5 U.S.C. 552(b)(6)

16. DATE SIGNED (YYYYMMDD)
20140526

CASE NUMBER (Do not write in this space.)
JUN 10 2014



DEPARTMENT OF THE NAVY
NAVY PERSONNEL COMMAND
5720 INTEGRITY DRIVE
MILLINGTON TN 38055-0000

1610
PERS-32
7 May 2015

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Via: PERS/BCNR Coordinator (PERS-3C)

Subj: 5 U.S.C. 552(b) (6) [REDACTED], USN (RET), XXX-XX [REDACTED]

Ref: (a) BUPERSINST 1610.10A (EVALMAN)

Encl: (1) BCNR File NR 7351-14 wo/Service record

1. Enclosure (1) is returned. The member requests the removal of his fitness report for the period of 01 November 2006 to 31 October 2007.

2. Based on our review of the material provided, we find the following:

a. A review of the member's headquarters record revealed the fitness report in question to be on file. The fitness report was signed by the member acknowledging the contents of the fitness report and his right to submit a statement. The member indicated on the fitness report that he intended to make a statement. The member's statement and the reporting senior's endorsement are present in the file.

b. The fitness report in question is a Periodic/Regular report ending 31 October 2007. The member alleges the fitness report is an incomplete and inaccurate characterization of his performance, including final recommendations against promotion and retention on active duty and should be removed.

c. The fitness report is a valid report. The reporting senior was required to submit the fitness report for the member's Periodic report period. Reference (a), Chapter 1, page 1-17, block 41 – COMMENTS ON PERFORMANCE, requires a reporting senior to comment on a "Significant Problems (SP)" promotion recommendation. Reference (a), Chapter 13, page 13-5, subparagraph 13-11 (b) – Leadership, addresses how a reporting senior may document details of particularly strong or weak performance on a member's evaluation report. It is not uncommon for members to disagree with their reporting senior's appraisal. In this case the reporting senior commented on the member's inability to perform tasks on time, to the standard and failure to maintain a level of proficiency as a Physician. The member within his statement acknowledged and accepted responsibility for his inability to keep up with his workload and backlog.

d. The member exercised his rights to file an Inspector General Complaint, pertaining to reprisal by the reporting senior which was investigated and reviewed through a General Court-Martial

RECEIVED MAY 13 2015

Subj: 5 U.S.C. 552(b) (6) USN (RET), XXX-XX-5

Convening Authority (GCMCA), Article 138 hearing. Per Enclosure (1), the GCMCA concluded that the member's complaint lacked merit and no relief was warranted. The Assistant Secretary (Manpower and Reserve Affairs) concurred with the GCMCA that no relief was warranted. PERS-32 also agrees that "No relief is merited" as the fitness report was prepared in accordance with reference (a).

e. In reviewing petitions that question the exercise of the reporting senior's evaluation responsibilities, we must determine if the reporting senior abused his/her discretionary authority. PERS-32 cannot comment on 5 U.S.C. 552(b) (6) intent of the fitness report comments or what input she received just the foundational elements of the fitness report as they apply to the instruction. The reporting senior is charged with commenting on the performance or characteristics of each member under his/her command and determine what material will be included in a fitness report. The comments and performance trait marks assigned on a report are at the discretion of the reporting senior. The evaluation of a member's performance and making recommendations concerning suitability for appointment and assignments are the responsibility of the reporting senior. For us to recommend relief, the petitioner has to show that either there is no rational support for the reporting senior's action or that the reporting senior acted for an illegal or improper purpose. Nothing in the member's petition indicated the reporting senior acted for illegal or improper purposes or that the fitness report lacked rational support.

f. The member does not prove the fitness report to be in error.

3. We recommend the member's record remain unchanged.

5 U.S.C. 552(b) (6)

CLARENCE E. CARVER
By Direction

Phd
240/269/310

APPLICATION FOR CORRECTION OF MILITARY RECORD DEFENSE DEPARTMENT OF TITLE 10, U.S. CODE, SECTION 1552 <small>(Please read instructions on reverse side BEFORE completing this application.)</small>		OMB No. 0704-0003						
<small>The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Executive Services Directorate, Information Management Division, 1155 Defense Pentagon, Washington, DC 20301-1155 (0704-0003). Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.</small>								
PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE ABOVE ORGANIZATION. APPROPRIATE ADDRESS ON THE BACK OF THIS PAGE.								
PRIVACY ACT STATEMENT		5 U.S.C. 552(b)(6) NR20140007351						
AUTHORITY: Title 10 US Code 1552, EO 9397. PRINCIPAL PURPOSE: To initiate an application for correction of military record. The form is used by Board members for review of pertinent information in making a determination of relief through correction of a military record.		ROUTINE DISCLOSURE: voluntary; however, failure to provide identifying information may impede processing of this application. The request for Social Security number is strictly to assure proper identification of the individual and appropriate records.						
1. APPLICANT DATA <i>(The person whose record you are requesting to be corrected.)</i>								
<table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;"> a. BRANCH OF SERVICE <i>(X one)</i> ARMY <input type="checkbox"/> NAVY <input checked="" type="checkbox"/> AIR FORCE <input type="checkbox"/> MARINE CORPS <input type="checkbox"/> COAST GUARD <input type="checkbox"/> </td> <td style="width:33%;"> c. PRESENT OR LAST PAY GRADE O4 </td> <td style="width:33%;"> d. SERVICE NUMBER <i>(If applicable)</i> 5 U.S.C. 552(b)(6) </td> </tr> </table>			a. BRANCH OF SERVICE <i>(X one)</i> ARMY <input type="checkbox"/> NAVY <input checked="" type="checkbox"/> AIR FORCE <input type="checkbox"/> MARINE CORPS <input type="checkbox"/> COAST GUARD <input type="checkbox"/>	c. PRESENT OR LAST PAY GRADE O4	d. SERVICE NUMBER <i>(If applicable)</i> 5 U.S.C. 552(b)(6)			
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5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED: <i>(Entry required)</i> See attached. <div style="text-align: center; font-style: italic;">Failed FT 11, 12, 13 + 14 Staff CDR S-1 B45</div>								
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15. SIGNATURE 5 U.S.C. 552(b)(6)		16. DATE SIGNED <i>(YYYYMMDD)</i> 20140526						



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

SJN

Docket No: 9186-14

MAY 5 2016

5 U.S.C. 552(b) (6)

Dear 5 U.S.C. 552(b) (6):

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, decided your application on 16 November 2015. The names and votes of the members of the panel will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record, and applicable statutes, regulations, and policies. In addition, the Board considered the advisory opinions furnished by Navy Personnel Command (NPC) PERS-32 dated 26 January 2015; PERS-00J dated 15 June 2015, copies of which were previously provided to you and are enclosed. Additionally, the Board considered your responses to the advisory opinions dated 4 March and 23 September 2015 and Attorney at Law letter dated 6 November 2012.

After careful and conscientious consideration of the entire record, the Board found the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this regard, the Board substantially concurred with the comments contained in the advisory opinions. Specifically, that your reporting senior was required to submit a detaching fitness report and referencing the findings of command Inspector General (IG) investigation was appropriate. It was determined that you failed to uphold the Navy's Core Values by using poor judgment and leadership. The merits of your reprisal complaint were not fully adjudicated due to your untimely reporting. You submitted your complaint 11 months after being issued your adverse fitness report, and eight months after submitting your complaint against your command's IG investigation.

While it was noted that your complaint was dismissed because your reprisal allegation was untimely as a matter of law, the Board concluded that your reporting senior's decision to submit the adverse report was nonetheless appropriate, and it was administratively and procedurally correct as written and filed. The Board found that the detaching fitness report covering the period from 11MAY01 to 11DEC29 remain a part of your official record. Accordingly, your application has been denied.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence within one year from the date of the Board's decision. New evidence is evidence not previously considered by the Board prior to making its decision in your case. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

5 U.S.C. 552(b) (6)

SCOTT F. THOMPSON
Executive Director

Enclosures

240

**APPLICATION FOR CORRECTION OF MILITARY RECORD
UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552**
(Please read instructions on reverse side BEFORE completing this application.)OMB No. 0704-0003
OMB approval expires
Oct 31, 2014

The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Executive Services Directorate, Information Management Division, 4800 Mark Center Drive, Suite 02G09, Alexandria, VA 22304-3100 (0704-0003). Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

**PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE ABOVE
APPROPRIATE ADDRESS ON THE BACK OF THIS PAGE.**

PRIVACY ACT



NR20140009186

AUTHORITY: 10 U.S.C. 1552, and E.O. 9397, as amended (SSN).
PRINCIPAL PURPOSE(S): To initiate an application for correction of military record. The form is used by Board members for review of pertinent information in making a determination of relief through correction of a military record. Completed forms are covered by correction of military records SORNs maintained by each of the Services or the Defense Finance and Accounting Service.

SSN is used to retrieve these records and links to the member's official military personnel file and pay record.

1. APPLICANT DATA (The person whose record you are requesting to be corrected.)

a. **BRANCH OF SERVICE (X one)** ☐ ARMY ☒ NAVY ☐ AIR FORCE ☐ MARINE CORPS ☐ COAST GUARD

b. **NAME (Print - Last, First, Middle Initial)**

5 U.S.C. 552(b) (6)

c. **PRESENT OR LAST
PAY GRADE**

O-5

d. **SERVICE NUMBER (If applicable)**

N/A

e. **SSN**

5 U.S.C. 552(b) (6)

2. **PRESENT STATUS WITH RESPECT TO THE
ARMED SERVICES (Active Duty, Reserve,
National Guard, Retired, Discharged, Deceased)**

RETIRED

3. **TYPE OF DISCHARGE (If by court-martial, state
the type of court)**

HONORABLE

4. **DATE OF DISCHARGE OR RELEASE
FROM ACTIVE DUTY (YYYYMMDD)**

28131831

5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED: (Entry required)REQUEST REMOVAL OF FITNESS REPORT DATED 11 MAY 01 - 11 DEC 29
SUBMITTED BY 5 U.S.C. 552(b) (6)**6. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST FOR THE FOLLOWING REASONS: (Entry required)**5 U.S.C. 552(b) (6) HAD ACCESS TO PROTECTED COMMUNICATIONS (PC) PRIOR TO
SUBMISSION OF FITNESS REPORT DATED 11 MAY 01 - 11 DEC 29, SUBJECT FITREP IS
THEREFORE AN UNFAVORABLE PERSONNEL ACTION (UPA), IN THE INTEREST OF
EQUITY, JUSTICE, AND AN ACCURATE ACCOUNT OF MY PERFORMANCE, REQUEST REMOVAL.**7. ORGANIZATION AND APPROXIMATE DATE (YYYYMMDD) AT THE TIME THE ALLEGED ERROR OR INJUSTICE IN THE RECORD
OCCURRED (Entry required)**

NAVY RECRUITING DISTRICT PORTLAND, OR 28111229

8. DISCOVERY OF ALLEGED ERROR OR INJUSTICEa. **DATE OF DISCOVERY
(YYYYMMDD)**

28140728

b. **IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE
BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THE APPLICATION.**

N/A

**9. IN SUPPORT OF THIS APPLICATION, I SUBMIT AS EVIDENCE THE FOLLOWING ATTACHED DOCUMENTS: (If military documents or medical
records are pertinent to your case, please send copies. If Veterans Affairs records are pertinent, give regional office location and claim number.)**NAVY IG LETTER SER N627/0724 DATED 17 JUL 14, WITH ATTACHMENTS FROM CHNAV
PERS IG DATED 26 FEB 13, AND DOD IG DATED 26 MAR 14.10. **I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON,
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BASED ON RECORDS AND EVIDENCE.11.a. **COUNSEL (If any) NAME (Last, First, Middle Initial) and ADDRESS (Include ZIP Code)**

NONE

b. **TELEPHONE (Include Area Code)**c. **E-MAIL ADDRESS**d. **FAX NUMBER (Include Area Code)****12. APPLICANT MUST SIGN IN ITEM 15 BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF
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5 U.S.C. 552(b) (6)

b. **TELEPHONE (Include Area Code)**c. **E-MAIL ADDRESS**

5 U.S.C. 552(b) (6)

d. **FAX NUMBER (Include Area Code)****14. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE
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(Do not write in this space.)**

AUG 11 2014

15. **SIGNATURE**

5 U.S.C. 552(b) (6)

16. **DATE SIGNED
(YYYYMMDD)**

28140801



DEPARTMENT OF THE NAVY
NAVY PERSONNEL COMMAND
5720 INTEGRITY DRIVE
MILLINGTON TN 38055-0000

1610
PERS-32
26 January 2015

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Via: PERS/BCNR Coordinator (PERS-3C)

Subj: CDR 5 U.S.C. 552(b) (6), USN, XXX-XX-5

Ref: (a) BUPERSINST 1610.10C (EVALMAN)

Encl: (1) BCNR File NR 9186-14 wo/Service record

1. Enclosure (1) is returned. The member requests the removal of his fitness reports for the period of 01 May 2011 to 29 Dec 2011.

2. Based on our review of the material provided, we find the following:

a. A review of the member's headquarters record revealed the fitness report in question to be on file. The fitness report was signed by the member acknowledging the contents of the fitness report and his right to submit a statement. The member indicated on the fitness report that he intended to make a statement. The member's statement and the reporting senior's endorsement are present in the file.

b. The fitness report in question is a Detachment of Individual/Regular report ending 29 December 2011. The member alleges reprisal actions were taken against him and the fitness report is an unfavorable personnel action (UPA) in the interest of equity, justice and accurate account of his performance and should be removed.

c. The fitness report is a valid report. The reporting senior was required to submit the fitness report for the member's permanent detachment to another command. Reference (a), Chapter 13, page 13-5, subparagraph 13-11 (b) – Leadership, addresses how a reporting senior may document details of particularly strong or weak performance on a member's fitness report. In this case the reporting senior commented on the member's inability to uphold the Navy's Core Values by exercising poor judgment and leadership and was substantiated through a Commander, Navy Recruiting Command (CNRC) Inspector General (IG) investigation.

d. The member exercised his rights to file an IG complaint and subsequently contacted the Chief of Naval Personnel (CHNAVPERS) office of IG, pertaining to reprisal by the reporting senior. However, the official response on the findings or actions by the IG investigation per enclosure 1, determined the evidence supported the findings against CDR Stocking and was approved by higher authority. IG recommended the case be closed as the reprisal complaint was not timely filed and no further investigation was warranted.

15 June 2015

MEMORANDUM

From: Office of Legal Counsel, Navy Personnel Command, (PERS-00J)
To: Executive Director, Board for Correction of Naval Records (BCNR)
Via: Assistant for BCNR Matters, (PERS-3C)
Subj: ADVISORY OPINION ICO CDR(Ret.) 5 U.S.C. 552(b) (6)
Ref: (a) BCNR Request for Advisory Opinion, dtd 17APR2015
(b) Memorandum for the Record, NIGHTS Case Number 201203880, dtd 26MAR2014
(c) Application for the Correction of Military Records ICO CDR(Ret.) 5 U.S.C. 552(b) (6) dtd 01AUG2014 w/ Encls.
(d) 10 U.S.C. § 1552
(e) SECNAVINST 5420.193
(f) 10 U.S.C. 1034
(g) DoDD 7050.06
(h) SECNAVINST 5370.7D
(i) Memorandum for the Executive Director, Board for Correction of Naval Records, 5 U.S.C. 552(b) (6) dtd 26JAN2015

1. Reference (a) was forwarded to this office for legal advisory opinion and comment. The Board for Correction of Naval Records (BCNR) specifically requests an Advisory Opinion (AO) from PERS-OOJ to address the "*finding*" in reference (b) that the reporting senior "*had knowledge of protected communications by Petitioner when he submitted the contested report.*"

2. FACTS AND ADMINISTRATIVE BACKGROUND:

Pursuant to reference (c), CDR(Ret.) 5 U.S.C. 552(b) (6) ("Petitioner") requests that BCNR exercise its equitable powers to correct his military record and remove an adverse FITREP. From the documents contained in references (a) through (c), the following important events/facts/dates are gleaned:

- **PRIOR TO NOV OF 2011:** Petitioner was the subject of a Commander, Navy Recruiting Command (CNRC) Inspector General (IG) investigation (Case No. 201102585).
- **07NOV2011:** Petitioner was interviewed by Video Teleconference and further issued an "e-mail" statement with regard to the CNRC/IG investigation (these were later acknowledged as qualified "protected communications," see below).
- **12DEC2011:** The CNRC/ IG Investigation Report (Case No. 201102585) was issued substantiating two allegations against Petitioner.

- **29DEC2011:** 5 U.S.C. 552(b) (6) (NRD, Portland) issued an adverse FITREP to Petitioner covering the period 1MAY2011-29DEC2011, specifically commenting upon the substantiated CNRC/IG investigation.
- **06JAN2012:** Petitioner submits his "*Statement in Response to Fitness Report dated 11DEC29.*"
- **31JAN2012:** 5 U.S.C. 552(b) (6) submits a "*First Endorsement*" on Petitioner's "*Statement in Response to Fitness Report Dated 11DEC29,*" which sets forth "[b]ased on the findings of Navy Recruiting Command IG Hotline Case #11086 of 12DEC11, both allegations were substantiated and it was clear to me 5 U.S.C. exercised poor judgment and leadership."
- **12MAR2012:** Petitioner submitted a general IG hotline complaint (Case No. 201200908) to Chief of Naval Personnel (CHNAVPERS) alleging that the CNRC/IG investigation (Case No. 201102585) was "flawed and the Investigating Officer was biased." CHNAVPERS IG reviewed the CNRC/IG investigation and determined the evidence supported the findings against Petitioner (and closed the case on 10JAN2013, see below).
- **06NOV2012:** Petitioner's attorney sends letter to "BUPERS IG" alleging a "reprisal" complaint on behalf of Petitioner (see below).
- **07NOV2012:** Prior to the completion of CHNAVPERS IG investigation (Case No. 201200908), Petitioner "contacts" the IG office of CHNAVPERS and alleges that his prior FITREP was improperly issued in reprisal to protected communications. Accordingly, a new "Whistleblower Reprisal" (Case No. 201203880) case was opened.
- **01JAN2013:** Petitioner retires from active duty.
- **10JAN2013:** CHNAVPERS IG closed CHNAVPERS IG investigation (Case No. 201200908) and provided Petitioner with the results of the review.
- **26FEB2013:** Petitioner was interviewed by CHNAVPERS IG with regard to his "reprisal" complaint (Case No. 201203880).
- **8MAR2013:** Record of Preliminary Inquiry (PI) into Allegation of Military Whistleblower Reprisal (Case No. 201203880) was issued. Petitioner was advised that his complaint ostensibly had no merit because it lacked a covered "protected communication" to investigate. Thereafter, Petitioner "withdrew" his complaint. It was further noted that the complaint was not timely reported under governing authority. Accordingly, Whistleblower Reprisal (Case No. 201203880) was closed.
- **26MAR2014 :** Per reference (b), a correction (of sorts) to the Whistleblower Reprisal (Case No. 201203880) was issued by and through a "*Memorandum for the Record.*" This Memorandum acknowledges that there were, in fact, protected communications made by Petitioner which were covered by regulations. Petitioner, therefore, was incorrectly advised about this matter by the CHNAVPERS IG. *Nonetheless*, no further investigation was deemed warranted because the reprisal allegation was untimely in accordance with governing directives. According, the case investigation closure was basically affirmed on these aforementioned grounds.
- **01AUG2014 :** Petitioner files his "*Application for Correction of Military Record*" with BCNR.

- **15DEC2014** : BCNR requests an Advisory Opinion (AO) from PERS-3C.
- **26JAN2015** : PERS-3C issues its AO.
- **05FEB2015** : BCNR serves Petitioner with a copy of the AO from PERS-3C.
- **04MAR2015**: Petitioner files his "response" to the AO from PERS-3C.
- **17APR2015**: BCNR requests an AO from PERS-OOJ.

3. STANDARD OF REVIEW:

Reference (d) authorizes and grants broad and plenary power to the Secretary of the Navy to correct a servicemember's naval record when "*necessary to correct an error or remove an injustice.*" Reference (e) implements the Navy's BCNR review process. Pursuant to reference (d), an application for correction of a naval record will not be granted unless the record itself contains or an Petitioner provides "*substantial evidence*" which persuades BCNR that he or she was the victim of an error or injustice. Absent such evidence, BCNR will presume that the Navy authorities have properly discharge their official duties and the application will be denied.

4. ISSUES PRESENTED:

In light references (a) through (c), there appears to be two basic questions for resolution as follows:

- a. Is Petitioner entitled to relief as a matter of law pursuant to the "findings" contained in reference (b)?
- b. Is there an equitable basis to provide relief to Petitioner based upon the facts of the case before BCNR?

5. ANALYSIS:

- a. As a matter of law, is Petitioner entitled to relief?

In reference (c), Petitioner basically alleges that "**5 U.S.C. 552(b) (6)** *improperly acted upon protected communications (PC), making the subject Fitness Report an unfavorable personnel action (UPA).*" Accordingly, reference (a) ostensibly requests whether there is a finding in in reference (b) which substantively binds the current BCNR review from a legal perspective.

Review of reference (b) does not support any legal conclusion that **5 U.S.C.** acted improperly or under the guise of "reprisal." Specifically, reference (b) acknowledges that protected communications by Petitioner were made during the course of the prior CNRC/IG investigation and that the Commodore had knowledge of such statements. However, it must be stressed that no further investigation was conducted on Petitioner's "reprisal" complaint. Moreover, there was absolutely no determination of "reprisal" whatsoever and the merits of Petitioner's "reprisal" complaint were never fully adjudicated due to the procedural bar of untimely reporting.

Petitioner's complaint was ostensibly dismissed without substantive investigation because the reprisal allegation was untimely as a matter of law. Accordingly, Petitioner's current claim that there was a "finding" of reprisal, be it direct or implied, is without merit and should be rejected.

Even assuming for argument that Petitioner's reprisal complaint was timely made, it remains that pursuant to references (f) through (h), there can be no "reprisal" if the evidence shows that the personnel action (i.e., the adverse FITREP) would have been taken if the protected communication had not been made. In this case, it is not disputed that 5 U.S.C. 552(b)(6) was given a substantiated CNRC/IG report on Petitioner and specifically took adverse action in response to these substantiated findings. Other than speculation and conjecture, Petitioner offers no substantive evidence that the adverse action taken by the Commodore was due to a reprisal animus (and not the substantiated findings before the Commodore as stated). It should be noted that the CNRC/IG investigation was itself investigated by the CHNAVPERS IG and basically affirmed.

Further, Petitioner was afforded administrative relief to address the adverse remarks as a matter of record by filing his "*Statement in Response to Fitness Report Dated 11DEC29.*" Finally, the remarks in reference (i) appear correct and appropriate. Accordingly, I see no basis to grant relief as a matter of law pursuant the very limited "findings" of reference (b) and/or the allegations of "reprisal" (be it direct or inferred) in reference (c).

b. Is there an equitable basis to provide relief to Petitioner?

Generally speaking, an "injustice" is "unfairness" or "the state of not being fair or just." In his application, Petitioner basically advances numerous arguments (i.e., "injustices") in support of his request that BCNR grant relief by effectively recognizing that the CHNAVPERS IG (201102585) report was wrong or improperly conducted (and therefore any adverse action in response to this report was equally wrong or unjust).

As the law grants, and implicitly imposes a duty upon, the BCNR to review such "injustice" arguments, Petitioner's arguments should be considered and given whatever weight the BCNR deems appropriate under its statutory and regulatory authority to consider matters "*necessary to correct an error or remove an injustice*" pursuant to references (d) and (e).

The equitable powers granted to the BCNR are broad, but whether the BCNR elects to exercise these powers is a different matter. Given the facts of this case, I would recommend that the BCNR give due consideration to Petitioner's plea for relief under principles of equity to correct an "*injustice*," but that ultimate decision lies within the sound discretion of the board after full consideration of the facts and circumstances of the individual case.

To the extent that Petitioner now claims that the procedural bar to adjudicating his "reprisal" claim should be ignored by BCNR as a matter of "equity," I would once again

counsel the BCNR to consider and give this argument whatever weight it deems appropriate.

6. RECOMMENDATION.

Petitioner is not entitled to relief as a matter of law, but it is within the sound discretion of BCNR to either grant or deny Petitioner's claim for relief pursuant to its plenary power to "*remove an injustice.*"

5 U.S.C. 552(b)(6) [REDACTED] (APT) AGC, USN

for

M. Holley
CAPT, JAGC, USN

**FOR OFFICIAL USE ONLY-PRIVACY SENSITIVE-ATTORNEY WORK
PRODUCT**

Any misuse or unauthorized disclosure may result in both civil and criminal penalties. This memorandum is a privileged communication protected from disclosure as Attorney-Client Work Product and may not be released to anyone but the addressee without the express approval of the Office of Legal Counsel.



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

SJN:ks

Docket No: NR11252-14

12 January 2016

From: Chairman, Board for Correction of Naval Records
To: Commandant of the Marine Corps

Subj: REVIEW NAL RECORD OF SSGT 5 U.S.C. 552(b) (6) USMC
XXX-XX-5

Ref: (a) 10 U.S.C. 1552

Encl: (1) Copy of approved Report of Proceedings w/o
attachments
(2) Copy of letter to Subject

1. In accordance with reference (a), the Board for Correction of Naval Records has reviewed allegations of error and injustice in Subject's naval record.

2. The designated representative of the Assistant Secretary of the Navy for Manpower and Reserve Affairs has reviewed the proceedings of the Board and approved the recommendation for corrective action as set forth in enclosure (1).

3. Regulations approved by the Secretary of the Navy require that Subject's naval record be corrected, where appropriate, in accordance with the approved recommendation of the Board.

4. It is requested that this Board be furnished a copy of any correspondence relating to the approved recommendation.

5 U.S.C. 552(b) (6)

for
By direction



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

SJN

Docket No: 11252-14
12 January 2016

From: Chairman, Board for Correction of Naval Records
To: Commandant of the Marine Corps

Subj: REVIEW NAVAL RECORD OF SSGT 5 U.S.C. 552(b) (6), USMC,
XXX-XX-5

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149 with attachments
(2) Case Summary
(3) IGMCase #12767
(4) Commander 4th Marine Aircraft Wing ltr 5800 SJA/mab
dtd 8 Oct 15

1. Pursuant to the provisions of reference (a), Petitioner, an enlisted member of the Marine Corps, filed enclosure (1) with this Board requesting, in effect, that her record be corrected by removing adverse fitness reports covering the period from 20131001 to 20140331 and from 20140401 to 20140529. Additionally she also requested the removal of two Page 11 (administrative remarks) counseling and rebuttal statements dated 20140329 and 20140523 from her Official Military Personnel File (OMPF).

2. The Board, consisting of 5 U.S.C. 552(b) (6) reviewed Petitioner's allegations of error and injustice on 16 November 2015, and pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies. In addition, the Board considered the enclosures (3) and (4).

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

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

b. Enclosure (1) was filed in a timely manner.

c. On 29 March 2014, Petitioner was issued a Page 11 adverse counseling regarding her trend of inappropriate, disrespectful, and insubordinate communication with senior personnel. She was given recommendations for corrective action and warned that

failure to take corrective actions could result in administrative discharge action. Petitioner elected to submit a rebuttal statement. On 30 May 2014, Petitioner signed an adverse fitness report covering the period from 20131001 to 20140331 reflecting her deficiencies outlined in the Page 11 counseling she received on 29 March 2014. Petitioner received another adverse fitness report covering the period from 20140401 to 20140529 regarding her failure to complete routine training in a timely manner, that she required supervision and assistance, and her lack of communication skills. On 23 May 2014, Petitioner was issued a Page 11 counseling regarding her failure to be at her appointed place of duty (muster time) for a command unit hike. Again, she was given recommendations for corrective action and warned that failure to take corrective action could result in administrative discharge action.

d. On 15 May 2014, Petitioner filed a complaint of alleged reprisal with the Inspector General of the Marine Corps (IGMC) against members of her chain of command. She believed that she received the adverse fitness reports and two Page 11 counseling's in reprisal of her attempts to request mast, equal opportunity and IG complaints.

e. On 26 August 2015, the IGMC forwarded a letter to Petitioner that stated, in part, that their investigation had been completed regarding her complaint of reprisal under Title 10, United States Code, Section 1034 (U.S.C. 1034), "Protected communications; prohibition of retaliatory personnel action," implemented by DoD Directive 7050.06, "Military Whistleblower Protection." Her complaint was substantiated, and she was provided a redacted copy of the investigation.

f. On 8 October 2015, the Commander, 4th Marine Aircraft Wing submitted an endorsement letter to Petitioner's application recommending that her adverse fitness reports covering the period from 20131001 to 20140331 and two Page 11 entries dated 20140329 and 20140529 be removed from her OMPF based on the IGMC's substantiated reprisal.

g. The Board also believes the adverse fitness report covering the period from 20140401 to 20140529 should also be removed from Petitioner's OMPF along with the rebuttal statements accompanying Page 11 entry dated 20140329 and 20140529.

CONCLUSION:

Upon review and consideration of all the evidence of record, and especially in light of enclosure (3) and (4), the Board concludes that Petitioner's request warrants full relief.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing the adverse fitness reports covering the period from 20131001 to 20140331 and from 20140401 to 20140529.

b. That Petitioner's naval record be corrected by removing Page 11 counseling and rebuttal statements dated 20140329 and 20140523 from her Official Military Personnel File (OMPF).

c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) 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 entitled matter.

5 U.S.C. 552(b) (6)

Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulation, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

5 U.S.C. 552(b) (6)

SCOTT F. THOMPSON
Executive Director



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

SJN:ks
Docket No. NR11252-14
12 January 2016

5 U.S.C. 552(b) (6)

Dear Staff Sergeant 5 U.S.C. :

This is in reference to you application for correction of his naval record pursuant to the provisions of Title 10, United States Code, Section 1552.

The final decision in your case is set forth in the Board's report of proceedings, a copy of which is enclosed. The approved changes to his naval record will be made by the Commandant of the Marine Corps (CMC), Code MMSR3, Headquarters, United States Marine Corps, 3280 Russell Road, Quantico, VA 22134-5103. Please wait at least 180 days from the date of this letter before contacting CMC about the status of your case.

Sincerely,

5 U.S.C. 552(b) (6)

By direction

Enclosure

Copy to:
CMC

240/
330

JRN

APPLICATION FOR CORRECTION OF MILITARY RECORD
UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552
(Please read instructions on reverse side BEFORE completing this application.)OMB No. 0704-0003
OMB approval expires
Oct 31, 2014

The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Executive Services Directorate, Information Management Division, 4800 Mark Center Drive, Suite 02G09, Alexandria, VA 22350-3100 (0704-0003). Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE ABOVE ORGANIZATION. RETURN COMPLETED FORM TO THE APPROPRIATE ADDRESS ON THE BACK OF THIS PAGE.

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. 1552, and E.O. 9397, as amended (SSN).
PRINCIPAL PURPOSE(S): To initiate an application for correction of military record. The form is used by Board members for review of pertinent information in making a determination of relief through correction of a military record. Completed forms are covered by correction of military records SORNs maintained by each of the Services or the Defense Finance and Accounting Service.

RO
hnc
DIS
info
SSI
military personnel and pay records.NR20140011252
5 U.S.C. 552(b) (6)n.
s
icial

1. APPLICANT DATA (The person whose record you are requesting to be corrected.)

a. BRANCH OF SERVICE (X one)	ARMY	NAVY	AIR FORCE	<input checked="" type="checkbox"/> MARINE CORPS	COAST GUARD
b. NAME (Print Last, First, Middle Initial)	c. PRESENT OR LAST PAY GRADE		d. SERVICE NUMBER (If applicable)	e. SSN	
5 U.S.C. 552(b) (6)	E-5		5 U.S.C.	5 U.S.C.	
2. PRESENT STATUS WITH RESPECT TO THE ARMED SERVICES (Active Duty, Reserve, National Guard, Retired, Discharged, Deceased) Active Duty		3. TYPE OF DISCHARGE (If by court-martial, state the type of court.)		4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY (YYYYMMDD)	

5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED: (Entry required)

any rebuttal of same date
6105 dated 03/29/2014 (Enclosure 1), (CH) Fitness Report dated 03/31/2014 (Enclosure 2), and (TR) Fitness Report dated 05/29/2014 (Enclosure 3), and Page 11 dated 05/23/2014 (Enclosure 4),
and rebuttal dtd 28 May 14

6. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST FOR THE FOLLOWING REASONS: (Entry required)

I believe the above items are direct reprisals from the Request Mast that I filed on or about 05/31/2013 (Enclosure 5), EO Complaint that I filed on or about 02/27/2014 (Enclosure 6), Request Mast that I filed on or about 02/27/2014 (Enclosure 7), IG Complaint that I filed on or about 05/19/2014 (Enclosure 8) and Request Mast to Commanding General of 4th MAW that I filed on or about 05/19/2014 (Enclosure 9).

7. ORGANIZATION AND APPROXIMATE DATE (YYYYMMDD) AT THE TIME THE ALLEGED ERROR OR INJUSTICE IN THE RECORD OCCURRED (Entry required)

8. DISCOVERY OF ALLEGED ERROR OR INJUSTICE

a. DATE OF DISCOVERY (YYYYMMDD)	b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THE APPLICATION.
20140329	

9. IN SUPPORT OF THIS APPLICATION, I SUBMIT AS EVIDENCE THE FOLLOWING ATTACHED DOCUMENTS: (If military documents or medical records are pertinent to your case, please send copies. If Veterans Affairs records are pertinent, give regional office location and claim number.)
Please see attachments continued on supplemental page and Summary of events.

10. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. (At no expense to the Government) (X one)	<input checked="" type="checkbox"/> YES. THE BOARD WILL DETERMINE IF WARRANTED.	NO. CONSIDER MY APPLICATION BASED ON RECORDS AND EVIDENCE.
---	---	--

11. a. COUNSEL (If any) NAME (Last, First, Middle Initial) and ADDRESS (Include ZIP Code)	b. TELEPHONE (Include Area Code)
Hafemann, John 5 U.S.C. 552(b) (6) 5 U.S.C. 552(b) (6)	5 U.S.C.
	c. E-MAIL ADDRESS
	5 U.S.C. 552(b) (6)
	d. FAX NUMBER (Include Area Code)
	5 U.S.C.

12. APPLICANT MUST SIGN IN ITEM 15 BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, indicate the name (print) and relationship by marking one box below.

<input type="checkbox"/> SPOUSE	<input type="checkbox"/> WIDOW	<input type="checkbox"/> WIDOWER	<input type="checkbox"/> NEXT OF KIN	<input type="checkbox"/> LEGAL REPRESENTATIVE	<input type="checkbox"/> OTHER (Specify)
---------------------------------	--------------------------------	----------------------------------	--------------------------------------	---	--

13. a. COMPLETE CURRENT ADDRESS (Include ZIP Code) OF APPLICANT OR PERSON IN ITEM 12 ABOVE (Forward notification of all changes of address.)	b. TELEPHONE (Include Area Code)
	c. E-MAIL ADDRESS
	d. FAX NUMBER (Include Area Code)

14. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM. (U.S. Code, Title 18, Sections 287 and 1001, provide that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)

CASE NUMBER
(Do not write in this space)

15. SIGNATURE (Applicant must sign here)	16. DATE SIGNED (YYYYMMDD)	BCNR 9/18/15
5 U.S.C. 552(b) (6)	20140916	



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

JDR
Docket No: 809-15

AUG 29 2016

5 U.S.C. 552(b) (6)

Dear 5 U.S.C. 552(b) (6):

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

Although your application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider your application on its merits. A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 22 January 2016. The names and votes of the members of the panel will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record, and applicable statutes, regulations, and policies.

Board regulations state that personal appearances before the Board are not granted as a right, but only when the Board determines that such an appearance will serve some useful purpose. The Board determined that a personal appearance was not necessary and considered the case based on the evidence of record.

After careful and conscientious consideration of the entire record, the Board found the evidence submitted was insufficient to establish the existence of probable material error or injustice.

You enlisted in the Marine Corps, began a period of active duty on 13 March 1972, and served without disciplinary incident for about a year. However, on 19 April and 28 November 1973, you received nonjudicial punishment (NJP) for two periods of being absent from your appointed place of duty and failure to obey a lawful order. On 9 December 1973, you received NJP for sleeping on post. On 19 January 1974 you were convicted by special court-martial (SPCM) of two specifications of willful disobedience of a lawful order and being disrespectful in language. You received NJP on 2 March 1976 for being absent from your appointed place of duty and disobedience of a lawful order. On 31 March 1976, at the end of your active obligated service, you were released from active duty with a general, under honorable conditions characterization of service. Character of service is based, in part, on proficiency and conduct averages which are

computed from marks assigned during periodic evaluations. Your proficiency and conduct average marks were 3.6 and 3.9, respectively. An average of 4.0 in conduct was required at the time of your separation for a fully honorable characterization of service.

The Board, in its review of your entire record and application, carefully weighed all potentially mitigating factors, such as your record of service, your desire to upgrade your discharge, and your assertion that you were the whistleblower on the contaminated water at Camp Lejeune. Nevertheless, the Board concluded these factors were not sufficient to warrant recharacterization of your discharge, given the seriousness of your misconduct which resulted in four NJPs and a SPCM conviction. Regarding your assertion of being the whistleblower on the contaminated water at Camp Lejeune, the Board considered your assertion under applicable rules and concluded that, without any substantiating documents, your assertion is not valid. Further, Public Law 112-154, Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, requires the Veterans Administration to provide health care to Veterans with one or more of 15 specified illnesses or conditions. You should contact the nearest office of the Department of Veterans Affairs (DVA) concerning your right to apply for benefits or appeal an earlier unfavorable determination. Finally, the Board concluded that your average proficiency and conduct marks would not have been sufficient for a fully honorable characterization given your misconduct. The Board believed that you were fortunate to complete your obligated service and receive a general characterization of service rather than being processed early and receiving a less favorable discharge. Accordingly, your application has been denied.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence within one year from the date of the Board's decision. New evidence is evidence not previously considered by the Board prior to making its decision in your case. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

5 U.S.C. 552(b)(6)

ELIZABETH A. HILL
Executive Director

NATIONAL CAPITAL REGION
BENEFITS OFFICE

189/62

APPLICATION FOR CORRECTION OF MILITARY RECORD
UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552
(See instructions on reverse side BEFORE completing this application.)

OMB No. 0704-0003
OMB approval expires
Oct 31, 2014

The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Executive Service Directorate, Information Management Division, 4800 Mark Center Drive, Suite 02G09, Alexandria, VA 22304-3100 (0704-0003). Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE ABOVE ORGANIZATION. RETURN COMPLETED FORM TO THE APPROPRIATE ADDRESS ON THE BACK OF THIS PAGE.

AUTHORITY: 10 U.S.C. 1552, and E.O. 9397, as amended (SSN). PRINCIPAL PURPOSE(S): To initiate an application for correction of military record. The form is used by Board members for review of pertinent information in making a determination of relief through correction of a military record. Completed forms are covered by correction of military records SORNs maintained by each of the Services or the Defense Finance and Accounting Service.		PRIVACY ACT STATE: ROUTE: http://www.dod.mil DISCL: Inform SSN in military, personnel and civil pay records.	5 U.S.C. 552(b) (6) NR20150000809 clon. d ant's official
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1. APPLICANT DATA (The person whose record you are requesting to be corrected.)				
a. BRANCH OF SERVICE (X one)	ARMY	NAVY	AIR FORCE	MARINE CORPS
b. NAME (Last, First, Middle Initial)	5 U.S.C. 552(b) (6)		d. SERVICE NUMBER (If applicable)	5 U.S.C. 552(b) (6)

2. F. SERVICE WITH RESPECT TO THE ARMED SERVICES (Active Duty, Reserve, National Guard, Retired, Discharged, Deceased)	3. TYPE OF DISCHARGE (If by court-martial, state the type of court.)	4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY (YYYYMMDD)
DISCHARGED	UNDER HONORABLE CONDITION	

5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED: (Entry required)
 RAISED FROM UAC TO HONORABLE

6. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST FOR THE FOLLOWING REASONS: (Entry required)
 I WAS A WHISTLEBLOWER ON THE CONTAMINATED WATER AT CAMP LEJEUNE, NC. WAS GIVEN AN ARTICLE 31 THEN LET OUT AFTER I SPOKE UP ABOUT CAMP LEJEUNE.

7. ORGANIZATION AND APPROXIMATE DATE (YYYYMMDD) AT THE TIME THE ALLEGED ERROR OR INJUSTICE IN THE RECORD OCCURRED (Entry required)

8. DISCOVERY OF ALLEGED ERROR OR INJUSTICE	
a. DATE OF DISCOVERY (YYYYMMDD)	b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THE APPLICATION.
1976/03/31	TO BE ELIGIBLE FOR A REINSTATED TSC CLEARANCE

9. IN SUPPORT OF THIS APPLICATION, I SUBMIT AS EVIDENCE THE FOLLOWING ATTACHED DOCUMENTS: (If military documents or medical records are pertinent to your case, please send copies. If Veterans Affairs records are pertinent, give regional office location and claim number.)
 DD 214 MC

10. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. (At no expense to the Government) (X one)	YES. THE BOARD WILL DETERMINE IF WARRANTED.	NO. CONSIDER MY APPLICATION BASED ON RECORDS AND EVIDENCE.
---	---	--

11. a. COUNSEL (If any) NAME (Last, First, Middle Initial) and ADDRESS (Include ZIP Code)	b. TELEPHONE (Include Area Code)
	c. E-MAIL ADDRESS
	d. FAX NUMBER (Include Area Code)

12. APPLICANT MUST SIGN IN ITEM 15 BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, indicate the name (print) and relationship by marking one box below.

<input type="checkbox"/> SPOUSE <input type="checkbox"/> WIDOW <input type="checkbox"/> WIDOWER <input type="checkbox"/> NEXT OF KIN <input type="checkbox"/> LEGAL REPRESENTATIVE <input type="checkbox"/> OTHER (Specify)	
13. a. COMPLETE CURRENT ADDRESS (Include ZIP Code) OF APPLICANT OR PERSON IN ITEM 12 ABOVE (Equivalent notification of all changes of address.)	b. TELEPHONE (Include Area Code)
5 U.S.C. 552(b) (6)	5 U.S.C. 552(b) (6)
	c. E-MAIL ADDRESS
	5 U.S.C. 552(b) (6)
	d. FAX NUMBER (Include Area Code)

14. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM. (U.S. Code, Title 18, Sections 287 and 1001, provide that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)

15. SIGNATURE (Applicant must sign here)	16. DATE SIGNED (YYYYMMDD)	CASE NUMBER (Do not write in this space.)
5 U.S.C. 552(b) (6)	2014/08/28	



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

JSR
Docket No: NR1270-15
3 June 2015

5 U.S.C. 552(b) (6)

Dear 5 U.S.C. 552(b) (6) :

This is in reference to your application for correction of your naval record. You requested promotion to lieutenant.

Your application states that the portion of your request regarding an end of tour award is pending investigation by the CNIC Inspector General. The result of that investigation would be useful to the Board in reviewing your application. Accordingly, your case is administratively closed. When the investigation has been completed, you may ask that your case be reopened. If you do request that your case be reopened, please provide a copy of the completed investigation, as well as a complete copy of the report of investigation of Navy Hotline Complaint 201101294, a portion of which you submitted with your application.

Sincerely,

5 U.S.C. 552(b) (6)

By direction

<div style="font-size: 2em; font-weight: bold; margin-bottom: 5px;">240</div> APPLICATION FOR CORRECTION OF MILITARY RECORD UNDER THE PROVISIONS OF TITLE 10, U.S. CODE SECTION 1552 <i>(Please read Privacy Act Statement and instructions on back BEFORE)</i>		OMB No. 0704-0003 OMB approval expires	
<p>The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the data needed, and completing and reviewing the collection of information. Send comment including suggestions for reducing the burden, to the Department of Defense, Washington Headquarters Set Alexandria, VA 22350-3100 (0704-0003). Respondents should be aware that notwithstanding any other provision of information if it does not display a currently valid OMB control number.</p>			
NR20150001270			
RETURN COMPLETED FORM TO THE APPROPRIATE ADDRESS ON THE E			
1. APPLICANT DATA <i>(The person whose record you are requesting to be corrected.)</i>			
a. BRANCH OF SERVICE <i>(X one)</i>		ARMY <input type="checkbox"/> NAVY <input checked="" type="checkbox"/> AIR FORCE <input type="checkbox"/> MARINE CORPS <input type="checkbox"/> COAST GUARD <input type="checkbox"/>	
b. NAME <i>(Print - Last, First, Middle Initial)</i> 5 U.S.C. 552(b) (6)		c. PRESENT OR LAST PAY GRADE LT	
d. SERVICE NUMBER <i>(If applicable)</i>		e. SSN 5 U.S.C.	
2. PRESENT STATUS WITH RESPECT TO THE ARMED SERVICES <i>(Active Duty, Reserve, National Guard, Retired, Discharged, Deceased)</i> Active Duty		3. TYPE OF DISCHARGE <i>(If by court-martial, state the type of court.)</i> USNR Involuntary Separation	
4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY <i>(YYYYMMDD)</i> 20150131			
5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED AS FOLLOWS: <i>(Entry required)</i> (1) Fitness Reports for periods ending 31 Jan 2011 and 31 Jan 2012 displayed no progression even though reports indicate in Block 41 my performance was exceptional (even under duress). (2) These unjust Fitness Reports did not reflect true exceptional performance traits therefore promotion board members could not fairly consider my record in 2011 or 2012. (3) I would like my record reviewed for promotion to Lieutenant Commander and back dated as the BCNR Board deems appropriate and recalled to Active Duty (if required) considering End of Service, Involuntary Separation is effective 31 January 2015. (4) Command did not provide an end of tour award deserving based on excellent performance. This leadership response is consistent with the substantiated reprisal complaint. This part of the complaint was recently submitted to CNIC IG in September 2014 and is still under investigation. FICIA F408-15 CMC LDR 201345 Currently USNR			
6. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST FOR THE FOLLOWING REASONS: <i>(Entry required)</i> I believe even though the performance of my duties were exceptional according to Block 41 (Fitness reports 2011, 2012) and displayed improvement, the performance traits revealed no improvement due to substantiated allegations against Naval Base Ventura County leadership determining the Department of Defense 7050.06, Military Whistleblower Protection was violated according to investigation completed by Navy Installations Command Inspector General (CNIC IG). BLUF: Substantiated reprisal led to unjust Fitness Reports, no end of tour award, deflating performance and ability to fairly compete with peers for promotion.			
a. IS THIS A REQUEST FOR RECONSIDERATION OF A PRIOR APPEAL?		b. IF YES, WHAT WAS THE DOCKET NUMBER?	
<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		c. DATE OF THE DECISION	
7. ORGANIZATION AND APPROXIMATE DATE (YYYYMMDD) AT THE TIME THE ALLEGED ERROR OR INJUSTICE IN THE RECORD OCCURRED <i>(Entry required)</i> February 2011 and February 2012			
8. DISCOVERY OF ALLEGED ERROR OR INJUSTICE			
a. DATE OF DISCOVERY <i>(YYYYMMDD)</i> 20150107		b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THE APPLICATION. CNIC IG did not contact me with results of my claim so I sought Congressional assistance in August 2014. Navy IG did not release results to my Congresswoman until 07 JAN 2015 (5 months later).	
9. IN SUPPORT OF THIS APPLICATION, I SUBMIT AS EVIDENCE THE FOLLOWING ATTACHED DOCUMENTS: <i>(If military documents or medical records are pertinent to your case, please send copies. If Veterans Affairs records are pertinent, give regional office location and claim number.)</i> Fitness Reports from 2010, 2011 & 2012, Letter from DON, Naval Inspector General dated 07 JAN 2015 and the first two pages of the investigation revealing the allegations were substantiated.			
10. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. <i>(At no expense to the Government)</i> <input type="checkbox"/> YES. THE BOARD WILL DETERMINE IF WARRANTED. <input checked="" type="checkbox"/> NO. CONSIDER MY APPLICATION BASED ON RECORDS AND EVIDENCE.			
11.a. COUNSEL <i>(If any)</i> NAME <i>(Last, First, Middle Initial)</i> and ADDRESS <i>(Include ZIP Code)</i> None		b. TELEPHONE <i>(Include Area Code)</i> c. E-MAIL ADDRESS d. FAX NUMBER <i>(Include Area Code)</i>	
e. I WOULD LIKE ALL CORRESPONDENCE/DOCUMENTS SENT TO ME ELECTRONICALLY.		<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	
12. APPLICANT MUST SIGN IN ITEM 15 BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, indicate the name <i>(print)</i> and relationship by marking one box below.			
<input type="checkbox"/> SPOUSE <input type="checkbox"/> WIDOW <input type="checkbox"/> WIDOWER <input type="checkbox"/> NEXT OF KIN <input type="checkbox"/> LEGAL REPRESENTATIVE <input type="checkbox"/> OTHER <i>(Specify)</i>			
13.a. COMPLETE CURRENT ADDRESS <i>(Include ZIP Code) OF APPLICANT OR PERSON IN ITEM 12 ABOVE</i> <i>(Forward notification of all changes of address.)</i> 5 U.S.C. 552(b) (6)		b. TELEPHONE <i>(Include Area Code)</i> c. E-MAIL ADDRESS 5 U.S.C. 552(b) (6) d. FAX NUMBER <i>(Include Area Code)</i>	
14. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM. <i>(U.S. Code, Title 18, Sections 287 and 1001, provide that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)</i>			CASE NUMBER <i>(Do not write in this space.)</i>
15. SIGNATURE <i>(Applicant must sign here.)</i> 5 U.S.C. 552(b) (6)			16. DATE SIGNED <i>(YYYYMMDD)</i> 20150127



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

TAL
Docket No: 2946-15
17 December 2015

5 U.S.C. 552(b) (6)

Dear 5 U.S.C. 552(b) :

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552 and section 1034.

Although your application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider your application on its merits. A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 13 November 2015. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record, and applicable statutes, regulations, and policies. The Board carefully considered all your arguments for relief but concluded relief was not warranted.

After careful and conscientious consideration of the entire record, the Board found the evidence submitted was insufficient to establish the existence of probable material error or injustice.

Regarding your request for a personal appearance, Board regulations state that personal appearances before the Board are not granted as a right, but only when the Board determines that such an appearance will serve some useful purpose. In your case, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

The Board found no error or injustice in the actions that led to your retirement. The Board concluded that the administrative actions related to your retirement were conducted in accordance with the applicable regulations and that your assertion of being constructively discharged is without merit. In this regard, Navy Personnel Command previously responded to Senator Casey's inquiry on your behalf that you were contacted several times to complete your retirement physical and processing, but did not contact the command separations office until weeks after your retirement.

Regarding your claim of whistleblower retaliation, a request was sent to the Naval Inspector General (IG) for any record of investigation. The IG responded that a search of the Naval Inspector General Hotline Tracking System (NIGHTS) did not produce any open or closed report of investigation to support your assertion. The Board did not find evidence of a retaliatory personnel action within the meaning of title 10 of the United States Code section 1034.

The Board did not find evidence of error or injustice in your record of promotion. Department of the Navy regulations provide that an officer eligible for promotion is responsible for the accuracy of her service record; afford an opportunity to submit a statement or other relevant information for consideration by any promotion selection board; and allow an officer to request a special selection board based upon an alleged error or injustice in the promotion selection board. Further, the Undersecretary of Defense for Personnel and Readiness memo of February 10, 2015, and the opinion of the United States Court of Appeals for the Federal Circuit in *Schwalier v. Hagel, et. Al.* (776 F.3d 832 (2015)), affirm that Military Department correction boards do not have the authority to appoint military officers.

The Board considered your request to be awarded the Legion of Merit medal as a "retirement award" to recognize your performance during your last ten years of service. The Department of the Navy's policy on awards in Secretary of the Navy Instruction 1650.1H (Navy and Marine Corps Awards Manual) states that the Department does not have a retirement award and that awards delivered upon retirement shall only recognize service that has not previously been recognized. Your DD-214 documents significant awards recognizing your performance throughout your career. Accordingly, the Board did not find an error or injustice in the Navy's decision to not present you an award upon retirement.

Finally, the Board considered your claim that you were unjustly or erroneously denied healthcare benefits for physical therapy following your retirement, and obtained treatment at personal expense. Navy Personnel Command previously responded to Senator Casey's inquiry on your behalf, informing you that you were never without medical coverage. Care at a military treatment facility is not a right, and as your expenses were limited to a co-pay, it appears you availed yourself of your retiree medical benefits. You did not present any evidence indicating that you have exhausted your administrative remedies by seeking reimbursement from, or appealing the benefit paid by, your TRICARE insurance coverage. Accordingly, the Board did not find an error or injustice warranting reimbursement of the cost of physical therapy.

Accordingly, your application has been denied. It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence within one year from the date of the Board's decision. New evidence is evidence not previously considered by the Board prior to making its decision in your case. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

5 U.S.C. 552(b)(6)

SCOTT F. THOMPSON
Executive Director

**APPLICATION FOR CORRECTION OF MILITARY RECORD
UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552**
(Please read instructions on reverse side BEFORE completing this application.)

OMB No. 0704-0003
OMB approval expires
Oct 31, 2014

The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Executive Services Directorate, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Project Director (0704-0003). Respondents should be aware that notwithstanding any other provision of law, no person shall be penalized for providing less than the required information.

**PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE ABOVE
APPROPRIATE ADDRESS ON THE BACK OF THIS PAGE.**

PRIVACY ACT

AUTHORITY: 10 U.S.C. 1552, and E.O. 9397, as amended (SSN).
PRINCIPAL PURPOSE(S): To initiate an application for correction of military record. The form is used by Board members for review of pertinent information in making a determination of relief through correction of a military record. Completed forms are covered by correction of military records SORNs maintained by each of the Services or the Defense Finance and Accounting Service.

NR20150002946 TE M.
5 U.S.C. 552(b) (6)

DISCLOSURE: Information may result in a denial of your application. An applicant's SSN is used to retrieve these records and links to the member's official military personnel file and pay record.

1. APPLICANT DATA (The person whose record you are requesting to be corrected.)

a. BRANCH OF SERVICE (X one)		<input type="checkbox"/> ARMY	<input checked="" type="checkbox"/> NAVY	<input type="checkbox"/> AIR FORCE	<input type="checkbox"/> MARINE CORPS	<input type="checkbox"/> COAST GUARD
b. NAME (Print - Last, First, Middle Initial)		c. PRESENT OR LAST PAY GRADE		d. SERVICE NUMBER (if applicable)		e. SSN
5 U.S.C. 552(b) (6)		O3		N/A		5 U.S.C. 552(b) (6)
2. PRESENT STATUS WITH RESPECT TO THE ARMED SERVICES (Active Duty, Reserve, National Guard, Retired, Discharged, Deceased)		3. TYPE OF DISCHARGE (if by court-martial, state the type of court.)			4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY (YYYYMMDD)	
Retired		Honorable			20100930	

5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED: (Entry required)

See accompanying Memorandum in Support.

6. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST FOR THE FOLLOWING REASONS: (Entry required)

See accompanying Memorandum in Support.

7. ORGANIZATION AND APPROXIMATE DATE (YYYYMMDD) **AT THE TIME THE ALLEGED ERROR OR INJUSTICE IN THE RECORD OCCURRED** (Entry required)

National Naval Medical Center, Bethesda, MD.

8. DISCOVERY OF ALLEGED ERROR OR INJUSTICE

a. DATE OF DISCOVERY (YYYYMMDD)	b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THE APPLICATION.
20100930	N/A

9. IN SUPPORT OF THIS APPLICATION, I SUBMIT AS EVIDENCE THE FOLLOWING ATTACHED DOCUMENTS: (If military documents or medical records are pertinent to your case, please send copies. If Veterans Affairs records are pertinent, give regional office location and claim number.)

See attached Memorandum in Support.

10. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. (At no expense to the Government) (X one)

☒ YES. THE BOARD WILL DETERMINE IF WARRANTED.

☐ NO. CONSIDER MY APPLICATION BASED ON RECORDS AND EVIDENCE.

11.a. COUNSEL (If any) NAME (Last, First, Middle Initial) and ADDRESS (Include ZIP Code)	b. TELEPHONE (Include Area Code)
5 U.S.C. 552(b) (6)	5 U.S.C. 552(b) (6)
	c. E-MAIL ADDRESS
	5 U.S.C. 552(b) (6)
	d. FAX NUMBER (Include Area Code)
	5 U.S.C. 552(b) (6)

12. APPLICANT MUST SIGN IN ITEM 15 BELOW. If the record in question is that of a deceased or incompetent person, **LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION.** If the application is signed by other than the applicant, indicate the name (print) and relationship by marking one box below.

<input type="checkbox"/> SPOUSE	<input type="checkbox"/> WIDOW	<input type="checkbox"/> WIDOWER	<input type="checkbox"/> NEXT OF KIN	<input type="checkbox"/> LEGAL REPRESENTATIVE	<input type="checkbox"/> OTHER (Specify)
---------------------------------	--------------------------------	----------------------------------	--------------------------------------	---	--

13.a. COMPLETE CURRENT ADDRESS (Include ZIP Code) OF APPLICANT OR PERSON IN ITEM 12 ABOVE (Forward notification of all changes of address.)	b. TELEPHONE (Include Area Code)
5 U.S.C. 552(b) (6)	5 U.S.C. 552(b) (6)
	c. E-MAIL ADDRESS
	5 U.S.C. 552(b) (6)
	d. FAX NUMBER (Include Area Code)
	N/A

14. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM. (U.S. Code, Title 18, Sections 287 and 1001, provide that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)

CASE NUMBER
(Do not write in this space.)

15. SIGNATURE (Applicant must sign here.)

5 U.S.C. 552(b) (6)

16. DATE SIGNED
(YYYYMMDD)

2013 07 17

REC'D JUL 17 2013

IN THE BOARD FOR CORRECTION OF NAVAL RECORDS

In re. CDR 5 U.S.C. 552(b) (6), USN (retired)

MEMORANDUM IN SUPPORT OF APPLICATION FOR CORRECTION OF RECORD

In her accompanying "Application for Correction of Military Record Under the Provisions of Title 10, U.S. Code, Section 1552" (DD Form 149), CDR 5 U.S.C. 552(b) (6) USN (retired), requests that her record be corrected based on the following errors and injustices:

- On 30 September 2010 5 U.S.C. was retired from the Navy involuntarily and "*in Absentia*" while she was recovering from traumatic brain injury sustained on 20 May 2007 when she was physically attacked by someone we now know was an Al-Qaeda operative on board an Air France flight from Djibouti, Africa, to Paris, France;
- Two of the most blatant of multiple "errors or injustices" that cry out for BCNR relief, aside from the "due process" injustice of the involuntary "*in Absentia*" retirement itself, are that 5 U.S.C. never completed her separation physical, and then was denied physical therapy at both NNMC Bethesda and Walter Reed from the date of her involuntary "*in Absentia*" retirement on 30 September 2010 until 6 January 2013;
- The totality of all the errors and injustices associated with her involuntary "*in Absentia*" retirement warrants that 5 U.S.C. now be brought back to active duty in order to complete her separation physical and be accorded the opportunity to retire with the dignity and honor customarily granted to an officer who has: (a) given the best years of her life in service to the United States Navy; and (b) survived a brutal attack by an Al Qaeda operative while she was serving overseas, and who notwithstanding this brutal attack continued to contribute 110% of her abilities in service to the United States Navy.

5 U.S.C. presents the evidence and arguments described in detail throughout this Memorandum, demonstrating the need "to correct an error or remove an injustice." 10 U.S.C. §1552(a)(1). On account of the length of this Memorandum, a "Table of Contents" is provided:

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B. ERROR OR INJUSTICE #2: DENIAL OF PHYSICAL THERAPY...	Page 10
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I. SUMMARY OF ARGUMENTS FOR RELIEF

The facts recounted in the following chronology demonstrate, first of all, that 5 U.S.C. performance of duty as a Navy Commander was exemplary notwithstanding extraordinary adversity. Second, the evidence establishes material error or injustice. 5 U.S.C. was treated in an *at best* irregular manner after her traumatic brain injury caused by an Al-Qaeda terrorist while 5 U.S.C. was on official duty travel aboard a foreign commercial airline flight from her duty station in Djibouti, Africa. The subsequent actions by BUPERS in retiring 5 U.S.C. against her will and "*in Absentia*" amounted to an involuntary and blatantly unjust constructive discharge of an exemplary officer who was still recovering from this traumatic brain injury. Finally, there is a causal nexus between the constructive discharge of 5 U.S.C. and 5 U.S.C. 552(b) "protected communications" under the Military Whistleblower Protection Act. Accordingly, 5 U.S.C. respectfully requests a personal appearance before the Board.

II. LEGAL STANDARD

Under Title 10 of United States Code, "The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice." 10 U.S.C. §1552(a)(1). Once the Applicant presents, "sufficient relevant evidence . . . to demonstrate the existence of probable error or injustice warranting corrective action," the BCNR "is charged with an 'abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief.'" *Roth v. United States*, 56 Fed. Cl. 239 (Ct. Cl. 2003) (internal quotes and citations omitted); *Duhon v. United States*, 461 F.2d 1278, 1280 (Ct. Cl. 1972) (Board "had the power, and the duty, to remove injustices and correct errors."); see SECNAVINST 5420.193, "BOARD FOR CORRECTION OF NAVAL RECORDS," Enclosure (1), "Procedures of the Board for Correction of Naval Records," Section 3(e)(2), 19 November 1997 ("The Board may deny an application in executive session if it determines that the evidence of record fails to demonstrate the existence of probable material error or injustice.").

III. FACTUAL CHRONOLOGY OF MULTIPLE ERRORS & INJUSTICES

1999-2000: Naval Inspector General issued report of investigation, finding, in effect, that CDR 5 U.S.C. 552(b)(6) engaged in protected communication, *i.e.*, speaking or communication with her chain of command, a member of Congress, and/or an IG regarding improper actions by the superior whose fitness report she refused to sign.¹

¹ 5 U.S.C. has requested a copy of the Naval Inspector General Report through the Freedom of Information Act, and will submit it to the BCNR upon receipt; in the meantime, we request that the Board request from the Naval Inspector General whatever information it has associated with 5 U.S.C. pursuant to the Board's authority under the Military Whistleblower Protection Act, 10 U.S.C. §1034(f), which provides: "(1) A board for the correction of military records acting under section 1552 of this title, in resolving an application for the correction of records made by a member or former member of the armed forces who has alleged a personnel action prohibited by subsection (b), on the request of the member or former member or otherwise, may review the matter. . . (2) In resolving an application described in paragraph (1), a correction board— (A) shall review the report of the Inspector General submitted under subsection (e)(1); (B) may request the Inspector General to gather further evidence; . . ."

2002- 2006: Virtually all of the leadership of the Navy's Information Professional Community including 5 U.S.C. 552(b) (6) 5 U.S.C. 552(b) (6) with knowledge that 5 U.S.C. 552(b) (6) had communicated with the DoD and the Naval Inspectors General, repeatedly denied 5 U.S.C. 552(b) (6) the opportunity to be assigned to career-enhancing sea duty in 2002 to 2006 after 5 U.S.C. 552(b) (6) had been "Board Screened" for sea duty, and then failed to select her for promotion to Captain. See Declaration of 5 U.S.C. 552(b) (6) July 10, 2013 (Tab A).

13 March 2006: E-mail from 5 U.S.C. 552(b) (6) to 5 U.S.C. 552(b) (6) ("Big change in plans. . . . I know this isn't what you wanted to hear, but we can look in that time frame for an at sea job of you."), and E-mail from 5 U.S.C. 552(b) (6) back to 5 U.S.C. 552(b) (6) ("I am qualified [for an at sea tour, aka a "sea milestone billet"]. I have not been descreened. I do not have any letter in my file saying I declined Sea nor will I ever. If there is something else in play please please tell me what it is. I am just looking for the truth.") (Tab B).

25 April 2006: E-mail from 5 U.S.C. 552(b) (6) to 5 U.S.C. 552(b) (6) 5 U.S.C. 552(b) (6) superior at the time ("When 5 U.S.C. 552(b) (6) completed her command tour, our community flag officers decided that she would not be sent to a sea milestone billet based on her status as a two time FOS'd [i.e., failure of selection, aka passed over for promotion] officer" (Tab C).

4 May 2006: E-mail from 5 U.S.C. 552(b) (6) to 5 U.S.C. 552(b) (6) 5 U.S.C. 552(b) (6), May 4, 2006 ("Do not bend over backwards for 5 U.S.C. 552(b) (6) if this is her second FOS.") (Tab D).

1 October 2006: 5 U.S.C. 552(b) (6) assigned to Core Staff CJTF-HOA (as J6)/Second fleet Norfolk, Virginia, for training to include Combat training at NIACT (while also still under the Command of Commanding Officer, Naval Communication Security Material System, Andrews AFB).

2 December 2006: Naval Network Warfare Command (NETWARCOM)/Naval Communication Security Material System Command (NCMS) Change of Command at Andrews Air Force Base: 5 U.S.C. 552(b) (6) outgoing Commanding Officer of NCMS, was ranked 1st of 8 commanders by 5 U.S.C. 552(b) (6) COMNETWARCOM for two years (October 2004 to December 2006) (see Tab E).

5 December 2006: 5 U.S.C. 552(b) (6) reported to 2NDFLT/CJTF-HOA full time to complete training.

8 February 2007: 5 U.S.C. 552(b) (6) deployed with Core Staff to Djibouti, Africa, for one year OEF IA assignment.

March 2007: 5 U.S.C. 552(b) (6) injured back exiting CH53 helicopter in Hurso, Ethiopia.

19-20 May 2007: 5 U.S.C. 552(b) (6) departed Djibouti (ON OFFICIAL GOVERNMENT ORDERS) via Air France for Stuttgart Germany for transition meeting with AFRICOM Transition team.

20 May 2007: 5 U.S.C. 552(b) (6) is brutally attacked while asleep aboard the Air France flight by a Somali man traveling with a Dutch passport (see Memo for the Record dated 24 May 2007 and Navy Medical Record Excerpt at Tab F), who is now believed to have been Al Qaeda operative

Forward to Release Authority: FBI

Forward to Release Authority: FBI

23 May 2007: 5 U.S.C. 552(b) returned to CJTF-HOA, having been diagnosed with a concussion and vertigo by EMTF SIQ for 3 days (at this time, 5 U.S.C. 552(b) and medical personnel do not know the full extent of her traumatic brain injuries).

01 June 2007: 5 U.S.C. 552(b) began an 18-day R&R trip to New York City. She is instructed by CJTF-MOA Medical to see a neurologist (5 U.S.C. 552(b)(6)) while on R&R. The neurologist diagnosed her with a concussion, vertigo, and strained neck; the neurologist recommends a follow up consultation in September 2007.

20 June 2007: 5 U.S.C. 552(b) returned to Djibouti, Africa.

25 June 2007: Forward to Release Authority: FBI

Forward to Release Authority: FBI

September 2007: 5 U.S.C. 552(b) is aero-evacuated to the U.S. Military medical hospital in Landstuhl, Germany, with persistent post-concussion syndrome.

September 2007: 5 U.S.C. 552(b) is diagnosed with traumatic brain injury ("TBI"), and asked by her U.S. Military physician, 5 U.S.C. 552(b), if she wanted to return home or to "suck it up." She elected to "suck it up." 5 U.S.C. 552(b) instructed and facilitated reporting to NNMC TBI Center when 5 U.S.C. 552(b) redeployed in February 2008 for further testing and evaluation.

January 2008: FY09 Captain (06) LINE SELECTION BOARD CONVENED (and considered her record as it was – unchecked by 5 U.S.C. 552(b) on account of her TBI condition – and passed over 5 U.S.C. 552(b) for promotion to Captain).

8 February 2008: 5 U.S.C. 552(b) redeployed back to ComSecondFlt.

22- 27 February 2008: 5 U.S.C. 552(b) reported to NNMC BETHESDA TBI CENTER for testing and evaluation.

March 2008: NNMC Case Manager called 2nd Fleet for funded, i.e., "cost orders"; 2nd Fleet sends "no cost" orders. 5 U.S.C. 552(b) starts vestibular and physical rehab at NNMC BETHESDA.

28 April 2008: Results of 5 U.S.C. 552(b) TBI/ neurocognitive testing results showed severe impairment in a number of areas: most pronounced in Memory and Information Processing (see Tab J).

2 May 2008: 5 U.S.C. 552(b) is referred into DoD Disability Evaluation System (DES) by TBI Center at NNMC (5 U.S.C. 552(b)). 5 U.S.C. 552(b) status was "no cost" orders from 2nd Fleet, (6)

which changed when she received LIMDU (limited duty) PCS Orders from 2nd Fleet to NNMC (see Tab K).

5 May 2008: 5 U.S.C. [REDACTED] requested cancellation of her previously approved retirement orders for 1 June 2008 "Due to Serious head injury sustained while deployed to CJTF-HOA" (Tab L).

June 2008- June 2009: 5 U.S.C. [REDACTED] began TBI TREATMENT at NNMC.

June 2008- present: 5 U.S.C. [REDACTED] began lower back rehab at Walter Reed Medical Center -- Physical Medicine/Pain Management.

July 2009: 5 U.S.C. [REDACTED] accepted into Government-funded Mount Sinai School of Medicine Brain Injury Research Center's "Short Term Executive Program" (STEP), and was scheduled to begin STEP in January 2010, Because of capacity issues, her start date was pushed back by STEP staff to 12 April 2010 and then to 1 July 2010.

5 November 2009: 5 U.S.C. [REDACTED] submitted papers for retirement as of 1 May 2010 (see Tab M). She later requested a modified retirement date of 01 September 2010 to accommodate STEP.

13 November 2009: 5 U.S.C. [REDACTED] found fit to continue Naval Service by the Navy's Physical Evaluation Board (PEB) (see Tab Mc).

March 2010: 5 U.S.C. [REDACTED] took a trip to Naval Personnel Command in Millington, Tennessee; she was advised by PERS 8 promotions personnel that due to special circumstances she was eligible for a special 06 promotion board.

12 April 2010: 5 U.S.C. [REDACTED] began STEP program, in which she showed impairment in a number of areas particularly Attention Deficits and perceptual difficulties to include visual attention concentration and eye strain, for which she was referred to a neuro-opthamologist at NNMC Bethesda.

28 April 2010: BUPERS issued ORDER 3519(01) to CDR Semple: "YOUR REQUEST TO BE TRANSFERRED TO THE REIRED LIST WAS APPROVED BY THE SECRETARY OF THE NAVY EFFECTIVE 01 SEP 2010. . . ." (see Tab N).

01 July 2010: 5 U.S.C. [REDACTED] completed STEP and return to NNMC BETHESDA. The recommendation from the NNMC doctors -- 5 U.S.C. 552(b) [REDACTED] and 5 U.S.C. 552(b) (6) [REDACTED] was that she remain in the Navy (at least for 4-6 months), and return to work so that she can test her abilities in a safe and familiar environment AND that she be evaluated as to whether or not she can still perform as a CYBER Security expert.

Additionally in light of the treatment and additional impairments identified at Mount Sinai, 5 U.S.C. [REDACTED] neurologist, 5 U.S.C. [REDACTED] requested 5 U.S.C. 552(b) [REDACTED] treatment records in order to have her reevaluated by the NICO for TBI.

06 July 2010: 5 U.S.C. [REDACTED] resumed workout with trainer at Washington Navy Yard (WNY).

12 July 2010: 5 U.S.C. [REDACTED] seen by Neuro-opthamologist at NNMC.

13 July 2010: 5 U.S.C. [REDACTED] received steroid injection for her injured back a WWRMC.

16 July 2010: 5 U.S.C. [REDACTED] received post-treatment testing at Mount Sinai Brain Injury Research Center.

22 July 2010-30 July 2010: 5 U.S.C. [REDACTED] took annual leave in Orlando, Florida.

August 2010: 5 U.S.C. [REDACTED] began discussions with PERS 8 retirement personnel and Detailer for the purpose of withdrawing her retirement papers; they recommended an ORDMOD/extension. The Detailer offered either one or two year orders to the Office of the Secretary of the Navy (SECNAV). 5 U.S.C. [REDACTED] ACCEPTED one year orders to SECNAV.

23-24 August 2010: 5 U.S.C. [REDACTED] sent e-mail to PERS 471 (5 U.S.C. 552(b) [REDACTED]) requesting one-year delay in retirement: "I have requested one year but really believe that six month's [sic] will give us sufficient information as to whether I will be able to resume my career in Cyber Security. I am working with safe harbor to enter into a internship but would also be interested in discussing with you and the IP leadership if perhaps there is a special project I could work on for six month's [sic]. I am also going to be working with my neurologist and the staff at the new NICO for TBI at Bethesda to aid in the development of future treatments for TBI. My goal is to help others and to help leadership understand what it is like and the challenges rehabilitation presents" (see Tab O).

PERS 471 (5 U.S.C. 552(b) [REDACTED]) e-mailed 5 U.S.C. [REDACTED] back: "Are you saying that medical folks are going to extend you in your current medical hold/limdu status? If you are found fit for full duty and want to be retained on active duty I can issue you orders but not for a special project, would be to a staff somewhere like in DC and would be 24 months orders (standard DOD tour lengths)" (see Tab O).

5 U.S.C. [REDACTED] sent e-mail back to PERS 471 (5 U.S.C. 552(b) [REDACTED]): "Yes that was the discussion but I have been found fit so [sic] Whatever is the best way to do this. I am not opposed to getting 2 year orders I just want to make sure I can do my job. A staff job would be great I am open!!! Please advise soonest" (see Tab O).

PERS 471 (5 U.S.C. 552(b) [REDACTED]) e-mailed 5 U.S.C. [REDACTED] back: "If you are to decide to do a 2yr tour you would have to cancel your retirement request" (see Tab O).

PERS 471 (5 U.S.C. 552(b) [REDACTED]) sent second e-mail 71 minutes later (without an intervening e-mail from 5 U.S.C. [REDACTED]) "5 U.S.C. [REDACTED], you would need to CANX if you are going to remain on active duty for another tour. However in the system it looks like you might stat out before the end ofhte [sic] two years. You can have 28 years of commissioned service as an officer – what was your commissioning date? (Assume it was 850322)" (see Tab O).

22 minutes later, PERS 822 (5 U.S.C. 552(b) [REDACTED]) sent e-mail to PERS 471 (5 U.S.C. 552(b) [REDACTED]), cc 5 U.S.C. [REDACTED]: "CDR, You wouldn't STAT until 01 April 2013. Will your detailer support a one year ordmod?" (see Tab O).

25 August 2010: 5 U.S.C. [REDACTED] accepts one-year assignment to SECNAV, after which PERS

Forwarded to Release Authority: Navy Personnel Command

26 August 2010: 5 U.S.C. 552(b) request to modify her retirement date from 01SEP10 to 01SEP11 denied by PERS 4B. Forwarded to Release Authority: Navy Personnel Command (see Tab Q).

28 August 2010 (Saturday): 5 U.S.C. e-mailed PERS 471 (5 U.S.C. 552(b)) and PERS 822 (5 U.S.C. 552(b)). Forwarded to Release Authority: Navy Personnel Command
Forwarded to Release Authority: Navy Personnel Command

30 August 2010: PERS 471 5 U.S.C. 552(b) e-mailed 5 U.S.C. Forwarded to Release Authority: Navy Personnel Command
Forwarded to Release Authority: Navy Personnel Command

31 August 2010: PERS 82 (5 U.S.C.) denied 5 U.S.C. 552(b) physician-directed re-entry into DES; instead, PERS 82 (5 U.S.C. 552(b)) recommended 5 U.S.C. for a one month extension of her retirement date to 01 October 2010 in order to complete reevaluation by 5 U.S.C. Forwarded to Release Authority: Navy Personnel Command
Forwarded to Release Authority: Navy Personnel Command (see Tab S).

01 September-17 September 2010: All of 5 U.S.C. 552(b) accounts, including DEERS were down (for unknown reason). She did not receive her ORDMOD until 17 September for the 01 Oct 2010 retirement. She could not make any Doctor appointments (specifically part two of her physical) because the DEERS system had her as "ineligible").

14 September 2010: 5 U.S.C. reinjured her back (sustained in Ethiopia see March 2007 entry above) working out in Gym with Navy trainer doing squats.

20 September 2010: Forwarded to Release Authority: Navy Personnel Command
Forwarded to Release Authority: Navy Personnel Command

28 September 2010: The Navy Surgeon General (5 U.S.C.) intervened and was told a resounding "No" by PERS 82 (5 U.S.C.). The Surgeon General also advised him (PERS 82 (5 U.S.C.)) that 5 U.S.C. had not completed her retirement physical.

30 September 2010: PSD Bethesda retired 5 U.S.C. "in Absentia," mailing to 5 U.S.C. her "Certificate of Release or Discharge from Active Duty," DD Form 214 (see Tab V).

1 October 2010: Memorandum For Congressional Matters re Congressional Inquiry (Tab W).

3 October 2010: 5 U.S.C. [REDACTED] was denied Physical Therapy by National Naval Medical Center (NNMC) Bethesda and Walter Reed Army Medical Center (WRAMC) because she was no longer active duty, after which denial 5 U.S.C. [REDACTED] sought and received private physical therapy for her back through Chesapeake Bay Aquatic Physical Therapy w/co-pay of \$144/month (through May 2011).

7 October -18 October 2010: National Intrepid Center of Excellence (NICOE) TBI evaluation of 5 U.S.C. [REDACTED] commenced at NNMC Bethesda.

25 October 2010: 5 U.S.C. [REDACTED] was notified by Ortho and Walter Reed that her back condition was serious and that she was being referred to a surgeon.

13 December 2010: Navy Personnel Command writes letter to 5 U.S.C. 552(b) (6) [REDACTED] concluding: **Forwarded to Release Authority: Navy Personnel Command** [REDACTED] **Forwarded to Release Authority: Navy Personnel Command** (Tab X).

January 2011: Veterans Administration (VA) disability award delayed because someone in the Navy had falsely notified the Veterans Administration that 5 U.S.C. [REDACTED] "opted to retire" (see Tab Y).

28 March 2011: 5 U.S.C. [REDACTED] finished her NICOE evaluation (see Tab Z).

May 2011: 5 U.S.C. [REDACTED] completes physical therapy for back through Chesapeake Bay Aquatic Physical Therapy (that had started after 3 October 2010 denials by NNMC and Walter Reed).

6 January 2013: 5 U.S.C. [REDACTED] is accepted back into physical therapy program (for back injury) at Walter Reed National Military Medical Center in Bethesda, notwithstanding prior denials by NNMC and Walter Reed Army Medical Center (see Tab Z).

IV. ARGUMENTS FOR RELIEF

A. ERROR OR INJUSTICE #1: FAILURE TO PROVIDE PROCEDURAL DUE PROCESS ASSOCIATED WITH CONSTRUCTIVE DISCHARGE

As demonstrated by the factual chronology and associated supporting documentation, 5 U.S.C. [REDACTED] did everything she could reasonably have been expected to do in order to obtain "notice and an opportunity to be heard . . . at a meaningful time and in a meaningful manner" before being retired from the Navy "*in Absentia*" and against her specific request and contrary to a statute allowing her to serve 28 years (see 10 U.S.C. § 633) on 30 September 2010. As the United States Supreme Court reiterated in 2004, "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner. These essential constitutional promises may not be eroded." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (internal quotes and cites omitted).

The truncated processing of 5 U.S.C. 552(b) "*in Absentia*" retirement did not provide 5 U.S.C. [REDACTED] with the required "due process" protections for her liberty and/or property interests. She was supposed to receive timely and meaningful notice and an opportunity to be heard. Due

process and fundamental fairness require that the 5 U.S.C. have the opportunity to address whatever it was that caused PERS 4 on August 26, 2010, to deny 5 U.S.C. 552(b) request to withdraw her retirement papers – shortly after she had accepted one-year orders through PERS 8.

Especially considering her traumatic brain injuries for which she was still being treated during the time period preceding her “*in Absentia*” retirement, this “bait and switch” by the Bureau of Naval Personnel in the proverbial 11th hour followed by an “*in Absentia*” retirement was a fundamentally unfair “constructive discharge” and therefore an “injustice” within the meaning of 10 U.S.C. § 1552.

1. Constructive Discharge Is An Error or Injustice Correctable under 10 U.S.C. §1552.

An individual may suffer an “error or injustice” when an otherwise “voluntary” retirement is deemed a “constructive discharge” that is correctable under 10 U.S.C. §1552. See *Chappell v. Wallace*, 462 U.S. 296, 303 (1983) (when there has been a constructive discharge, “The Board is empowered to order retroactive backpay and retroactive promotion. 10 U.S.C. § 1552(c).”); cf. *Shoaf v. Department of Agriculture*, 260 F.3d 1336, 1140 (Fed. Cir. 2001) (explaining legal standard for establishing “constructive discharge”).

Shoaf establishes that, “As a general proposition, to establish involuntariness on the basis of coercion this court requires an employee to show: (1) the agency effectively imposed the terms of the employee's resignation or retirement; (2) the employee had no realistic alternative but to resign or retire; and (3) the employee's resignation or retirement was the result of improper acts by the agency.” 260 F.3d. at 1141, citing *Christie v. United States*, 207 Ct. Cl. 333, 518 F.2d 584, 587 (1975) and *Staats v. United States Postal Serv.*, 99 F.3d 1120, 1124 (Fed.Cir.1996).

Once “constructive discharge” is demonstrated to be a “probable error or injustice,” the BCNR has an “abiding moral sanction . . . to take steps to grant thorough and fitting relief.” *Roth v. United States*, 56 Fed. Cl. 239, 248 (Ct. Cl. 2003) (internal quotes and citation omitted). See also *Yee v. United States*, 512 F.2d 1383, 1387-88 (Ct. Cl. 1975) (BCNR has “an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief.” (citations omitted)).

2. The Evidence of Constructive Discharge that Accompanies the Application is Creditable.

Although she had previously submitted her retirement papers, in August 2010 5 began discussions with PERS 8 and her Detailer for the purpose of withdrawing her retirement papers and/or postponing her retirement until at least September 2011. The Detailer offered either one or two year orders to the Office of the Secretary of the Navy (SECNAV). 5 U.S.C. ACCEPTED one year orders to SECNAV, after which: “(1) the agency effectively imposed the terms of the employee's resignation or retirement; (2) the employee had no realistic alternative but to resign or retire; and (3) the employee's resignation or retirement was the result of improper acts by the agency.” *Shoaf*, 260 F.3d. at 1141, *supra*.

Specifically, the “improper acts by the agency” were the series of acts by various officials within the Bureau of Naval Personnel (and chronicled above) during which 5 U.S.C. who

was still undergoing TBI rehabilitation, was led to believe that she would be able to accept one-year orders to the Secretary of the Navy's office, after which she orally accepted those order, but within days she was denied those same orders.

To compound these "improper acts," 5 U.S.C. [REDACTED] was subsequently denied the opportunity to complete her retirement physical and was unceremoniously retired from active duty "in Absentia" and against her will on 30 September 2010.

Accordingly, the BCNR should direct that 5 U.S.C. [REDACTED] be brought back to active duty in order to complete her separation physical and be accorded the opportunity to retire with the dignity and honor customarily granted to an officer who has: (a) given the best years of her life in service to the United States Navy; and (b) survived a brutal attack by an Al Qaeda operative while she was serving overseas, and who notwithstanding this brutal attack continued to contribute 110% of her abilities in service to the United States Navy.

B. ERROR OR INJUSTICE #2: 5 U.S.C. 552(b) [REDACTED] WAS UNJUSTLY AND/OR ERRONEOUSLY DENIED PHYSICAL THERAPY AT BOTH NNMCMC BETHESDA AND WALTER REED FROM THE DATE OF HER INVOLUNTARY "IN ABSENTIA" RETIREMENT ON 30 SEPTEMBER 2010 UNTIL 6 JANUARY 2013

1. Denial of Physical Therapy Is a Correctible Error or Injustice under 10 U.S.C. §1552.

The fact that 5 U.S.C. [REDACTED] was denied physical therapy from the time of her involuntary retirement in September 2010 until 6 January 2013, when she was admitted back into a physical therapy program at Walter Reed National Military Medical Center (WRNMMC) speaks for itself. Whether it is deemed an "error or injustice," CDR 5 U.S.C. 552(b)(6) [REDACTED] should have been continued in her ongoing physical therapy through her transition from active duty to retired status. That she was not is a correctible error or injustice under 10 U.S.C. §1552.

2. Material Evidence that 5 U.S.C. [REDACTED] Was Denied Physical Therapy Is Creditable.

Within days of being involuntarily retired from active duty, 5 U.S.C. [REDACTED] reported first to National Naval Medical Center (NNMC) and then to Walter Reed Army Medical Center (WRAMC) for physical therapy, only to be denied physical therapy, ostensibly because she was no longer on active duty. (See Declaration of 5 U.S.C. 552(b)(6) [REDACTED] at Tab A). From October 2010 until May 2011, 5 U.S.C. 552(b)(6) [REDACTED] received private physical therapy for her back through Chesapeake Bay Aquatic Physical Therapy w/co-pay of \$144/month. See *Id.*

On January 6, 2013, 5 U.S.C. [REDACTED] tried again to receive physical therapy for her back through WRNMMC. As evidenced by the "Welcome to Physical Therapy" paperwork attached at Tab Z, this time WRNMMC accepted 5 U.S.C. 552(b)(6) [REDACTED] into a program of physical therapy. The only explanation for her denial in October 2010 can be an "error or injustice." 10 U.S.C. §1552.

Accordingly, 5 U.S.C. [REDACTED] should be awarded relief to put herself back into the position in which she would have been but for the "error or injustice." The BCNR has an "abiding moral sanction . . . to take steps to grant thorough and fitting relief." *Roth v. United States*, 56 Fed. Cl. 239, 248 (Ct. Cl. 2003) (internal quotes and citation omitted).

C. ERROR OR INJUSTICE #3: WHISTLEBLOWER RETALIATION

1. 5 U.S.C. [REDACTED] engaged in protected communication, *i.e.*, speaking or communication with her chain of command, a member of Congress, and/or an IG regarding improper actions by the superior whose fitness report she refused to sign.

As demonstrated by the above chronology, 5 U.S.C. [REDACTED] engaged in protected communications in connection with actions of her commanding officer that she believed were unlawful. The Naval Inspector General later proved her beliefs to be well founded.

2. 5 U.S.C. 552(b)(6) was subjected to a number of prohibited personnel practices.

Subsequent to her protected communications, 5 U.S.C. [REDACTED] was subjected to a number of prohibited personnel practices, including the denial of her repeated request to be assigned to sea duty in order to be more competitive for promotion, the failure to select her for promotion to Captain, and culminating in the August 26, 2010, denial by "PERS 4" of her request to withdraw her retirement request in order to accept one year orders, which as explained above resulted in 5 U.S.C. 552(b) [REDACTED] "constructive discharge" from the active naval service on 30 September 2010.

3. A Causal Nexus Between #1 and #2 Is Established by the Rebuttable Presumption Based on Evidence that the Person(s) Who Took the Adverse Personnel Action (#2) Had Knowledge of 5 U.S.C. 552(b) Protected Communication (#1).

- a. Reprisal is a recognized "error or injustice" correctable under 10 U.S.C. §1552.

The Military Whistleblower Protection Act, 10 U.S.C. §1034(f), provides for the following correction board relief for whistleblowers and speaks for itself:

Correction of Records When Prohibited Action Taken.—

- (1) A board for the correction of military records acting under section 1552 of this title, in resolving an application for the correction of records made by a member or former member of the armed forces who has alleged a personnel action prohibited by subsection (b), on the request of the member or former member or otherwise, may review the matter.
- (2) In resolving an application described in paragraph (1), a correction board—
 - (A) shall review the report of the Inspector General submitted under subsection (e)(1);
 - (B) may request the Inspector General to gather further evidence; and
 - (C) may receive oral argument, examine and cross-examine witnesses, take depositions, and, if appropriate, conduct an evidentiary hearing.
- (3) If the board elects to hold an administrative hearing, the member or former member who filed the application described in paragraph (1)—
 - (A) may be provided with representation by a judge advocate if—

- (i) the Inspector General, in the report under subsection (e)(1), finds that there is probable cause to believe that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in subsection (c)(2);
 - (ii) the Judge Advocate General concerned determines that the case is unusually complex or otherwise requires judge advocate assistance to ensure proper presentation of the legal issues in the case; and
 - (iii) the member is not represented by outside counsel chosen by the member; and
- (B) may examine witnesses through deposition, serve interrogatories, and request the production of evidence, including evidence contained in the investigatory record of the Inspector General but not included in the report submitted under subsection (e)(1).
- (4) The Secretary concerned shall issue a final decision with respect to an application described in paragraph (1) within 180 days after the application is filed. If the Secretary fails to issue such a final decision within that time, the member or former member shall be deemed to have exhausted the member's or former member's administrative remedies under section 1552 of this title.
- (5) The Secretary concerned shall order such action, consistent with the limitations contained in sections 1552 and 1553 of this title, as is necessary to correct the record of a personnel action prohibited by subsection (b).
- (6) If the Board determines that a personnel action prohibited by subsection (b) has occurred, the Board may recommend to the Secretary concerned that the Secretary take appropriate disciplinary action against the individual who committed such personnel action.

- b. Material evidence indicates that the official who effectuated adverse personnel actions against 5 U.S.C. [REDACTED] had knowledge of 5 U.S.C. 552(b) [REDACTED] protected communications.

As is evident from the above chronology and the preponderance of the evidence, the same officials who prevented 5 U.S.C. [REDACTED] from being assigned to sea duty and who later effectuated her "constructive discharge" from active duty had knowledge of her protected communication. Specifically, "virtually all of the leadership of the Navy's Information Professional Community, including 5 U.S.C. 552(b)(6) [REDACTED] 5 U.S.C. 552(b)(6) [REDACTED] all knew that 5 U.S.C. 552(b) [REDACTED] had communicated with the DoD and the Naval Inspectors General when they: (a) denied [her] the opportunity to be assigned to career-enhancing sea duty in 2002 to 2006 after Board Screening; and (b) passed [her] over for selection to Captain during the FY-07, FY-08, FY-09 and FY-10 Active Duty Captain Line Selection Boards." Declaration of 5 U.S.C. 552(b)(6) [REDACTED] signed July 10, 2013 (Tab A). Likewise, 5 U.S.C. [REDACTED] and 5 U.S.C. 552(b)(6) [REDACTED] had knowledge that 5 U.S.C. [REDACTED] had communicated with the DoD and Naval Inspectors General prior to their effectuation of what amounted to 5 U.S.C. 552(b) [REDACTED] constructive discharge from the active naval service on 30 September 2010 (*see id.*).

Under Title 5 of the Code of Federal Regulations and established DoD guidance, therefore, the burden shifts to the complained against officials to establish -- by a clear and convincing evidence standard -- that the personnel action would still have been taken, withheld, or threatened even if the protected communication had not been made. *See* 5 C.F.R. §1209.7 ("Burden and degree of proof. (a) Subject to the exception stated in paragraph (b) of this section, in any case involving a prohibited personnel practice described in 5 U.S.C. 2302(b)(8), the Board will order appropriate corrective action if the appellant shows by a preponderance of the evidence that a disclosure described under 5 U.S.C. 2302(b)(8) was a contributing factor in the personnel action that was threatened, proposed, taken, or not taken against the appellant. (b) However, even where the appellant meets the burden stated in paragraph (a) of this section, the

Board will not order corrective action if the agency shows by clear and convincing evidence that it would have threatened, proposed, taken, or not taken the same personnel action in the absence of the disclosure.”); Inspector General of the Department of Defense, “Whistleblower Reprisal Investigation: Arlington National Cemetery,” Report No. CRI-HL109655, p. 4, June 29, 2010; 5 C.F.R. §1209.4(d) (“Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than ‘preponderance of the evidence’ as defined in 5 CFR 1201.56(c)(2).”); *see generally* Joseph E. Schmitz, “Whistleblower Reprisal,” in THE INSPECTOR GENERAL HANDBOOK: FRAUD, WASTE, ABUSE, AND OTHER CONSTITUTIONAL “ENEMIES, FOREIGN AND DOMESTIC,” pp. 373-74 (2013).

Accordingly, as 5 U.S.C. [REDACTED] has provided material evidence to support the first three elements of whistleblower reprisal, the only elements for which she bears the burden of proof, she should be awarded relief to put herself back into the position in which she would have been but for the “error or injustice.” The BCNR has an “abiding moral sanction . . . to take steps to grant thorough and fitting relief.” *Roth v. United States*, 56 Fed. Cl. 239, 248 (Ct. Cl. 2003) (internal quotes and citation omitted).

V. ENUMERATION OF RELIEF REQUESTED

A. Reinstatement on Active Duty and Correction of Record for Promotion Consideration

In *Rempfer v. A.F. Bd. For Cor. of Mil. Recds.*, 538 F. Supp. 2d 200 (D.D.C. 2008), the United States District Court for the District of Columbia remanded to the Air Force Board for the Correction of Military Records a constructive discharge claim when the Board had failed to determine whether or not the applicant had been constructively discharged. Here, 5 U.S.C. [REDACTED] has amply demonstrated that on September 30, 2010, she was constructively discharged. “But for” this constructive discharge and the associated adverse action described above, 5 U.S.C. [REDACTED] would have been retained on Active Duty and considered for promotion to Captain (O-6). Accordingly, the appropriate remedial action is to reinstate 5 U.S.C. [REDACTED] on active duty and administratively correct her record so that it can be reviewed for Captain selection, as the Court directed in *Rempfer v. A.F. Bd. For Cor. of Mil. Recds.*, 538 F. Supp. 2d 200, 209 (D.D.C. 2008).

B. Placement of Letter in Record Explaining Gap from Attack by Al Qaeda in May 2007 until Reinstatement, Making Clear that Gap Not Caused By Any Fault of 5 U.S.C. [REDACTED] 552(b)(6)

The Federal Court of Claims has explained: “Unexplained gaps in an officer's record prejudice that officer's chances for promotion.” *Sanders v. United States*, 594 F.2d 804, 819 (Ct. Cl. 1979) (citation omitted). A corrective disclosure can be inserted into the record providing an appropriate explanation as to the Applicant's actual manner of performance and, thereby, explains the gap caused by the defective OERs. *See e.g., Yee v. U. S.*, 512 F.2d at 1386, 1388 (“We believe it would have been virtually impossible for any Selection Board to give proper consideration to plaintiff unless it had access to an adequate explanation of the 5-year gap caused by the Air Force *** And we further direct the Secretary to place in plaintiff's selection folder an adequate explanation of the 5-year gap from 1965-1970 and the 1973-1975 gap, making it clear

that these gaps were not caused by any fault on the part of plaintiff.”). *See also Finkelstein v. U.S.*, 29 Fed. Cl. 611, 613 (Fed. Cl. 1993) (“Deputy Secretary of the Army approved the removal and destruction of her two 1975 OERs and ordered that ‘an adequate explanation be placed in her selection folder, relative [to] the gap in her officer evaluation reports from the date of her last report to the date of her return to active duty status, to show that this gap was not [due to] any fault on her part and to insure that she would not be prejudiced thereby in the consideration of any future personnel actions’.”) (bracket insertions in the original.); *Weiss v. U.S.*, 408 F.2d 416, 419 (Ct. Cl. 1969.) (Remedial relief is proper since the record “must be substantially complete, and must fairly portray the officer’s record.”).

As set forth above, the Applicant’s record of performance before and after (and in spite of) the 20 May 2007 attach by a since eliminated Al Qaeda terrorist was exemplary. Accordingly, 5 U.S.C. § 552(b)(6) requests that the BCNR direct its staff to coordinate with Counsel for 5 U.S.C. § 552(b)(6) an appropriate letter for inclusion into 5 U.S.C. 552(b) official file in anticipation of presentation to a stand-by promotion board, such that, “Unexplained gaps in [5 U.S.C. 552(b)(6)] record [do not] prejudice that officer’s chances for promotion.” *Sanders, supra*.

C. Request for Direct Promotion to Captain (O-6) Based on Precedent from the Air Force Board for the Correction of Military Records

As an alternative to placing 5 U.S.C. § 552(b)(6) on Active Duty for promotion consideration, she requests direct promotion to Captain (O-6) in accordance with precedent from the Air Force Board for the Correction of Military Records (“AFBCMR”) in case number BC-2004-00976 (the “AFBCMR Record of Proceedings”).

The AFBCMR Record of Proceedings in reasoning in BC-2004-00976 bears striking similarity to 5 U.S.C. 552(b) situation. The AFBCMR Record of Proceedings establishes that in certain circumstances of whistleblower reprisal, a Correction Board can direct a promotion from O-5 (Lieutenant Colonel or, in the Navy, Commander) to O-6 (Colonel or, in the Navy, Captain) without resort to a standby promotion board. The reasoning of the AFBCMR Record of Proceedings in BC-2004-00976 fits squarely within the established principle that the decision maker has an “abiding moral sanction . . . to take steps to grant thorough and fitting relief.” *Roth v. United States*, 56 Fed. Cl. 239,248 (Fed. Cl. 2003) (internal quotes and citation omitted).

In BC-2004-00976, the AFBCMR favored direct promotion action because the “magnitude of the injustice is such that it can only be rectified by a Secretarial directed promotion.” Record of Proceedings at 8; *see Duhon v. United States*, 461 F.2d 1278, 1280 (Cl. Cl. 1972) (Correction Board “had the power, and the duty, to remove injustices and correct errors”).

In facts set forth in the AFBCMR Record of Proceeding, an Air Force Squadron Commander, an O-5 like 5 U.S.C. § 552(b)(6) brought a whistleblower action after his commanding general relieved him of command and threatened him with an adverse efficiency report based on erroneous information. The Squadron Commander brought a second IG complaint against his Commanding General for reprisal based upon the Commanding General’s actions, including false statements. After further appeals, the Squadron Commander applied to the AFBCMR,

which agreed that the Commanding General had misinterpreted the Squadron Commander's performance of duty while on deployment. This failure was exacerbated by the Air Force Inspector General (AF/IG) investigators failure to interview key witnesses. The AFBCMR observed: "It takes no 'rocket scientist' to figure that where there was improper investigation, there will be an improper conclusion. . . . A proper OPR guaranteed him promotion to colonel and a bright future. Even when this Board removes this poison pen OPR, the applicant will still be disadvantaged by lack of a sterling OPR for his wartime leadership. This is an outrageous foul. Only a direct promotion to colonel, a Meritorious Service Medal, and a removal of this misleading and retaliatory OPR will correct this abuse." Record of Proceedings at 7.

The AFBCMR assessed the situation and ruled that, "the magnitude of the injustice is such that it can only be rectified by a Secretarial directed promotion." Record of Proceedings at 8. Under these circumstances, the AFBCMR determined: "that because of factors over which he had little or no control, [the applicant] can never compete for promotion on a fair and equitable basis with his peers. Since, in our view, there is no way for the system as presently constituted to restore equity, it is imperative for us to impose the extraordinary solution of direct promotion -- it is the only possible way to rectify the grievous injustice in this particular case." *Id.* at 9.

5 U.S.C. 552(b) situation is similar to that of the Squadron Commander in BC-2004-00976 in that she never received any appropriate or accurate fitness report accounting for her illness and injury post May 2007. This severely impacted the accuracy of her personnel records when it went before the O-6 promotion board. Furthermore, because some aspects of her situation were national security secrets bound together with FBI, DoD, CENTCOM and Navy assets tracking Al Qaeda operatives, her file did not reflect either the award normally associated with her encounter with a terrorist on May 20, 2007 or the severity of her injury and her prognosis for recovery. Accordingly, As the Air Force Board did in BC-2004-00976, the Navy Board can and should award **5 U.S.C. 552(b)(6)** with a direct promotion to Captain (O-6).

D. Appropriate Retirement Award for Her last Ten Years of Exemplary Naval Service

As indicated above, **5 U.S.C.** has served in an exemplary manner throughout her career. Under these circumstances, a Commander, upon retirement is considered for a Legion of Merit medal with a synopsis of the last ten years of outstanding service as the theme and justification of the award. During the past ten years, **5 U.S.C.** was at the "point of the spear" in the Global War on Terror. Indeed, she was a casualty in that non-conventional conflict having been assaulted in the Theater of Operations by Al Qaeda operative **5 U.S.C. 552(b)(6)** in route to AFRICOM, HQs on May 20, 2007. But for the operational secrecy involved in tracking members of the Al Qaeda network, **5 U.S.C. 552(b)(6)** assault would have been front page news throughout the world as Al Qaeda expanded its terrorist activities to commercial aircraft in the Middle East. Three years later, after years of medical treatment, **5 U.S.C.** was retired "*in Absentia*" by the PSD at Bethesda Naval Hospital in 2010.

Under normal conditions, upon approaching retirement, a senior officer's commanding officer considers the person for a retirement award. As **5 U.S.C.** was in a medical hold status at the time of her retirement, the traditional and customary procedures were dispensed with. This omission by the medical authorities coincided with the well-reported consolidation of WRAMC

with NNMC on the Bethesda campus. Regardless, of the cause, the failure of administrative medical personnel to submit 5 U.S.C. [REDACTED] with a retirement award is without justification and fails the test of naval traditions. Accordingly, the Board should award 5 U.S.C. [REDACTED] with a Legion of Merit medal and an appropriate Certificate reflecting her exceptional conduct in the years prior to her retirement.

E. Reservation of Right to Supplement Application for Award of the Purple Heart Medal

As indicated above, on May 20, 2007, 5 U.S.C. [REDACTED] was accosted by Al Qaeda operative, 5 U.S.C. 552(b)(6) [REDACTED]. Recently, the Department of Defense directed that procedures and criteria for award of the Purple Heart medal be rewritten by the Services to reflect the realities of the global reach of terrorism and the physical and psychological injuries associated with a concussion and TBI. 5 U.S.C. [REDACTED] is in the process of making an administrative application for the Purple Heart medal in accordance with the Navy's ALL NAV Message dated December 9, 2011. If the Navy does not administratively award 5 U.S.C. [REDACTED] with the Purple Heart medal, she reserves the right to request that the BCNR act within its separate equitable powers to award the Purple Heart.

F. Reimbursement of Physical Therapy Costs between October 2010 and January 2013

As indicated above, from October 2010 until May 2011, for eight months 5 U.S.C. [REDACTED] received private physical therapy for her back through Chesapeake Bay Aquatic Physical Therapy w/co-pay of \$144/month, during which time she should have been receiving the same physical therapy for no cost from the military. Accordingly, the Board should award 5 [REDACTED] \$1,152 to reimburse her for out-of-pocket costs that she would not have occurred but for the error or injustice associated with the denial by NNMC and WRAMC of 5 U.S.C. 552(b) [REDACTED] efforts to obtain physical therapy at NNMC and WRAMC, only to be denied physical therapy, ostensibly because she was no longer on active duty.

G. Administrative Processing Suggestions to the Board

If offered an opportunity personally to appear before the panel, 5 U.S.C. [REDACTED] and the undersigned counsel will make themselves available to answer any queries.

Finally, 5 U.S.C. [REDACTED] would reserve her right to supplement her Application for Correction of Record based upon new information, including but not limited to information that has been requested, but not yet received, from the Naval Inspector General.

July 10, 2013

Respectfully submitted,

5 U.S.C. 552(b)(6) [REDACTED]

5502 Parkston Road
Bethesda, MD 20816

Counsel to 5 U.S.C. 552(b)(6) [REDACTED] USN (retired)

ATTACHMENTS: Exhibits A-Z



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

RJO
Docket No: 5885-15

APR 1 2016

5 U.S.C. 552(b) (6)

Dear 5 U.S.C. 552(b) (6):

The Board for Correction of Naval Records recently reviewed allegations of error and injustice in your naval record pursuant to the provisions of Title 10 of the United States Code, Section 1552. The proceedings have been reviewed, and the recommendation of the Board has been approved on behalf of the Secretary of the Navy as set forth in the enclosure.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new evidence within one year from the date of the Board's decision. New evidence is evidence not previously considered by the Board prior to making its decision in this case. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

5 U.S.C. 552(b) (6)

SCOTT F. THOMPSON
Executive Director

Enclosure

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

RJO
Docket No: 5885-15

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

Subj: STAFF 5 U.S.C. 552(b) (6) USMC
REVIEW OF NAVAL RECORD (WHISTLEBLOWER)

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 w/attachments
(2) USMC IG report ICO 5 U.S.C. 552(b) (6)

1. Pursuant to the provisions of reference (a) Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected to remove all medical records related to his 11 February 2014 mental health referral.
2. The Board, consisting of 5 U.S.C. 552(b) (6), reviewed Petitioner's allegations of error and injustice on 7 March 2016 and, pursuant to its regulations, determined that in light of the available evidence of record, relief should be denied. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.
3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:
 - a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.
 - b. In November 2012, Petitioner was assigned to the Inspector-Instructor Detachment, B Company, 4th Combat Engineer Battalion in Roanoke Virginia. His performance evaluations from November 2012 through April 2013 indicated he was performing well.
 - c. In December 2013, Petitioner requested to see his Commander to report incidents of hazing and misconduct by the First Sergeant assigned to the unit. Petitioner was upset with how subordinates, including himself, were being treated by the First Sergeant. His complaint initiated an investigation within the unit.
 - d. In February 2014, Petitioner received a performance evaluation with a "judgment" grade of "B." This grade was substantially lower than the previous grade of "D" that Petitioner

received on his previous evaluation. Petitioner concluded that this lower grade was issued as a reprisal for his complaint of hazing by the First Sergeant.

e. That same month, Petitioner visited his TRICARE assigned civilian health provider reporting health problems associated with his work environment. On 7 February 2014, his provider issued him a note excusing Petitioner from work between the dates of 7 February 2014 through 9 March 2014. The basis for the note was Petitioner's inability to "focus, concentrate, make decisions, and deal with stress."

f. Petitioner provided the note to his chain of command. The note stated "Unable to work 2/7/14 - 3/9/14" and contained no explanation. When questioned by the chain of command on the basis for the physician's note, Petitioner chose not to disclose any information.

g. On 11 February 2014, the Petitioner was directed by the Battalion Commander to report to Portsmouth Naval Medical Center for a mental health referral. The basis for the referral was to determine the Petitioner's fitness for duty since he refused to provide any information on his physician's note.

h. 12 February 2014, Petitioner is examined by a staff psychologist at Portsmouth Naval Medical Center. He was determined to be fit for full duty despite symptoms of adjustment disorder with depressed mood.

i. 21 February 2014, Petitioner receives another note from his civilian provider excusing him from work through 31 March 2014.

j. 4 April 2014, Petitioner is again cleared for full duty, with the exception of a 30-day weapons ban, and his adjustment disorder is deemed resolved.

k. Petitioner files an Marine Corps Inspector General reprisal complaint that is determined to be unsubstantiated on 19 February 2016.

CONCLUSION

Upon review and consideration of all the evidence of record, the Board finds no evidence of an error or an injustice warranting corrective action. The Board agrees with the decision of the USMC Inspector General that Petitioner's allegation of reprisal due to the mental health referral by his command is unsubstantiated.

The Board concluded that the command had a reasonable basis for referring the Petitioner to the Portsmouth Naval Medical Center for an

mental health examination. Petitioner's refusal to disclose the basis for a no duty chit from his civilian medical provider created a legitimate cause for concern in his chain of command. Petitioner was an active duty supply Sergeant with duties that included weapons handling. The Board determined that the Command's actions to ensure Petitioner was fit to perform his duties were correct in light of the potential safety issues involved. In addition, the Board determined that Petitioner was properly informed and acknowledged his rights relating to the mental health referral. The basis for the referral was outlined in the rights notification letter and Petitioner could have resolved the issue by addressing the concerns raised by his Commander. Furthermore, Petitioner was advised that he had a right to refuse the referral and the ability to consult legal counsel. Accordingly, the Board felt the Petitioner's request to remove medical records associated with the mental health referral was not supported by the evidence. Petitioner's request for a personal appearance before the Board was also denied. The Board felt it had sufficient evidence to make a decision in your case and your presence was not required.

RECOMMENDATION:

Petitioner's request be denied.

4. It is certified that 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 entitled matter.

5 U.S.C. 552(b) (6)

Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

5 U.S.C. 552(b) (6)

SCOTT F. THOMPSON
Executive Director

Reviewed and approved/disapproved.

3/25/16

5 U.S.C. 552(b) (6)

Franklin R. Parker
ASN (M+RA)

330

**APPLICATION FOR CORRECTION OF MILITARY RECORD
UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 155.**
Please read Privacy Act Statement and instructions on back BEFORE completingOMB No. 0704-0003
OMB approval expires

The public reporting burden for this collection of information is estimated to average 30 minutes per response, including reviewing the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Project Director (0704-0188), Washington, DC 20503.



NR20150005885

5 U.S.C. 552(b) (6)

RETURN COMPLETED FORM TO THE APPROPRIATE ADDRESS ON THE BACK**1. APPLICANT DATA** (The person whose record you are requesting to be corrected.)

a. BRANCH OF SERVICE (X one)	<input type="checkbox"/> ARMY	<input type="checkbox"/> NAVY	<input type="checkbox"/> AIR FORCE	<input checked="" type="checkbox"/> MARINE CORPS	<input type="checkbox"/> COAST GUARD
b. NAME (Print - Last, First, Middle Initial)	c. PRESENT OR LAST PAY GRADE		d. SERVICE NUMBER (If applicable)	e. SSN	
5 U.S.C. 552(b) (6)	E-6			5 U.S.C. 552(b) (6)	

2. PRESENT STATUS WITH RESPECT TO THE ARMED SERVICES (Active Duty, Reserve, National Guard, Retired, Discharged, Deceased)	3. TYPE OF DISCHARGE (If by court-martial, state the type of court.)	4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY (YYYYMMDD)
ACTIVE DUTY		

5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED AS FOLLOWS: (Entry required)
REMOVE MY MEDICAL RECORDS ALL RECORDS AND REFERENCES RELATING TO MENTAL AND BEHAVIORAL HEALTH TREATMENT AT PORTSMOUTH NAVAL MEDICAL CENTER FOR THE PERIOD FROM 20140101 TO THE PRESENT

6. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST FOR THE FOLLOWING REASONS: (Entry required)
I WAS UNJUSTLY REFERRED BY MY COMMANDER TO PORTSMOUTH NAVAL MEDICAL CENTER AS RETALIATION FOR REPORTING BULLYING AND IMPROPER CONDUCT WITHIN MY UNIT

a. IS THIS A REQUEST FOR RECONSIDERATION OF A PRIOR APPEAL?	<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	b. IF YES, WHAT WAS THE DOCKET NUMBER?	c. DATE OF THE DECISION
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7. ORGANIZATION AND APPROXIMATE DATE (YYYYMMDD) AT THE TIME THE ALLEGED ERROR OR INJUSTICE IN THE RECORD OCCURRED (Entry required) I&I STAFF, B CO (REINF), 4TH CBT ENGR BN, USMC; 20 MAY 2013

8. DISCOVERY OF ALLEGED ERROR OR INJUSTICE

a. DATE OF DISCOVERY (YYYYMMDD)	b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THE APPLICATION.
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20140212

9. IN SUPPORT OF THIS APPLICATION, I SUBMIT AS EVIDENCE THE FOLLOWING ATTACHED DOCUMENTS: (If military documents or medical records are pertinent to your case, please send copies. If Veterans Affairs records are pertinent, give regional office location and claim number.)

(1) MEMORANDUM OF LAW; (2) EXHIBIT A--DECLARATION OF 5 U.S.C. 552(b) (6); (3) EXHIBIT B--PORTSMOUTH NAVAL MEDICAL CENTER RECORDS

10. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. (At no expense to the Government) (X one) ☒ YES. THE BOARD WILL DETERMINE IF WARRANTED. ☐ NO. CONSIDER MY APPLICATION BASED ON RECORDS AND EVIDENCE.

11.a. COUNSEL (If any) NAME (Last, First, Middle Initial) and ADDRESS (Include ZIP Code)	b. TELEPHONE (Include Area Code)
5 U.S.C. 552(b) (6)	5 U.S.C. 552(b) (6)
	c. E-MAIL ADDRESS
	5 U.S.C. 552(b) (6)
	d. FAX NUMBER (Include Area Code)
e. I WOULD LIKE ALL CORRESPONDENCE/DOCUMENTS SENT TO ME ELECTRONICALLY.	
<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	

12. APPLICANT MUST SIGN IN ITEM 15 BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, indicate the name (print) and relationship by marking one box below.

<input type="checkbox"/> SPOUSE	<input type="checkbox"/> WIDOW	<input type="checkbox"/> WIDOWER	<input type="checkbox"/> NEXT OF KIN	<input type="checkbox"/> LEGAL REPRESENTATIVE	<input type="checkbox"/> OTHER (Specify)
---------------------------------	--------------------------------	----------------------------------	--------------------------------------	---	--

13.a. COMPLETE CURRENT ADDRESS (Include ZIP Code) OF APPLICANT OR PERSON IN ITEM 12 ABOVE (Forward notification of all changes of address.)	b. TELEPHONE (Include Area Code)
5 U.S.C. 552(b) (6)	5 U.S.C. 552(b) (6)
	c. E-MAIL ADDRESS
	isaac.cordeiro@gmail.com
	d. FAX NUMBER (Include Area Code)

14. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM. (U.S. Code, Title 18, Sections 287 and 1001, provide that an individual shall be fined under this title or imprisoned not more than 5 years; or both.)

15. SIGNATURE (Applicant must sign here.)	16. DATE SIGNED (YYYYMMDD)	CASE NUMBER (Do not write in this space.)
5 U.S.C. 552(b) (6)	20150309	1001 : 2 2015



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

ES
Docket No: 6369-15
JAN 11 2017

5 U.S.C. 552(b) (6)

Dear 5 U.S.C. 552(b) (6):

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10, United States Code, section 1552.

Regarding your request for a personal appearance, be advised that Board regulations state personal appearances before the Board are not granted as a right, but only when the Board determines that such an appearance will serve some useful purpose. In your case, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 27 July 2016. The names and votes of the members of the panel will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations, and policies. In addition, the Board considered DoD Inspector General's completed investigation report with its findings, as well as the advisory opinions of the Marine Corps Military Awards Branch Personnel Management Division, dated 1 June 2015, and the Enlisted Assignments Branch, dated 29 June 2015, copies of which have been previously provided to you for your review and comment.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this regard, the Board substantially concurred with the comments contained in both advisory opinions and the IG findings. Accordingly, your application has been denied.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence within one year from the date of the Board's decision. New evidence is evidence not previously considered by the Board prior to making its decision in your case. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records.

ES

Docket No: 6369-15

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

Sincerely,

5 U.S.C. 552(b)(6)

ELIZABETH A. HILL

Executive Director



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

5420
MMEA
29 Jun 15

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL
RECORDS (BCNR)

Via: NAVPERSCOM, BUPERS/BCNR Coordinator (PERS-3C)

Subj: COMMENTS AND RECOMMENDATIONS IN THE CASE OF FORMER 5 U.S.C. 552(b) (6)
5 U.S.C. 552(b) (6) USMC

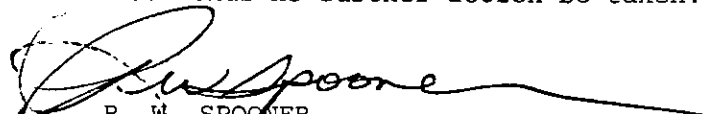
Ref: (a) 10. U.S.C., Section 1552
(b) SECNAV M-5216-5, Chapter 10 of Mar 2010
(c) SECNAVINST 5420.193
(d) NAVSO P-473 (Codified as 32 CFR 723), Procedures of
the Board for Correction of Naval Records
(e) BUPERS INST 5420.21A
(f) MCO 1040.31
(g) MCO P1900.16
(h) MARADMIN 548/12

Encl: (1) BCNR Docket Number NR20150006403
(2) DD FORM 214

1. Per the references, forwarded are enclosures (1) and (2). Per enclosure (1), requested is an advisory opinion on 5 U.S.C. 552(b) petition to be granted an enlisted career force control (ECFC) waiver to go beyond 30 years of active service.

2. Per enclosure (2), on 31 December 2014, 5 U.S.C. separated from the United States Marine Corps with 30 years, and 21 days of service. 5 U.S.C. received an Honorable Discharge, a Reenlistment Eligibility (RE) code of RE-2B and a Separations Program Designator (SPD) cod "RBCD".

3. Due to 5 U.S.C. retiring on 1 January 2015, he is no longer eligible for an ECFC wavier. This headquarters recommends no further action be taken.


R. W. SPOONER
Deputy Head, Enlisted
Assignments Branch



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2008 ELLIOT ROAD
QUANTICO, VA 22134-5030

IN REPLY REFER TO:

1650

MMMA-4

June 1, 2015

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

SUBJ: BCNR APPLICATION IN THE CASE OF 5 U.S.C. 552(b) (6)
5 U.S.C. U.S. MARINE CORPS, RETIRED

Ref: (a) SecNavInst 1650.1H

Encl: (1) Application For Correction Of Military Record
(DD Form 149)

1. PURPOSE: To provide comments and recommendation on petition by 5 U.S.C. 552(b) (6) request for award while assigned as Marine Forces Korea (MARFORK) Sergeant Major from June 14, 2011 to July 22, 2013.

2. DISCUSSION:

a. Policy established by the Secretary of the Navy requires that award recommendations for a personal decoration must be submitted within three years and awarded within five years of the act of service.

b. A review of Sergeant 5 U.S.C. 552(b) (6) official military record and the records of this Headquarters revealed no evidence that he was ever recommended for a personal decoration, including the Meritorious Service Medal for his service during the period June 14, 2011 to July 22, 2013. Since the action period for which 5 U.S.C. 552(b) (6) is requesting recognition is still within the required time limits, if 5 U.S.C. 552(b) (6) 5 U.S.C. former Commander or another officer in his former chain of command who has knowledge of his services chooses to submit an award recommendation on his behalf via the improved Awards Processing System (iAPS), that award recommendation must be submitted prior to July 22, 2016. The award recommendation must be forwarded to each member of the entire chain of command, including the awarding authority.

c. Personal awards are not an entitlement. The fact that one's predecessor in a billet received an award does not suggest or require that the next individual to occupy the billet should accept the same (or any) award. Personal awards are based solely on the performance of the individual under consideration

SUBJ: BCNR APPLICATION IN THE CASE OF 5 U.S.C. 552(b) (6)
5 U.S.C. U.S. MARINE CORPS, RETIRED

as determined by the chain of command up to and including the awarding authority. Specifically, intended recipients of a personal award are expected to have stood out above their peers, and one should not assume that every individual in a given billet, even those serving successfully, would stand out above their peers. The partially redacted paragraph on Enclosure (1), Page 15 of the enclosed Department of Defense Inspector General (DODIG) report indicates the command evaluated the Sergeant Major's performance as falling into the category of "acceptable, but not above his peers." Appropriately, no award was recommended.

d. Award authority rests with commanders and is not delegated to deputies. In the case of MARFORK, the Deputy Commander is a Trusted Assistant for the Commanding General. This role allows the deputy to enter decisions made by the Commanding General into the Improved Awards Processing System (iAPS), but does not enable the deputy to actually make any awards endorsement or approval decision. In cases where the Commanding General will be unavailable to make decisions for the command, he or she may issue an "Acting" letter to their deputy to grant them to make decisions in their stead. "Acting" letters apply to all command decisions, not just awards. Additionally, when an officer of rank junior to the commander receives an "Acting" letter, that officer inherits only those awards appropriate to their rank.

e. SECNAVINST 1650.1H, Appendix A to Chapter 1 (page 1-20) indicates: "Award recommendations for immediate staff (e.g., Executive Assistant, Aide, Flag Secretary, etc.) shall be forwarded to the next higher awarding authority in the chain of command for appropriate action." There is no explicit determination in applying this provision to Sergeants Major. For clarity, typically such an award would be originated by MARFORK and decided by MARFORPAC. Given the unusual circumstances in this case, it would certainly be appropriate (although not required) for the CG, MARFORK to defer to the CG, MARFORPAC. Enclosure 1, Page 6 of the included DODIG report indicates the CG, MARFORPAC has already considered this case.

f. The award recommendation 5 U.S.C. 552(b) (6) provided as the enclosure, cannot be used to substantiate his entitlement to the Meritorious Service Medal. Since the award recommendation will be considered based on its merits, it is very important that the recommending officer describe in detailed the actions

SUBJ: BCNR APPLICATION IN THE CASE OF 5 U.S.C. 552(b) (6)
5 U.S.C. U.S. MARINE CORPS, RETIRED

of the individual in the summary of action in each personal award recommendation (i.e. This Headquarters does not recommend submitting summaries of action, or proposed citations, which would describe the same actions for another Marine). To process personal award recommendations, regulations require that they must be appropriately justified and sufficiently detailed to allow proper evaluation and decision.

3. RECOMMENDATION: The former commander or another officer in 5 U.S.C. 552(b) (6) former chain of command who has knowledge of his service must submit an award recommendation on his behalf within the required time limits, should that officer believe an award is appropriate.

4. Point of contact at MMMA-3B is 5 U.S.C. 552(b) (6) at 5 U.S.C. 552(b) (6)

5 U.S.C. 552(b)(6)

R. P. BUTTRAM

Lieutenant Colonel, U.S. Marine Corps
Assistant Head, Military Awards Branch
Personnel Management Division
By direction of the
Commandant of the Marine Corps

APPLICATION FOR CORRECTION OF MILITARY RECORD UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552 <i>(Please read instructions on reverse side BEFORE completing this application.)</i>				OMB No. 0704-0003 OMB approval expires Oct 31, 2014	
The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Executive Services Directorate, Information Management Division, 4800 Mark Center Drive, Suite 02G09, Alexandria, VA 22350-3100 (0704-0003). Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE AB APPROPRIATE ADDRESS ON THE BACK OF THIS PAGE.				TO THE	
PRIVACY AUTHORITY: 10 U.S.C. 1552, and E.O. 9397, as amended (SSN). PRINCIPAL PURPOSE(S): To initiate an application for correction of military record. The form is used by Board members for review of pertinent information in making a determination of relief through correction of a military record. Completed forms are covered by correction of military records SORNs maintained by each of the Services or the Defense Finance and Accounting Service.				as found at: ly to this collection. vide requested An applicant's SSN is used to retrieve these records and links to the member's official military personnel file and pay record.	
NR20150006369 5 U.S.C. 552(b) (6)					
1. APPLICANT DATA <i>(The person whose record you are requesting to be corrected)</i>					
a. BRANCH OF SERVICE <i>(X one)</i>		<input type="checkbox"/> ARMY	<input type="checkbox"/> NAVY	<input type="checkbox"/> AIR FORCE	<input checked="" type="checkbox"/> MARINE CORPS
b. NAME <i>(Print - Last, First, Middle Initial)</i> 5 U.S.C. 552(b) (6)		c. PRESENT OR LAST PAY GRADE E-9		d. SERVICE NUMBER <i>(If applicable)</i>	
2. PRESENT STATUS WITH RESPECT TO THE ARMED SERVICES <i>(Active Duty, Reserve, National Guard, Retired, Discharged, Deceased)</i> Active Duty		3. TYPE OF DISCHARGE <i>(If by court-martial, state the type of court.)</i> Pending Honorable		4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY <i>(YYYYMMDD)</i> 20141231	
5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED: <i>(Entry required)</i> The FINDINGS AND ANALYSIS OF DOD IG Case 20130529-02 are biased and do not take the entire context of the reprisal against me into account. My claims of reprisal in the form of continual threats against me, and eventual early PCS, as well as withholding of an award should be substantiated based on the facts of the case, and which I will prove further in this request.					
6. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST FOR THE FOLLOWING REASONS: <i>(Entry required)</i> The investigating officer in this case was not even able to accurately determine that my predecessor did in fact receive an award. His investigation states he did not and I have provided proof that he did. He also spoke of dysfunction within the command but does not take into account 5 U.S.C. 552(b) (6) SUBSTANTIATED misconduct. He also portrays an inaccurate view of the timing of my original complaints against 5 U.S.C. 552(b) (6) and my eventual PCS move. The PI against me was unfounded and was only another act of reprisal. I will point all of this out clearly in the attached letter and enclosures (1) through (12).					
7. ORGANIZATION AND APPROXIMATE DATE <i>(YYYYMMDD)</i> AT THE TIME THE ALLEGED ERROR OR INJUSTICE IN THE RECORD OCCURRED <i>(Entry required)</i> Marine Forces Korea, HQMC, and DOD IG Whistle blower Investigation Division. 20120813-20140403					
8. DISCOVERY OF ALLEGED ERROR OR INJUSTICE					
a. DATE OF DISCOVERY <i>(YYYYMMDD)</i> 20140403		b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THE APPLICATION. N/A			
9. IN SUPPORT OF THIS APPLICATION, I SUBMIT AS EVIDENCE THE FOLLOWING ATTACHED DOCUMENTS: <i>(If military documents or medical records are pertinent to your case, please send copies. If Veterans Affairs records are pertinent, give regional office location and claim number.)</i> My nine page letter is attached as well as enclosures (1) through (12). I have clearly referenced the pertinent parts of the enclosures throughout my letter. Aside from these clearly defined points each enclosure in it's entirety serves to establish the context not only of my initial complaints that Majgen Regner was abusing his authority (substantiated) but also the reprisal against me afterwards.					
10. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. <i>(At no expense to the Government)</i> <i>(X one)</i>				<input checked="" type="checkbox"/> YES. THE BOARD WILL DETERMINE IF WARRANTED.	
11. a. COUNSEL <i>(if any)</i> NAME <i>(Last, First, Middle Initial)</i> and ADDRESS <i>(Include ZIP Code)</i> None				b. TELEPHONE <i>(Include Area Code)</i> N/A	
				c. E-MAIL ADDRESS N/A	
				d. FAX NUMBER <i>(Include Area Code)</i> N/A	
12. APPLICANT MUST SIGN IN ITEM 15 BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, indicate the name (print) and relationship by marking one box below.					
<input type="checkbox"/> SPOUSE <input type="checkbox"/> WIDOW <input type="checkbox"/> WIDOWER <input type="checkbox"/> NEXT OF KIN <input type="checkbox"/> LEGAL REPRESENTATIVE <input type="checkbox"/> OTHER <i>(Specify)</i>					
13. a. COMPLETE CURRENT ADDRESS <i>(Include ZIP Code)</i> OF APPLICANT OR PERSON <i>(If other than applicant, forward notification of all changes of address.)</i> 5 U.S.C. 552(b) (6)					
b. TELEPHONE <i>(Include Area Code)</i> 5 U.S.C. 552(b) (6)					
c. E-MAIL ADDRESS 5 U.S.C. 552(b) (6)					
d. FAX NUMBER <i>(Include Area Code)</i> N/A					
14. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM. <i>(U.S. Code, Title 18, Sections 287 and 1001, provide that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)</i>					CASE NUMBER <i>(Do not write in this space.)</i> JUN 10 2014
15. SIGNATURE <i>(Applicant must sign here.)</i> 5 U.S.C. 552(b) (6)					16. DATE SIGNED <i>(YYYYMMDD)</i> 20140604

INSTRUCTIONS

Under Title 10 United States Code Section 1552, Active Duty and Reserve Component Service members, Coast Guard, former Service members, their lawful or legal representatives, spouses of former Service members on issues of Survivor Benefit Program (SBP) benefits, and civilian employees with respect to military records other than those related to civilian employment, who feel that they have suffered an injustice as a result of error or injustice in military records may apply to their respective Boards for Correction of Military Records (BCMR) for a correction of their military records. These Boards are the highest level appellate review authority in the military. The information collected is needed to provide the Boards the basic data needed to process and act on the request.

1. All information should be typed or printed. Complete all applicable items. If the item is not applicable, enter "None."
2. If space is insufficient on the front of the form, use the "Remarks" box below for additional information or attach an additional sheet.
3. List all attachments and enclosures in item 9. Do not send original documents. Send clear, legible copies. Send copies of military documents and orders related to your request, if you have them available. Do not assume that they are all in your military record.
4. The applicant must exhaust all administrative remedies, such as corrective procedures and appeals provided in regulations, before applying to the Board of Corrections.
5. ITEM 5. State the specific correction of record desired. If possible, identify exactly what document or information in your record you believe to be erroneous or unjust and indicate what correction you want made to the document or information.
6. ITEM 6. In order to justify correction of a military record, it is necessary for you to show to the satisfaction of the Board by the evidence that you supply, or it must otherwise satisfactorily appear in the record, that the alleged entry or omission in the record was in error or unjust. Evidence, in addition to documents, may include affidavits or signed testimony of witnesses, executed under oath, and a brief of arguments supporting the application. All evidence not already included in your record must be submitted by you. The responsibility of securing evidence rests with you.
7. ITEM 8. U.S. Code, Title 10, Section 1552b, provides that no correction may be made unless a request is made within three years after the discovery of the error or injustice, but that the Board may excuse failure to file within three years after discovery if it finds it to be in the interest of justice.
8. ITEM 10. Personal appearance before the Board by you and your witnesses or representation by counsel is not required to ensure full and impartial consideration of your application. If the Board determines that a personal appearance is warranted and grants approval, appearance and representation are permitted before the Board at no expense to the government.
9. ITEM 11. Various veterans and service organizations furnish counsel without charge. These organizations prefer that arrangements for representation be made through local posts or chapters.
10. ITEM 12. The person whose record correction is being requested must sign the application. If that person is deceased or incompetent to sign, the application may be signed by a spouse, widow, widower, next of kin (son, daughter, mother, father, brother, or sister), or a legal representative that has been given power of attorney. Other persons may be authorized to sign for the applicant. Proof of death, incompetency, or power of attorney must accompany the application. Former spouses may apply in cases of Survivor Benefit Plan (SBP) issues.
11. For detailed information on application and Board procedures, see: Army Regulation 15-185 and www.arba.army.pentagon.mil; Navy - SECNAVINST 5420.193 and www.hq.navy.mil/bcncr/bcncr.htm; Air Force Instruction 36-2603, Air Force Pamphlet 36-2607, and www.afpc.randolph.af.mil/safmrbr; Coast Guard - Code of Federal Regulations, Title 33, Part 52.

MAIL COMPLETED APPLICATIONS TO APPROPRIATE ADDRESS BELOW

ARMY Army Review Boards Agency 251 18th Street South, Suite 385 Arlington, VA 22202-3531	NAVY AND MARINE CORPS Board for Correction of Naval Records 701 S. Courthouse Road, Suite 1001 Arlington, VA 22204-2490
AIR FORCE Board for Correction of Air Force Records SAF/MRBR 550-C Street West, Suite 40 Randolph AFB, TX 78150-4742	COAST GUARD Department of Homeland Security Office of the General Counsel Board for Correction of Military Records 245 Murray Lane, Stop 0485 Washington, DC 20528-0485

17. REMARKS

I specifically desire the following remedies from BCNR which I believe are just and within the Board's power to grant:

- 1) That I receive a Meritorious Service Medal prepared using enclosure (3) for my meritorious performance of my duties while assigned as MARFORK SgtMaj, as the withholding of this award was clearly an act of reprisal and unjust.
- 2) That I be reassigned to a MajGen level or higher billet and be granted a enlisted career force control (ECFC) waiver to go beyond 30 yrs active service in order to do this as my early reassignment from Korea was unjust and an act of reprisal.
- 3) That, for the purposes of the selection of the next Sergeant Major of the Marine Corps that I be considered to be currently in a general Officer position as my early reassignment was clearly unjust and deprived me of that consideration. I am currently the 11th most senior SgtMaj in the Marine Corps, have proven myself, and am only at an O-6 billet now due to this reprisal.



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

BJG
Docket No: 6403-14
27 May 2014

5 U.S.C. 552(b) (6)

Dear 5 U.S.C. 552(b) (6) :

This is in reference to your Application for Correction of Military Record (DD Form 149) dated 10 April 2014 with enclosures.

Following a preliminary review of your application and enclosures, I found that your reprisal complaint was not substantiated by the Department of Defense Inspector General on 3 April 2014. The only request you now make is for an apology. This Board is not in a position to apologize for the alleged suffering that you and your family may have endured. You are further advised that this Board is not an investigative body.

As a result of the foregoing, no action is required by this Board. Accordingly, your case is hereby administratively closed without prejudice.

Sincerely,

5 U.S.C. 552(b) (6)

Head, Discharge Section

330 WB

**APPLICATION FOR CORRECTION OF MILITARY RECORD
UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552**
(Please read instructions on reverse side BEFORE completing this application.)

OMB No. 0704-0003
OMB approval expires
Oct 31, 2014

The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Executive Services Directorate, Information Management Division, 4800 Mark Center Drive, Suite 02G09, Alexandria, VA 22304-3100 (0704-0003). Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE ABOVE ORGANIZATION. RETURN COMPLETED FORM TO THE APPROPRIATE ADDRESS ON THE BACK OF THIS PAGE.

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. 1552, and E.O. 9397, as amended (SSN).

PRINCIPAL PURPOSE(S): To initiate an application for correction of military record. The form is used by Board members for review of pertinent information in making a determination of relief through correction of a military record. Completed forms are covered by correction of military records SORNs maintained by each of the Services or the Defense Finance and Accounting Service.

NR20140006403
5 U.S.C. 552(b) (6)

is at:
is collection.

requested
applicant's
member's official

1. APPLICANT DATA (The person whose record you are requesting to be corrected.)

a. BRANCH OF SERVICE (X one)	<input type="checkbox"/> ARMY	<input type="checkbox"/> NAVY	<input type="checkbox"/> AIR FORCE	<input checked="" type="checkbox"/> MARINE CORPS	<input type="checkbox"/> COAST GUARD
b. NAME (Print - Last, First, Middle Initial)	c. PRESENT OR LAST PAY GRADE		d. SERVICE NUMBER (If applicable)	e. SSN	
5 U.S.C. 552(b)	E-9			5 U.S.C.	

2. PRESENT STATUS WITH RESPECT TO THE ARMED SERVICES (Active Duty, Reserve, National Guard, Retired, Discharged, Deceased)
Active Duty

3. TYPE OF DISCHARGE (If by court-martial, state the type of court.)

Pending Honorable

4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY (YYYYMMDD)

20141231

5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED: (Entry required)

The FINDINGS AND ANALYSIS of DOD IG Case 20130529-02 are biased and do not take the entire context of the reprisal against me into account. My claims of reprisal in the form of continual threats against me, and eventual early PCS, as well as withholding of an award should be substantiated based on the facts of the case, and which I will prove further in this request.

6. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST FOR THE FOLLOWING REASONS: (Entry required)

The investigating officer in this case was not even able to accurately determine that my predecessor did in fact receive an award. His investigation states he did not and I have provided proof that he did. He also spoke of dysfunction within the command but does not take into account 5 U.S.C. 552(b) SUBSTANTIATED misconduct. He also portrays an inaccurate view of the timing of my original complaints against 5 U.S.C. and my eventual PCS move. The PI against me was unfounded and was only another act of reprisal. I will point all of this out clearly in the attached letter and enclosures (1) through (12).

7. ORGANIZATION AND APPROXIMATE DATE (YYYYMMDD) AT THE TIME THE ALLEGED ERROR OR INJUSTICE IN THE RECORD OCCURRED (Entry required)

Marine Forces Korea, HQMC, and DOD IG Whistle blower Investigation Division. 20120813-20140403

8. DISCOVERY OF ALLEGED ERROR OR INJUSTICE

a. DATE OF DISCOVERY (YYYYMMDD)	b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THE APPLICATION.
20140403	N/A

9. IN SUPPORT OF THIS APPLICATION, I SUBMIT AS EVIDENCE THE FOLLOWING ATTACHED DOCUMENTS: (If military documents or medical records are pertinent to your case, please send copies. If Veterans Affairs records are pertinent, give regional office location and claim number.)

My nine page letter is attached as well as enclosures (1) through (12). I have clearly referenced the pertinent parts of the enclosures throughout my letter. Aside from these clearly defined points each enclosure in its entirety serves to establish the context not only of my initial complaints that Majgen Regner was abusing his authority (substantiated) but also the reprisal against me afterwards.

10. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. (At no expense to the Government) (X one)

☒ YES. THE BOARD WILL DETERMINE IF WARRANTED.

☐ NO. CONSIDER MY APPLICATION BASED ON RECORDS AND EVIDENCE.

11.a. COUNSEL (If any) **NAME** (Last, First, Middle Initial) and **ADDRESS** (Include ZIP Code)

None

b. TELEPHONE (Include Area Code) N/A

c. E-MAIL ADDRESS
N/A

d. FAX NUMBER (Include Area Code) N/A

12. APPLICANT MUST SIGN IN ITEM 15 BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, indicate the name (print) and relationship by marking one box below.

☐ SPOUSE ☐ WIDOW ☐ WIDOWER ☐ NEXT OF KIN ☐ LEGAL REPRESENTATIVE ☐ OTHER (Specify)

13.a. COMPLETE CURRENT ADDRESS (Include ZIP Code) OF APPLICANT OR PERSON forward notification of all changes of address.)

5 U.S.C. 552(b) (6)

b. TELEPHONE (Include Area Code) 5 U.S.C.

c. E-MAIL ADDRESS
5 U.S.C. 552(b) (6)

d. FAX NUMBER (Include Area Code) N/A

14. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM. (U.S. Code, Title 18, Sections 287 and 1001, provide that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)

CASE NUMBER
(Do not write in this space.)

15. SIGNATURE (Applicant or authorized representative) 5 U.S.C. 552(b) (6)

16. DATE SIGNED
(YYYYMMDD)
20140410

REC'D APR 16 2014

INSTRUCTIONS

Under Title 10 United States Code Section 1552, Active Duty and Reserve Component Service members, Coast Guard, former Service members, their lawful or legal representatives, spouses of former Service members on issues of Survivor Benefit Program (SBP) benefits, and civilian employees with respect to military records other than those related to civilian employment, who feel that they have suffered an injustice as a result of error or injustice in military records may apply to their respective Boards for Correction of Military Records (BCMR) for a correction of their military records. These Boards are the highest level appellate review authority in the military. The information collected is needed to provide the Boards the basic data needed to process and act on the request.

1. All information should be typed or printed. Complete all applicable items. If the item is not applicable, enter "None."
2. If space is insufficient on the front of the form, use the "Remarks" box below for additional information or attach an additional sheet.
3. List all attachments and enclosures in item 9. Do not send original documents. Send clear, legible copies. Send copies of military documents and orders related to your request, if you have them available. Do not assume that they are all in your military record.
4. The applicant must exhaust all administrative remedies, such as corrective procedures and appeals provided in regulations, before applying to the Board of Corrections.
5. ITEM 5. State the specific correction of record desired. If possible, identify exactly what document or information in your record you believe to be erroneous or unjust and indicate what correction you want made to the document or information.
6. ITEM 6. In order to justify correction of a military record, it is necessary for you to show to the satisfaction of the Board by the evidence that you supply, or it must otherwise satisfactorily appear in the record, that the alleged entry or omission in the record was in error or unjust. Evidence, in addition to documents, may include affidavits or signed testimony of witnesses, executed under oath, and a brief of arguments supporting the application. All evidence not already included in your record must be submitted by you. The responsibility of securing evidence rests with you.
7. ITEM 8. U.S. Code, Title 10, Section 1552b, provides that no correction may be made unless a request is made within three years after the discovery of the error or injustice, but that the Board may excuse failure to file within three years after discovery if it finds it to be in the interest of justice.
8. ITEM 10. Personal appearance before the Board by you and your witnesses or representation by counsel is not required to ensure full and impartial consideration of your application. If the Board determines that a personal appearance is warranted and grants approval, appearance and representation are permitted before the Board at no expense to the government.
9. ITEM 11. Various veterans and service organizations furnish counsel without charge. These organizations prefer that arrangements for representation be made through local posts or chapters.
10. ITEM 12. The person whose record correction is being requested must sign the application. If that person is deceased or incompetent to sign, the application may be signed by a spouse, widow, widower, next of kin (son, daughter, mother, father, brother, or sister), or a legal representative that has been given power of attorney. Other persons may be authorized to sign for the applicant. Proof of death, incompetency, or power of attorney must accompany the application. Former spouses may apply in cases of Survivor Benefit Plan (SBP) issues.
11. For detailed information on application and Board procedures, see: Army Regulation 15-185 and www.arba.army.pentagon.mil; Navy - SECNAVINST 5420.193 and www.hq.navy.mil/bcncr/bcncr.htm; Air Force Instruction 36-2603, Air Force Pamphlet 36-2607, and www.afpc.randolph.af.mil/safmrbr; Coast Guard - Code of Federal Regulations, Title 33, Part 52.

MAIL COMPLETED APPLICATIONS TO APPROPRIATE ADDRESS BELOW

ARMY Army Review Boards Agency 251 18th Street South, Suite 385 Arlington, VA 22202-3531	NAVY AND MARINE CORPS Board for Correction of Naval Records 701 S. Courthouse Road, Suite 1001 Arlington, VA 22204-2490
AIR FORCE Board for Correction of Air Force Records SAF/MRBR 550-C Street West, Suite 40 Randolph AFB, TX 78150-4742	COAST GUARD Department of Homeland Security Office of the General Counsel Board for Correction of Military Records 245 Murray Lane, Stop 0485 Washington, DC 20528-0485

17. REMARKS

Dear Sir/Ma'am, at this point there is no remedy that can adequately bring balance to the injustices of this case. I have lived this, and witnessed the efforts the Marine Corps took to not only excuse 5 U.S.C. 552(b)(6) misconduct but to also destroy me for daring to speak out. I have already PCS'ed and have a retirement date. I do not wish to work for another General Officer and although I know my performance in Korea was meritorious enough to deserve recognition, no award can make up for the damage already done to my career.

All I would like at this point is for this reprisal to be substantiated as it should have been and I would like an apology for the suffering I, and my family have endured throughout this entire experience. V/R, 5 U.S.C. 552(b)(6)



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

EGA:ks
Docket No: NR8189-15
26 February 2016

From: Chairman, Board for Correction of Naval Records
To: Commandant of the Marine Corps

Subj: REVIEW NAVAL RECORD OF 5 U.S.C. 552(b) (6) USMC,
XXX-XX-5

Ref: (a) 10 U.S.C. 1552

Encl: (1) Copy of approved Report of Proceedings w/o
attachments
(2) Copy of letter to Subject

1. In accordance with reference (a), the Board for Correction of Naval Records has reviewed allegations of error and injustice in Subject's naval record.
2. The designated representative of the Assistant Secretary of the Navy for Manpower and Reserve Affairs has reviewed the proceedings of the Board and approved the recommendation for corrective action as set forth in enclosure (1).
3. Regulations approved by the Secretary of the Navy require that Subject's naval record be corrected, where appropriate, in accordance with the approved recommendation of the Board.
4. It is requested that this Board be furnished a copy of any correspondence relating to the approved recommendation.

5 U.S.C. 552(b) (6)

By direction



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

EGA
Docket No: 8189-15
19 November 2015

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

Subj: REVIEW NAVAL RECORD ICO

5 U.S.C. 552(b) (6)

USMC

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149 with attachments
(2) HQMC memo 1610 MMRP-13/PERB dtd 26 Aug 15
(3) Petitioner's letter in response/rebuttal of advisory opinion
(4) Letter from 5 U.S.C. 552(b) (6) in support of Petitioner

1. Pursuant to the provisions of reference (a) Petitioner, an enlisted member of the Marine Corps, filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected by removing his fitness report covering the period from 20140403 to 20140615 from his Official Military Personnel File (OMPF), Electronic Service Record (ESR), and the Marine Corps Total Force System (MCTFS), where applicable. Enclosures (1) through (4) apply.

2. The Board, consisting of 5 U.S.C. 552(b) (6) reviewed Petitioner's allegations of error and injustice on 2 November 2015 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records excerpts, and applicable statutes, regulations, and policies. In addition, the Board considered enclosure (2), which was furnished by Headquarters Marine Corps (HQMC).

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

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

b. Enclosure (1) was filed in a timely manner.

c. In correspondence attached as enclosures (2), the office having cognizance over the subject matter addressed in Petitioner's application has commented to the effect that the contested report contained a minor error and should remain a part of the Petitioner's official military record.

d. In correspondence attached as enclosure (3), Petitioner having reviewed enclosure (2), submitted an additional statement arguing that the report does not accurately portray his performance and is unjust do to the lack of observed time. He also submitted an additional letter from his previous Battalion Sergeant Major, which stated the report was inaccurate and should have been a non-observed report.

e. In correspondence attached as enclosure (4), the Battalion Sergeant Major and command reviewer for enlisted fitness reports stated that senior enlisted leadership, to include the Petitioner's Company First Sergeant, were omitted in the review process by the reporting senior (RS) and reviewing officer (RO). It was also highlighted that during this period, the Petitioner was reassigned as the Chief Drill Instructor due to his exceptional maturity, superior performance, and ethical leadership.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes, in disagreement with enclosure (2), that Petitioner's request warrants favorable action. In this regard, and especially in light of the contents of enclosure (4), the Board concludes that the fitness report covering the period from 20140403 to 20140615 should be removed from the record. In view of the foregoing, the Board finds the existence of an error and injustice warranting the following corrective action.

RECOMMENDATION:

a. That the Petitioner's naval record be corrected by removing the following enlisted fitness report and related material.

<u>Date of report</u>	<u>Reporting Senior</u>	<u>Period of report</u>
20140615	5 U.S.C. 552(b) (6)	From 20140403 to 20140615

b. That there be inserted in Petitioner's naval record a memorandum in place of the removed report, containing appropriate identifying data concerning the report; that such memorandum state that the report has been removed by order of the Secretary of the Navy in accordance with the provisions of federal law and may not be made available to selection boards and other reviewing authorities; and that such boards may not conjecture or draw any influences as to the nature of the report.

c. 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 entitled matter.

5 U.S.C. 552(b) (6)

Recorder

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

5 U.S.C. 552(b) (6)

SCOTT F. THOMPSON
Executive director

5 U.S.C. 552(b)(6)

Reviewed and Approved/~~Disapproved~~

5 U.S.C. 552(b)(6)

1/27/16

ROBERT L. WOODS
Assistant General Counsel
(Manpower and Reserve Affairs)
1000 Navy Pentagon, Rm 4D548
Washington, DC 20350-1000



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:

1610

MMRP-13/PERB

26 AUG 2015

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
5 U.S.C. 552(b) (6), USMC DOCKET NO. 332-15

Ref: (a) 5 U.S.C. 552(b) (6) DD Form 149 of 23 April 2015
(b) MCO P1610.7F

1. Per MCO 1610.7, the Performance Evaluation Review Board, with three members present, met on 13 August 2015 to consider Gunnery 5 U.S.C. 552(b) (6) petition contained in reference (a). Removal of fitness report 20140403-20140615 (TR) was requested. Reference (b) is the performance evaluation directive governing submission of the report.

2. 5 U.S.C. 552(b) (6) contends that the report is unjust because the Reporting Senior (RS) did not state, per reference (b), why he was submitting an observed report for a period of less than 90 days. He also contends that certain attributes were marked below average and, therefore, contradict the Section I comments. 5 U.S.C. 552(b) (6) further contends that he barely saw the RS and the end date of the report should have been 23 May 2014 to coincide with his reporting to 5 U.S.C. 552(b) (6) who was his new RS at the Battalion S-3.

3. In its proceedings, the Board concluded that the contested report is administratively correct as written and filed. The following is offered as relevant:

a. Per paragraph 3005.3 of reference (b), RSs have the option to submit observed reports for 89 days or less if they have meaningful contact with the Marine Reported On (MRO), can provide an account of significant performance, and indicate in Section I that they are exercising this waiver to do an observed report. The RS's failure to note in Section I that he was invoking the aforementioned waiver, however, is a minor error and not a material error that invalidates the report. The RS felt he had a basis to submit an observed report and Section C, Billet Accomplishments, lists a myriad of significant efforts by Gunnery 5 U.S.C. 552(b) (6), which were also listed on his Marine Reported On Worksheet (MROW) which he provided in reference (a).

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
5 U.S.C. 552(b) (6) USMC DOCKET NO. 332-15

b. 5 U.S.C. 552(b) (6) notes in the beginning of his letter of 23 April 2013 that he was personally selected by the 2nd Battalion Sergeant Major for his expertise and skills to specifically fill the breach as the Golf Company Chief Drill Instructor. The RS certified the validity of the report when he signed Section J-1 and the RO did likewise in concurring with the report and signing Section K-5. The purpose of Section I is not to justify attribute markings but rather to provide mandatory comments defining the "whole Marine" not apparent from the markings and the narrative portions of the report. Section I is not in conflict with the overall assessment and 5 U.S.C. 552(b) (6) 5 U.S.C. fails to substantiate that certain attribute marks are unjust.

c. The (TD) fitness report that 5 U.S.C. 552(b) (6) received subsequent to the contested report, while working for 5 U.S.C. begins on 20140616. Therefore, it does not appear that the ending date of the contested report is inaccurate, nor does 5 U.S.C. 552(b)(6) provide any endorsement from 5 U.S.C. that the (TD) report should have had a starting date of 24 May when 5 U.S.C. 552(b) (6) reported to 5 U.S.C.

4. In summary, the Board found that the petitioner failed to meet the burden of proof necessary to establish an inaccuracy or injustice warranting the removal of the report. The Board's opinion, based on deliberation and majority vote, is that the contested fitness report should remain a part of 5 U.S.C. 552(b) (6) 5 U.S.C. official military record.

5. The point of contact regarding this matter is 5 U.S.C. 552(b) (6) 5 U.S.C. 552(b) (6)

5 U.S.C. 552(b)(6)

CALVIN F. SWAIN
Deputy Director
Manpower Management Division
Manpower and Reserve Affairs
Department
By direction of the Commandant
of the Marine Corps

240

NR 2189-15

**APPLICATION FOR CORRECTION OF MIL
UNDER THE PROVISIONS OF TITLE 10, U.S.C.**

(Please read instructions on reverse side BEFORE completing.)

The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing existing data sources, gathering the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Executive Service Directorate (0704-0003). Respondents should be aware that notwithstanding any other provision of law, it does not display a currently valid OMB control number.

5 U.S.C. 552(b) (6)

NR20150008189

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ormation if it

PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE ABOVE ORGANIZATION. RETURN COMPLETED FORM TO THE
APPROPRIATE ADDRESS ON THE BACK OF THIS PAGE.

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. 1552, and E.O. 9397, as amended (SSN).
PRINCIPAL PURPOSE(S): To initiate an application for correction of military record. The form is used by Board members for review of pertinent information in making a determination of relief through correction of a military record. Completed forms are covered by correction of military records SORNs maintained by each of the Services or the Defense Finance and Accounting Service.

ROUTINE USE(S): The DoD Blanket Routine Uses found at: http://privacy.defense.gov/blanket_uses.shtml apply to this collection.

DISCLOSURE: Voluntary; however, failure to provide requested information may result in a denial of your application. An applicant's SSN is used to retrieve these records and links to the member's official military personnel file and pay record.

1. APPLICANT DATA (The person whose record you are requesting to be corrected.)

a. BRANCH OF SERVICE (X one)	<input type="checkbox"/> ARMY	<input type="checkbox"/> NAVY	<input type="checkbox"/> AIR FORCE	<input checked="" type="checkbox"/> MARINE CORPS	<input type="checkbox"/> COAST GUARD
b. NAME (Print - Last, First, Middle Initial)	c. PRESENT OR LAST PAY GRADE		d. SERVICE NUMBER (if applicable)	e. SSN	
5 U.S.C. 552(b)	E-7 / GySgt			5 U.S.C. 552(b)	

2. PRESENT STATUS WITH RESPECT TO THE ARMED SERVICES (Active Duty, Reserve, National Guard, Retired, Discharged, Deceased)	3. TYPE OF DISCHARGE (if by court-martial, state the type of court.)	4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY (YYYYMMDD)
Active Duty		

5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED: (Entry required)
Error in numerous areas of Fitness Report dated 20140403 to 20140523.

6. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST FOR THE FOLLOWING REASONS: (Entry required)
Please See Attached Letter. (Enclosure 1)

7. ORGANIZATION AND APPROXIMATE DATE (YYYYMMDD) AT THE TIME THE ALLEGED ERROR OR INJUSTICE IN THE RECORD OCCURRED (Entry required) Company G, 2nd BN, RTR, MCRD 20140701

8. DISCOVERY OF ALLEGED ERROR OR INJUSTICE

a. DATE OF DISCOVERY (YYYYMMDD)	b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THE APPLICATION.
20141001	

9. IN SUPPORT OF THIS APPLICATION, I SUBMIT AS EVIDENCE THE FOLLOWING ATTACHED DOCUMENTS: (If military documents or medical records are pertinent to your case, please send copies. If Veterans Affairs records are pertinent, give regional office location and claim number.)
fitness report from 20140403 to 20140615, MROW submitted for fitness report that shows correct dates, RTR Recruit Training graduation schedule.

10. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. (At no expense to the Government) (X one)	YES. THE BOARD WILL DETERMINE IF WARRANTED.	<input checked="" type="checkbox"/> NO. CONSIDER MY APPLICATION BASED ON RECORDS AND EVIDENCE.
--	--	---

11.a. COUNSEL (If any) NAME (Last, First, Middle Initial) and ADDRESS (Include ZIP Code)	b. TELEPHONE (Include Area Code)
	c. E-MAIL ADDRESS
	d. FAX NUMBER (Include Area Code)

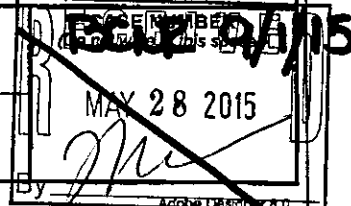
12. APPLICANT MUST SIGN IN ITEM 15 BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, indicate the name (print) and relationship by marking one box below.

<input type="checkbox"/> SPOUSE	<input type="checkbox"/> WIDOW	<input type="checkbox"/> WIDOWER	<input type="checkbox"/> NEXT OF KIN	<input type="checkbox"/> LEGAL REPRESENTATIVE	<input type="checkbox"/> OTHER (Specify)
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13.a. COMPLETE CURRENT ADDRESS (Include ZIP Code) OF APPLICANT OR PERSON IN ITEM 12 ABOVE (Forward notification of all changes of address.)	b. TELEPHONE (Include Area Code)
5 U.S.C. 552(b) (6)	5 U.S.C. 552(b) (6)
	c. E-MAIL ADDRESS
	5 U.S.C. 552(b) (6)
	d. FAX NUMBER (Include Area Code)

14. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM. (U.S. Code, Title 18, Sections 287 and 1001, provide that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)

15. SIGNATURE (Applicant must sign here) /	16. DATE SIGNED (YYYYMMDD)
5 U.S.C. 552(b) (6)	20150423



MC#332-15



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

SJN
Docket No: 9140-15
13 November 2015

5 U.S.C. 552(b) (6)

Dear 5 U.S.C. 552(b) (6):

This is in reference to your Application for Correction of your records. You requested removal of three fitness reports from your official military personnel file (OMPF).

Please be advised that because you have an ongoing complaint of reprisal filed with the Navy Inspector General's office, your case before this Board has been closed administratively without prejudice. When the investigation has been completed, you may request that your case be reopened. If you submit such request, please include a copy of the final investigation report.

Our point of contact regarding this matter is 5 U.S.C. 552(b) (6) and he may be reached at 5 U.S.C. 552(b) (6). Please do not hesitate to contact me if you need further assistance.

Sincerely,

5 U.S.C. 552(b) (6)

By direction

APPLICATION FOR CORRECTION OF MILITARY RECORD UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552 <i>(Please read Privacy Act Statement and instructions on back BEFORE completing this application.)</i>		OMB No. 0704-0003 OMB approval expires Dec 31, 2017						
The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Washington Headquarters Services, Executive Services Directorate, Directives Division, 4800 Mark Center Drive, Alexandria, VA 22304-3100 (0704-0003). Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.								
RETURN COMPLETED FORM TO THE APPROPRIATE ADDRESS ON THE BACK OF THIS PAGE.								
1. APPLICANT DATA <i>(The person whose record you are requesting to be corrected.)</i>								
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%;">a. BRANCH OF SERVICE <i>(X one)</i></td> <td style="width: 25%;">ARMY</td> <td style="width: 25%;">NAVY <input checked="" type="checkbox"/></td> <td style="width: 25%;">AIR FORCE</td> <td style="width: 25%;">MARINE CORPS</td> <td style="width: 25%;">COAST GUARD</td> </tr> </table>			a. BRANCH OF SERVICE <i>(X one)</i>	ARMY	NAVY <input checked="" type="checkbox"/>	AIR FORCE	MARINE CORPS	COAST GUARD
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b. NAME <i>(Print - Last, First, Middle Initial)</i> 5 U.S.C. 552(b) (6)		c. PRESENT OR LAST PAY GRADE O4/LCDR						
d. SERVICE NUMBER <i>(If applicable)</i>		e. SSN 5 U.S.C. 552(b)						
2. PRESENT STATUS WITH RESPECT TO THE ARMED SERVICES <i>(Active Duty, Reserve, National Guard, Retired, Discharged, Deceased)</i> Active Duty		3. TYPE OF DISCHARGE <i>(If by court-martial, state the type of court.)</i> N/A						
		4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY <i>(YYYYMMDD)</i> INDEF 00000000						
5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED AS FOLLOWS: <i>(Entry required)</i> Unfortunately, at NAVEUR/NAVAF from July 2012 to December 2012 I was assaulted three different ways. I was assaulted by a then active duty Navy Commander, 5 U.S.C. 552(b) (6), who kicked the back of my chair so hard with his boot that I felt the taste of blood in my mouth and had back pain for at least two weeks. I was assaulted by an US Army civilian, 5 U.S.C. 552(b) (6), with a direct blow to my chest close to my heart, again feeling the taste of blood in my mouth. Embarrassingly, I was assaulted by a retired Navy O6 working as a contractor, 5 U.S.C. 552(b) (6), who proceeded to pin me at my chair while rubbing his crotch on my shoulder during the work day. Immediately thereafter, he then ran over to an active duty CDR and exclaimed in order to humiliate me, "this is what I did to 5 U.S.C. 552(b) (6)" in front of several witnesses that to date have mysteriously forgotten the event. Importantly, after compiling all my facts, seeking advice and reporting these assaults up my chain of command, my stellar *EP (period ending October 2012 by 5 U.S.C. 552(b) (6) dropped to three subsequent Ps (May 2013 by 5 U.S.C. 552(b) (6) October 2013 by 5 U.S.C. 552(b) (6) October 2014 by 5 U.S.C. 552(b) (6) as is. Those three subsequent FITREPs are quoted in email as the main reason I did not promote to CDR.								
6. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST FOR THE FOLLOWING REASONS: <i>(Entry required)</i> In June 2015, 5 U.S.C. 552(b) MCPON OPNAV, N00D recommended that I contact IG and BNCR for your assistance in what to do about these unfair FITREPs. MCPON wrote, "Sir - please know that your email is of great concern to me. No one should have to put up with harassment, intimidation, assault, or reprisal in our Navy. I have forwarded the information you provided to the NAVEUR Force Judge Advocate to ensure these allegations were properly investigated and that any additional investigation required is referred to the appropriate. I also want to make sure you are aware that Military Whistleblower complaints may be made to the Navy Inspector General: http://www.secnav.navy.mil/ig/Pages/Home.asp , and that you may petition the Board of Correction for Naval Records to modify your fitreps. I appreciate your words and dedication. Please let me know if I can be further assistance. V/r, MCPON MASTER CHIEF PETTY OFFICER OF THE NAVY MCPON(AW/NAC) 5 U.S.C. 552(b)								
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 33%;">a. IS THIS A REQUEST FOR RECONSIDERATION OF A PRIOR APPEAL?</td> <td style="width: 33%;">YES <input type="checkbox"/> NO <input checked="" type="checkbox"/></td> <td style="width: 33%;">b. IF YES, WHAT WAS THE DOCKET NUMBER?</td> </tr> <tr> <td colspan="3">c. DATE OF THE DECISION</td> </tr> </table>			a. IS THIS A REQUEST FOR RECONSIDERATION OF A PRIOR APPEAL?	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	b. IF YES, WHAT WAS THE DOCKET NUMBER?	c. DATE OF THE DECISION		
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8. DISCOVERY OF ALLEGED ERROR OR INJUSTICE								
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%;">a. DATE OF DISCOVERY <i>(YYYYMMDD)</i></td> <td style="width: 75%;">b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THE APPLICATION.</td> </tr> <tr> <td>20150306, 20150806</td> <td>Please consider this complaint that is ongoing. I believe this still falls within the three year timeframe since the harassment, intimidation, assault, and reprisal incidents that occurred over a period of six months from July to Dec 2012.</td> </tr> </table>			a. DATE OF DISCOVERY <i>(YYYYMMDD)</i>	b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THE APPLICATION.	20150306, 20150806	Please consider this complaint that is ongoing. I believe this still falls within the three year timeframe since the harassment, intimidation, assault, and reprisal incidents that occurred over a period of six months from July to Dec 2012.		
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9. IN SUPPORT OF THIS APPLICATION, I SUBMIT AS EVIDENCE THE FOLLOWING ATTACHED DOCUMENTS: <i>(If military documents or medical records are pertinent to your case, please send copies. If Veterans Affairs records are pertinent, give regional office location and claim number.)</i> 5 U.S.C. 552(b) (6) FITREPs 201210, 201305, 201311, 201411, 201503, 201508; Also, 201407 5 U.S.C. 552(b) (6) LOR; AND Emails "Re: Next Steps", 201509 FY17 FAO Milestone Screen Board Petition ICO 5 U.S.C. 552(b) (6) DENIED								
10. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. <i>(At no expense to the Government)</i> <input checked="" type="checkbox"/> YES. THE BOARD WILL DETERMINE IF WARRANTED. <input type="checkbox"/> NO. CONSIDER MY APPLICATION BASED ON RECORDS AND EVIDENCE.								
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 60%;">11.a. COUNSEL <i>(If any) NAME</i> <i>(Last, First, Middle Initial) and ADDRESS</i> <i>(Include ZIP Code)</i> Pro Se</td> <td style="width: 40%;">b. TELEPHONE <i>(Include Area Code)</i> 5 U.S.C. 552(b) (6)</td> </tr> <tr> <td></td> <td>c. E-MAIL ADDRESS 5 U.S.C. 552(b) (6)</td> </tr> <tr> <td></td> <td>d. FAX NUMBER <i>(Include Area Code)</i></td> </tr> </table>			11.a. COUNSEL <i>(If any) NAME</i> <i>(Last, First, Middle Initial) and ADDRESS</i> <i>(Include ZIP Code)</i> Pro Se	b. TELEPHONE <i>(Include Area Code)</i> 5 U.S.C. 552(b) (6)		c. E-MAIL ADDRESS 5 U.S.C. 552(b) (6)		d. FAX NUMBER <i>(Include Area Code)</i>
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	c. E-MAIL ADDRESS 5 U.S.C. 552(b) (6)							
	d. FAX NUMBER <i>(Include Area Code)</i>							
e. I WOULD LIKE ALL CORRESPONDENCE/DOCUMENTS SENT TO ME ELECTRONICALLY. <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO								
12. APPLICANT MUST SIGN IN ITEM 15 BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, indicate the name <i>(print)</i> and relationship by marking one box below.								
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 16.6%;">SPOUSE</td> <td style="width: 16.6%;">WIDOW</td> <td style="width: 16.6%;">WIDOWER</td> <td style="width: 16.6%;">NEXT OF KIN</td> <td style="width: 16.6%;">LEGAL REPRESENTATIVE</td> <td style="width: 16.6%;">OTHER <i>(Specify)</i></td> </tr> </table>			SPOUSE	WIDOW	WIDOWER	NEXT OF KIN	LEGAL REPRESENTATIVE	OTHER <i>(Specify)</i>
SPOUSE	WIDOW	WIDOWER	NEXT OF KIN	LEGAL REPRESENTATIVE	OTHER <i>(Specify)</i>			
13.a. COMPLETE CURRENT ADDRESS <i>(Include ZIP Code) OF APPLICANT OR PERSON IN ITEM 12 ABOVE</i> <i>(Forward notification of all changes of address.)</i> 5 U.S.C. 552(b) (6)								
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 60%;">b. TELEPHONE <i>(Include Area Code)</i> 5 U.S.C. 552(b) (6)</td> </tr> <tr> <td>c. E-MAIL ADDRESS 5 U.S.C. 552(b) (6)</td> </tr> <tr> <td>d. FAX NUMBER <i>(Include Area Code)</i></td> </tr> </table>			b. TELEPHONE <i>(Include Area Code)</i> 5 U.S.C. 552(b) (6)	c. E-MAIL ADDRESS 5 U.S.C. 552(b) (6)	d. FAX NUMBER <i>(Include Area Code)</i>			
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d. FAX NUMBER <i>(Include Area Code)</i>								
14. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM. <i>(U.S. Code, Title 18, Sections 287 and 1001, provide that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)</i> 5 U.S.C. 552(b) (6)		16. DATE SIGNED <i>(YYYYMMDD)</i> 20150922						
CASE NUMBER <i>(Do not write in this space.)</i>								



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

JMP

Docket No: 9788-15
JAN 27 2017

5 U.S.C. 552(b) (6)

Dear 5 U.S.C.

This is in reference to your application for correction of your naval record pursuant to the provisions of Title 10, United States Code, Section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 20 October 2016. The names and votes of the members of the panel will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record, and applicable statutes, regulations, and policies. In addition, the Board considered the advisory opinion (AO) furnished by Navy Personnel Command (NPC/PERS-3), dated 7 March 2016, a copy of which was previously sent to you on 22 March 2016.

After careful and conscientious consideration of the entire record, the Board found the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this regard, the Board substantially concurred with the comments contained in the AO. Specifically, the Board found insufficient evidence to conclude that the reporting senior acted for an illegal or improper purpose or that the fitness report lacked rational support or was in error. It was the Board's opinion that you failed to meet the burden of proof necessary to establish an inaccuracy or injustice warranting removal or modification of the contested reports. Accordingly, your application has been denied. Additionally, the Board noted you had filed an Article 138 against your commanding officer. If the outcome of your Article 138 is favorable, consider submitting the documentation in a reconsideration application.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matters not previously considered by the Board within one year from the date of the Board's decision. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

5 U.S.C. 552(b)(6)

ELIZABETH A. HILL
Executive Director



DEPARTMENT OF THE NAVY
NAVY PERSONNEL COMMAND
5720 INTEGRITY DRIVE
MILLINGTON TN 38055-0000

1610
PERS-32
7 March 2016

**MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS**

Via: PERS/BCNR Coordinator (PERS-3C)

Subj: 5 U.S.C. 552(b) (6), USN, XXX-XX 5 U.S.C. 552(b) (6)

Ref: (a) BUPERSINST 1610.10D (EVALMAN)

Encl: (1) BCNR File NR 9788-15 wo/Service records

1. Enclosure (1) is returned. The member requests the removal of his fitness reports for the periods of 16 September 2014 to 15 June 2015 and 16 June 2015 to 15 September 2015.

2. Based on our review of the material provided, we find the following:

a. A review of the member's headquarters record revealed the fitness reports in question to be on file. The fitness reports were signed by the member acknowledging the contents of the fitness reports and his right to submit a statement. The member indicated on the fitness reports that he intended to make a statement. The member's statement and the reporting senior's endorsement for the first report in question are present in the file.

b. The first fitness report in question is a Special/Regular report ending 15 June 2015. The member alleges the fitness report was submitted under false and unverifiable contents while not observed by the reporting senior and should be removed.

c. The fitness report is a valid report.

d. Reference (a), chapter 3, page 3-7, subparagraph 3-9(d) allows the reporting senior to submit a special evaluation report to withdraw an enlisted promotion or recommendation for advancement/retention. The reporting senior provided justification in block 41 of why promotion recommendation was withdrawn. Reference (a), Chapter 1, page 1-17, block 41 – COMMENTS ON PERFORMANCE, requires a reporting senior to comment on a "Significant Problems (SP)" promotion recommendation. The member alleges the comments were written directly from investigations and allegations never proven to be true or verified and were in direct reprisal of his refusal to CAPT's mast/NJP. Reference (a), Chapter 13, page 13-11, subparagraph 13-6 (a) states – General Commenting on Misconduct allows a reporting senior to comment on misconduct whenever the facts are clearly established to the reporting senior's satisfaction. The reporting senior did not make reference to investigations or investigative reports but clearly established the reason for the adverse fitness report. The reporting senior may use input from a variety of

MAR 16 2016

Subj: 5 U.S.C. 552(b) (6)

sources for writing fitness reports. The basis of observation is decided by the reporting senior and does not require the member to be in daily contact.

e. The second fitness report in question is a Periodic/Regular report ending 15 September 2015. The member alleges the adverse fitness report was not warranted due to same reasons and request the reporting senior correct the report to rank him fairly among his peers or provide a Not Observed (NOB) report for continuity purposes.

f. The fitness report is a valid report.

g. The reporting senior was required to submit the fitness report for the member's Periodic report period. Reference (a), Chapter 6, page 6-1, subparagraph 6-2 allows for submission of NOB reports for short periods of duty but is at the discretion of the reporting senior. The reporting senior commented that member had shown little progression in upholding the Navy Core Values of Honor, Courage and Commitment since his special fitness report and member failed to adhere to MCPON's guiding principles for a Chief Petty Officer.

h. In reviewing petitions that question the exercise of the reporting senior's evaluation responsibilities, we must determine if the reporting senior abused his/her discretionary authority. PERS-32 cannot comment on 5 U.S.C. intent of the fitness report comments or what input he received just the foundational elements of the fitness report as they apply to the instruction. The reporting senior is charged with commenting on the performance or characteristics of each member under his/her command and determine what material will be included in a fitness report. The comments and performance trait marks assigned on a report are at the discretion of the reporting senior. The evaluation of a member's performance and making recommendations concerning suitability for appointment and assignments are the responsibility of the reporting senior. For us to recommend relief, the petitioner has to show that either there is no rational support for the reporting senior's action or that the reporting senior acted for an illegal or improper purpose. Nothing in the member's petition indicated the reporting senior acted for illegal or improper purposes or that the fitness report lacked rational support.

i. If the member believed the reporting senior prepared the report for reprisal or in retaliation, he could have filed a complaint of wrongful treatment under one of the processes set up for that purpose, e.g. Article 138, Navy Hotline, etc.

j. The member does not prove the fitness reports to be in error.

3. We recommend the member's record remain unchanged.

5 U.S.C. 552(b)(6)

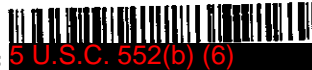
CLARENCE E. CARVER
By Direction

240**APPLICATION FOR CORRECTION OF MILITARY RECORD****UNDER THE PROVISIONS OF TITLE 10, U.S. CODE,**

(Please read Privacy Act Statement and Instructions on back BEFORE cc)

OMB No. 0704-0003

The public reporting burden for this collection of information is estimated to average 30 minutes per response, including reviewing the data needed, and completing and reviewing the collection of information. Send comments including suggestions for reducing the burden, to the Department of Defense, Washington Headquarters Service, Alexandria, VA 22304-3100 (0704-0003). Respondents should be aware that notwithstanding any other provision of information if it does not display a currently valid OMB control number.



NR20150009788

5 U.S.C. 552(b) (6)

Serial
n.
Location**RETURN COMPLETED FORM TO THE APPROPRIATE ADDRESS ON THE BACK****1. APPLICANT DATA (The person whose record you are requesting to be corrected.)**

a. BRANCH OF SERVICE (X one)	ARMY	<input checked="" type="checkbox"/> NAVY	AIR FORCE	MARINE CORPS	COAST GUARD
b. NAME (Print - Last, First, Middle Initial)	c. PRESENT OR LAST PAY GRADE		d. SERVICE NUMBER (if applicable)	e. SSN	
5 U.S.C. 552(b) (6)	B-7			5 U.S.C. 552(b) (6)	
2. PRESENT STATUS WITH RESPECT TO THE ARMED SERVICES (Active Duty, Reserve, National Guard, Retired, Discharged, Deceased)		3. TYPE OF DISCHARGE (If by court-martial, state the type of court.)		4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY (YYYYMMDD)	
ACTIVE DUTY					

5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED AS FOLLOWS: (Entry required)

- 1) SPECIAL ADVERSE CHIEF EVALUATION DATED 15JUN15 BE REMOVED FROM MY OMPF. THE EVALUATION WAS SUBMITTED UNDER FALSE AND UNVERIFIABLE CONTENTS, WHILE NOT OBSERVED BY THE COMMANDING OFFICER.
- 2) ADVERSE CHIEF EVALUATION DATED 15SEP15 BE REMOVED AND CORRECTED BY COASTAL RIVERINE SQUADRON FOUR. COMMANDING OFFICER RANK ME FAIRLY AMONG MY PEERS, OR SUPPLY ME WITH A NOT OBSERVED EVALUATION FOR CONTINUITY PURPOSES.

6. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST FOR THE FOLLOWING REASONS: (Entry required)

BOTH ADVERSE EVALUATIONS (15JUN15 AND 15SEP15) WERE WRITTEN IN VIOLATION OF BUPERSINST. 1610.10D, PARA 13, IN THE FACT THAT BLOCK 41 WAS WRITTEN DIRECTLY FROM INVESTIGATIONS AND ALLEGATIONS NEVER PROVEN TO BE TRUE OR VERIFIED, AND IN DIRECT REPRISAL FOR MY REFUSAL TO CAPT'S MAST/NIP. NEGATIVE TRAITS WERE MARKED BY THE COMMANDING OFFICER THAT DID NOT OBSERVE ME. I WAS TAD DURING PERIOD OF REPORT. THE CO USED THE EVALUATION PROCESS AS A MEANS FOR PUNISHMENT, THUS ENSURING HIS DENIAL OF MY RE-ENLISTMENT.

a. IS THIS A REQUEST FOR RECONSIDERATION OF A PRIOR APPEAL?	YES	b. IF YES, WHAT WAS THE DOCKET NUMBER?	c. DATE OF THE DECISION
<input checked="" type="checkbox"/> NO			

7. ORGANIZATION AND APPROXIMATE DATE (YYYYMMDD) AT THE TIME THE ALLEGED ERROR OR INJUSTICE IN THE RECORD OCCURRED (Entry required) COASTAL RIVERINE SQUADRON FOUR, 20150621, 20150929**8. DISCOVERY OF ALLEGED ERROR OR INJUSTICE**

a. DATE OF DISCOVERY (YYYYMMDD)	b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THE APPLICATION.
---------------------------------	---

20150929

9. IN SUPPORT OF THIS APPLICATION, I SUBMIT AS EVIDENCE THE FOLLOWING ATTACHED DOCUMENTS: (If military documents or medical records are pertinent to your case, please send copies. If Veterans Affairs records are pertinent, give regional office location and claim number.)

CHIEFEVAL DTD 15SEP15, SPECIAL (ADVERSE) CHIEFEVAL DTD 15JUN15 w/ STATEMENT, ADVERSE CHIEFEVAL DTD 15SEP15 w/ STATEMENT. TAD ORDERS DURING PERIOD OF REPORT, ART. 138 LETTER AGAINST COMMANDING OFFICER, CRS-4.

10. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. (At no expense to the Government) (X one) ☐ YES. THE BOARD WILL DETERMINE IF WARRANTED. ☒ NO. CONSIDER MY APPLICATION BASED ON RECORDS AND EVIDENCE.

11.a. COUNSEL (if any) NAME (Last, First, Middle Initial) and ADDRESS (Include ZIP Code)	b. TELEPHONE (Include Area Code)
	c. E-MAIL ADDRESS
	d. FAX NUMBER (Include Area Code)
e. I WOULD LIKE ALL CORRESPONDENCE/DOCUMENTS SENT TO ME ELECTRONICALLY. <input type="checkbox"/> YES <input type="checkbox"/> NO	

12. APPLICANT MUST SIGN IN ITEM 15 BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, indicate the name (print) and relationship by marking one box below.

<input type="checkbox"/> SPOUSE	<input type="checkbox"/> WIDOW	<input type="checkbox"/> WIDOWER	<input type="checkbox"/> NEXT OF KIN	<input type="checkbox"/> LEGAL REPRESENTATIVE	<input type="checkbox"/> OTHER (Specify)
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13.a. COMPLETE CURRENT ADDRESS (Include ZIP Code) OF APPLICANT OR PERSON IN ITEM 12 ABOVE (Forward notification of all changes of address.)

5 U.S.C. 552(b) (6)

b. TELEPHONE (Include Area Code)
c. E-MAIL ADDRESS
5 U.S.C. 552(b) (6)
d. FAX NUMBER (Include Area Code)

14. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM. (U.S. Code, Title 18, Sections 287 and 1001, provide that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)

5 U.S.C. 552(b) (6)

16. DATE SIGNED (YYYYMMDD)
2015 10 20

CASE NUMBER
(Do not write in this space.)



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

SJN
Docket No: 6844-16
OCT 25 2016

From: Chairman, Board for Correction of Naval Records
To: Commandant of the Marine Corps

Subj: REVIEW NAVAL RECORD OF 5 U.S.C. 552(b) (6), USMC,
5 U.S.C. 552(b)

Ref: (a) 10 U.S.C. 1552

Encl: (1) Copy of approved Report of Proceedings w/o attachments
(2) Copy of letter to Subject

1. In accordance with reference (a), the Board for Correction of Naval Records has reviewed allegations of error and injustice in Subject's naval record.
2. The designated representative of the Assistant Secretary of the Navy for Manpower and Reserve Affairs has reviewed the proceedings of the Board and approved the recommendation for corrective action as set forth in enclosure (1).
3. Regulations approved by the Secretary of the Navy require that Subject's naval record be corrected, where appropriate, in accordance with the approved recommendation of the Board.
4. The Board has advised Petitioner and the Defense Finance and Accounting Service of the Assistant Secretary's designated representative's action. Enclosure (2) applies.
5. It is requested that this Board be furnished a copy of any correspondence relating to the approved recommendation.

5 U.S.C. 552(b) (6)

By direction



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

SJN

Docket No: 6844-16

OCT 25 2016

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

Subj: REVIEW NAVAL RECORD OF 5 U.S.C. 552(b) (6) USMC,
5 U.S.C. 552(b)

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149 dtd 11 Apr 16 w/encls
(2) Case Summary with attachments
(3) Service Record (excerpts)
(4) HQMC MMRP-13/PERB memo dtd 1 Aug 16
(5) USMC IG substantiated Hotline Complaint ltr dtd 12 Aug 16
(6) DD Form 149 dtd 16 Aug 16 w/encls
(7) USMC IG Action Memo date 17 Aug 16

1. Pursuant to the provisions of reference (a), Petitioner, an enlisted member of the Marine Corps, filed enclosure (1) with this Board requesting that his naval record be corrected by removing four fitness reports covering the periods from 20130608 to 20131231(AN), 20140101 to 20140918 (CD), 20140919 to 20141231 (AN), and 20150101 to 20150327 (TR), from his Official Military Personnel File (OMPF), Electronic Service Record (ESR), and the Marine Corps Total Force System (MCTFS), where applicable. Enclosures (1) through (6) apply.
2. The Board, consisting of 5 U.S.C. 552(b) (6) reviewed Petitioner's allegations of error and injustice on 21 October 2016 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations, and policies. Additionally, the Board considered enclosure (4), an advisory opinion from Headquarters Marine Corps (HQMC).
3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:
 - a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.
 - b. Enclosure (1) was filed in a timely manner.

Subj: REVIEW NAVAL RECORD OF 5 U.S.C. 552(b) (6) USMC,
5 U.S.C. 552(b)

c. On 13 October 2013, Petitioner submitted an anonymous letter in a complaint box alleging misconduct against members of his command. In February 2014, he provided a written statement to his Company First Sergeant regarding his Reviewing Officer (RO) who was married, but pending final divorce, was engaged in an inappropriate relationship with a female contractor. On 3 March 2014, Petitioner made an anonymous Hotline complaint to HQMC Inspector General (IG) providing additional information about his complaint. On 22 September 2014, Petitioner submitted a complaint of reprisal under Title 10, USC Section 1034 (10 U.S.C. 1034), "Protected communications; prohibition of retaliatory personnel actions, "implemented by DoD Directive 7050.06, "Military Whistleblower Protection."

d. During the period from 8 June 2013 to 27 March 2015, Petitioner received four fitness reports, although none were adverse, they were determined to be unfavorable personnel actions (UPA) because the reports had values lower than the baseline report, which reflected a significant decline in his performance.

e. During the period from 28 September 2014 to 18 March 2015, Petitioner submitted a Military Whistleblower Reprisal complaint, a written complaint alleging misconduct against his RO, Reporting Senior (RS) and a civilian, a written complaint alleging misconduct against a GySgt, made an unrestricted sexual assault complaint against a RS to Naval Criminal Investigative Service (NCIS) and base Sexual Assault Response Coordinator (SARC), and reported to his Commanding Officer that he had received threatening text messages from another SSgt.

f. On 11 April 2016, Petitioner submitted a DD Form 149 application to the Board for Correction of Naval Records (BCNR) via the HQMC Performance Evaluation Review Board (PERB/MMRP-13) requesting the above mentioned fitness reports be removed from his OMPF. Enclosure (4), an advisory opinion provided by the PERB, recommended that his report ending 20131231, remain a part of his OMPF with modification, the report ending 20140908, should be removed from his OMPF, and his reports ending 20141231 and 20150327 remain with modification, a part of his OMPF. The Board noted that, at that time, it appears the PERB was unaware Petitioner had an ongoing IG investigation pending. Enclosure (5) is Petitioner's HQMC IG substantiated complaint of reprisal.

Subj: REVIEW NAVAL RECORD OF 5 U.S.C. 552(b) (6) USMC,
5 U.S.C. 552(b)

g. Prior to the Board ruling on Petitioners initial petition, he submitted enclosure (6), a second DD Form 149 dated 16 August 16 to the BCNR, in light of the substantiated IG report, requesting the removal of his three remaining reports ending 20131231, 20141231, and 20150101. Petitioner stated, in part, that he was providing material that he believes would meet the burden of proof to establish inaccuracies and injustices warranting the removal of all three remaining fitness reports.

h. Enclosure (7), a Notification of a Completed Military Whistleblower Reprisal Investigation Action Memo dated 17 August 2016, was forwarded to the Secretary of the Navy from HQMC IG recommending that their report be approved. The memorandum stated, in part, that the RO and RS took UPA against Petitioner, in reprisal for making protected communications in violation of DoD Directive 7050.06.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's requests warrants favorable action. In this regard, and especially in light of enclosures (5) and (7), the Board concludes that Petitioner's fitness reports ending 20131231, 20141231 and 20150327, should all be removed from is OMPF, ESR and MCTFS in their entirety.

In view of the foregoing, the Board finds the existence of an error and injustice warranting the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing therefrom the following enlisted fitness reports and related material.

<u>Date of report</u>	<u>Reporting senior</u>	<u>Period of report</u>
20140129	5 U.S.C. 552(b) (6)	From 20130608 to 20131231
20150127		From 20140919 to 20141231
20150331		From 20150101 to 20150327

b. That there be inserted in Petitioner's naval record a memorandum in place of each removed report, containing appropriate identifying data concerning the reports; that such memorandums state that the reports have been removed by order of the Secretary of the Navy in accordance with

Subj: REVIEW NAVAL RECORD OF 5 U.S.C. 552(b) (6) USMC,
5 U.S.C. 552(b) (6)

the provisions of federal law and may not be made available to selection boards and other reviewing authorities; and that such boards may not conjecture or draw any influences as to the nature of the reports.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)), 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 entitled matter.

5 U.S.C. 552(b) (6)

fo

Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulation, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

5 U.S.C. 552(b)(6)

ELIZABETH A. HILL
Executive Director



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

SJN
Docket No: 6844-16
OCT 25 2016

5 U.S.C. 552(b) (6)

Dear 5 U.S.C. 552(b) (6)

This is in reference to your application for correction of your naval record pursuant to the provisions of Title 10, United States Code, Section 1552.

The final decision in your case is set forth in the Board's report of proceedings, a copy of which is enclosed. The approved changes to your naval record will be made by the Commandant of the Marine Corps (CMC), Code MMRP, Headquarters, United States Marine Corps, 3280 Russell Road, Quantico, VA 22134-5103. Please wait at least 180 days from the date of this letter before contacting CMC about the status of your case.

Sincerely,

5 U.S.C. 552(b) (6)

By direction



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:

1610
MMRP-13/PERB
01 AUG 2016

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
5 U.S.C. 552(b) (6) USMC DOCKET NOS. 452-16,
453-16, 454-16, AND 455-16

Ref: (a) 5 U.S.C. 552(b) (6) DD Form 149 of 11 Apr 2016
(b) MCO P1610.7F
(c) MCO 1610.7

1. Per MCO 1610.7, the Performance Evaluation Review Board, with three members present, met on 21 July 2016 to consider 5 U.S.C. 552(b) (6) petition contained in reference (a). Removal of fitness reports 20130608-20131231 (AN), 20140101-20140918 (CD), 20140919-20141231 (AN), and 20150101-20150327 (TR) was requested. References (b) and (c) are the performance evaluation directives governing submission of the reports.

2. 5 U.S.C. 552(b) (6) is requesting that all four reports be removed contending that he "became a subject of a major investigation for reporting moral misconduct, government property theft and reprisal by then and subsequent members of my reporting chain..." 5 U.S.C. 552(b) (6) further contends that "most of those involved in these acts of misconduct were administratively separated from the Marine Corps, pending separation or disciplinary action." 5 U.S.C. 552(b) (6) also contends that he never received counseling on his billet description or performance expectations from the Reporting Senior (RS) of the first three reports and that all four reports "were loaded with velvet daggers and derogative comments, even though none of these were adverse reports." Lastly, he contends that none of the reports were reviewed by a senior enlisted command reviewer.

3. In its proceedings, the Board concluded that (1) the report covering the period 20130608-20131231 (AN) is procedurally correct but does contain an administrative error; (2) the report covering the period 20140101-20140918 (CD) is both procedurally and administratively incorrect; and (3) the reports covering the periods 20140919-20141231 (AN) and 20150101-20150327 (TR) are both administratively and procedurally correct, as written and filed. The following is offered as relevant as it applies to all contested reports:

a. The petitioner provides no substantiation of his contention that members of his reporting chain were under investigation and, if they were, the results of those investigations. A search of the RS and RO records (5 U.S.C. 552(b)(6)) revealed no adversity as the petitioner claims.

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
5 U.S.C. 552(b) (6) USMC DOCKET NOS. 452-16,
453-16, 454-16, AND 455-16

b. The petitioner fails to substantiate that, as a senior staff sergeant and for the 18 months covered by and under the tasking of 5 U.S.C. 552(b)(6) as the RS, he was not aware of his billet duties and expectations and never received performance counseling from the RS in the spirit and intent of references (b) and (c).

c. Per paragraph 2009 of reference (b) and on Page 2-4 of reference (c), the use of a senior enlisted advisor is encouraged but is not mandatory when submitting fitness reports on enlisted Marines.

d. The following is offered as relevant, as it applies to each of the contested reports:

(1) Fitness Report covering the period of 20130608-20131231 (AN):

(a) The RS's assessment documents positive and successful performance and the Section I comments are not derogatory nor do they contain "velvet daggers". However, the Reviewing Officer's (RO) comments are clearly adverse and his review should have been referred to the petitioner for rebuttal. The Marine Corps' course of action, therefore, is to *remove all information in Items 11a through 11f and remove Section K in its entirety.*

(2) Fitness Report for the period of 20140101-20140918 (CD):

(a) The Board found that this report does indicate a significant drop in the petitioner's performance during the reporting period, especially by the RS. Both the RS and RO comments are adverse and the report should have been referred to the petitioner for acknowledgement and a chance to rebut. The Marine Corps' course of action, therefore, is to *remove the contested fitness report in its entirety.*

(3) Fitness Reports covering the period of 20140919-20141231 (AN) and 20150101-20150327 (TR)

(a) The RS and RO assessments on both these reports are positive and document satisfactory performance even though the petitioner was performing at a basic satisfactory level. The petitioner provides no substantiation that the report is not a true and accurate portrayal of his exhibited efforts and results for the finite period. He provides no specifics of how his performance was more than as observed by the RS and RO.

4. In summary, the Board found that the petitioner failed to meet the burden of proof necessary to establish an inaccuracy or injustice warranting removal of all four reports. The Board's opinion, based on deliberation and majority vote, is that the report covering the period 20130608-20131231 (AN) should remain, with modification, a part of 5 U.S.C. 552(b) (6) official military record; that the report covering the period 20140101-20140918 (CD) should be

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
5 U.S.C. 552(b) (6), USMC DOCKET NOS. 452-16,
453-16, 454-16, AND 455-16

removed from 5 U.S.C. 552(b) (6) official military record; and that the reports covering
the periods 20140919-20141231 (AN), and 20150101-20150327 (TR) should remain, as written
and filed, a part of 5 U.S.C. 552(b) (6) official military record.

5. The point of contact regarding this matter is 5 U.S.C. 552(b) (6).

5 U.S.C. 552(b)(6)

CALVIN F. SWAIN
Deputy Director
Manpower Management Division
Manpower and Reserve Affairs
Department
By direction of the Commandant
of the Marine Corps



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

JSR
Docket No: NR8505-14
29 June 2015

5 U.S.C. 552(b) (6)

Dear 5 U.S.C. 552(b) (6)

As set forth in the attached report, a three-member panel of the Board, sitting in executive session, voted to deny relief in your case, and the Assistant General Counsel (Manpower and Reserve Affairs) approved the Board's recommendation.

You are entitled to have the Board reconsider your case upon submission of new evidence within one year from the date of the Assistant General Counsel's decision. New evidence is evidence not previously considered by the Board prior to making its recommendation in this case.

It is regretted that a more favorable reply cannot be made.

Sincerely,

5 U.S.C. 552(b)(6)

ROBERT J. O'NEILL
Executive Director

Enclosure



DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
(MANPOWER AND RESERVE AFFAIRS)
1000 NAVY PENTAGON
WASHINGTON DC 20350-1000

June 26, 2015

5 U.S.C. 552(b) (6)

Dear 5 U.S.C. 552(b) (6)

This correspondence is in reference to your application of June 24, 2014, to the Board for Correction of Naval Records.

I have reviewed and approved the recommendation of the Board to deny relief in your case. Within 90 days, you may request that the Secretary of Defense reconsider this decision, pursuant to Department of Defense Directive 7050.6 of July 23, 2007 – Military Whistleblower Protection. This request should be mailed to the following address:

Deputy Under Secretary of Defense for Program Integration
Attention: Director, Legal Policy
4000 Defense Pentagon
Washington, D.C. 20301-4000

Your request for reconsideration by the Secretary of Defense must be in writing and include your name, rank, duty title, organization, duty location, address and commercial or DSN telephone number; a copy of your application to the Board for Correction of Naval Records; a copy of my final decision (which the Board will send you separately); and a statement of the specific reasons you are not satisfied with my decision and the specific remedy or relief you request. Your request for reconsideration by the Secretary of Defense must be based on the Board's record; a request based on factual allegations or evidence not previously presented to the Board will not be considered by the Secretary of Defense, but may be the basis for reconsideration by the Board under Secretary of the Navy Instruction 5420.193, enclosure (1), Section 9.

Sincerely,

5 U.S.C. 552(b)(6)

Robert L. Woods
Assistant General Counsel
(Manpower and Reserve Affairs)



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

JSR

Docket No. NR8505-14

4 June 2015

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

Subj: 5 U.S.C. 552(b) (6), USN, XXX-XX-5 U.S.C. 552(b) (6)
REVIEW OF NAVAL RECORD

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149 dtd 24 Jun 14 w/attachments
(2) NAVIG ltr 5041/201401118 Ser N625/0556
dtd 21 May 15 w/enclosures
(3) PERS-32 memo dtd 22 Jan 15

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected by modifying the enlisted performance evaluation report for 16 November 2013 to 6 June 2014 (copy at Tab A) by changing the mark in block 45 ("Promotion Recommendation - Individual") from "Must Promote" (second best of five possible marks) to "Early Promote" (best).

2. The Board, consisting of 5 U.S.C. 552(b) (6) reviewed Petitioner's allegations of error and injustice on 23 April 2015, and requested that the report of investigation of Petitioner's complaint of reprisal be obtained. In accordance with the Board's request, enclosure (2) was obtained. Pursuant to its regulations, the Board, then consisting of 5 U.S.C. 552(b)(6)

5 U.S.C. 552(b)(6) reviewed Petitioner's case on 4 June 2015 and determined that in light of the available evidence of record, relief should be denied. Documentary material considered by the Board consisted of the enclosures and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

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

b. Enclosure (1) was filed in a timely manner.

c. Enclosure (2) shows that the Naval Inspector General (NAVIG) investigation did not substantiate Petitioner's complaint that the contested promotion recommendation was in reprisal for her equal opportunity complaint submitted in November 2013. It further shows that the Department of Defense Inspector General concurred with the findings of the NAVIG.

d. In the advisory opinion at enclosure (3), the Navy Personnel Command office with cognizance over the subject matter of Petitioner's case has commented to the effect that the request should be denied. This advisory opinion did not take into account enclosure (2), which was not received until after the opinion had been submitted.

CONCLUSION:

Upon review and consideration of all the evidence of record, and especially in light of enclosures (2) and (3), the Board finds that Petitioner's request should be denied. Accordingly, the recommendation of the Board is as follows:

RECOMMENDATION:

a. That Petitioner's request be denied.

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 entitled matter.

5 U.S.C. 552(b)(6)

Recorder

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

5 U.S.C. 552(b)(6)

ROBERT J. O'NEILL

Reviewed and approved:

5 U.S.C. 552(b)(6)

6/24/15

ROBERT L. WOODS
Assistant General Counsel
(Manpower and Reserve Affairs)
1000 Navy Pentagon, Rm 4D548
Washington, DC 20350-1000



DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
(MANPOWER AND RESERVE AFFAIRS)
1000 NAVY PENTAGON
WASHINGTON DC 20350-1000

June 26, 2015

5 U.S.C. 552(b) (6)

Dear 5 U.S.C. 552(b) (6) :

This correspondence is in reference to your application of June 24, 2014, to the Board for Correction of Naval Records.

I have reviewed and approved the recommendation of the Board to deny relief in your case. Within 90 days, you may request that the Secretary of Defense reconsider this decision, pursuant to Department of Defense Directive 7050.6 of July 23, 2007 – Military Whistleblower Protection. This request should be mailed to the following address:

Deputy Under Secretary of Defense for Program Integration
Attention: Director, Legal Policy
4000 Defense Pentagon
Washington, D.C. 20301-4000

Your request for reconsideration by the Secretary of Defense must be in writing and include your name, rank, duty title, organization, duty location, address and commercial or DSN telephone number; a copy of your application to the Board for Correction of Naval Records; a copy of my final decision (which the Board will send you separately); and a statement of the specific reasons you are not satisfied with my decision and the specific remedy or relief you request. Your request for reconsideration by the Secretary of Defense must be based on the Board's record; a request based on factual allegations or evidence not previously presented to the Board will not be considered by the Secretary of Defense, but may be the basis for reconsideration by the Board under Secretary of the Navy Instruction 5420.193, enclosure (1), Section 9.

Sincerely,

5 U.S.C. 552(b)(6)

Robert L. Woods
Assistant General Counsel
(Manpower and Reserve Affairs)



DEPARTMENT OF THE NAVY
NAVY PERSONNEL COMMAND
5720 INTEGRITY DRIVE
MILLINGTON TN 38055-0000

1610
PERS-32
22 January 2015

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Via: PERS/BCNR Coordinator (PERS-3C)

Subj: 5 U.S.C. 552(b) (6) [REDACTED] USN, XXX-XX 5 U.S.C. 552(b) [REDACTED]

Ref: (a) BUPERSINST 1610.10C (EVALMAN)

Encl: (1) BCNR File NR 8505-14 wo/Service record

1. Enclosure (1) is returned. The member requests the evaluation report for the period of 16 November 2013 to 06 June 2014 be changed to reflect a promotion recommendation of Early Promote (EP) vice Must Promote (MP).

2. Based on our review of the material provided, we find the following:

a. A review of the member's headquarters record revealed the evaluation report in question to be on file. It was signed by the member acknowledging the contents of the fitness report and her right to submit a statement. The member indicated on the fitness report that she intended to submit a statement. The member's statement and the reporting senior's endorsement are not present in the file.

b. The evaluation report in question is a Detachment of Individual/Regular report ending 06 June 2014. The member alleges the evaluation report is unjust due to her submission of an EO complaint in November 2013 and a subsequent reprisal complaint shortly thereafter.

c. The evaluation report is a valid report. Evaluation reports are unique to period evaluated. A decline in performance is defined as decline in the promotion recommendation or a decline of two of more trait grades by the same reporting senior. If decline was due to forced distribution limits, explain as such (Chapter 13, page 13-4, subparagraph 13-9h). The member was graded by the same reporting senior during the previous reporting period with same promotion recommendation.

d. Reference (a), Chapter 3, page 3-2, subparagraph 3-6, required the reporting senior to submit an evaluation report for the member's permanent detachment to another command. The evaluation report was accurately prepared and submitted by the reporting senior in accordance with Reference (a). Per Reference (a), Chapter 17, page 17-1, and subparagraph 17-3, the member was able to provide input in the preparation of the evaluation report, which aids the reporting senior. The basis of observation is decided by the reporting senior and does not require

Subj: 5 U.S.C. 552(b) (6), USN, XXX-XX5

the member to be in daily contact. The reporting senior may use input from a variety of sources for writing evaluation reports.

e. The evaluation of a member's performance, the member's standing within a summary group, and corresponding promotion recommendation are all responsibilities of the reporting senior. It is not uncommon for members to disagree with their reporting senior's appraisal. In this case, the reporting senior assigned the member a promotion recommendation of "Must Promote," which is not adverse. The comments and performance trait marks assigned on the report are not adverse and are at the discretion of the reporting senior. The evaluation of a member's performance and making recommendations concerning suitability for appointment and assignments are the responsibility of the reporting senior.

f. In reviewing petitions that question the exercise of the reporting senior's evaluation responsibilities, we must determine if the reporting senior abused his/her discretionary authority. For us to recommend relief, the petitioner has to show that either there is no rational support for the reporting senior's action or that the reporting senior acted for an illegal or improper purpose. Nothing in the member's petition indicated the reporting senior acted for illegal or improper purposes or that the evaluation report lacked rational support.

g. The member does not prove the evaluation report to be in error.

3. We recommend the member's record remain unchanged.

5 U.S.C. 552(b)(6)

CLARENCE E. CARVER
By Direction



DEPARTMENT OF THE NAVY
NAVAL INSPECTOR GENERAL
1254 9TH STREET SE
WASHINGTON NAVY YARD DC 20374-5006

IN REPLY REFER TO:
5041/201401118
Ser N625/0556
21 May 15

From: Naval Inspector General
To: Chairman, Board of Correction of Naval Records
Subj: NAVY HOTLINE COMPLAINT 201401118; ALLEGED REPRISAL ICO
5 U.S.C. 552(b) (6) USN

Ref: (a) 10 U.S.C. 1552

Encl: (1) NAVINSGEN Report of Investigation
(2) DOD IG Case ID# 20140514-025347-CASE 01/Service Case
201401118
(3) BCNR Letter, Review of Naval Records Docket No
NR8505-14, of 28 April 2015

1. Pursuant to reference (a), enclosures (1), (2) and (3) are forwarded for your review, as requested.

2. Logistics Specialist 5 U.S.C. 552(b) (6) USN, alleged that she suffered multiple unfavorable personnel actions in reprisal for her protected communications.

3. In accordance with Department of Defense Directive (DoDD) 7050.06, Military Whistleblower Protection, the Naval Inspector General (NAVINSGEN) conducted an investigation and determined that the allegations of reprisal were not substantiated, enclosure (1).

4. NAVINSGEN forwarded the report of investigation (ROI) to the Department of Defense Inspector General (DoD IG) for approval. DoD IG reviewed the results of the ROI and concurred with the findings, enclosure (2).

5. Enclosure (1) is being provided For Official Use Only per your 28 April 2015 request, enclosure (3). NAVINSGEN remains the cognizant release authority for this report. Please forward to NAVINSGEN any subsequent requests you may receive pertaining to this report.

6. My point of contact for this case is 5 U.S.C. 552(b) (6) NAVINSGEN (N62). 5 U.S.C. 552(b) (6) may be contacted at commercial 5 U.S.C. 552(b) (6).

5 U.S.C. 552(b)(6)

CHERYL J. MILLER
By direction

MAY 28 2015

For Official Use Only



DEPARTMENT OF THE NAVY
NAVAL INSPECTOR GENERAL
1254 9TH STREET SE
WASHINGTON NAVY YARD DC 20374-5006

IN REPLY REFER TO:
5041/201401118
Ser N625/0556
21 May 15

From: Naval Inspector General
To: Chairman, Board of Correction of Naval Records
Subj: NAVY HOTLINE COMPLAINT 201401118; ALLEGED REPRISAL ICO
5 U.S.C. 552(b) (6) USN

Ref: (a) 10 U.S.C. 1552

Encl: (1) NAVINSGEN Report of Investigation
(2) DOD IG Case ID# 20140514-025347-CASE 01/Service Case
201401118
(3) BCNR Letter, Review of Naval Records Docket No
NR8505-14, of 28 April 2015

1. Pursuant to reference (a), enclosures (1), (2) and (3) are forwarded for your review, as requested.
2. Logistics Specialist 5 U.S.C. 552(b) (6), USN, alleged that she suffered multiple unfavorable personnel actions in reprisal for her protected communications.
3. In accordance with Department of Defense Directive (DoDD) 7050.06, Military Whistleblower Protection, the Naval Inspector General (NAVINSGEN) conducted an investigation and determined that the allegations of reprisal were not substantiated, enclosure (1).
4. NAVINSGEN forwarded the report of investigation (ROI) to the Department of Defense Inspector General (DoD IG) for approval. DoD IG reviewed the results of the ROI and concurred with the findings, enclosure (2).
5. Enclosure (1) is being provided For Official Use Only per your 28 April 2015 request, enclosure (3). NAVINSGEN remains the cognizant release authority for this report. Please forward to NAVINSGEN any subsequent requests you may receive pertaining to this report.
6. My point of contact for this case is 5 U.S.C. 552(b) (6), NAVINSGEN (N62). 5 U.S.C. 552(b) (6) may be contacted at commercial 5 U.S.C. 552(b) (6).

5 U.S.C. 552(b)(6)

CHERYL S. MILLER
By direction

MAY 28 2015

For Official Use Only

240

**APPLICATION FOR CORRECTION OF MILITARY RECORD
UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552**
(Please read instructions on reverse side BEFORE completing this application.)OMB No. 0704-0003
OMB approval expires
Oct 31, 2014

The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Executive Services Directorate, Information Management Division, 4800 Mark Center Drive, Suite 02G09, Alexandria, VA 22304-3100 (0704-0003). Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

**PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE ABOVE OFFICE.
APPROPRIATE ADDRESS ON THE BACK OF THIS PAGE.**

PRIVACY ACT



NR20140008505

AUTHORITY: 10 U.S.C. 1552, and E.O. 9397, as amended (SSN).**PRINCIPAL PURPOSE(S):** To initiate an application for correction of military record. The form is used by Board members for review of pertinent information in making a determination of relief through correction of a military record. Completed forms are covered by correction of military records SORNs maintained by each of the Services or the Defense Finance and Accounting Service.

5 U.S.C. 552(b) (6)

lection.

ed

military personnel file and pay record.

1. APPLICANT DATA (The person whose record you are requesting to be corrected.)**a. BRANCH OF SERVICE** (X one) ☐ ARMY ☒ NAVY ☐ AIR FORCE ☐ MARINE CORPS ☐ COAST GUARD**b. NAME** (Print - Last, First, Middle Initial)

5 U.S.C. 552(b) (6)

**c. PRESENT OR LAST
PAY GRADE**
E-6**d. SERVICE NUMBER** (If applicable)**e. SSN**

5 U.S.C.

**2. PRESENT STATUS WITH RESPECT TO THE
ARMED SERVICES** (Active Duty, Reserve,
National Guard, Retired, Discharged, Deceased)
ACTIVE**3. TYPE OF DISCHARGE** (If by court-martial, state
the type of court.)
NONE**4. DATE OF DISCHARGE OR RELEASE
FROM ACTIVE DUTY** (YYYYMMDD)
00000000**5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED:** (Entry required)

I request that the "MP" on my transfer evaluation be changed to "EP". I was not competing with anyone during that time frame. Transfer evaluations scored less than "EP" are viewed adversely by leadership on a Chief Petty Officer and Officer Boards.

6. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST FOR THE FOLLOWING REASONS: (Entry required)

I submitted an EO complaint NOV13 and a subsequent reprisal complaint shortly thereafter. The justification given at my debrief was that the current evaluation mirrored the last evaluation, which is untrue. This was a 6 month transfer evaluation and in that period I attained 4 NECs, to include the Lean Six Sigma qualification, Lead expeditor, 2 CPO 365 COMRELS, FLOC, NAM, President of the FCPOA Education Group, DOL Purchasing Agent Certification. Wounded Warrior Mentor 5hrs., Virginia Election Official. I have had no adverse consultation and I currently have more qualifications than any other Sailor in CNAFR N41.

7. ORGANIZATION AND APPROXIMATE DATE (YYYYMMDD) **AT THE TIME THE ALLEGED ERROR OR INJUSTICE IN THE RECORD OCCURRED** (Entry required) 20140604**8. DISCOVERY OF ALLEGED ERROR OR INJUSTICE****a. DATE OF DISCOVERY**
(YYYYMMDD)

20140604

b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THE APPLICATION.

NONE

9. IN SUPPORT OF THIS APPLICATION, I SUBMIT AS EVIDENCE THE FOLLOWING ATTACHED DOCUMENTS: (If military documents or medical records are pertinent to your case, please send copies. If Veterans Affairs records are pertinent, give regional office location and claim number.)

Current and previous evaluations, all documents to support my claim. Because of the volume of the EO complaint, I have the redacted copy upon request. For the reprisal case I was made to sign a non-disclosure agreement with the Inspector General.

**10. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON,
D.C.** (At no expense to the Government) (X one)☒ YES. THE BOARD WILL
DETERMINE IF WARRANTED.☐ NO. CONSIDER MY APPLICATION
BASED ON RECORDS AND EVIDENCE.**11.a. COUNSEL** (If any) **NAME** (Last, First, Middle Initial) and **ADDRESS** (Include ZIP Code)

NONE

b. TELEPHONE (Include Area Code) NONE**c. E-MAIL ADDRESS**
NONE**d. FAX NUMBER** (Include Area Code) NONE**12. APPLICANT MUST SIGN IN ITEM 15 BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, indicate the name (print) and relationship by marking one box below.**☐ SPOUSE ☐ WIDOW ☐ WIDOWER ☐ NEXT OF KIN ☐ LEGAL REPRESENTATIVE ☐ OTHER (Specify)**13.a. COMPLETE CURRENT ADDRESS** (include ZIP Code) **OF APPLICANT OR PERSON**
IN ITEM 12 ABOVE (Forward notification of all changes of address.)

5 U.S.C. 552(b) (6)

b. TELEPHONE (Include Area Code)**c. E-MAIL ADDRESS**

5 U.S.C. 552(b) (6)

d. FAX NUMBER (Include Area Code)**14. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM.** (U.S. Code, Title 18, Sections 287 and 1001, provide that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)

5 U.S.C. 552(b) (6)

16. DATE SIGNEDmymy
0140624**CASE NUMBER**
(Do not write in this space.)

JUL 21 2014



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

JDR
Docket No: 8566-15
DEC 12 2016

5 U.S.C. 552(b) (6)

Dear 5 U.S.C. 552(b) (6)

This is in reference to your application for correction of your naval record, dated 15 September 2015, pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 11 March 2016. The names and votes of the members of the panel will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record, and applicable statutes, regulations, and policies. In addition, the Board considered the advisory opinion (AO) furnished by Headquarters, Marine Corps (MMRP-13) dated 10 September 2015, a copy of which was previously provided to you and is enclosed, and your rebuttal statement dated 28 October 2015.

After careful and conscientious consideration of the entire record, the Board found the evidence submitted was insufficient to establish the existence of probable material error or injustice.

The Board, in its review of your entire record and application, carefully weighed all potentially mitigating factors, such as your assertion that your fitness report for the reporting period 1 March 2013 to 30 April 2013 is unjust or in error, and your desire to have the report removed from your record. In this regard, the Board considered your contention that your Reporting Senior (RS) did not indicate, in Section I of the report, why he was invoking an exception to the policy of writing an observed report for a reporting period that is less than 90 days. Nevertheless, the Board determined that removal of the report from your record is not warranted. Specifically, the Board concurred with the AO and noted that the RS's failure to state why he was invoking an exception to policy was merely a harmless administrative error that does not invalidate the report. Further, given that the RS was the same person in the previous reporting period for you, the Board concurred with the AO and believed that the RS felt justified in providing an observed assessment for the reporting period. Accordingly, your application has been denied.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence within one year from the date of this letter. New evidence is evidence not previously considered by the Board prior to making its decision in your case. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

5 U.S.C. 552(b)(6)

ELIZABETH A. HILL
Executive Director



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:

1610

MMRP-13/PERB

10 SEP 2015

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
5 U.S.C. 552(b) (6), USMC DOCKET NO. 372-15

Ref: (a) 5 U.S.C. 552(b) (6) DD Form 149 of 9 March 2015
(b) MCO P1610.7F CH 2

1. Per MCO 1610.7, the Performance Evaluation Review Board, with three members present, met on 20 August 2015 to consider Staff Sergeant Cordeiro's petition contained in reference (a). Removal of fitness report 20130301-20130430 (TD) was requested. Reference (b) is the performance evaluation directive governing submission of the report.

2. 5 U.S.C. 552(b) (6) is requesting that the report be removed from his official record due to insufficient observation time on behalf of the Reporting Senior (RS). The reporting period covered in the report is approximately 60 days. He contends that, per paragraph 3005.3 of reference (b), the RS did not indicate in Section I that he was invoking an exception to policy based on meaningful personal contact with the petitioner.

3. In its proceedings, the Board concluded that the contested report is procedurally correct, but contains an administrative error. The following is offered as relevant:

a. While the RS does not invoke the exception to policy for the duration of the report, this is considered an administrative error that does not invalidate the overall observation of the RS.

b. In reviewing the Section I comments, it is clear that the RS felt justified in providing an observed assessment on this report, especially given the fact that he was the RS on the prior report. If the petitioner believes this not to be the case, then he should have contacted the RS and asked him to consider making the report not-observed.

4. In summary, the Board found that the petitioner failed to meet the burden of proof necessary to establish an inaccuracy or injustice warranting the removal of the report. The Board's

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
5 U.S.C. 552(b) (6), USMC DOCKET NO. 372-15

opinion, based on deliberation and majority vote, is that the contested fitness report should remain a part of Staff Sergeant Cordeiro's official military record.

5. The point of contact regarding this matter is 5 U.S.C. 552(b) (6)
5 U.S.C. 552(b) (6).

5 U.S.C. 552(b)(6)

for

CALVIN F. SWAIN
Deputy Director
Manpower Management Division
Manpower and Reserve Affairs
Department
By direction of the Commandant
of the Marine Corps



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:

1610

MMRP-13/PERB

10 SEP 2015

From: Commandant of the Marine Corps

To: 5 U.S.C. 552(b) (6), USMC Docket No. 372-15
5 U.S.C. 552(b)(6)

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION

Ref: (a) MCO 1610.7

Encl: (1) Copy of PERB Advisory Opinion

1. Reference is made to your Application for Correction of Military or Naval Record (DD Form 149) of 9 March 2015.

2. Your case was considered by the Performance Evaluation Review Board (PERB) on 20 August 2015. As the enclosure reflects, it was the opinion of the PERB that the contested fitness report of **20130301-20130430 (TD)** remain in your Official Military Personnel File.

3. Per chapter 10, paragraph 4d(2) of the reference, your application has been forwarded to the Board for Correction of Naval Records (BCNR) for final consideration.

4. Any comment you may wish to make regarding the report of the PERB should be submitted directly to BCNR, 701 South Courthouse Road, Building 12, Suite BE140, Arlington, VA 22204-2490, not to Headquarters Marine Corps.

5. Should you desire to comment on the report of the PERB, you have 30 days from the date of this letter to do so. If you find it inconvenient to respond within 30 days, you should advise BCNR in writing of the date that your comment will be forthcoming. If no communication is received within the 30-day period cited above, your case will be decided by BCNR on the evidence of record as soon as a crowded docket will permit.

6. If BCNR determines that your case requires action on an urgent basis (e.g., it involves imminent mandatory separation or consideration by a selection board), it may be considered before the expiration of the 30-day period cited above, even if no communication has been received from you. If BCNR determines that your case does not require action on an urgent basis, it

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION

will not be considered before the end of the prescribed period
unless you expressly request such consideration.

5 U.S.C. 552(b)(6)

for

C. F. SWAIN ✓

By direction

330

APPLICATION FOR CORRECTION OF MILITARY RECORD
UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 15OMB No. 0704-0003
OMB approval expires

Please read Privacy Act Statement and instructions on back BEFORE completing

The public reporting burden for this collection of information is estimated to average 30 minutes per response, including reviewing the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Project Collection (0704-0003). Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to provide information if it does not display a currently valid OMB control number.



NR20150005885

5 U.S.C. 552(b) (6)

RETURN COMPLETED FORM TO THE APPROPRIATE ADDRESS ON THE BACK

1. APPLICANT DATA (The person whose record you are requesting to be corrected.)

a. BRANCH OF SERVICE (X one)	ARMY	NAVY	AIR FORCE	<input checked="" type="checkbox"/> MARINE CORPS	COAST GUARD
b. NAME (Print - Last, First, Middle Initial)	c. PRESENT OR LAST PAY GRADE		d. SERVICE NUMBER (If applicable)	e. SSN	
5 U.S.C. 552(b) (6)	E-6			5 U.S.C. 552(b) (6)	

2. PRESENT STATUS WITH RESPECT TO THE ARMED SERVICES (Active Duty, Reserve, National Guard, Retired, Discharged, Deceased)	3. TYPE OF DISCHARGE (If by court-martial, state the type of court.)	4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY (YYYYMMDD)
ACTIVE DUTY		

5. I REQUEST THE FOLLOWING ERROR OR INJUSTICE IN THE RECORD BE CORRECTED AS FOLLOWS: (Entry required)
REMOVE MY MEDICAL RECORDS ALL RECORDS AND REFERENCES RELATING TO MENTAL AND BEHAVIORAL HEALTH TREATMENT AT PORTSMOUTH NAVAL MEDICAL CENTER FOR THE PERIOD FROM 20140101 TO THE PRESENT

6. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST FOR THE FOLLOWING REASONS: (Entry required)
I WAS UNJUSTLY REFERRED BY MY COMMANDER TO PORTSMOUTH NAVAL MEDICAL CENTER AS RETALIATION FOR REPORTING BULLYING AND IMPROPER CONDUCT WITHIN MY UNIT

a. IS THIS A REQUEST FOR RECONSIDERATION OF A PRIOR APPEAL?	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	b. IF YES, WHAT WAS THE DOCKET NUMBER?	c. DATE OF THE DECISION
---	---	--	-------------------------

7. ORGANIZATION AND APPROXIMATE DATE (YYYYMMDD) AT THE TIME THE ALLEGED ERROR OR INJUSTICE IN THE RECORD OCCURRED (Entry required) I&I STAFF, B CO (REINF), 4TH CBT ENGR BN, USMC; 20 MAY 2013

8. DISCOVERY OF ALLEGED ERROR OR INJUSTICE

a. DATE OF DISCOVERY (YYYYMMDD)	b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THE APPLICATION.
---------------------------------	---

20140212

9. IN SUPPORT OF THIS APPLICATION, I SUBMIT AS EVIDENCE THE FOLLOWING ATTACHED DOCUMENTS: (If military documents or medical records are pertinent to your case, please send copies. If Veterans Affairs records are pertinent, give regional office location and claim number.)
(1) MEMORANDUM OF LAW; (2) EXHIBIT A--DECLARATION OF SSGT ISAAC CORDEIRO; (3) EXHIBIT B--PORTSMOUTH NAVAL MEDICAL CENTER RECORDS

10. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, ☒ YES. THE BOARD WILL DETERMINE IF WARRANTED. ☐ NO. CONSIDER MY APPLICATION BASED ON RECORDS AND EVIDENCE.
D.C. (At no expense to the Government) (X one)

11.a. COUNSEL (If any) NAME (Last, First, Middle Initial) and ADDRESS (Include ZIP Code)
5 U.S.C. 552(b) (6)

b. TELEPHONE (Include Area Code) 5 U.S.C. 552(b) (6)

c. E-MAIL ADDRESS
gary@garymbowman.com

d. FAX NUMBER (Include Area Code)

e. I WOULD LIKE ALL CORRESPONDENCE/DOCUMENTS SENT TO ME ELECTRONICALLY. ☒ YES ☐ NO

12. APPLICANT MUST SIGN IN ITEM 15 BELOW. If the record in question is that of a deceased or incompetent person, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY THE APPLICATION. If the application is signed by other than the applicant, indicate the name (print) and relationship by marking one box below.

<input type="checkbox"/> SPOUSE	<input type="checkbox"/> WIDOW	<input type="checkbox"/> WIDOWER	<input type="checkbox"/> NEXT OF KIN	<input type="checkbox"/> LEGAL REPRESENTATIVE	<input type="checkbox"/> OTHER (Specify)
---------------------------------	--------------------------------	----------------------------------	--------------------------------------	---	--

13.a. COMPLETE CURRENT ADDRESS (Include ZIP Code) OF APPLICANT OR PERSON IN ITEM 12 ABOVE (Forward notification of all changes of address.)
5 U.S.C. 552(b) (6)

b. TELEPHONE (Include Area Code) 5 U.S.C. 552(b) (6)

c. E-MAIL ADDRESS
5 U.S.C. 552(b) (6)

d. FAX NUMBER (Include Area Code)

14. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM. (U.S. Code, Title 18, Sections 287 and 1001, provide that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)

CASE NUMBER
(Do not write in this space.)

15. SIGNATURE (Applicant must sign here.)

5 U.S.C. 552(b) (6)

16. DATE SIGNED
(YYYYMMDD)
20150309

JUN 12 2015



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

HD:hd
Docket No. 03701-11
June 23, 2011

THE HONORABLE BENJAMIN L CARDIN
UNITED STATES SENATOR
TOWER 1 STE 1710
100 S CHARLES ST
BALTIMORE MD 21201

Dear Senator Cardin:

This is in further reply to your letter of January 10, 2011 concerning
5 U.S.C. 552(b)(6), United States Navy Reserve,
Retired.

Enclosed is a copy of the letter informing Chief Hall that his
application has been denied.

Your interest in this case is appreciated, and the Board regrets that
a more favorable reply cannot be made.

Sincerely,

5 U.S.C. 552(b)(6)

W. DEAN PFEIFFER
Executive Director

Enclosure



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

HD:hd
Docket No. 03701-11
23 June 2011

5 U.S.C. 552(b) (6)

Dear 5 U.S.C. :

This is in reference to your counsel's letter dated 25 March 2010 with enclosures, seeking reconsideration of your previous application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

Your previous case, docket number 2306-06, was denied on 17 August 2006. You requested modifying your fitness report for 16 September 2004 to 15 September 2005 by raising the mark in block 35 ("Military Bearing/Character") from "3.0" on a five-point scale to "4.0" and block 38 ("Leadership") from "4.0" to "5.0." You impliedly requested that this report be modified further by adding all favorable comments and promotion recommendations that, you assert, had been unjustly eliminated. You now add requests for retroactive advancement to pay grade E-8 and advancement to pay grade E-9 effective June 2006.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, reconsidered your case on 23 June 2011. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your letter, together with all material submitted in support thereof, the Board's file on your prior case, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the memoranda furnished by the Navy Personnel Command (NPC) dated 27 and 29 October and 24 November 2010, the advisory opinions furnished by NPC dated 24 November 2010 and 18 February 2011, the NPC e-mail dated 12 November 2010 and the memo

for record dated 12 November 2010, copies of which are attached. The Board also considered your counsel's letters dated 11 November 2010 and 22 April 2011 with enclosure.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In substantial concurrence with the comments contained in the advisory opinion dated 24 November 2010, the Board adhered to its previous decision. The Board was unable to find the command master chief caused the contested fitness report, which was submitted by the commanding officer, to be downgraded in reprisal for your refusal to comply with the command master chief's unlawful orders. In this regard, the Board particularly noted that in blocks 42 and 43 ("Promotion Recommendation") of the contested report, you received the highest possible mark, "Early Promote," ahead of your two peers; and that in block 34 ("Command or Organizational Climate/Equal Opportunity") of the contested report, you were marked "4.0," whereas the same reporting senior had marked you "3.0" in that block in the immediately preceding report for 3 October 2003 to 15 September 2004. Since the Board still found no defect in your fitness report record, it had no basis to recommend your advancement to either pay grade E-8 or E-9. In view of the above, the Board again voted to deny relief. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

5 U.S.C. 552(b)(6)

W. DEAN PFETTER
Executive Director

Enclosure

Copy to:

5 U.S.C. 552(b)(6)



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

HD:hd
Docket No. 03701-11
April 13, 2011

THE HONORABLE BENJAMIN L CARDIN
UNITED STATES SENATOR
TOWER 1 STE 1710
100 S CHARLES ST
BALTIMORE MD 21201

Dear Senator Cardin:

This replies to your letter of January 10, 2011 concerning **5 U.S.C. 552(b) (6)**, United States Navy Reserve, Retired.

5 U.S.C. 552(b) (6) case is ongoing. On March 25, 2011 this Board received a fax from him, a copy of which is enclosed, that was understood as a request to withdraw his application, so his case was administratively closed by letter of March 25, 2011, a copy of which is also enclosed. On April 4, 2011 he forwarded another fax, a copy of which is enclosed, stating that his previous fax had not been intended as a request to close his case. Accordingly, on April 6, 2011 his case was administratively reopened.

Enclosed is a copy of the Assistant General Counsel (Manpower and Reserve Affairs) letter to **5 U.S.C. 552(b)** counsel dated April 8, 2011.

By letter dated 8 March 2011, a copy of which is enclosed, this Board forwarded to his counsel memoranda from the Navy Personnel Command PERS-3C dated 27 and 29 October and 24 November 2010 and advisory opinions from PERS-32 dated 24 November 2010 and PERS-00J1 dated 18 February 2011, copies of which are also enclosed. As a general rule, the Board will not decide a case prior to the expiration of the 30-day period from the date of the letter forwarding advisory opinions unless it has received the applicant's response to the opinions.

I have also enclosed information relevant to **5 U.S.C. 552(b) (6)** case that the Board has obtained from the Department of Defense Inspector General and PERS-803.

As a matter of information, hearings before the Board are not granted as a matter of right. In every case before the Board, after all of the evidence of record has been studied, the Board either denies the application, recommends that the requested relief be granted, or determines that a hearing should be conducted. Hearings are granted when the Board determines that there is some indication of error or injustice and that a hearing will serve a useful purpose.

You will be informed of the final disposition of 5 U.S.C. 552(b) (6) application. Your interest is appreciated.

Sincerely,

5 U.S.C. 552(b)(6)

W. DEAN PFEIFFER
Executive Director

Enclosure

Copy to:

The Honorable Senator Barbara Mikulski

The Honorable Congressman Steny H. Hoyer



DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
(MANPOWER AND RESERVE AFFAIRS)
1000 NAVY PENTAGON
WASHINGTON, D.C. 20350-1000

April 8, 2011

5 U.S.C. 552(b) (6)

Re: BCNR Reconsideration ICO 5 U.S.C. 552(b) (6), U.S. Navy
(Retired), Docket No. 02306-06

Dear 5 U.S.C. 552(b)

This correspondence is in response to your letter to the Secretary of the Navy of March 16, 2011. I am responding on behalf of the Secretary.

In your letter you request a series of extraordinary measures on behalf of your client, 5 U.S.C. These requested measures include, among others, withdrawal of authority from the Board for Correction of Naval Records (BCNR) to make a final decision on 5 U.S.C. petition, disqualification of BCNR staff from involvement in the consideration of 5 U.S.C. petition, and the disallowance of advisory opinions unless there is written justification in the record for their consideration.

BCNR is empowered by law to act for the Secretary and, when appropriate, correct military records. I am the official delegated the authority to act on most BCNR recommendations granting relief with the exception of certain cases not implicated here that the Assistant Secretary of the Navy (Manpower and Reserve Affairs) and the Secretary of the Navy have reserved to themselves. Having reviewed numerous cases, I can assure you that advisory opinions are vital to the fair consideration of BCNR petitions and that in the vast majority of petitions where BCNR has recommended relief and I have granted it, the advisory opinions recommended denial. I can also assure you that BCNR staff diligently process thousands of petitions a year knowing that each is vitally important to the petitioner concerned.

For these reasons, your requests are denied and BCNR will continue to process 5 U.S.C. 552(b) petition as it does all such petitions. However, BCNR is submitting your client's case to a

new panel for reconsideration. When that panel issues its results, 5 U.S.C. [REDACTED] will be notified.

Sincerely, [REDACTED]

5 U.S.C. 552(b)(6)

Robert L. Woods
Assistant General Counsel
(Manpower and Reserve Affairs)



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

HD:hd
Docket No. 03701-11
23 June 2011

5 U.S.C. 552(b) (6)

Dear 5 U.S.C. 552(b) (6):

This is in reference to your interest, as counsel, in the case of
5 U.S.C. 552(b) (6) USNR, Retired.

Enclosed is a letter addressed to your client informing him that his application has been denied. It is requested that you transmit the denial letter to him, a copy of which is enclosed for your records.

It is regretted that a more favorable reply cannot be made.

Sincerely,

5 U.S.C. 552(b)(6)

W. DEAN PFETTER
Executive Director

Enclosure

CAT
EPS#
26/48/62

REFERENDUM

Affix

5 U.S.C. 552(b) (6)



03701-11

Subject's Name:

5 U.S.C. 552(b) (6)

Last

First

MI

Suffix

☐ REQUEST FOR RECONSIDERATION

☐ Approved: _____

☐ Disapproved: _____

Signature

Date

☒ ADMINISTRATIVE RE-OPEN

☒ Approved: _____

5 U.S.C. 552(b) (6)

Signature

Date

6 APR 11

COMMENTS: _____

NOTE: Please deliver to
OIS Section with "closed"
BCNR file

NEW Docket No.

(OIS/11 1Jul86)

5 U.S.C. 552(b)(6)

attorneys and counselors at law

VA Office

5 U.S.C. 552(b)(6)

Replace with LAST
submission with this
corrected version. Thank you

5 U.S.C. 552(b)(6)

November 11, 2010

Corrected Version Via US Postal Service

The Honorable W. Dean Pfeiffer
Executive Director
Board for Correction of Naval Records
2 Navy Annex Room 2432
Washington, DC 20370-5100

Re: 5 U.S.C. 552(b)(6) Retired

Board for Correction of Naval Records (BCNR)

Docket #: 09130-10 (Reconsideration)

- 1 - Confirmation That Case is Being Reconsidered (p. 4)
- 2 - Expanded Protection Under the MPWA for Servicemembers Punished in Reprisal for Assisting Sexual Harassment Victims to file an EO Complaint (pp. 2-3, 4-8)
- 3- Inapplicability & Waiver of Processing Time Guidelines (p. 8)
- 4- BCMR's Advisory Opinion Procedure is Erroneous (p. 8-9)
- 5- Request for Personal Appearance/Hearing (pp. 9-16)
- 6- BCMR Adjudication Standards (pp. 16-23)
- 7- Request for Recusal or Disqualification of Analyst (pp. 23-25)

Of Counsel

5 U.S.C. 552(b)(6)

Dear Executive Director Pfeiffer:

I am writing to you on behalf of my client, 5 U.S.C. 552(b)(6) regarding seven matters. While on track for Master Chief Petty Officer, he was the victim of an adverse personnel evaluation, subsequently nonselected for Senior Chief Petty Officer, and mandatorily retired as a result of vindictive bias and wrongful retaliation because he refused to comply with his command master chief's illegal orders to (i) cover-up an incompetent Navy subordinate's display of her breasts and lap-dance, on duty, in uniform, at the Navy office; (ii) cover-up that same Navy subordinate's sexual harassment of a female civilian employee; and (iii) prevent the civilian employee from filing a sexual harassment equal opportunity complaint to avoid embarrassment to the command. Not only did 5 U.S.C. 552(b)(6) refuse but he assisted the victim to file her complaint. In retaliation, the command master chief destroyed 5 U.S.C. 552(b)(6) exemplary career -- the command master chief abused his position of trust by lying to and deceiving the commander through false adverse reports about 5 U.S.C. 552(b)(6) performance.

Be advised that issue seven involves the sensitive issue of the disqualification of the case analyst and a discussion of the Executive Director's role. The issues are summarized:

REC'D NOV 22 2010

5 U.S.C. 552(b)(6)

The Honorable W. Dean Pfeiffer
Executive Director, BCNR

Re: Supplement to Request for Reconsideration

Retired 5 U.S.C. 552(b) (6), Docket # 09130-10

First, please advise Applicant and me whether, in fact, the BCNR is reconsidering the case. In approximately April of this year, you sent a summary letter which advised Applicant that you had declined to reconsider the case. Applicant and I were pleasantly surprised, however, to learn from Congressman Hoyer's office that you apparently informed Congressman Hoyer in September 2010 that the case is being reconsidered.

Second, this case presents the BCNR with the historic opportunity of becoming an ally of the Secretary, sexual harassment victims, and Marines and Sailors fighting sexual harassment in the war against sexual harassment and assault. *The time is ripe for the BCNR to use its equitable powers to determine that Servicemembers assisting victims to file a sexual harassment complaint are deemed to have attempted to file a protected complaint, thus qualifying those Servicemembers for protection under the Military Whistleblower Protection Act.* If it declines to do so – by refusing to apply the great remedial equitable power possessed only by BCMRs – the BCNR will stand idly by as Servicemembers sympathetic to sexual harassment and assault victims stand as prey – with bullseyes on their backs – to revengeful predators in the chain of command intent on punishing those Servicemembers who assisted victims to surface embarrassing information. 5 U.S.C. current case is a classic illustration of this phenomenon.

The result is that the wrongdoers are able to isolate the victims from unprotected colleagues who provide consultation, and superiors, who provide guidance, advice and assistance. That leaves victims alone to walk through the gauntlet of a chain of a command which often includes one or more members hostile to reporting sexual harassment or assault. Under those circumstances, the reporting of sexual assaults is not likely to rise significantly because the victims have no lifelines that can act with the knowledge that the Secretary and the Navy will protect their "backs." This is a function that only the BCNR can effectuate. And 5 U.S.C. case is the vehicle for the action.

There should be no doubt as to the importance of the proposed course for the BCNR. Sexual harassment has the attention of leadership because of its impact on morale, effectiveness of the Force, and national security. This is the opportunity for a doctrinally sensitive BCNR to join the fight and make a difference. In establishing April as *Sexual Assault Awareness Month*, Secretary of Defense Gates pronounced, "The Department of Defense has a no tolerance policy toward sexual assault. This type of act not only does harm to the victim; it destabilizes the workplace and threatens national security." www.dcmilitary.com/stories/041510/journal_28251.shtml.

On May 17, 2010, Undersecretary of Defense (Personnel and Readiness) Dominguez informed the nation on *The CBS Evening News* that of approximately 200,000 women in the Army, 2,900 were sexually assaulted in 2009, with 66% involving rape or aggravated assault.

The Honorable W. Dean Pfeiffer
Executive Director, BCNR

Re: Supplement to Request for Reconsideration

Retired 5 U.S.C. 552(b) (6)

Docket # 09130-10

CBS reported that, "One in three female soldiers will experience sexual assault while serving in the military, compared to one in six in the civilian world."
www.cbsnews.com/.../main4872713.shtml.

In June of this year, the Sea Service Leadership Association's 23rd *Annual Women's Leadership Symposium*, attended by over 1,000 Marine, Coast Guard and Naval personnel, addressed sexual harassment and assault. Women stated that readiness included a safe working environment free from sexual harassment and assault. In response, 5 U.S.C. 552(b) (6), Chief of the Navy's Personnel Readiness and Community Support Branch, announced *the combating of sexual harassment and assault is a top work-life priority for its Servicemembers and is a "matter of the highest priority for the Secretary of the Navy."* 5 U.S.C. 552(b) (6) revealed that for that reason, the Secretary of the Navy stood up the Department of the Navy Sexual Assault, Prevention and Response Office. *Federal News Radio 1500 AM: Navy Declares War on Sexual Harassment.* www.federalnewsradio.com/?nid=35&sid=1972473-cached (6/4/2010). That followed the Navy's *Sexual Assault Awareness Observance* in April 2010.

Since the war against sexual harassment and assault is a top priority of the Secretary, the time is now ripe for the BCNR to use its powerful tools – *especially its expansive power – to create a factual record that enables Servicemembers assisting victims to be shielded from revengeful actions through the protective power of the Military Whistleblower Protection Act.* Such a move by the BCNR would display institutional responsiveness and management of the personnel system in the spirit envisioned by Congress when it created the BCMR system. Indeed, Congress never intended to solely protect the victim of sexual harassment, while leaving in the cold – to be punished at will by the command – those Servicemembers who took affirmative steps to facilitate the victim's actual report. Such a result opens those Servicemembers to retaliatory sanctions by revengeful command members and erodes the support structure for the victims. That is a patently unreasonable way to fight the war against sexual harassment and assault.

Third, Applicant believes that statutory processing times in whistleblower reprisal and BCMR adjudications do not apply on reconsideration; and, in any event, Applicant waives those requirements.

Fourth, the BCNR's procedure for advisory opinions is erroneous.

Fifth, the BCNR should afford Applicant a personal appearance and hearing.

The Honorable W. Dean Pfeiffer
Executive Director, BCNR

Re: Supplement to Request for Reconsideration

Retired 5 U.S.C. 552(b) (6)

Docket # 09130-10

Sixth, the law of BCMR adjudication requires the BCNR to address Applicant's arguments, analyze the entire record – including affidavits from Applicant's witnesses – and base an equitable and legal analysis and result on the record. Under those circumstances, the record supports relief for Applicant.

Seventh, the BCNR's case analyst should recuse himself or be disqualified from the case based on an actual or appearance of impartiality, or out of an abundance of caution. His comments to Applicant implicated adjudication standards referred to in six above, or gave rise to a fairness problem under the public perception test – significant issues before the BCNR because it sets the example in the Navy's personnel field.

The above matters, one through seven, are discussed below.

1. Confirmation of Reconsideration

In April of this year, the BCNR sent a written statement summarily denying Applicant's request for consideration. Additionally, you and the case analyst did not return my telephone calls for a meeting regarding the reason for the denial.

Thus, I was pleasantly surprised by the Navy's observation to Congressman Hoyer, in September 2010, that the BCNR is now considering the case on the merits and that it was sent to Millington's Navy Personnel Command for an advisory opinion.

I wish to confirm that reconsideration has been granted and the case is now being considered on the merits. Would your office indicate so to me?

2. Protecting Servicemembers, Who Assist Sexual Harassment Victims to File a Complaint With the Command, From Reprisal by Revengeful Members of the Chain of Command

Compelling policy reasons warrant the BCNR taking an expansive view of whistleblower retaliation allegations, as in this case. The Secretary, you acting on behalf of the Secretary, and the BCNR should not abdicate the statutory responsibility to adjudicate this case under an expansive equity standard in favor of subordinate personnel boards or the Navy's prior inspector general investigations (years earlier) which did not substantiate the claim under the legal "smoking gun" standard.

What distinguishes the BCNR from all other personnel management entities in the Navy is that Congress delegated to it a reserve of equitable powers to correct apparent wrongs even when the result is legally correct. This is a power not possessed by organizations such as the Supreme Court, Federal courts, inspectors general, Office of The Judge Advocate General, and the Navy Personnel Council. Only the Secretary acting only through the BCNR can exercise that power.

The Honorable W. Dean Pfeiffer
Executive Director, BCNR

Re: Supplement to Request for Reconsideration

Retired 5 U.S.C. 552(b) (6)

Docket # 09130-10

When a case arrives at the BCNR, the paradigm shifts. The legal “smoking gun” standard – which reflects an institutional bias on behalf of the Navy as the standard makes it difficult for an applicant to prove his or her case – recedes as the curative powers of equity runs her course (for a BCNR predisposed to using the power to supervise the Naval personnel system). Under the paradigm shift, the fact that a case has been investigated and even re-investigated is not dispositive of denial. Rather, under the paradigm shift the BCNR examines the facts anew in more detail for deeper meaning with a more expansive standard for analysis under equity and fairness, not just the letter of the law.

The degree to which the Board has immense equity power particularly in the area of whistleblower retaliation may be difficult to appreciate without a firm grasp of the pertinent historical evolution of Service Boards for Correction of Military Records (BCMRs).

a. Creation of BCNR & BCMRs in Era of Social Torment

The *Legislative Reorganization Act of 1946*, 60 Stat. 812 (1946) provided that the Secretary of War, along with the Service Secretaries, acting through civilian boards were “authorized to correct any military or naval record...to correct an error or remove an injustice.” 60 Stat. 812, 817 (1946). While the main factor for the creation of Service Boards for Correction of Military Records was the delegation of the workload of a busy Congress, there was also a legitimate recognition by Congress for an entity with the right amount of time to address the personnel concerns of the military. The decade of the 1940s was torrential in comparison to modern times. Following Hitler’s commencement of WWII, the U.S. began a massive rearmament program for the military. In 1940, a peacetime draft was implemented with the establishment of the order of induction of some 16,000,000 men. At the same time African-Americans protested the racial discrimination they faced in the military.

b. BCMRs, Congress & Focus on Social Issues

Following the Japanese attack on Pearl Harbor and America’s entrance into WWII, Congress commenced its reorganization process as stated above. **Congressman Maroney, vice chairman of the Joint Committee on Legislative Reorganization, wrote that Congress knew it was inevitable that the military would treat some of its members unjustly and discharge them in a defective manner. Congressman Maroney opined the stress of war and the huge numbers of Servicemembers meant that mistakes would be made.** He also advised that Congress was not staffed to give the Servicemembers the fair evaluation on the issues they deserved.

The Honorable W. Dean Pfeiffer

Executive Director, BCNR

Re: Supplement to Request for Reconsideration

Retired 5 U.S.C. 552(b) (6) Docket # 09130-10

Accordingly, Congress' creation of the BCMRs was designed to deal with a multitude of social issues in the personnel context. Congress delegated the equity power which makes the Boards for Correction of Military Records among the most powerful administrative boards in the nation, and clearly the most powerful in the Department of Defense. Boards for Correction of Military Records have powers to change the facts in records or create records, thereby triggering a series of legal entitlements. Not even the Supreme Court has that kind of power; and neither do other federal or state courts. **Given this enormous equity power, the Secretary and the Board are empowered to grant relief in a range of circumstances where relief could not be granted under the law.**

When President Truman ended racial segregation in the military, the Service Secretaries, acting through the BCMRs, were charged with the responsibility of enforcing the law during a time in which desegregation was very unpopular. The context of the BCMRs' development allows us to see one of its many institutional roles is to enforce unpopular social directives from the President or Congress. In this respect, BCMR protects the unpopular minority from the tyranny of the majority. The equivalent of that today would include the Servicemembers charged with homosexuality and Muslim Servicemembers suspected of disloyalty, as well as racial minorities, women and whistleblowers suffering retaliation, like 5 U.S.C. among others.

c. A Special Focus on Retaliation Claims

(1) Military Whistleblower Protection Statute

Moreover, it appears the BCNR has the greatest amount of power and authority to act in whistleblower retaliation cases than in any other category of cases. Congress has delegated the BCNR to act on whistleblower retaliation cases through the Military Whistleblower Protection Act or statute, Title 10 U.S.C. § 1034 (1994), which provides a degree of protection to military personnel who report information on improper or illegal activities by other military personnel. Further, Title 10 U.S.C. § 1034 is a forum through which members of the Armed Forces could bring their grievances. *Hernandez v. U.S.*, 38 Fed. Cl. 532, 536 (1997). Thus, the statute provides for an investigative and administrative process for the handling of improper retaliatory personnel actions.

Although not required to do so, a claimant may submit an allegation to the Inspector General, who investigates allegations of prohibited personnel actions in violation of the statute. Title 10 U.S. C. § 1034(c).

Congress vested and entrusted Service Secretaries through their Boards for Correction of Military Records with the responsibility of adjudicating claims made by persons complaining of retaliatory action taken against them. Title 10 U.S. C. § 1034(f).

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In the *Military Whistleblower Protection Statute*, Congress stipulated responsibilities for Boards for Correction of Military Records, including: reviewing of any Inspector General's report of investigation; requesting the Inspector General to gather further evidence; propounding interrogatories; requesting the production of evidence; conducting or receiving depositions; holding an administrative hearing. Title 10 U.S.C § 1034(f)(2), (3) and (4).

So significant is the area that Congress took the extraordinary step of authorizing Boards for Correction of Military Records – normally benign remedial bodies – to recommend that the Service Secretary take appropriate disciplinary action against the person who committed the personnel violation. Title 10 U.S.C. § 1034(f)(6).

(2) *BCMR Statute*

The combination of the *Military Whistleblower Protection Statute* with the BCMR statute is an explosive combination mandating expansive analysis in the arena of whistleblower protection for purpose of managing the Armed Forces in a manner complying with Congress' mandate for the rooting out of the pernicious evils of whistleblower retaliation.

The BCNR's equity test includes not just actual conduct clearly proven (a standard which governs subordinate administrative actors, agencies and boards) – but one which *is met in this case* – but ***apparent actions that impact on the appearance or the public perception of fairness*** in the Naval system. Just as 5 U.S.C. 552(b) referred to *Washington Post* coverage of personnel problems in the Navy, consider that when the disposition of military whistleblower retaliation claims are published in the *Washington Post* or *Washington Times*, elements of the public lose confidence in the Armed Forces' fair treatment and management of America's daughters and sons as Sailors attempting to stop sexual harassment suffer career assassination at the hands of senior leaders who attempted to thwart reports of sexual harassment.

In an era where military and bureaucratic institutions require the trust of the public for effective functioning – i.e., belief and support of the Navy mission by Naval personnel, their families, Congress, media and public – disposition of documented reprisal complaints should be in a reasonable manner. The Secretary, through the BCNR, should ensure that relief is granted to persons with credible cases of whistleblower reprisal. This case presents an independently investigated and well documented report of a retaliation against Applicant. The investigation presents a battery of witnesses establishing, in fact and in appearance, that his military supervisor retaliated against him based on a pattern of conduct with Applicant and other Navy personnel.

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The record establishes an actual and/or apparent retaliation reprisal – as well as bias and the other assignments of error – as a matter of law and equity. One is hard pressed to think of what more any applicant could possibly do.

A declination to grant relief in a case such as this would signal the BCNR's use of an unreasonably and unwarranted stringent legal standard, as well as an abandonment of the equitable "appearance" and "public perception" tests. The result would be the BCNR's institutional bias in favor of offending command leaders, as the BCNR would stand by watch and leaders like Applicant become victimized by career assassination as it values a conservative application of BCNR rules in support of the status quo rather than "changing" or evolving to fight on the frontline in the Navy's and Secretary war against sexual harassment and assault.

3. Whistleblower Processing Requirements Are Inapplicable & Waived

As contained in the original filing, the MWPA provides that the BCNR is to adjudicate whistleblower claims within 180 days. Applicant does not believe that provision is operative in this case. Congress intended for that rule to take place in a case where an active duty Servicemember raises a complaint. There is no military efficiency to be achieved by applying the rule to retirees. Moreover, Applicant waives any application of the rule.

Additionally, Applicant does not believe that the BCMR adjudication timeline standards are applicable to cases on reconsideration. The Board has already adjudicated the case and it is merely an extension of a previously considered case. Congress did not envision counting that case twice for adjudication timeline standards. Moreover, Applicant waives any application of the rule.

4. Correction of an Advisory Opinion Policy

Your response to Congressman Hoyer warrants an adjustment. The letter indicated that if the Navy Personnel Command's advisory opinion is not entirely favorable, 5 U.S.C. 552(b)(6) is to be furnished with a copy of the advisory opinion. That is consistent with the provisions of the BCNR's website.

The law, however, is more expansive. Title 10 § 1556(a), *Prohibited Ex parte Communications*, applicants shall be provided, "a copy of all correspondence and communications (including summaries of verbal communications) to or from the agency or board, or a member of the staff of the agency or board, with an entity or person outside the agency or board that pertain directly to the applicant's case or have a *material effect* on the applicant's case" (emphasis added).

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Congress does not authorize BCMRs to secrete any part of an advisory opinion from an applicant. In fact, any such withholding is inconsistent with the transparency in government interests underlying Congress' decision to require release of all outside contacts with the BCNR deliberative process, including advisory opinions.

Since a recommendation by the Navy Personnel Command in this case has a material effect on the case, 5 U.S.C. 552(b)(6) is entitled to review it no matter what it states. I trust you will provide us with a copy of it. Will you do so?

5. The BCNR Should Grant Applicant a Personal Appearance & Hearing

This case has all the elements ripe for triggering a personal appearance and investigation.

a. Recap of Allegations

In stark contrast to his original request for relief before the BCNR several years ago, 5 U.S.C. current request for reconsideration is summarized below:

5 U.S.C. current request for reconsideration portrays a classic case of a command master chief's infliction of a litany of improper whistleblower reprisal sanctions as well as unwarranted punishments based on bias against 5 U.S.C. When 5 U.S.C. refused his command master chief's order to obstruct a civilian employee from filing an equal opportunity complaint to the effect that the command master chief's favorite female enlisted sailor exposed her breasts in the office to her subordinates, the command master chief thwarted 5 U.S.C. career advancement by abusing his position of trust to manipulate and rig the personnel system against 5 U.S.C. That course is consistent with a pattern of misuse of the personnel system exhibited by the command master chief as illustrated in the current evidentiary record. From an institutional or policy perspective, this case tests the Secretary of the Navy's commitment to Navy core values, and the eradication and vindication of the pernicious wrongs arising from the mortal enemies of Naval management: whistleblower reprisal sanctions, bias, and other improper actions.

5 U.S.C. current filing before the BCNR contains the equivalent of a comprehensive report of investigation, including notarized statements regarding highly probative evidence from witnesses never previously considered by the BCNR.

5 U.S.C. current request for relief alleges fifteen injustices – the vast majority of which have not been previously considered by the BCNR nor evaluated in the light of the evidentiary record Applicant has currently submitted:

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- (1) Mismanagement of command policy;
- (2) Improper bias;
- (3) Wrongfully ordering 5 U.S.C. 552(b)(6) to obstruct the filing of an equal opportunity complaint and its investigation;
- (4) Violation of sound management and leadership practices by wrongfully undermining 5 U.S.C. effective management and administration of his office by repeatedly denying 5 persistent requests to fire his incompetent and immature principal assistant, a yeoman who disgraced the Navy with her indecent burlesque show, on duty at the NAFW, in uniform, before junior enlisted and civilians;
- (5) Unlawful reprisals and retaliation against a protected whistleblower;
- (6) Lying to senior officials with the intent to deliberately mislead and deceive them regarding Applicant 5 performance;
- (7) Wrongfully causing a personnel evaluation to be inaccurate;
- (8) Causing 5 U.S.C. 2004-2005 fitness report to be inaccurate in contravention of Navy policy, regardless of the motivation, on substantive, technical and procedural grounds, including a failure by the command to conduct mandatory midpoint counseling as required by law under the provisions of BUPERINST 1610.10;
- (9) Maliciously or negligently causing 5 U.S.C. nonselection to E7;
- (10) Causing 5 U.S.C. to unjustly face mandatory retirement and forever lose the career that had been lived for 23 years, and the significant potential he 5 U.S.C. 552(b)(6) had for senior leadership at the E-9 level and above;
- (11) Depriving 5 U.S.C. of the opportunity to compete for E-8 and E-9;
- (12) The conduct of the command master chief in question was so abusive and flagrant toward 5 U.S.C. that the command master chief divested himself of the status of his grade or rank;
- (13) The command master chief violated the Joint Ethics Regulations by misuse of official Government resources and processes for purposes of a personal vendetta;

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- (14) The command master chief uttered false statements about 5 U.S.C. to assassinate 5 character before his superiors at the Pentagon's OPNAV; and,
- (15) The command master chief engaged in a pattern of abuse and misuse of authority to effectuate detrimental objectives outside the scope of duties, principles, and practices authorized or tolerated by the Secretary, Chief of Naval Operations, or Assistant Secretary of the Navy (Manpower and Reserve Affairs).

b. Description of Investigation Submitted by 5 U.S.C. 552(b)(6)

5 U.S.C. current request for relief consists of 3 bound volumes (566 total pages, including argument consisting of 108 pages single-spaced (216 pages double-spaced); details all of his performance evaluations to show his consistent record of outstanding performance; details his record of stellar first-year performance while at the Navy Air Facility Washington (NAFW), at Andrews Air Force Base; details his outstanding performance the year after he departed Andrews for a subsequent high level position regarding Naval operations in the Pentagon, where he performed superbly for an Admiral; and presents detailed affidavits from:

- (i) 5 U.S.C. 552(b)(6)
- (ii) 5 U.S.C. 552(b)(6) (who commanded 5 U.S.C. at the NAFW and has the highest regard for 5 U.S.C. professionalism, ability and leadership);
- (iii) Civilian employee and former Military Policewoman Martin (who explains she was victimized by sexual harassment by a female; 5 U.S.C. disobeyed the command master chief's order that he 5 U.S.C. stop her from filing the equal opportunity complaint and assisted her to file her complaint, including by warning her that the command master chief would take other steps to block the filing of her complaint).
- (iv) 5 U.S.C. who reveals other revengeful actions taken by the command master chief against 5 U.S.C. and others; and,
- (v) 5 U.S.C. 552(b) whose statement and the command investigation of her complaints leave no serious question that the command master chief engaged in a pattern of abusing the personnel system as a form of retaliation.

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5 U.S.C. submission also contains notations of oral statements by two other anonymous persons regarding the command master chief:

One, a senior female currently on active duty wanted to report that she believed the command master chief sexually harassed her but she declined to file the report because she was concerned he would orchestrate a retaliation against her in the promotion board.

A second person, a civilian, relates that the command master chief falsified a complaint regarding his (the civilian's) performance. The civilian believes that false report was in retaliation because the civilian had a personal interest in a female petty officer that was the object of the command master chief's affections. The civilian declined to submit a statement before the BCNR for fear that the command master chief will embarrass him at his civilian employment by causing a ruckus at the workplace.

In light of this convoluted fact pattern that sounds like it comes from a Hollywood script for the old 1983 TV Show, *Emerald Point N.A.S.* (starring Dennis Weaver as an Admiral), the BCNR should hold a hearing or allow a personal appearance. Any declination to hold a hearing or allow a personal appearance might be an indication that the BCNR may harbor institutional bias in favor of the Naval command – see argument seven below – and, as a result, lacks an incentive to probe the case. The reality is that although the BCNR and other BCMRs claim they do not investigate, the Federal courts, which are superior, have ruled otherwise.

c. Case Law Supporting Personal Appearances and Hearings

While applicants do not have an *absolute* right to a personal appearance, neither do BCMRs have an unfettered or absolute right to deny personal appearances or hearings based solely on their subjective determinations.

As the 1945 and 1946 Congress wanted the BCMR system to operate fluidly without being bogged-down by a trial-type procedure for every records correction application, it did not make a personal appearance mandatory upon request of the applicant, as a matter of law. Thus, courts have ruled applicants have no due process right to a hearing before BCMRs. See *Paskert v. U.S.*, 20 Cl. Ct. 65, 77 (1990); see also *Roetenberg v. Secretary of the Air Force*, 73 F. Supp. 2d 631 (E.D. Va. 1999).

That proposition has long been a subject of challenge by observers of the military justice and administrative law systems.

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*The evolving law, however, has distinguished between an applicant's lack of an automatic entitlement to a right to appear upon demand, from a **BCMR's independent duty to investigate matters when such an investigation is warranted to properly adjudicate the case.*** Regarding the latter, the BCMRs have uniformly had trouble with the concept. For example, the National Defense provisions in 32 CFR § 581.1 (c)(iii) provides that the ABCMR "is not an investigative body," but that the ABCMR may, in its discretion, hold an evidentiary hearing or administrative hearing" to adjudicate a whistleblower claim.

However, historical practice and Federal court rulings reveal that BCMRs are *an investigative body*. Congress did not direct BCMRs to adjudicate cases based merely on the showing of an applicant's petition and Government documents from repositories. That was not the practice of Congress prior to 1946, when it corrected military records through private relief. As illustrated by the private relief bill documents of **5 U.S.C. 552(b) (6)**, **5 U.S.C.** efforts to correct his military records, Congress considered not only the traditional military background records, but compelled the War Department to furnish a vast array of documentary information not located in **5 U.S.C.** official personnel file, *and conducted investigative hearings for 3 days.* See *Congressional Record*, 76th Congress, 1st Sess., Vol 84, Part 10, July 31, 1939 at 10563. It does make sense that Congress expected BCMRs not to be an investigative body; how else would the BCMRs discover the truth when an investigation is required?

In fact, the early ABCMR understood that it was to conduct investigative hearings and memorialized that understanding in its 1950 records revealing it was to obtain probative documents from installations or whatever source under the Army's control, in addition to reviewing official personnel records; *send out interrogatories; take depositions; and initiate and conduct investigative hearings.* ABCMR, *Standard Operating Procedures for the Examining Branch of the Army Board for Correction of Military Records* (1950).

Additionally, Federal courts have held that BCMRs are an investigative body. For example, in *Richey v. United States*, 44 Fed. Cl. 577 (Ct. Cl. 1999), the U.S. Court of Federal Claims ruled BCMRs cannot deny relief if they fail to take reasonable steps to investigate and clarify problematic evidence after the applicant's evidence invalidates the presumption of administrative regularity. The *Richey* court criticized the ABCMR's "total and inexcusable failure" to investigate the rater's alleged comment to applicant that "junior captains are a dime a dozen, and if we need a scapegoat for the maintenance situation, it will probably be you." The *Richey* court concluded "*after perusing the administrative record, we find a total absence of any meaningful effort by the Correction Board to determine the truth*" of applicant's allegations (emphasis supplied). After reviewing Supreme Court guidance regarding "deficient records," the *Richey* court remanded the case to the ABCMR for the development of a record to enable it to decide the case.

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The Court directed the ABCMR to take oral testimony pursuant to applicant's request, and make specific and numbered findings of fact and conclusions of law based on each of applicant's allegations.

In *Black v. US*, 24 Cl. Ct. 465, 470 (1991), the Court of Federal Claims ordered the AFBCMR to “**investigate** whether or not plaintiff was the subject of a ‘covert intelligence activity to [establish] he was insane’ ”; “prepare a report” of the investigation; provide the investigation to applicant; and **hold a hearing** that permits applicant to call and cross-examine witnesses and produce relevant evidence (emphasis supplied).

Moreover, in *Werner v. United States*, 226 Ct. Cl. 462 (1981), **the court criticized the ABCMR for failing to conduct a hearing** and found the ABCMR reached an unbalanced decision.

There is no question that the BCNR is an investigative body. For the BCNR to deny relief without holding a hearing in this case would be contrary to the letter and spirit of the case law. Congressional intent for an informed BCMR adjudication would not be served if the BCNR denies relief without conducting an investigation on its own initiative, passes the “buck” to the Federal courts. Assuming Applicant could afford Federal court litigation – and he cannot – the interests of justice are not served by waiting for the Federal courts to order the BCNR to conduct an investigation regarding a matter the BCNR was obligated to conduct in the first instance, based on common sense, historical practice, a need to discover the truth and court rulings. That practice – in which BCMRs trundle applicants off to Federal court where they face a higher burden of proof, consumption of time, and greater expense for adjudication services Congress intended for them (Servicemembers) to have at no cost – is manifestly unfair. It is time for that practice to halt, and the BCNR can start by being sensitive to it.

But there is more in support of personal appearances and investigative hearings. In the early 1960s, Congress considered proposals and bills to allow applicants to have a hearing upon request. S. 2306, 85th Conf., 1st Sess.; HR 9247, 88th Cong., 2 Sess.; S. 2313, 88th Cong., *Constitutional Rights of Military Personnel, Hearings Before Subcommittee on the Judiciary*, 1962, at 513. Opponents argued that mandatory hearings would congest BCMR dockets with primarily non-meritorious claims and increase administration costs. Congress concurred.

Thirty-six years ago, Glossner and Rosenberg evaluated BCMR operations in a scholarly article, *Military Corrections Boards: Administrative Process and Review by the Court of Claims*, published in 23 *American Law Review* 391 (1974).

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*They criticized BCMRs, among other reasons, for not providing personal appearances or hearings upon an applicant's request in cases with **potential merit**; lacking formal discovery procedures; lacking a method for applicants to cross-examine authors of advisory opinions; and "an absence of uniformity in the regulations or policies pertaining to the production of copies of military records."* 23 *American Law Rev.* at 401.

Nevertheless, the BCNR's right to refuse or hold a personal appearance/investigative hearing is not absolute. A legal and equitable reading of legal and equitable reading to Title 10 USC § 1034 (*Protected communications; prohibition of retaliatory personnel actions*), points not only to a personal appearance, but a hearing in this case. Under Title 10 USC § 1034(f)(2)(A), the BCNR is required to review the report of the Inspector General (IG) – and should request one to review the allegations in Applicant's report/submission that have never been evaluated by the Inspector General, pursuant to Title 10 USC § 1034(f)(2)(B) (where there is no relevant/current IG report). That is, **5 U.S.C. (b)(6)** application and report of investigation contain substantial matters not previously considered by the Inspector General or the BCNR.

Under Title 10 USC § 1034(f)(2)(C), the Board "may receive oral argument, examine and cross-examine witnesses, take depositions, and if appropriate, conduct an evidentiary hearing." In that regard, Applicant has submitted the equivalent of a report of investigation – containing sworn statements – that reveals theories, arguments, details, facts, and information not previously submitted to the BCNR. Particularly since there is no follow-up Inspector General investigation to interview Applicant and his witnesses, it makes a great deal of sense for the BCNR to authorize a personal appearance and conduct a hearing – although Applicant's report of investigation and submission to the BCNR, standing alone, are an ample basis for the granting of relief.

Applicant interprets the letter and spirit of Title 10 USC § 1034 as requiring the BCNR to conduct an evidentiary inquiry into Applicant's whistleblower claims, particularly since the BCNR did not refer the current matter to the IG. Applicant believes strongly that his claim cannot be summarily dismissed on the grounds, such as those asserted by the BCNR in the initial denial of reconsideration.

Regardless of the law, as a matter of equity it is only fair for the BCNR to grant Applicant's request for a personal appearance and a hearing to explain submissions approximating 565-pages (including almost 120 pages in memoranda, and 465 pages in hearing exhibits). Under these circumstances, it is eminently reasonable for Applicant to request to explain the case and the lengthy pleadings through a personal appearance to ensure the BCNR accurately understands Applicant's positions. Further, a hearing under those circumstances promotes transparency, and openness and accountability to Servicemembers, their families and the public.

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Accordingly, under the import of *Werner v. United States*, a declination by the BCNR to conduct a personal hearing would be problematic because it deprives Applicant of the opportunity to clarify the case for the BCNR – ***and that is significant in light of the case analyst's apparent misunderstanding of the applicable standards and Applicant's arguments -- and impartiality problems*** (see Argument seven, below).

Similarly, at 32 CFR Part 724 § 724.221 (*Scheduling of Discharge Reviews*) the following governs the Naval Discharge Review Board (NDRB): “(a) If an applicant requests a personal appearance discharge review, or to be represented in absentia, the NDRB shall provide a hearing in the NCR or at another site within the forty-eight contiguous states.” ***If a Sailor may obtain an automatic personal appearance before the NDRB, it makes sense that the BCNR would grant Applicant a personal appearance or hearing under the unique facts and important issues of this case.***

6. Special Standards for Adjudication Upon Reconsideration

a. The Unmet Need for an Appellate Body Within DoD

The case law reflects judicial concern with a persistent pattern in the BCMR decision-making process which displays institutional bias in favor of the Services by disregarding or undervaluing the import of the record supporting applicants. Thus, from a public perception perspective, the reconsideration process has an appearance of a conflict of interest. That is, from an applicant's viewpoint, the BCNR's prior declination to reconsider the case may be an indication that it is not likely to recognize, take seriously or objectively resolve, the problems in the current case during the reconsideration process.

Indeed, it is impractical to expect that in every case a BCMR will be able to objectively and dispassionately review criticisms of its own work when applicants seek reconsideration of the opinion by the same BCMR issuing the original opinion. In those instances, it is unfair for the Servicemember to be denied a fair adjudication – including the loss of equity -- before his BCMR only to be trundled off to Federal court and its higher evidentiary burden, provided the Servicemember can afford expensive Federal litigation.

The problem rests, in part, with a major systemic or structural deficiency. There is no Department of Defense (DoD) appellate body above a Service BCMR. Rather than being allowed to appeal to a body internal to DoD, Servicemembers must reappeal to the same BCMR through reconsideration or turn to expensive litigation, which as stated previously is costly, has a very high evidentiary burden, and lacks privacy and equity.

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This defect is all the more glaring considering that Title 10 U.S.C. § 1034(g) authorizes a Servicemember alleging a whistleblower retaliation claim to appeal a BCMR's denial of relief to the Secretary of Defense (SECDEF), where it is adjudicated by a different and higher authority. Considering the multitude other important constitutional, statutory, equitable and regulatory issues before BCMRs, it appears prudent to have an internal and objective DoD level body to review certain categories of BCMR appeals on a discretionary basis.

Since Congress created the BCMR 64 years ago, in 1946, an explosion of issues have arisen before BCMRs. The Supreme Court has ruled BCMRs are the proper bodies to determine if Servicemembers have been prejudiced by violations of the Constitution, statute, or regulations, and to remedy those violations. The issues now include **whistleblower/reprisal allegations**; administrative command influence; violations of First Amendment rights to speech and religious freedoms; **sexual harassment and gender discrimination**; racial discrimination; discrimination against homosexuals; an array of challenges to medical disability and other medical decisions; professional discipline of doctors, lawyers, and chaplains; wrongful debt collection by the military; clemency regarding courts-martial convictions; administrative matters arising under the UCMJ, including nonjudicial punishment and prison administration; personnel/performance evaluation reports; home of record; memoranda of reprimands; promotions; retirements; separations; survivor benefit plans; titling decisions by law enforcement authorities; bonus entitlements; ROTC obligations and debts; *and an array of other matters pertaining to personnel administration.*

Congress regards BCMRs as the "guarantors of fair and equitable treatment for thousands" of current and former Servicemembers (*House Committee on National Security, National Defense Authorization Act for Fiscal Year 1999, 105 House Report 532 (May 2, 1998) (italics supplied).* However, since some areas have Service-wide impact, SECDEF should have the authority to stamp the BCMR system with the imprimatur of his and DoD's vision of the BCMR system as a national symbol of the role of justice, equity and fairness in the Services and nation. For constitutional rights should not be granted in one Service but withheld in another Service. Likewise, because he lacks the equity power of the Service Secretaries acting through BCMRs, SECDEF is relegated to the sidelines as Service Secretaries refuse to commit their expansive equity power to the war against sexual harassment.

A solution rests, in part, with history. In 1946, the War Department's Chief of Staff, General Eisenhower, issued War Department Memorandum 400-20-1, *Secretary of War's Board for Correction of Military Records*, 1 January 1946. The Secretary of War (SECWAR) appointed Board Members and directed the War Department's General and Special Staffs to support the requirements of the SECWAR BCMR, including advisory and investigative services.

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Although the SECWAR Board was subsequently phased out, its 1946 roots have resonance today. If the law reinstituted the SECWAR BCMR as the Secretary of Defense's DoD Board for Correction of Military Records (DoD BCMR), this case would not involve the BCNR at this point. The important policy question in this case, with Service-wide implications, would be decided on a uniform basis within DoD by the DoD BCMR if it exercised discretion to decide the case.

In effect, the DoD BCMR would serve as a "blowout preventer" or the last stop gap measure in the military to guarantee justice and equity for Servicemembers on behalf of Armed Forces personnel, their families, Congress, public and the nation. The DoD BCMR would review reconsideration appeals filed by Servicemembers, with a view toward adjudicating and granting relief in instances in which there is a miscarriage of justice, as in the current case; and ensure legal and equitable justice is rendered in compliance with the law of BCMR adjudication, without forcing Servicemembers to endure the burden and costs of Federal litigation before a court lacking equity powers. *The DoD BCMR would hear appeals of Service BCMRs purely on a discretionary basis.*

Unlike current Service BCMRs which are only part-time and weak Board Members (with full-time jobs) under the management of a strong executive director and staff, the DoD BCMR would have strong, full-time Board Members with a President to whom the executive director and staff would report and take direction daily. Unlike the 1946 structure of current BCMRs, the DoD BCMR would be capable of deploying worldwide as required, adjudicating accelerated or expedited emergency cases, and managing complex and protracted hearings. Moreover, although BCMRs have long discontinued the 1950 practice of routine investigations, interrogatories, depositions, and hearings required, the DoD BCMR would revive those practices and, in that regard operate similar to the 1946 SECWAR BCMR. The reality is some cases require investigation to ascertain the truth, and the DoD BCMR would have the authority and mandate to direct an investigation through DoD and Service elements or conduct the investigation itself, when is warranted.

**b. Special Sensitivity to Fairness in the Absence of Appeal to DoD Before
Costly Litigation in Federal Court**

Unfortunately, a DoD BCMR appellate body does not exist. Accordingly, 5 must turn to the Secretary of the Navy and his BCNR for review of their first denial of relief and subsequent declination to grant reconsideration before advising 5 U.S.C. 552(b) (6) that reconsideration apparently is in the works – after the analyst informed Applicant in effect that the case is lost.

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To ensure transparency, fairness to **5 U.S.C.** and the perception of fairness in the eyes of Servicemembers, Congress and public, the BCNR should provide extra care to adhere to the standards for BCMR adjudication. And frankly, the signals point another business as usual declination of relief -- leaving Applicant to turn to costly litigation if he could afford it -- in light of the BCNR's error regarding the advisory opinion, initial declination of reconsideration, declination to discuss the rationale for the initial denial of reconsideration, and granting of reconsideration without notice to Applicant or his counsel, as well as the analyst's gloomy comments to Applicant at the BCNR. Still, Applicant forges ahead because that is the only recourse available, as he seeks to reclaim the fair adjudication Congress intended for him to have without resorting to a costly Federal lawsuit he cannot afford.

(i) General Standards for BCNR Opinions

As observed by the Supreme Court in *Clinton v. Goldsmith*, 526 U.S. 529, 539 (1999), the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.*, provides guidance to Service Boards for Correction of Military Records for the resolution of cases. As an aid to more fully complying with the APA requirement that BCMR opinions adequately explain the rationale for its result, the test is whether the BCMR opinions contain a sufficiently *balanced and objective* discussion of the facts and governing standards for applicants and the public to be assured that the Board members (a) independently weighed all of the arguments and the evidence in the record; (b) applied the appropriate laws, policies, principles and equity considerations; and (c) reached a fair and balanced conclusion in determining whether the record supports or contradicts applicant's claims. *Cf. U.S. v. Rust*, 38 M.J. 726, 729-30 (AFCMR 1993).

A review of the pertinent case law reveals a disturbing trend. Boards for Correction of Military Records engage in a perennial violation of standards governing fair and balanced decision-making. As a result, periodic legally defective decision-making is endemic to the BCMR process. To the BCNR, that result may be inevitable or statistically insignificant. However, from the standpoint of applicants, their families and their communities, such results are anguishing, broken promises of fair treatment.

Even more troubling, only a few Servicemembers have the funds to challenge Service Secretaries, and their legions of Armed Services JAG lawyers and civilian counsel, and Department of Justice lawyers as well as other resources, in Federal court -- albeit at a higher standard since judicial review of the final decision of a military correction board is limited to a determination of whether the board's decision "is arbitrary and capricious, contrary to law, or unsupported by substantial evidence." *Frizelle v. Slater*, 111 F. 3d 172, 176 (D.C. Cir. 1997) -- or have the time or ability to litigate the case in Federal court *pro se*.

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Moreover, the number of defective BCMR cases issued annually that are not challenged in Federal court because the Servicemembers lack the funds, time or know-how, are unknown. The answer should be zero but that is extremely unlikely in light of the Federal cases that have been decided and the current case. The Congress implemented major initiatives in the 1990s to repair a broken management system regarding BCMRs. Ordinarily, one would think that BCMRs and their management would regard the duty of fairness and balance as one of its highest and most sacrosanct responsibilities not just for most cases, but for *all* cases. With regard to the authority of BCMRs to deny relief, as Judge Heuville opined, "The military's discretion may be broad, but, as the statute [Title 10 USC § 1552] plainly indicates, it is not boundless." *Homer v. Roche*, 226 F. Supp. 2d 222, 226 (D.D.C 2002).

(ii) *Secretarial Decisions*

Earlier this year, the United States District Court for the District of New Jersey addressed standards Service Secretaries must follow in evaluating BCMR cases. In *Waudby v. United States*, Civil Action No. 2:09-cv-1167 (SDW-MCA); 2010 U.S. Dist/ LEXIS 4723; 1/19/10, the USMA Superintendent discharged Cadet Waudby after 4 ½ years of enrollment during his senior year, withheld his Bachelor's Degree, and initiated action recover the cost of his West Point education. The ABCMR evaluated the evidence and concluded it warranted legal and equitable relief.

However, Assistant Secretary for Manpower and Reserve Affairs, the Honorable Pete Geren, issued a memorandum to the Deputy Assistant Secretary (Review Boards), on behalf of the Secretary, "refusing to accept the full determinations of the ABCMR." Upon review in Federal court, the district court ruled the Secretary's "choice of language indicates that he disregarded the ABCMR's finding of fact merely because he disagreed with it, not because it was unsupported by evidence." The court determined the "Secretary's deviation from the ABCMR's decision was against substantial evidence and thus arbitrary."

The conscientious objector case of *Kanai v. Geren*, 671 F. Supp. 2d 713 (D.MD 2009), is illustrative of problematic decision-making made by an agency delegated authority by the Secretary. The *Kanai* decision found taint of the conscientious objector process which denied Kanai relief, improper institutional bias in favor of the Army, legally defective opinion writing (lacking a "basis in fact, speculative and impermissible conclusions), **and the inability of a tainted agency to review the case again.**

Finally, in considering the remedy, Judge Messette found that the Army's defective decision-making, imprudent actions, and "multiple procedural irregularities" caused a taint in which "there is no way to cure." *Kanai* at 728. Accordingly, Judge Messette declined to remand the case to the Secretary and, instead granted relief to Kanai.

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In declining to remand the case, Judge Messette cited *Goldstein v. Middendorf*, 535 F. 2d 11339, 1344 (1st Cir. 1976), which, in declining to remand a case to the Secretary of the Navy, observed “impermissible grounds” by decision-makers “strongly” suggests “unreliable” conclusions “infected with bias.”

In *Mudd v. Caldera*, 25 F. Supp. 2d 113 (D. D. C. 1998), the US District Court for the District of Columbia ruled that Assistant Secretary Lister (for Manpower and Reserve Affairs) erred when she rejected the ABCMR’s recommendation to vacate Dr. Mudd’s conviction as a conspirator in the assassination of President Lincoln. The court determined her ruling was “arbitrary and capricious because it failed to address seemingly meritorious arguments raised by Dr. Mudd,” and because her decision was “unsupported by substantial evidence in the record.” *Mudd v. Caldera* at 121. The court opined, “where the Secretary of the Army endeavors to finally resolve a matter...and to determine whether there was error or injustice, he may not do so in a manner that is arbitrary and capricious or unsupported by the record.” *Mudd v. Caldera* at 123-124. The court vacated Secretary Lister’s decision and remanded the matter to the Secretary for reconsideration.

(iii) *BCMR’s Neglect to Address the Issues of Applicants*

In *Roberts v. Harvey*, 441 F. Supp. 2d 111, 118 (D.D.C. 2006), the U.S. District Court for the District of Columbia concluded that although Roberts raised the issue that he was misled by counsel or under duress, the ABCMR declined to address it. The court ruled, “the Board’s failure to address this argument renders its May 16, 2002 decision arbitrary and ‘requires a remand for a more fully reasoned explanation’ by the Board.” *Roberts v. Harvey* at 122.

In *Calloway v. Brownlee*, 366 F. Supp. 2d 43 (D.D.C. 2005), the US District Court for the District of Columbia ruled as follows regarding the ABCMRs failure to address issues raised by the applicant:

The District of Columbia Circuit has concluded that the failure of a BCMR to respond to arguments raised by a plaintiff, which do not appear frivolous on their face and could affect the Board’s ultimate disposition, is arbitrary....Accordingly, because it appears that this argument may have been raised at the agency level and the argument is not frivolous on its face, the ABCMR’s failure to address it was arbitrary and this case must be remanded to the Secretary of the Army to review this argument in the first instance. If the agency decides to disregard this argument, then it must expressly indicate that it has done so. Otherwise neither [the plaintiff] nor this court would be able to discern whether the [ABMCR] considered and was unpersuaded by those factors or whether the [ABMCR] simply excluded them from its decision making process. Moreover, if the [ABCMR] excludes those factors from consideration it must explain its rationale for doing so.

Calloway v. Brownlee at 55.

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In the ABCMR case of *Dickson v. Secretary of Defense*, 68 F. 3d 1396 (D.C. Cir. 1995), the Court of Appeals for the District of Columbia observed the Administrative Procedure Act prohibits arbitrary and capricious action, and requires the ABCMR to *adequately* explain its result in a manner which enables citizens and courts to evaluate the agency's rationale at the time of decision. Further, in explaining its decisions, the ABCMR may not dismiss an applicant's evidence, but must accord it some weight and explain its rationale for rejecting that evidence. Judge Wald ruled, "[w]hen an agency merely parrots the language of a statute without providing an account of how it reached its results, it has not adequately explained the basis for its decision." *Dickson*, 68 F. 3d at 1405.

In *Werner v. United States*, 226 Ct. Cl. 462 (1981), former 1LT Gerald Werner alleged before the U.S. Court of Claims that the ABCMR's decision violated his constitutional rights and was erroneous. The Court of Claims opined, *inter alia*, "the decision of the ABCMR is inadequate because there is no satisfactory indication that the ABCMR based its decision on a balanced consideration of all the evidence presented and available to it." *Werner* at 462. The Werner court noted that "without having granted a hearing" the ABCMR denied relief on the standard grounds there was "insufficient evidence" had been presented to indicate a "probable material error or injustice." *Werner* at 465-466. The Werner court observed, "The ABCMR did not specify the legal or factual grounds" for its conclusion, "although it appears that the ABCMR was guided by a case memorandum written by an ABCMR examiner." *Werner* at 462. The Werner court reviewed the evidence, arguments and law, and determined the ABCMR's denial of relief was erroneous in addition to being unbalanced. *Werner* at 477.

The Court of Claims subsequently explained that under *Werner* an ABCMR opinion need not always address each and every allegation raised, but must address "everything of legal significance." *Koster v. U.S.*, 231 Ct. Cl. 301, 311 (1982).

(iv) *Will Those Standards Be Applied?*

An objective reading of the BCNR's denial of Applicant's request for reconsideration appears to be a summary denial of new facts, a new investigation, new arguments and new theories not previously articulated. The BCNR did not engage in the required analysis or comply with the adjudication standards, some of which are summarized above. When Applicant's counsel called both the Executive Director and analyst for a meeting to clarify the BCNR's declination of the reconsideration request, there was no response.

Consequently, Applicant reasonably has apprehension whether the BCNR shall fully consider his concerns, if the case is resolved on the merits. That apprehension is increased when the BCNR articulated the wrong advisory opinion standard.

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Moreover, Congressman Hoyer's Office should not have had to inform Applicant of the most recent disposition of his BCNR case. *The Final Report of the Joint Committee of Congress*, December 1993, observed the *Legislative Reorganization Act of 1946* is "generally regarded as marking the inception of the 'modern Congress'." The 1993 *Final Report* commented that as a response to the overloading of the Congressional system in a wartime legislative environment, the 1946 Act, "minimized extraneous or peripheral legislation," by "banning the introduction of certain types of private legislation."

Those same considerations are in force today. Congress faces major decisions regarding the challenges of terrorism, War of Afghanistan, a War in Iraq, a major recession, tensions with Iran and North Korea, the drug cartel war in Mexico, the Gulf Oil crisis, other international crisis points, violent crime, responses to natural disasters, health reform, environmental pollution and global warming issues, strategic issues related to space exploration, aging infrastructure challenges, ballooning social entitlements arising from Social Security and Medicaid, as well as other challenging issues. In this context, the duty of the Secretary and his BCNR is to exercise maximum powers Congress has already delegated to them to deflect the need for attempted private relief legislation or Congressional oversight in individual cases.

Accordingly, again, Applicant should not have to turn to his Congressman to be informed that his case, which was denied on reconsideration, is now being considered on the merits – if that is indeed the status.

Moreover, Applicant's apprehension is intensified from a conversation he had with the case analyst – a conversation that appears to suggest the analyst is not using the applicable standards to evaluate the case but relies on impermissible factors. This is discussed in Argument seven below.

7. Impartiality of the BCNR, Request for Recusal/Disqualification of the BCNR Analyst and Discussion of the Executive Director and BCNR

a. Judicial Temperament

The American Bar Association defines judicial temperament as "compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice." Standing Committee on Federal Judiciary, *What Is Said and How It Works*, American Bar Association (1991) at 4. In 2008, George Washington Law School Professor Jeffrey Rosen addressed the subject in *The Supreme Court: Judicial Temperament and the Democratic Ideal*, 47 *Washburn Law Journal* 1 (2008).

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Professor Rosen observes the indicia of modern judicial temperament include a sense of vision, doctrine and sensitivity to the significance of the issues; an understanding of the institutional roles of the litigants before court, including the decision-maker's role in that process; the ability to embrace difference ideas, concepts and perspectives; accountability to the participants or litigants; and, a combination of boldness and practicality.

b. Discussion

The totality of the facts raise the issue of whether in this case the BCNR can serve as a "*guarantor of fair and equitable treatment*" (*House Committee on National Security, National Defense Authorization Act for Fiscal Year 1999*, 105 House Report 532 (May 2, 1998) (*italics supplied*) for Applicant.

This Summer's discussion between Applicant and the analyst, 5 U.S.C. 552(b)(6) is instructive. From the outset, counsel had authorized the BCNR to directly contact Applicant to obtain information. So, there was no problem with 5 U.S.C. 552(b)(6) having a conversation with Applicant, who advised 5 U.S.C. 552(b)(6) that the problematic command master chief in question worked on the floor above the BCNR. It was Applicant's good-faith understanding from 5 U.S.C. 552(b)(6) comments that the case had no prospects for relief because "one-on-one" or "he-said-she-said" cases are hard for applicants win; the case was old and had been investigated and nonsubstantiated by the inspector general years ago; and Applicant should move forward with his life and let this phase go. 5 U.S.C. 552(b)(6) shared he had a similar problem when he was in the Service. 5 U.S.C. 552(b)(6) also shared that the Executive Director did not support relief. That information constitutes the import or effect of the words that Applicant understood 5 U.S.C. 552(b)(6) to have made. A disillusioned Applicant informed counsel and during the same month sent counsel an email summary of the conversation.

Those recollections are based on Applicant's *honest and good faith* understanding of the conversation between himself and 5 U.S.C. 552(b)(6) who was also acting in good faith, kindness and compassion. Whether 5 U.S.C. 552(b)(6) does or does not have a different recollection, the operative appearances are the substance in the above paragraph, and Applicant's counsel is duty bound to raise the matter.

Based on Applicant's understanding of the conversation, it appears 5 U.S.C. 552(b)(6) did not read, or did not understand or elected to disregard Applicant's reconsideration submission, because it contained new facts, updated information, a new report, new theories, and new arguments.

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The information in Applicant's reconsideration request obviates any prior nonsubstantiation by the inspector general because it contains sworn statements from witnesses having first-hand knowledge of the command master chief's scheme against Applicant, and information from witnesses who have been victimized by the command master chief's reprisal *modus operandi*. Moreover, it does not appear that 5 U.S.C. 552(b)(6) ascertained that in the reconsideration request, Applicant requests the BCNR to assume an important institutional role in DoD's and the Navy's war against sexual harassment. Even more disheartening is 5 U.S.C. 552(b) (6) belief – or Applicant's perception thereof – the case is difficult to prove, has little merit and is not worth pursuing. This comment was expressed regarding the combination of the *Military Whistleblower Protection Act* and the BCMR statute, which as stated previously, constitutes the zenith of the BCNR's powers – an apparent abandonment of the operative legal tools.

Those conclusions are supported by the fact that the denial of the request for reconsideration was a summary dismissal and did not address any substantive details in Applicant's request for reconsideration, in contravention of the *Calloway v. Brownlee* line of cases.

The situation is dismaying for any applicant. Under the *Kanai v. Geren* and *Goldstein v. Middendorf* line of cases, this case borders on the granting of relief to 5 because of problems with the appearance of impartial or objective adjudication. However, that would require Federal court action and 5 U.S.C. cannot afford Federal court litigation – *unless the BCNR acted independently*. Likewise, there is no serious question that a Federal court acting under the *Mudd v. Caldera* line of cases would remove the analyst and probably the Executive Director from the case and refer supervisory and final action to the Assistant Secretary for Manpower and Reserve Affairs. But, again, there is no court involved in this case. Accordingly, Applicant crafts the following, which requests the disqualification of the analyst.

Under the circumstances – and given the BCNR's position as the role model for the Navy regarding fair adjudication – 5 U.S.C. should recuse himself from the case, or he should be ineligible to participate in this case out of an abundance of caution, or he should be disqualified from further participation in the case due to the actual or apparent lack of requisite impartiality *and/or a predisposition to applying the incorrect adjudication standards*.

Further, it is Applicant's understanding that 5 U.S.C. 552(b) revealed that the Executive Director opposed relief in this case. Assuming that to be the case, the Executive Director reasonably relied upon a flawed recommendation by the analyst. Indeed, it appears that the BCNR recognized its problematic decision and reversed course by addressing the case on the merits. Moreover, the Executive Director is an esteemed member of the BCMR community with years of experience. Applicant trusts that if the Executive Director believes that he is not impartial, he will recuse himself.

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8. Conclusion

In conclusion, based on the foregoing (i) the BCNR is urged to display extra sensitivity to its impartiality and commitment to fairness and equity in this case; and, (ii) 5 U.S.C. is entitled to the full relief requested.

Respectfully,

5 U.S.C. 552(b)(6)

cf:

Congressman Hoyer

Senator Mulkulski

Senator Cardin

5 U.S.C. 552(b)(6)