No. _____

In the Supreme Court of the United States

CDR JOHN F. SHARPE, USN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

VOLUME I

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APPENDIX A

United States Court of Appeals for the Federal Circuit

JOHN F. SHARPE, PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

2018-1406

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS IN NO. 1:15-CV-01087-TCW, JUDGE THOMAS C. WHEELER.

Decided: August 27, 2019

RACHEL J. ELSBY, Akin, Gump, Strauss, Hauer & Feld, LLP, Washington, DC, argued for plaintiff-appellant. Also represented by DEVIN S. SIKES; CAITLIN ELIZABETH OLWELL, New York, NY.

IGOR HELMAN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also

represented by ROBERT EDWARD KIRSCHMAN, JR., JOSEPH H. HUNT, DOUGLAS K. MICKLE; STEPHEN ROBERT STEWART, Office of the Judge Advocate General, General Litigation Division, United States Department of the Navy, Washington, DC.

Before TARANTO, SCHALL, and CHEN, *Circuit Judges.*

SCHALL, Circuit Judge.

John E. Sharpe is an officer in the U.S. Navy. In a decision dated February 8, 2016, the Board for Correction of Naval Records ("BCNR" or "Board") found Mr. Sharpe's 2009 separation from the service to have been unlawful. Accordingly, the Board recommended that Mr. Sharpe be returned to active duty, and the Assistant Secretary of the Navy approved the Board's recommendation. Before us now is Mr. Sharpe's appeal of the November 8, 2017 decision of the United States Court of Federal Claims that sustained the Navy's decision to deny Mr. Sharpe, upon his return to active duty, certain categories of back pay associated with his military record. *See Sharpe v. United States*, 134 Fed. Cl. 805 (2017). For the reasons set forth below, we affirm.

BACKGROUND

I

The pertinent facts are not in dispute. Mr. Sharpe checked in aboard the aircraft carrier USS Carl Vinson ("Carl Vinson") as a Public Affairs Officer ("PAO") on June 20, 2006. *Id.* at 809. At the time of

his assignment to the Carl Vinson, the ship was undergoing a refueling and complex overhaul and thus was non-operational and uninhabitable. *Id.* The overhaul was "set to last during the entire pendency of Mr. Sharpe's assignment to the Carl Vinson." *Id.* Thus, Mr. Sharpe was instructed to report to the Media Department, which was located ashore on the eighth floor of the "Bank Building" attached to the Northrop Grumman Newport News complex in downtown Newport News, Virginia. *Id.* Mr. Sharpe regularly reported to this onshore location throughout the entirety of his assignment to the Carl Vinson and carried out the majority of his duties at this location, except when he reported to a few other onshore locations in Hampton Roads, Virginia. *Id.* At no time during his assignment did Mr. Sharpe perform any regular duties onboard the Carl Vinson or "eat, work, live, stand watch or serve any punishment aboard the Carl Vinson or any other ship." *Id.* (citing Administrative R. at 248, J.A. 1104).

In March of 2007, a reporter contacted a Media Relations Officer from the office of the U.S. Fleet Forces Public Affairs Office, inquiring about Mr. Sharpe's alleged involvement in "hate group activity." *Id.* (quoting Administrative R. at 34, J.A. 890). The next day, Mr. Sharpe was ordered to turn over his duties and report to his home in Carrollton, Virginia, as his assigned place of duty until further notice. *Id.* As a result, Mr. Sharpe began a temporary assignment to the Commander, Naval Air Forces Atlantic. *Id.* at 809–10. On March 9, 2007, the Naval Criminal Investigations Service began a formal investigation into the reporter's query, and approximately two months later, in May of 2007, Mr. Sharpe was informed that the Commanding Officer ("CO") of the Carl Vinson intended to impose a non-judicial

punishment on him. *Id.* at 810. On May 16, 2007, the CO issued Mr. Sharpe a punitive letter of reprimand for two alleged violations of UCMJ Article 88, 10 U.S.C. § 888.[1] When Mr. Sharpe inquired about the process for demanding a trial by court-martial, the CO informed him that, due to the "vessel exception," he had no right to make such a demand. *Id.* The "vessel exception" denies the right of a service member "attached to or embarked in a vessel" to refuse a non-judicial punishment and demand a trial by court-martial. *Id.*; 10 U.S.C. § 815(a).

On July 9, 2009, the Assistant Secretary of the Navy approved a recommendation by the Commander, Navy Personnel Command, to discharge Mr. Sharpe from the Navy. *Sharpe*, 134 Fed. Cl. at 810. Mr. Sharpe formally separated from the Navy on September 30, 2009. *Id.*

II

Mr. Sharpe submitted an application for Correction of Naval Record to the BCNR on September 28, 2012. *Id.* In his application, he requested reinstatement. He also requested that his naval record be corrected by removing all documentation pertaining to his non-judicial punishment. *Id.*; J.A. 2620–22. In addition to seeking reinstatement and correction of his record, Mr. Sharpe requested that he receive "back payment of all regular or special pay, allowances, allotments,

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[1] Article 88, 10 U.S.C. § 888, states:

Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.

compensation, emoluments, or other pecuniary benefits" due to him as a result of his alleged erroneous separation from the Navy. J.A. 884. In his application, Mr. Sharpe argued that the vessel exception had been improperly invoked because the dry-docked Carl Vinson was not a "vessel" and because, although he was officially assigned to the ship, he was not "attached to or embarked in a vessel," as he did not "live, eat, work, stand watch, or serve any punishment aboard" the Carl Vinson. J.A. 912; J.A. 1104.

On February 8, 2016, the BCNR recommended to the Secretary of the Navy that Mr. Sharpe's non-judicial punishment be set aside, along with its administrative consequences. *Sharpe*, 134 Fed. Cl. at 811–12; J.A. 898. In addition, the Board recommended that Mr. Sharpe be treated as if he had not been discharged but "ha[d] continued to serve on active duty without interruption." J.A. 901. The Board also recommended that Mr. Sharpe be retroactively promoted. *Id.* In arriving at its recommendations, the BCNR noted, as Mr. Sharpe had, the significance of the Carl Vinson's non-operational status during the entirety of Mr. Sharpe's assignment. In addition, the Board observed that "neither [Mr. Sharpe's] regular place of work, nor his [non-judicial punishment] rights-advice session or . . . hearing, were aboard ship." J.A. 898. The Assistant Secretary of the Navy approved the BCNR's findings and recommendations on April 25, 2016. *Sharpe*, 134 Fed. Cl. at 812; J.A. 902.

The Navy proceeded to implement the Board's recommendations. As a result, Mr. Sharpe was issued orders to report to active duty by February 13, 2017, and to report to his new duty station in Washington, D.C. by May of 2017. *Sharpe*, 134 Fed. Cl. at 812. On May 5, 2017, Mr. Sharpe was retroactively

promoted to the rank of Commander effective August 1, 2008. *Id.* Mr. Sharpe's case was then forwarded to the Defense Finance and Accounting Services ("DFAS") for calculation of the appropriate back pay to which he was entitled. J.A. 857.

A memorandum by Brian D. Bourne ("Bourne memorandum"), which was issued by the Naval Personnel Command on May 11, 2017, set forth the Personnel Command's position regarding DFAS's calculations. J.A. 858–60. First, the memorandum noted that, before his separation, Mr. Sharpe was assigned to the Carl Vinson for three years and three months, a time period that exceeded the normal twenty-four-month sea duty tour for a PAO. Thus, the memorandum stated that, "[c]ommensurate with PAO detailing policy, [Mr. Sharpe] would not have continued to serve aboard [the Carl Vinson] past 2009 and his record (including pay) should be corrected to show that his sea duty ended on 30 Sep 09." J.A. 858–59. The Bourne memorandum thus recommended that Mr. Sharpe not receive career sea pay ("CSP") or a CSP premium, since he "did not serve aboard ship, and for constructive service purposes would not have been assigned to a ship" from October 1, 2009, to February 12, 2017. J.A. 859.[2] Next, the Bourne memorandum recommended that Mr. Sharpe receive basic allowance housing ("BAH") at the rate for Nor-

[2] As stated by the Court of Federal Claims, "CSP is an allowance for service members entitled to basic pay who are 'assigned to' and 'serving on' a ship." *Sharpe*, 134 Fed. Cl. at 818 (quoting 37 U.S.C. § 305a(e)). Additionally, "[a] CSP premium is paid to those members who serve on sea duty for over 36 consecutive months." *Id.* (citing 37 U.S.C. § 305a(c)). During the period between June 20, 2006, when he joined the Carl Vinson, and September 30, 2009, when he was separated from the Navy, Mr. Sharpe received CSP. *See Sharpe*, 134 Fed. Cl. at 819 n.8. The record does not reflect that he received a CSP premium.

folk, Virginia for the period of his separation, despite a change in the home port of the Carl Vinson from Norfolk to San Diego, California, in 2010. *Id.*[3] In line with the recommendation in the Bourne memorandum, DFAS declined to pay Mr. Sharpe CSP or a CSP premium for the period of his separation. Also consistent with the Bourne memorandum, DFAS awarded Mr. Sharpe BAH at the Norfolk rather than San Diego rate for the period of his separation.

III

While his application was pending before the BCNR, Mr. Sharpe filed suit in the Court of Federal Claims "to preserve his right to judicial review." *Sharpe*, 134 Fed. Cl. at 811 (quoting Compl. at 8). The case was stayed while the BCNR reviewed Mr. Sharpe's application. *Id.* Following the Board's decision and the Navy's implementation of it, proceedings resumed before the court. *Id.* at 812.

In due course, Mr. Sharpe filed a motion for summary judgment. In it, he argued that he is entitled to the BAH rate for San Diego, beginning April 1, 2010, when the Carl Vinson's home port changed. He also argued that he is entitled to CSP and a CSP premium for the period of his separation from the Navy. *Id.*[4] The government filed a cross-motion arguing (1) that judgment on the administrative record,

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[3] As the Court of Federal Claims explained, "BAH is a variable, basic housing allowance awarded to service members eligible for basic pay in order to address higher costs of living in certain geographic areas." *Sharpe*, 134 Fed. Cl. at 817 (citing 37 U.S.C. § 403(a)(1)).

[4] Before the Court of Federal Claims, Mr. Sharpe alleged his thirty-seventh month of consecutive sea duty began on June 21, 2009. J.A. 631.

not summary judgment, was the proper procedural vehicle, (2) that Mr. Sharpe should be judicially estopped from making inconsistent arguments before the BCNR and the Court of Federal Claims, and (3) that Mr. Sharpe is entitled only to the amounts of back pay that DFAS calculated. *Id.*

The Court of Federal Claims first determined that judgment on the administrative record was appropriate. *Id.* at 814. The court then held that, because of arguments he made before the BCNR, Mr. Sharpe was judicially estopped from seeking BAH at the rate for San Diego and from seeking CSP and a CSP premium. The basis for the court's ruling was its determination that Mr. Sharpe presented inconsistent arguments before the Board and the court. *Id.* at 814–16. The court stated:

> [Mr. Sharpe] now argues that this Court cannot ignore and must instead give full weight to the technicality of his formal assignment to the Carl Vinson, and that this "on-paper assignment" entitles him to the BAH rate for San Diego, CSP, and the CSP premium. Simply put, Mr. Sharpe urged the BCNR to ignore his technical "assignment" to the ship in order to nullify his non-judicial punishment and correct his record but now urges this Court to give full weight to that very same technical "assignment" in determining his back pay. These arguments are plainly inconsistent. It is clear that Mr. Sharpe's interests have changed, so he has changed his position accordingly.

Id. at 815–16 (citation and footnote omitted).

The court concluded that all three requirements

for the application of judicial estoppel were met: (1) Mr. Sharpe made inconsistent arguments before the BCNR and the court relating to his status vis-à-vis the Carl Vinson; (2) Mr. Sharpe was successful in persuading the Board to accept the position he argued before it (that the Board should ignore his technical "assignment" to the Carl Vinson and recognize that he really was assigned to shore duty); and (3) absent the application of judicial estoppel, Mr. Sharpe would gain an unfair advantage in the litigation. *Id.* at 814–17; *see also New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001) (setting forth factors that "typically inform" the decision of whether to apply judicial estoppel).

In the alternative, the Court of Federal Claims determined that the Navy's decision to award Mr. Sharpe the BAH rate for Norfolk, Virginia, and to deny him CSP and a CSP premium was not arbitrary or capricious, or contrary to law. *Id.* at 817. Turning first to BAH, the court rejected Mr. Sharpe's argument that he should be paid the higher rate for San Diego based on his "on-paper assignment" to the Carl Vinson. The court did so on the grounds that Mr. Sharpe never moved to San Diego and that, regardless of his separation, his assignment to the Carl Vinson was set to expire in June of 2008 and he had already exceeded the average tour length on the ship for a PAO. *Id.* at 818.[5] To award Mr. Sharpe the BAH for San Diego, the court stated, would confer on him

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[5] On appeal the government contends that the reason Mr. Sharpe was not issued orders to another duty station was because, after he received non-judicial punishment, on June 17, 2008, the Navy determined that he should be administratively separated, and he underwent out-processing prior to the issuance of his separation orders on September 15, 2009. Appellee's Br. 47.

a substantial windfall and would "defeat the very purpose behind the regulations governing BAH: to aid service members in obtaining housing in the vicinity of their permanent duty station and to help with corresponding cost-of-living expenses." *Id.* The court concluded that "the Navy's decision to place Mr. Sharpe in the same position he was in before his improper separation by paying him the BAH rate for Norfolk—which he was receiving at the time of his unlawful separation—was not arbitrary or capricious, or contrary to law; rather, it was quite reasonable." *Id.* (citing *Holley v. United States*, 33 Fed. Cl. 454 (1995), *rev'd on other grounds*, 124 F.3d 1462 (Fed. Cir. 1997); *Ulmet v. United States*, 17 Cl. Ct. 679 (1989), *aff'd* 935 F.2d 280 (Fed. Cir. 1991)).

Turning next to CSP, the Court of Federal Claims "[found] it illogical to award Mr. Sharpe CSP and [a] CSP premium when he never actually went to sea or performed any sea duties." *Id.* at 818–19. The court relied on *Boruski v. United States*, 155 F. Supp. 320 (Ct. Cl. 1957), where the court held that a service member was not entitled to "flight pay" because the member "did not participate in any aerial flight." *Sharpe*, 134 Fed. Cl. at 819 (quoting *Boruski*, 155 F. Supp. at 324). The court held it was reasonable for the Navy to deny Mr. Sharpe CSP, since he had not experienced the rigors of sea duty.

Mr. Sharpe timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

Discussion

I

We review the grant or denial of a judgment on the administrative record without deference. *Cleveland*

Assets, LLC v. United States, 883 F.3d 1378, 1381 (Fed. Cir. 2018) (citing *Croman Corp. v. United States*, 724 F.3d 1357, 1363 (Fed. Cir. 2013)). Thus, we apply the same standard of review as the Court of Federal Claims, namely, the standard set forth in the Administrative Procedure Act ("APA"). 28 U.S.C. § 1491(b)(4); 5 U.S.C. § 706; *Walls v. United States*, 582 F.3d 1358, 1367 & n.11 (Fed. Cir. 2009) (observing "it has become well established that judicial review of decisions of military correction boards is conducted under the APA" and collecting cases). Under the APA, a court must set aside agency action if the plaintiff demonstrates that the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In performing this review under § 706(2)(A):

> Our scope of review is "narrow": we determine only whether [the agency] examined "the relevant data" and articulated "a satisfactory explanation" for [its] decision, "including a rational connection between the facts found and the choice made." We may not substitute our judgment for that of [the agency], but instead must confine ourselves to ensuring that [it] remained "within the bounds of reasoned decisionmaking."

Dep't of Commerce v. New York, 139 S. Ct. 2551, 2569 (2019) (first quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983); then quoting *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 105

(1983)).[6]

Mr. Sharpe challenges both bases for the decision of the Court of Federal Claims: (1) its application of judicial estoppel; and (2) its ruling on the merits. We turn first to Mr. Sharpe's claims with respect to BAH and CSP. Because we conclude that the Court of Federal Claims did not err in its ruling on the merits, we do not reach the issue of judicial estoppel.

II

"Under the constructive service doctrine, 'military personnel who have been illegally or improperly separated from service are deemed to have continued in active service until their legal separation.'" *Barnick v. United States*, 591 F.3d 1372, 1379 (Fed. Cir. 2010) (quoting *Christian v. United States*, 337 F.3d 1338, 1347 (Fed. Cir. 2003)). "The basic premise of the constructive service doctrine is to 'return successful plaintiffs to the position that they would have occupied "but for" their illegal release from duty.'" *Id.* (quoting *Dilley v. Alexander*, 627 F.2d 407, 413 (D.C. Cir. 1980)). Accordingly, military pay claimants are "entitled to be placed in the same position they would have been in" but for the wrongful action they suffered, "but not in a better position." *Christian*, 337 F.3d at 1344. This approach is consistent with the fundamental principle of corrective remedies in gen-

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[6] We note that a discretionary decision by the Secretary of the Navy would be beyond our review. *See Dysart v. United States*, 369 F.3d 1303, 1317–18 (Fed. Cir. 2004); *Groves v. United States*, 47 F.3d 1140, 1144 (Fed. Cir. 1995); *Voge v. United States*, 844 F.2d 776, 780 (Fed. Cir. 1988). Instead, we "merely determine[] whether the procedures were followed by applying the facts to the statutory or regulatory standard." *Murphy v. United States*, 993 F.2d 871, 873 (Fed. Cir. 1993).

eral: "The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Wicker v. Hoppock*, 73 U.S. 94, 99 (1867); *see also Pirkl v. Wilkie*, 906 F.3d 1371, 1378 (Fed. Cir. 2018) (collecting cases).

Mr. Sharpe argues that the Court of Federal Claims erred when it upheld the Navy's decision to award him the BAH rate for Norfolk, Virginia. According to Mr. Sharpe, (1) his duty station at the time of his separation was the Carl Vinson, (2) the determination of BAH for a service member assigned to a ship is a function of the ship's home port, and (3) the Carl Vinson undisputedly moved home ports from Norfolk to San Diego on April 1, 2010. Thus, Mr. Sharpe argues, he should receive the San Diego BAH rate for the period from April 1, 2010, to February 12, 2017. Mr. Sharpe relies on *Holley*, a case in which an Army serviceman was held entitled to receive an overseas housing allowance for the entire period of his constructive active duty service, although it was "probable" that, but for his illegal discharge, he would have remained abroad for only ten more months. 33 Fed. Cl. at 457. In this vein, Mr. Sharpe contends that it was improperly speculative for the Navy and the Court of Federal Claims to infer that he would not have continued to serve on the Carl Vinson past 2009.

Next, Mr. Sharpe contends that because he was receiving CSP at the time of his separation, he should have received CSP and a CSP premium for the period of his separation, regardless of whether he was "serving on" the Carl Vinson. According to Mr. Sharpe, returning him to his prior status takes priority over whether his CSP payments were originally proper. Mr. Sharpe relies on *Groves*, arguing that it

supports his contention that although the Secretary has certain discretion to award or terminate special pay, that discretion may not be exercised when a service member is denied special pay by virtue of an unlawful conviction.

The government responds that it was not arbitrary or capricious for the Navy to provide Mr. Sharpe with the BAH he was receiving at the time of his separation and that it would have created a windfall for Mr. Sharpe to receive the higher BAH rate for San Diego, where he never resided. To find otherwise, the government argues, would do more than make Mr. Sharpe "whole." Instead, it would put him in a better position than he would have been in had he not been separated. The government also contends that it is Mr. Sharpe's burden to show that he would have continued to serve on the Carl Vinson during the time of his separation, and that the Navy's determination that Mr. Sharpe would not have served on the ship for that time period is entitled to deference, citing *Voge*. Appellee's Br. 45– 47 (citing 844 F.2d at 779–80). The government contends that to award Mr. Sharpe the San Diego BAH is contrary to its purpose, which is to assist service members with the cost-of-living expenses in the area within the vicinity of their permanent duty station, not to award a post-hoc windfall for servicemembers retroactively restored to duty.

Next, the government contends that the purpose of CSP and the CSP premium are to compensate service members for the arduous conditions of sea duty and separation from home and family. The government states that the fact that Mr. Sharpe was receiving CSP before his separation does not entitle him to

receive it during his separation.[7]

III

As noted, the law requires that Mr. Sharpe be placed in the same position he would have been in but for his wrongful separation. At the time of his wrongful separation, Mr. Sharpe was assigned to the Carl Vinson, which was at home port in Norfolk, Virginia. Accordingly, the Navy used the best approximation it had for the position Mr. Sharpe would have been in but for his illegal separation—that position he was in before he was improperly separated—assigned to the Carl Vinson and receiving the BAH rate for Norfolk, Virginia.

As we have previously acknowledged, the constructive service doctrine is a "legal fiction," and it is improper for us to speculate exactly where Mr. Sharpe's career path would have led him but for his separation. *See Barnick*, 591 F.3d at 1379; *Boruski*, 155 F. Supp. at 324. Mr. Sharpe relies on *Holley* to support his argument that the Navy was not permitted to speculate that he would have separated from the Carl Vinson and not continued with the ship to San Diego. However, that Mr. Sharpe was assigned to a ship whose home port, and correspondingly, the associated BAH rate, could change is of no moment here, where the facts make clear that regardless of where Mr. Sharpe would have been assigned next, he would *not* have continued to be assigned to the Carl Vinson. As explained by the Bourne memorandum, during the relevant period, the normal length of a

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[7] Counsel for the government stated at oral argument that the Navy believes it was error for Mr. Sharpe to have received CSP before his separation. Oral Arg. at 26:18–27:06 (May 6, 2019).

sea duty tour for PAOs was twenty-four months and "commensurate with PAO detailing policy, [Mr. Sharpe] would not have continued to serve aboard [the Carl Vinson] past 2009." J.A. 858–59. Moreover, Mr. Sharpe's original orders to the ship were set to expire in June of 2008, and Mr. Sharpe's replacement had reported to the ship by June 20, 2008. *Sharpe*, 134 Fed. Cl. at 818; J.A. 2606.

Given the facts of this case, the Navy's decision to place Mr. Sharpe in the same position he was in before his improper separation by paying him the BAH rate for Norfolk was not arbitrary, capricious, or contrary to law. Rather, we agree with the Court of Federal Claims that it was "quite reasonable." *Sharpe*, 134 Fed. Cl. at 818; *see also Ulmet*, 17 Cl. Ct. at 710 (concluding that a wrongfully discharged service member was entitled to "basic allowance for quarters [and] the variable housing allowance, . . . all at the appropriate rates applicable to the location where the plaintiff was assigned to duty prior to his improper release.")

That Mr. Sharpe should be placed in the "same position" does not mean that the BCNR erred when it declined to pay him CSP or a CSP premium.[8] Mr. Sharpe's reliance on *Groves* on this point is misplaced. In that case, until his trial by court-martial on charges of larceny, an orthopedic surgeon who was an officer in the Army Reserve was receiving "financial bonuses designed to attract and retain certain professionals in military service." 47 F.3d at 1142. These were in the form of Variable Special Pay, Incentive Special Pay, and Additional Special Pay. *Id.* His conviction was later set aside, and he

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[8] As noted, Mr. Sharpe was receiving CSP at the time of his separation.

sought back pay, allowances, and restoration to active duty. *Id.* at 1143. The Court of Federal Claims awarded him basic pay and allowances, but it denied his request for special pay because he did not demonstrate that he had satisfied the additional eligibility requirements for it. *Id.* We reversed, noting that, under 10 U.S.C. § 875(a) Groves was entitled to the restoration of "all rights, privileges, and property affected by an executed part of a court-martial sentence which has been set aside or disproved." *Id.* at 1144. With respect to Variable Special Pay, we noted that that pay "depends solely on an officer's status on active duty under orders to active duty for at least one year," and "there is no reason to believe that [Groves] would not have continued to [receive Variable Special Pay] but for the conviction and sentence." *Id.* (quoting 37 U.S.C. § 302(a)). With respect to Incentive Special Pay and Additional Special Pay, the Secretary of the Army had discretion not to renew those forms of special pay, but in Groves's case, no such discretionary decision was ever made. *Id.* We stated:

> Absent evidence that the Secretary would have otherwise denied Groves the special pay at issue, the statutory mandate to restore all rights, privileges, and property includes any special pay that Groves was receiving prior to his court-martial, *and for which he would have continued to be eligible had the conviction never occurred.*

Id. (emphasis added). The facts here are noticeably different. Here, unlike in *Groves*, there *is* reason to believe that Mr. Sharpe would *not* have continued to receive CSP or have received a CSP premium. Namely, for the reasons discussed above, the facts make

clear that Mr. Sharpe would not have continued to be assigned to the Carl Vinson.

Whether Mr. Sharpe's original award of CSP was proper is not before us, although we note Mr. Sharpe's statements in his application to the BCNR suggest otherwise. *See, e.g.*, J.A. 912 ("I was at no relevant time attached to or embarked in a vessel within the meaning of Art. 15. *At no time* did I live, eat, work, stand watch, or serve any punishment aboard ship."). In any event, what is determinative is that Mr. Sharpe cannot claim to have been "assigned to" or "serving on" a ship during the time of his constructive service. *See Sharpe*, 134 Fed. Cl. at 818 (quoting 37 U.S.C. § 305a(e)). On this basis, the Navy's decision to deny him CSP and a CSP premium for that time period was not arbitrary, capricious, or contrary to law. Finally, like the Court of Federal Claims, we find *Boruski*, 155 F. Supp. at 324, to be instructive. As noted above, in that case, an Army officer was denied flight pay for the period of his constructive service since he did not participate in any aerial flight during that period.

Conclusion

For the foregoing reasons, we hold that the Court of Federal Claims properly sustained the Navy's decisions to (1) award Mr. Sharpe the BAH rate for Norfolk, Virginia, and (2) deny Mr. Sharpe CSP and a CSP premium. We therefore affirm the decision of the Court of Federal Claims.

AFFIRMED

COSTS

APPENDIX B

United States Court of Federal Claims

No. 15-1087C
Filed: November 8, 2017

**********	* Military Pay Act, 37 U.S.C. §§ 204, 305a, 403; 10 U.S.C. § 1552; Motion for Summary Judgment; Judgment on the Administrative Record; Judicial Review of BCNR Decision and Implementation; Vessel Exception to UCMJ Article 15; Judicial Estoppel; Basic Allowance for Housing; Entitlement to Career Sea Pay and Career Sea Pay Premium.
JOHN F. SHARPE, Plaintiff	
v.	
THE UNITED STATES, Defendant.	
**********	

John F. Sharpe, Glenelg, Maryland, *pro se* Plaintiff.

Igor Helman, with whom were *Chad A. Reader*, Acting Assistant Attorney General, *Robert E. Kirschman*, Jr., Director, *Douglas K. Mickle*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C., and *Lt. Maryam Austin*, Of Counsel, Office of the Judge Advocate General, General Litigation Division (Code 14), U.S. Department of the Navy, Washington, D.C., for Defendant.

OPINION AND ORDER

WHEELER, Judge.

Pro se Plaintiff John F. Sharpe seeks review of the U.S. Navy's decision to deny him certain categories of back pay associated with corrections to his military record. Mr. Sharpe was separated from the Navy on September 30, 2009 after receiving a non-judicial punishment. In September 2015, Mr. Sharpe argued before the Board for Correction of Naval Records ("BCNR" or "the Board") that his non-judicial punishment was unlawfully imposed and that he should be treated as if he was never discharged from the Navy and has continued to serve on active duty without interruption. In February 2016, the BCNR took favorable action on Mr. Sharpe's application, voiding his non-judicial punishment and correcting his military record to reflect his continued service in the Navy without interruption. In light of his corrected record, Mr. Sharpe is entitled to appropriate back pay and allowances covering the eight-year period of his unlawful separation.

Mr. Sharpe now disputes certain aspects of the Navy's calculation of his back pay. In his motion for summary judgment, Mr. Sharpe argues that he is entitled to the basic allowance for housing ("BAH") rate for San Diego, California and to career sea pay ("CSP") and a CSP premium. In its cross-motion for judgment on the administrative record, the Government argues that Mr. Sharpe should be judicially estopped from making inconsistent arguments before the BCNR and this Court, and, alternatively, that the Navy properly awarded him the BAH rate for Norfolk, Virginia and properly denied him CSP and

the CSP premium.[9] For the reasons explained below, the Court GRANTS the Government's cross-motion for judgment on the administrative record and DENIES Mr. Sharpe's motion for summary judgment.

Background[10]

A. Mr. Sharpe's Naval Service

Mr. Sharpe graduated from the U.S. Naval Academy in 1993 and was certified as a Submarine Officer and Nuclear Engineer Officer shortly thereafter. AR 29, 153. Mr. Sharpe transferred into the Public Affairs Officer ("PAO") community in November 1999 and accepted a permanent appointment to Lieutenant Commander on December 1, 1999. Id. at 29. In June 2004, Mr. Sharpe was assigned to the office of the Navy Chief of Information ("CHINFO") in the Pentagon, taking a role as the Director for Plans and Policy. Id.

During his assignment to CHINFO in 2004 and 2005, Mr. Sharpe co-edited a two- volume anthology of articles critical of the Iraq War. Id. The anthology was published in April 2005. Id. Mr. Sharpe did not author any of the articles himself and his name appeared only once on an interior page, where he was listed as a co-editor under the name "J. Forrest Sharpe." Id. While Mr. Sharpe took no part in writ-

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[9] The parties also disagree over the proper procedural vehicle for resolving this case. Mr. Sharpe argues that summary judgment is proper, while the Goverrnnent contends that judgment on the administrative record is proper.

[10] As the Court explains below, judgment on the administrative record is the appropriate procedural vehicle for resolving this case. Accordingly, the facts in this decision are taken from the administrative record ("AR").

ing the articles, he and his co-editors did co-author 71 summaries describing the contents of the articles, which appeared just prior to the article they introduced. Id. at 30. One of these summaries was charged as showing contempt toward then-President George W. Bush. Id.

On October 31, 2005, the United States Fleet Forces Inspector General received a "hotline complaint" over Mr. Sharpe's alleged "improper participation in the anti-war movement," prompting the Navy Inspector General to conduct a preliminary inquiry into the matter. Id. On November 21, 2005, the Inspector General reported his results to CHINFO in a memo stating, for the most part, that Mr. Sharpe was "exercising his free speech rights under the Constitution," and that his personal writings and speaking "pre-dated the war in Iraq." Id. Regarding the anti-war anthology, the memo stated that some of the language contained in the second volume's dedication could be problematic under Article 88 of the Uniform Code of Military Justice ("UCMJ"), but that the anthology was written "in a very academic and reasoned way." Id. The Inspector General chose not to recommend or take any further action on the matter, other than to refer the memo to CHINFO. Id. at 31. In response to the memo, Mr. Sharpe's Reporting Senior at CHINFO issued a non-punitive letter of caution urging Mr. Sharpe to "exercise greater care in the performance of [his] duties in order to measure up to the high standards of CHINFO and the Navy Public Affairs community" in the future. Id.

On June 20, 2006, Mr. Sharpe checked in aboard the USS Carl Vinson ("Carl Vinson"), a nuclear-powered aircraft carrier, as a PAO. Id. at 33, 170-71. At the time of Mr. Sharpe's assignment to the Carl Vinson, the ship was non-operational and uninhabit-

able because it was undergoing a refueling and complex overhaul ("RCOH"). Id. at 33, 170. The RCOH was set to last during the entire pendency of Mr. Sharpe's assignment to the Carl Vinson. Id. at 42. As such, Mr. Sharpe was instructed to report to the Media Department, which was located ashore on the eighth floor of the "Bank Building" attached to the Northrop Grumman Newport News complex in downtown Newport News, Virginia. Id. at 33-34. Mr. Sharpe regularly reported to this onshore location throughout the entirety of his assignment to the Carl Vinson and carried out the majority of his duties at this location, except for reporting to a few other onshore locations in Hampton Roads, Virginia. Id. at 168, 248. Mr. Sharpe's duties while onshore at the Bank Building included conducting "routine business" and providing "personal and staffed public-affairs coordination and photography support" for various on-shore command events. Id. at 169. At no time during his assignment did Mr. Sharpe perform any regular duties on board the Carl Vinson; nor did he eat, work, live, stand watch or serve any punishment aboard the Carl Vinson or any other ship. Id. at 248. On April 1, 2010, the Carl Vinson's home port officially changed from Norfolk, Virginia to San Diego, California. Id. at 3.

B. Non-Judicial Punishment

On March 6, 2007, a Media Relations Officer ("MRO") from the office of the U.S. Fleet Forces PAO received a query from a reporter affiliated with a small publication in the Newport News area regarding an allegation, in a nongovernmental report, that Mr. Sharpe was involved in "hate group activity." Id. at 34. The MRO prepared an email to the immediate

superior in command of the Carl Vinson summarizing the query, and on March 7, 2007, the Executive Officer of the Carl Vinson ordered Mr. Sharpe to tum over his duties to his deputy and report to his home in Carrollton, Virginia as his assigned place of duty "until further notice." Id. Mr. Sharpe was relieved of all watch and command duties and began a temporary assignment to the Commander, Naval Air Forces Atlantic ("CNAL") in Norfolk, Virginia. Id. at 34-35.

On March 9, 2007, the Naval Criminal Investigations Service ("NCIS") began a formal investigation into the reporter's query. Id. at 35. Approximately two months later, in May 2007, Mr. Sharpe was informed that the Commanding Officer ("CO") of the Carl Vinson intended to impose a non-judicial punishment on him. Id. On May 16, 2007, the CO issued Mr. Sharpe a punitive letter of reprimand for two alleged violations of UCMJ Article 88. Id. at 35. Article 88 states, in relevant part:

> Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Commonwealth, or possession in which he is on duty or present shall be punished as a court- martial may direct.

10 U.S.C. § 888; AR 35. These violations pertained to the two-volume anthology of articles co-edited by Mr. Sharpe critical of the Iraq War. AR 35. When Mr. Sharpe inquired about the process for demanding a trial by court-martial, the CO informed Mr. Sharpe

that he had no right to make such a demand due to his assignment to the Carl Vinson. Id. at 35. The CO thereby invoked Article 15 of the UCMJ, the "vessel exception," which denies the right of a service member "attached to or embarked on a vessel" to refuse a non-judicial punishment and demand a trial by court-martial. 10 U.S.C. § 815(a).[11] On July 9, 2009, after the Commander, Navy Personnel Command ("CNPC") made a series of reports and recommendations to the Assistant Secretary of the Navy ("ASN") related to Mr. Sharpe's non-judicial punishment, the ASN approved the CNPC's recommendation that Mr. Sharpe be discharged from the Navy. AR 39; see also id. at 35-38. On September 30, 2009, Mr. Sharpe formally separated from the Navy. Id. at 39.

C. Administrative and Judicial Proceedings

1. Applications to the Board for Correction of Naval Records

On September 28, 2012, Mr. Sharpe submitted his first application to the BCNR, challenging his non-judicial punishment and subsequent separation from the Navy. Id. at 122, 1704. This initial application was misdirected by the Board to the Navy Personnel Command ("the NPC") instead of the Code 20 Criminal Law Division, prompting the Board to allow Mr. Sharpe to submit a supplemented application on September 28, 2015, which accounted for subse-

[11] Article 15 of the UCMJ states, "except in the case of a member attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment." 10 U.S.C. § 815(a).

quently discovered information. Id. at 121-52.

In his supplemented application to the Board, Mr. Sharpe primarily argued that the Article 15 "vessel exception" did not apply to him because he was not "attached to or embarked in a vessel within the meaning of Art[icle] 15" and thus, was unjustly deprived of his right to demand a trial by court-martial before the imposition of his non-judicial punishment iμ 2007. Id. at 129, 187, 247-48. In making his case to the Board, Mr. Sharpe put forth two main, overarching arguments: first, that the Carl Vinson was not a vessel within the meaning of UCMJ Article 15 because it had completed only nineteen months of a 43-month drydock refueling overhaul, did not go out to sea, and thus, was effectively inoperable at the time he received his non-judicial punishment;[12] and second, that despite his technical assignment to the vessel, his actual permanent duty station ("PDS") was ashore in various locations away from the ship and thus, his PDS also was not a vessel within the meaning of Article 15. Id. at 187-88; 1708. Relying heavily on the analysis performed by the Court of Appeals for the Armed Forces in United *States v. Edwards*, 46

M.J. 41 (C.A.A.F. 1997), Mr. Sharpe stressed that the Board should give little weight to the "on-paper" technicality of his "assignment" to the ship and instead focus on the realities of his relationship to the ship and the ship's operational status. AR 132.

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[12] Mr. Sharpe also noted that the crew (l) did not begin returning aboard the Carl Vinson until fifteen months after the imposition of his non-judicial punishment; (2) did not complete the process of moving aboard the ship until over 21 months later; and (3) did not actually go out to sea on the ship until 25 months after the imposition of the non-judicial punishment. See AR 129.

Mr. Sharpe further argued, among other things, that he was likewise ashore in Norfolk, Virginia while he was assigned to CNAL after being ordered home, and did not engage in any activities on the sea before the implementation of his non-judicial punishment and formal separation from the Navy in September 2009. Id. at 188. Mr. Sharpe also contended that the "nexus" between himself and the Carl Vinson was not in line with the legislative intent behind the phrase "attached to or embarked in a vessel" in Article 15, because he did not live, perform duties, or stand watch aboard the ship; his regular place of duty was an on-shore office building in downtown Newport News, Virginia; and he was not required to check in with the ship after being ordered back home and subsequently assigned to CNAL in Norfolk, Virginia. Id.

Lastly, in addition to requesting his reinstatement to active duty and correction of his naval record, Mr. Sharpe requested that he be paid all "regular or special pay, allowances, allotments, compensation, emoluments or other pecuniary benefits" due to him as a result of his alleged erroneous separation from the Navy. Id. at 1759-61.

2. Initial Proceedings Before This Court

In conjunction with his revised application to the BCNR, Mr. Sharpe filed suit in this Court on September 29, 2015 "to preserve his right to judicial review" of the Board's final action. Compl. at 8. In his complaint, Mr. Sharpe asserts the same arguments he submitted to the Board challenging his non-judicial punishment and requests the same relief. See id. at 51-97. On November 24, 2015, Mr. Sharpe and the Government filed a joint motion to stay the

case while the BCNR reviewed Mr. Sharpe's application for relief. Dkt. No. 6. This Court granted the parties' motion on December I , 2015 and stayed the case pending a final determination by the Board with respect to Mr. Sharpe's application. Dkt. No. 7.

3. The BCNR's Decision

On February 8, 2016, the BCNR took favorable action on Mr. Sharpe's application and recommended to the Secretary of the Navy that Mr. Sharpe be granted appropriate relief. AR 42-46. In its decision, the Board agreed with Mr. Sharpe that he was not attached to a vessel within the meaning of UCMJ Article 15 and was unfairly deprived of his right to demand a trial by court-martial. Id. In so doing, the Board pointed to the following considerations and justifications: (1) Mr. Sharpe was ordered away from the ship before the imposition of his non-judicial punishment; (2) Mr. Sharpe was assigned to on-shore duties after being ordered home; (3) the Carl Vinson was completely non- operational during the entirety of Mr. Sharpe's assignment to the ship; and (4) neither Mr. Sharpe's regular place of work nor his non-judicial punishment hearing took place aboard the ship. Id. at 42. The Board also noted that in making its decision, it looked beyond the technicality of Mr. Sharpe's "on-paper assignment" to the ship and instead focused on the "totality of th[e] case's factual circumstances" in concluding that Mr. Sharpe fell outside the vessel exception, as Mr. Sharpe had urged the Board to do in his application. Id.

Based on this conclusion, the Board recommended that Mr. Sharpe's non-judicial punishment and its resulting consequences be set aside and ordered that his record be corrected to remove any references to

the punishment and its consequences. Id. at 42-44. The Board further recommended that Mr. Sharpe be treated as if he "was not discharged from the Naval Service, but has continued to serve on active duty without interruption." Id. at 45. The Board's recommendation did not specify how Mr. Sharpe's back pay and appropriate compensation should be calculated.

On April 25, 2016, the Assistant Secretary of the Navy approved the Board's recommendations. Id. at 46. Mr. Sharpe received orders to report to active duty no later than February 13, 2017, and to report to his ultimate duty station in Washington, D.C. by May 2017. Id. at 18-23. Additionally, the Assistant Secretary issued an amended order on December 21, 2016 putting into effect Mr. Sharpe's appropriate promotions, id. at 24, and Mr. Sharpe endorsed his permanent appointment letter on May 5, 2017, promoting him to the rank of "Commander" effective August 1, 2008. Id. at 5.

4. Current Proceedings Before This Court

After the BCNR issued its recommendations to the Assistant Secretary of the Navy, the parties provided this Court with a series of joint status reports keeping the Court appraised of the Navy's final approval and implementation of the Board's recommendations, including the calculation of Mr. Sharpe's back pay. See Dkt. Nos. 8, 10, 14, 20, 26, 28, 32. On May 5, 2017, the Court ordered the Government to submit its final position on the amount of back pay to which Mr. Sharpe is entitled on or before May 12, 2017, and to pay Mr. Sharpe the undisputed amount "as soon as practicable." Dkt. No. 33. The Court also ordered Mr. Sharpe to file a status report responding to the Government's final calculations on or before May 19,

2017. Dkt. No. 33.

On May 12, 2017, the Government filed its status report detailing what it believed to be the proper amount of back pay owed to Mr. Sharpe. Dkt. No. 34. In its status report, the Government indicated that the NPC issued a memorandum to Defense Finance and Accounting Services ("DFAS"), the entity responsible for calculating military back pay, recommending DFAS take certain actions with respect to Mr. Sharpe's back pay. Dkt. No. 34, at 1-3; see also AR 2--4. While Mr. Sharpe and the Government agree with most of the Navy's recommendations regarding Mr. Sharpe's back pay calculations – a sum totaling $666,471.49[13] the parties remain in disagreement over Mr. Sharpe's proper BAH rate, whether Mr. Sharpe is entitled to CSP, and, relatedly, whether Mr. Sharpe is entitled to the CSP premium. The Government and Navy opine that Mr. Sharpe is entitled to the BAH rate for Norfolk, Virginia covering the period from October 1, 2009 to February 13, 2017, and that Mr. Sharpe is not entitled to CPS or the CPS premium for that same period. See Dkt. No. 34, at 2. Mr. Sharpe takes a different view, outlined below.

In response to the Government's status report, Mr. Sharpe submitted together as a single filing a status report, motion for leave to file portions thereof as plaintiff s second amended complaint, and motion for summary judgment, which this Court filed by its leave as a motion for summary judgment. See Dkt. No. 36. In Mr. Sharpe's motion for summary judgment, he argues, among other things, that he is entitled to the BAH rate for San Diego, California begin-

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[13] This amount has already been paid to Mr. Sharpe. See Dkt. No. 39, at Ex. I.

ning April 1, 2010, when the Carl Vinson's home port changed from Norfolk, Virginia to San Diego, California. Pl.'s Mot. at 44-77. Mr. Sharpe also argues that he is entitled to CSP and the CSP premium for the period covering October 1, 2009 to February 12, 2017. Id. at 78-89. Finally, Mr. Sharpe argues that summary judgment is the appropriate vehicle for resolving the issues in this case. Id. at 13-16.

On July 19, 2017, the Government filed a cross-motion for judgment on the administrative record, arguing (1) that judgment on the administrative record is the proper procedural vehicle for resolving this case; (2) that Mr. Sharpe should be judicially estopped from making inconsistent arguments before the BCNR and this Court; and (3) that Mr. Sharpe is entitled only to the amounts DFAS calculated pursuant to the Navy's recommendations, as reflected in the Government's status report. See Dkt. No. 43. The parties finished briefing these issues on September 6, 2017, and the Court heard oral argument on the parties' motions on October 25, 2017.

Discussion

This case presents unique and novel factual circumstances that give rise to complex issues. While the parties dispute procedural mechanisms and certain aspects of Mr. Sharpe's back pay, they do not challenge this Court's jurisdiction to hear these issues or to resolve this case. The Court agrees that it has jurisdiction to hear this case and derives its subject matter jurisdiction from both the Tucker Act, 28 U.S.C. § 1491, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 703. The Tucker Act grants jurisdiction over claims "against the United States founded either upon the Constitution, or any Act of Con-

gress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(l). The APA in turn entitles a person legally wronged by agency action to seek judicial review, thus waiving sovereign immunity of the United States. 5 U.S.C. § 703; *Weaver v. United States*, 46 Fed. Cl. 69, 76 (2000).

Additionally, a Plaintiff must establish an independent right to money damages from a money-mandating source within a contract, regulation, statute or constitutional provision in order for the case to proceed. Jan's Helicopter Serv. Inc. v. FAA, 525 F.3d 1299, 1306 (Fed. Cir. 2008); *Volk v. United States*, 111 Fed. Cl. 313, 323 (2013). Here, the separate money-mandating sources are 37 U.S.C. §§ 204, 305a, and 403, which govern the portions of Mr. Sharpe's pay that are currently in dispute. Thus, in conjunction with the APA, this Court has jurisdiction pursuant to the Tucker Act to review the Navy's decision regarding the proper calculation of Mr. Sharpe's back pay.

As the Court notes above, in accordance with the correction of Mr. Sharpe's naval record, the parties have agreed on most of the Navy's calculations of Mr. Sharpe's back pay. The following three issues remain in dispute: (1) whether this case should be decided on summary judgment or judgment on the administrative record; (2) whether Mr. Sharpe is judicially estopped from making inconsistent arguments before the BCNR and this Court; and (3) whether the Navy's decision to pay Mr. Sharpe the BAH rate for Norfolk, Virginia and deny him CSP and the CSP premium was arbitrary, capricious, or contrary to law. The Court will resolve each of these issues in

turn.

A. Judgment on the Administrative Record Is the Proper Procedural Vehicle for Resolving This Case.

The parties first dispute whether summary judgment or judgment on the administrative record is the appropriate procedural vehicle for resolving this case. In his motion for summary judgment, Mr. Sharpe argues that summary judgment is appropriate because there is no genuine dispute as to any material fact and that he is entitled to judgment as a matter of law because he is merely seeking to enforce the BCNR's decision. Pl.'s Mot. at 13-16. In its cross-motion for judgment on the administrative record and reply to Mr. Sharpe's subsequent response, the Government contends that judgment on the administrative record is appropriate because (1) this is a military pay case, and such cases are reviewed on the administrative record like all other agency action; and (2) agency action here consists of both the BCNR's decision and the Navy's implementation of that decision, which includes the calculation of Mr. Sharpe's back pay. Def.'s Mot. at 13; Def's Rep. at 1-4. Mr. Sharpe disputes this latter point in his response to the Government's cross- motion, noting that only the BCNR's decision to correct his record constitutes "agency action," and that the Board's decision here is not in dispute. See Pl.'s Resp. at 7-9.[14]

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[14] In response to the Government's cross-motion for judgment on the administrative record, Dkt. No. 43, Mr. Sharpe filed two appendices: "Appendix A" and "Appendix B." See Dkt. Nos. 46, 47. "Appendix A" is Mr. Sharpe's response to the Government's cross-motion for judgment on the administrative record, while "Appendix B" is Mr. Sharpe's reply to the Government's opposition of his motion for summary judgment. As

Military pay cases involving decisions of a military correction board and a service member's subsequent entitlement to appropriate monetary compensation under the U.S. Code are reviewed on the administrative record under the same standard as any other agency action. *Metz v. United States*, 466 F.3d 991, 998 (Fed. Cir. 2006); *Martinez v. United States*, 333 F.3d 1295, 1314-15 (Fed. Cir. 2003). "Agency action" is not limited to a correction board's decisions; rather, agency action also includes the implementation of that decision and any recommended relief. See *Laningham v. United States*, 30 Fed. Cl. 296, 304 (1994) ("[F]inal and binding decisions made by the General Counsel and [Assistant Secretary], in furtherance of processing plaintiff's claims based upon a resolution of the BCNR, are also given the same weight as resolutions of the BCNR. Together, they compromise the 'administrative decision' of the defendant . . . .").

Here, Mr. Sharpe defines the relevant agency as solely the BCNR and the relevant agency action as solely the BCNR's favorable decision to void his nonjudicial punishment and correct his record. However, Mr. Sharpe adopts far too narrow a definition of "agency action." The proper agency here is the Navy as a whole, and the proper agency action includes both the BCNR decision and the implementation of that decision by DFAS, under the direction and recommendations of the NPC. The fact that the BCNR did not have the Navy's recommendations regarding Mr. Sharpe's back pay and DFAS' final calculations before it while contemplating its decision on Mr. Sharpe's application does not mean that those rec-

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such, the Court cites to "Appendix A" as "Pl.'s Resp. at _" and to "Appendix B" as "Pl. 's Rep. at _."

ommendations and calculations are not agency action subject to this Court's review on the administrative record. To the contrary, the BCNR decision, the NPC's back pay recommendations, and DFAS' calculations together constitute agency action currently under review by this Court. See id. at 304. As such, the Court finds that judgment on the administrative record is the appropriate procedural vehicle for resolving this case and will review the Navy's decision under the same standard as any other agency action.

B. Mr. Sharpe Is Judicially Estopped from Making Inconsistent Arguments Before the BCNR and This Court.

Before addressing the reasonableness of the Navy's decision to deny Mr. Sharpe certain aspects of what he believes to be his proper back pay, the Court first finds that Mr. Sharpe is judicially estopped from making inconsistent arguments before the BCNR and this Court. In order for a court to invoke the doctrine of judicial estoppel, this Court has noted that the following three elements must be satisfied:

> First, a party's later position must be 'clearly inconsistent' with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Finally, [a] third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing par-

ty if not estopped.

Cuyahoga Metro. Rous. Auth. v. United States, 65 Fed. Cl. 534, 556 (2005) (citing New *Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001)); see also Moreland Corp. v. United States, 76 Fed. Cl. 268, 294 (2007). Here, all three elements of the judicial estoppel doctrine are plainly satisfied.

1. Mr. Sharpe's Arguments Before the BCNR and This Court Are Inconsistent.

The parties here primarily disagree over whether Mr. Sharpe made inconsistent arguments before the BCNR and this Court. The disputed "inconsistency" relates to how Mr. Sharpe argued that his case did not fall within the Article 15 "vessel exception," which denies the right of a service member to demand a trial by court-martial if they are "attached to or embarked in a vessel within the meaning of Art[icle] 15," 10 U.S.C. § 815(a), and how Mr. Sharpe argues before this Court that he is entitled to certain categories of back pay based on his formal "assignment" to the Carl Vinson.

The Government asserts that Mr. Sharpe argued before the BCNR that the vessel exception did not apply because he was not actually "attached to or embarked in" the Carl Vinson, since he was stationed onshore in an office building and the Carl Vinson itself was non-operational during his entire assignment to the ship. Def.'s Mot. at 17. The Government also argues that Mr. Sharpe stressed to the Board that it give little weight to his "on-paper assignment" to the ship and instead focus on where he was physically located to determine whether he was "attached to or embarked in" the Carl Vinson for

purposes of the vessel exception. Def.'s Rep. at 5. Now, the Government argues, Mr. Sharpe is contradicting himself by urging this Court to focus on the formality of his "on-paper assignment" to the Carl Vinson, as reflected by his corrected record, in order to grant him CSP, the CSP premium, and the BAH rate for San Diego after the ship changed home ports. Def.'s Mot. at 17; Def.'s Rep. at 5.

In his briefings and arguments before the Court, Mr. Sharpe frames his argument before the BCNR in a different way. Mr. Sharpe first asserts that his argument before the Board focused on the fact that there was no "operational inconvenience" to giving him a trial by court-martial since he was on land and never at sea, and then argues that his current argument before this Court focuses on the fact that he is entitled to the BAH rate for San Diego, CSP, and a CSP premium by way of his corrected record stating that he was continuously "assigned" to the Carl Vinson from June 20, 2006 to February 12, 2017. Pl.'s Resp. at 2, 16; see also AR 129. Mr. Sharpe further argues that the Government falsely equates the terms "assignment" and "attachment," that each of these terms mean separate and distinct things, and that he has maintained the same position with respect to whether he was "assigned" or "attached" to the Carl Vinson before both the BCNR and this Court. See Pl.'s Resp. at 16-18.

While at first glance these arguments, as framed by Mr. Sharpe to the Court, appear to be distinct enough to defeat any notion of inconsistency, the administrative record – which this Court relies upon in making its decision – tells a wholly different story. Mr. Sharpe's argument before the BCNR goes far beyond stating that there were no impediments to conducting a trial by court-martial since he was not

physically serving on the Carl Vinson. To the contrary, the crux of Mr. Sharpe's argument before the BCNR lies in his explicit urging of the Board to ignore the technicality of his "on-paper assignment" to the ship and to instead focus on the realities of his physical relationship to the ship and the ship's operational status to determine that he did not fall within the vessel exception. Mr. Sharpe's application to the BCNR states as much:

> To be sure, no one disputes that the MCM says that 'a person is "attached to" or "embarked in" a vessel if . . . [he] is assigned or attached to the vessel.' What is disputed-and what the courts and the Board have clarified-is what 'attached to or embarked in a vessel' means, and the relevant authorities, which Code 20 fails to cite, have made clear that, contrary to the facial language of the MCM, the Art[icle] 15 [vessel exception] is to be applied not on the sole basis of an on-paper assignment to a ship, but on the basis of facts that establish both the nature of a member's relationship to a ship, and the operational-readiness status of the ship itself.

AR 132 (emphasis in original) (footnote omitted); see also id. at 129, 168. Now, before this Court, Mr. Sharpe starkly changes his tune. He now argues that this Court cannot ignore and must instead give full weight to the technicality of his formal assignment to the Carl Vinson, and that this "on-paper assignment" entitles him to the BAH rate for San Diego, CSP, and the CSP premium. Pl.'s Resp. at 1-2. Simply put, Mr. Sharpe urged the BCNR to ignore his technical "assignment" to the ship in order to nullify his non-

judicial punishment and correct his record but now urges this Court to give full weight to that very same technical "assignment" in determining his back pay. These arguments are plainly inconsistent. It is clear that Mr. Sharpe's interests have changed,[15] so he has changed his position accordingly. Mr. Sharpe's attempt to draw distinctions between the meanings of the terms "assignment" and "attachment" does nothing to change this analysis. Mr. Sharpe simply cannot urge the BCNR to ignore a technicality and then ask this Court to give full weight to that same technicality after his interests have changed. See Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1565 (Fed. Cir. 1996). Thus, Mr. Sharpe's arguments are inconsistent and the Court finds that the first element of the judicial estoppel doctrine is satisfied.

2. Mr. Sharpe Persuaded the BCNR to Accept His Earlier Position.

The second element of the judicial estoppel doctrine looks to see if the party asserting inconsistent positions was successful in persuading a court or any other tribunal of its first position, such that the acceptance of the second position by a subsequent court or tribunal would "create the perception that either the first or second court [or tribunal] was misled." New Hampshire, 532 U.S. at 750. This element is also met. After hearing and reviewing Mr. Sharpe's application, the BCNR agreed with Mr. Sharpe's position that he was not attached to or embarked in the Carl Vinson for purposes of the vessel exception. AR

[15] Mr. Sharpe's interest before the BCNR was to nullify his non-judicial punishment and correct his record, while his interest before this Court is to obtain monetary relief related to his back pay.

42. In so doing, the Board specifically accepted Mr. Sharpe's argument that it ignore his literal "on-paper assignment" and instead look to the realities of his relationship to the ship and the ship's operational status:

> And in light if the DDC's remark, in the case referred to by Code 20 in enclosure (4), that vessel-exception cases 'have generally . . . looked not to literal definitions but to multiple factors that affect the propriety of allowing or denying the right to refuse mast,' the Board feels that the totality of this case's factual circumstances make it appropriate to apply the Edwards factors as a matter of equity.

Id. It is clear that Mr. Sharpe persuaded the Board to ignore his technical and literal "assignment" to the ship; therefore, to persuade this Court that such a literal "assignment" should now be given full weight would certainly create the perception that either this Court or the BCNR was misled. As such, the Court finds that the second element of the judicial estoppel doctrine is also satisfied.

3. Absent Judicial Estoppel, Mr. Sharpe Would Derive an Unfair Advantage.

The last element of the judicial estoppel doctrine considers whether the party asserting inconsistent positions would stand to derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. See New Hampshire, 532 U.S. at 751. Here, Mr. Sharpe stands to derive an unfair advantage if he is not estopped: he will avoid non-judicial punishment by arguing that his "on-paper

assignment" to the Carl Vinson was practically meaningless since he was sufficiently removed from the ship to fall outside the vessel exception, while gaining improper back pay allotments by arguing that this "on-paper assignment" conclusively entitles him to such pay. While Mr. Sharpe plays semantic games in an attempt to undercut this conclusion, he is, in reality, doing nothing more than "playing fast and loose with the courts." See U.S. Philips Corp. v. Sears Roebuck & Co., 55 F.3d 592, 596 (Fed. Cir. 1995). As such, the Court finds that the third element of the judicial estoppel doctrine is satisfied and thus, Mr. Sharpe is judicially estopped from taking inconsistent positions before the BCNR and this Court.

C. Alternatively, the Navy's Decision to Award Mr. Sharpe the BAH Rate for Norfolk, Virginia and Deny him CSP and the CSP Premium Was Not Arbitrary or Capricious, or Contrary to Law.

In the alternative, having determined that judgment on the administrative record is the proper procedural vehicle for resolving this case, the Court also finds that the Navy's decision to award Mr. Sharpe the BAH rate for Norfolk, Virginia and to deny him CSP and the CSP premium was not arbitrary or capricious, or contrary to law.

Rule 52.1 of this Court governs motions for judgment on the administrative record. A review of this kind is like a paper trial based upon the documents assembled by the agency. The Court makes factual findings based upon the evidence presented in this record. See, e.g., Bannum, Inc. v. United States, 404 F.3d 1346, 1356 (Fed. Cir. 2005); Coastal Envtl. Grp., Inc. v. United States, 118 Fed. Cl. 1, 10 (2014). To

review a motion under Rule 52.1, this Court must decide whether a party has met its burden of proof based on the evidence in the record given all disputed and undisputed facts. *Anderson v. United States*, 111 Fed. Cl. 572, 578 (2013), aff'd (Fed. Cir. 13-5117, July 11, 2014); Bannum, Inc., 404 F.3d at 1356.

In reviewing agency actions related to decisions of military correction boards, this Court must apply the standard of review set forth in the APA, 5 U.S.C. § 706. Under section 706(2)(A), this Court must "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." Id. § 706(2)(A). The Court shall overturn an agency's decision only if it determines that the decision was "arbitrary and capricious, unsupported by substantial evidence, or not in accordance with the applicable laws or regulations." Laningham, 30 Fed. CL at 310. Accordingly, as long as the agency's decision was reasonable and based upon substantial evidence, this Court will not disturb the result. *Wronke v. Marsh*, 787 F.2d 1569 (Fed. Cir. 1986); Van *Cleave v. United States*, 70 Fed. Cl 674, 678-79 (2006).

Mr. Sharpe has the burden of proving that the Navy's decision regarding his proper BAH rate and its denial of his CSP and CSP premium was arbitrary, capricious, unsupported by substantial evidence, or contrary to law. See *Lewis v. United States*, 458 F.3d 1372, 1376 (Fed. Cir. 2006). In his motion for summary judgment and subsequent filings before the Court, Mr. Sharpe first argues that the APA standard described above does not apply to this case, and then argues that he is entitled to the BAH rate for San Diego, CSP, and the CSP premium by way of his corrected record only, and without any further

exercise of discretion from the NPC. See PL 's Mot. at 13-16, 65-87; PL 's Resp. at 22-24. In its cross-motion for judgment on the administrative record, the Government counters that the Navy properly awarded Mr. Sharpe the BAH rate for Norfolk, Virginia- the Carl Vinson's home port at the time of Mr. Sharpe's unlawful separation-and also properly denied Mr. Sharpe CSP and the CSP premium, because both require that Mr. Sharpe physically be "at sea," which he was not. See Def.'s Mot. at 19-24. For the reasons discussed below, the Court finds that the Navy's decision was reasonable and that Mr. Sharpe has failed to meet his burden in proving otherwise.

1. The Navy Properly Determined that Mr. Sharpe Was Entitled to the BAH Rate for Norfolk, Virginia, Not San Diego, California.

BAH is a variable, basic housing allowance awarded to service members eligible for basic pay in order to address higher costs of living in certain geographic areas. See 37 U.S.C. § 403(a)(l); see also Pl.'s Mot. at 65-66. It is undisputed that Mr. Sharpe is entitled to BAH, since he is also entitled to basic pay. Mr. Sharpe argues that he is entitled to the BAH rate of wherever the Carl Vinson's home port was during the length of his assignment to the ship, which lasted from June 20, 2006 to February 12, 2017, as reflected by his corrected record. See Pl.'s Mot. at 65-69, 72. Following this logic, Mr. Sharpe claims that he is entitled to the BAH rate for San Diego from April 1, 2010 to February 12, 2017, after the Carl Vinson's home port changed from Norfolk to San Diego on April 1, 2010. See id. at 65-77. Mr. Sharpe further argues that the NPC had no discretion or authority to recommend to DFAS that his BAH rate be kept at

the lower Norfolk rate, even though Mr. Sharpe did not physically relocate with the ship to San Diego and instead remained at his home in Virginia throughout his separation. Id. at 59-65.

As both parties note and the Court agrees, the factual circumstances in this case are unlike any this Court has dealt with in the past. However, the Court sees no logical reason why Mr. Sharpe should be paid the higher BAH rate for San Diego when he at no time set foot in San Diego nor sought housing in San Diego. While Mr. Sharpe urges the Court to give full weight to his "on-paper assignment" to the Carl Vinson and accept the fiction that he traveled with the ship from Norfolk to San Diego-and remained in San Diego for the past seven years-the Court will instead take the tack Mr. Sharpe successfully advanced before the BCNR: to look to factors beyond his literal "on-paper assignment" to the ship. Those factors show that Mr. Sharpe never moved with the ship to San Diego and never sought housing in San Diego between April 1, 2010 and February 12, 2017.

Even if Mr. Sharpe had not been erroneously separated from the Navy to begin with, he still offers no evidence to prove that he would have remained assigned to the Carl Vinson until February 12, 2017. In fact, on his own admission, Mr. Sharpe's rotation with the Carl Vinson was set to expire in June 2008 and most PAO officer tour lengths only last between 24 to 36 months. Id. at 33, 43. Thus, to award him the higher BAH rate for San Diego for seven years would not only be illogical, but would also confer a substantial windfall on Mr. Sharpe and defeat the very purpose behind the regulations governing BAH: to aid service members in obtaining housing in the vicinity of their permanent duty station and to help with corresponding cost-of-living expenses. See

OPNAVINST 7220.12 CH- I if 3; see also Def.'s Rep. at 9. The Court therefore finds that the Navy's decision to place Mr. Sharpe in the same position he was in before his improper separation by paying him the BAH rate for Norfolk-which he was receiving at the time of his unlawful separation- was not arbitrary or capricious, or contrary to law; rather, it was quite reasonable. See generally *Holley v. United States*, 33 Fed. Cl. 454 (1995); *Ulmet v. United States*, 17 Cl. Ct. 679 (1989), aff d 935 F.2d 280 (Fed. Cir. 1991).

2. The Navy's Decision to Deny Mr. Sharpe CSP and the CSP Premium Was Likewise Reasonable.

CSP is an allowance for service members entitled to basic pay who are "assigned to" and "serving on" a ship. See 37 U.S.C. § 305a; see also Pl.'s Mot. at 79-80. A CSP premium is paid to those members who serve on sea duty for over 36 consecutive months. See 37 U.S.C. § 305a(c). Mr. Sharpe argues that he is entitled to CSP and the CSP premium because his corrected record reflects his continuous assignment to the ship through February 2017, and whether he actually served on the ship through this time does not control whether he is entitled to such special pay. See Pl.'s Mot. at 25-26.

Like before, Mr. Sharpe looks to derive a windfall from a technicality he told the BCNR to ignore yet implores this Court to give full weight. The heart of Mr. Sharpe's argument here is that because his corrected record reflects his continuous assignment to the Carl Vinson, the Court must determine that he served on the ship from October 1, 2009 to February 12, 2017 and is therefore entitled to CSP and the CSP premium. See id. at 79-89. Again, the Court

finds it illogical to award Mr. Sharpe CSP and the CSP premium when he never actually went to sea or performed any sea duties. The Court finds the Government's analogy to *Boruski v. United States*, 155 F. Supp. 320 (Ct. CL 1957), particularly persuasive. See Def.'s Mot. at 21. In Boruski, a five-judge panel of this Court's predecessor held that a service member was not entitled to "flight pay" because the member "did not participate in any aerial flight," which was imperative for entitlement to that pay. See Boruski, 155 F. Supp. at 324. The Court sees no reason not to extend this principle to sea pay for purposes of CSP and the CSP premium. Further, to award Mr. Sharpe CSP and the CSP premium would again defeat the purposes behind the regulations governing such pay: to recognize "the greater than normal rigors of sea duty, the arduous duty involved in long deployments and the repetitive nature of assignment to such duty." OPNAVINST 7220.14 ¶ 3; see also Def.'s Rep. at 9. Mr. Sharpe did not experience these rigors; thus, it was reasonable for the Navy to deny him this specialized pay.[16]

Additionally, Mr. Sharpe's reliance on *Carlisle v. United States*, 66 Fed. CL 627 (2005), for the proposition that entitlement to special duty pay is not controlled by whether a service member actually performed special duty is misplaced. See id. at 637; Pl's Resp. at 26. In Carlisle, this Court held that whether a member of the Army was entitled to continue receiving "special duty assignment pay" was a decision

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[16] The Court recognizes that Mr. Sharpe was receiving CSP before his unlawful separation, despite the fact that he was neither serving on the ship nor out to sea. While the Court questions whether this payment was proper to begin with, that issue is not before the Court and thus, the Court will not disturb this pre-separation payment.

for either the Secretary of the Army or the Army Board for the Correction of Military Records to make. Carlisle, 66 Fed. CL at 639. In so holding, the Court relied on the Federal Circuit's decision in *Groves v. United States*, 47 F.3d 1140 (Fed. Cir. 1995). In Groves, the Federal Circuit determined that Mr. Groves, a member of the Army, was erroneously denied "special pay by virtue of [a later overturned] court-martial conviction and sentence." Id. at 1144. In its decision, the Federal Circuit noted:

> [i]t is inarguable that the special pay at issue here is awarded at the discretion of the Secretary of the Army, and that no court is qualified to review the substantive merits of a decision to deny it, so long as the decision comports with any procedural standards mandated by statute or regulation.

Id. (citations omitted). The Federal Circuit then noted that the Secretary of the Army could have lawfully exercised its discretion to discontinue Mr. Groves' special pay,[17] but that no such discretion was exercised; rather, Mr. Groves was denied his special pay by some other means. Id. The Court in Carlisle faced the same factual scenario:

> As in Groves . . . this court is not called upon to review whether the Secretary of the Amy correctly terminated plaintiff's [special duty assignment pay]. Rather, the issue is whether

---

[17] The Federal Circuit's holding here also cuts against Mr. Sharpe's argument that the NPC, by way of the "Bourne Memorandum," had no discretion to make recommendations to DFAS concerning the calculation of Mr. Sharpe's back pay and allowances. See Pl.'s Mot. at 46-51.

> defendant has failed to comply with the first Board's recommendation . . . that plaintiff should receive 'restoration of all rights and privileges, including all back pay and allowances.'

Carlisle, 66 Fed. CL at 637. The factual scenarios described above are not currently present in the case before this Court; rather, this Court is being called upon to review the decision of the Navy-through the NPC and DFAS-to deny Mr. Sharpe CSP and the CSP premium. As the Court explains above, the Navy's decision was reasonable and the Court will not disturb the Navy's lawful exercise of discretion denying Mr. Sharpe these categories of specialized sea pay.

D. A Remand to the BCNR or Any Other Applicable Subdivision of the Navy Is Not Necessary.

Finally, the Court notes that there are no gaps in the administrative record that would preclude it from reaching its conclusions or entering judgment in this case. Accordingly, the Court finds that a remand to the BCNR or any other applicable subdivision of the Navy is not necessary.

Conclusion

In sum, for the foregoing reasons, the Court finds that (1) judgment on the administrative record is the proper procedural vehicle for resolving this case; (2) Mr. Sharpe is judicially estopped from making inconsistent arguments before the BCNR and this Court; and (3) the Navy's decision to award Mr. Sharpe the BAH rate for Norfolk, Virginia and to deny him CSP

and the CSP premium was not arbitrary or capricious, or contrary to law. Mr. Sharpe has received the appropriate amount of back pay in light of his corrected record and is entitled to nothing further. The Court therefore GRANTS the Government's cross-motion for judgment on the administrative record and DENIES Mr. Sharpe's motion for summary judgment. The Clerk shall enter judgment in favor of the Government. No Costs.

IT IS SO ORDERED.

/s/
Thomas C. Wheeler
Judge

APPENDIX C

United States Court of Federal Claims

No. 15-1087C
Filed: December 15, 2017

JOHN F. SHARPE, Plaintiff	
v.	
THE UNITED STATES, Defendant.	

John F. Sharpe, Glenelg, Maryland, pro se Plaintiff.

Igor Helman, with whom were *Chad A. Reader*, Acting Assistant Attorney General, *Robert E. Kirschman*, Jr., Director, *Douglas K. Mickle*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C., and *Lt. Maryam Austin*, Of Counsel, Office of the Judge Advocate General, General Litigation Division (Code 14), U.S. Department of the Navy, Washington, D.C., for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S NOVEMBER 8, 2017 OPINION AND ORDER

WHEELER, Judge.

On December 7, 201 7, pro se Plaintiff John F. Sharpe filed a motion for reconsideration of the Court's November 8, 2017 Opinion and Order, Dkt. No. 63, denying Mr. Sharpe's motion for summary judgment and granting the Government's cross-motion for judgment on the administrative record. The Court deems a response to Mr. Sharpe's motion and oral argument unnecessary. For the reasons stated below, the Court DENIES Mr. Sharpe's motion for reconsideration.

The decision of whether to grant a motion for reconsideration is squarely within the discretion of the trial court. Under Rule 54(b), the Court may revise "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties [that] does not end the action as to any of the claims or parties" prior to entry of a judgment adjudicating all claims. Reconsideration under Rule 54 is "available 'as justice requires.'" *Martin v. United States*, 101 Fed. Cl. 664, 671 (2011). Such a motion should only be granted upon the showing of "exceptional circumstances justifying relief, based on manifest error of law or mistake in fact . . . . . " *Webster v. United States*, 93 Fed. Cl. 676, 679 (2010) (citing *Henderson Cty. Drainage Dist. No. 3 v. United States*, 54 Fed. Cl. 334, 337 (2003)). Exceptional circumstances include: (I) an intervening change in the controlling law; (2) availability of previously unavailable evidence; or (3) preventing manifest injustice. *Shirlington Limousine & Transp., Inc. v. United States*, 78 Fed. Cl. 27, 29 (2007).

Mr. Sharpe's motion for reconsideration does not meet this standard. Regarding Mr. Sharpe's life in-

surance offset, LSL payment offset, and minor basic pay discrepancy claims, the parties represented to the Court during oral argument that there was no "substantive disagreement" between them with respect to these issues and that such issues could be resolved outside of the Court. See Sharpe, Tr. 8-11. Regarding his Basic Allowance for Housing, Career Sea Pay, and Career Sea Pay Premium claims, Mr. Sharpe simply disagrees with the Court's conclusions in its Opinion and Order and retreads the arguments from his motion for summary judgment. A motion for reconsideration is not an opportunity for an unhappy litigant to have an "additional chance to sway the court." *Martin*, 101 Fed. Cl. at 671 (quoting *Matthews v. United States*, 73 Fed. Cl. 524, 525 (2006)) (internal quotation marks omitted). Further, motions for reconsideration should not be entertained upon "'the sole ground that one side or the other is dissatisfied with the conclusions reached by the court, otherwise[, as here,] the losing party would generally, if not always, try [its] case a second time .... '" *Pinckney v. United States*, 90 Fed. Cl. 550, 554 (2009) (quoting *Fru-Con Const. Corp. v. United States*, 44 Fed. Cl. 298, 300 (1999) (quoting another source)). The Court will not grant Mr. Sharpe's motion because it "'merely reasserts ... arguments previously made ... all of which were carefully considered by the Court.'" *Ammex, Inc. v. United States*, 52 Fed. Cl. 555, 557 (2002) (quoting *Principal Mut. Life Ins. Co. v. United States*, 29 Fed. Cl. 157, 164 (1993) (omissions in original)). Thus, Mr. Sharpe's motion for reconsideration is DENIED.

IT IS SO ORDERED.

/s/
Thomas C. Wheeler
Judge

APPENDIX D

United States Court of Federal Claims

No. 15-1087C
Filed: May 5, 2017

JOHN F. SHARPE,	*
Plaintiff	*
v.	*
THE UNITED STATES,	*
Defendant.	*

ORDER

WHEELER, Judge.

On May 5, 2017, the Court held a status conference in this case. As noted in that conference, the Court is dissatisfied with the pace at which the Government is calculating and organizing Mr. Sharpe's promotion and back pay. The Court recognizes that Mr. Sharpe's reinstatement and promotion raise unique issues. " Unique," however, is not and should not be synonymous with "never-ending." Therefore, after considering the patties' positions, the Court has determined that the following schedule is appropriate:

1. The Government shall submit a status report on or before next Friday, May 12, 2017, that sets forth the Government's final position on the amount of back pay to which Mr. Sharpe is entitled. The Government shall then pay Mr. Sharpe this undisputed amount as soon as practicable. As to any disputed amounts, it is impermissible for the Government to report that the amount is "still being examined," or is " to be determined." The Government must state the amount it believes is correct for all items.

2. On or before May 19, 2017, Mr. Sharpe shall file a status report detailing his position on the Government's back pay proposal, as well as any requests he might have for resolving disputes associated with his back pay.

3. The parties shall use best efforts to expedite Mr. Sharpe's promotion, and shall file a status report on or before May 31, 2017 that sets forth their progress on the promotion package.

IT IS SO ORDERED.

/s/
Thomas C. Wheeler
Judge

APPENDIX E

From: Austin, Maryam B LT OJAG, Code 14
Sent: Friday, May 05, 2017 10:14 AM
To: Cordts, Bradley J CAPT NAVPERSCOM, PERS-00J
Cc: Holley, Mark C CAPT NAVPERSCOM, PERS-00J; Bourne, Brian CIV NPC, Pers-00J; Lattin, Grant E CIV OJAG, CODE 14; Bishop, Laura E CDR OJAG, Code 14

Subject: Judge Order ICO Sharpe

Good morning Sir,

We have an ongoing case in the Federal Circuit Court of appeals. LCDR Sharpe, pursuant to a grant of relief issued by the ASN(M&RA), is on track to promote to O-5 and receive a large sum of back pay (he was erroneously separated in September 2009). The Judge in this case will be issuing an order later today directing the Navy to state its position regarding the disputed back pay award amounts NLT 12 May 17. Additionally, by 31 May 17, he is requesting that the promotion piece be resolved.

I am in the process of drafting a letter from CNP directing DFAS to take certain actions. Our office was planning to send this letter to your office and CAPT Peppetti's office in order to get your sign off and determine who the appropriate approval authority should be. It seems that we are short on time. I am planning on finalizing the letter and getting a copy to you COB today. Our hope is that this letter can be

signed NLT 11 May 17 so we make the filing deadline and so we can comply with the jugde's order.

With regard to the promotion piece, Mr. Bourne reached out to PERS-8 yesterday. They are planning on releasing a NAVADMIN in July to promote him (the Senate confirmed him 1 May 17). Given this Judge's vocalized frustration with the Government's pace, and record of ruling against us on other cases, we are wondering if NPC would be inclined to give him an individual appointment so that he can promote earlier. LCDR Sharpe will be reporting to his duty station at the end of the month and would like to report as a CDR .

I'd be happy to discuss this case with you Sir.

Thank you in advance for your time and consideration.

Very Respectfully,

Lieutenant Maryam Austin, U.S. Navy
Office of the Judge Advocate General
General Litigation Division (Code 14)
1322 Patterson Ave., Suite 3000
Washington Navy Yard, DC 20374-5066
Off: 202-685-5442
Main: 202-685-5450
DSN: 325-5398
FAX: 202-685-5472

APPENDIX F

11 May 17

From: BUPERS-00J
To: Director, Navy Centralized Processing, Defense Finance and Accounting Services DFAS) Cleveland
Via: Disbursing Officer, Navy Pay and Personnel Support Center, Millington, TN

Subj: BACKPAY ICO CDR JOHN F. SHARPE, USN, DFAS ACCOUNT NO. MSFSKT5RG

Ref: (a) BCNR ltr JLB Docket No. 4284-14/10521-12 of 8 Feb 16
(b) ASN(M&RA) ltr JLB Docket No. 4284-14/10521-12 of 20 Jun 16
(c) ASN(M&RA) ltr JLB Docket No. 4284-14/10521-12 of 21 Dec 16
(d) Navy Personnel Command ltr 1421 Ser 8/167 of 5 May 17
(e) LCDR John F. Sharpe ltr of 24 Feb 17
(f) MILPERSMAN 5370-010
(g) Joint Ethics Regulations
(h) 37 U.S.C. § 403
(i) 37 U.S.C § 305a
(j) Decision of the Comptroller General of the United States, file no. B-195558, of 6 Jan 81

1. References (a) through (c) are the Board for Correction of Naval Records (BCNR) findings and recommendations in CDR John F. Sharpe's, USN, case and two Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN(M&RA)) orders imple-

menting BCNR's findings and recommendations. On May 2, 2017, CDR Sharpe was confirmed by the Senate for promotion to the rank of commander with an effective date of August 1, 2008. Reference (d) is CDR Sharpe's delivery of permanent appointment that was endorsed by him on 8 May 17. Pursuant to references (a) through (d), I request that DFAS take the following actions pertaining to CDR Sharpe's pay to correct his record to show that he was not discharged from the Naval Service, but has continued to serve on active duty without interruption:

a. Moonlighting. In response to reference (e), and consistent with the requirements of references (f) and (g) pertaining to requests for outside employment, I find that, from 1 Oct 09 through 12 Feb 17, CDR Sharpe was authorized to engage in outside employment with BRN Associates, Inc. and maintain this outside employment while on active duty, as it was compatible and could have been performed contemporaneously with his active duty military responsibilities. Accordingly, I request DFAS forgo the offset of monies earned by CDR Sharpe at BRN Associates, Inc. from 1 Oct 09 through 12 Feb 17 from his award of back pay.

b. Constructive Service. CDR Sharpe was assigned to USS CARL VINSON (CVN 70) from 20 Jun 06 to 30 Sep 09, when he was separated from the Navy. During this period, he was paid Basic Housing Allowance (BAH) at the Norfolk, Virginia rate and Career Sea Pay. CDR Sharpe was assigned to USS CARL VINSON for three years and three months. The normal sea duty tour length for Public Affairs Officers (PAO) is 24 months. Commensurate with PAO detailing policy, he would not have continued to

serve aboard USS CARL VINSON past 2009 and his record (including pay) should be corrected to show that his sea duty ended on 30 Sep 09.

c. BAH. Per reference (h), "the amount of the basic allowance for housing for a member will vary according to the ... geographic location of the member." In 2010, the USS CARL VINSON changed its homeport from Norfolk, Virginia, to San Diego, California. This was after the date on which CDR Sharpe was separated from the Navy and after the date on which CDR Sharpe would have been transferred under permanent change of station orders, had he not been separated; Following his separation, CDR Sharpe and his dependents continued to reside in Carrollton, Virginia. Accordingly, CDR Sharpe's geographic location during all relevant periods was Carrollton, Virginia. For the purposes of constructive service, CDR Sharpe's naval record should be corrected to show BAH allowance at the Norfolk, Virginia rate from 1 Oct 09 until he returned to active duty on 13 Feb 17.

d. Career Sea Pay and Career Sea Pay Premium. Reference (i) provides, "a member of a uniformed service who is entitled to basic pay is also entitled, while on sea duty, to special pay ... Sea duty means duty performed by a member while permanently or temporarily assigned to a ship and while serving on a ship." In accordance with reference (i), CDR Sharpe did not serve aboard ship, and for constructive service purposes would not have been assigned to a ship, from 1 Oct 09 to 12 Feb 17. Therefore, his naval record should be corrected to reflect he is not entitled to career sea pay for that period. Reference (i) also provides, "a member of a uniformed service entitled

to career sea pay under this section who has served 36 consecutive months of sea duty is also entitled to a career sea pay premium." As CDR Sharpe did not serve over 36 consecutive months of sea duty in this period, his naval record should be corrected to show he is not entitled to career sea pay premium.

e. Life Insurance Premiums. If CDR Sharpe elects to provide Navy Personnel Command with a Servicemembers Group Life Insurance (SGLI) Election and Certificate (SGLV 8286) indicating that, for constructive service purposes, he declines SGLI for the period 1 Oct 09 through 12 Feb 17, his naval record should be corrected so that DFAS should forgo the SGLI premium offset for that time period.

f. Lump Sum Leave Payment. In accordance with reference (j), as a matter of equity, DFAS should waive the offset of the lump-sum leave payment CDR Sharpe received when he was separated from the Navy in 2009, because those days of accumulated leave cannot be restored to CDR Sharpe. CDR Sharpe's naval record should be corrected to show a leave balance of 60 days to reflect the maximum amount of leave CDR Sharpe is statutorily authorized to carry from his constructive service period.

g. Payments. DFAS should provide the aforementioned payments as expeditiously as possible, irrespective of multiple payment requirements. In particular, back-payments of base pay, basic allowance for subsistence, and BAH should be made at the earliest opportunity.

2. For questions regarding back pay, please contact PERS-23 at (901) 874-4517.

APPENDIX G

United States Court of Federal Claims

No. 15-1087C
Filed: May 12, 2017

JOHN F. SHARPE,	*	
Plaintiff	*	No.: 1:15-cv-01087
	*	Judge: Thomas C.
v.	*	Wheeler
THE UNITED STATES,	*	
Defendant.	*	

DEFENDANT'S STATUS REPORT

Pursuant to this Court's May 5, 2017 Order (Order), defendant, the United States, respectfully submits this Status Report setting forth the Government's final position on the amount of back pay to which plaintiff, Mr. Sharpe, is entitled, and informing the Court of the progress on the status of Mr. Sharpe's promotion.

With respect to Mr. Sharpe's promotion, the Navy Personnel Command issued a Delivery of Permanent Appointment Letter, dated May 5, 2017, which delivered Mr. Sharpe's "permanent appointment with the

date of rank [of Commander] and effective date of 1 August 2008." Exh. 1. Mr. Sharpe endorsed this appointment on May 8, 2017. Id.

With respect to back pay calculations, the Navy Personnel Command issued a memorandum to Defense Finance and Accounting Services (DFAS), requesting that DFAS take certain actions with respect to Mr. Sharpe's pay. Exh. 2. The directive instructed DFAS to:

- address Mr. Sharpe's claim to keep his moonlighting earnings by "forgo[ing] the offset of monies earned by [Mr.] Sharpe at BRN Associates, Inc.," *see* Exh. 2 ¶ 1(a);

- treat Mr. Sharpe as though his tour of duty aboard the USS Carl Vinson ended on September 30, 2009, because as of that date, he would have been assigned as a Public Affairs Officer (PAO) on the USS Carl Vinson for three years and three months (39 months) whereas the normal sea duty tour length for PAOs is 24 months, see Exh. 2 ¶ 1(b);

- treat Mr. Sharpe as receiving the Basic Housing Allowance (BAH) for Norfolk, Virginia, for the time from October 1, 2009, until February 13, 2017, see Exh. 2 ¶ 1(c). During his separation, Mr. Sharpe resided in Carrollton, Virginia, which has a different BAH rate than Norfolk. Nevertheless, as the best approximation of Mr. Sharpe's constructive service record during his separation, the Navy believes that the BAH for Norfolk is appropriate given the circumstances;

- deny Mr. Sharpe entitlement to Career Sea Pay (CSP) and CSP Premium during the period from October 1, 2009, until February 12, 2017, because Mr. "Sharpe did not serve aboard [a] ship [during that time], and for constructive service purposes would not have been assigned to a ship," see Exh. 2 ¶ 1(d);

- "forgo the [Servicemembers Group Life Insurance] SGLI premium offset for th[e] time period" of Mr. Sharpe's separation, provided that he gives Navy Personnel Command a backdated SGLI Election and Certificate form (SGL V 8286), see Exh. 2 ¶ l(e). Otherwise, DFAS will offset the SGLI and Family SGLI premiums, in the amounts of$2,376.00 and $616.00, respectively;

- "waive the offset of the lump-sum leave payment [Mr.] Sharpe received when he was separated from the Navy in 2009, because those days of accumulated leave cannot be restored" to him, see Exh. 2 ¶ l(f) (citing Comptroller General Decision No. B- 195558 in reference (j)). If DFAS is able to restore the leave to Mr. Sharpe, then it will offset the lump-sum leave payment, in the amount of $13,308.00;

- "provide the aforementioned payments as expeditiously as possible, irrespective of multiple payment requirements" and, in particular, to pay the "base pay, basic allowance for subsistence [(BAS)), and BAH ... at the earliest opportunity," see Exh. 2 ¶ 1(g).

Based on this directive (along with its earlier cal-

culations reported to the Court), DFAS has calculated the following undisputed amounts that it believes are due to Mr. Sharpe. See Exh. 3. DFAS notes several caveats regarding these amounts. First, they do not include taxes (including federal and state taxes) that DFAS is required to withhold from Mr. Sharpe's back pay amounts. Given the Navy's position on Mr. Sharpe's constructive service period, DFAS computed Virginia state taxes. Compounding this issue, multiple payments to Mr. Sharpe may complicate the withholding of taxes.

Second, to the extent that the entitlements are adjusted subsequently – by, for example, the Board for Correction of Naval Records – such adjustment may have an impact on the entitlement amounts, as well as on taxes and other withholdings.

Third, due to the idiosyncrasies of the DFAS pay system software, it is not possible to have the system generate pay estimates without an actual payment; accordingly, DFAS examiners calculated the amounts by hand. Despite our best efforts, it is possible that unintentional calculation errors occurred that, once rectified, could change the final amount.

With those caveats, the Navy and DFAS have determined that Mr. Sharpe is entitled to the following amounts.

1. For the period from August 1, 2008, to September 30, 2009, a retroactive increase for the promotion to O-5 rank:

a. Base pay increase:	$5,720.50
b. BAH (for Norfolk, VA) increase:	$2,857.00
c. CSP increase:	$700.00

2. For the period from October 1, 2009, to April

24, 2016, calculated at the O-5 rank:

a. Base pay:	$639,015.37
b. BAS:	$18,781.63
c. BAH (for Norfolk, VA):	$191,135.40

3. For the period from April 25, 2016, to February 12, 2017, calculated at the O-5 rank:

a. Base pay:	$85,213.44
b. BAS:	$2,434.85
c. BAH (for Norfolk, VA):	$23,644.80

Finally, the Navy notes that it disputes Mr. Sharpe's entitlement to CSP and CSP Premium, but intends to provide these disputed entitlements as per the Court's order. DFAS previously calculated and provided the CSP and CSP Premium amounts at the O-4 rate. Unfortunately, because the promotion to O-5 was effectuated only recently, DFAS informs the Navy that the CSP and CSP Premium calculations for that new rank are not yet available. DFAS intends to provide them by Tuesday, May 16, 2017, and we will file an amended status report with those calculations on that date. We apologize to the Court for any inconvenience that this may cause.

Respectfully submitted,

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/s/
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May 12, 2017 *Attorneys for Defendant*

APPENDIX H

United States Court of Federal Claims

No. 15-1087C
Filed: May 15, 2017

JOHN F. SHARPE,	*	
Plaintiff	*	No.: 1:15-cv-01087
	*	Judge: Thomas C.
v.	*	Wheeler
THE UNITED STATES,	*	
Defendant.	*	

DEFENDANT'S ADDENDUM TO ITS STATUS REPORT

Pursuant to this Court's May 5, 2017 Order (Order), defendant, the United States, respectfully submits this Addendum to its Status Report, filed on May 12, 2017, setting forth the Government's final position on the amount of Career Sea Pay (CSP) and CSP Premium to which plaintiff, Mr. Sharpe, is entitled.

As explained in the May 12, 2017 Status Report, the Navy's position is that Mr. Sharpe is not entitled to Career Sea Pay (CSP) and CSP Premium during the period from October 1, 2009, until February 12,

2017, because he "did not serve aboard [a] ship [during that time], and for constructive service purposes would not have been assigned to a ship." Accordingly, the Navy disputes Mr. Sharpe's entitlement to CSP and CSP Premium, but provides these disputed entitlements as per the Court's order:

1. For the period from October 1, 2009, to April 24, 2016, calculated at the O-5 rank:

a. CSP:	$30,167.17
b. CSP Premium:	$15,986.67

2. For the period from April 25, 2016, to February 12, 2017, calculated at the O-5 rank:

a. CSP:	$3,981.80
b. CSP Premium:	$1,960.00

Respectfully submitted,

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Acting Assistant Attorney General

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Director

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May 12, 2017 *Attorneys for Defendant*

APPENDIX I

United States Court of Federal Claims

No. 15-1087C
Filed: May 25, 2017

JOHN F. SHARPE,	*	
Plaintiff	*	No.: 1:15-cv-01087
	*	Judge: Thomas C.
v.	*	Wheeler
THE UNITED STATES,	*	
Defendant.	*	

PLAINTIFF'S STATUS REPORT, MOTION FOR LEAVE TO FILE PORTIONS THEREOFAS PLAINTIFF'S SECOND AMENDED COMPLAINT, AND MOTION FOR SUMMARY JUDGMENT

Pursuant to this Court's order of May 5, 2017 (Order), Mr. Sharpe hereby submits his position with respect to the Defendant's view, *see* Def.'s Status Report [hereinafter DSR], 1–4, ECF No. 34, of the amounts due to him on the basis of Board for Correction of Naval Records (BCNR) action for the period of his unlawful separation (October 1, 2009, to February 12, 2017), and for one period (August 1, 2008, to

September 30, 2009) of the two for which Mr. Sharpe is entitled to pay at the Commander (O5) pay grade and has been paid as a Lieutenant Commander (O4). Defendant's determinations, which Mr. Sharpe received by mail on May 17, 2017, did not include amounts based upon the difference between the pay Mr. Sharpe has received since February 13, 2017, and the pay owed him as an O5, despite this Court's Order that the Defendant report amounts "for *all items*," Order, 1, ¶ 1, on May 17, 2017 (emphasis added). On May 19, 2017, Mr. Sharpe received notice that Defense Finance and Accounting Services (DFAS) will pay the O4-O5 differential for this period as part of Mr. Sharpe's end-of-month pay for May 2017. Ex. 1, at 1. Defendant provided Career Sea Pay (CSP) and CSP Premium (collectively Sea Pay hereinafter) amounts separately, in an addendum docketed on May 23, 2017, *see* Def.'s Addendum to Its Status Report [hereinafter Addendum], 1–2 (May 23, 2017), ECF No. 35, notwithstanding this Court's Order that Defendant's first report was not to note any amount as "to be determined." *Id.*; *see* DSR, 4 (noting CSP numbers as "not yet available"). (Mr. Sharpe provided CSP calculations to the government as early as September 30, 2015. *See* Joint Status Report [hereinafter JSR], Ex. 6, at 1–5 (May 2, 2017), ECF No. 32.) It is also not clear why Defendant reported the Sea Pay but not San Diego Basic Allowance for Housing (BAH), from April 1, 2010, and following, since it denies his entitlement to each claimed amount.

Summary and Introduction

To make matters as clear as possible, Mr. Sharpe first submits this brief "big picture" summary show-

ing that the pay and allowance amounts in question between the parties fall into thirteen "lump" sums, as shown by the Arabic numerals in the figure below. *See* fig.1, *infra*. The periods of August 1, 2008, to September 30, 2009, and that following February 12, 2017, address differences between what Mr. Sharpe has already been (or will be) paid and what he is owed.

Period	Pay or Allowance			
	Base Pay	BAS	BAH	CSP/CSP-P
1 Aug 08 – 30 Sep 09	1	n/a	2	3*
1 Oct 09 – 24 Apr 16	4	5	8 (II)	11 (III)
25 Apr 16 – 12 Feb 17	7 (I)	6	9 (II)	12 (III)
13 Feb 17 – PCS report date	n/a	n/a	10 (II)	n/a
13 Feb 17 – O5 pay start date	13 (IV)	n/a	n/a	n/a

Figure 1- Agreements (Green) and Disagreements (Red) as to Pay Amounts
(*Defendant has slightly over-stated the amount due in this instance.)

The amounts due from the other two periods – October 1, 2009, to April 24, 2016, and April 25, 2016, to February 12, 2017 (the Constructive Service Period) – are absolute amounts.

Of the thirteen amounts, Mr. Sharpe states *infra* his agreement with six (green) amounts, *see* fig.1,

amounts 1–6, though as regards amount 3 Defendant has calculated more than Mr. Sharpe is due. His disagreements with the remaining (red) amounts, *id.*, amounts 7–13, fall into four categories, each represented by a Roman numeral in the figure. The simplest matter is first: in the case of his base pay between April 25, 2016, and February 12, 2017, Defendant fails to account for the 2017 pay raise.[18] *See* fig.1, amount 7(I). The second and third issues, dealing with Sea Pay for the Constructive Service Period, and BAH for the part of that period following March 31, 2010, are points of contention, because Defendant has attempted to direct DFAS "to correct [Mr. Sharpe's] record,"[19] DSR, Ex. 2 [hereinafter Bourne Memorandum] ¶ 1, ECF No. 34 (letter of Mr. Brian D. Bourne, Deputy Legal Counsel (00J), Bureau of Naval Personnel (BUPERS), to DFAS, May 11, 2017), to reflect the speculation that Mr. Sharpe was detached on September 30, 2009 – the day he was discharged from the Navy – from the permanent duty station (PDS) to which he was then and had been assigned since June 20, 2006 – the USS CARL VINSON (CVN 70) (CARL VINSON) – and remained in Norfolk ever since, *id.* ¶ 1.c, even though, *more than a year ago*, BCNR *expunged* both the evidence of his discharge and the sole document in the record effecting his detachment from the ship. JSR, Ex. 1 [hereinafter BCNR Decision], 17 (May 2, 2016), ECF No. 10-1. As a result, and notwithstanding Mr. Bourne's arguably *ultra vires* act, Mr. Sharpe be-

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[18] Mr. Sharpe informed counsel for the Defendant on April 28, 2017, that the FY 2017 rates had not been incorporated into the preliminary calculations the latter provided him.

[19] As argued herein, this is ironic (to say the least), because DFAS does not "correct" records; DFAS acts upon records that *have been corrected* by the correction boards.

lieves that the evidence of record, established with finality by BCNR, in light of the constructive-service doctrine and applicable regulations, all show that he has been attached to CARL VINSON for the entirety of the Constructive Service Period. He therefore claims entitlement to BAH at the rate applicable to CARL VINSON's geographic location – Norfolk, Va., until March 31, 2010 (thus far the Defendant agrees), and San Diego, Calif., thereafter (so Mr. Sharpe claims the difference, for April 1, 2010, to February 12, 2017, between the BAH he is entitled to at the San Diego rate and what the Defendant wishes to pay him). *See* fig.1, amounts 8(II) and 9(II). Because regulations also provide that during a permanent change of station (PCS), a member's BAH rate remains what it was at the PDS from which he detaches until the day before his arrival at the new PDS, Mr. Sharpe also claims the difference, for the period of February 13, 2017, to the day before he reports to his prospective PDS in Washington, D.C., between whatever BAH he has received and will receive and the BAH for the San Diego PDS, all at the O5 pay grade.[20] *See* fig.1, amount 10(II). On the same

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[20] The Defendant has complicated matters in two ways. First: paying Mr. Sharpe BAH since his reinstatement at the rate for his Carrollton, Va., residence, on that theory that he is a "new accession" to active duty or a reservist being "recalled" (regulations provide for BAH based on the home location in those cases), even though Mr. Bourne appears to think that Mr. Sharpe was notionally attached to an unidentified PDS in Norfolk, Va. through February 12, 2017. (How Mr. Sharpe transferred from his imaginary Norfolk PDS to his home is unexplained. Defendant even argues, Bourne Memorandum ¶ 1.c, that the Norfolk BAH is correct *because* (?) Mr. Sharpe resided in Carrollton.) This means that we are faced with the task of calculating the difference, for the period following February 12, 2017, between Carrollton and San Diego BAH instead of being

theory Mr. Sharpe claims entitlement to Sea Pay for the Constructive Service Period, *id.*, amounts 11(III) and 12(III). (The Defendant's amounts, Addendum, 1–2, for these disputed items differ from Mr. Sharpe's calculations.) Finally, Mr. Sharpe claims, for the period February 12 to May 31, 2017 (assuming DFAS starts his O5 pay June 1), the difference between the BP of an O4 and that of an O5. *See id.*, amount 13(IV).

The final matters for the parties' resolution involve potential offsets and withholdings from the amounts due to Mr. Sharpe. He accepts, though with important caveats, Defendant's decision not to offset his moonlighting earnings, life-insurance premiums, and lump-sum leave (LSL) payment (with a technical correction to the leave that should be credited to him), but disputes the withholding of Virginia state tax, as he has never been a legal resident of the state.

Status Report Contents – Overview

This report is divided into two sections. The first recites *seriatim* the amounts or others of Defendant's determinations that Mr. Sharpe believes are correct and as to which he so stipulates, along the lines of the summary already provided.

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able to use the Norfolk rate as a baseline for the entire settlement period. Second: Defendant's delay has caused the moving parts of Mr. Sharpe's change in both pay grade (as of May 5, 2017) and PDS (he has to report in Washington, D.C., no later than May 31) to impinge upon the determination of a "cutoff" between back pay and current pay. Though not impossible to manage, most if not all of this drill is, in hindsight, totally unnecessary. Alas.

The second section of the report addresses the amounts and other of Defendant's determinations that Mr. Sharpe rejects, and responds to this Court's Order that he "detail[] . . . any requests he might have for resolving disputes associated with his back pay," Order, 1, ¶ 2. Mr. Sharpe hopes to receive the Court's leave to style the second portion of this report a Second Amended Complaint (SAC) and Motion for Summary Judgment (MSJ), since it is his view that, insofar as the proposed pleading and motion dovetail with his statement of "position on the government's back pay proposal" and his "requests for resolving disputes," *id.* at 1, ¶ 2, consolidation of these matters will best serve the public interest in "prompt disposition of cases by trial courts," *Bennett v. United States*, No. 77-005T, 2002 U.S. Claims LEXIS 353, at *5 (Fed. Cl. Dec. 2, 2002), further the Court's purpose to obtain "the just, speedy, and inexpensive determination of every action and proceeding," U.S. Ct. Fed. Claims R. (RCFC) 1, and maximize efficiency, by queuing for mutual disposition the issues upon which the parties agree, in the first part of this report, and by identifying, in the second part, the outstanding claims and the relevant legal issues, as well as arguing for the propriety of the further proceedings that he recommends and requests, all so as to facilitate the Defendant's prompt response, obviate new rounds of status reports, remands, court orders, and motions, and arrive at an expeditious final adjudication.

Further Proceedings and Sole Disagreement on Matter of Law

Mr. Sharpe's view of this case – as it has been since early 2007 – rests upon the single, well-

established and "axiomatic" principle "that an agency of the government must scrupulously observe its own rules, regulations, and procedures." *Blassingame v. Sec'y of the Navy*, 866 F.2d 556, 560 (2nd Cir. 1989) (citations omitted). As the United States Court of Appeals for the Federal Circuit (CAFC) has stated, "The military no less than any other organ of the government is bound by statute." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002). This applies as much to the government's (and Mr. Bourne's) obligation to properly implement BCNR's decision, approved on April 25, 2016, for the Secretary of the Navy (SECNAV), BCNR Decision, 19, as to the actions Mr. Sharpe took to BCNR for review in the first place.

Some years ago the CAFC felicitously noted that "the disciplinary discharge of a senior officer after years of faithful service is not an informal routine matter, and in fact is governed by elaborate procedures." *Doe v. United States*, 132 F.3d 1430, 1435 (Fed. Cir. 1997). Equally so is the correction of such a discharge once the Secretary decides it was improper. But in this case Mr. Sharpe has, especially after reviewing Defendant's recent submissions, regrettably come to the conclusion that aside from minor mistakes the latter may be willing to remedy – e.g., the improper withholding of Virginia state tax and the small error in calculating the O5 BP for the first part of 2017 – the essential disagreement exists only because of Defendant's failure to comprehend such procedures, e.g., as regards the statutory finality of correction-board decisions, the consequent impropriety of a mid-level civilian attorney directing DFAS "to correct [his] record," Bourne Memorandum ¶ 1, and the way in which statute and regulation operate upon a corrected record in figuring the entitlements

that result. Perhaps well-intentioned unfamiliarity with relevant statues, regulations, and back-pay case principles developed by this Court and its predecessors, the CAFC, the Comptroller General of the United States (CGUS), and, the Claims Appeals Board (CAB) of the Defense Office of Hearings and Appeals (DOHA).[21] But this strains credulity, because all one need do is consult the Navy Personnel Command (NPC) website to find a statement of the sole, salutary principle that disposes of this entire case:

> The Comptroller General (CompGen) has consistently held that *except for corrections made by BCNR*, there is no authority to retroactively correct a military record in order to create a pay entitlement for a prior period. If the change requested will create a retroactive claim for pay and/or allowances, refer it to BCNR. Even if the error is an obvious clerical error, *if money or entitlement is involved, refer it to BCNR.*

NPC Document Correction Home Page, http://www.public.navy.mil/bupers-npc/career/ records management/militarypersonnelrecords/Pages/ DocCorrect.aspx (last visited May 19, 2017) (emphasis added). In any event, even unintentional unfamiliarity with the law does nothing to alter the rule obliging "[a]gencies [to follow] applicable statutes and regulations . . . [This] also applies to the military . . . . Like any other body of the government, [it] is bound by statute and its own regulations."

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[21] The CAB is the "successor" to the CGUS for the Defense Department. *See* Claims Case No. 99051701 (July 28, 1999), http://ogc.osd.mil/doha/claims/military/99051701.html.

Wisotsky v. United States, 69 Fed. Cl. 299, 305 (2006) (citations omitted).

In light of what the above-recited sources of authority (and even the website) stand for, Defendant simply violated the law in the process of doing what it said, on May 2, 2017, it would do – i.e., "reconstruct[] Mr. Sharpe's personnel record for [the] eight years [sic]" of his separation so as to "reflect . . . the entitlements the Navy *believes* should be accorded [him]," *id.*, 2–3 (emphasis added).[22] Agency counsel simply has no authority to "correct" Mr. Sharpe's record, *subsequent to BCNR action*, to reflect his personal view of what "would" or "would not have" happened "had [Mr. Sharpe] not been separated," Bourne Memorandum ¶¶ 1.b–.f. Moreover, what Defendant "*believes* . . . appropriate under the circumstances," DSR, 2 (emphasis added), has utterly no role to play in figuring Mr. Sharpe's entitlements, because it is not the former's "*approximation* of Mr. Sharpe's . . . record," *id.* (emphasis added), but rather BCNR's (long since completed) *correction* thereof, "final and conclusive on all officers of the United States," 10 U.S.C. § 1552(a)(4) (2012) (even on officers of the Department of the Navy (DON)), that provides the sole predicate for a determination of what Mr. Sharpe is owed. Even more objectionable is the fact that a colleague of "BUPERS 00-J" vigorously argued the contrary position before the BCNR, i.e., that because Mr. Sharpe "*had orders* to USS CARL

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[22] At the time and with a charitable spin, Defendant's statement of intent may have seemed only to mean that statute books and a calculator would be used to figure what Mr. Sharpe is owed. In hindsight, Defendant's plan to "reconstruct" Mr. Sharpe's record obviously means an attempt to shape his entitlements according to the former's preferences rather than the law.

VINSON" he was "therefore assigned to the vessel" and could not exercise his statutory right to a trial by court-martial in lieu of accepting nonjudicial punishment, Ex. 2, at 2, 3 (Aug. 31, 2015, legal advice to BCNR) (emphasis added),[23] even though Mr. Sharpe had been ordered off the ship on March 7, 2007, never to return, BCNR Decision, ¶ 3.dd. It is, of course, outrageous for Navy attorneys to argue that Mr. Sharpe was amenable to punitive action because of his "on-paper" attachment to CARL VINSON, notwithstanding his actual removal from the ship, and then argue, when BCNR reverses the action as inequitable, BCNR Decision, 15, that the "paper" is not controlling after all. A more "disturbing" example of the government "whipsaw[ing a] plaintiff with inconsistent positions that both prolong resolution and increase expenses," *Mata v. United States*, 107 Fed. Cl. 618, 624 (2012), would be hard to imagine.

Prompted by the Navy's highly improper action,[24] Mr. Sharpe now believes, in terms of his requests to this Court for further proceedings, that the questions, as to the legality of agency counsel's action and as to the entitlements accruing as a matter of law by application of statute and regulation to the facts in his record as corrected by BCNR, are now ripe for adjudication by way of an amended complaint and motion for summary judgment. The following pertains.

The Department of Defense (DOD) *Financial Management Regulation* (DODFMR), DoD 7000.14-R, states that amounts due from a correction of military records under 10 U.S.C. § 1552 are determined "by applying pertinent laws and regulations to all

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[23] In any event BCNR was not persuaded. BCNR Decision, 15.

[24] Though the "Bourne Memorandum" might make a great sixth film in the famous series.

the material facts shown *in the corrected record*," *id.*, Volume 10B, para. 100301 (2015) (emphasis added). This is consistent with all relevant case law. *See, e.g., Ray v. United States., 197 Ct. Cl. 1*, 7 (1972) (noting that "the grant of discretion" under § 1552 extends only to "the record correction" (quoting Acting Comptroller General Weitzel to the Secretary of the Army, 34 Comp. Gen. 7, 12 (1954) (explaining that "specific amounts to be paid as a result of the correction of military or naval records . . . depend solely on a proper application of the statutes to the facts or purported facts as shown by the corrected record")))). Indeed, because an approved BCNR record-correction is "final and conclusive," *id.* § 1552(a)(4), the status of a member whose record is corrected under § 1552 is "*fixed by the records as corrected* and he becomes entitled to pay, allowances, and other benefits pursuant to the provisions of the law when applied to the facts in his case *as they appear from the corrected records*." Lieutenant Stuart M. Steen, USN, retired, B-148868, 1962 U.S. Comp. Gen. LEXIS 2723, at *2–3 (June 26, 1962) (emphasis added).

Because BCNR record-correction action is complete and final, no further exercise of agency discretion, as least as regards Mr. Sharpe's entitlements, is proper or required.[25] Indeed, "once a discretionary decision is made to correct a record, the grant of appropriate money relief *is not discretionary* but automatic." *Denton v. United States*, 204 Ct. Cl. 188, 195

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[25] As Mr. Sharpe explains elsewhere, decisions to waive or forgo offsets, though not proper matters for a "correction" of his record or for any exercise of discretion relative to the consequences of BCNR's record correction, may certainly be made pursuant to the authority provided by statues such as 10 U.S.C. § 2774 or 31 U.S.C. § 3702.

(1974) (emphasis added) (citation omitted); *see Thomas v. United States*, 47 Fed. Cl. 560, 580 (2000) (explaining *Denton* as meaning that a plaintiff who has "not received back pay" to which he is entitled "should be so reimbursed," and where there is a decision "to reinstate plaintiff," he should be "reimbursed" with "all of the back pay driven by that additional relief"); *Hankins v. United States*, 183 Ct. Cl. 32, 34 (1968) (finding plaintiff entitled to "necessary result[s] of the Correction Board's determinations"). This is because, as Acting Comptroller General Weitzel noted, whether "acting through boards or independently of such boards," the military department Secretaries "are not vested. . . with any discretionary power to make determinations of the specific amounts to be paid as a result of the correction of . . . records." 34 Comp. Gen. at 9, 12.

What is more, agency counsel's attempted (and illegal, as herein argued) exercise of discretion, so as to fix Mr. Sharpe's entitlements at amounts to his own liking, is not rectified by virtue of being covered with the fig leaf of an additional "correction" (by memorandum) of Mr. Sharpe's record. (Maybe Mr. Bourne is aware that Mr. Sharpe's entitlements arise from an application of law and regulation to his record "as corrected," because his memorandum tries to "correct" Mr. Sharpe's record seven times, Bourne Memorandum ¶¶ 1.b–.f.) But this "post hoc salvage operation[] of counsel," *Mengistu v. Ashcroft*, 355 F.3d 1044, 1046-7 (7th Cir. 2004), designed to give effect, rather transparently, only to what Mr. Bourne personally believes Mr. Sharpe is "entitled to," Bourne Memorandum ¶ 1.d, is, indeed, arguably void and of no legal effect. As noted, the military departments have no discretion to exercise in determining amounts due following a record correction. This is,

again, firstly because BCNR's decision is "final and conclusive on all officers of the United States," 10 U.S.C., *supra.*, even on Mr. Bourne, and it is Mr. Sharpe's record *as corrected by BCNR*, not (a year later) by Mr. Bourne, to which "pertinent laws and regulations" are applied in determining the financial consequences of the correction of that record. DODFMR, *supra*, paras. 100101, 100202 (noting that the "right to the payment of money" must originate with a "proper correction" of a record *by a military correction board*, not by Mr. Bourne). Indeed, BCNR *sent its final decision to DFAS a year ago*, *see* JSR, Ex. 2, at 1 (May 2, 2017), which DFAS acknowledged, *id.*, Ex. 4, at 1, and it was not "Via: Mr. Bourne." Moreover, there is *no statutory authority* – as even NPC's website informs us – for payment of money (in this context) on any basis *other* than 10 U.S.C. § 1552, which permits payments "found to be due" as a result of "correcting a record *under this section*," *id.* § 1552(c)(1) (emphasis added) – and not "under Mr. Bourne's pen." Also, a correction "under this section" must be made "by the Secretary *acting through boards of civilians*," *id.* § 1552(a)(1) (emphasis added), not through Mr. Bourne. The law here is well established. *See Weiss v. United States*, 187 Ct. Cl. 1, 12 (1966) (citing the "requirement[] that the Secretary *act through civilian boards*" (emphasis added)); *Hertzog v. United States*, 167 Ct. Cl. 377, 385–6 (1964) (same); *Proper v. United States*, 139 Ct. Cl. 511, 526 (1957) (rejecting an interpretation of the statute that would render the words "acting through boards" superfluous); H. C. McDaniel, Department of the Army, 52 Comp. Gen. 952, 955 (1973) (noting that no official even with secretarial authority may "make any changes in an individual's . . . record that would result in a change of material fact or the crea-

tion of a new record [absent] a proceeding" before a correction board). Equally problematic are the facts that record corrections "under this section" 1) are only made "under procedures established by the Secretary concerned," 10 U.S.C. § 1552(a)(3)(A); *cf.* 32 C.F.R. §§ 723.1–723.11 (2016); 2) may not be made without "a request for the correction" from the service member, *id.*§ 1552(b); and 3) may only be made "in favor of a serviceman and never against him." *Doyle v. United States*, 220 Ct. Cl. 285, 311 (1979).

Mr. Sharpe therefore submits that the key, and singular, issue remaining for adjudication in this case is the extent of the relief due him as a result of the correction of his naval record by BCNR rather than by Mr. Bourne. That correction removed the evidence of Mr. Sharpe's discharge from the Naval Service just as it, necessarily, removed the evidence of his detachment from CARL VINSON, because the expunged orders that separated him from the service *were the orders that detached him from the ship. See* Ex. 3, at 1. So, following BCNR's action, there is not a shred of evidence to which Defendant can point effecting or memorializing Mr. Sharpe's detachment from CARL VINSON. Which means that, by applying the relevant regulations to his record, as corrected by BCNR, in light especially of the key opinions of this Court, its predecessors, the CAFC, and the CGUS, certain unavoidable conclusions result 1) Mr. Sharpe can not have detached from CARL VINSON *prior* to executing his PCS orders on February 12, 2017, because a PCS requires a PCS order, and there is no other prior order in his record; 2) calculation of Mr. Sharpe's entitlements are thus based on the predicate fact of his attachment to CARL VINSON for the entirety of the Constructive Service Period; 3) Mr. Sharpe is entitled to the special pay he would have

received in view of that attachment: and 4) Mr. Sharpe is entitled to the BAH he would have received based on the two geographic locations CARL VINSON had during the Constructive Service Period, because regulations provide that a member's location for BAH purposes is the location *of the home port of the ship to which he is assigned*, and that when a ship shifts her home port, the assigned members' BAH rates change to the rate of the new home port location as of the date of the shift. Indeed, Mr. Bourne virtually *gives away the game* in "correcting" Mr. Sharpe's record to end his service aboard CARL VINSON on September 30, 2009, Bourne Memorandum ¶ 1.b, because the necessary implication is that, absent Bourne's illegal action, Mr. Sharpe's record would show his attachment to CARL VINSON as continuing well beyond that date. Otherwise, what need would there be for Bourne's intervention? But instead of engaging in the process which DOD regulations mandate (and which have the "force and effect of law," *Jackson v. United States*, 216 Ct. Cl. 25, 36 (1978)) – that payments due from "a correction of military records" be determined "by applying pertinent laws and regulations to all the material facts shown in the corrected record," DODFMR, *supra*, para. 100301, Bourne goes about it the other way: he determines the amounts *he thinks are due*, and corrects the record, *sua sponte* and *ultra vires*, so that when the "pertinent laws and regulations," *id.*, are applied to *his* facts, the outcome is to the Navy's liking.

MSJ Correct Vehicle for Disposition of This Case

The propriety of the BCNR decision approved by SECNAV is unquestioned; indeed, both parties agree

that it constitutes the "final agency action." *See* Joint Mot. for Stay [hereinafter JMS], 2 (Nov. 24, 2015), ECF 6; *see also* JSR, 1 (Dec. 12, 2016), ECF No. 20 (noting that the parties had informed the Court of SECNAV's "final determination" on BCNR's recommendations). Because BCNR's action only modified the *facts* in Mr. Sharpe's record, *see* DODFMR, *supra*, para. 100202 ("A proper correction and a right to the payment of money must be a result of a change of *facts* from those already in the original record, or an addition or deletion of *a fact*.") (emphasis added) (discussing statutory record corrections); *see also Russell v. United States*, 161 Ct. Cl. 183, 186 (1963) ("[O]nly the facts found by the Correction Board are final."); Lieutenant Colonel H. W. Kasserman, 45 Comp. Gen. 538, 541 (Mar. 3, 1966) ("[A] a member's military record contains a history of the facts which g[i]ve rise to certain legal rights under applicable provisions of law."), and because Mr. Sharpe takes no issue with BCNR's correction of those facts, there is "no genuine dispute" in their regard, RCFC 56(a).

Mr. Sharpe therefore does not believe it appropriate to return to BCNR, because it is BCNR's unobjectionable correction of his record which Mr. Sharpe seeks to enforce. BCNR has already, quite properly, found Mr. Sharpe's separation "void due to plain legal error" and corrected his record to reflect that he "was not discharged . . . but has continued to serve on active duty without interruption." BCNR Decision, 16, 18. Consequently, the posture of this case fits precisely within the four corners of the exception that the CAFC in *Martinez v. United States noted makes 10 U.S.C. § 1552 a money-mandating statute: i.e., "when the correction board has granted relief and the service member seeks to enforce or challenge the implementation or scope of the remedial order*,"

Martinez v. United States, 333 F.3d 1295, 1315 n.4 (Fed. Cir. 2003); *see Sinclair v. United States*, 66 Fed. Cl. 487, (2005) (noting that the *Martinez* exception to a cause of action accruing with the underlying discharge applies when, as here, a board "found Plaintiff's discharge to be unlawful, and . . . grant[ed] relief that Plaintiff seeks to enforce"). In the context of this exception, as here, BCNR's work is done. It has already "granted relief." *Martinez, id.*

Nor is judgment upon the administrative record (JAR) under RCFC 52.1 the correct proceeding. "Judicial review of [BCNR's] decision" requires its administrative record, *Hwang v. United States*, 94 Fed. Cl. 259, 268 (2010); *accord Greene v. United States*, 65 Fed. Cl. 375, 382 (2005); *see Walls v. United States*, 582 F.3d 1358, 1367 (Fed. Cir. 2009), but that decision is *not disputed here*. So JAR proceedings, i.e., "a paper trial based upon the [agency's] documents," where the "Court makes factual findings," *Strand v. United States*, 127 Fed. Cl. 44, 49 (2016) (citations omitted), *appeal docketed*, No. 16-2450 (Fed. Cir. Aug. 10, 2016), are not apposite.

Mr. Sharpe's claims as herein consolidated now address solely whether Mr. Bourne's attempt to correct his record is *ultra vires* and whether the facts of his record as corrected by BCNR (and not Mr. Bourne) "entitle [him] to the benefit[s] of [the relevant] statute[s]." *Russell*, *supra*. Because, therefore, these claims "require[] the interpretation of a statute, and, hence, [are] question[s] of law," *id.*; *see also Clary v. United States*, 333 F.3d 1345, 1348 (Fed. Cir. 2003) (citations omitted) ("Issues of statutory interpretation are reviewed *de novo*."); because a return to BCNR will not produce a relevant remedy, insofar as "[t]here is no place in [a military] record for a formal statement of a conclusion of law relating

to the rights which accrue as a result of" correction-board action, 45 Comp. Gen. at 541; and because a correction-board applicant who disagrees with a proffered amount due from its action "may look to the Court of Claims . . . for consideration and settlement of his claim against the United States," 34 Comp. Gen. at 10; *accord Ray*, 197 Ct. Cl. at 7, Mr. Sharpe respectfully submits that this Court's consideration of his MSJ is the most appropriate and expeditious path to disposition of his remaining claims. The MSJ is in fact especially appropriate "when there is no administrative record reflecting a prior [adverse] agency or board decision on plaintiff's claims," *Lippmann v. United States*, 127 Fed. Cl. 238, 252 (2016) (citation omitted). Moreover, to the extent needed in this case, the Court may take judicial notice of publicly verifiable information such as statutes, regulations, pay tables, and government documents submitted by the parties. *Anchor Savings Bank v. United States*, 121 Fed. Cl. 296, 317 n.23 (2015) ("This court adheres to Rule 201 of the Federal Rules of Evidence" and "may take judicial notice . . . at any stage of the proceeding" of "facts which can be accurately determined by consulting reliable sources.") (citations omitted) (quoting Fed. R. Evid. 201(b), (c)). Finally, Mr. Sharpe is firmly convinced that the "materials filed in [this] case [will] reveal that 'there is no genuine dispute as to any material fact and [that he] is entitled to judgment as a matter of law,'" *Lippman*, 127 Fed. Cl. at 244 (quoting RCFC 56(a)).

This Court has somewhat recently observed that, "once a military personnel board has decided that benefits are appropriate and the Secretary's designee has expressly adopted that determination, this court would be hard pressed to explain convincingly why it should not award those benefits as part of the relief

appropriate to compensate a claimant." *Metz v. United States*, 65 Fed. Cl. 631, 636 (2005) (citation omitted). In view of that observation, along with the additional points herewith submitted, Mr. Sharpe hereby moves this honorable Court for leave to file the second part of this status report as his Second Amended Complaint and Motion for Summary Judgment, and likewise respectfully moves the Court for leave to style his five statements of disagreement with Defendant's back-pay proposal as five Counts of his SAC, regarding which he moves the Court, finally, to find that there is no genuine dispute as to any material fact and that Mr. Sharpe is therefore entitled to judgment as a matter of law.

The Back-Pay Proposal: Summary of Response

1. As outlined *supra* and detailed *infra*, Mr. Sharpe stipulates as to the rectitude of Defendant's decisions regarding the offsets of his interim civilian moonlighting earnings, the LSL payment he received in October 2009, and the life-insurance premiums, with caveats as noted. And, regarding the amounts indicated for which there is agreement between his figures and Defendant's, Mr. Sharpe stipulates that those amounts are correct and undisputed.

2. On the other hand, in the Counts that follow, Mr. Sharpe disputes some of Defendant's determinations. First, regarding the amounts for which his figures and Defendant's figures do not agree, Mr. Sharpe disputes the former's amounts and claims entitlement to additional amounts as below detailed. Additionally, as also noted already, Mr. Sharpe claims entitlement to BAH at the San Diego rate between April 1, 2010, and February 12, 2017 (applicable to CARL VINSON's geographic location at the

time), and to Sea Pay for the duration of his Constructive Service Period. He also claims entitlement to the differences in BP and BAH between the O5-pay-grade amounts, at the San Diego BAH rate, and what he has received or will receive at the O4 pay grade, for the period from February 13, 2017, when his active-duty pay started following reinstatement, until his base pay changes to the O5 pay grade (for the pay-grade-dependent differential) and until he reports to his Washington, D.C., PDS (in terms of the BAH-entitlement differential). Finally, he disputes the withholding of state tax from the amounts due.

3. In support of the Counts and stipulations to which it is applicable, Mr. Sharpe's offers the Court and the Defendant a chart reflecting his calculations of claimed entitlements and their sources. *See* Ex. 4, at 1. For clarity, the O4 entitlements are lined out wherever they are inapplicable. For comparison with Defendant's figures, the chart includes calculations for BAH at the Norfolk, Va., as well as the San Diego, Calif., rate. The chart stops at May, 31, 2017, because that is when DFAS indicated it will begin Mr. Sharpe's regular O5 pay, Ex. 1, at 1, though the San Diego BAH amount shown will only be good until Mr. Sharpe reports to Washington, D.C..Finally, for ease of reference, the Roman numerals in the summary figure at the outset of this report match the numbering of the Counts *infra* that identify Mr. Sharpe's claims and disagreements with Defendant's proposals.

The Back-Pay Proposal Part I: Stipulations

A. Entitlements based upon the difference between the O5 and O4 pay grades for the period August 1, 2008, to September 30, 2009

1. Base pay

4. Defendant has determined, DSR, 3, that Mr. Sharpe is owed $5720.50 for this period and entitlement.

5. Mr. Sharpe agrees with and accepts the determination recited in paragraph 4 *supra*.

2. Basic allowance for housing

6. Defendant has determined, DSR, 4, that Mr. Sharpe is owed $2857.00 for this period and entitlement.

7. Mr. Sharpe agrees with and accepts the determination recited in paragraph 6 *supra*.

3. Career sea pay

8. Defendant has determined, DSR, 4, that Mr. Sharpe is owed $700.00 for this period and entitlement.

9. Mr. Sharpe accepts the determination recited in paragraph 8 *supra*, subject to the following clarification.

10. Mr. Sharpe's calculations, *see* Ex. 4, at 1 (cells N5 to N8), reflect that he was paid during this period at the rate of $280.00 per month through June 8, 2009, because he had five years of cumulative sea duty, and at the rate of $285.00 per month thereafter, because his sea duty counter, as of June 9, 2009, reflected six years of cumulative sea duty. Defendant's calculations fail to use the monthly rates appropriate for Mr. Sharpe's years of sea duty, and instead assume that he was previously paid only at the

rate of $260.00 per month. Mr. Sharpe believes that he is owed only $471.33 rather than $700.00 for this period, but would accept the difference of $228.67 against other entitlements herein claimed, should Defendant wish to agree thereto.

B. Entitlements at the O5 pay grade for the period October 1, 2009, to April 24, 2016

1. Base pay

11. Defendant has determined, DSR, 4, that Mr. Sharpe is owed $639,015.37 for this period and entitlement.

12. Mr. Sharpe agrees with and accepts the determination recited in paragraph 11 *supra*.

2. Basic allowance for subsistence

13. Defendant has determined, DSR, 4, that Mr. Sharpe is owed $18,781.63 for this period and entitlement.

14. Mr. Sharpe agrees with and accepts the determination recited in paragraph 13 *supra*.

3. Basic allowance for housing

15. Defendant has determined, DSR, 4, that Mr. Sharpe is owed $191,135.40 for this period and entitlement.

16. Mr. Sharpe accepts the Defendant's determination recited in paragraph 15 *supra* to the extent that he does not dispute that he is entitled to receive *at least* the amount indicated, but he disagrees with and disputes the Defendant's determination that he is entitled only to that amount, and suggests that he is also entitled to receive an additional $42,112.20 for

this period on the basis of his view, detailed *infra* at Count II, that the correct total amount is $233,247.60, *see* Ex. 4, at 1 (cell U32), and he invites the Defendant to so stipulate.

17. Incidentally Mr. Sharpe wishes to note that his calculations, *see* Ex. 4, at 1 (cell S32), indicate that his BAH entitlement at the Norfolk, Va., rate is $185,490.60. He cannot identify the source of the divergence between his calculations and Defendant's because the latter has not submitted information as to how its calculations were performed or as to the pay rates and periods that provided their bases. DSR, Ex. 4, at 1 (noting "see attached calculation" but providing no calculation). In the event Mr. Sharpe does not prevail in establishing his entitlement to BAH as alleged *infra* at Count II, he would accept the difference of $5,644.80 between his and Defendant's calculations against other entitlements herein claimed, should Defendant wish to agree thereto.

C. Entitlements at the O5 pay grade for the period April 25, 2016, to February 12, 2017

1. Base pay

18. Defendant has determined, DSR, 4, that Mr. Sharpe is owed $85,213.44 for this period and entitlement.

19. Mr. Sharpe accepts the Defendant's determination recited in paragraph 18 *supra* to the extent that he does not dispute that he is entitled to receive *at least* the amount indicated, but he disagrees with and disputes the Defendant's determination that he is entitled only to that amount, and suggests that he is also entitled to receive an additional $260.82 for

this period on the basis of his claim, *infra* at Count I, that the correct total amount is $85,474.26, *see* Ex. 4, at 1 (cell Q37), and he invites the Defendant to so stipulate.

20. Mr. Sharpe notes that he is entitled to monthly O5 BP of $9,062.70 for 2017, *see* DFAS Military Pay Charts, https://www.dfas.mil/militarymembers/payentitlements/military-pay-charts.html (last visited May 18, 2017). It appears that Defendant calculated the 2017 BP base pay entitlement at the 2016 rate of $8,876.40 per month, *id.*, though Defendant offers no details as to its calculations, DSR, Ex. 4, at 2 (noting "see attached calculation" but providing none). *See* Ex. 4, at 1 (cells P36–Q37). The monthly difference of $186.30 and the forty-two days' (January 1 to February 12) worth of this error would account for the difference of $260.82.

2. Basic allowance for subsistence

21. Defendant has determined, DSR, 4, that Mr. Sharpe is owed $2,434.85 for this period and entitlement.

22. Mr. Sharpe agrees with and accepts the determination recited in paragraph 21 *supra*.

3. Basic allowance for housing

23. Defendant has determined, DSR, 4, that Mr. Sharpe is owed $23,644.80 for this period and entitlement.

24. Mr. Sharpe accepts the Defendant's determination recited in paragraph 23 *supra* to the extent that he does not dispute that he is entitled to receive *at least* the amount indicated, but he disagrees with and disputes the Defendant's determination that he

is entitled only to that amount, and suggests that he is also entitled to receive an additional $6,904.20 for this period on the basis of his view, detailed *infra* at Count II, that the correct total amount is $30,549.00, *see* Ex. 4, at 1 (cell U37), and he invites the Defendant to so stipulate.

25. Incidentally Mr. Sharpe wishes to note that his calculations reflect (*see* Ex. 4, at 1, cell S37) that his BAH entitlement at the Norfolk, Va., rate is $21,718.20. He cannot identify the source of the divergence between his calculations and Defendant's because the latter has not provided information as to how its calculations were performed or as to the pay rates and periods that provided their bases. DSR, Ex. 4, at 2 (noting "see attached calculations" for further detail but providing none). In the event Mr. Sharpe does not prevail in establishing his entitlement to BAH as alleged *infra* at Count II, he would accept the difference of $1,926.60 between his and Defendant's calculations against other entitlements herein claimed, should Defendant wish to agree thereto.

D. Offsets against entitlements

1. Setoff of interim civilian earnings from moonlighting

26. Defendant has determined, DSR, 1, that Mr. Sharpe's civilian wages from the Constructive Service Period should not be set off against the amounts found due to him.

27. Mr. Sharpe agrees with and accepts the determination recited in paragraph 26 *supra*, subject to the following clarifications.

28. Mr. Sharpe wishes to note for the record his disagreement with the purportedly discretionary

finding that he "was authorized to engage in outside employment," Bourne Memorandum ¶ 1.a, to the extent that the cited circular references (one simply points to the other) do not require such a finding, but rather establish the presumption that a DOD employee is free to engage in outside employment "[i]f action is not taken to prohibit the employment or activity." *Joint Ethics Regulation*, DoD 5500.7-R, para. 2-303.b (1993). Insofar as Mr. Sharpe's record contains no such prohibition, the purported "finding" is arguably unnecessary.

29. Mr. Sharpe additionally wishes to note that, as an exception to the facially non-discretionary language of 32 C.F.R. § 723.10(c)(1) (2016) ("Earnings received from civilian employment . . . during any period for which active duty pay and allowances are payable will be deducted from the settlement."); *accord* DODFMR, Volume 16, para. 040602, the exemption of moonlighting wages from the general requirement that civilian earnings be set off is solely a creature of case law developed in this Court, its predecessors, and the CAFC, *see, e.g, Montiel v. United States*, 40 Fed. Cl. 67, 70 (1998). Presumably the Defendant can act under 31 U.S.C. § 3702 (2016) or other authority, and its willingness to apply the exemption is appreciated.

2. Servicemembers' Group Life Insurance (SGLI) premiums

30. The Defendant has determined, DSR, 2, that the amounts due to Mr. Sharpe should not be reduced by $2992.00, which amount represents SGLI premiums Defendant maintains would have been paid but for his unlawful separation, as long as he provides to NPC a "backdated" form, DSR, Ex. 2, at

2, "indicating that, for constructive service purposes, he declines SGLI" for the Constructive Service Period, Bourne Memorandum ¶ 1.e.

31. Mr. Sharpe agrees with and accepts the determination recited in paragraph 30 *supra*, subject to the following clarifications.

32. As detailed below, *infra* ¶¶ 143–156, Mr. Sharpe disputes the lawfulness of Defendant's counsel purporting to "correct" his naval record, and he makes this observation here solely to avoid any appearance of acquiescing in Defendant's arguably unlawful "record correction."

33. Mr. Sharpe is, however, happy to accept Defendant's determination as to the allegedly due life-insurance premiums because he believes that, notwithstanding the absence of authority for the underlying record correction, Defendant's forgoing of recoupment of said premiums is warranted, as noted in the margin,[26] or at least discretionary under 31 U.S.C. § 3702.

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[26] There is apparently no authority addressing whether retrospective insurance coverage is part of the "legal fiction" of constructive service, *see, e.g., Barnick v. United States*, 591 F.3d 1372, 1379 (Fed. Cir. 2010) (citations omitted). Still, federal regulations permit the reduction of amounts found due incident to a record correction "by the amount of any existing indebtedness to the Government arising from military service," but only "to the extent authorized by law and regulation." DODFMR, Volume 16, para. 040602; *accord* 32 C.F.R. § 723.10(c)(1) (2016). Unpaid SGLI premiums are not debts, which only arise only from erroneous *payments received. See* 32 C.F.R. § 283.3 (2016). Nor does any "law [or] regulation," DODFMR, *supra*, authorize the recoupment of unpaid SGLI premiums via administrative setoff or any other recognized debt-collection means. The non-payment of premiums due is instead addressed in four ways. First, a service member who fails to make direct premium payments when required to do so, *see* 38 U.S.C. § 1969(a)(2)(A) (2012), has coverage terminated

34. As invited, Mr. Sharpe has executed and submitted to counsel a backdated form SGLI 8286 declining, for constructive-service purposes, SGLI for the Constructive Service Period. *See* Ex. 5, at 1–2 (Servicemembers' Group Life Insurance Election and Certificate).

3. Lump-sum leave (LSL) payment

35. The Defendant has determined, DSR, 2, that amounts due to Mr. Sharpe should not be reduced by the amount of the LSL payment he received when he was separated from the Navy.

36. Mr. Sharpe agrees with and accepts the determination recited in paragraph 35 *supra*, subject to the following clarifications, and provided Defendant

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sixty days *following* the date he is notified of his failure, unless before the termination he remits all amounts due and justifies the delay to the Secretary concerned. 38 U.S.C. § 1969(a)(2)(B) (2012); DODFMR, Volume 7A, para. 470504. The premiums are not collected as debts for the months during which a member is insured without having made the required payments. Instead (the second scenario), unpaid premiums are deducted from his policy proceeds, 38 U.S.C. § 1969(a)(4); DODFMR, *supra*, para. 4708.A, in the event of a payout for a death during that two-month (or longer) premium-nonpayment period. Third, SGLI coverage is reinstated for a military member who is restored to duty with pay following appellate leave incident to a court-martial, DODFMR, Volume 7A, para. 4704, but no premiums are recouped on the theory that the member had "retroactive" coverage during his leave. Finally, SGLI is protected by statute as "incontestable," except in the case of "nonpayment of premium[s]." 38 U.S.C. § 1979 (2012). Since statute and regulation articulate these express remedies for the non-payment of premiums, *expressio unius exclusio alterius* arguably renders their collection as indebtedness via offset in a record- correction case *not* "authorized by law and regulation," DODFMR, *supra*; 32 C.F.R, *supra*.

properly credits Mr. Sharpe's pay account with seventy-one days' leave accrued during the Constructive Service Period.

37. By way of background, a member may be paid for any unused leave to his credit upon discharge from the service. 37 U.S.C. § 501(b)(1), (f) (2012) (providing for the payment of up to sixty days of unused accrued leave to a member "at the time of his discharge"); *accord* DODFMR Volume 7A, para. 350201.A.1, .2.a. When he was separated, Mr. Sharpe was paid $13,380.00 for sixty days' worth of the 105 days of leave he had accrued. *See* Ex. 6, at 3, 5 (September 2009 Leave and Earnings Statement (LES) showing 105 days of accumulated leave and October 2009 LES reflecting the lump-sum leave payment and no leave).

38. Defendant's counsel suggests that "DFAS should waive the offset of the lump-sum leave payment [Mr. Sharpe] received when he was separated from the Navy in 2009, because those days of accumulated leave cannot be restored to [him]." Bourne Memorandum ¶ 1.f. Defendant appears to equivocate, however, regarding counsel's suggestion and instead indicates that "if DFAS is able to restore the leave to Mr. Sharpe, then it will offset the lump-sum leave payment in the amount of $13,308.00." DSR, 2.

39. Mr. Sharpe respectfully notes that Defendant's "either-position appears to run counter to the express terms of this Court's Order, which stated that no items were to be reported as "'still being examined,' or . . . 'to be determined.'" Order, 1, ¶ 1. If DFAS does intend to withhold the $13,308.00, it is difficult to see what value to place in the agency's statement that it will "waive the offset" of that amount. Bourne Memorandum ¶ 1.h. Mr. Sharpe's stipulation in this matter is therefore limited to the

Defendant's position as recited in paragraph 36 *supra.*

40. Defendant's counsel further incorrectly suggests that Mr. Sharpe's record "should be corrected to show a leave balance of 60 days to reflect the maximum amount of leave [he] is statutorily authorized to carry from his constructive service period." Bourne Memorandum ¶ 1.f.

41. Though Mr. Sharpe objects, as noted at paragraph 32, *supra*, hereby incorporated by reference, to any purported "correction" of his record by Defendant's counsel, he maintains in any event that counsel's so-called correction is itself incorrect, for the reasons that follow.

42. Members of an armed force accrue leave at the rate of thirty days per year. 10 U.S.C. § 701(a) (2012), and they "may not accumulate more than 60 days' leave." *Id.* § 701(b).

43. Because Mr. Sharpe's separation has been set aside, he has accumulated leave during his Constructive Service Period and, based upon the statutory rate of accrual and the Constructive Service Period running for longer than two full fiscal years, Mr. Sharpe's constructive record should reflect the maximum of sixty days' leave *as of October 1, 2016.*

44. Following October 1, 2016, Mr. Sharpe constructively accrued leave at the regular rate, such that he should have earned an additional 17.5 days for the current fiscal year between October 1, 2016, and, e.g., the end of April 2017, for a total of 77.5 based upon the 17.5 from this year and the 60 earned during two of the several fiscal years of the Constructive Service Period prior to October 1, 2016.[27]

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[27] Technically Mr. Sharpe had a zero leave balance on October 1, 2009, because the sixty he could carry forward were sold. *See* Ex. 6, at 5 (October 2009 LES). He then earned his balance

His most recent LES reflects the correct number of leave days. *See* Ex. 5, at 7 (April 2017 LES reflecting 77.5 days of leave).

45. Defendant's figures appear to acknowledge this, though in a backhanded way, by making reference to "reverse leave sell [–] 71 days LSL added to member's record." DSR, Ex. 4, at 1. The apparent problem with this note is that Mr. Sharpe "sold" only sixty days' leave to the government upon his separation (and these were leave days that had accrued to him *prior* to his September 30, 2009, separation), and the only possible source of the figure of seventy-one is the days of leave that Mr. Sharpe accrued *following* his separation, during the Constructive Service Period – i.e., a sum of the maximum of sixty-days that could be carried through September 30 of fiscal year (FY) 2016, plus the eleven days earned for FY 2017 through February 12. (The eleven accrued on top of the sixty-day maximum because they are available for use until the end of the fiscal year. *See* 10 U.S.C. § 701(b) (2012) ("Leave taken during a fiscal year may be charged to leave accumulated during that fiscal year without regard to [the sixty-day] limitation."). Again, it is likely that DFAS understands this, because Mr. Sharpe's April 2017 LES shows a "before balance" of 71 days' leave. *See* Ex. 6, at 7 (block "BF Bal").

46. Mr. Sharpe's case is arguably controlled by an on-point decision of the DOHA CAB. *Mutatis mutandis*, the decision stated that

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of sixty by the end of FY 2011 so that his record would have reflected sixty days' leave by September 30, 2011. Those are the sixty days carried forward to October 1, 2016 – because all subsequently earned leave is lost owing to the statutory limit.

> 37 U.S.C. § 501(f) prevents the crediting of more than 60 days to [a] member's leave account in any fiscal year. That limitation governs correction settlements. *See* 56 Comp. Gen. 587 (1977). While it is true that [Mr. Sharpe] would have accrued 30 days per year, or a total of [221] days of leave between [October 1, 2009, and February 12, 2017], he would not have been able to carry over more than 60 days from one fiscal year to the next. *See* 10 U.S.C. §701(b).

DOHA CAB Decision, Claims Case No. 00060601 (Aug. 3, 2000), http://ogc.osd.mil/doha/ claims/ military/00060601.html.

47. Wherefore Mr. Sharpe submits that his leave account should show a total of seventy-one days' leave to his credit from the Constructive Service Period, exclusive of the leave he has earned since his February 13, 2017, reinstatement, he invites the Defendant to so stipulate.

The Back-Pay Proposal Part II: Disagreements, Second Amended Complaint, and Motion for Summary Judgment

48. Insofar as leave of the Court is herein requested to style this portion of the status report as a Second Amended Complaint and Motion for Summary judgment, Mr. Sharpe states in what follows his disagreements with defendants position equally as Counts of his SAC and as claims in his MSJ, in view of which he asks the Court to award him judgment as a matter of law.

49. In order to ensure that the SAC is properly perfected, Mr. Sharpe provides *infra* pursuant to

RCFC 8(a)(1) a statement of the grounds for the court's jurisdiction, in additional support of the undisputed jurisdiction already held by the Court over his claims. He also incorporates by reference to his first Amended Complaint his identification of the parties, Am. Compl. ¶¶ 1–2, (Oct. 14, 2015), ECF No. 4, his preliminary statement and statement of the basis of his original claims (for background regarding the claims favorably resolved by BCNR), Am. Compl. ¶¶ 4–5, 9–11, and his statement of the propriety of venue, Am. Compl. ¶ 7.

Timeliness

50. This SAC is timely because Mr. Sharpe's original Complaint was timely filed, Compl. ¶ 8 (Sep. 29, 2015), ECF No. 1; *see also* JMS, 4 (noting Mr. Sharpe filed his Complaint "while he was still within the six-year statute of limitations"), and because it asserts claims arising from the conduct, transactions, and occurrences set out in the original Complaint, *see* RCFC 15(c)(1)(B); *see generally* Compl. ¶¶ 1–428, and the first Amended Complaint, *see generally* Am. Compl. ¶¶ 1–491, or because, in addition or in the alternative, Mr. Sharpe's current cause of action accrued on April 25, 2016, well within the six-year statute of limitations, *see* 28 U.S.C. § 2501 (2012), upon the approval by SECNAV of BCNR's decision entitling him to the back and regular pay and allowances that are herein claimed and which Defendant has now indicated it will not in their entirety pay to Mr. Sharpe. *See Martinez*, 333 F.3d at 1315 n.4 (noting that for a successful correction-board applicant, a cause of action does not accrue "at the time of [an] allegedly improper discharge" but rather at the time of a correction-board's "remedial order" when it

"grant[s SECNAV-approved] relief"; the original cause of action is not the discharge, because "whether the original discharge was lawful is no longer in issue"); BCNR Decision, 16, 18 (finding Mr. Sharpe's separation "void" and directing correction of his record to reflect that he "was not discharged . . . but has continued to serve on active duty"); *Denton*, 204 Ct. Cl. at 195 (holding that if "a discretionary decision is made to correct a record [and] appropriate payment is not *then* made, a cause of action accrues in this court *at that time*" (emphasis added)); *DeBow v. United States*, 193 Ct. Cl. 499, 504 (1970) ("A major reason why we have extended the concept of a 'new cause of action' or a 'continuing claim' to petitions grounded upon a beneficial administrative determination which cuts off a claimant without the full relief he seeks, and to which he is entitled, is that, once the Board decides to give a remedy, it should not be free to slice the relief illegally or arbitrarily.").

Jurisdiction

51. The Court's jurisdiction over this claim for money owed by the United States to Mr. Sharpe as a member of a uniformed service, 37 U.S.C. § 101(3) (2012), pursuant to Acts of Congress – namely, 10 U.S.C. § 1552, which is money mandating where, as here, "the Secretary makes a correction to a military record and then fails to pay . . . the resulting relief," *Pride v. United States*, 40 Fed. Cl. 730, 734 (1998) (citing cases), and 37 U.S.C. §§ 204(a)(1), 305a(a), (c), 403(a)(1) (2012) (providing for base pay, special pay to a member on "sea duty," a monthly "career sea pay premium" when a member serves beyond thirty-six consecutive months of sea duty, and "basic allowance for housing") – arises under the Tucker Act, *see* 28

U.S.C. § 1491(a)(1) (2012), and its jurisdiction over the claims for collateral relief, *see id.*§ 1491(a)(2), arises from its jurisdiction over the claim for money.

52. Furthermore, the claims stated herein raise justiciable controversies because the Court can evaluate the lawfulness of Defendant's actions against the "tests and standards" afforded by statute and regulation, *see Murphy v. United States*, 993 F.2d 871, 873 (Fed. Cir. 1993); *Voge v. U.S., 844 F.2d 776*, 780 (Fed. Cir. 1988), and because "once a military personnel board has decided that benefits are appropriate and the Secretary's designee has expressly adopted that determination," their award is no longer discretionary, *Polk v. United States*, 73 Fed. Cl. 331, 332–33 (2006) (citation omitted); *accord Dehne v. United States*, 23 Cl. Ct. 606, 616 (1991) (noting that an agency "cannot refuse to grant monetary relief which flows as a natural consequence of its [correction-board] action." (citations omitted)), *vacated on other grounds*, 970 F.2d 890 (Fed. Cir. 1992).

Procedural Posture

53. On September 29, 2015, Mr. Sharpe filed suit in this Court seeking relief from various actions taken by the Navy and claiming entitlements to pay and allowances of which he was improperly deprived by those actions, along with appropriate collateral relief. *See generally* Compl., 1–97. The following day, Mr. Sharpe applied for relief to the BCNR, a panel of which voted, on October 7, 2015, to grant his petition in full. BCNR Decision, 1–19.

54. The relief recommended by BCNR included *inter alia* correction of his record: 1) to reflect that he "was not discharged from the Naval Service, but has continued to serve on active duty without interrup-

tion"; 2) to remove "all documentation pertaining to the . . . administrative separation, including but not limited to the . . . DD Form 214 (Certificate of Discharge from Active Duty) of 30 September 2009 [and] . . . the CNPC messages pertaining to Petitioner's ADSEP dated 151230ZSEP09, 151231ZSEP09, 151632ZJUL09, and 151633ZJUL09"; 3) to "correct[], remove[], or completely expunge[] from [Mr. Sharpe's] record" any "material or entries inconsistent with the foregoing" directives; and 4) to assure that "no such entries or material be added to [his record] in the future." *Id.*, 18.

55. Before BCNR's decision was approved, the parties jointly moved for a stay on the claims before this Court in order to allow the Navy to finalize its action on BCNR's recommendations. JMS, 1–4. The Court subsequently granted the motion and directed the first of a series of joint status reports. Order, 1 (Dec. 1, 2015), ECF No. 7.

56. On May 2, 2016, the parties notified the Court that the delegate of the SECNAV approved BCNR's decision, as above recited, on April 25, 2016, and provided the Court a copy thereof. BCNR Decision, 19; JSR, 1 (May 2, 2016).

57. On December 7, 2016, in implementation of BCNR's decision to show that Mr. Sharpe had never left active duty, Defendant issued "recall" orders for Mr. Sharpe to report to a new PDS in Washington D.C., no later than the last day of May 2017, via stops at two intermediate activities between, respectively, February 13 and 22, and February 23 and March 30, 2017. *See* Ex. 8, at 1–3 (BUPERS ORDER 3426); *see also* JSR, 1 (Dec. 12, 2016) (referring to Mr. Sharpe returning to active duty no later than February 13, 2017). The orders indicated that Mr.

Sharpe was being recalled to active duty and was "detaching from home." *See* Ex. 8, at 1, 4.

58. On December 12, 2016, Defendant reported that DFAS would calculate amounts due Mr. Sharpe resulting from his promotion to O5 and his reinstatement to active duty as directed by BCNR. JSR, 1–2 (Dec. 12, 2016).

59. In anticipation of his return to duty, and foreseeing the disagreement over Mr. Sharpe's BAH entitlement, both as regards the Constructive Service Period and as regards the period between the date he returned to active duty and the date he reports to his Washington, D.C., PDS, Mr. Sharpe attempted to advise the Court that the Navy's orders, showing him as transferring from home rather than from his prior PDS consistent with both the evidence of record and BCNR's direction to treat him as if he "was not discharged . . . but has continued to serve on active duty without interruption," BCNR Decision, 18, risked "prejudicing the record that will form the basis for calculation of [his] entitlements." *See* Joint Mot. to Suppl. the JSR, 8 (Jan. 6, 2017), ECF No. 22. Though the Court subsequently, on February 13, 2017, found moot the parties' motion to supplement, the Defendant therein admitted that memorializing the recall orders as part of Mr. Sharpe's record "would be contrary to the BCNR recommendations." *See* Joint Mot. to Suppl. the JSR, 22.

60. In a further effort to document a correct determination of the BAH issue without the need for this Court's intervention, Mr. Sharpe alerted Navy authorities of his claimed entitlement to BAH at the rate currently applicable to members attached to CARL VINSON home ported in San Diego. *See* Ex. 9, 1–6 (Feb. 7, 2017, letter to Head, Military Pay and Compensation Policy (Chief of Naval Operations

(OPNAV) N130), less enclosures, all of which are hereto attached or otherwise already before the Court). Mr. Sharpe's letter requested

> a determination . . . regarding his claim to entitlement, according to applicable regulations, to BAH at the rate for the San Diego (CA038) military housing area (MHA), based upon [his] assignment to the USS CARL VINSION (CVN 70) as [his] previous PDS, up to the day before the date [he] report[s] to [his] new PDS in May 2017 under current permanent change of station (PCS) orders.

Id., 1.

61. On February 13, 2017, OPNAV N130's reply summarily denied what he characterized as Mr. Sharpe's "request" and self-servingly noted a service member's entitlement to "a housing allowance *based on the member's location*," *see* Ex. 10 ¶ 1, citing to Per Diem, Travel and Transportation Allowance Committee, *The Joint Travel Regulations* [hereinafter JTR], para. 10002 (2016) (stating that "in general, a member . . . is authorized a housing allowance based on the member's grade, dependency status, and location"), while ignoring the more specific regulation providing that BAH is paid "based on the member's PDS, or the home port for a member assigned to a ship or afloat unit," *id.*, para. 10402.B. OPNAV N130 also failed to address the regulations that Mr. Sharpe cited standing for the proposition that "'[g]eography-based station allowances' are determined by the location of the ship's home port" for a member assigned to a ship, *see* Ex. 9, ¶ 4.a (alteration in original), and simply ignored Mr. Sharpe's re-

quest for "a written statement of findings of fact and conclusions of law," *id.* ¶ 5.

62. On May 2, 2017, Defendant moved the Court for a further stay of forty-five days and reported that, in order to finalize the calculations of back-pay amounts owed to Mr. Sharpe, DFAS required "a memorandum from the Navy's Chief of Naval Personnel [CNP], reflecting the personnel decisions" enabling the "reconstructing [of] Mr. Sharpe's personnel record for [the] . . . years" of his separation. JSR, 2 (May 2, 2017). On May 5, the Court ordered Defendant to submit a status report stating the final amounts it believes are due to Mr. Sharpe. Order, 1.

63. In response to the Court's Order, Defendants produced a memorandum to DFAS from Mr. Brian D. Bourne, Bureau of Naval Personnel (BUPERS) Deputy Legal Counsel (00-J), "request[ing] that DFAS take . . . actions pertaining to [Mr.] Sharpe's pay to correct his record" to show *inter alia* 1) "that his sea duty ended on 30 Sep 09," 2) "BAH allowance at the Norfolk, Virginia rate from 1 Oct 09 until he returned to active duty on 13 Feb 17," 3) that "he is not entitled to [CSP]," and 4) that "he is not entitled to [CSP-P]." Bourne Memorandum ¶¶ 1, 1.b–.d.

64. Because Mr. Sharpe believes that the Bourne Memorandum is unlawful and *ultra vires* and is therefore null, void, and of no effect upon his record as corrected by BCNR, and because Mr. Sharpe therefore claims title by law to the disputed back pay and allowance amounts herein indicated on the basis of that record, Mr. Sharpe now seeks leave of this Court to revise his complaint and move for summary judgment on each and all of his claims.

Facts That Cannot Be Genuinely Disputed

65. Mr. Sharpe asserts the following facts either derived from incontestable evidence previously submitted by the parties or submitted herewith, or of universal notoriety, or notorious within this Court's jurisdiction, or susceptible of ready and accurate determination from reliable sources whose accuracy cannot reasonably be questioned, and of which Mr. Sharpe requests this Court, to the extent necessary, to take judicial notice.

66. Mr. Sharpe's Home of Record (HOR) is and has been Cerritos, Calif., since his 1989 accessioning onto active duty. Ex. 11, at 1–2; Ex. 12, at 1, block 7.b.

67. Prior to the events that gave rise to his application to BCNR, Mr. Sharpe's

> record in the [N]aval [S]ervice was unblemished. He graduated from the U.S. Naval Academy in the top 4 percent of his class and was accepted into the submarine community where he was certified as a Submarine Officer and Nuclear Engineer Officer before transferring into the Public Affairs Officer (PAO) community in November 1999 . . . .
>
> In June 2004 [he] was assigned to the Pentagon as the Director for Plans and Policy in the office of the Navy Chief of Information (CHINFO). He was highly regarded for his performance, as his fitness reports and receipt of additional awards reflect . . . .
>
> On 13 February 2007, based on his outstanding performance and qualifications, the FY-08 Active Duty CDR . . . . Selection Board selected [him] for promotion to CDR.

BCNR Decision ¶¶ 3.c, .d, .y.

68. On March 28, 2006, Mr. Sharpe was assigned to CARL VINSON as the ship's Public Affairs Officer (PAO) via BUPERS ORDER 0876, to report in June 2006 with a PRD of June 2008, and he reported aboard on June 20, 2006. Ex. 7, at 1, 2; Ex. 13, at 1; Ex. 24, at 1; BCNR Decision ¶ 3.w.

69. A "PRD" is a "Projected Rotation Date." Naval Military Personnel Manual [hereinafter MILPERSMAN], Article 1301-104, para 2 (2003).

70. When Mr. Sharpe reported to CARL VINSON, his regular place of work was an office building in downtown Newport News, Va., and the ship was in mid-life overhaul during the entirety of his assignment thereto. BCNR Decision ¶ 3.w; *id.*, at 15.

71. OPNAV Instruction [hereinafter OPNAVINST] 7220.14, *Career Sea Pay and Career Sea Pay Premium*, enclosure (2) ¶ 1 (2005), lists a "CVN" as among "Category A" vessels.

72. The orders assigning Mr. Sharpe to CARL VINSON referred to the ship also as "CVN 70" and designated the assignment as one of "unusually arduous sea duty." Ex. 7, at 4.

73. CARL VINSON was, for the entirety of the time of Mr. Sharpe's assignment to the ship, located at the commercial shipyard in Newport News, Va., BCNR Decision ¶ 3.w, ii, which has a ZIP code of 23607, Newport News Shipbuilding Home Page, http://nns.huntingtoningalls .com (last visited May 18, 2017).

74. The BAH Calculator maintained by the Defense Travel Management Office (DTMO) reflects that ZIP code 23607 falls in Military Housing Area (MHA) VA297 (Hampton/Newport News, Va.). BAH Calculator,
http://www.defensetravel.dod.mil/site/bahCalc.cfm
(last visited May 18, 2017).

75. CARL VINSON's on-paper home port, for the entirety of the time of Mr. Sharpe's assignment to the ship, was Norfolk, Va., as reflected by each personnel order he received during that time. Ex. 3, at 1; Ex. 7, at 1, Ex. 14, at 1, Ex. 15, at 1, Ex. 16, at 1; Ex. 17, at 1.

76. The Naval Station in Norfolk, Va., has a ZIP code of 23511, *see* Standard Navy Distribution List, http://www.navy.mil/sndl/table.html (last visited May 18, 2017), the ZIP code also reflected on Mr. Sharpe's LES's for the period before his separation from the Naval Service on September 30, 2009, *see* Ex. 6, at 1, 3.

77. The DTMO BAH Calculator reflects that ZIP code 23511 falls in MHA VA298 (Norfolk/ Portsmouth, Va.). BAH Calculator, http://www.defensetravel.dod.mil/site/bahCalc.cfm (last visited May 18, 2017).

78. Mr. Sharpe was ordered on November 2, 2006, to transfer to USS ENTERPRISE (CVN 65) in January 2007, Ex. 14, at 1, but before transferring, on December 5, 2006, the order was cancelled and he was ordered to "continue present duty" aboard CARL VINSON, Ex. 16, at 1.

79. On March 7, 2007, Mr. Sharpe was ordered to turn over his duties to another officer and to report to his home in Carrollton, Va., as his assigned place of duty. BCNR Decision ¶ 3.dd. Mr. Sharpe subsequently performed no duties aboard the ship. *Id.*

80. On November 28, 2007, NPC ordered an officer to CARL VINSON, to report no later than the last day of June 2008, as Mr. Sharpe's "numerical relief." Ex. 18, at 1, 5.

81. On January 2, 2008, Mr. Sharpe's commanding officer aboard CARL VINSON received permis-

sion from CNP to detach Mr. Sharpe from the ship for cause. BCNR Decision, ¶ 3.nn.

82. On June 20, 2008, Mr. Sharpe's "numerical relief" reported aboard CARL VINSON. Ex. 19, at 1, block 9.

83. On June 20, 2009, the Chief of Naval Operations ordered CARL VINSON to change her home port from Norfolk, Va., to San Diego, Calif. Ex. 20, at 1.

84. Between June 28 and July 3, 2009, CARL VINSON went to sea for post-overhaul initial sea trials. Ex. 21, at 1, 2; Ex. 22, at 1. Mr. Sharpe did not go to sea with the ship. BCNR Decision ¶ 3.dd.

85. On July 15, 2009, Mr. Sharpe was ordered to detach from CARL VINSON and separate from the Naval Service by Commander, NPC (CNPC), via BUPERS ORDER 1969, when directed by his reporting senior and no later than the last day of August 2009. Ex. 15, at 1.

86. On August 28, 2009, BUPERS ORDER 1969 was cancelled and Mr. Sharpe was ordered to "continue present duty" aboard CARL VINSON. Ex. 17, at 1.

87. On September 15, 2009, Mr. Sharpe was ordered by the Commander, NPC (CNPC), via BUPERS ORDER 2589 (date-time group 151230Z SEP 09), to detach from CARL VINSON when directed by his reporting senior, but no later than the last day of September 2009, and to thereby separate from the Naval Service. Ex. 3, at 1. The order provided that he was to, "when directed[,] detach" from "duty" aboard CARL VINSON. *Id.* The order noted that Mr. Sharpe's separation would "take effect at 2400 on [the] date of detachment from [CARL VINSON.]" *Id.*

88. On September 30, 2009, Mr. Sharpe was separated from the Naval Service aboard CARL VINSON. Ex. 12, at 1, block 8.b.

89. OPNAVINST 7220.14 notes that a member's cumulative sea-duty time is reflected on the LES in the "remarks" block. *Id.* ¶ 12.a.(1).

90. As of Mr. Sharpe's now voided detachment from CARL VINSON, Mr. Sharpe had six years, three months, and twenty-one days of cumulative sea-duty time. Ex. 7, at 4.

91. For the entirety of the time of Mr. Sharpe's assignment to CARL VINSON, he resided in Carrollton, Va., which has a ZIP code of 23314, United States Postal Service Look Up a ZIP Code Page, https://tools.usps.com/go/ZipLookupAction!input.action (last visited May 18, 2017).

92. The DTMO BAH Calculator reflects that the ZIP code 23314 falls in MHA ZZ830 (County Cost Group 830). BAH Calculator, http://www.defensetravel.dod.mil/site/ bahCalc.cfm (last visited May 18, 2017).

93. For the entirety of the time of Mr. Sharpe's assignment to CARL VINSON, Mr. Sharpe was paid BAH at the rate for MHA VA298, the "on-paper" location of CARL VINSON, and not at the rate for MHA VA297, the ship's actual location, or at the rate for MHA ZZ830, his residential location. *See* Ex. 6, at 1, 3 (block "VHA Zip").

94. For the entirety of the time of Mr. Sharpe's assignment to CARL VINSON, he was paid CSP. Bourne Memorandum ¶ 1.b; *see* Ex. 7, at 1,3.

95. On April 1, 2010, CARL VINSON's change of home port to San Diego, Calif., became effective. Ex. 20, at 1.

96. On August 31, 2015, the Deputy Assistant Judge Advocate General for Criminal Law (Code 20)

opined that because Mr. Sharpe at the time that Mr. Sharpe "*had orders* to USS CARL VINSON" he was "therefore assigned to the vessel." Ex. 2, at 2, 3.

97. Effective April 25, 2016, by approval of Secretary of the Navy, BCNR corrected Mr. Sharpe's record to show that he "was not discharged . . . but has continued to serve on active duty without interruption," BCNR Decision, 18, and to remove "all documentation pertaining to the . . . administrative separation, including but not limited to the . . . DD Form 214 (Certificate of Discharge from Active Duty) of 30 September 2009 [and] . . . the CNPC messages pertaining to Petitioner's ADSEP dated [*inter alia*] 151230ZSEP09." BCNR Decision, 17.

98. Mr. Sharpe's record consequently reflects that he is serving and has served without interruption on active duty since May 23, 1993, the date he accepted his original appointment in the Naval Service. Ex. 12, at 1, block 12.a; Ex. 13, at 2; Ex. 23, at 1.

99. Mr. Sharpe has therefore consequently been since May 26, 1993, without interruption, a member of a uniformed service, *see* 37 U.S.C. § 101(3) (2012), on active duty, *see id.* § 101(18), entitled to "the basic pay of the pay grade to which . . . assigned in accordance with [his] years of service," *see id.* § 204(a)(1); *accord* DODFMR, *supra*, para. 010301.A, .A.1, tbl.1-3, r. 1.

100. As a further consequence of BCNR's decision, Mr. Sharpe's appointment to O5, retroactive to August 1, 2008, was memorialized by CNPC on May 5, 2017. *See* DSR, Ex. 1, at 1; JSR, Ex. A, at 1 (Mar. 31, 2017); BCNR Decision, 15, 16, 18.

101. On April 28, 2016, BCNR provided a copy of its decision to DFAS for payment. JSR, Ex. 2, at 1 (May 2, 2017). DFAS acknowledged receipt on February 10, 2017. *Id.*, Ex. 3, at 1.

102. Upon his reinstatement to active duty, pursuant to his current PCS orders, *see* Ex. 8, at 1–6, Mr. Sharpe reported to his first temporary duty assignment on February 13, 2017, and completed his second temporary duty assignment on April 6, 2017, *see* Ex. 13, at 1, Ex. 24, at 1, and is en route his permanent duty assignment in Washington, D.C., where he is required to report no later than the last day of May 2017, *see* Ex. 8, at 3.

103. The ZIP code of Mr. Sharpe's prospective PDS is 20350, *see* Navy.mil Contact Us Page, http://www.navy.mil/submit/contacts.asp (showing Chief of Information address).

104. The DTMO BAH Calculator reflects that the ZIP code 20350 falls in MHA DC053 (Washington, D.C., Metro Area). BAH Calculator, http://www.defensetravel.dod.mil/site/ bahCalc.cfm (last visited May 18, 2017).

105. Since returning to active duty on February 13, 2017, Mr. Sharpe has been paid BAH on the basis of the 23314 ZIP code. *See* Ex. 6, at 7 (block "VHA Zip"); Ex 10, at 1.

106. The Navy Personnel Database (NPDB) "is an integrated database of all Navy Personnel [that] contains current and historical data on over 1.75 million Navy members and annuitants including[] officers, candidates, enlisted[,] active and inactive, as well as those in a retired status." NPC NPDB Home Page, http://www.public.navy.mil/bupers-npc/organization/ npc/IM/corporatessystems/Pages/NavyPersonnelDatabase.aspx (last visited May 19, 2017).

107. The Navy Standard Integrated Personnel System (NSIPS) "is the Navy's single, field-entry, electronic pay and personnel system . . . . [It] . . . offers Sailors 24-hour access to their Electronic Service Record (ESR), training data, and career counseling

records." NPC NSIPS Home Page, http://www.public.navy.mil/bupers-npc/organization/npc/IM/corporatessystems/Pages/nsips.aspx (last visited May 17, 2017).

108. The ESR "provides individual sailors . . . with secure worldwide internet access to personnel, training and awards data." NPC ESR Home Page, http://www.public.navy.mil/bupers-npc/career/recordsmanagement/Pages/ElectServRcd.aspx (last visited May 19, 2017).

109. In the context of personnel assignment history, "RAD" is defined as "Released from active duty or active duty for training (ADT/AT) and transferred to a reserve component," and "TRF" is defined as "[t]ransferred or detached to another activity. MILPERSMAN 1070-290, para 3 (2002).

110. A Navy Officer Precedence Number is maintained on the Active Duty List by SECNAV along with the "names, grades, [and] dates of rank . . . of all commissioned officers in the grade of ensign and above on active duty." OPNAVINST 1427.2, *Rank, Seniority, and Placement of Officers on the Active Duty List and Reserve Active Status List of the Navy*, ¶ 4 (2005). The eight-digit number indicates "[t]he relative seniority of officers." *Id.* ¶ 7.

111. Mr. Sharpe's Duty Station History in his NPDB entry reflects that CARL VINSON has a home port of San Diego, Calif., and his tour aboard CARL VINSON ended on September 30, 2009, and reflects no other assigned duty stations subsequent thereto prior to his assignment that began on February 13, 2017. Ex. 13, at 1.

112. Mr. Sharpe's Officer Data Card (ODC) reflects that CARL VINSON has a home port of San Diego, Calif., and that his tour aboard CARL VINSON ended on September 30, 2009, and that re-

flects no other assigned duty stations subsequent thereto prior to his assignment that began on February 13, 2017. Ex. 25, at 1.

113. Mr. Sharpe's History of Assignment page from his NSIPS ESR reflects that he was detached from CARL VINSON on September 30, 2009, with a loss type "RAD," and reflects no other orders or assignments subsequent thereto prior to his assignment that began on February 13, 2017. Ex. 24, at 1.

114. Mr. Sharpe's Orders History page from his NSIPS ESR reflects that his orders dated July 15, 2009, August 28, 2009, and September 15, 2009, constituting respectively initial separation orders, separation-order cancellation, and subsequent (and final) separation orders, are in his Electronic Service Record," and reflects no other orders subsequent thereto were issued to him prior to the orders issued on December 7, 2016. Ex.26, at 1.

115. Mr. Sharpe's Status Reports pursuant to the Servicemembers Civil Relief Act provided by the Defense Manpower Data Center reflect him as not having been on active duty between October 1, 2009, and February 12, 2017, inclusive. Ex. 27, 1–9.

116. The Naval Register currently lists Mr. Sharpe as an O4 with no Navy Officer Precedence Number. Ex. 28, at 1.

117. Mr. Sharpe's ESR Member Profile page from the NSIPS reflects his HOR as being in the state of Virginia. Ex. 29, at 1.

118. Annual performance evaluations for officers in the O5 pay grade are prepared every April. BUPERS Instruction [hereinafter BUPERSINST] 1016.10D, *Navy Performance Evaluation System*, Enclosure (1), at 11, tbl.1 (2015).

119. On August 4, 2016, NPC inserted a "Memorandum for the Fitness Report Record" of Mr. Sharpe

into his Official Military Personnel File which stated that it was "in lieu of fitness report for the period of 01 NOV 2007 thru 20 JUN 2016," and which read as follows:

> This memorandum is being filed in lieu of performance evaluations for the above period. By direction of the Secretary of the Navy, fitness reports for the period above are not available for inclusion in [Subject Naval Officer's] Naval Record and no speculation or inferences as to the nature or contents of such reports may be made by Selection boards or other reviewing authorities.

Ex. 30, at 1.

120. On February 15, 2017, Mr. Sharpe emailed his BCNR point of contact requesting the following language to be used when the August 4, 2016, memorandum is re-written to reflect a correct end date (because Mr. Sharpe will not receive a regular performance evaluation until April 2017 and it will only cover performance subsequent to his reporting to his next PDS):

> This memorandum is being filed in lieu of performance evaluations for the above period. By direction of the Secretary of the Navy and due to no fault of SNO, fitness reports for the period above are not available for inclusion in SNO's Naval Record and no adverse speculation or inferences as to the nature of contents of such reports may be made by selection boards or other reviewing authorities. The overall performance of SNO

> should be evaluated from the material presently available.

Ex. 31, at 1–2. Mr. Sharpe cited several back-pay cases to support the wording he requested. *Id.*

121. Mr. Sharpe's BCNR point of contact acknowledged his email the same day. *Id.*

122. SECNAV Instruction [hereinafter SECNAVINST] 5420.193, *Board for Correction of Naval Records* (1997), states that "[t]he Chief of Naval Operations . . . shall ensure that action is taken to make the military record corrections directed by the Secretary or BCNR." *Id.*¶ 4.

123. The DON *Financial Management Policy Manual*, NAVSO P-1000, defines "Accession Travel," in pertinent part, as the "PCS movement of . . . [o]fficers from home or place of acceptance of commission to first duty station," *id.* § 03146, "Permanent Change of Station," para. 3.b.i, (2015), and "Operational Travel Between Duty Stations" as "the PCS movement between PDSs within overseas locations for officer and enlisted personnel when no transoceanic travel is involved in reaching the new PDS," *id.* para. 3.d. The definitions of these types of PCS travel found is essentially the same as that provided for in the FY 2017 DON budget estimates, Department Of The Navy Fiscal Year (FY) 2017 Budget Estimates, 6, 148, 150, 156 (2016), http://www.secnav.navy.mil/fmc/fmb/Documents/17pres/MPN_Book.pdf (last visited May 22, 2017) (providing *inter alia* for "Accession" and "Operational" types of PCS travel).

124. BUPERSINST 7040.6B, *Financial Management Guide for Permanent Change of Station Travel (Military Personnel, Navy) (MPN)*, defines "Accession Travel" for "Officers," in pertinent part, as "Movements from home or place of acceptance of

commission to first duty station . . . ," *id.* ch. 1, sec. B, "Classifications," para. 1.a, at 1-B-4 (2010), and "Operational Travel Between Duty Stations, Land," for both officers and enlisted, as, in pertinent part, "Movements to and from a PDS located within [the continental United States]," *id.*, para. 4.a, at 1-B-5. It also establishes that travel accounting data for officer accessions has a subhead of ".2250" and a "Purpose Identification Code (PIC)" of "2," *id.*, ch. 3, sec. A, para. 3.a., at 3-A-1, and a subhead of ".2252" and PIC of "4" for officer operational travel, *id.* at 3-A-2.

125. The above-recited definitions of "new accession" are with the JTR. *See id.*, para. 10416.D.1 (defining a member in the "accession pipeline" as a new service academy graduate, a member undergoing initial entry training, or a student with no prior military service).

126. Mr. Sharpe's December 7, 2016, orders provide for new accession travel rather than operational travel between duty stations because they have appropriation subhead ".2250" and purpose identification code "2" in the PCS line of accounting (LOA), Ex. 7, at 4.

127. DFAS cites to 10 U.S.C. § 1552 for authority to make payment of amounts due to Mr. Sharpe for the Constructive Service Period. JSR, Ex. 4, pt. II (May 2, 2017); *see also* Ex. 1, at 1.

128. BUPERSINST 5400.61, *Bureau of Naval Personnel Millington Organization Manual*, explains that BUPERS-00J is the "Office of Legal Counsel . . . . the principal advisor and staff assistant . . . to [Deputy CNP] concerning the interpretation and application of law and policy." *Id.*, at 3 (2014). The regulation authorizes BUPERS-00J to "[p]rovide[] legal advice to BUPERS Millington (BPM) and . . . [NPC] NAVPERSCOM, field activities, and the fleet

on [*inter alia*] uniformed personnel entitlements and benefits." *Id.*; see Ex. 32, at 1–4.

129. MILPERSMAN 1320-030 ¶ 1.a (2002) provides that "[c]ompetent orders for officers are issued and approved by [CNP], or commands authorized by [CNP]."

130. MILPERSMAN 1301-110, Ex. 4, ¶ 4.3 (2015), prescribes twenty-four to thirty-six month tour lengths for public affairs officers.

COUNT I
ENTITLEMENT TO BASE PAY AT THE O5 PAY GRADE FOR FY 2017

131. Pursuant to RCFC 10(c), and to the extent necessary, Mr. Sharpe realleges paragraphs 1–487 of his first Amended Complaint, *see* Am. Compl., 1–107, as if fully set forth here.

132. Mr. Sharpe realleges paragraphs 1–131, *supra*, as if fully set forth here.

133. Defendant has determined to pay Mr. Sharpe $85,213.44 in view of his entitlement to the base pay (BP) of an O5 for the period April 25, 2016, to February 12, 2017. DSR, 4.

134. Mr. Sharpe herein claims entitlement to BP at the pay grade of O5 for this period and to the $85,474.26 consequently due, i.e., $260.82 more than Defendant proposes to pay him, *supra* ¶ 19; *see* Ex. 4, at 1 (cell Q37); that Defendant is obliged to pay this claim by law and by regulation having the force and effect of law; and that, because there is no genuine dispute as to any fact material to this claim, he is consequently entitled to summary judgment thereupon.

135. Defendant's determination of the amount owed for this period appears to be based on paying

Mr. Sharpe as an O5 for the 2017 portion of the period at the 2016 rate. *See supra*, ¶ 20.

136. Because there is no genuine dispute as to any fact material to this Count I, and in view of the authorities herein cited, Mr. Sharpe prays this honorable Court to find that he is entitled to judgment as a matter of law, and to enter such judgment against Defendant, enjoining him to pay Mr. Sharpe either $85,474.26 or, if Defendant has already paid the amount previously determined, *supra* ¶ 18, the remaining $260.82; and, further incident of and collateral to that judgment, so as to provide an entire remedy and to complete the relief afforded, requiring Defendant to modify all DON and DOD paper and electronic records as *inter alia* ordered herein below *infra*, as well as ordering whatever additional relief the Court may find due and proper.

COUNT II
ENTITLEMENT TO BASIC ALLOWANCE FOR HOUSING AT THE O5 PAY GRADE AND AT THE RATE APPLICABLE TO MHA CA038 (SAN DIEGO) FOR THE PERIOD APRIL 1, 2010, TO THE DAY BEFORE THE DATE MR. SHARPE REPORTS TO HIS NEXT PDS UNDER HIS CURRENT PCS ORDERS

137. Pursuant to RCFC 10(c), and to the extent necessary, Mr. Sharpe realleges paragraphs 1–487 of his first Amended Complaint, *see* Am. Compl., 1–107, as if fully set forth here.

138. Mr. Sharpe realleges paragraphs 1–137, *supra*, as if fully set forth here.

139. Defendant proposes to pay Mr. Sharpe BAH at the Norfolk, Va., rate at the pay grade of O5 for his entire Constructive Service Period, totaling an

amount of $214,780.20, *supra* ¶¶ 15, 23, and has indicated and acted upon its intention to pay Mr. Sharpe BAH at the Carrollton, Va., rate since his February 13, 2017, reinstatement, *supra* ¶¶ 61, 105.

140. Mr. Sharpe herein claims entitlement to BAH at the pay grade of O5 from October 1, 2009, through March 31, 2010, at the Norfolk, Va., rate, as Defendant acknowledges, DSR, 2, and at the San Diego, Calif., rate for the remainder of the Constructive Service Period, through the day before he reports or reported to his prospective PDS in Washington, D.C., and to the following amounts consequently due: 1) $263,796.60 for the entire Constructive Service Period, *supra* ¶¶ 16, 24; *see* Ex. 4, at 1 (cells U32, U37), i.e., $49,016.40 more than Defendant proposes to pay him for the Constructive Service Period; and 2) either a) $3502.80, *see* Ex. 4, at 1 (cell V49), which is the difference between the monthly BAH rate for San Diego at the pay grade of O5 for the period between February 13 and May 29, 2017, the day before he plans (as of this filing) to report to his new PDS in Washington, D.C., inclusive, less the BAH he has been paid at the Carrollton, Va., rate, at whatever pay grade, for that period,[28] or b) whatever other amount may be due based on Mr. Sharpe's actual date, if not May 30, of reporting to his new PDS; that Defendant is obliged to pay this claim by law and by regulation having the force and effect of law; and that, because there is no genuine dispute as to any

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[28] DFAS has proposed to begin paying Mr. Sharpe as an O5 on June 1, 2017, and to pay him pay and allowances in arrears for February 13, 2017, to that date. Ex. 1, at 1. In any event the claim here is for O5 BAH at the San Diego rate for this post-reinstatement period, less whatever Mr. Sharpe will have been paid either in regular mid-monthly amounts or in the arrears amount DFAS says will be paid on May 31, 2017.

fact material to this claim, he is consequently entitled to summary judgment thereupon.

141. The claim as articulated under Count II is predicated upon Defendant's representation, DSR, 2; Bourne Memorandum ¶ 1.c, that Mr. Sharpe is entitled to BAH at the rate applicable to Norfolk, Va., for the pay grade of O5 for the entirety of the Constructive Service Period, and concomitant denial that he is entitled to BAH at the San Diego rate for any of that period. In consequence, Mr. Sharpe's legal claim to an additional entitlement applies only to the period beginning April 1, 2010 (when the PDS to which his record reflects he was assigned at that time changed home port and thereby altered the BAH entitlement), through the day before he reports to his prospective PDS in Washington, D.C. (insofar as the previous BAH entitlement continues to apply during a PCS until the transiting member arrives at the final PDS). Also, because, since Mr. Sharpe's reinstatement on February 13, 2017, Defendant has been paying BAH for his Carrollton, Va., residence rather than continuing it at the rate to which Defendant believes Mr. Sharpe is entitled prior to that date, a portion of this claim encompasses the difference between the Carrollton, Va., rate that has been paid and the amount based on the San Diego rate to which Mr. Sharpe claims entitlement. This latter portion of the claim is contingent upon the date Mr. Sharpe reports (within the next few days) to his new PDS, insofar as that act will give him a new BAH entitlement (which should be reflected in his regular pay) and establish the end date of the entailment claimed here. For convenience purposes Mr. Sharpe has provided calculations that assume be will report to his Washington, D.C., PDS on May 30, according to his current plans.

142. Not having access to Defendant's calculations, Mr. Sharpe is unable to account for the fact that, on the assumption (herein denied) that he is only entitled to BAH at the Norfolk, Va., rate for the entirety of the Constructive Service Period, he estimates the amount owed to him as $207,208.80, *supra* ¶¶ 17, 25; *see* Ex. 4, at 1 (cells S32 and S37). Mr. Sharpe likewise cannot provide any information as to whether his figures and Defendant's agree for the period prior to CARL VINSON's home port change, i.e., October 1, 2009, to March 31, 2010, for which period the parties agree at least as to the legal basis for Mr. Sharpe's entitlements.

A. Bourne Memorandum is *ultra vires* and illegal

143. Insofar as the record in this case has taken a significant turn with the Navy's purported "correction" of Mr. Sharpe's record, *supra* ¶ 63, following BCNR action, and Defendant's subsequent representation that on the basis of that additional correction Mr. Sharpe is not entitled to BAH at the rate of CARL VINSON's current home port following March 31, 2010, DSR, 2, and is not entitled to Sea Pay, *id.*; Addendum,1, Mr. Sharpe therefore herein alleges first – as a threshold matter – that the Bourne Memorandum is, for the reasons set forth *infra*, fragrantly contrary to statute and regulation, and is therefore *ultra vires*, void, of no effect whatsoever upon his record, and thus powerless to have any effect on the entitlements owed to him as a result of BCNR's correction of his record, and should therefore, pursuant to the Court's equitable power incident to a claim for money, *see* 28 U.S.C. § 1491(a)(1), should be stricken by the court (because Mr. Sharpe claims here that his entitlements on the basis of law and regulations

"survive" the Bourne Memorandum's attempt to change them). An administrative act "which . . . exceeds applicable statutory authority . . . is void," *Keef v. U.S., 185 Ct. Cl. 454*, 461 (1968), and likewise because "[a]ctions by an agency of the executive branch in violation of its own regulations are [equally] illegal and void." *Vandermollen v. U.S., 571 F.2d 617*, 624 (D.C. Cir. 1977) (citations omitted) (quoted by *Lewis v. United States*, 114 Fed. Cl. 682, 689 (2014)); *accord Tilley v. United States*, No. 331-86C, 1991 U.S. Cl. Ct. LEXIS 538, at *10 n.8 (Nov. 21, 1991).

144. Defendant's attempt to "correct" Mr. Sharpe's record by way of the Bourne Memorandum was facially contrary to 10 U.S.C. § 1552 (2012), because said "correction" was not "made by the Secretary acting through [a] board[] of civilians of the executive part of [the] military department," *id.* § 1552(a)(1), as the statute requires.

145. Defendant's attempt to "correct" Mr. Sharpe's record by way of the Bourne Memorandum was facially contrary to § 1552, because said "correction" was not made "to correct an error or remove an injustice," *id.* § 1552(a)(1), as the statute requires.

146. Defendant's attempt to "correct" Mr. Sharpe's record by way of the Bourne Memorandum was facially contrary to § 1552, because said "correction" was not "made under procedures established by the Secretary concerned," *id.* § 1552(a)(3)(A), or under procedures "approved by the Secretary of Defense," *id.*, as the statute requires in this case.

147. Defendant's attempt to "correct" Mr. Sharpe's record by way of the Bourne Memorandum was facially contrary to § 1552, because "no [such] correction may be made . . . unless then claimant or the Secretary concerned files a request for the correction," *id.* § 1552(b)(1) (2012), and neither Mr. Sharpe

nor SECNAV filed any such request, and in any event "The Secretary concerned may file a request for correction of a military record only if the request is made on behalf of a group of members or former members of the armed forces who were similarly harmed by the same error or injustice," *id.*

148. Defendant's attempt to "correct" Mr. Sharpe's record by way of the Bourne Memorandum was contrary to § 1552 as interpreted in this Court, because "[i]t is clear that the statute only confers on the Secretary the power to correct records in favor of a serviceman and never against him," *Doyle*, 220 Ct. Cl. at 311, and the "correction" was not made in Mr. Sharpe's favor. *See generally South Corp. v. United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982) (adopting Court of Claims decisions as precedent in the Federal Circuit).

149. Defendant's attempt to "correct" Mr. Sharpe's record by way of the Bourne Memorandum was facially contrary to 10 U.S.C. §§ 1552 and 5013 and BUPERSINST 5420.21A, *Administration of Board for Correction of Naval Records Applications Within the Bureau of Naval Personnel* (2011), because, by purporting to change Mr. Sharpe's record to reflect that "his sea duty ended on 30 Sep 09," Bourne Memorandum ¶ 1.b, that he "would have been transferred . . . had he not been separated," that he did not serve aboard . . . and would not have been assigned to a ship [as of] 1 Oct 09," he blatantly ignored and effectively reversed the SECNAV-approved action of the BCNR to remove from Mr. Sharpe's record the separation order evidencing his September 30, 2009, detachment from CARL VINSON, *supra* ¶ 87, 88, 97, such that the order is "void, and [its] effect on [Mr. Sharpe's] status is *as though it were never given*," *Groves v. United States*,

30 Fed. Cl. 28, 33 (1993), *rev'd on other grounds*, 47 F.3d 1140 (Fed. Cir. 1995) (emphasis added), in flagrant violation of 10 U.S.C. § 1552(a)(4) (2012), which makes corrections effected by BCNR "final and conclusive *on all officers* of the United States," *id.* (emphasis added), and directly contrary both to SECNAV's authority as "the head of the [DON]," 10 U.S.C. § 5013(a)(1) (2012), who is "responsible for, and has the authority necessary to conduct, all affairs of the [DON]," *id.* § 5013(b), such that the Bourne Memorandum is, on this ground alone, "invalid . . . to the extent that" it conflicts with the order "issued by a superior in [Bourne's] chain of command," *Strickland v. U.S., 69 Fed. Cl. 684*, 703 (2006) (citations omitted), and to regulations expressly applying to BUPERS and governing its role in the statutory record-correction process, which require the latter to "assist[ ] BCNR by . . . implementing [its] approved corrections." BUPERSINST 5420.21A, *supra*, ¶ 3.

150. Defendant's attempt to "correct" Mr. Sharpe's record by way of the Bourne Memorandum was facially contrary to SECNAVINST 5420.193, *supra*, because only BCNR and the Assistant Secretary of the Navy (Manpower and Reserve Affairs) are delegated SECNAV's authority to take action regarding "applications for the correction of military records," *id.* ¶ 3.a–.b, and no delegation of such authorization was made to Mr. Bourne.

151. Defendant's attempt to "correct" Mr. Sharpe's record by way of the Bourne Memorandum was facially contrary to SECNAVINST 5420.193, *supra*, because personnel records may only be corrected outside the scope of 10 U.S.C. § 1552 and implementing procedures if they are "obvious clerical or administrative errors," *id.* ¶ 5, and the purported "correc-

tions" made by the Bourne Memorandum do not correct "obvious clerical or administrative errors."

152. Defendant's attempt to "correct" Mr. Sharpe's record by way of the Bourne Memorandum was facially contrary to DODFMR, *supra*, because a genuine record correction requires "a *change of facts from those* already *in the original record*, or an addition or deletion of a fact," *id.*, Volume 10B, para. 100202 (emphasis added), and the Bourne Memorandum made (and had no authority to make) no changes to Mr. Sharpe's *actual* record, *supra* ¶ 144–151, but rather only requested "that DFAS take the [requested] actions pertaining to [Mr.] Sharpe's pay . . . ," Bourne Memorandum ¶ 1.

153. Defendant's attempt to "correct" Mr. Sharpe's record by way of the Bourne Memorandum was facially contrary to BUPERSINST 5420.21A, *supra*, because BUPERS is not authorized to make corrections to service member's records, but is limited to "assist[ing] the BCNR by providing advisory opinions and implementing the approved corrections," *id.*¶3, and the Bourne Memorandum attempts to *make* a correction to Mr. Sharpe's record rather than "implement[] the [BCNR-]approved corrections," *id.*

154. Defendant's attempt to "correct" Mr. Sharpe's record by way of the Bourne Memorandum was facially contrary to BUPERSINST 5400.61, *supra*, because BUPERS 00-J is authorized only to provide "legal advice" to "BPM . . . [NPC,] field activities, and the fleet" with regard to "personnel entitlements and benefits," *id.* at 3, and not to "correct" records on behalf of the DON under 10 U.S.C. § 1552.

155. Defendant's attempt to "correct" Mr. Sharpe's record by way of the Bourne Memorandum exceeded the jurisdiction afforded by federal regulations, which limit record-correction action to "review

and determin[ation]," 32 C.F.R. § 723.2(c) (2016), by the BCNR of "applications properly before it for the purposes of determining the existence of error or injustice in the naval records of" an applicant, *id.* § 723.2(b), and the Bourne Memorandum did not purport to make any "corrections" by means of an application properly presented to BCNR for the purpose of "determining the existence of error or injustice," *id.*

156. Defendant's attempt to "correct" Mr. Sharpe's record by way of the Bourne Memorandum was facially contrary to 32 C.F.R. § 723.3(a)(2) (2016), and therefore illegal, because it was not made upon an "application . . .signed by the person requesting corrective action with respect to his[] record," *id.*, in that it was not made upon an application signed by Mr. Sharpe "requesting corrective action with respected to his[own] record," *id.*

B. Defendant may not rely upon anything other than record corrected under 10 U.S.C. § 1552 to determine amounts payable under that section

157. The Bourne Memorandum's invalidity notwithstanding, Defendant cannot rely – i.e., to announce Mr. Sharpe's entitlement only to the Norfolk, Va., rate of BAH and the lack thereof to Sea Pay, DSR, 2 – upon the supposed "corrections" to Mr. Sharpe's record it attempts, for the simple reason that statute and regulation both expressly provide, for military records corrected pursuant to 10 U.S.C. § 1552, that payments in view of those corrections are only to be made on the basis of the record-correction that is made under the authority of that statute, the language of which says that "[t]he Secretary may pay . . . a claim for the loss of pay[and] allowances" if "the amount is found to be due" as "a *result* of cor-

recting a record *under this section*," *id.* § 1552(c)(1) (2012) (emphasis added). The DOD financial regulations that implement the law as to payments that result from corrections of records are equally explicit: "Payments based on a correction of military records" are to be made "in the amounts determined to be due by applying pertinent laws and regulations to all the material facts *shown in the corrected record*," DODFMR, *supra*, para. 100301 (emphasis added), and it is clear – because the whole section of the regulation is discussing the operation of correction boards under 10 U.S.C. § 1552, *see, e.g., Yanko v. United States*, 127 Fed. Cl. 682, 694 (2016) (looking to a statute's section heading to clarify the meaning of its contents) – that "facts shown in the corrected record," *id.*, refers to the record *as corrected by BCNR*. Consequently, the record to which the "pertinent laws and regulations," *id.*, are to be applied is the record that was delivered to DFAS by BCNR on April 28, 2016, *supra* ¶ 101, not the record as adulterated by the Bourne Memorandum more than a year later. Like the discharge that SECNAV overturned, the Bourne Memorandum, because not part of any record-correction (valid or otherwise) *under § 1552* for purposes of fixing the predicate record upon which the determination of Mr. Sharpe's entitlements conducted, is "void, and its effect on [his record] is as though it were never [written]." *Groves*, 30 Fed. Cl. at 33. That DFAS itself cites § 1552 as the authority for the payment to be made, *supra* ¶ 127, is decisive.

158. This principle was well understood by the CGUS, who, in 1973, wrote the following, in a decision arguably controlling, uncontroversially, the disposition of Mr. Sharpe's case:

> We recognize that the Secretaries of the military departments concerned may perform or delegate the performance of certain ministerial duties with regard to a service member's military or naval records under authority inherent in their positions, in order to correct certain administrative errors which from time to time arise regardless of the care taken to insure the accuracy of such records. However, *we are unaware of any authority in law or regulation*, nor has any been cited in either your submission or in the enclosures, whereby the Secretary of the Army acting through the Office of [t]he [A]djutant General may make any changes in an individual's Army record that would result *in a change of material fact* or the creation of a new record, *in the absence of a proceeding before the Army Board for Correction of Military Records.*

To H. C. McDaniel, Department of the Army, 52 Comp. Gen. 952, 954–5 (1973) (emphasis added); *accord* Lieutenant Colonel Albert S. Babinec, USAF, Retired, B-186070, 1976 U.S. Comp. Gen. LEXIS 1884, at *10 (Oct. 28, 1976) (applying rule to Air Force).

C. Defendant may not exercise any discretion to set entitlements that arise from a proper correction of records under § 1552.

1. Discretion may not be exercised by way of resort to *extra*-Board records

159. Since the correction-board statute was amended in 1951 to give service secretaries the abil-

ity to pay amounts due as a result of a military record correction, *see* An Act to Amend the Legislative Reorganization Act of 1946, Pub. L. No. 82-220, 65 Stat. 655 (1951); *see also Ray*, 197 Ct. Cl. at 7 (discussing the amendment), the payment authority provided therein has long been understood to operate as a bar to the military departments and secretaries arriving at any purely discretionary opinions or judgments as to amounts that come due incident to a record correction. The application of this principle is obvious in this case, where the military attempts to exercise forbidden discretion by evading the statutory constraint above detailed, i.e., by making a "correction" to a record *subsequent* to its final correction by the correction board, in order to make that *subsequently corrected* record the basis for payment rather than the one that appears *as corrected "under § 1552," id.* § 1552(c)(1). Because there is no doubt that the statute forbids such conduct, "that is the end of the matter; [and this C]ourt, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron USA v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43(1984).

160. As the CGUS recognized, again in a decision arguably disposing, and effortlessly so, with Mr. Sharpe's case, only record-correction action "through" the BCNR is effective to establish the record upon which Mr. Sharpe's entitlements may be based:

> The pertinent statute, 10 U.S.C. 1552, provides that the Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, "and acting through boards of civilians of the executive part of that military department," may correct any military record of

> that department when he considers it necessary to correct an error or remove an injustice. It would appear that the issuance of the orders of February 13, 1962, *long after the correction of the member's records* as directed in the memorandum of August 22, 1961, *was not action "through" the Air Force Board for Correction of Military Records* since such action rather than incorporating any of the board's recommendations apparently was taken independently thereof and directed a correction not considered by the board. *Compare* 32 Comp. Gen. 296, 297. Consequently, it may not be concluded from the facts appearing that the orders of February 13, 1962, provide a *record basis* showing that Captain Grundy was entitled to the permanent change of station allowances involved. See 32 Comp. Gen. 242; *id.* 372; 34 *id.* 93; *id.* 95; 35 *id.* 508; *id.* 643. Also, *see*, *Thomas Nathan Russell v. United States*, 314 F.2d 809, 161 Ct. Cl. 183, decided 1963.

To the Secretary of the Air Force, 42 Comp. Gen. 582, 584–5 (1963) (emphasis added).

2. The phrase "found to be due" in § 1552(c)(1) has consistently been interpreted to exclude any exercise of discretion by the Defendant in determining amounts due incident to a record-correction

161. But there is another barrier to the kind of improper discretion that the Navy attempted to exercise here, *sua sponte*, by adjusting Mr. Sharpe's record on the basis of what entitlements it "believes" are

due, DSR, 2, provided by the long-standing and consistent interpretive approach of the executive branch to the statutory phrase "found to be due," *id.* § 1552(c)(1). As already noted, the phrase "found to be due," *id.*, means, according to DOD financial rules, "determined to be due *by applying pertinent laws and regulations to all the material facts* shown in the corrected record," DODFMR, *supra* (emphasis added). That is, while the statute (and the regulation as well) clearly limit the entitlements that accrue to a service member from favorable correction-board action to those that arise from his *record* as finalized *by the board*, the tandem regulation also confines the determination of entitlements, given the pre-existing premise of that corrected record, to those that arise from a dispassionate application of statute and regulation to facts found in the record. This, then, by the obvious terms of the regulation, is what the statutory phrase "found to be due," *id.*, means, and where, like here, "the regulatory language is clear and unambiguous, the inquiry ends with [its] plain meaning." *Roberto v. Dept. of the Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006) (citing *Meeks v. West*, 216 F.3d 1363, 1366 (Fed. Cir. 2000)).

162. This regulatory interpretation of the statute has been consistently upheld by – and, given the regulation at issue, even likely derives from – the CGUS decisions dealing with back-pay claims incident to § 1552 record corrections. One representative decision among numerous others, in words paralleling the regulation, held that

> the Secretaries of the Army, Navy, Air Force and, then Treasury – now Transportation with respect to Coast Guard matters – are not vested with discretionary power to make

> determinations of the amounts to be paid as a result of the correction of military records pursuant to 10 U.S.C. § 1552; and the amounts to be paid under that statute depend solely upon a proper application of the statutes and regulations to the facts as shown by the corrected record in each particular case.

Reynaldo Garcia, B-207299, 1982 U.S. Comp. Gen. LEXIS 367, at 4*–5* (Oct. 6, 1982); *accord* Lt. Col. Mary S. League, B-198489, 1981 U.S. Comp. Gen. LEXIS 1691, at *4 (Feb. 19, 1981) ("[U]pon correction of a member's service records, all resulting benefits and liabilities are based solely upon the application of the law then in effect, to the facts as show[n] in the record as reconstructed."); Lieutenant Commander George K. Huff, 55 Comp. Gen. 961, 965 (1976) (authority to pay a claim against the United States depends only upon a member's record as reflected by final decision to modify said record or decline to do so); To the Secretary of Transportation, 51 Comp. Gen. 191, 194 (1971) ("Upon the correction of his record, a member is entitled under 10 U.S.C. 1552(c) to all pay which would have become due under applicable provisions of law on the basis of the facts reflected by the record as corrected."); 1962 U.S. Comp. Gen. LEXIS 2723, at *2–*3 (same); 45 Comp. Gen. at 541 (noting that "legal conclusion[s as to entitlements] follow[] from the facts and cannot exist apart from them"). This view has been maintained since before 1954, when the acting CGUS denied the proposition that a "Secretary concerned . . . has plenary power to grant or withhold monetary benefits which . . . would accrue to a person as a matter of law on the basis of the matters of fact or purported

fact shown in his corrected record." Acting Comptroller General Weitzel to the Secretary of the Army, 34 Comp. Gen. 7, 9 (1954). Instead, in a decision that this Court's predecessor relied upon as "able," *Ray*, 197 Ct. Cl. at 6, he insisted that

> the Secretaries of the departments concerned are not vested, impliedly or otherwise, with any discretionary power to make determinations of the specific amounts to be paid as a result of the correction of military or naval records and . . . the amounts lawfully authorized to be paid . . . pursuant to the correction of military or naval records are not dependent upon either the judgment or the generosity of such Secretaries in any particular situation but depend solely on a proper application of the statutes to the facts or purported facts as shown by the corrected record in the particular case.

Id. at 12. Indeed, the CGUS has refused to give effect to a military secretary's determination where it "does not relate to a record correction within the purview of 10 U.S.C. 1552 but rather [is] a determination of the specific amount to be paid as the result of the records correction . . . ," To Major N. C. Alcock, Department of the Air Force, 50 Comp. Gen. 180, 183 (1970). At the same time, and recently, where the determination of amounts due are clear from a member's record as established by correction-board action, he has not hesitated to find the board's decision controlling as to such amounts. Senior Chief Petty Officer John J. Chiumento, USN (Retired), B-244598, 1991 U.S. Comp. Gen. LEXIS 1298, at *2–3 (Oct. 2, 1991) (denying member's claim to entitlement on the

basis of an asserted error in his record with regard to the timing of PCS orders because BCNR refused to correct the member's record in the first instance).

163. The Defense Claims Appeals Board, successor to the CGUS for the purposes of settling claims within the DOD, *see* Legislative Branch Appropriations Act, Pub. L. No. 104-53, § 211(b), 109 Stat. 514, 535 (1995); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, DETERMINATION WITH RESPECT TO TRANSFER OF FUNCTIONS PURSUANT TO PUBLIC LAW 104-53, Attachment A, at 1 (1996), continues to follow the CGUS precedents. "When a member is retroactively restored to active duty, DFAS calculates the amount, if any, which is due the member . . . using the appropriate Service regulations and Comptroller General decisions." DOHA CAB Decision, Claims Case No. 01032705 (June 22, 2001), http://ogc.osd.mil/doha/ claims/military/01032705.html, *rev'd on other grounds by* Deputy General Counsel (Fiscal), Department of Defense, on August 7, 2002; *accord* Claims Case No. 99051701, *supra* ("DOHA bases its decisions on the Comptroller General's decisions."). In a lengthy and recent decision by the CAB, reviewing the history of CGUS decisions along the lines herein indicated, DOHA CAB, Claims Case No. 2012-CL-082003.2, at 6–7, (Apr. 24, 2013), http://ogc.osd.mil/doha/ claims/military/2012-CL-082003.2.pdf, the CAB concludes that just as Congress declined the CGUS's invitation to exercise review over correction-board decisions, *see* H. R. REP. NO. 82-449 (1951), at 3, DFAS likewise has *no authority* to reject conclusions that necessarily flow from the application of law and regulation to the facts established with finality by correction-board action: "Congress settled the issue in 1951. As long as a

correction board performs a genuine correction of a military record, DFAS' authority is limited to calculating the proper amounts due under the correction," *id.*, at 7.

164. Admittedly, CGUS decisions are not binding on this Court. But they do reflect a body of decision-making interpreting the interplay between the authority provided by 10 U.S.C. § 1552 and the monetary entitlements that result from the exercise of that authority, and, because they reflect a "position [that] has been consistent and reflects agency-wide policy, and [they likewise reflect] . . . a reasonable conclusion as to the proper construction of the statute," *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352,1366 (Fed. Cir. 2005), they are entitled to some deference. Moreover, this Court has recognized, in similar circumstances, that "[t]he [CGUS] has rendered decisions in a long line of cases that address the [relevant] issue," has found that the "cases [were] instructive and well-reasoned," and has decided to "follow their rationale . . . ." *Bean Stuyvesant, L.L.C., v. United States*, 48 Fed. Cl. 303, 325 (2000); *but see Kinne v. United States*, 21 Cl. Ct. 104, 111 (1990) (CGUS as adjudicator). Moreover, and arguably decisive, the JTR itself – providing regulations that the CGUS and his successor routinely interpret – by its own admission is "issued under the . . . authorit[y] of" *inter alia* the "decisions of the U.S. Comptroller General (CG)[and the] Defense Office of Hearings and Appeals (DOHA)." *Id.*, para. B.2.e.4. Finally, and prescinding from the exact question of the controlling weight of the CGUS decisions, it is clear that Defendant's departure from these well-established precedents without a sufficiently persuasive explanation "[should] be vacated as arbitrary and capricious." *Fred Beverages, Inc. v.*

Fred's Capital Mgmt. Co., 605 F.3d 963,967 (Fed. Cir. 2010) (citations omitted). This is because "[a]n agency is obligated to follow precedent, and if it chooses to change, *it must explain why*," *M.M. & P. Maritime Advancement, Training, Educ. & Safety Program v. Dep't of Commerce*, 729 F.2d 748, 755 (1984) (emphasis added) (citing *Greater Boston Television v. FCC*, 444 F.2d 841 (D.C. Cir. 1970)). As the Supreme Court of the United States (SCOTUS) has noted, "[a]n agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (citation omitted).

3. Conclusion: Defendant cannot set entitlements

165. That the foregoing constraints against Defendant purporting to shape Mr. Sharpe's entitlements by way of the recent record "correction" applies in spades to Defendant's conduct here is not only obvious from the face of the Bourne Memorandum, which purports to correct Mr. Sharpe's record to show that he is "not entitled" to various pays, *id.* ¶ 1.d. Indeed, the Defendant tipped its hand earlier, by remarking that its intention was to ensure Mr. Sharpe did not receive an "undue windfall." JSR, 3 (May 2, 2017). While Mr. Sharpe here does not claim a windfall, and rather asks only that the Government follow its own regulations – its obligation to do so being "a fundamental tenet of our legal system," *Vandermollen*, 571 F.2d at 624 – the Defendant's admission arguably places its conduct squarely within the zone of what statute and regulation, as emphasized and consistently interpreted by the administrative tribunals charged with implementing them, forbid.

166. In consequence, any claim that the Bourne Memorandum may make, relative to what is "found to be due," 10 U.S.C. § 1552(c)(1) (2012), to Mr. Sharpe, is void, not only because the memorandum is *ultra vires* as manifestly contrary to statute and regulation, as detailed *supra* ¶¶ 143–156, but also because it attempts to affect the entitlements due Mr. Sharpe on some basis other than the operation of law and regulation upon his record as corrected by BCNR, contrary to the settled understanding within the DOD of how amounts are "found to be due," *id.*, which is, on the basis of an uninterrupted line of CGUS and CAB decisions, that the military departments, incident to a correction of records, "do not have discretionary authority to limit or reduce the amounts . . . payable under the law," Acting Comptroller General Weitzel, 34 Comp. Gen. at 7, and that they are absolutely "*without authority* to decide [how] correction action shall be applied *for pay purposes*," To Commander M. M Alexander, Department of the Navy, 42 Comp. Gen. 252, 254 (1962) (emphasis added).

D. Bourne Memorandum violates the constructive-service doctrine by engaging in impermissible speculation as to Mr. Sharpe's "supposed" non-separation career

167. Finally, Defendant's reliance upon the Bourne Memorandum as "the best approximation of Mr. Sharpe's constructive service record during his separation," DSR, 2, in order to arrive at what the Navy "believes . . . is appropriate," *id.*, relative to Mr. Sharpe's entitlements, not only ignores the fact that his record as corrected by BCNR *is* the "constructive service record," by effectively replacing *his* record

with one Mr. Bourne, unlawfully, has created for him, but also, to the extent Defendant's speculations rely on Bourne's gratuitous assumptions that Mr. Sharpe "would not have continued to serve aboard USS CARL VINSON past 2009," Bourne Memorandum ¶ 1.b, that he "would have been transferred under [PCS] orders had he not been separated," *id.* ¶ 1.c, and that he "would not have been assigned to a ship[] from 1 Oct 09 to 12 Feb 17," *id.* ¶ 1.d, disregards decades' worth of law addressing constructive service incident to the reversal of an illegal discharge, as well as the general principles of administrative law that bar resort to speculation when it is being made to substitute for an exercise of discretion that can only have been accomplished in the first instance.

1. **Bourne cannot exercise discretion reserved for BCNR or Navy personnel authorities in the first instance**

168. The general rule goes back at least to 1943 with the renowned SCOTUS decision in *S.E.C. v. Chenery*, standing for the proposition that an administrative or judicial review cannot substitute for the lack of action which an "agency alone is authorized to make and which it has not made." 318 U.S. 80, 87–8 (1943). The principle has been frequently acknowledged in this circuit, *see, e.g., Vizio v. Int'l Trade Comm'n*, 605 F.3d 1330, 1343 (Fed. Cir. 2010) (holding that where a decision "implicates agency discretion" the reviewer "cannot properly substitute [his] decision on a discretionary issue" (citations and quotation marks omitted)), and has likewise been invoked precisely in the context of back-pay claims arising from the reversal of an unlawful discharge.

In *Wagner v. United States*, controlling here, the CAFC anticipated Mr. Bourne's effort by more than a decade. While the latter speculates that Mr. Sharpe "would have been transferred . . . *had he not been separated*," Bourne Memorandum, ¶ 1.c (emphasis added), the court declined the government's invitation to take that approach to an Army member unlawfully discharged, stating instead that "we *will not speculate* as to what the outcome might have been *had the error not occurred*," 365 F.3d 1358, 1365 (2004) (emphasis added) (refusing to find Army error harmless when it failed to approve discharge proceedings in the first instance as required by regulation). The court emphasized that its approach to the case was "particularly" apposite, because "a finding of harmlessness would require us to approximate the *absolute discretion afforded the Secretary of the Army on personnel matters* with a determination of our own." 365 F.3d at 1365. Likewise, Bourne – not only unlawfully, but contrary to the principles established by *Chenery* and *Wagner* – attempts to approximate the "absolute discretion" of BCNR or CNP "with a determination of [his] own," *id.* – which the CAFC found to be totally improper, and he simply is not authorized to exercise in the first instance. Only CNP and commands he authorizes issue orders to officers, *supra* ¶ 129, and BUPERS-00J is not among them, *supra* ¶ 128. Moreover, BCNR could possibly have exercised discretion to constructively assign Mr. Sharpe to his home or to another duty station, at least for purposes of a retroactive record correction. *See, e.g., Camilo v. United States*, 89 Fed. Cl. 671, 675 (2009) (noting Air Force correction board's correcting a member's record to show an PCS to her home of record during the period between her voided discharge and her reinstatement); *but see Roth v.*

United States, 378 F.3d 1371, 1392 (Fed. Cir. 2004) (rejecting as an inadequate remedy the idea of notionally assigning a member "home" during his constructive-service period). In any event, BCNR declined to do so, in light of which the conclusion aptly stated the United States Court of Appeals for the District of Columbia Circuit applies here: "[C]ounsel's post hoc rationalizations cannot substitute for the agency's own failure" to exercise discretion in the first instance. *Matlovich v. Sec'y of the Air Force*, 591 F.2d 852, 860 n. 20 (D.C. Cir. 1978).

2. Constructive-service doctrine enjoins Defendant from fabricating an alternative career and requires instead the return of Mr. Sharpe to "where he left off"

169. This Court has frequently enforced the CAFC's approach in *Wagner*; *Wisotsky v. United States, supra*, is one among many. Because "[w]hat might have happened is subject to speculation[, and because neither] defendant, plaintiff nor this court can know the result with any reasonable certainly," 69 Fed. Cl. at 311 – or in this case, because neither Defendant nor Mr. Bourne nor Mr. Sharpe can know whether or when or where he might have been transferred following September 30, 2009 – such speculation is simply inappropriate and irrelevant as to determining the entitlements that should be found due on the basis of the corrected record. "What is known," the Court in *Wisotsky* continued, was that (in that case) the plaintiff's "Board of Inquiry was improperly constituted," just as, in this case, what is known – and all that is known – is that Mr. Sharpe's discharge was "void due to plain legal error," BCNR Decision, 16, just as, in *Holley v. United States*, all that

was known was that the reversal of a discharge returned the plaintiff "to the position he occupied at the time of his discharge, as if the discharge had never happened." 33 Fed. Cl. 454, 457 (1995) (rejecting the government's view that the plaintiff's station-based entitlements would not continue during the constructive-service period because he likely would have been transferred).

170. Restoration of restored service members to "the position[s they] occupy[] at the time of [their] discharge[s]," *id.*, is, indeed, the *heart* of the constructive-service doctrine which is controlling in this circuit. *Doyle*, 220 Ct. Cl. at 306 (restoring discharged plaintiffs to the "position, rank, and pay" held at time of discharge); *accord Dilley v. Alexander*, 627 F.2d 407, 413 (D.C. Cir. 1980) (constructive service mandates the award of "retroactive reinstatement to the position[the member] held on [his] . . . date[] of separation"); *see also Ulmet v. United States*, 17 Cl. Ct. 679, 701 (1989) (noting that "[t]his court agrees with the approach developed" in *Dilley*, *id.*). All of which means that Bourne is not entitled to speculate, "for constructive service purposes," Bourne Memorandum, ¶ 1.c–.e, as to what might have happened "had [Mr. Sharpe] not been separated," *id.* ¶ 1.c, even if, as this court recognized in its (also controlling) decision in *Reale v. United States*, 208 Ct. Cl. 1010 (1976), the necessary effect of the constructive-service doctrine in a particular case would be to "postulate [an] impossibility," *id.* at 1013, i.e., "that a man may serve 20 years in the same rank," *id.*, or, as here "that [Mr. Sharpe] may serve [7 additional] years [o]n the same [ship]," *id.* For corrective actions like those that Bourne attempted to make "pertaining to [Mr.] Sharpe's pay," Bourne Memorandum ¶ 1, the theory is even more applica-

ble, because, as the court further announced in *Reale*, speculation plays *no role* in the formulation of back-pay awards, which "are not and *do not pretend to be realistic reconstructions* of what the pecuniary consequences of a serviceman's career *would have been*," *id.* at 1013 (emphasis added).

3. Bourne's reconstruction of Mr. Sharpe's career is in any event untenable

171. Bourne's assumptions that Mr. Sharpe would not have "continued to serve" aboard CARL VINSON, Bourne Memorandum ¶ 1.c, that he "would have been transferred," *id.*, and that, despite the transfer, he would have remained in Norfolk, Va., *id.*, by their internal contradictions as well as their incompatibility with conclusions that more intelligent speculation would likely have produced, illustrates the unreliability of this inherently questionable approach to Mr. Sharpe's constructive service.

172. Indeed, if Bourne is assuming that Mr. Sharpe's tour on CARL VINSON would only have been "24 months" based on "PAO detailing policy," *id.* ¶ 1.b, what is to be done with the fifteen months, from June 2008 to September 2009, *supra* ¶¶ 68, 87, 88, that Mr. Sharpe *actually* served on the ship? That Mr. Sharpe remained aboard for that long passed his "planned" rotation date, *supra* ¶¶ 68, 69, undermines rather than supports Bourne's fiction.

173. Moreover, if "PAO detailing policy," *id.*, is the basis for Bourne's assumptions, and he really wishes to engage in the forbidden "probable career reconstruction" that this Court has previously rejected, *Holly*, 33 Fed. Cl. at 457, how can he not have taken into account the reality that most O5 assignments for officers in Mr. Sharpe's category are *not* in Nor-

folk, Va., *see* Ex. 33, at 2–3; Ex. 34, at 1 (showing only *nine percent* of the assignments there), and that a vastly greater number of them are in areas having a much higher geography-based BAH rate than Norfolk, *see* Ex. 34, at 1 – on average, a rate, looking at just FY 2017 numbers, that exceeds the Norfolk entitlement by $654.00 per month, and, if one takes the overseas assignments into account, the average of the excess increases to $933.00, *id.* Given Mr. Sharpe's fluency in Italian, *see* Ex. 29, at 2–3, and his previous service in Italy, *see, e.g.,* Ex. 13, at 2, why would we not presume his constructive service was in Naples, where the housing allowance would exceed Norfolk's by well over $2000 monthly, *id.*, and even exceed San Diego's by $850? Finally, given prescribed officer tour lengths of twenty-four to thirty-six months, *supra* ¶ 130, Mr. Sharpe may have moved three times since his hypothetical Bourne-ordered detachment from CARL VINSON. The Navy's desire to avoid a "windfall," JSR, 3 (May 2, 2017), for Mr. Sharpe would certainly be ill-served by an accurate "career reconstruction," *Holley, id.* – less self-serving than the assumption that Mr. Sharpe did three back-to-back tours in Norfolk despite all the odds – that saw Mr. Sharpe serving, e.g., in London, Hawaii, Miami, or Bahrain, *see* Ex. 33, at 2–3; Ex. 34, at 1. (The housing allowance for a thirty-six month London assignment is roughly the amount Mr. Sharpe claims in BAH for the entire eighty-seven month Constructive Service Period.) Nor would that interest be served by following the lead of the Air Force correction board, *see Camilo, supra*, because assigning Mr. Sharpe to his home of record in Los Angeles county, *supra* ¶ 66, would entitle him to more than $.3 million worth of BAH, *see* Ex. 34, at 1.

174. The fancifulness of the foregoing scenarios illustrates why courts have consistently declined to indulge in speculation advanced by plaintiffs claiming entitlements which, on the basis of their constructive-service records, simply appear too speculative. *See, e.g., Dilley*, 627 F.2d at 414 (denying a claim for hazardous-duty pay to successful plaintiffs because it was "too speculative"); *see also Verbeck v. United States*, 118 Fed. Cl. 420, 428 (2014) (disallowing amounts in a back-pay claim that are "too speculative," such as morale and welfare benefit); *Holley*, 33 Fed. Cl. at 458 (same, reciting cases); *Ulmet*, 17 Cl. Ct. at 705 (same). For consistency's sake, however, this must cut both ways – at times even against the Government.

E. In summary: Bourne Memorandum is void as a "correction" to Mr. Sharpe's record to reflect his detachment from CARL VINSON on the date of his unlawful discharge

175. Because, therefore, as alleged *supra* ¶¶ 143–156, the Bourne Memorandum is *ultra vires*, void, or otherwise of no legal effect upon Mr. Sharpe's record, it is powerless to change that record so as to make it reflect that Mr. Sharpe did not serve aboard CARL VINSON "past 2009" or "from 1 Oct 09" thereafter, Bourne Memorandum ¶ 1.b–.c, and, as also alleged *supra* ¶¶ 157–167, Defendant cannot rely upon it as establishing that "Mr. Sharpe's tour of duty aboard the USS Carl Vinson ended on September 30, 2009," DSR, 1; therefore, Mr. Sharpe's entitlements must be established solely upon the basis of the application of the relevant statutes and regulations to his record as it exists pursuant to the BCNR recommendations approved as "final and conclusive," 10 U.S.C. §

1552(a)(4), for SECNAV on April 25, 2016. These are summarized below.

F. BAH is a station-based allowance based on location of member's duty station

176. Statute and regulation provide in pertinent part for the payment of "a basic allowance for housing" for "a member of a uniformed service who is entitled to basic pay. 37 U.S.C. § 403(a)(1) (2012); *accord* JTR, para. 10002.A. It is uncontroverted that Mr. Sharpe is now and was for the entirety of the Constructive Service Period entitled to basic pay. *Supra* ¶ 99.

177. The statute also says that BAH "will vary according to the pay grade in which the member is assigned or distributed for basic pay purposes, the dependency status of the member, and the geographic location of the member," § 403(a)(1), *accord* JTR, *supra*. The variation of the housing allowance by location – the variable relevant here – began with the Military Personnel and Compensation Amendments of 1980, which added to the basic allowance for quarters (BAQ) a variable allowance to address the higher cost of living in given areas. *Id.*, Pub. L. No. 96-343 [hereinafter MPCA], § 4(a)(1), 94 Stat. 1123, 1125 (1980) (adding VHA to housing-allowance entitlements); *see* 37 U.S.C. 403(a)(2)(A) (1982) (codifying the VHA entitlement). Notably, the amendment to section 403 of title 37 provided that the VHA would accrue to a member entitled to BAQ if he were "*assigned to duty in an area . . .* which is a high housing cost area . . . ." MPCA, *supra*. The VHA's dependency upon the area of the member's duty station lasted until 1998, *see* 37 U.S.C. § 403a(a)(1) (1994) (entitling member to VHA when "assigned to duty" in

a high housing cost area), when it and the BAQ were consolidated into a single BAH in the National Defense Authorization Act for Fiscal Year 1998, *id.*, Pub. L. No. 105–85, § 603(c)(4), 111 Stat. 1629, 1775–83 (1997), effective January 1, 1998, *id.* § 603(e), 111 Stat. at 1783. Illustratively, when legislators enacted the location-dependant housing allowance, they referred to it as a "station housing allowance." H. R. REP. NO. 96-1233, at 14 (1980).

178. Because the rate of the VHA, until its consolidation with the BAH, was predicated upon the area of a member's assignment, 37 U.S.C. § 403a(a)(1) (1994), current regulations having the force and effect of law, *see* 37 U.S.C. § 403(k) (2012) (authorizing the Secretary of Defense to implement the statue via regulation) – even though the principles they codify today long predate the amalgamation of BAQ and VHA into the single BAH, *see* 37 U.S.C. § 403(j)(1) (1982) (authorizing the President at the time to "prescribe regulations for the administration of [the] section") – consistently interpret the phrase "geographic location of the member" as meaning, for station allowance purposes, the geographic location *of the member's permanent duty station*. *See* JTR, para. 10402-B ("[A] housing allowance is paid based on the member's PDS . . . ."); *accord* OPNAVINST 7220.12, *Basic Allowance for Housing Entitlements*, CH-1 ¶ 3 (2011) ("BAH rates vary based on the geographic location *of the member's [PDS]* . . . ." (emphasis added)). The CGUS has likewise long adhered to this understanding of the military housing allowances. *See* Private Vaughn Desha, USMC, B-214731, 1984 U.S. Comp. Gen. LEXIS 602, at *4 (Sep. 4, 1984) (noting the dependency of the VHA entitlement upon being "assigned to duty" in a qualifying geographical area (quoting JTR, para. M4550)); Military Leave

Settlements – Variable Housing Allowance, 1981 U.S. Comp. Gen. LEXIS 238, at *4 (Feb. 18, 1981) (noting that the VHA is a "station housing allowance," citing H. R. REP. NO. 96-1233, "not payable by virtue of membership in a uniformed service but accru[ing] incident to particular duty assignments"); Lieutenant Colonel L. E. Sholtes, Department of the Army, 51 Comp. Gen. 312, 315 (1971) ("Station housing allowances . . . are not payable by virtue of membership in a uniformed service but accrue incident to particular duty assignments."); *accord Holley v. U.S., 33 Fed. Cl. 454*, 458 (1995) (noting that service members receive station housing allowance "by virtue of their . . . assignment"); *see also* Private J. E. Gines, USMC, 70 Comp. Gen. 435, 437 (1991), (noting that "allowances should be those appropriate for [a member's] duty station . . . .").

1. For BAH purposes, regulations provide that the duty station of a member assigned to a ship is the ship's home port

179. The CGUS has long considered that "[t]he permanent station of a member assigned to a ship is the ship . . . ," Ensign James W. Howard, USN, 61 Comp. Gen. 602, 603 (1982); *accord* To the Secretary of the Army, 45 Comp. Gen. 689, 692 (1966), and Navy regulations agree with this interpretation, MILPERSMAN 1320-300, para. 4 (2014) ("A PDS is the post of duty/official station of a member, including a ship."). But for purposes of allowances that depend upon the location of a member's duty station, when a member is assigned to a ship his PDS is uniformly considered by regulation to be the ship's home port. *See* JTR, para. 10402.B (noting a "housing allowance is paid based on . . . the home port for a

member assigned to a ship . . . ."); *id.*, app. A, pt. 1, at A1-32, *Permanent Duty Station*, para. A.1.b(4) (defining the "[s]hip's home port . . . that a member is assigned/attached for duty . . . [as] the PDS for . . . [g]eography-based station allowances"); DOD Instruction [hereinafter DODI] 1315.18, *Procedures for Military Personnel Assignments*, Glossary, pt. II, at 66 (2015) (establishing that "The home port of a ship . . . to which a member is assigned or attached for duty . . . is the PDS for . . . geography-based station allowances . . . "); MILPERSMAN, *supra* (same). Pertinent CGUS decisions agree: because a ship may be at sea in any location whatsoever, consideration of the ship's home port as the PDS location is an "administrative convenience" for the figuring of station-allowances and other entitlements. Allowances on Home port Change, 65 Comp. Gen. 888, 890–91 (1986) ("We have consistently held that the [PDS] of a member assigned to a vessel is the vessel itself. The vessel's home port is regarded as a duty station for administrative convenience in applying the . . . station allowances."). As a result, the CGUS has, with equal consistency, held that for a member assigned to a ship, the "ship's home port is [the] a member's [PDS]." Commander James P. Brown, Jr., NOAA Corps, B-186703, 1976 U.S. Comp. Gen. LEXIS 1647, at *4 (Dec. 28, 1976) (citing numerous decisions); *accord, e.g.,* Captain Tim H. Roberts, USNR, B-215390, 1984 U.S. Comp. Gen. LEXIS 225, at *6 (Nov. 20, 1984); *see also* Evacuation Allowances, B-248153, 1992 U.S. Comp. Gen. LEXIS 1128, at * 2 (Oct. 14, 1992) (noting that when a ship changes home port the old home port is not any longer the PDS of members attached to the ship).

180. With further regard to station allowances and a ship's home port, regulations also mandate, for

"a member [who] is currently assigned to a ship . . . with an announced home port change," that the "housing allowance" be "[c]hange[d] . . . to the new home port rate on the home port change effective date prescribed by the Service." JTR para. 10402.B.4.a. DFAS acknowledges the propriety of this requirement. *See* Lieutenant Commander Bernard R. Hess, USN - Reconsideration of waiver request, B-247264, 1992 U.S. Comp. Gen. LESIX 969, at *4 (Sep. 8, 1992) (noting DFAS's determination that a member's housing allowance changes effective the date of a ship's home port change, regardless of where the member chooses to maintain a residence, and that payments at the old home-port rate are erroneous after the home port change).

2. Regulations provide that BAH for a member between duty stations continues at the rate applicable to the old duty station until the member reports to the new duty station

181. Finally, as regards a member in transit between an old and a follow-on PDS, regulations direct the "old PDS-based BAH" to "[c]ontinue . . . through the day before the day the member reports to the new PDS, to include [temporary duty] en route. New PDS-based BAH . . . authority begins on the day the member reports to the new PDS." JTR, tbl.10E-12, r. 1; *accord id.*, para. 10416.B (stating that "[a] member's old PDS is the PDS for BAH purposes from the day the member departs the old PDS through the day before the member reports to the new PDS in compliance with a PCS order."). The CGUS has enforced this provision of the travel regulations, as he has the others herein cited. *See* Lance Corporal J. F. Murphy, USMC, B-223425 1986 U.S. Comp. Gen.

LEXIS 258, at *3–4 (Nov. 3, 1986) (holding that "entitlement to VHA" does not accrue following a member's departure from his PDS on the basis of anything other than the PDS from which he has detached until he is "assigned to duty" at the new PDS (quoting JTR M4550)).

3. These regulations bind the Defendant and the Court

182. The above-cited regulations, interpreting 37 U.S.C. § 403(a), noting that BAH "will vary according to . . . the geographic location of the member," *id.*, and controlling the issues as to payment of BAH to a member who is both assigned to a ship whose home port changes during his assignment thereto and who is undergoing a PCS, bind the agency and this Court. This is because "regulations . . . reasonably designed to carry into effect the acts enacted by the Congress and . . . promulgated pursuant to the statutes . . . . have the force and effect of law," *Henneberger v. United States*, 185 Ct. Cl. 614, 623 (1968), and because, "[w]hen Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp., 533 U.S. 218*, 227 (2001) (quoting *Chevron*, 467 U.S. at 843–844).

G. Mr. Sharpe's duty station after March 31, 2010, was CARL VINSON in San Diego

183. Because Mr. Sharpe asserts entitlement to BAH at the rate applicable to CARL VINSON's San Diego home port for the portion of the Constructive Service Period following March 31, 2010, until the day before he reports to his prospective Washington, D.C., PDS, the sole material fact, *see* RCFC 56(a), needing determination relative to the claim in this Count II is Mr. Sharpe's PDS on and after the effective date of CARL VINSON's change of home port.

184. Though "[i]t has consistently been held that that which constitutes a member's designated post of duty is a question of fact, the determination of which is to be made with the assistance of any available evidence . . . ," Master Sergeant Thomas W. Dunning, USAF, B-185851, 1976 U.S. Comp. Gen. LEXIS 2667, at *4 (Apr. 28, 1976) (citations omitted); *accord* Chief Warrant Officer Henry R. Connor, B-241214, 1991 U.S. Comp. Gen. LEXIS 1091, at *2 (Sep. 12, 1991) (same); 70 Comp. Gen. at 437 (same), it is herein submitted that the evidence does not give rise to any genuine dispute as to the fact of Mr. Sharpe's constructive duty assignment on and after April 1, 2010, and therefore that he is entitled to judgment as a matter of law. *See* RCFC 56(a).

1. A member's PDS does not change without a competent PCS order

185. Navy personnel rules define a PDS as "the post of duty or official station . . . to which a member is assigned or attached for duty other than [temporary duty] or [temporary additional duty."

MILPERSMAN Article 1306-122, para. 1.a.(1) (2007).

186. Regulations uniformly define a permanent change of station (PCS) as the

> assignment, detail, or transfer of an employee, member, or unit to a different PDS under a competent travel order that does not specify the duty as temporary, provide for further assignment to a new PDS, or direct return to the old PDS.

JTR, app. A, pt. 1, at A1-31 (defining "Permanent Change of Station"); *accord* DODI 1315.18, *supra*; DODI 1327.06, *Leave and Liberty Policy and Procedures*, CH-3, at 44 (2016) (same); MILPERSMAN 1306-122 ¶ 1.b(1) (2007) (same); *see also* BUPERSINST 7040.6B, ch. 1, sec. B, at 1-B-2 (defining a "PCS Move" as the "transfer or assignment of a member from one PDS to another PDS").

187. Because a member is not assigned "to a different PDS" without "a competent travel order" that does not specify the new assignment as anything other than permanent, JTR, *supra*, federal travel regulations expressly provide that a PCS cannot be effected by any means other than a PCS order. JTR, para. 5006.A ("A PCS order must direct a PCS."). This is consistent with Navy policy. *See* MILPERSMAN 1320-300 para. 3.a (stating that change of duty orders "detach members from one duty station and assign them to another").

188. The settled meaning of the travel regulations with regard to a member's change of PDS is established by several on-point judicial and administrative decisions. *See Holley v. U.S., 33 Fed. Cl. 454 (1995); Laningham v. U.S., 5 Cl. Ct. 146 (1984); Private J. E.*

Gines, USMC, 70 Comp. Gen. 435 (1991); Acting Comptroller General Fisher to the Secretary of Defense, 32 Comp. Gen. 348 (1953); Submarine Duty – Off-Crew Travel to New Home Port, 44 Comp. Gen. 507 (1965).

189. These decisions stand for the propositions, consistent with regulation, 1) that a PDS is not changed absent a PCS order, *see Holley*, 33 Fed. Cl. at 465 n.2 (holding that a PDS does not change absent the receipt of PCS orders); *Laningham*, 5 Cl. Ct. 146, 154 (1984) (noting that a record devoid of orders showing an "assign[ment] and 'transfer[]'" is "patently insufficient" to establish it as a fact, and finding instead that a member's "old" PDS remains what it was until "the member reports at the new permanent duty station in compliance with permanent change-of-station orders" (quoting the JTR, para. M4550)); 70 Comp. Gen. at 437 (1991) ("[I]f no action has been taken to detach or transfer [a] member . . . we see no reason why the member's duty station would not remain the same."); *see also* 32 Comp. Gen. at 350 ("Detachment from station under orders . . . [has] the effect of terminating the member's duty assignment at that station"); and 2) that a vessel's change of home port does not alter the attachment to the vessel of the members so assigned, 44 Comp. Gen. at 509 (noting that homeport change orders "do not . . . disturb the attachment of the members" to the vessel).

2. Mr. Sharpe was assigned to CARL VINSON from June 20, 2006, until February 12, 2017, when he received the first subsequent PCS order detaching him from the ship

190. Mr. Sharpe's assignment to CARL VINSON as his permanent duty station (PDS) began on June

20, 2006, when he reported to the office building in Newport News, Va., where CARL VINSON was undergoing overhaul, and where he worked continuously until being ordered to his home on March 7, 2007. *Supra* ¶¶ 68, 70, 79.

191. Though Mr. Sharpe was ordered to his home and never returned to his ship, *supra* ¶ 79, and though the ship went to sea in June 2009 without him, *id. 84*, he remained assigned to the ship, as Code 20 observed, because he still "had orders" to the vessel, *id.* ¶ 96, and was paid CSP continuously, *id.* ¶ 94.

192. Defendant subsequently declined four opportunities to exercise discretion to remove Mr. Sharpe from CARL VINSON. First, though (as the Bourne Memorandum states, *id.* ¶ 1.b) his tour of duty was originally scheduled to last two years, and his orders reflect a "PRD" of June 2008, Ex. 7, at 2, he was not transferred on schedule. Second, even though his "numerical relief" reported to the ship on June 20, 2008, *supra* ¶ 82, Mr. Sharpe was not relieved, and instead remained aboard. Third, though Mr. Sharpe's commanding officer had requested and obtained, on January 2, 2008, permission to detach Mr. Sharpe for cause from the ship, BCNR Decision ¶ 3.nn, still Mr. Sharpe remained aboard. Finally, though Mr. Sharpe was ordered in July 2009 to detach from CARL VINSON and thereby separate from the Naval Service, *supra* ¶ 85, Mr. Sharpe's orders were canceled, and he was directed to "continue present duty," *supra* ¶ 86.

193. Prior to BCNR action, Mr. Sharpe's PDS remained CARL VINSON until September 30, 2009, when his detachment therefrom was effected by BUPERS ORDER 2589, *supra* ¶¶ 87, 88, 111–114.

194. Effective April 25, 2016, BCNR expunged from Mr. Sharpe's record the orders detaching him from CARL VINSON and ordered that his record reflect uninterrupted and continuous service on active duty. *Supra* ¶ 97.

195. Mr. Sharpe's current (December 7, 2017) orders are PCS orders that have the effect of changing his PDS, *supra* ¶ 186, because they do not specify his assignment to his prospective Washington, D.C., PDS, as temporary, provide thereafter for further assignment, or direct him to return to any other PDS. Ex. 9, at 3 (noting his Washington, D.C., assignment as his "ultimate activity" and "permanent duty station").

196. Given BCNR's removal from his record of the orders detaching him from CARL VINSON on September 30, 2009, *supra* ¶ 97; given the nullity of the Bourne Memorandum purporting to "correct" Mr. Sharpe's record to show his service aboard CARL VINSON ending on that date, *id.* ¶ 1.b, .d; and given the absence of other orders intervening between the (voided) separation and detachment orders that were executed on September 30, 2009, and the order Mr. Sharpe started to execute on February 13, 2017, *supra* ¶¶ 111–114, the evidence constituted by Mr. Sharpe's record reflects that he was not removed from his PDS, CARL VINSON, prior to the day before he reported to duty on February, 13, 2017, en route his subsequent PDS, and that he therefore remained attached to CARL VINSON following her change of home port effective April 1, 2010, *supra* ¶¶ 83, 95 .

3. The conclusion is compelled by relevant judicial and administrative case law

197. Relevant case law supports this conclusion. The CGUS, in B-164538, denied to a naval member certain entitlements that would have accrued incident to his ship's change of home port, because "[p]rior to the effective date of the change of home port of the [ship]," the member "received orders detaching [him] from duty on that vessel and directing [his] separation from the service [precisely the orders that Mr. Sharpe received releasing him from CARL VINSON and the Navy, *supra* ¶ 87]. In view of those orders, [the member's] status as serving on board the [vessel] was terminated." Mr. Gregory A. Benadom, B-164538, 1968 U.S. Comp. Gen. LEXIS 1945, at *3 (Oct. 8, 1968). Had Mr. Sharpe's separation orders not been voided by BCNR, they would have had the same continuing effect. But, as this Court held in *Groves*, 30 Fed. Cl., *supra*, when a discharge order is invalidated, it is "void, and its effect on [a member's] status is *as though it were never given*," *id.* at 33 (emphasis added) (citing cases). The absence of the order in Mr. Sharpe's record that had previously detached him from CARL VINSON means that his attachment thereto necessarily endures – until changed by his recent, valid PCS orders – as it was before his discharge. *See Laningham*, 5 Cl. Ct. at 154 (member's duty station prior to illegal pay stoppage, absent PCS orders in the record to the contrary, remains what it was at the time of the illegal act); *Holley*, 33 Fed. Cl. at 457 (because plaintiff "never received PCS orders . . . his PDS . . . [is] the same as [it was] at the time of his illegal discharge from service"); *Ulmet*, 17 Cl. Ct. at 710 (awarding back pay to include VHA at the rate "applicable to the location

where the plaintiff was *assigned to duty* prior to his improper release" (emphasis supplied)).

4. Application of the constructive-service doctrine also requires this conclusion

198. Even acknowledging the "legal fiction" of Mr. Sharpe's constructive, rather than actual, service, *see Groves*, 30 Fed. Cl. at 35 ("In military pay cases, the setting aside of previously issued orders has the effect of creating a hiatus in the serviceman's records that is filled by giving recognition to a status that is a legal fiction."), the conclusion is the same. "The legal fiction of constructive service places [Mr. Sharpe] *in the position he was prior to the time of his illegal discharge*," *Holley*, 33 Fed. Cl. at 458 (emphasis added), which is that of an officer assigned to CARL VINSON as PAO, *supra* ¶ 68. The cases establishing the essentials of the constructive-service doctrine support this outcome, because they require that when a member's discharge is overturned, he is restored to the position he had when he was discharged. *See supra* ¶ 170. Such reinstatement to "position" means that the clock must be turned back far enough, when unraveling the consequences of a voided discharge, to constructively restore a service member to his actual position, rather than to a nominal "hold" status that serves as a predicate for denying him some or all of the entitlements which would otherwise be due. *See Groves v. United States*, 47 F.3d 1140, 1145–46 (Fed. Cir. 1995) (reversing lower court decision to retroactively consider plaintiff as having no duty assignment during his constructive-service period); *see also Roth*, 378 F.3d at 1392 (rebuking Air Force board for "fail[ing] to adequately remedy the gap in [plaintiff]'s record"). The upshot,

under controlling legal precedent as under applicable regulations and in view of the record evidence, is that Mr. Sharpe necessarily remains attached to CARL VINSON through the end of the Constructive Service Period.

199. Application of the logic of the most relevant of the constructive-service cases likewise points to the conclusion herein advanced, that Mr. Sharpe is entitled to BAH for his Constructive Service Period on the basis of the premise established by the evidence, i.e., that he was not detached from CARL VINSON on September 30, 2009, but remained assigned to her until reassigned by competent travel orders, JTR, app. A, pt. 1, at A1-31.In *Holley*, this Court awarded overseas housing allowance to a successful plaintiff on the basis of the facts that he was assigned overseas at the time of his discharge and that his record, following the voiding of the discharge, reflected the absence of any order assigning him elsewhere, declining the Government's invitation to speculate he likely would have been transferred back to the United States had he remained in the service. *See* 33 Fed. Cl. at 457. In *Laningham*, the predecessor to this Court relied on the JTR to deny a plaintiff his claim for Washington, D.C., housing allowance, even though that is where he apparently had lived for twenty-two months, because he could not produce a competent PCS order indicating that he was in fact assigned there, and to instead award him back housing allowance for Norfolk, Va., the location of the duty station to which the record reflected he had been officially assigned. *See* 5 Cl. Ct. at 154. Finally, in *Ulmet*, the Court's predecessor included in a back pay award to a successful plaintiff the VHA to which he was entitled "at the appropriate rate[] *applicable to the location where the plaintiff*

was assigned to duty prior to his improper release," 17 Cl. Ct. at 710 (emphasis supplied). In view of the predication of the VHA rate on the location not of the member himself but of his assigned duty station, *see* 37 U.S.C. § 403a(a)(1) (1994) (affording VHA when a member is "assigned to duty" in a high housing cost area), the court's use of the phrase "location where the plaintiff was assigned to duty" is of obvious significance.

H. Count II – Motion for Judgment

200. Because there is no genuine dispute as to any fact material to this Count II, and in view of the authorities herein cited, providing 1) that a member's PDS does not change absent a PCS order, *supra* ¶¶ 185–189, 2) that a member's PDS for BAH purposes is the home port of his ship, if assigned thereto, *supra* ¶ 179, 3) that, following BCNR's correction of Mr. Sharpe's record, it contains no evidence of a PCS order subsequent to the orders assigning him to CARL VINSON in June 2006 Mr. Sharpe, *supra* ¶¶ 196–198; 4) that, therefore, Mr. Sharpe was not detached from CARL VINSON prior to February 12, 2017, *supra id.*, and that 5) in consequence Mr. Sharpe's constructive duty station from October 1, 2009, to February 12, 2017, necessarily was CARL VINSON, Mr. Sharpe prays this honorable Court to find that he is entitled to judgment as a matter of law, and to enter such judgment against Defendant – striking the Bourne Memorandum, including the *ultra vires* determination of Mr. Sharpe's entitlement to "BAH allowance at the Norfolk, Virginia rate from 1 Oct 09 until he returned to active duty on 13 Feb 17," *id.* ¶ 1.c, except insofar as it memorializes acts of the Defendant that are properly based on discretion-

ary authority rather than upon the Memorandum's *ultra vires* "correction" of Mr. Sharpe's record, or are otherwise favorable to Mr. Sharpe, *see id.* ¶ 1.a, .e, .f; striking the erroneous February 13, 2017, OPNAV 130 determination with respect to Mr. Sharpe's BAH for February 13, 2017, and following; declaring Mr. Sharpe entitled to BAH for the pay grade of O5 at the rate applicable to San Diego, Calif., from April 1, 2010, until the day before the date Mr. Sharpe reports to his prospective PDS in Washington, D.C.; enjoining Defendant to pay Mr. Sharpe 1) either $263,796.60 BAH for the entire Constructive Service Period, or, if Defendant has already paid the amounts previously determined, *supra* ¶¶ 15, 23, the remaining $49,016.40, as well as, in either case, 2) either a) $3502.80 for the period between February 13 and May 29, 2017, inclusive, or b) whatever other amount may be due based on the difference between the monthly BAH rate for San Diego at the pay grade of O5 for the period between February 13, 2017, and the day before he reports to his new PDS in Washington, D.C., inclusive, less the BAH he has been paid at the Carrollton, Va., rate for that period; and, further incident of and collateral to that judgment, so as to provide an entire remedy and to complete the relief afforded, requiring Defendant to modify all DON and DOD paper and electronic records as *inter alia* ordered herein below *infra*, as well as ordering whatever additional relief the Court may find due and proper.

COUNT III
ENTITLEMENT TO CAREER SEA PAY (CSP) AND CSP PREMIUM AT THE O5 PAY GRADE FOR THE PERIOD OCTOBER 1, 2009, TO FEBRUARY 12, 2017

201. Pursuant to RCFC 10(c), and to the extent necessary, Mr. Sharpe realleges paragraphs 1–487 of his first Amended Complaint, *see* Am. Compl., 1–107, as if fully set forth here.

202. Mr. Sharpe realleges paragraphs 1–201, *supra*, as if fully set forth here.

203. Defendant denies that Mr. Sharpe is entitled Sea Pay for the Constructive Service Period. DSR, 2; Addendum, 1; Bourne Memorandum ¶¶ 1, 1.d.

204. Defendant has determined that, were the Sea Pay entitlement to be established, Mr. Sharpe would be owed a total of $52,095.64. Addendum, 1–2. Mr. Sharpe's calculations reflect his belief that he is entitled to a total of $45,595.53, *see* Ex. 4, at 1 (cells W32, W37, Y32, Y37).

205. Mr. Sharpe therefore claims entitlement to Sea Pay for the Constructive Service Period in the greater amount of either $45,593.70, *see* Ex. 4, at 1 (cells W32, W37, Y32, Y37), or (in the event his calculations are erroneous) the amount Defendant finds to be due on the basis of Mr. Sharpe's entitlement as herein claimed; that Defendant is obliged to pay this claim by law and by regulation having the force and effect of law; and that, because there is no genuine dispute as to any fact material to this claim, he is consequently entitled to summary judgment thereupon.

206. As alleged *supra* ¶¶ 143–156, the Bourne Memorandum is *ultra vires*, void, and of no legal effect upon Mr. Sharpe's record. It is therefore powerless to change that record to make it reflect that Mr. Sharpe did not serve aboard CARL VINSON "past 2009" and that his "sea duty ended on 30 Sep 09," *id.* ¶ 1.b; that he "would have been transferred under [PCS] orders had he not been separated," *id.* ¶ 2.c; and that he "did not serve aboard ship" and "did not

serve over 36 consecutive months of sea duty" during the Constructive Service Period, *id.* ¶ 1.c.

207. Likewise, the Bourne Memorandum is powerless to affect Mr. Sharpe's entitlements so as to show that he "is not entitled to career sea pay" for the Constructive Service Period, *id.* ¶ 1.d, and "not entitled to career sea pay premium," *id.*, because as noted *supra* ¶¶ 157–166, and because also of its illegality, *supra* ¶ 206, the settled rule, established by regulation and judicial and administrative case, is that the military departments possess no discretion to opine efficaciously as to entitlements that arise from a correction of records, and that instead they are solely to be established, and, in fact, are only authorized to be paid, *see* 10 U.S.C. § 1552(c)(1), on the basis of an application of the relevant statutes and regulations to the record as it exists, in this case, pursuant to the recommendations of BCNR, approved as "final and conclusive," *id.* § 1552(a)(4), for SECNAV on April 25, 2016, and the Bourne Memorandum, considered in this light, is equally *ultra vires*, void, and of no legal effect upon Mr. Sharpe's entitlements.

A. CSP and CSP-P (Sea Pay) – Statutory and regulatory entitlement

208. Statute and regulation provide in pertinent part for the payment of CSP for a member of a uniformed service who is 1) "entitled to basic pay," 37 U.S.C. § 305a(a) (2012); 2) "assigned to a ship," *id.* § 305a(e)(A); and 3) "serving on a ship," *id.* § 305a(e)(A)(i); *accord* DODFMR, Volume 7A, para. 180201, 180202.C.1 (2016); OPNAVINST 7220.14 ¶ 6 (same, while "serving on a qualifying sea duty as-

signment"); *id.* ¶ 7.a ("assigned to *and* serving in" a "Category A ship" (emphasis in original)).

209. Navy regulations further note that "continuous entitlement to CSP remains" where members "permanently assigned to CSP-eligible vessels in regular overhaul periods" must "move certain workcenters or staff spaces . . . ashore for either overhaul management effectiveness or loss of shipboard working spaces." OPNAVISNT 7220.14 ¶ 8.c.

210. The DODFMR also provides persuasive authority suggesting that Sea Pay should be paid retroactive to a service member's restoration to duty upon the set-aside of adverse actions either contemplated or taken and then reversed. "When an eligible member . . . is suspended or otherwise removed from duty or confined awaiting trial by court-martial," and he "is acquitted or [the] charges are dismissed," CSP then "accrues retroactively from the first day of . . . removal from duty." *Id.*, Volume 7A, tbl.18-1, r. 12.

211. Mr. Sharpe is now and was for the entirety of the Constructive Service Period entitled to basic pay. *Supra* ¶ 99.

B. Because Mr. Sharpe was attached to CARL VINSON during the whole Constructive Service Period, he necessarily likewise "served on" the ship for that same period

212. As herein established *supra* ¶¶ 185–198, Mr. Sharpe was assigned to CARL VINSON from June 20, 2006, a "Category A" CVN designated as "unusually arduous sea duty," *supra* ¶¶ 71–72, until February 12, 2017. This conclusion is not only consistent with (and arguably the only possible conclusion from) the evidence of record, but it is also dictated by the constructive-service doctrine, long employed by this

circuit to resolve questions of entitlements to pay and allowances arising from an invalidated discharge. *See supra*, ¶ 199.

213. By virtue of his assignment to CARL VINSON during the Constructive Service Period and in view of his constructive service for that period, he likewise constructively *served on* CARL VINSON so as to be entitled to Sea Pay, as demonstrated by what follows.

214. By the admission of liability to pay base pay (BP), *see generally* DSR, 1–4, Defendant necessarily concedes that Mr. Sharpe constructively served during the Constructive Service Period. The entitlement to BP depends upon Mr. Sharpe's being, during that period, "a member of a uniformed service who is on active duty." 37 U.S.C. § 204(a)(1) (2012). Active duty is defined under the relevant code title as "full time duty *in the active service* of a uniformed service." *Id.* § 101(18). "Active service" is further defined as "service on active duty." *Id.* § 101(20). Likewise, payment under 10 U.S.C. § 1552, also concededly due, *supra* ¶ 127, may only be made "on account of [Mr. Sharpe's]. . . service in the . . . Navy . . . ," *id.* § (c)(1), which his corrected record reflects.

1. As a matter of statutory interpretation, "served on" with respect to shipboard service means the same as "service" with respect to serving on active duty

215. There appears to be no reason whatsoever why, if the statutory phrases "service on active duty," 37 U.S.C. § 101(20), and "service in the . . . Navy," 10 U.S.C. § 1552(c)(1), may also mean "constructive" service on active duty, and "constructive" service in the Navy, for purposes of retroactive entitlement to

"pay[and] allowances," *id.*, the phrase "serving on," 37 U.S.C. § 305a(e)(A)(i); *accord* DODFMR, Volume 7A, para. 180201, 180202.C.1 (2016); OPNAVINST 7220.14 ¶ 6, a ship, or "serving in," *id.* ¶ 7.a, a ship, should not also mean "constructively" serving on or "constructively" serving in a ship. Indeed, this interpretation of the statutory and regulatory language is arguably compelled, and is solely a question to be resolved by this Court. "The issue of statutory interpretation is a question of law, which [the Court] review[s] completely and independently." *Demko v. United States*, 216 F.3d 1049, 1052 (2000) (citing *Cathy v. United States*, 191 F.3d 1336, 1338 (Fed. Cir. 1999)).

216. The BP entitlement in its current form has its source in title 37, codified on September 7, 1962. *See* Pub. L. No. 87-649, § 204(a), 76 Stat. 451, 457 (1962). Naturally the payment of service members long predates the enactment of title 37 into positive law. *See, e.g.,* Career Compensation Act, Pub. L. No. 81-351 [hereinafter CCA], § 201(e), 63 Stat. 802, 807 (1949) (noting that members of the uniformed services "when on active duty" are "entitled to receive the basic pay of the pay grade to which assigned"). The terms "active duty" and "active service" (upon which the definition of active duty depends) were not defined, however, until title 37 was codified. *See* 37 U.S.C. § 101(18), (20) (1964); Pub. L. No. 87-649, *supra*, § 101(18), (20), 76 Stat. at 452. The corresponding entitlement to sea pay was originally restricted to "enlisted persons of the uniformed services . . . while on sea duty." CCA, § 206, 63 Stat. at 811; the provision found its way into title 37 effectively unchanged. *See* 37 U.S.C. § 305(a) (1964) (entitling "an enlisted member of a uniformed service who is entitled to basic pay – (1) . . . while on sea duty, to . . .

special pay . . . .”). The sea pay entitlement was not extended to officers until December 23, 1980, long after title 37 was codified, with passage of the Military Pay and Allowances Benefits Act of 1980. *See id.*, Pub. L. No. 96-579 [hereinafter MPABA], § 4(a), 94 Stat. 3359, 3364–65 (1980) (entitling to sea pay “a member of a uniformed service who is entitled to basic pay . . . while on sea duty”). Importantly, as well, the statutory term “sea duty” was only first defined in the MPABA, *id.*, 94 Stat. at 3365, as meaning, in pertinent part, “duty performed by a member – (1) while permanently . . . assigned to a ship . . . and while serving on a ship . . . .” *See* 37 U.S.C. § 305a(d)(1) (1982). This pertinent statutory language is identical with the language of today’s statute. *See* 37 U.S.C. § 305a(e)(1)(A)(i).

217. The question, therefore, as to whether the phrase “service on,” 37 U.S.C. § 101(20), with reference to the definition of member of a uniformed service on active duty, and the phrase “serving on,” 37 U.S.C. § 305a(e)(A)(i), should be construed as having the same meaning, such that if “service on” can, in effect, mean “constructive service on,” likewise “serving on” can mean “constructively serving on,” can be resolved by way of reference to a single canon of statutory construction. This is the “natural presumption that identical words used in different parts of the same act are intended to have the same meaning.” *Libbey Glass v. United States*, 921 F.2d 1263, 1265 (1990) (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87, (1934)); *see Albemarle Corp. & Subsidiaries v. United States*, 118 Fed. Cl. 549, 577 (2014) (noting that “the Supreme Court has endorsed ‘the “normal rule of statutory construction” that “identical words used in different parts of the same act are intended to have the same

meaning.'" (citing *Gustafson v. Alloyd Co., 513 U.S. 561*, 570 (1995))); *see also Texaco, Inc. v. DOE*, 795 F.2d 1021, 1030 (Temp. Emer. T. App. 1986) (quoting 2A SUTHERLAND STATUTORY CONSTRUCTION § 51.02 (4th ed. 1968)). Consequently, if "service" on active duty, 37 U.S.C. § 101(20), and "service" in the Navy, 10 U.S.C. § 1552(c)(1), includes "constructive service," as it *must* in order to justify payment of any amounts at all, "serving" on a ship must also mean "constructive" service, because, barring adjustments for grammar, the words are used in the same context, i.e., uniformed service members' entitlements incident to their service, and because when "sea duty" was defined in the 1980 MPABA, *supra*, the provision was inserted into the preexisting title 37, which had already employed the term "service" with regard to the base-pay entitlement, *see id.*, §§ 101(20), 204(a) (1964), with its settled meaning as including "constructive" service – so the meaning must apply also to the term as used as regards sea pay.

218. The CAFC's decision in *Cathy v. United States, supra, aff'g Cathy v. United States*, 41 Fed. Cl. 547 (1998), arguably controls the inquiry here and compels the result asserted. In that instance the court had to address the question of whether the phrase "served on active duty" in 10 U.S.C. § 638a(b)(2)(B) (2000) was "restricted to those persons who actually engage in active duty, or whether the phrase also includes those who, while not actively engaging in duty, are treated for other significant purposes as if they were engaging in active duty." *Cathy*, 191 F. 3d at 1339 (addressing whether the years of service reflected in a plaintiff's record, even though some were only constructive, had to be counted genuinely as "service" in terms of his subjection to

early retirement due to years of service). "In a nutshell," the court asked, "does 'served on active duty' include time served constructively on active duty?" *Id.* The court answered in the affirmative, upholding the lower court's finding that the plaintiff's "service" was not actual service but that "reflected in [his] military records." 41 Fed. Cl. at 550. The CAFC ruled the way it did for the reason, among others, that construing "served" as meaning only actual and not constructive service "cannot explain why [the plaintiff] has received pay, and other significant benefits . . . for *serving* as colonel, when he in fact did not 'serve' *actually* as a colonel." 191 F.3d at 1339 (emphasis added). Indeed, the court ruled that it was essential for the colonel to be considered as having "served on active duty . . . in order to warrant receipt of the benefits of that rank," *id.*, just as here it is inconceivable (and rather ludicrous to imagine) that Mr. Sharpe can be envisioned as entitled to the monetary benefits of "service," such as the base pay and allowances to which Defendant admits he is entitled, without, indeed, being equally envisioned as having continued "serve[] on" the duty station to which we was assigned

2. The record supports this conclusion

219. The facts of Mr. Sharpe's record likewise dictate the conclusion herein advocated. BCNR corrected Mr. Sharpe's record to show that he "continued to serve on active duty." BCNR Decision, 18. It is hardly credible that the board, in making that correction, intended that his record not reflect service wherever the record happens to reflect he was assigned. What is more, as Mr. Bourne admits, Mr. Sharpe "was paid . . . Career Sea Pay" for the period "from 20 Jun

06 to 30 Sep 09," Bourne Memorandum ¶ 1.b, notwithstanding the facts that he never worked aboard ship, due to its overhaul, *supra* ¶ 70, he was ordered to leave the ship on March 7, 2007, and never returned, *supra* ¶ 79, and the ship even went to sea without him aboard *supra* ¶ 84 – none of which, by Defendant's admission, operated to end his entitlement to Sea Pay.

220. The result herein asserted is also, finally, compelled by a consideration of the constructive-service doctrine, as alluded to *supra* ¶¶ 167–174, not only with regard to Mr. Sharpe's continuing attachment to CARL VINSON during the Constructive Service Period, *supra* ¶¶ 189, 197–198, and to his consequent continued entitlement to the station allowance dictated by that continued attachment, *supra* ¶ 199, but also with regard to Mr. Sharpe's continued entitlement to the special pay he would have received had he remained in service at the PDS to which his service-record reflects he was assigned.

3. The constructive-service doctrine requires this conclusion

221. As noted in the discussion of *Cathy v. United States*, 191 F.3d 1336, constructive service as understood in this circuit is based on the presumption means that unlawfully separated officers are "*deemed to have served* during the time of their illegal release," *Barnick v. United States*, 591 F.3d 1372, 1379 (Fed. Cir. 2010) (emphasis added) (quoting *Dilley*, 627 F.2d at 413); *accord Christian v. United States*, 337 F.3d 1338, 1347 (Fed. Cir. 2003) ("[P]ersonnel who have been illegally or improperly separated from service are deemed to have *continued in active service*." (emphasis added)). This logic has

been applied by this court not only to find that improperly separated service members are entitled to benefits that arise from their status as active duty officers, in the case of base pay, or from their presumed location, in the case of a station allowance, but also to find that such service members are entitled to the special pay they would have been entitled to in view of the service they *presumably* would have rendered. Indeed, notwithstanding the Bourne Memorandum's assertion that Mr. Sharpe "*did not serve* aboard ship . . . from 1 Oct 09 to 12 Feb 17," *id.* ¶ 1.d (emphasis added), this Court has clearly articulated the arguably controlling principle that "whether a service member *has actually performed special duty*, or otherwise met the requirements for receiving such pay, *does not control* whether he should receive special duty pay as part of the restoration of his rights and privileges." *Carlisle v. United States*, 66 Fed. Cl. 627, 637 (2005) (emphasis added). On the contrary, the Court, in *Carlisle*, went on to note that "this court and its predecessor generally have awarded special pay to service members as the result of constructive service, even where such pay or benefits ordinarily would be received *only for active service*." *Id.* (emphasis added). Both this court and the CAFC have followed this decisive logic, and operated upon the premise that even a discretionary act which would *ordinarily* have been required to qualify a member for special pay will be presumed to have occurred during a constructive-service period in order to provide the predicate for an award of the claimed special pay, provided that there is no "denial on the merits" of the entitlement to the pay which would be entrusted to the government's sole discretion. *See e.g., Groves*, 47 F.3d at 1144 (reversing *Groves*, 30 Fed. Cl. at 35, for its denial of an award of special

pay due to the absence in the record of orders and signed agreements during the constructive service period); *Schuenemeyer v. United States*, 776 F.2d 329, 331–32 (Fed. Cir. 1985) (citing its unpublished decision, 770 F.2d 177 (Fed. Cir. 1985), for its holding that "since [Schuenemeyer] had been illegally separated in 1977 and was ordered reinstated . . . he was entitled to flight pay without further proof on his part that he remained qualified.) The principle is also applied to work in the opposite direction. Wherever the record is devoid of evidence that a successful plaintiff's or correction-board applicant's particular status is terminated, it is presumed to have continued, to the extent that the termination of such status is only by means of a voided, unlawful act, and not by "a substantive decision on the merits," *Holley*, 33 Fed. Cl. at 457, the status providing the basis for the pay entitlement continues. *See Groves,* 47 F. 3d at 1144. (finding plaintiff entitled to special pays during his separation period because he "was denied his special pay by virtue of the court-martial conviction and sentence, later overturned, and not by any discretionary decision by the Secretary"); *Holley*, *id.* (noting that "no other action, which the court deemed illegal, has been taken" that would end his entitlement to overseas allowances, and that the entitlement to "all corresponding back pay and allowances [continues], until th[e] status ends as a result of some action"). In Mr. Sharpe's case, the holding of the CAFC in *Groves* is, *mutatis mutandis*, arguably controlling: "While the[e] decision [to stop Sea Pay by means of an order detaching Mr. Sharpe from CARL VINSON] would *normally* be well within the Secretary's discretion, . . . that discretion is tempered by the . . . command of [BCNR] to [correct Mr. Sharpe's record to show that he "was not discharged"]. It can-

not stand if the Secretary [denied the Sea] Pay because [Sharpe] was [invalidly discharged] at that time." *Id.*

4. Speculation is an impermissible basis for establishing that Mr. Sharpe was not aboard CARL VINSON during the Constructive Service Period

222. Finally, the predicate for Defendant's denial of Sea Pay is Mr. Bourne's speculations that Mr. Sharpe "would not have continued to serve aboard USS CARL VINSON past 2009," Bourne Memorandum ¶ 1.b, that he "would have been transferred," *id.* ¶ 1.c, that he "would not have been assigned to a ship" for the Constructive Service Period, *id.* ¶ 1.c; and that he "did not serve over 36 consecutive months of sea duty in this period," *id.* Aside from the fact that neither Bourne nor Defendant have the authority to make judgments regarding entitlements arising from correction-board decisions, *supra* ¶¶ 161–165, such that the determination that Mr. Sharpe is "not entitled to" CSP and CSP premium, *id.* ¶ 1.d, the speculation upon which those determinations are based is, finally, likewise improper. As detailed *supra* ¶ 168, an exercise of discretion entrusted to an agency is to be exercised by the agency in the first instance – in this case, by BCNR, for the correction of records, *supra* ¶¶ 150–156, or CNP, for the issuing of orders, *supra* ¶ 129. Moreover, speculation – whether Mr. Bourne's or another's – is simply not a proper ground upon which to base entitlements, as the Court's predecessor held when it announced that back-pay awards simply do not operate on the basis of a purportedly "realistic reconstruction[] of what . . . a serviceman's career would have

been," *Reale*, 208 Ct. Cl. at 1013. Though in this case, as in most back-pay and record-correction cases, "[Mr. Sharpe]'s status, after [his discharge] was set aside, and his military records were corrected, was *constructive* active duty, a legal fiction," *Groves*, 30 Fed. Cl. at 37 (emphasis added), that fiction never involves – *pace* the Bourne Memodandum – "speculat[ion] as to which path [Sharpe's] military career may have followed. The [BCNR's] judgment had the effect of restoring [Sharpe] to the position he occupied at the time of his discharge," *Holley*, 33 Fed. Cl. at 457, and that is that.

223. Statute and regulation further provide in pertinent part for the payment of a CSP Premium (CSP-P) for a member who 1) is "entitled to career sea pay," 37 U.S.C. § 305a(c) (2012); and 2) "has served 36 consecutive months of sea duty," *id.*; *accord* DODFMR, Volume 7A, para. 180302 (2016); OPNAVINST 7220.14 ¶ 13.a.

224. Since Mr. Sharpe's assignment to CARL VINSON began on June 20, 2006, *supra* ¶ 68, and was not terminated until he began executing his recent PCS orders, *supra* ¶¶ 102, 196; because therefore his thirty-seventh month of consecutive sea duty began on June 21, 2009; and because as established herein, *supra* ¶¶ 204–222, he is entitled to career sea pay for the duration of the Constructive Service Period, thereby entitling him to the monthly CSP-Premium, *supra* ¶ 223, which started on October 1, 2009.

C. Count III – Motion for Judgment

225. Because there is no genuine dispute as to any fact material to this Count III, and in view of the authorities herein cited, Mr. Sharpe prays this hon-

orable Court to find that he is entitled to judgment as a matter of law, and to enter such judgment against Defendant striking the Bourne Memorandum subject to the qualification herein noted, *supra* ¶ 200; declaring Mr. Sharpe entitled to Sea Pay for the entirety of the Constructive Service Period; enjoining Defendant to pay Mr. Sharpe the greater of $45,593.70 or, in the event Mr. Sharpe's calculations are erroneous, the amount Defendant finds to be due, *see* Addendum, 1–2, on the basis of Mr. Sharpe's entitlement as herein stated; and directing the additional relief, *supra* ¶ 200, to include the voiding of the Bourne Memorandum's purported findings that Mr. Sharpe's "sea duty ended on 30 Sep 09"; that he "did not serve aboard ship" and "would not have been assigned to a ship" for the Constructive Service Period; that he "did not serve over 36 consecutive months of sea duty in this period"; and that he is "not entitled to" CSP and CSP premium," Bourne Memorandum, ¶ 1.d; and, further incident of and collateral to that judgment, so as to provide an entire remedy and to complete the relief afforded, requiring Defendant to modify all DON and DOD paper and electronic records as *inter alia* ordered herein below *infra*, as well as ordering whatever additional relief the Court may find due and proper.

COUNT IV
ENTITLEMENT TO BASE PAY BASED ON THE DIFFERENCE BETWEEN THE O4 AND O5 PAY GRADES FOR THE PERIOD FEBRUARY 13, 2017, TO MAY 31, 2017, OR OTHER DATE BEFORE THE DAY MR. SHARPE'S O5 PAY STARTS

226. Pursuant to RCFC 10(c), and to the extent necessary, Mr. Sharpe realleges paragraphs 1–487 of

his first Amended Complaint, *see* Am. Compl., 1–107, as if fully set forth here.

227. Mr. Sharpe realleges paragraphs 1–226, *supra*, as if fully set forth here.

228. DFAS has indicated that it will begin paying Mr. Sharpe at the O5 pay grade on June 1, 2017. *See* Ex. 1, at 1.

229. Mr. Sharpe herein claims entitlement to BP at the pay grade of O5 from February 13, 2017, to the date before the day DFAS begins paying him as an O5, inclusive, and to the amount consequently due, less the O4 BP already received. He therefore claims the amount either, respectively, of $4,960.44 (assuming Mr. Sharpe's regular O5 pay starts June 1, 2017), or of whatever other amount is due from the period February 13, 2017, to the day before the Defendant begins to pay Mr. Sharpe's BP at the O5 pay grade, less the BP he has received or will receive at the pay grade of O4 for that period; that Defendant is obliged to pay this claim by law and by regulation having the force and effect of law, and that, because there is no genuine dispute as to any fact material to this claim, he is consequently entitled to summary judgment thereupon.

230. Defendant has provided no amounts for this period, but DFAS has indicated to Mr. Sharpe that the back pay addressed by this Count IV will be included in Mr. Sharpe's end-of-month pay for May 2017. *See* Ex. 1, at 1. On that assumption Mr. Sharpe identifies herein an amount that he has calculated *see* Ex. 4, at 1 (cell S50), based on the premise that the relevant period ends May 31, 2017, but makes the claim as in any event running through the day before DFAS starts his O5 pay.

231. While Mr. Sharpe hopes and fully expects that as stated DFAS will pay the amounts due based

on the entitlement as herein claimed, and on the schedule that DFAS has proposed, he likewise believes that he deserves judgment on this claim, in view of BCNR's correction of his record, the pertinent statutes herein cited, and the consequent entitlement, and he therefore makes the claims solely in order to preserve his rights therein in the event it is not paid by Defendant *sua sponte*.

232. Because, therefore, there is no genuine dispute as to any fact material to this Count IV, and in view of the authorities herein cited, Mr. Sharpe prays this honorable Court to find that he is entitled to judgment as a matter of law, and to enter such judgment against Defendant, enjoining him to pay Mr. Sharpe $4,960.44 for the claimed entitlement and period, or the amount properly due based on Mr. Sharpe's entitlement to BP at the O5 pay grade for the period February 13, 2017, to the day before the Defendant begins Mr. Sharpe's BP at the O5 pay grade, less amounts paid at the O4 pay grade for the same period, or any amounts Defendant may have already paid Mr. Sharpe pursuant to its stated intentions, *see* Ex. 1, at 1, to the extent those may be less than the amounts herein claimed; and, further incident of and collateral to that judgment, so as to provide an entire remedy and to complete the relief afforded, requiring Defendant to modify all DON and DOD paper and electronic records as *inter alia* ordered herein below *infra*, as well as ordering whatever additional relief the Court may find due and proper.

COUNT V
STATE TAX WITHHOLDING

233. Pursuant to RCFC 10(c), and to the extent necessary, Mr. Sharpe realleges paragraphs 1–487 of his first Amended Complaint, *see* Am. Compl., 1–107, as if fully set forth here.

234. Mr. Sharpe realleges paragraphs 1–233, *supra*, as if fully set forth here.

235. Defendant will withhold Virginia state tax from the amounts due Mr. Sharpe, DSR, 3.

236. Mr. Sharpe herein makes the claim that he is not liable to pay Virginia state income tax, that withholding thereof by Defendant from amounts due to him would be contrary to law and regulation having the force of law, and that, because there is no genuine dispute as to any fact material to this claim, he is consequently entitled to summary judgment thereupon.

237. Defendant does not now withhold state tax from Mr. Sharpe's pay nor was it withheld from his pay prior to his unlawful separation, because his LES's reflect California as the relevant state for purposes of income tax withholding. *See* Ex. 6, at 1, 3, 7.

238. Navy regulations provide in pertinent part that a member's HOR is "[t]he place recorded as the Service member's home when commissioned, appointed, enlisted, inducted, or ordered into a tour of active duty." MILPERSMAN 1000-100, para 2.a (2015).

239. Mr. Sharpe's personnel record reflects that his HOR is, and that he entered active duty from, Cerritos, California. Ex. 11, at 1–2; Ex. 12, at 1, block 7.b.

240. Regulations likewise provide that "The place recorded as the Service member's home when reinstated, reappointed, or reenlisted remains the same as that recorded when commissioned, appointed, enlisted, inducted, or ordered into the tour of active du-

ty, unless there is a break in service of more than 1 full day." MILPERSMAN, *supra.*, para 2.b.

241. DOD regulations governing the withholding of state income tax expressly provide that a member's "[l]egal residence at the time of entry into the Armed Forces remains the same until changed by the member." DODFMR Volume 7A, para. 440206.B.

242. Mr. Sharpe has never changed his legal residence, and no evidence of record exists adequate to support any conclusion to the contrary or put this fact genuinely into dispute.

243. Mr. Sharpe's ESR improperly and contrary to the regulations above recited shows Mr. Sharpe's home of record as Virginia, Ex. 29, at 1.

244. The Servicemembers Civil Relief Act (SCRA) provides that "[a] servicemember shall [not] acquire a residence or domicile for purposes of taxation with respect to the . . . income of the servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders." 50 U.S.C. § 4001(a)(1) (2012 & Supp. 2016).

245. DOD regulations likewise provide that "[a] member's legal residence does not change because of a change of permanent station." DODFMR, *supra.*

246. Mr. Sharpe's most recent period of continuous residence in Virginia began when he transferred from Fort Meade, Md., to Virginia Beach, Va., on May 13, 2000, pursuant to military orders. Ex. 13, at 1; Ex. 24, at 2.

247. The SCRA also provides that "[c]ompensation of a servicemember for military service shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the servicemember is not a resident or domiciliary of the jurisdiction in which the

servicemember is serving in compliance with military orders." *Id.* at § 4001(b).

248. The DODFMR likewise states that "[c]ompensation for Military Service. . . is not taxable by any state, territory, possession, political subdivision, or district that is not the member's legal residence." *Id.*, para. 440206.A.

249. Virginia state law provides that "[p]ersons in the armed forces of the United States stationed on military or naval reservations within Virginia who are not domiciled in Virginia shall not be held liable to income taxation for compensation received from military or naval service." VA. CODE ANN. § 58.1-321.B (2017).

250. Finally, as DFAS apparently recognizes, *supra* , ¶ 237, Mr. Sharpe's income is not taxable by virtue of his legal California residence. *See* Cal Rev & Tax Code § 17014(a)(2), (b)(3) (Deering 2017) (defining a "resident" as "[e]very individual domiciled in this state who is outside the state for a temporary or transitory purpose" but excluding officers of "the armed forces of the United States" from being "considered outside this state for a temporary or transitory purpose"); *see also id.* 17016 (presuming the residence in California of "[e]very individual who spends in the aggregate more than nine months of the taxable year"); *id.* 17041 (d)(1)–(2), (i)(1)(A)–(B) (imposing tax upon the "taxable income of every nonresident . . . when the nonresident . . . is the head of a household" and defining the "taxable income of a nonresident" as including all "gross income and deductions" for "any part of the taxable year during which the taxpayer was a resident of this state (as defined by Section 17014)" or the "gross income and deductions" that are "derived from sources within this state").

251. Because there is no genuine dispute as to any fact material to this Count V, and in view of the authorities herein cited, Mr. Sharpe prays this honorable Court to find that he is entitled to judgment as a matter of law, and to enter such judgment against Defendant enjoining the withholding of any amounts for the payment of state income tax from the amounts that are legally due to Mr. Sharpe, and, incident of and collateral to that judgment, so as to provide an entire remedy and to complete the relief afforded, requiring Defendant to correct all DON and Department of Defense (DOD) paper and electronic records so as to properly reflect Mr. Sharpe's Home of Record as Cerritos, Calif., as well as ordering whatever additional relief the Court may find due and proper..

CONCLUSION

In summary, Mr. Sharpe accepts Defendant's calculations of amounts due with respect to X, Y, and Z; respectfully disagrees with Defendant's calculations of amounts due with respect to A, B, and C and submits that he is due, respectively, additional sums of I, II, and III amounting to respective totals of a, b, and c; disagrees with Defendant's deductions of amounts 1, 2, and 3 and submits that no deductions should be made; and finally invites the Defendant to stipulate to his view A, B, C as detailed *supra.*

Mr. Sharpe requests oral argument under RCFC 20(c) on his Motion for Summary Judgment (on the assumption that at least two of the claims upon which it is sought will be opposed), as well as on his motion for leave to amend in the event it is opposed.

Proposed Order/Requested Relief

Pursuant to this Court's Order directing Mr. Sharpe to "detail[] . . . any requests he might have for resolving disputes associated with his back pay," Order, 1, ¶ 2, Mr. Sharpe respectfully requests the Court, with respect to such proceedings, to Order as follows:

1. The Defendant to pay Mr. Sharpe forthwith the amounts it has indicated as due to him in its May 12, 2017, status report, along with any additional amounts Defendant may concede as due (or not proper for deduction from the amounts due) in response to the demurrers Mr. Sharpe has herein offered;

2. The Defendant to stipulate in writing in conjunction with the aforesaid payment 1) that Mr. Sharpe's acceptance of said payment will not constitute a waiver or release of his claim to the additional amounts he believes due and which are herein detailed, and 2) that Defendant waives any defense that may be provided by 10 U.S.C. § 1552(c)(3), DODFMR Volume 7B, para. 100305, and 32 C.F.R. § 723.10(c)(2) against any such claim, unless the Defendant proposes to pay Mr. Sharpe the entire amount he claims as due, which would render any such stipulation unnecessary;

3. The Defendant to credit Mr. Sharpe with the greater of seventy-one days' leave, or the number of days it deems due him, for the Constructive Service Period, exclusive of the leave he accrued since his February 13, 2017, reinstatement;

4. The Defendant to submit a status report no later than a date deemed proper by the Court containing: 1) identification of the amounts it has paid Mr. Sharpe with reference to its May 12, 2017, status report; 2) specification of any additional amounts it has paid Mr. Sharpe on the basis of corrections he has herein outlined; and 3) a detailed explanation with regard to Mr. Sharpe's divergent figures in any case where Defendant has opted to pay an amount Mr. Sharpe believes is owed which is less than Defendant has indicated he is owed;

5. That leave is granted to Mr. Sharpe to file his Plaintiff's Status Report equally as his Second Amended Complaint and Motion for Summary Judgment;

6. That the parties be available as deemed necessary or appropriate by the Court for a telephonic status conference in order to determine whether there is any possibility of the parties' resolving the disagreements herein detailed before the Court is required to take Mr. Sharpe's MSJ under advisement and before Defendants face the requisite deadlines for a reply under RCFC 7.2(a)(1), (b)(1) and 12(a)(1)(A); and

7. That oral argument shall be scheduled at the earliest mutual convenience of the parties and the Court on any claims with regard to which the Defendant opposes a grant of summary judgment and on any other motion herein made which Defendant opposes.

Furthermore, in view of the foregoing and pursuant to 28 U.S.C. § 1491(a)(1)(2012) and RCFC 56,

Mr. Sharpe once again moves this honorable Court to grant his Motion for Summary Judgment, enter judgment against Defendant on each of the foregoing Counts, and to award the following relief:

1. Back payment of all regular and special pay, allowances, allotments, compensation, emoluments, or other pecuniary benefits due, accruing for the periods: 1) Oct. 1, 2009, to February 12, 2017, at the O5 pay grade; and 2) from Aug. 1, 2008, to Sep. 30, 2009, and from February 13 to the appropriate end date (i.e., for BP, when Defendant begins paying Mr. Sharpe at the O5 pay grade, and for BAH, when Mr. Sharpe reports to his prospective Washington, D.C., permanent duty station), less the pay Mr. Sharpe will have previously received at the O4 pay grade, as herein claimed or as the Court deems proper based upon a correct figuring of entitlements on Mr. Sharpe's corrected record pursuant to law and regulation and as correctly calculated;

2. That Defendants submit a status report no later than a date deemed proper by the Court providing a detailed explanation with regard to any case in which Mr. Sharpe's figures diverge from Defendant's (as in the case of Sea Pay, where Mr. Sharpe claims entitlement to less than Defendant believes he would be due were the Court to award him judgment) and where Defendant desires to pay Mr. Sharpe the lower of the differing amounts;

3. That Defendants may not withhold state tax from the amounts due to Mr. Sharpe;

4. That Defendants, pursuant to 28 U.S.C. § 1491(a)(2), incident of and collateral to the Court's judgment, so as to provide an entire remedy and to complete the relief afforded, and, pursuant to SECNAVINST 5420.193, Board for Correction of Naval Records (1997), which states that "[t]he Chief of Naval Operations . . . shall ensure that action is taken to make the military record corrections directed by the Secretary or BCNR," *id.* ¶ 4:

   a. Strike the Bourne memo except insofar as it provides determinations which are favorable to Mr. Sharpe;

   b. Strike the OPNAV N130 determination limiting Mr. Sharpe's BAH following the Constructive Service Period to the rate applicable to Carrollton, Va., rather than San Diego, Calif., where Mr. Sharpe's duty station previous to that assigned by his current orders is located;

   c. Properly credit Mr. Sharpe with seventy-one days' leave accruing through the end of the Constructive Service Period;

   d. Enter into Mr. Sharpe's service record a memorandum with the language he requested, *supra* ¶ 120, nonprejudicially accounting for his gap in service;

   e. Enter into the records of the DON Mr. Sharpe's correct Officer Precedence Number, pursuant to his retroactive promotion and BCNR's grant of relief, BCNR Decision, 18;

f. Correct all DON and DOD paper and electronic records to properly implement BCNR's direction, *see* BCNR Decision, 16, 18, including but not limited to correction or expungement of:

   i. Records relating to Mr. Sharpe's voided discharge, such as the two separation orders and the one separation-cancellation order reflected on his NSIPS Orders History page, and the September 30, 2009, "RAD" in his NSIPS History of Assignments page;

   ii. Records relating to Mr. Sharpe's voided detachment from CARL VINSON, such as the September 30, 2009, transfer therefrom reflected in his NPDB page, his NSIPS History of Assignments page, and his ODC, and replacing the detachment date with February 12, 2017, or other date that properly reflects the fact that he was not assigned to duty following his actual and constructive tour aboard CARL VINSON until the Navy issued his current December 7, 2016, PCS orders;

   iii. Records relating to his constructive service on active duty and reinstatement, including the SCRA DMDC Status Reports from October 1, 2009, to February 12, 2017, and the August 1, 2016, "Pending Navy Gain" entry in his NSIPS History of Assignments page;

iv. Records throughout the DON relating to his home of record, ensuring that it properly reflects Cerritos, Calif.;

v. The type and accounting data on Mr. Sharpe's December 7, 2016, PCS orders to reflect that they are change-duty orders directing operational travel rather than orders directing new-accession travel directed to a reservist or new officer accession, in order to remove the predicate for the payment of BAH at an erroneous rate following February 12, 2017, and to remedy the orders' memorialization of Mr. Sharpe's no-longer-extant non-active-duty period, pursuant to BCNR's relief, BCNR Decision, 18; so as to 1) expunge all evidence of Mr. Sharpe's September 30, 2009, separation from the Naval Service, release from active duty, and detachment from CARL VINSON; 2) ensure that his record reflects his continuous active-duty status during the Constructive Service Period; 3) expunge or otherwise correct all records pertaining to his February 13, 2017, reinstatement to ensure that they do not imply or give rise to the inference that Mr. Sharpe was ever not on active duty at any point between May 23, 1993, and the date of his reinstatement; 4) ensure Mr. Sharpe's HOR is properly reflected in all relevant paper and electronic data and information systems; 5) remove, correct, or completely expunge any material or entries inconsistent with the Court's

grant of relief, and ensure that no such entries are made in the future.

5. That Defendants submit a status report no later than a date deemed proper by the Court providing a detailed explanation of the record-corrections accomplished pursuant to the Court's order;

6. That the Court will retain jurisdiction pending the payment of the amounts due to Mr. Sharpe and correction of records as herein ordered, or, at the parties' discretion, until a Consent Decree and Joint Motion for Stipulation of Dismissal is submitted to the Court indicating Mr. Sharpe's satisfaction with the payment and corrections as herein requested and providing for the Court to retain or reassert jurisdiction as necessary to enforce the terms of the Stipulation and Consent Decree;

7. All other due and proper relief, incident of and collateral to the Court's judgment, so as to provide an entire remedy and to complete the relief afforded by that judgment, as seems appropriate to the Court.

Offer of Settlement

252. In the event the Defendant wishes to spare the time and expense of continued proceedings in this case, Mr. Sharpe hereby expresses his willingness to settle the matter in consideration of an aggregate total consisting of the entitlements as herein claimed, in addition to those which Defendant admits are due, DSR, 1–4, as well as reimbursement of his $400 filing fee paid to this Court, and provided

the Defendant accomplish the record corrections as herein detailed and the parties execute a Consent Decree and Joint Motion for Stipulation of Dismissal indicating Mr. Sharpe's satisfaction with the payment and record corrections as herein requested and providing for the Court to retain or reassert jurisdiction as necessary to enforce the terms of the Stipulation and Consent Decree and Stipulation.

253. The offer of is made for Defendant's consideration under 31 U.S.C. § 3702(a)(1)(A) or other applicable authority.

254. The Court is hereby thanked for its attention to this matter and its consideration and assistance thus far, and this matter is, furthermore,

May 25, 2017

/s/
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APPENDIX J

United States Court of Federal Claims

No. 15-1087C
Filed: August 11, 2017

JOHN F. SHARPE,	*	
Plaintiff	*	No.: 1:15-cv-01087
	*	Judge: Thomas C.
v.	*	Wheeler
THE UNITED STATES,	*	
Defendant.	*	

PLAINTIFF'S OPPOSED MOTION TO AMEND AND SUPPLEMENT HIS MOTION FOR SUMMARY JUDGMENT

Mr. Sharpe respectfully seeks leave of this Court to file the attached amendment, see App. A, at 1–4, replacing and adding one paragraph in his Motion for Summary Judgment (MSJ), see generally id., May 30, 2017, ECF No. 36, and adding one additional exhibit, see App. A, Ex. 1, at 1–4. The document Mr. Sharpe seeks to incorporate is an email he received on May 8, 2017. Because it was forwarded via a separate email addressed personally to Mr. Sharpe

regarding a separate aspect of the case, relevant at the time but now moot, he did not then advert to the part of it that appears relevant to the MSJ (it addressed the now relevant part several pages below the portion relevant at the time), and only noted the relevant part this past week during preparation of the Motion to Strike, see id., 2–3, Aug. 4, 2017, ECF No. 48, in response to the leave recently given by the Court for filing the Administrative Record in this case, see Order, 1, July 24, 2017, ECF No. 44.

*****

~ APPENDIX A ~

PLAINTIFF'S AMENDMENT AND SUPPLEMENT TO HIS MOTION FOR SUMMARY JUDGMENT

Plaintiff hereby amends his Motion for Summary Judgment (MSJ) in the above-captioned case by replacing paragraph 144, see MSJ, 47, May 30, 2017, ECF No. 36, and adding paragraph 144a, as follows:

> 144. Defendant's attempt to "correct" Mr. Sharpe's record by way of the Bourne Memorandum was facially contrary to 10 U.S.C. § 1552 (2012), because said "correction" was not "made by the Secretary acting through [a] board[] of civilians of the executive part of [the] military department," id. § 1552(a)(1), as the statute requires. First, the memorandum signed by Mr. Bourne reflects on its face that the record corrections it attempts were not made by a "board[]," id. Additionally, the Bourne Memorandum was essentially the

work of a uniformed officer of the Navy Judge Advocate General's Corps. See Ex. 35, at 4 (May 5, 2017, email from agency counsel, Lieutenant Maryam Austin to NPC (PERS-00J), explaining that she "draft[ed] a letter from CNP directing [Defense Finance and Accounting Service (DFAS)] to take certain actions"). Furthermore, agency counsel involved two military officers, Captain Bradley J. Cordts (PERS-00J) and Captain Jon Peppetti (Legal Counsel for the Chief of Naval Personnel), in the preparation and approval of the memorandum, routing it to them "in order to get [their] sign off and determine who the appropriate approval authority should be." Ex. 35, 4; see also Ex. 35, 3 (copying additional military officers, Captain Mark Holley and Commander Laura Bishop, on correspondence relating to the preparation of the memorandum). So when Mr. Bourne executed the memorandum, leaving aside the fact that he is not the Secretary of the Navy, it was a failure to act "through boards of civilians," 10 U.S.C. § 1552(a)(1) (2012) (emphasis added), contrary both to the statute, id., and to binding case law in this circuit barring the participation of military officers in the record-correction process, see, e.g., *Strickland v. United States*, 423 F.3d 1335, 1341 (Fed. Cir. 2005) (noting that *Proper v. United States stands for the proposition that it is "contrary to statute [for] the Secretary [to] involve[] a member of the military in the civilian corrections process" (quoting Proper*, 139 Ct. Cl. 511, 526 (1957) ("Since the errors or injustices which might require correction were originally made by the military,

Congress made it manifest that the correction of those errors and injustices was to be in the hands of civilians." (emphasis added))))); *Weiss v. United States*, 187 Ct. Cl. 1, 10, 12 (1969) (finding the Secretary of the Navy, contrary to law, did not "'act[] through' a civilian board" as the statute required where "JAG advised [him] . . . to take the position he did . . . and probably . . . actually prepared the decision for [his] . . . signature" (emphasis added)); id. at 11 ("An officer who has the predominant voice the [uniformed litigator] had here is one the Secretary is 'acting through[,]' and if [s]he is uniformed [s]he is one of those the Congress intended should not be 'acted through.'").

144a. Because the Bourne Memorandum was drafted and signed by agency counsel, see Ex. 35, at 4; supra ¶ 128, purports to exercise authority that the signatory does not possess, see supra ¶¶ 128–29, 143–44; infra ¶¶ 145–56, and was prepared at the "eleventh hour," only in response to this Court's order, see Order, 1, May 5, 2017, ECF No. 33, directing the Government to make a final decision regarding Mr. Sharpe's pay, it appears not to reflect a discretionary decision but merely a post hoc defense of DFAS's prior refusal, see Joint Status Report, 2, May 2, 2017, ECF No. 32, to pay Mr. Sharpe the entitlements he herein claims. Because by law DFAS is obliged to "calculat[e] the proper amounts due under [a genuine correction of a military record]," DOHA CAB, Claims Case No. 2012-CL-082003.2, at 6–7, (Apr. 24, 2013), http://ogc.osd.mil/doha/claims/military/2012-CL-082003.2.pdf; see infra ¶ 163, its improper refusal to do so (as herein al-

> leged) is the only decision presented for the Court's review, leaving the Bourne Memorandum as no more than the "government['s] . . . considerable effort attempting to justify the [DFAS] decision[]." *Dickson v. Sec' of Defense*, 68 F.3d 1396, 1406 n.16 (D.C. Cir. 1995). In that respect, the Memorandum is "of no avail at this stage of the process," id., because "counsel's post hoc rationalizations for agency action," *Williams v. United States*, 116 Fed. Cl. 149, 159 (2014), are not adequate justification for DFAS's decision; instead, the Court may only "find support for [it] . . . in the decision of [DFAS] itself," id. (citations omitted); see Florida Power & Light Co. v. Fed. Energy Regulatory Comm'n, 85 F.3d 684, 689 (D.C. Cir. 1996) ("[DFAS] runs this . . . program, not [Navy] lawyers; parties are entitled to [DFAS's] analysis . . . , not post hoc salvage operations of counsel. We therefore do not consider these arguments." (citing *SEC v. Chenery Corp., 318 U.S. 80*, 93–95 (1943) (other citation omitted)).

Plaintiff also hereby supplements his MSJ in the above-captioned case by adding the attached exhibit as Exhibit 35 to the MSJ.

The Court is hereby thanked for its attention to this matter and its consideration and assistance thus far, and this matter is, furthermore,

Respectfully submitted,

/s/

August 10, 2017

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No. _____

In the Supreme Court of the United States

CDR JOHN F. SHARPE, USN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

VOLUME II

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APPENDIX J

[SEAL]

DEPARTMENT OF THE NAVY
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701 S. COURTHOUSE ROAD,
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ARLINGTON, VA 22204-2490

JLB
Docket No. 4284-14/
10521-12
28 Apr 16

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

Subj: REVIEW OF NAVAL RECORD ICO LCDR JOHN F. SHARPE, USN, XXX-XX-3671

Ref: (a) 10 U.S.C. § 1552

Encl: (1) Approved findings, conclusions and recommendations of SECNAV, less enclosures

1. In accordance with reference (a), the Secretary of the Navy has reviewed allegations of error and injustice in the naval record of the Petitioner.

2. The Regulations approved by the Secretary of the Navy require that the naval record of Petitioner to be corrected, where appropriate, in accordance with the approved recommendation of the Board as contained

in enclosure (1).

3. By copy of this letter, the Defense Finance & Accounting Service, DFAS-IN/COR/Claims, is authorized to pay all monies lawfully found to be due as a result of the above correction to Petitioner's naval record.

4. The Board has advised Petitioner of the approved recommendation,

5. It is requested that this letter and enclosures be placed in Petitioner's official record, and that this Board be furnished a copy of any correspondence relating to this approved recommendation .

/s/
DAVID J. CASH
By direction

Copy to:
DFAS-IN/COR/Claims
PERS 3C or CMC

APPENDIX K

United States Court of Federal Claims

No. 15-1087C
Filed: December 12, 2016

JOHN F. SHARPE,	*	
Plaintiff	*	No.: 1:15-cv-01087
	*	Judge: Thomas C. Wheeler
v.	*	
THE UNITED STATES,	*	
Defendant.	*	

JOINT STATUS REPORT

Pursuant to this Court's September 8, 2016 Order (Order), the parties submit this Joint Status Report. In their previous status update, the parties informed the Court that on April 25, 2016, the Secretary of the Navy (SECNAV) made a final determination regarding the findings, conclusions, and recommendations made by the Board for Correction of Naval Records (BCNR) relative to plaintiff John F. Sharpe's claims for back pay, reinstatement, correction of his naval record and other relief. The Board notified Mr. Sharpe of its recommendation and the Secretary's

subsequent approval. Since that time, on June 20, 2016, the Secretary issued an amended recommendation to Navy Personnel Command (NPC) calling for the correction of Mr. Sharpe's naval record, reinstatement to active duty and promotion to the rank of Commander.

Navy's Position

The Navy now reports to this Court that it has corrected Mr. Sharpe's naval record, including removing adverse documentation from his record. *See* Appendix A (December 6, 2016 Letter from Navy Personnel Command to Mr. Sharpe). Additionally, Navy detailers have been working with Mr. Sharpe to determine his active duty start date and location. Mr. Sharpe's orders were released on December 7, 2016 and he will report to active duty no earlier than February 11, 2017 and later than February 13, 2017. The Navy further reports that Mr. Sharpe's promotion to Commander is still pending: the Navy has identified the proper authority to use to forward the promotion and is awaiting a signed directive to effectuate the action. Once the promotion to Commander is complete and after Mr. Sharpe reports to active duty, Defense Finance and Accounting Services (DFAS) will calculate the back pay amounts due to him.

The Navy now requests that the Court continue the stay it granted in its Order to afford the Navy time to finish effectuating Mr. Sharpe's promotion and the calculation of the appropriate back pay, and to provide the parties an opportunity to assess the impact of the Navy's actions on Mr. Sharpe's claims that are currently pending before this Court. The Navy further proposes that the parties file a joint

status report on or by April 1, 2017. At that time, the parties can apprise the Court of which issues, if any, remain outstanding. The Navy notes that the issue Mr. Sharpe raises below regarding his forthcoming orders is not ripe for the Court's consideration at this time.

Plaintiff's Position

Plaintiff appreciates the Navy's work to date in implementing the relief recommended by BCNR and approved by SECNAV, and wishes only to bring to the Court's attention three issues, to explain his minor disagreement with the request that the Navy makes in this status report.

Back pay.

Plaintiff notes that the Navy does not intend to deal with "the back pay amounts due to him" until "[he] reports to active duty" *and* "the promotion to Commander is complete," though the Navy offers no timeline for the latter. Plaintiff sees no reason, however, why some progress cannot be made to afford the relief contemplated by I 0 U.S.C. § 1552(c) and is therefore hesitant to agree to the April 1, 2017, stay unless the Navy is willing, by a sooner date, to take *some* steps in this direction. To date – seven months after the approval of BCNR's recommendations – there has been no action even to calculate the "pay, allowances, compensation, emoluments, or other pecuniary benefits," *id.*, consequently due. Plaintiff appreciates that still-pending matters may have an effect on the total amount ultimately paid, *see* Appendix A (acknowledging that if the promotion is approved "CNPC will notify [DFAS] for a calculation

and payment of back pay"), and that these matters may be complicated. But he disagrees that the Navy should be "off the hook" until April 1, 2017, merely to report even just minimal (or no) progress on this front – given 1) the patties' May 2, 2017, advice to the court that payment of amounts owed was envisioned within approximately 90 days, *see* Joint Status Report, May 2, 2016, ECF No. 10 (JSR), at l; JSR, Ex. 2, at 1 ECF No. 10-1, and 2) the Navy's plan to put off even calculating those amounts until the promotion is effected, for which no timeframe exists, meaning that subsequent status reports can come and go without any pay action at all, as long as the promotion is incomplete. Some amounts due, however, are undisputed, e.g., back pay to a date certain at Plaintiff s current pay grade; the court has elsewhere utilized this approach. *See, e.g, Verbeck v. U.S.*, 118 Fed. Cl. 420, 429-30 (2014) (calculating back pay from date of separation to a fixed date and ordering a later payment from that date to date of reinstatement); *Kindred v. U.S.*, 41 Fed. Cl. 106, 121 (1998); *see also Carmichael v. US.*, 66 Fed. Cl. 115, 129 (2005) (affording the Navy 60 days to calculate back pay due).

From Plaintiff's point of view it also seems that to be ordered to active duty - in a scenario where his entitlement to the benefits of constructive service have been conceded, *see* JSR, May 2, 2016, Ex. 1, at 1 (granting Plaintiff relief on his claim for *inter alia* constructive- service credit), and where the payment of amounts due under 10 U.S.C. l 552(c) is no longer discretionary, *see, e.g., Denton v. US.*, 204 Ct. Cl. 188, 195 (1974) –without the Navy making some effort as regards a payment against what the Plaintiff is owed by law, is a classic case of "putting the cart before the horse." This is especially true in view of

the fact that receipt of "military pay or allowances" is one of the indicia of subjection to military jurisdiction, *see* 10 U.S.C. § 802(c)(3) (Article 2 of the Uniform Code of Military Justice) – which jurisdiction the Navy obviously claims in exercising authority necessary to order him to a new duty assignment, notwithstanding Plaintiff s current, civilian status, *see* Appendix B, at 1 (Servicemember Civil Relief Act Status report reflecting, as of December 2, 2016, Plaintiff not in active-duty status).

Orders.

The second matter the Plaintiff wishes to bring to the Court's attention is his understanding that the orders which the Navy has issued (but which he has not seen) direct him to detach from his home as his current permanent duty station (PDS) en route his new assignment. Plaintiff takes no exception to being assigned to a new position, barring the above-articulated concern that the Navy's expectation appears to be that he begin serving on active duty before any monetary entitlements owed in arrears are even calculated. Plaintiff appreciates, and has cooperated with, the Navy's finding him an 0-5 billet, consistent with his pending promotion. He also agrees that the matter is not ripe for the Court's adjudication, and instead seeks only the Court's assistance, for reasons of economy and expedition, in facilitating the patties' discussion and resolution of the issue short of that adjudication, if possible.

Plaintiff s concern is based upon his view that the constructive-service doctrine, *see, e.g., Dilley v. Alexander*, 627 F.2d 407, 413 (D.C. Cir. 1980), and BCNR's relief, *see* JSR, Ex. 1, at 18 (directing correction of Plaintiff s record to reflect that he "was not

discharged from the Naval Service, but has continued to serve on active duty without interruption"), require that he be seen as having served constructively aboard the USS CARL VINSON (CVN 70), his PDS on the date of his illegal separation, from that date until his proper reassignment. orders drafted to reassign him from home, however, will necessarily imply his having been detached from CARL VINSON prior to the date of reassignment, and both undermine the above-noted portion of the relief granted by SECNAV and provide a predicate for payment to him of less than his actual entitlements as provided for at 37 U.S.C. §§ 305a(a) (special pay while a member is on "sea duty"); 305a(c) (monthly "career sea pay [CSP] premium" (CSP-P) when a member serves beyond 36 consecutive months of sea duty); 405(a) ("basic allowance for housing" (BAH) calculated according to geographic location) (2015). Plaintiff notes that his service aboard CARL VINSON constitutes sea duty, his constructive service there exceeds 36 months, and CARL VINSON's home po1t changed from Norfolk, Va. to San Diego as of April, 1, 2010, during the constructive-service period. Regulations provide that a member's BAH is calculated at the rate determined by the home p01t of the ship to which he or she is assigned, Per Diem, Travel and Transportation Allowance Committee, *The Joint Travel Regulations* (JTR) 10E2-1 para. 10402.B (2016) (BAH determined based upon the "home port for a member assigned to a ship").

Plaintiff has raised these concerns directly with the Navy, but the Navy has declined to respond substantively and has not indicated any change of intention to draft his orders along the lines indicated above. Plaintiff therefore asks that the Court, in the interest of judicial economy and the speedy and in-

expensive determination of this proceeding, *see* U.S. Ct. Fed. Claims R. 1, and analogous to what the Court has permitted in other instances, *see, e.g., Williams v. US.*, No. 10-263 (Fed. Cl. Apr. 28, 2010), to pe1mit the Plaintiff to communicate to the Navy the concerns detailed in Appendix C (which, for convenience, includes excerpts from pertinent regulations), and to direct the Navy to make a determination regarding Plaintiff s view of his entitlements, so that the parties may assess whether or not they have a substantive disagreement on this matter.

Promotion.

Finally, Plaintiff is hesitant to agree to a stay until April 1, 2017, without the Navy being obliged to make timely repo1is of its progress relative to Plaintiff s promotion. While, again, understanding that the matter is potentially complex, and grateful for any and all effort thus far made by the Navy, Plaintiff neve1iheless believes that more substantial progress to date to implement BCNR's approved recommendation could have been made, and that the Court's assistance in monitoring such progress will prove beneficial. In support of his view, Plaintiff invites the Court's attention to: 1) the approximate timeframe of 30 days that the Navy first advertised for completing the non-pay aspects of BCNR's direction, *see* JSR, at 1; JSR, Ex. 2, at 1; 2) pertinent regulations that speak of, respectively, 90-to-1 00-day and 180-day timeframes for completion of nomination packages arising from regular promotion-selection boards and for nominations of individual officers withheld from nomination, *see* SECNAV, *Memorandum for the Chief of Naval Operations and Commandant of the Marine Corps*, June 30 2000, en-

closure (1) (mandating a 50-day deadline for promotion-nomination processing exclusive of routing through the Office of the Secretary of Defense (OSD) and the White House); SECNAV, *Memorandum for Chief of Naval Operations*, February 13, 2004, enclosure (I) (mandating a 180-day deadline for processing of individual officers); Depaliment of Defense Instruction 1320.04, *Military Officer Actions Requiring Presidential, Secretary of Defense, or Under Secretary of Defense for Personnel and Readiness Approval or Senate Confirmation*, January 3, 2014, Enclosure 3, para. 2.a (affording roughly a calendar month for processing a nomination through OSD); and 3) BCNR's direction, as of April 28, 2016, to "expedite" the processing of Plaintiff s relief, *see* Appendix D, at 1, 3. By any calculation, the Navy has exceeded these timeframes and BCNR's request for expedition.

An additional consideration is the harm that Plaintiff will arguably be occasioned if he is expected by the Navy to return to a permanent active-duty position prior to being promoted. Consistent with the standard approach to military-pay cases, the BCNR has signaled its intention to "put the [Plaintiff] in the same position he would have been in but for the nonjudical punishment and subsequent discharge." *See* Appendix C, Exhibit 13, at 1 (ACTION MEMO for Assistant General Counsel of the Navy (M&RA) from Executive Director, BCNR, June 14, 2016). As Plaintiff's promotion confronts continued delays, the likelihood that he will return to work as a Lieutenant Commander (0-4) and both be evaluated as an 0-4 and be compared, for evaluation purposes, to other 0-4's only increases. Plaintiff is of the opinion that allowing for such a record of performance to be created would expressly contravene BCNR' s stated intention to put him in the situation he would have been

in "but for" the adverse personnel action, and it would, likewise, run directly afoul of BCNR's direction that (provided OSD and Senate proceedings are favorably accomplished) Plaintiff be treated, including for purposes of reinstatement, as if he were promoted to Commander on August 1, 2008, *see* JSR, Ex. 1, at 18.

Without wishing to appear confrontational or ungrateful for the Navy's efforts thus far in acknowledging and remedying its errors, Plaintiff does wish to note that the predicament fast developing, where the reinstatement currently offered Plaintiff will begin to conflict with the promotion-related relief he was awarded (i.e., if he returns to work as an 0-4 for any length of time), is at least partially due to what appears to be inaction on the promotion front since April 25, 2016, and from which time, by even the most generous standard, a nomination package could have been routed through OSD and be now awaiting Senate action.

Proposed order.

Wherefore, in view of the foregoing, Plaintiff requests:

1. That the court order the parties to agree on an amount due Plaintiff through December 31, 2016, and on a proposed deadline for payment, and to advise the court prior to the earlier of February 1, 2017, or 30 days prior to the date that the Navy expects Plaintiff to report to his first duty station (regardless of whether such duty station be for a brief, temporary assignment), of said amount and deadline or of their inability to reach such an agreement;

2. That, pursuant to the Court's authority to remand any matter to an administrative or executive body or official, *see* U.S. Ct. Fed. Claims R. 52.2(a), the Court order the Navy to consider Plaintiff s position, as detailed at Appendix C, regarding his claimed entitlement to CSP, CSP-P, and BAH at the rate applicable to CARL VINSON's home port between October 1, 2009, and the date of his reinstatement, and to advise Plaintiff and the Court, by January 15, 2017, whether the Navy will stipulate to his position and include those amounts in the calculation to be made pursuant to the paragraph immediately above, or whether the Navy disagrees with that position, and to indicate in its advice the reason or reasons for such disagreement, so as to enable the parties' further deliberation and discussion;

3. That the Court order the Navy to provide the Court and Plaintiff with a copy of the directive forwarding Plaintiff s promotion to OSD no later than 15 days after it is signed; provide the Court with status reports vis-a-vis Plaintiff s promotion every 30 days thereafter; provide notice to the Court and to Plaintiff no later than 15 days following the routing of his promotion nomination recommendation through OSD en route the Senate; and, in any event, provide the Court and Plaintiff with a detailed and comprehensive report regarding the status of Plaintiff s promotion no later than 60 days prior to the date the Navy expects Plaintiff to report to his next permanent duty station.

If the Court in its judgment deems it appropriate to issue an order along the above-detailed lines, Plaintiff makes no objection to the stay of all other proceedings as requested by the Navy. Plaintiff is also amenable to filing at any time, either as directed by the Court or at a time agreed by the parties, a statement pursuant to U.S. Ct. Fed. Claims R. 52.2(t)(1), indicating whether agency action as regards any or all of the above-detailed matters "affords a satisfactory basis for disposition of the case," *id.* (A), or "whether further proceedings before the court are required" and indicating "the nature of such proceedings," *id* (B).

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

/s/
DOUGLAS K. MICKLE
Assistant Director

/s/
IGOR HELMAN
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December 8, 2016

Attorneys for Defendant

APPENDIX L

[SEAL]

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

5800
BUPERS 00J/185
December 6, 2016

John F. Sharpe
13088 Lighthouse Lane
Carrollton, VA23314

Dear Mr. Sharpe:

The following is a status update regarding the implementation of the Secretary of the Navy's amended recommendation dated June 20, 2016. The following items have been completed:

1. The removal from your Official Military Personnel File of all documentation pertaining to the NJP of 16 May 2007, including, but not limited to the 25 June 2007 NJP Report (with all enclosures and endorsements thereto).

2. The removal of all documentation from your Official Military Personnel File pertaining to the DFC, including but not limited to the 2 January 2008 DFC approval.

3. The removal of all documentation in your Official Military Personnel File pertaining to the 17 June 2008 BOI and the consequent administrative separa-

tion, including but not limited to the BOI Report of 17-18 June 2008, the ADSEP letter of 29 June 2009, the DD Form 214 (Certificate of Discharge from Active Duty) of 30 September 2009, the NPC (PERS-48) email letter of 12 February 2008, and the CNPC messages pertaining to Petitioner's ADSEP dated 151230ZSEP09, 151231ZSEP09, 151632ZJUL09, and 151633ZJUL09.

4. The removal of all documentation pertaining to the removal of your name from the Promotion List, including but not limited to CNPC's letter of 30 May 2008 (with its enclosed CNO Action Memo for SECNAV dated 27 May 2008) and Mr. Sharpe's letter of 7 May 2009.

5. The correction of the Fitness Report (FITREP) of 31 October 2007.

6. The correction, removal, or redaction from your Official Military Personnel File of any material or entries inconsistent with the foregoing; no such entries or material will be added in the future.

7. The inaccessibility to promotion boards of any documents relating to the specific content of the Board's decision, to include the Board's decision letter approved by ASN (M&RA), the amendment, and enclosures.

8. The removal of failures of selection.

The following items are in progress:

1. The detailers have offered you an assignment as the Chief of Information Defense Media Activity

Liaison Officer, an O-5 billet located in Fort Meade, MD. The detailers are working on determining your active duty start date and finalizing orders.

2. Your promotion to O-5 requires routing a request to the Office of the Secretary of Defense and confirmation by the Senate. We have identified the proper authority to use to forward the promotion and are awaiting a signed directive to effectuate the action.

3. If the promotion is approved, additional steps will be taken to appropriately adjust your date of rank, and effective date for the pay and allowances.

4. If there is a correction of the date of rank and effective date for pay and allowances, CNPC will notify Defense Finance and Accounting Services for a calculation and payment of back pay.

5. The insertion of an entry covering 1 November 2007 to the appropriate end date stating, "By direction of the Secretary of the Navy, fitness reports [for the relevant period] are not available for inclusion in SNO's Naval Record and no speculation or inferences as to the nature or contents of such reports may be made by selection boards or other reviewing authorities," or words to that effect has not yet been made to your record. This entry will be added to your Official Military Personnel File once the appropriate end date has been established after you report to your first assignment.

/s/
M. C. HOLLEY
Captain, U.S. Navy
Legal Counsel
Navy Personnel Command

Enclosure: 1. ASN(M&RA) ltr JLB Docket No. 4284-14/10521-12 of 20 Jun 16

Copy to: The Honorable Thomas C. Wheeler

APPENDIX M

United States Court of Federal Claims

No. 15-1087C
Filed: January 6, 2017

JOHN F. SHARPE,	*	
Plaintiff	*	No.: 1:15-cv-01087
	*	Judge: Thomas C.
v.	*	Wheeler
THE UNITED STATES,	*	
Defendant.	*	

JOINT MOTION TO SUPPLEMENT THE JOINT STATUS REPORT

On December 8, 2016, the parties filed a joint status report (JSR), which the Court received on December 12, 2016. In that report the parties updated the Court regarding the implementation of the relief directed by the Board for Correction of Naval Records (BCNR), as approved by the Secretary of the Navy (SECNAV) on April 25, 2016, relative to Mr. Sharpe's claims for back pay, reinstatement, correction of his naval record and other relief. The status report included the parties' respective positions rela-

tive to the implementation of the BCNR's recommendations.

In the report, the Navy informed the Court that Mr. Sharpe had been offered an assignment and that "detailers [were at that time] working on determining his active duty start date and location." Joint Status Report (Dec. 8, 2016) at 1. The Navy additionally reported that Mr. Sharpe's orders had been released the previous evening, *see id.* At the time of filing the report, however, Mr. Sharpe had not yet received the orders or had a chance to review them. Mr. Sharpe subsequently received the orders (Orders) that the Navy was preparing. *See* Appendix A (Dec. 7, 2016 Orders). Because the parties did not have an opportunity to provide their comments to the Court regarding the Orders in the prior status report, they therefore jointly seek leave of the Court to file this supplement to the December 8, 2016 report, updating the Court on issues regarding the orders and explaining their respective positions. Further, the parties wish to apprise the Court of additional information they have received since the last status report, which is pertinent to the disposition of Mr. Sharpe's claims.

The Parties' Joint Position

The parties report that the Navy has acted administratively on November 4, 2016, to modify Naval Inspector General (NAVIG) case number 20050930 by annotating it as "not substantiated." *See* Appendix B at 1 (November 17, 2016, Memo. for the Record, from NAVIG). This matter is addressed in Plaintiff's Amended Complaint. *See* Am. Compl. ¶¶ 63, 373–82, 387–92, 490, ECF No. 4. Mr. Sharpe was apprised of this action on December 15, 2016, follow-

ing the parties' submission of their December 8, 2016 status report.

The parties additionally report that the Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN), on December 21, 2016, issued an amended order. *See* Appendix C (Dec. 21, 2016, Amended Order). The order amends the previous ASN letter to show that Mr. Sharpe "met a Special Selection Board (SSB) for the FY-09 Active-Duty Navy Commander Line Public Affairs Officer . . . Promotion Selection Board and was recommended for promotion," and that "upon Senate confirmation" Mr. Sharpe "is to be granted the same date of rank, the same effective date for the pay and allowances of the grade to which promoted, and the same position on the active-duty list as he would have had if his name had not been removed from the FY-08 Active-Duty Navy Commander Line (PAO) Promotion List." *Id.*

Plaintiff's Position

A. Orders

Plaintiff incorporates herein by reference the substance of his submission to the Court in the December 8, 2016, JSR, relative to the Orders, insofar as they assign him from his home to a new permanent duty station (PDS). He submits the following in view of his opportunity, since filing the previous report, to examine the Orders and consider the significance of their being of the "recall" type applicable to the call of a Navy Reserve officer to active duty.

The BCNR's approved recommendation, issued with SECNAV's authority, *see* 10 U.S.C. § 1552 (2015); *accord e.g., Harris v. U.S.*, 177 Ct. Cl. 538, 545 (1966) (noting that a military correction board is

the Secretary's "alter ego"); *Kennedy v. U.S.*, 124 Fed. Cl. 309, 333 n.12 (2015) ("[T]he BCNR acts on behalf of the [SECNAV]"), directs the Department of the Navy (DON) to correct Plaintiff's record to reflect that he "has continued to serve *on active duty without interruption.*" JSR, May 2, 2016, Ex. 1, at 16, 18, ECF No. 10-1 (emphasis supplied). BCNR also directed that "no entries or material" inconsistent with that correction "be added to [Plaintiff's record] in the future." *Id.* The import of this directive goes beyond merely what may be filed in Plaintiff's Official Military Personnel File (OMPF), *see, e.g.* Naval Military Personnel Manual (MILPERSMAN) Article 1070-020 (2015). Rather, under the relevant statute, it covers *any* "document or other record that pertains" to the Plaintiff, 10 U.S.C. § 1552 (h) (2015); *accord Porter v. U.S.*, 163 F.3d 1304, 1311 (Fed. Cir. 1998) ("Section 1552 does not limit the kind of military record subject to correction."). BCNR's recommendation is, furthermore, "final and conclusive on all officers of the United States." 10 U.S.C. § 1552(a)(4) (2015).

Plaintiff received the Orders subsequent to the filing of the recent status report. While he does not object to being assigned to a new PDS – as the Navy notes, the assignment is part of the relief he requested, and he fully cooperated with the Navy's efforts to identify a billet for him – he does object to the Orders insofar as they treat him as a Navy Reserve officer not *currently* on active duty, contravening SECNAV's relief and rendering them of questionable legality.

As a cursory review of the Orders will show, they are of the "recall" type – one of several the Navy us-

es.[1] *See* Appendix A, at 1. Recall orders call members of the Navy Reserve to active duty. *See* Chief of Naval Operations (CNO) Instruction 3060.7B, *Navy Manpower Mobilization/ Demobilization Guide*, April 25, 2006, at 1-2 para. 1-3 (noting that a recall is a "mechanism[] for recalling Reserve Component (RC) personnel to the active Armed Forces"). *Cf.* Secretary of the Navy Instruction (SNI) 1920.6 CH-5, *Administrative Separation of Officers*, Aug. 26, 2015, Enclosure (1) para. 25 (defining "release from active duty" as "the transfer of a Reserve officer from active duty"), Enclosure (3) para. 7 (governing the return of a "recall" officer to a non-active-duty status via a "release from active duty"). The Orders fit the description of an "indefinite" recall, which transfers an officer from the RC to the Active Duty List. *See* MILPERSMAN 1320-150, *Active Duty Navy Definite and Indefinite Recall Program for Reserve Officers*, May 21, 2009, at 2 para. 1.c(4) (comparing "indefinite recall orders" to "[active duty] change of duty station orders [that] . . . have a planned rotation date (PRD) in lieu of a having a prescribed period of time"). Furthermore, the Orders *expressly* direct the "activation of [Plaintiff's] active file *from the naval reserve to active duty*." Appendix A, at 3 (emphasis supplied). On the other hand, recall orders have no applicability in the context of assigning an active-duty officer to a PDS. *See generally* MILPERSMAN 1000-020; 1000-100; 1001-020; 1050-330; 1050-350; 1050-360; 1070-020; 1132-010; 1301-221; 1301-800; 1320-150 (providing for "recall" of officers only in finite circumstances, none of which are the assignment of an active-duty officer from one PDS to another). Illus-

[1] Other kinds of orders include, for instance, "change duty," "separation," "retirement," and "new appointment" orders, exemplified, respectively, at Appendices D, E, F, and G.

tratively (if unsurprisingly), in responding to a recent Freedom of Information Act, 5 U.S.C. § 552(a)(3) (2015), request, the Navy could not provide a single example of recall orders issued to an active-duty officer. *See* Appendix H, at 1.

What is more, by purporting to detach him from his home as his current PDS, the Orders recently issued by the Navy treat Plaintiff as if he has not been assigned to the USS CARL VINSON (CVN 70) (hereinafter CARL VINSON) continuously from the date of his illegal separation to the prospective date of his assignment to a new PDS. This matter was anticipated in Plaintiff's portion of the December 8, 2016, status report. *See* JSR, Dec. 8, 2016, App. C. The upshot of his argument therein is that there can be no other view than that Plaintiff has remained constructively assigned to the CARL VINSON, because 1) it was his PDS on the date of his unlawful separation, *see* Appendix I, at 1 (DD Form 214, Certificate of Discharge, Sep. 30, 2009, showing CARL VINSON as both "Last Duty Assignment" and "Station Where Separated"); *see also* MILPERSMAN 1910-812, Jan. 12, 2010, para. 1.a (providing for the separation of naval personnel inside the continental United States from "on board their current command"); 2) the orders intended to effect his detachment from CARL VINSON, *see* Appendix E, at 2 (BUPERS ORDER 2589, OFFICIAL SEPARATION ORDERS, Sep. 15, 2009, directing Plaintiff to "detach" from CARL VINSON) were voided, *see* JSR, May 2, 2016, App. 1, at 17, para. c; 3) a previous set of separation orders, *see* Appendix J, at 2 (BUPERS ORDER 1969, OFFICIAL SEPARATION ORDERS, July 15, 2009, also directing Plaintiff to "detach" from CARL VINSON), prior to being expunged by BCNR, JSR, May, 2, 2016, *id.*, were cancelled, at which time Plaintiff was

ordered to "continue present duty" aboard CARL VINSON, *see* Appendix K, at 2 (BUPERS ORDER 1969(01), OFFICIAL CANCELLATION OF ORDERS, August 28, 2009); and, finally, therefore, 4) no valid order has detached Plaintiff from CARL VINSON, to which he was assigned by his last and still current set of permanent-change-of-station (PCS) orders, *see* Appendix D, at 1 (BUPERS ORDER 0876, OFFICIAL CHANGE DUTY ORDERS, March 28, 2006) (assigning Plaintiff to CARL VINSION); *see also* Per Diem, Travel and Transportation Allowance Committee, *The Joint Travel Regulations* (JTR) para. 5006.A (2016) ("*A PCS order must direct a PCS.*" (emphasis supplied)); *id.* para. 10416.B (noting that "[a] member's old PDS" remains "the PDS" until "the day before the member reports to the new PDS in compliance with a PCS order"). Consequently, if Plaintiff is on active duty, even just constructively, it must be as assigned to the CARL VINSON. This is the proposition established not only by regulation but also by all of the relevant case law in this circuit. *See, e.g., Groves v. U.S.* 47 F.3d 1140, 1144 (Fed. Cir. 1995); *Schuenemeyer v. U.S.*, 776 F.2d 329, 330 (Fed. Cir. 1985); *Holley v. U.S.*, 33 Fed. Cl. 454, 458 (1995); *Ulmet v. U.S.*, 17 Cl. Ct. 679, 710 (1989); *Laningham v. U.S.*, 5 Cl. Ct. 146, 154 (1984).

No incidental or "logistical" similarity, if *arguendo* one exists, between Plaintiff's situation and that of a Navy Reserve officer mobilized from home can justify the Navy's assumption, in the absence of evidence, that Plaintiff was assigned by competent orders away from CARL VINSON and placed in a non-active-duty status at his home, nor its memorialization of that assumption in a record contravening both the explicit directive of SECNAV – which requires the record to reflect that Plaintiff "has continued to

serve on active duty without interruption" and bars the creation of any record to the contrary, *see* JSR, May 2, 2016, *id.* – and the time-honored constructive-service doctrine, *see, e.g., Dilley v. Alexander*, 627 F.2d 407, 413 (D.C. Cir. 1980), which demands that Plaintiff "be treated as if he had been on active duty . . . all during the period of his separation," *Schuenemeyer*, *id.* at 332; *accord Dilley, id.* at 411 (because Plaintiff has "never been lawfully discharged . . . in the eyes of the law, [he] remain[s] in service"), in full accord with BCNR's *express intention* to "put the [Plaintiff] back in the position he would have been in had he not been separated from the Navy," Appendix L, at 1 (ACTION MEMO for Assistant General Counsel of the Navy (M&RA) from Executive Director, BCNR, June 14, 2016). And because Plaintiff's entitlements will be calculated based upon the facts memorialized in the record as corrected by SECNAV, *see* Department of Defense (DOD), *Financial Management Regulation*, Vol. 7B, Ch.10, para. 100202 (noting that the "right to the payment of money must be a result of a change of facts from those already in the original record"); *accord* Reserve Members Restored to Duty, 56 Comp. Gen. 587 (1977) (noting that "benefits and liabilities" based on correction-board action "depend solely upon a proper application of the statutes to the facts as shown by the corrected record in each particular case"), the properly memorialized "legal fiction," *Dilley, id.* at 413, of his continuous active-duty service is essential to proper calculation of pay, *see* 37 U.S.C. §§ 204 (2015) (pay to a uniformed-service member "on active duty"), just as the record of his sea-duty assignment to CARL VINSON is essential to calculation of his special pay, *see* 37 U.S.C. § 305a(a) (2015) (career sea pay (CSP) to a member on "sea duty"); 37

U.S.C. § 305a(c) (2015) (monthly CSP "premium" (CSP-P) for more than 36 consecutive months of sea duty), and of his basic allowance for housing (BAH), insofar as the ship's home port – which changed during Plaintiff's assignment from Newport News, Va., to San Diego, Calif., *see* Appendix M, at 1 (CNO message, June 9, 2009) – sets his BAH rate for that period, *see* 37 U.S.C. § 405(a) (2015) ((BAH) calculated according to geographic location); CNO Instruction 7220-12 CH-1, *Basic Allowance for Housing Entitlements*, June 23, 2011, at 2 para. 3 ("BAH rates vary based on the geographic location of the member's [PDS]."); JTR para. 10402.B (BAH based upon the "home port for a member assigned to a ship"); DOD Instruction (DODI) 1315.18, *Procedures for Military Personnel Assignments*, October 28, 2015, at 66 ("The home port of a ship . . . is the PDS for . . . geography-based station allowances."); JTR para. 10402.B.4 (providing for a change of BAH "to the new home port rate on the home port change effective date prescribed by the Service").

Beyond prejudicing the record that will form the basis for calculation of Plaintiff's entitlements, the Orders appear questionably legal, insofar as they 1) are contrary to the relief ordered by SECNAV in his correction of Plaintiff's record; 2) are predicated upon statutory authority inapplicable to Plaintiff; 3) appear *ultra vires*, to the extent the fact they memorialize is correct (i.e., that Plaintiff is not currently on active duty); 4) fail to detach Plaintiff from his constructively current PDS, as required to assign him to a new PDS, and thus conflict with the orders currently applicable to Plaintiff; 5) treat Plaintiff as a "new accession" and improperly memorialize that treatment; and 6) implicate regulations that require

the memorialization of a record contrary to BCNR's SECNAV-approved directive. The following pertains.

First, as alluded to *supra*, when SECNAV, who "is the head of the [DON]" and is "responsible for, [with] the authority necessary to conduct, all affairs of the [DON]," 10 U.S.C. § 5013(a)(1), (b) (2015), corrects a military record, it is "final and conclusive on all officers of the United States," 10 U.S.C. § 1552(a)(4) (2015). Orders predicated on Plaintiff's being in a non-active-duty status, and thus subject to "recall," contravene SECNAV's express direction that the former's record reflect that he has "continued to serve on active duty without interruption." JSR, May 2, 2016, *id.* And it is well established that any military directive is "invalid when, and to the extent that," it conflicts with one "issued by a superior in the chain of command." *Strickland v. U.S.*, 69 Fed. Cl. 684, 703 (2006); *accord U.S. v. Daskam*, 31 M.J. 77, 81 (C.M.A.1990) (noting that a directive "from the Secretary of the Navy binds the Chief of Naval Operations . . . [and all] subordinate commands"); *see also, e.g., U.S. v. Patton*, 41 C.M.R. 572, 573 (A.C.M.R. 1969) ("As a matter of law, an order of a subordinate which contravenes . . . [a] lawful directive of higher authority can have no lawful validity." (citations omitted)).

Second, the "recall" Orders lack legal authority insofar as they rely upon statutory provisions which apply to the recall of *non-active duty* personnel, *see* 10 U.S.C., Subtitle E (2015) (providing for recall of RC officers); 10 U.S.C. § 688 (2015) (providing for recall of "retired" members); 10 U.S.C. § 802(d) (2015) (providing for recall of "member of a reserve component" for military-justice proceedings); 10 U.S.C. § 1211 (2015) (providing for recall of officer "whose name is on the temporary disability retired list

[TDRL]"); Appendix N, at 1 (DODI 1215.06, *Uniform Reserve, Training, and Retirement Categories for the Reserve Components*, March 11, 2014, Appendix to Enclosure 4) (tabulating statutory authority for recall); CNO Instruction 1001.27, *Policy and Procedures for Reserve Component Sailors Service Beyond 16 Years of Active-Duty Service*, Jan. 9, 2013, enclosure (1) para. 8 ("MPN and RPN recalls are written per [Title 10, U.S. Code]."); *see also Dambrava v. OPM*, 466 F.3d 1061, 1064 (Fed. Cir. 2006) (alluding to the fact that recall obviously applies to a service member *not* on active duty); *U.S. v. Spradley*, 41 M.J. 827, 831 (N.M.C.C.A. 1995) (same), and therefore do not apply to Plaintiff, again on the basis of SECNAV's direction and the constructive-service doctrine, both of which provide for the uninterrupted continuation of Plaintiff on active duty and militate against any notion that he should or can be "recalled"; *see also* Lt. Col. Carl F. Johnston, Comp. Gen. B-195129, Apr. 28, 1980, *available at* http://www.gao.gov/products/441074#mt =e-report (holding that an officer reinstated by a military correction board was not entitled to a uniform allowance, normally payable each time a member is "called or recalled to active duty," because action by the "board for correction of military records expunged the fact" of the claimant's separation and "produced a result showing that he has been serving on active duty with the armed forces continuously").

Third, if, alternatively, the premise implied by the Orders – that Plaintiff is not on active duty and must be "recalled" thereto – be accepted as true, there is no basis for the Navy's authority to order Plaintiff to active duty. As already noted, the statutory authority for the involuntary recall of non-active-duty personnel is inapposite (because it ap-

plies only to RC, retired, or TDRL personnel). The Orders' implication that Plaintiff is not currently on active duty can only, therefore, stand for the additional necessary implication that Plaintiff is simply not currently a member of the Armed Forces – because "regular component servicemembers are . . . on active duty" by definition, *Willenbring v. U.S.*, 559 F.3d 225, 237 (4th Cir. 2009). Thus, if Plaintiff is neither currently on active duty nor subject to statutes providing for the recall of RC, retired, or TDRL personnel, there would not seem to be on Plaintiff's part any "duty to comply," *U.S. v. Milldebrandt*, 25 C.M.R. 139, 143 (C.M.A. 1958), with the Orders, *see Dickenson v. Davis*, 245 F.2d 317, 319 (10th Cir. 1957) (noting that military status is required for one to be "subject to the rules, discipline and jurisdiction" of the Service); *but see Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) (holding that an officer is clearly bound by the duty orders he is issued, however contrary to his preferences they may be, provided he is lawfully in the military).

Fourth, insofar as SECNAV, via the recent BCNR action, has directed the restoration of Plaintiff to the "same position he would have been in," Appendix L, at 1, and that such action is entirely consistent with the mandate of the constructive-service doctrine, whereby, when Plaintiff's separation was set aside, he was restored to "the position[he] held on [his] . . . date[] of separation," *Dilley*, *id.* at 413; *accord Doyle v. U.S.*, 220 Ct. Cl. 285, 306 (1979) (noting that plaintiffs illegally separated remain entitled *inter alia* to "position"), Plaintiff's PDS remains what it was according to his last set of orders, Appendix K, at 2, directing him to "continue" his then-"present duty" aboard CARL VINSON. This fact is reinforced by applicable regulations: not having ever received a

PCS order transferring him to his home, Plaintiff is not and has never been assigned there as his PDS, *see* JTR para. 5006.A (requiring a "PCS order" to effect a PCS); *accord* DODI 1315.18, at 66 (noting that a "competent travel order" is required to accomplish a PCS); *see also* JTR Appendix A1, at A1-14 (defining home as a member's PDS only when the member is coming *into* the service *from* a non-active-duty status or *leaving* active duty en route the member's home). Consequently, insofar as a PCS is "the transfer or assignment of a member *from one PDS to another*," Bureau of Naval Personnel Instruction (BUPERSINST) 7040.6B, Sep. 29, 2010, enclosure (1), at 1-B-2 (emphasis supplied); *accord* DODI 1327.06, *Leave and Liberty Policy and Procedures*, CH-3, May 19, 2016, at 44, the Navy's present set of Orders simply does not effect Plaintiff's PCS, because he is not thereby transferred away from an old PDS but instead transferred from a place (his home) to which he has *never been properly assigned*. And since Plaintiff has never received competent orders that detach him from the CARL VINSON, the current Orders – assuming, *arguendo*, that they have any force at all – conflict with those, *see* Appendix D, at 1; Appendix K, at 2, that remain in effect and continue to assign him, at least constructively, to his current PDS, *see also, e.g.,* Maj. James B. McCracken, 45 Comp. Gen. 589 (1966) (holding that PCS orders remain in effect until receipt of subsequent, competent PCS orders); JTR para. 2235; *id.* para. 10416.B (noting that "[a] member's old PDS" remains "the PDS" until "the day before the member reports to the new PDS in compliance with a PCS order"). Plaintiff is thus left in the ultimately untenable position of having to be in two places at once, *cf. Patton*, *id.* (adverting to a case where "simultaneous compli-

ance with [one of two conflicting] orders is impossible" and noting that "[a]n individual cannot be expected to remain and depart at the same time.").

Fifth, on their face, the Orders apply to a new accession, as evidenced by the appropriation subhead (SH) "2250" and purpose identification code (PIC) "2" in the PCS line of accounting (LOA), Appendix A, at 4; *see* BUPERSINST 7040.6B enclosure (1), at 3-A-1 (defining SH 2250 and PIC 2 as identifying travel for "Officer Accession – Land"). But, pursuant to his record as corrected by BCNR, under the constructive-service doctrine, and according to applicable service regulations, *see, e.g.,* SNI 1920.6 para. 6 ("Once individuals have legally accepted a commission . . . they have acquired a legal status that continues until it is terminated through a specific, legally authorized process."), Plaintiff is not a new accession; new accession travel is only travel to a "first duty station" from home or another place where a person *enters* the armed forces, *see* BUPERSINST 7040.6B enclosure (1), at 1-B-4; DON, *Financial Management Policy Manual* (FMPM) § 03146, "Permanent Change of Station," para. 3.b (2015); *see also* JTR para. 10416.D.1 (defining a member in the "accession pipeline" as a new service academy graduate, a member undergoing initial entry training, or a student with no prior military service); Appendix O, at 7 (DON FY17 Budget Estimate, February 2016, Exhibit PB-30X Accession Travel, *available at* http://www.secnav.navy.mil/fmc/fmb/Documents/17pres/ MPN_Book.pdf).

Sixth, and finally, a range of regulatory authorities, having the force and effect of law, *see, e.g., Dorl v. U.S.*, 200 Ct. Cl. 626, 633 (1973) ("It is settled that regulations of the Secretaries of the Armed Services have the force and effect of law."), *require* that recall

orders be filed in an officer's OMPF, *see* MILPERSMAN 1070-020 para. 2, at 3 (2015) (providing for the filing of "recall to active duty" orders in the OMPF); BUPERSINST 1070.27B enclosure (2), at 8 (same); *id.* para. 4.b (referring to the online retain/delete listing, *available at* http://www.public.navy.mil/bupers-npc/career/recordsmanagement/Documents/RetainDeleteListing.xls, which, at line 125, requires the filing of "recall" orders in the OMPF). None of these authorities, furthermore, excludes a case like the present, where recall orders are issued to a member admitted to be on active duty. Therefore, unless one of two unacceptable premises be admitted – i.e., 1) that SECNAV, acting through BCNR under 10 U.S.C. § 1552, can order a record correction that is expressly contrary to regulation (i.e., ordering that there not be filed in an officer's record material that regulations positively require be so filed), *but see Dilley v. Alexander*, 603 F.2d 914, 942 n.20 (D.C. Cir. 1979) (noting that BCNR has "broad discretion" but that it is "not entitle[d] . . . to violate express statutory directives" (citations omitted)) or 2) that SECNAV possesses the inherent discretion to elect when his department's regulations apply, *but see, e.g., Lindsay v. U.S.*, 295 F.3d 1252, 1257 (Fed. Cir. 2002) ("[T] he military must abide by its own procedural regulations should it choose to promulgate them." (citation omitted)) – there is no other solution than for the Navy to issue regular change-duty orders, accommodating both BCNR's relief *and* binding DON regulations.

B. Promotion

The previous JSR noted that the Navy had "identified the proper authority to use to forward [Plain-

tiff's] promotion" to the Office of the Secretary of Defense (OSD) and the Senate. *See* JSR, Dec. 8, 2016, App. A, at 2. Evidently the authority that the Navy has decided to use is the creation of a record suggesting that Plaintiff was recommended for promotion to Commander by an FY-09 SSB instead of by the FY-08 regular promotion selection board (PSB). *See* Appendix C, at 1. Plaintiff appreciates and very much welcomes the Navy's efforts to effect the relief recommended by BCNR with regard to his promotion. At the same time, as in the case of the Orders issued to reinstate him to active duty, ASN's recent action raises statutory and regulatory questions which – out of an abundance of caution, and without wishing to pose new or unnecessary obstacles to implementation of BCNR's recommendations, make objections that seem overly technical, or appear ungrateful for the Navy's efforts in his favor – Plaintiff feels obliged to bring to the attention of the Defendant and the Court at this time.

By way of background, the original relief granted by BCNR included the correction of Plaintiff's record to reflect that his "name was never removed from the [FY-08 Commander] Promotion List, that he was not considered above zone by any subsequent promotion selection board, and that he has had no failures of selection." JSR, May 2, 2016, Ex. 1, at 17, para. g (BCNR relief letter, dated February 8, 2016, and approved April 25, 2016). This action was consistent, verbatim, with Plaintiff's request, *see* Appendix P, at 2, para. 1.b(3), for removal of the failure of selection (FOS) he twice incurred as a result of his name having been removed (before BCNR set aside that removal) from the FY-08 PSB list. *See* Appendix Q, at 1 (noting Plaintiff's removal from the FY-08 promotion list, his non-consideration by the FY-09 PSB,

and his FOS before the FY-10 PSB). The Navy reported, as early as May 20, 2016, that "[c]orrective action [was] taken on the removals of [Plaintiff's] failures of selection and the reinstatement of the FY-08 selection," JSR, Sep. 2, 2016, Ex. 2, at 1 (PERS-802 Memorandum, May 20, 2016), and confirmed it in the recent status report. JSR, Dec. 8, 2016, App. A, at 2, para. 8.

With his December 21, 2016, amended order, ASN has revised (and, at least on paper, withdrawn) the relief granted with respect to Plaintiff's FOS's and original (FY-08) promotion selection, and replaced it with the language referring to Plaintiff's having met an FY-09 SSB. As written, ASN's order *replaces*, in pertinent part, *see* Appendix C, at 1 ("[r]eplacing [BCNR] recommendations (g) and (h)" with new language), the relief BCNR directed in its letter of June 20, 2016, which "amended" (rather than "implemented") BCNR's original, February 8, 2016, recommendations, *see* JSR, Sep. 2, 2016, Ex. 1, at 1. Even though the Navy has twice reported having implemented para. g of BCNR's original recommendations, ASN's recent action appears to undermine the administrative finality attaching to that element of the earlier recommendations under 10 U.S.C. § 1552(a)(4) (making BCNR's record corrections "final" unless procured by fraud), because the ASN-revised recommendation simply *replaces* the original BCNR decision. In consequence, no BCNR decision addressing the removal of Plaintiff's FOS's any longer exists to which such administrative finality would attach.

But given the administrative finality that arguably *did* attach to BCNR's approved initial recommendations, it is doubtful whether ASN's subsequent revision is proper. Plaintiff does not dispute that

ASN can issue any order necessary to *implement* BCNR's recommendation. (ASN may have been able to take such an approach in this instance.) At the same time, if ASN can revise BCNR's approved decision at any time, the statute making BCNR record corrections "final" becomes devoid of all meaning. Indeed, both Plaintiff *and* Defendant represented to this Court that the Secretary made a "*final* determination" on BCNR's recommendation on April 25, 2016, JSR, May 2, 2016, at 1 (emphasis supplied). What is more, when this Court and others have upheld the "inherent" right of an agency to reconsider its previous decisions, two conditions for the proper exercise of that reconsideration power have always attached, namely, that such reconsideration be accomplished in a timely way (i.e., on the order of days or weeks, not months or years, after the original decision), and that notice be afforded the party that will be affected by the reconsideration. *See King v. U.S.*, 65 Fed. Cl. 385, 399 (2005) (citing *Gratehouse v. U.S.*, 206 Ct. Cl. 288 (1975), and *Bentley v. U.S.*, 3 Cl. Ct. 403 (1983), for the proposition that a reasonable time for a *sua sponte* reconsideration is measured in days and weeks, and that an eleven-month delay is "clearly unreasonable"); *Tokyo Kikai Seisakusho v. U.S.,* 529 F.3d 1352, 1361 (Fed. Cir. 2008) (noting that an agency "must also give notice to the parties of its intent to reconsider"); *see also McAllister v. U.S.*, 3 Cl. Ct. 394, 398 (1983) (holding that an agency's failure to exercise its reconsideration power in a timely way may be excused if the agency shows that its original decision was erroneous). Neither condition was met here, nor has ASN showed that the original BCNR recommendation was in error. (Plaintiff has reason to believe, based on conversation with isolated agency personnel, that the Navy's new order

arises from a concern that the 18-month promotion-eligibility period may impede his restoration to and nomination from the FY-08 promotion list, *see* 10 U.S.C. § 629(c)(1) (2015), but Plaintiff believes that such a concern can only be the fruit of a misreading of the relevant statute and neglect of its legislative history. In any event, as Plaintiff here notes, no agency authority has put this or any other rationale for the modification of BCNR's previous, approved recommendations in writing, rendering it impossible for him to work with the agency to explore and iron out the relevant legal issues along with any disagreement over those issues that they may have.)

Indeed, had ASN afforded Plaintiff notice of his intention *sua sponte* to revise BCNR's recommendations, Plaintiff could have afforded Defendant an opportunity to consider in the first instance the concerns now raised at the eleventh hour. As it stands, ASN undertook his revision without affording Plaintiff any opportunity to present matters relative to the planned reconsideration – an opportunity that has been called a "primary requisite of due process," *Ralpho v. Bell*, 569 F.2d 607, 628 (D.C. Cir. 1977) – and without the protection of 10 U.S.C. § 1556 (2015) (barring ex parte communications with correction board), which, had the reconsideration been handled under applicable BCNR procedures, 32 C.F.R. § 723.9 (2015), would have afforded Plaintiff an opportunity to obtain and comment on any advice (internal or external to the DON) bearing upon ASN's recent decision. In any event, to the extent ASN's revision has been made with advice from any military officer, such as an attorney of the Judge Advocate General's Corps, it is vulnerable to attack as contrary to the well-settled law of this circuit proving that Congress wanted the correction of military records to "be in

the hands of civilians," *Proper v. U.S.*, 139 Ct. Cl. 511, 526 (1957), and that, in consequence, "a Secretary may not rely on the advice of a military officer as justification for overruling a reasoned BCNR recommendation," *Strand v. U.S.*, 127 Fed. Cl. 44, 50 (2016).

In addition, because in his submission to BCNR, *see* Appendix P, at 2, Plaintiff specifically requested that his FOS's, *see* Appendix Q, at 1, be removed, ASN's recent amendment also has the effect – even if unintentionally – of denying Plaintiff the relief he requested, without the required explanation, *see* 5. U.S.C. § 555(e) (2015) (requiring a brief statement of grounds where agency denies request); 32 C.F.R. § 723.7(a) (2015) (same); *Strand, id.* (noting that "the Secretary must . . . justify a decision to overturn a [BCNR] recommendation . . . supported by the record" (citations omitted)); *Boyd v. U.S.*, 207 Ct. Cl. 1, 8 (1975) (noting the Secretary will be reversed where he "fails to explain his actions"). As in the case of affording notice of a *sua sponte* reconsideration, a proper explanation of the reasons justifying ASN's amendment of BCNR's original recommendations may have afforded (and may still afford) an opportunity for the parties to have resolved questions now put before the Court.

In terms of the substance of ASN's revision, it is axiomatic – as this Court has recently noted – that his authority to take final action on correction-board recommendations must "be exercised in accordance with the law," *Strand, id.* (citation omitted), and that, in exercising the "broad discretion to remedy errors in military records," neither BCNR nor ASN may "violate express statutory directives," *Dilley*, 603 F.2d at 942 n.20 (citations omitted). This is the case even in the context of a *sua sponte* reconsidera-

tion. *Tokyo Kikai, id.* at 1361 ("An agency cannot . . . exercise its inherent [reconsideration] authority in a manner that is contrary to a statute." (citations omitted)). And absent some (arguably required) explanation of the reason for his modification to BCNR's recommendation, it is difficult to see how ASN's new order comports with statute and regulation. *See* DODI 1320.14, *Commissioned Officer Promotion Procedures*, Dec. 11, 2013, para. 3.a. ("[S]pecial selection boards and processes [must be] conducted in full compliance with all applicable statutes and DoD issuances.")

The statutory authority for an SSB allows the secretary of a military department to convene such a board in the event that a person should have been, but due to an administrative error was not, considered for promotion by a regular PSB, or where he was so considered but in an unfair manner. *See* 10 U.S.C. § 628(a), (b) (2015). The statutory requirement is implemented by DOD and DON regulation. *See* DODI 1320.11, *Special Selection Boards*, Feb. 12, 2013, para. 3.a(1); SNI 1420.1B, *Promotion, Special Selection, Selective Early Retirement, and Selective Early Removal Boards for Commissioned Officers of the Navy and Marine Corps*, Mar. 28, 2006, para. 24.a. When an SSB considers an officer for promotion, that consideration "stand[s] in place of" consideration by the regular PSB for the corresponding year. *Porter, id.* at 1315; 10 U.S.C. § 628(a)(2), (b)(2) (providing for comparison of SSB-considered officer with records of those considered by corresponding year's regular PSB). By determining that Plaintiff met an SSB for FY-09, it thus appears that ASN must also have determined that Plaintiff should have been, but was not, considered by the regular FY-09 PSB. At the time, however, Plaintiff was on the FY-

08 promotion list, *see* JSR, May 2, 2016, Ex. 1, at 8, and a PSB "*may not consider* for promotion" an officer "whose name is on a promotion list for that grade as a result of his selection for promotion to that grade by an earlier [PSB]," 10 U.S.C. § 619(d)(1) (2015) (emphasis supplied). This is why the Navy noted in 2012 that, because Plaintiff "was legally in a select status in February 2008," he "could not be presented to the FY-09 selection board." Appendix Q, at 1. So unless Plaintiff's selection for Commander by the FY-08 PSB is again to be voided, even though the Navy reported it restored in May 2016, JSR, Sep. 2, 2016, Ex. 2, at 1, it seems impossible to say that due to "administrative error" Plaintiff was not, but should have been, considered by the FY-09 PSB; it thus appears likewise legally impossible to deem him as having met and been recommended by an SSB for that year.

Title 10 also provides that "[e]xcept as otherwise provided by law, an officer . . . may not be promoted to a higher grade . . . unless he is considered and recommended for promotion to that grade by a selection board convened under this chapter." 10 U.S.C. § 616(d) (2015). It is not clear, however, whether the Navy relies upon Plaintiff's regular FY-08 PSB selection or the new FY-09 SSB selection as satisfying that statutory requirement (though it appears that the Navy intended to *replace* the FY-08 PSB selection with the FY-09 SSB selection; it nowhere indicates that the FY-08 selection remains in effect), nor is it clear whether the "paper" SSB selection, if that be the one relied upon, would satisfy it. There is, regrettably, some case law intimating the contrary. *See Stein v. U.S.*, 121 Fed. Cl. 248, 279 (2015) (noting BCNR's determination that it "does not promote service members who have not been selected for promo-

tion"); *Dodson v. U.S.*, 988 F.2d 1199, 1205–06 (Fed. Cir. 1993) (correction board action not a substitute for selection-board consideration); *see also Baugh v. Sec'y of the Navy*, 504 Fed. Appx. 127, 131 (3rd Cir. 2012) (affirming ASN's "authority to review and adjust the relief that had been ordered" by BCNR when it improperly directed a naval officer to prepare and sign a record to which she could not factually attest).

Finally, both statute and regulation require, following the adjournment of an SSB, the creation and routing of specific reports to OSD, the President, and the Senate. Barring some dispensation from the statutory and regulatory requirements, the FY-09 SSB that ASN envisions as having *in theory* recommended Plaintiff's promotion, must, to effect it *in actuality*, submit to SECNAV "a written report" that is "signed by each member of the board" and that "certif[ies] that the board has carefully considered the record of each person whose name was referred to it." 10 U.S.C. § 628(c)(1) (2015). *See* Appendix R, at 3–9 (sample SSB report with certifications and signatures of actual SSB members). The report must then be submitted by SECNAV "to the Secretary of Defense for transmittal to the President for his approval or disapproval." 10 U.S.C. § 618(c)(1) (2015) (made applicable to SSBs by 10 U.S.C. § 628(c)(2) (2015)); *accord* DODI 1320.04, *Military Officer Actions Requiring Presidential, Secretary of Defense, or Under Secretary of Defense for Personnel and Readiness Approval or Senate Confirmation*, Jan. 3, 2014, enclosure 6, para. 1; *id.* enclosure 8 para. 1.f(1). When he forwards the report, SECNAV must "identify the selection board that . . . should have considered" Plaintiff originally, explain "the reason [why he] was considered by the SSB," DODI 1320.04 enclosure 8, paras. 1.f(5), i(1), "recommend[] approval

or disapproval of the [above-described] board report," and "certify[] that the board complied with applicable law and policy." DODI 1320.04 enclosure 8, para. 1.a(2). *See* Appendix R, at 1–2 (sample secretarial memorandum forwarding SSB report to DOD with White House nomination scroll). The Principal Deputy Under Secretary of Defense (Personnel and Readiness) must then approve the report for the President. DODI 1320.14 enclosure 2, para. 1.c; DODI 1320.04 enclosure 8, para. 1.f(6). Finally, the appointment of an officer recommended for promotion by an SSB may only be made on the basis of a report, as detailed *supra*, that has been approved by the President (or his delegate). 10 U.S.C. § 628(d)(1) (2015). Whether any of these requirements can actually be met in view of the "paper" SSB that ASN has elected to employ in order to effect BCNR's recommendation appears questionable at best. *See Baugh, id.*

In conclusion, as specified below, Plaintiff conditions his agreement to the Navy's requested stay of this action upon its willingness to address the foregoing statutory and regulatory concerns that stem from ASN's recent order, and upon its willingness to provide more timely and specific information relative to the progress of implementing the BCNR-directed promotion-related relief, in view of the facts that BCNR directed the "expedited" processing of its recommendations in Plaintiff's regard, *see* JSR, Dec. 8, 2016, App. D, at 1, 3, that the timelines proposed by the Navy and imposed by applicable regulation have long since elapsed, *see* JSR, Dec. 8, 2016, at 6 (noting 90- to 180-day regulatory timelines for routing a promotion packaged, and the Navy's advertised 30-day estimate for completing all non-pay-related record corrections ordered by BCNR), and that by May

he is expected to be working at a new PDS and should, pursuant to BCNR's approved relief, be working at that time as a Commander.

The Navy's Position

A. Recall Orders

Mr. Sharpe's orders, which were released on December 7, 2016, are an administrative necessity required to bring Mr. Sharpe back on active Duty from his home in Virginia to his ultimate duty station in Fort Meade, MD. Orders are accurate accounting records that evidence the sums that Navy expends to transfer servicemembers; in this case the cost of bringing Mr. Sharpe from his home to his ultimate duty station. In an effort to bring Mr. Sharpe back on active duty, the Navy has to ensure that he is moved through the various gates required to bring someone back on active duty. Recall orders serve this function: the various posts where Mr. Sharpe presents the orders will understand what to do with the orders, and things that Mr. Sharpe needs to do will be funded with these orders.

Importantly, the orders at issue here will not affect the relief that Mr. Sharpe sought and received from the BCNR. Most orders are not placed in the Official Military record and are inaccessible by selection boards. Although a Bureau of Naval Personnel Instruction requires reserve Recall orders to be placed in an officer's Official Military record, Mr. Sharpe's orders will not be placed in his record because doing so would be contrary to the BCNR recommendations.

The Navy is committed to implementing the recommendations of the BCNR and the Secretary that

Mr. Sharpe's record be corrected to reflect that he never left active duty. But the practical reality is that Mr. Sharpe has not been on active duty for almost a decade. The orders are necessary to bring Mr. Sharpe back to active duty as part of implementing the relief he seeks.

B. Back Pay And Allowances

Additionally, the Navy informs the Court that it contacted Defense Finance and Accounting Services (DFAS) on December 8, 2016 and informally requested that DFAS begin calculating the back pay and any allowances due to Mr. Sharpe, so that he can be paid incrementally as an O-4. DFAS has informed the Navy that it cannot calculate the pay until Mr. Sharpe reports to active duty, which is currently scheduled to take place in early February 2017. Once Mr. Sharpe has been promoted to O-5, the Navy expects that DFAS will recalculate the back pay and adjust the amount accordingly. DFAS will ultimately determine how Mr. Sharpe's basic allowance for housing (BAH) and Career Sea Pay (CSP) will be calculated, pursuant to applicable regulations. DFAS has its own administrative appeals process, which would be available to Mr. Sharpe if he is unsatisfied with DFAS's ultimate calculations.

C. Request To Extend Stay

The Navy renews its request that the Court continue the stay it granted in its Order to afford the Navy time to finish effectuating Mr. Sharpe's promotion and the calculation of the appropriate back pay and allowances, and to provide the parties an opportunity to assess the impact of the Navy's actions on

Mr. Sharpe's claims that are currently pending before this Court. The Navy further proposes that the parties file a joint status report on or by April 1, 2017. At that time, the parties can apprise the Court of which issues, if any, remain outstanding. Because the final back pay and allowance amounts have not yet been calculated, the Navy maintains that the issues raised by Mr. Sharpe regarding his orders are not ripe for the Court's consideration at this time. The Navy needs an opportunity to finish implementing the relief set forth by the BCNR and the Secretary; because components of the ordered relief are intertwined, the Navy is unable to address them in a piecemeal fashion. If, after the Navy has finished implementing the awarded relief, Mr. Sharpe is unsatisfied with the result, he may appeal to the BCNR and/or the Secretary of the Navy, or raise these issues to the Court directly, at that time.

Plaintiff's Response

A. Ripeness

The Navy posits that none of the issues Plaintiff has raised "regarding his orders" are "ripe for the Court's consideration at this time" due to the fact that "final back pay and allowance amounts have not yet been calculated." Plaintiff has, of course, identified other issues arguably requiring adjudication beyond the question of how the Orders relate to the entitlement amounts. In any event, it bears noting that Plaintiff's submissions (in this JSR and the previous, December 8, 2016, report) merely respond to the Navy's request for a further stay of this action – surely a matter that is not only ripe but which the Navy wishes the Court to address and which it will ulti-

mately have to address in the course of managing this litigation.

To recap: in the previous JSR, Plaintiff indicated his willingness to agree to the stay requested by the Navy on condition that the Navy undertake (by its own agreement or pursuant to this Court's direction) certain obligations – namely, 1) that it calculate the back pay owed Plaintiff up to a date certain, 2) that it indicate its position as to whether this calculation will be made on the basis of Plaintiff's constructive active duty since his unlawful separation and assignment to CARL VINSON during that period, and 3) that it provide detailed updates regarding Plaintiff's promotion, in view of the time that has passed with so little progress. Plaintiff now reiterates his willingness to agree to the Navy's request with essentially the same conditions, as clarified below, but wishes also to note his belief that the matters raised for the Navy's consideration are not at all unripe for settlement or adjudication at this point.

As is well established, courts resort to a ripeness analysis in order to avoid prematurely adjudicating what is an "abstract disagreement[]." *Land of Lincoln Mutual Health Ins. Co. v. U.S.*, No. 16-744C, 2016 U.S. Claims LEXIS 1718, at *39 (Fed. Cl. Nov. 10, 2016) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). In their analysis courts first consider "the fitness of the issues for judicial decision." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985) (quoting *Abbott Labs.*, *id.* at 149). Issues are fit for judicial determination when an "agency has adopted a final decision," as evidenced by "an agency action that marks the consummation of the [its] decisionmaking process" – one which is not "merely tentative or interlocutory," and one "by which rights or obligations have been determined, or

from which legal consequences will flow." *NSK v. U.S.*, 510 F.3d 1375, 1385 (Fed. Cir. 2007) (internal quotation marks omitted) (quoting *Bennett v. Spear*, 520 U.S. 154, 177 (1997)). Fitness for judicial determination is also found where an issue "is purely legal, and will not be clarified by further factual development." *Thomas, id.* In contrast, where a claim is based upon "contingent future events that may not occur," *id.* (citation omitted), or when review would "inappropriately interfere with further administrative action," *Ohio Forestry Assn. v. Sierra Club*, 523 U.S. 726, 733 (1998), it is likely unripe. The second prong of a court's ripeness analysis is an assessment of "the hardship to the parties of withholding court consideration." *Abbott Labs., id.*

Considered together, the matters Plaintiff raises in this and the previous status report stem from a determination by SECNAV, filed with the Court eight months ago, *see* JSR, May 2, 2016, at 1, that is plainly and admittedly final, *id.* (reporting SECNAV's "final determination"); *accord* JSR, Sep. 2, 2016, at 1 (same). Barring further amendments, arguably contrary in any event to the finality afforded by statute to correction-board decisions, *see* 10 U.S.C. § 1552(a)(4) (2015), no further administrative decision remains to be made by the Navy. The relief to which it has deemed Plaintiff entitled has been memorialized on paper for many months, and the ink is well dried. Nothing characterizes ASN's decisions as "tentative or interlocutory," *Bennett, id.*, and, as BCNR's action is long complete, no room for "further factual development" remains, *Thomas, id.* What is more, the "rights or obligations," *Bennett, id.*, attaching to the Navy's actions – i.e., the twice-amended BCNR recommendations and the Orders it recently issued – are fixed: the Orders memorialize, properly

or otherwise, Plaintiff's "return" to active duty from a non-active status at his home, with their concomitant implications for calculation of Plaintiff's back pay and allowances, while the ASN's amended order alters BCNR's "final" determination, presumably (while somewhat ironically) in an equally "final" way, relative to his promotion and, again, properly or otherwise, asserts his entitlement thereto based on an FY-09 SSB recommendation, with the legal ramifications that, as above detailed, unavoidably follow. Because the ripeness doctrine only serves to "protect the agencies from judicial interference *until an administrative decision has been formalized*," *Abbot Labs., id.,* at 148 (emphasis supplied), it poses no obstacle to judicial consideration of Plaintiff's issues at this time; the Navy's "decision has [indeed] been formalized," and its "legal consequences," *Bennett, id.*, are fixed for review.

Considered specifically, the matters narrowly identified by Plaintiff relative to each of the Navy's actions are "purely legal," *Thomas, id.* Plaintiff has identified questions relative *not* to any finding of fact by BCNR but solely to law and regulation implicated by 1) the issuance of "recall" Orders to a non-RC officer, which 2) purport to transfer him from a place to which he was never properly assigned, and 3) the "award" of an SSB selection to an officer whose non-consideration by the corresponding PSB was *not* a result of administrative error and whose promotion, on the basis of the SSB selection, appears to require effectuation by way of fabricated records. The matters raised by Plaintiff also each address a final decision that does not await "further administrative action," *Ohio Forestry, id.*: 1) now that Orders have been issued, no action remains to be taken by the Navy relative to Plaintiff's reinstatement; 2) regard-

less of the Navy's statement that "final back pay and allowance amounts have not yet been calculated," that calculation involves no further exercise of discretion, *Denton v. U.S.*, 204 Ct. Cl. 188, 195 (1974) ("[O]nce a discretionary decision is made to correct a record, the grant of appropriate money relief *is not discretionary but automatic*" (citation omitted) (emphasis supplied)), but will be made "solely upon a proper application of the statutes to the facts *as shown by the corrected record*," 56 Comp. Gen. 587 – a record already established with finality by BCNR's decision and the recent Orders; and 3) ASN's new order relative to Plaintiff's FY-09 SSB is not "tentative or interlocutory," *Bennett, id.*, but final, *see* 10 U.S.C. 1552(a)(4) (2015).

The Navy's well-taken argument that "components of the ordered relief are intertwined" nicely indicates how the second prong of the ripeness analysis – "the hardship to the parties of withholding court consideration," *Abbott Labs., id.* – is satisfied, insofar as the Orders Plaintiff has been directed to execute both intertwine the components of the ordered relief and constitute the source of the hardship. In the absence of the court's resolution of the matters herein identified, Plaintiff faces an "immediate and substantial impact," *Caraco Pharm. Labs. v. Forest Labs.*, 527 F.3d 1278, 1295 (Fed. Cir. 2008): namely, a dilemma offering only two unacceptable solutions. On the one hand, Plaintiff can decline to comply with Orders that compel him to act no later than February 13, 2016, *see* Appendix A, at 2, and thereby both 1) face the continued deprivation of entitlements that are owed to him, since the Navy says DFAS will not "calculate the pay [owed] until [he] reports to active duty," and 2) risk "expos[ure] to the imposition of strong sanctions," *Abbot Labs., id.*, at 154, for failure

to comply. *See also Confed. Tribes and Bands of the Yakama Nation v. U.S.*, 89 Fed. Cl. 589, 604 (2009) ("A sufficient risk of immediate hardship may warrant prompt adjudication." (citation omitted)). On the other hand, Plaintiff can comply with the Orders, though of questionable legality and admittedly in conflict with BCNR's approved relief, and thereby risk waiving objections to the Orders' defects, *see, e.g., U.S. v. O'Connor*, No. ACM 38420, 2015 LEXIS 47, at *13–14 (A.F.C.C.A. Feb. 12, 2015) (finding accused consented to recall orders by compliance therewith and failure to object), and thus risk acquiescence to payment of back pay and allowances of less than his legal entitlement and consenting in the creation of a record that undermines BCNR's approved relief. The dilemma confronting Plaintiff is present and real, and, rather than depending upon "uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all," *Confed. Tribes*, 89 Fed. Cl. 589, 616 (2009) (citation omitted), the Navy's Orders "require[] an immediate and significant change in the plaintiff['s] conduct of [his] affairs with [potentially] serious penalties attached to noncompliance," *Abbot Labs., id.*, at 153; *see also Nat'l Park Hospitality Ass'n v. Dept. of the Interior*, 538 U.S. 803, 809–10 (2003) (finding hardship in instances where a plaintiff's "primary conduct" is affected, or he is commanded "to do" or "to refrain from doing" something (citations omitted)). That the Navy has declined to respond in any substantive way, through counsel or directly, to the issues Plaintiff has raised, despite his efforts to get them addressed and resolved, *see, e.g.,* JSR, Dec. 8, 2016, App. C, at 9–10, further illustrates the appropriateness and, frankly, the helpfulness of court adjudication.

What is more, as regards the ASN order relative to Plaintiff's promotion, judicial resolution of the matters raised *supra* would not only contribute to the avoidance of the hardship to Plaintiff, as already explained, *see* JSR, Dec. 8, 2016, at 7, that beginning full-time work at his new PDS as an O-4 would arguably occasion, undermining the express relief afforded by BCNR, to "put the [Plaintiff] in the same position he would have been in but for the nonjudical punishment and subsequent discharge," *see* Appendix L, at 1, but it would also reduce – by helpfully settling or mooting the issues so as to streamline follow-on action – the hardship to the Defendant posed by leaving questions as to the legality of ASN's recent decision unaddressed.

Plaintiff finally notes that binding precedent in this circuit stands for the proposition that once an administrative process is underway to effect correction of records under 10 U.S.C. § 1552, "objection [must be] made to the Correction Board or to the courts" once a plaintiff becomes "well aware" that there exist aspects of the relief to which he objects; "cho[osing] not to raise the objection until after" implementation of the crafted relief yields an adverse result is not an option. *Doyle v. U.S.*, 220 Ct. Cl. 285, 310 (1979). As this Court's predecessor court clearly explained, "plaintiffs are required to voice their objections in such a way that the Secretary or Correction Board is aware of problems, well known to plaintiffs, in the manner a remedy is effectuated *before it is effectuated*." *Id.,* at 311–12 (emphasis supplied). In the absence of Defendant's cooperation in assessing Plaintiff's "objections" to the former's implementation of the record-correction remedy – notwithstanding Plaintiff's repeated invitations to consider those objections, and frequent but unsuccessful

attempts to engage directly with agency personnel – it arguably falls to this Court to facilitate compliance with the principle enunciated in *Doyle*, which, as the court there observed, is designed to give "proper regard to the broad powers of the agency to correct errors, [conserve] the good faith effort and expense undertaken by the Secretary[, and] . . . accord with principles of justice." *Id.* at 312.

B. Recall Orders

Relative to the Navy's comments, Plaintiff does not dispute that *orders*, in the abstract, are "an administrative necessity," nor that they contain "accurate accounting records," nor that when he reports to his new PDS, he will have started, in practical terms, "from his home." None of these uncontroversial points, however, addresses Plaintiff's concerns.

What Plaintiff does dispute is the Navy's apparent (if not fully articulated) position that his transfer from his home and his assignment to Ft. Meade, Md., can only be accomplished by orders labeled "recall," predicated on inapposite statutory authority and containing instructions treating him an officer of the Navy Reserve not on active duty. Indeed, in terms of accounting data, as detailed *supra*, there are only two differences (the SH and the PIC) between "change duty" PCS orders and the Navy's "recall" orders, and each consists of the label assigned to the PCS travel – whether it is accession (with SH "2250" and PIC "2") or operational change-duty (with SH "2252" and PIC "4") travel; either way, the source account of the funding is the same centrally managed, single-year appropriation (1453 – Military Personnel, Navy (MPN)). *See generally* BUPERSINST 7040.6B; FMPM § 03146 para. 3.a; Appendix O, at 3–4. More-

over, classifying Plaintiff's move as "Accession Travel" is contrary to the express terms of the Navy's own explanation, in the budgetary context, of the designated purpose of such funding – which is to provide for the "PCS movements" of 1) "officers appointed to a commissioned grade" from civilian life, a military academy, or ROTC, 2) "Reserve and national Guard officers called or recalled to extended active duty," or 3) "officers or warrant officers appointed or recalled from enlisted status," Appendix O, at 7 – each of which category positively excludes Plaintiff's situation. Besides, whether Plaintiff is transferred, on paper, from his home in Virginia or from his prior PDS in San Diego, his move remains funded by MPN obligations and the move's expenses will be composed of either fixed costs (such as *per diem* and dislocation allowance, *see* JTR paras. 2025, 5452), independent of his location, or costs reimbursing expenses for the PCS move that *actually* occurs, *see generally* JTR para. 2200.B (adverting to reimbursement of the official traveler by the government); *see also* Staff Sergeant Frank D. Carr, USMC, 67 Comp. Gen. 474 (1988) ("The established rule is that legal rights and liabilities in regard to per diem and other travel allowances vest when travel is performed under orders.").

Plaintiff additionally disputes that specifically "recall" orders are required to move him through the "various gates" necessary to "bring someone back on active duty." Again, though ignored by the Navy, the reality is that intermediate assignments – such as Plaintiff's 10-day stop with the Transient Personnel Unit, Norfolk, Va.– can be included in any kind of orders, not just "recall" orders. *See, e.g.,* Appendix D, at 1 (change-duty orders noting a one-day stop at the Fleet Training Center, Norfolk, Va.). And, as scruti-

ny of the Orders shows, they contain no specific instructions for any command as to steps necessary to restore Plaintiff to an active-duty status.

Finally, in conceding that filing the "recall" Orders in Plaintiff's record would be contrary to BCNR's relief, the Navy also unavoidably concedes that the Orders in fact do memorialize an assertion that Plaintiff has not continuously served on active duty. As such, and as detailed *supra*, the Orders run counter to that relief, regardless of whether they will be retained in Plaintiff's OMPF, to which the record-correction statute makes no reference, *see* 10 U.S.C. § 1552(h) (a military record is *any* "document or other record that pertains to . . . an individual member or former member of the armed forces.").

C. Back Pay and Allowances

Plaintiff appreciates the Navy's "informal" request to DFAS relative to the question of back pay and allowances, as well as the Navy's assurance that DFAS will calculate those entitlements "pursuant to applicable regulations." He nevertheless affirms his earlier submission on this matter, *see* JSR, Dec. 8, 2016, at 2–4, and notes, furthermore, that the Navy's assurance is essentially tautological, begging the key question as to *which facts* the "applicable regulations" will be applied by DFAS, namely: 1) whether DFAS will construe Plaintiff's period of constructive service as running without interruption from the date of his unlawful separation to the prospective date of his assignment to a new PDS, and 2) whether DFAS will consider Plaintiff as having been assigned to CARL VINSON as his PDS during that period of constructive service. As above noted, it is not DFAS who is charged with *establishing* these facts. It is, on

the contrary, the Na vy, by virtue of the record submitted to DFAS, who establishes the predicate facts upon which basis payment is then determined to be due. The Comptroller General has elaborated on the point explicitly in noting that, when a record is corrected pursuant to correction-board action, "[t]he resulting benefits and liabilities depend solely upon a proper application of the statutes to the facts *as shown by the corrected record*." 56 Comp. Gen. 587 (1977) (emphasis supplied). Whether Plaintiff's record contains a document memorializing the purported (but, in view of SECNAV's action, incorrect) fact that Plaintiff has not served continuously on active duty and has not been, for that period of service, assigned to CARL VINSON is, therefore, of capital importance – and is susceptible of resolution now, since DFAS's action will not constitute a future adjudication of the issue but will rather (and merely) be a consequence flowing from the record as already developed by the Navy.

Finally, in further explanation of Plaintiff's reasoning behind the request he makes of the Navy and the Court *infra* relative to the former's request for a further stay of this action, he invites their attention to the fact that as early as April 28, 2016, BCNR advised him, with copy to DFAS, that, "[a]fter NPC makes [corrections to his record, DFAS] *will make payment* of any money that [he] may be entitled to," JSR, May 2, 2016, Ex. 2, at 1 (emphasis supplied), and that a 90-day timeframe was approximated for such payment, *id.* (as the parties reported at the time). Indeed, also on April 28, 2016, BCNR "authorized [DFAS] to pay all monies lawfully found to be due [to Plaintiff] as a result of the . . . *correction to [his] naval record*." *See* Appendix S, at 1 (BCNR letter to Commander, Navy Personnel Command, copy

to DFAS, April 28, 2016) (emphasis supplied). No reference whatsoever was made in BCNR's authorization to DFAS or in its advice to Plaintiff to calculation (or payment) of entitlements as contingent upon Plaintiff's "report[ing] to active duty." Holding up any even partial settlement of those entitlements upon this new and novel basis appears therefore to be in direct conflict with BCNR's advice to Plaintiff, its authorization to DFAS, and its express requirement for the "expedited" processing of its approved recommendations, *see* JSR, Dec. 8, 2016, App. D, at 1, 3.

D. Plaintiff's Answer to Navy's Request for Further Stay

Lest there be any threshold question as to the authority of the Court to consider the matters herein raised, Plaintiff notes that as well as being ripe for consideration they also 1) fall within the Court's jurisdiction, as the bases for money claims under 37 U.S.C. §§ 204, 305a(a) and (c), and 405(a) and as collateral to those claims, 28 U.S.C.§ 1491(a)(2) (2015) (providing for placement in duty status and restoration of position), and 2) present justiciable questions, because statute and regulation provide the inherent tests and standards against which the Court can assess the Navy's actions, *see, e.g., Murphy v. U.S.*, 993 F.2d 871, 873 (Fed. Cir. 1993).

Wherefore Plaintiff submits to the Court his agreement to the stay requested by the Navy, on condition that, pursuant to this Court's order – with its power to remand a matter to any "administrative or executive body or official," U.S. Ct. Fed. Claims R. 52.2(a); *see also Williams v. U.S.*, No. 10-263 (Fed. Cl. Apr. 28, 2010) (permitting parties to submit mat-

ters for agency consideration in the first instance), and "to control the disposition of cases on its docket," *Prati v. U.S.*, 82 Fed. Cl. 373, 378 (2008) (citation omitted) – or on the Navy's own initiative, and in view *inter alia* of the "general rule that [travel] orders may be modified when they are clearly in conflict with a law or regulation," Stephen T. Croall, 60 Comp. Gen. 478 (1981), and of the fact that achievement of "economy of time and effort for itself, for counsel, and for litigants," *Prati, id.* (citation omitted), is an important goal to be considered in any court's exercise of its inherent power to decide whether a stay should issue – a goal that would arguably be achieved by the Navy or, failing that, the Court, acceding to Plaintiff's conditions – the Navy:

1. Modify or reissue the Orders it has issued to Plaintiff, no later than February 1, 2017, to 1) label them "CHANGE DUTY" vice "RECALL," and 2) remove the reference to "activation of [Plaintiff's] active file from the naval reserve to active duty."

2. Modify or reissue the Orders it has issued to Plaintiff, no later than February 1, 2017, to 1) remove the reference to Plaintiff "detaching from home"; and 2) indicate that Plaintiff is detaching from his previous PDS, even if just "constructively"; or, in the alternative, memorialize in the Orders or another administratively final and official document, no later than February 1, 2017, that the Orders as presently drafted are issued for purposes of accounting and personnel administration only and are not to be construed to support any inferences that, from the date of his assignment to CARL VINSON in June 2006 to the date

of his properly reporting to his new duty station under competent travel orders, Plaintiff 1) has ever been detached from CARL VINSON or 2) assigned to any subsequent PDS or 3) has not continued without interruption to serve on active duty assigned to CARL VINSON, but are to be construed as establishing the contrary, pursuant to BCNR Docket No. 4284-14, approved April 25, 2016.

3. Calculate and submit to Plaintiff and the Court, no later than February 1, 2017, 1) an amount due Plaintiff through December 31, 2016, at his currently applicable pay grade and 2) a projected deadline for payment.

4. Provide, within 10 days of Court action on the issues raised in this status report, a brief statement of the grounds for ASN's amendment and denial of BCNR's previously approved recommendations (g) and (h), which, at a minimum, addresses the issues raised by Plaintiff herein relative to that amendment, to include discussion of any relevance the Navy or DOD believes the promotion-eligibility period provided for at 10 U.S.C. § 629(c) (2015) might have to Plaintiff's promotion.

5. Agree to provide the Court and Plaintiff with: 1) a copy of any directive, memorandum, or other document forwarding Plaintiff's promotion to OSD no later than 15 days after it is signed; 2) status reports vis-à-vis Plaintiff's promotion every 30 days thereafter; 3) notice no later than 15 days following the routing of his promotion nomination recommendation through OSD en route the Senate; and, 4) a detailed and comprehensive report re-

garding the status of Plaintiff's promotion no later than 60 days prior to the date the Navy expects Plaintiff to report to his next permanent duty station.

Respectfully submitted,

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January 6, 2017

APPENDIX N

ROUTINE ZYUW RUCLFVA0000 3421238
R 071238Z DEC 16
FM COMNAVPERSCOM MILLINGTON TN//PERS448 //
TO BUPERS MILLINGTON TN//JJJ//
PERSUPP DET WASHINGTON DC//JJJ//
TRANSITPERSU NORFOLK VA//JJJ//
NPASE NORFOLK VA//JJJ//
CHINFO WASHINGTON DC//JJJ//
PERSUPP DET NAVSTA NORFOLK VA//JJJ//
NAVY IPO WASHINGTON DC//JJJ//
COMNAVREG MIDLANT NORFOLK VA//JJJ//

UNCLAS //N01321//
MSGID/GENADMIN/CHNAVPERS//
SUBJ/BUPERS ORDER//
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BUPERS ORDER: 3426 XXX-XX-3671/1650 (PERS-448)
OFFICIAL RECALL ORDERS FOR
LCDR JOHN FORREST SHARPE, USN
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
IN CARRYING OUT/PROCESSING THESE ORDERS, BOTH PARTS ONE AND TWO MUST BE READ AND LISTED INSTRUCTIONS COMPLIED WITH.
. FOR OFFICIAL USE ONLY
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
P A R T O N E
- HOME ADDRESS:
13088 LIGHTHOUSE LN CARROLLTON VA 23314
- WITHIN SEVEN DAYS AFTER RECEIPT OF THESE ORDERS PROCEED AND REPORT MEDICAL OFFICER DESIGNATED BY REGION EAST

FOR PHYSICAL EXAMINATION AND SCREENING FOR HUMAN IMMUNODEFICIENCY VIRUS (HIV) EXPOSURE. NEGATIVE HIV TEST RESULTS MUST BE VERIFIED AND DOCUMENTED WITHIN 24 MONTHS PRIOR TO EXECUTION OF THE ORDERS. INCLUDE A FLIGHT PHYSICAL IF BEING ORDERED TO DUTY INVOLVING FLYING. IF FOUND NOT PHYSICALLY QUALIFIED IMMEDIATELY RETURN ABOVE ADDRESS, UPON ARRIVAL CONSIDER RELEASED FROM TEMPORARY ACTIVE DUTY. IF FOUND PHYSICALLY QUALIFIED IMMEDIATELY RETURN ABOVE ADDRESS, UPON ARRIVAL CONSIDER RELEASED FROM TEMPORARY ACTIVE DUTY UNTIL SUCH TIME AS NECESSARY TO COMMENCE TRAVEL IN FEB 2017 AND IN TIME TO REPORT AS DIRECTED BELOW:
- MEMBER DIRECTED: UPON NOTIFICATION OF PCS AND PRIOR TO TRANSFER, MEMBER IS REQUIRED TO VISIT THE MOVING MADE EASY TRICARE SITE AT: WWW.TRICARE.MIL/MOVING AND FOLLOW THE INSTRUCTIONS FOR TRANSFERRING THEIR TRICARE PRIME OPTION (IF NECESSARY). IF CARE IS NEEDED WHILE IN TRANSIT, MEMBERS ARE REQUIRED TO CONTACT HIS/HER CURRENT REGIONAL TRICARE CONTRACTOR FOR COUNSELING ON URGENT OR EMERGENCY MEDICAL CARE DURING PCS MOVES. IN THE EVENT OF A TRUE MEDICAL EMERGENCY WHILE IN TRANSIT (SAFEGUARDING LIFE, LIMB OR EYESIGHT, OR TO RELIEVE SUFFERING OR SELF-RISK OR HARM), THE BENEFICIARY SHOULD IMMEDIATELY SEEK TREATMENT AT THE NEAREST HOSPITAL'S EMERGENCY DEPARTMENT. TRICARE PRIME ENROLLEES WHO VIS-

IT A CIVILIAN EMERGENCY ROOM MUST NOTIFY THEIR REGIONAL TRICARE CONTRACTOR WITHIN 24 HOURS IN ORDER FOR A REFERRAL FOR EMERGENCY CARE TO BE PROVIDED. IF IT IS DETERMINED THAT A TRICARE PRIME BENEFICIARY HAS OBTAINED ROUTINE CARE(NON-EMERGENT) IN AN EMERGENCY DEPARTMENT, A POINT OF SERVICE CHARGE (PAID BY THE SPONSOR) MAY BE INCURRED. THE TRICARE WEBSITE AND REGIONAL TRICARE CONTRACTORS CAN ALSO PROVIDE GENERAL INFORMATION AND HEALTH CARE OPTIONS AVAILABLE FOR FAMILY MEMBERS NOT ENROLLED IN TRICARE PRIME. FOR INFORMATION REGARDING TRICARE COVERAGE FOR YOU OR YOUR DEPENDENT(S) IN THE CONTINENTAL UNITED STATES (CONUS), GO TO
HTTP://WWW.TRICARE.MIL/CONTACTUS/CALLUS.ASPX OR CALL YOUR RESPECTIVE REGIONAL TRICARE CONTRACTOR AS FOLLOWS:
- NORTH REGION (HEALTH NET FEDERAL SERVICES, LLC): 1-877-874-2273
- SOUTH REGION (HUMANA MILITARY): 1-800-444-5445
- WEST REGION (UNITED HEALTHCARE MILITARY & VETERANS): 1-877-988-9378 IF YOU HAVE OVERSEAS PCS ORDERS, TRICARE QUESTIONS SHOULD BE DIRECTED TO THE TRICARE OVERSEAS PROGRAM (TOP) CONTRACTOR - INTERNATIONAL SOS. FOR INFORMATION REGARDING THE HEALTHCARE OPTIONS AVAILABLE TO YOU AND YOUR FAMILY WHILE OVERSEAS, CONTACT THE TRICARE SERVICE CENTER LOCATED AT THE MILITARY TREATMENT FACILITY (MTF) THAT SERVES

YOUR AREA OR CALL YOUR RESPECTIVE REGIONAL CALL CENTER AS FOLLOWS:
- EURSIA-AFRICA: 44-20-8762-8384
- PACIFIC: 65-6339-2676
- LATIN AMERICA AND CANADA: 1-215-942-8393
IF YOUR PCS ORDERS ARE TO A REMOTE OVERSEAS LOCATION THAT IS NOT SERVICED BY AN MTF, CONTACT THE APPLICABLE PHONE NUMBER ABOVE TO COORDINATE YOUR HEALTHCARE COVERAGE. ADDITIONAL TOP INFORMATION CAN BE FOUND AT: HTTP://WWW.TRICARE-OVERSEAS.COM/BENEFICIARIES.HTM.
- MEMBER DIRECTED: UPON RECEIPT OF ORDERS, IF ENROLLED IN THE EXCEPTIONAL FAMILY MEMBER PROGRAM (EFMP), MEMBER IS DIRECTED TO HAVE THE DETACHING FLEET FAMILY SERVICE CENTER EFMP CASE LIAISON (FFSC CL) AND THE HEALTH BENEFITS ADVISOR (HBA) WHO IS THE TRICARE REPRESENTATIVE CONFIRM CARE FOR THE FAMILY MEMBER(S) WITH THE GAINING FFSC CL AND HBA. ADDITIONAL EFMP INFORMATION CAN BE FOUND ON THE WEB AT: HTTP://WWWW.PUBLIC.NAVY.MIL/BUPERS-NPC/SUPPORT/EFM/PAGES/DEFAULT. ASPX. THE EFMP IS GOVERNED BY OPNAVINST 1754.2D AND SECNAVINST 1754. 5B AND MILPERSMAN 1300-700.
------- INTERMEDIATE (01) ACTIVITY (M) -------
REPORT NET 11 FEB 17 BUT NLT 13 EDA:
FEB 17 13 FEB 17
TO TPU NAVSTA NORVA OTH UIC: 32002
LOCATION: VA, NORFOLK
FOR TEMPORARY DUTY UNDER INSTRUCTION ACC: 341

FOR APPROXIMATELY 10 DAY(S)
- PERSONNEL ACCOUNTING SUP-
PORT: PERSUPPDET NORVA UIC: 42574
TO INCLUDE 10 DAY(S) AT PRO-
CESSING
CLASS: CONV: 170213 GRAD: 170222
CDP:
UPON COMPLETION OF TEMPO-
RARY DUTY UNDER INSTRUCTION
AND WHEN DIRECTED, DETACH. EDD: 22 FEB
17
- REPORT NOT LATER THAN 0730 13 FEB 17
AND NOT EARLIER THAN 11 FEB 17 . REPORT-
ING PRIOR TO NOT EARLIER THAN DATE WILL
TERMINATE LEAVE STATUS AND RESULTS IN
NON-PAYMENT OF PER DIEM FOR PERIOD
PRIOR TO THE NOT EARLIER THAN DATE
SPECIFIED UNLESS AUTHORIZED UNDER
MILPERSMAN 1320-140.
------- INTERMEDIATE (02) ACTIVITY (M) -------
REPORT NET 21 FEB 17 BUT NLT 23 EDA:
FEB 17 23 FEB 17
TO NAVY PA SUPPORT ELEMENT UIC: 63376
NORVA
LOCATION: VA, NORFOLK
FOR TEMPORARY DUTY UNDER ACC: 341
INSTRUCTION
FOR APPROXIMATELY 36 DAY(S)
- PERSONNEL ACCOUNTING SUP- UIC: 42574
PORT: PERSUPPDET NORVA
TO INCLUDE 36 DAY(S) AT TRAIN-
ING
CLASS: CONV: 170223 GRAD: 170330
CDP:
UPON COMPLETION OF TEMPO-
RARY DUTY UNDER INSTRUCTION EDD: 30 MAR

AND WHEN DIRECTED, DETACH. 17
- REPORT NOT LATER THAN 0730 23 FEB 17 AND NOT EARLIER THAN 21 FEB 17 . REPORTING PRIOR TO NOT EARLIER THAN DATE WILL TERMINATE LEAVE STATUS AND RESULTS IN NON-PAYMENT OF PER DIEM FOR PERIOD PRIOR TO THE NOT EARLIER THAN DATE SPECIFIED UNLESS AUTHORIZED UNDER MILPERSMAN 1320-140.
- MEMBER ADVISED: NO PERDIEM/LODGING REIMBURSEMENT AUTHORIZED AT ANY INTERMEDIATE STOP(S) IN THE SAME GEOGRAPHIC LOCATION AS THE ULTIMATE DUTY STATION. EXCEPTION TO THIS POLICY IS ARDUOUS SEA DUTY IDENTIFIED IN JTR U5120D AND LISTED IN OPNAVINST 4650.17.
- MEMBER DIRECTED: FOR EACH INTERMEDIATE STOP, IF GOVERNMENT QUARTERS ARE AVAILABLE (BQ/SHIPBOARD BERTHING) AND THE BASE HAS A GOVERNMENT MESS APPROPRIATED FUND FOOD SERVICE ACTIVITY/GALLEY AVAILABLE TO THE TRAVELER, USE OF THE GOVERNMENT MEAL PER DIEM RATE IS DIRECTED. IF GOVERNMENT MESSING IS NOT AVAILABLE OR IS PARTIALLY AVAILABLE, OBTAIN AN ENDORSEMENT TO THAT EFFECT FROM THE HOST COMMAND. JTR PARA U4400 APPLIES.
- A. FOR MORE INFORMATION ON YOUR NEXT PERMANENT CHANGE OF STATION (PCS) VISIT HTTP://WWW.CNIC.NAVY.MIL/CONTACTHOUSI
NG. THIS WEBSITE PROVIDES ON AND OFF BASE HOUSING CONTACT AND GENERAL INFORMATION ABOUT NAVY LOCATIONS WORLDWIDE.
- B. MEMBER ADVISED: TO INITIATE HOUSING

APPLICATION OR RECEIVE COMMUNITY HOUSING INFORMATION USE ONLINE HOUSING EARLY APPLICATION TOOL (HEAT), VISIT HTTP://WWW.CNIC.NAVY.MIL/HEAT
- C. TO VIEW PRIVATIZED AND COMMUNITY HOUSING LISTINGS AT YOUR NEXT DUTY STATION VISIT HTTP://WWW.CNIC.NAVY.MIL/HOMES FOR MORE INFORMATION ON THIS DEPARTMENT OF DEFENSE SPONSORED WEBSITE.
------- ULTIMATE ACTIVITY (M) -------
REPORT NOT LATER THAN MAY 17 EDA: MAY 17
TO CHINFO/FSD LIAISON OFFICE UIC: 47691
PERMANENT DUTY STATION DC, WASHINGTON
FOR DUTY
ACC: 100
BSC: 10010
PRD: 2005
- MEMBER ADVISED: CHILDCARE INFORMATION AND REGISTRATION FOR NEW DUTY STATION IS AVAILABLE AT: HTTPS://WWW.CNIC.NAVY.MIL/CYP
- IT IS IMPERATIVE THAT THE SUPPORTING PERSUPPDET THAT PROCESSES THESE ORDERS NOTIFY NAVPERSCOM MILLINGTON (PERS-80C3 AND PERS-8023) IMMEDIATELY UPON THE EXECUTION OF THESE ORDERS. THIS NOTIFICATION IS REQUIRED TO ENSURE ACTIVATION OF SNO'S ACTIVE FILE FROM THE NAVAL RESERVE TO ACTIVE DUTY. ALSO THE ASSIGNMENT OF PROPER ACCOUNTING CLASSIFICATION CODE (ACC 100), AND THEREBY ENSURING PROPER CONSIDERATION ON SNO'S FILE WITH PERTINENT ACTIVE SELECTION BOARDS. IF PERS-80C3 IS NOT NOTIFIED OF THE ACTUAL REPORTING DATE (THE DATE

THE MEMBER REPORTED) OF THESE ORDERS. IT WILL RESULT IN THE SNO MEMBER HAVING PAY AND PROMOTIONAL PROBLEMS. POC: EMAIL P80C3@ PERSNET.NAVY.MIL PHONE COMM:(901) 874-3209 OR DSN 882-3209. POC FOR PERS-8023 EMAIL: P8023@PERSNET.NAVY.MIL PHONE COMM: (901) 874-4537 OR DSN: 882-4537.
- MEMBER ADVISED: NAVY LODGE IS THE OFFICIAL GOVERNMENT LODGING WHEN ON PCS ORDERS. FOR RESERVATIONS CALL 1-800-628-9466 OR VISIT WEBSITE WWW.NAVY-LODGE.COM. FOR ADDITIONAL GOVERNMENT LODGING OPTIONS MAY BE LOCATED AT WEBSITE WWW.DODLODGING.NET OR CALL TOLL FREE 1-877-NAVY- BED (1-877-628-9233) TO DETERMINE GOVERNMENT LODGING AVAILABILITY IN THE VICINITY OF OLD AND NEW PERMANENT DUTY STATIONS. RESERVATIONS ARE REQUIRED TO ENSURE ROOM AVAILABILITY.
------- ADDITIONAL DUTY ACTIVITY -------
------- ACCOUNTING DATA -------
PCS ACCOUNTING DATA:
MAC CIC: N0002217CSW5664
CIC: AE2L71SL
LOA: 1771453.2250 210 00022 068566 2D SW5664 000227242008
SDN: N0002217CSW5664
TAC: NA27
.
NTS ACCOUNTING DATA:(USE BUPERS CROSSWALK)
NTS TAC: NN6_
SAC LOA: 1771453.2250 210 00022 068566 2D SW5664 000227242008 NTS
SDN: N00022 CSSNN6_

TEMDUINS ACCOUNTING DATA FOR FY-17
LOA: 1771804.22MM 210 62980 0 068566 2D OW5664 00022708100E
SDN: N0002217TOW5664
P A R T T W O
BUPERS ORDER: 3426 XXX-XX-3671/1650 (PERS-448)
OFFICIAL RECALL ORDERS FOR
LCDR JOHN FORREST SHARPE, USN
- MEMBER ADVISED: IF THIS ORDER CONTAINS FY17 OM&N (TRAINING PER DIEM) FUNDING, PROGRAM/FUND ALLOCATION IS ISSUED IN ANTICIPATION OF ENACTMENT OF THE FY17 DOD APPROPRIATIONS ACT OR A FY17 CONTINUING RESOLUTION (CR) AND IS SUBJECT TO AVAILABILITY OF FUNDS AND ALL PROVISIONS OF WHICHEVER ACT IS APPLICABLE.
- DETACHING COMMAND: IF TRANSOCEANIC TRAVEL WILL BE PERFORMED BY MEMBER, PORT CALL ASSIGNED BY THE NAVY PASSENGER TRANSPORTATION OFFICE WILL CANCEL THE REPORT NOT LATER THAN (NLT) DATE, AT RECEIVING COMMAND, AND SHALL CONSTITUTE THE SPECIFIC DATE MEMBER IS TO REPORT FOR TRANSPORTATION. IF THIS IS AN MODIFICATION CANCELLATION OR MODIFICATION OF PORT CALL MAY BE REQUIRED. IF SO, IMMEDIATELY CONTACT SERVICING NPTO. OPNAVINST 4650.15 SERIES REFERS.
- COMPLY WITH MILPERSMAN 1320-110 REGARDING TRAVEL TIME AUTHORIZED IN EXECUTION OF THESE ORDERS.
- MEMBER ADVISED: IF YOU WERE PREVIOUSLY RELEASED FROM ACTIVE DUTY UNDER SPECIAL SEPARATION BENEFITS (SSB) OR VOLUNTARY SEPARATION INCENTIVE (VSI)

PROGRAMS, OR RECEIVED SEPARATION PAY, PAYMENTS RECEIVED WILL BE DEDUCTED FROM RETIRED PAY SHOULD YOU SUBSEQUENTLY QUALIFY FOR SUCH PAY. YOU ARE DIRECTED TO REVIEW APPICABLE DIRECTIVE IN TITLE 10, U.S. CODE, SECTIONS 1174 AND 1175.

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

- MEMBER ADVISED: UPON ARRIVAL AT NEW DUTY STATION, ENSURE UPDATED PHONE/FAX NUMBER AND EMAIL ADDRESS ARE FORWARDED FOR INCLUSION IN THE PAO DIRECTORY. THE REGISTRATION FORM IS LOCATED AT: HTTPS://PORTAL.SECNAV.NAVY.MIL/ORGS/CHINFO/LISTS/PA 20DIRECTORY/ SEARCH.ASPX.

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

- DETACHING COMMAND: ENSURE MEMBER HAS A COMPLETED AND DOCUMENTED HIV TEST WITHIN 24 MONTHS OF EDD. EVERY EFFORT SHOULD BE MADE TO ENSURE RESULTS ARE RECEIVED PRIOR TO TRANSFER. HOWEVER, IF RESULTS ARE NOT RECEIVED, ENSURE MEMBER'S MEDICAL/DENTAL RECORD REFLECTS THAT THE MEMBER'S TEST WAS COMPLETED AND AWAITING RESULTS. TEST RESULTS SHOULD BE FORWARDED TO NEW DUTY STATION UPON RECEIPT FOR INCORPORATION IN MEDICAL/DENTAL RECORDS.

MBR IS DETACHING FROM HOME, 13088 LIGHTHOUSE LN CARROLLTON VA 23314

- THIS TRANSFER FUNDED FOR MEMBER AND AUTH DEPENDENTS AS REFLECTED ON SERVICE RECORD PAGE TWO, PER JTR U5215, DEPENDENTS ACQUIRED ON OR PRIOR TO THE EFFECTIVE DATE OF ORDERS ARE AUTH

TRAVEL/TRANSP ALLOWANCES FROM THE PLACE AT WHICH ACQUIRED TO THE NEW PDS, UP TO THE TVL/TRANSP ENTITLEMENT FOR TVL FROM OLD PDS TO THE NEW PDS. PLEASE REFER TO JTR APPENDIX A FOR DEFINITION OF EFFECTIVE DATE OF PCS ORDERS.
------- SPECIAL INSTRUCTIONS -------
- MEMBER DIRECTED: ACTION REQUIRED (AFFECTS PAY): IAW MILPERSMAN 1000-025, PROVIDE CHECK-IN DOCUMENTS WITHIN 4 DAYS OF ARRIVAL TO THE DESIGNATED COMMAND PASS COORDINATOR. REQUIRED DOCUMENTS LIST AT: HTTPS://MPTE.PORTAL.NAVY.MIL/SITES/NPC/PERS2/NPPSC 20INSTRUCTIONSCHECKLISTS/NPPSC_1320.1B_2_RECEIPT_CHECKLIST.PDF. CHECK-IN/CHECK-OUT STAMP(S) REQUIRED FROM EACH ACTIVITY.
- MEMBERS WHO RECEIVE PCS ORDERS WHEN THEIR OLD AND NEW PERMANENT DUTY STATIONS ARE WITHIN CLOSE PROXIMITY TO EACH OTHER (BASED ON A REASONABLE COMMUTE DETERMINED BY THE GAINING CO) MAY BE ELIGIBLE TO RECEIVE A CLOSE PROXIMITY WAIVER AND RECEIVE BAH BASED ON THEIR OLD PDS LOCATION. SEE NAVADMIN 101/10 FOR WAIVER ELIGIBILITY REQUIREMENTS AND PROCEDURES. GO TO: HTTP://WWW.PUBLIC.NAVY.MIL/BUPERS-NPC/REFERENCE/MESSAGES/PAGES/DEFAULT.ASPX.
- MEMBER ADVISED: IN CASES WHERE THESE ORDERS CONFLICT WITH THE JOINT TRAVEL REGULATIONS OR ANY OTHER REGULATION, THE REGULATION PREVAILS.
- MEMBER ADVISED: IAW MILPERSMAN 1320-

308, AUTHORIZE TRANSPORTATION COST REIMBURSEMENT FOR EXCESS BAGGAGE UP TO AND NOT TO EXCEED THE FOLLOWING: (A) ONE (1) PIECE FOR PILOTS, AIRCREW, DIVERS, AND PERSONNEL WHO MUST CARRY SPECIAL ISSUE GEAR WITH THEM (B) TWO (2) PIECES FOR ATTACHES. SERVICE MEMBERS IN RECEIPT OF PCS ORDERS TO FORWARD DEPLOYED UNITS ARE ADVISED THAT CERTAIN AIRLINES MAY CHARGE EXCESS BAGGAGE FEES. REIMBURSEMENT MAY BE REQUESTED IN ACCORDANCE WITH JOINT TRAVEL REGULATIONS (JTR) 3105-B UPON REPORTING TO YOUR ULTIMATE DUTY STATION. CONTACT PERS-40CC FOR ENLISTED PERSONNEL OR COGNIZANT DETAILER FOR OFFICERS. CONSULT YOUR LOCAL HOUSEHOLD GOODS (HHG) PERSONAL PROPERTY OFFICE REGARDING SPECIFIC HHG AND PERSONAL PROPERTY SHIPMENT ENTITLEMENTS.

- MEMBER ADVISED: SHIPPING HHG? HAVE MOVE QUESTIONS? WANT TO MAKE A DIFFERENCE? NOW YOU CAN PROCESS YOUR HHG SHIPMENT APPLICATION AND RECEIVE COUNSELING ON LINE AT YOUR CONVENIENCE AT: WWW.MOVE.MIL. YOU MUST COMPLETE THE CUSTOMER SATISFACTION SURVEY AFTER MOVE IS COMPLETE. CONTACT TRANSPORTATION SPECIALIST TO ANSWER QUESTIONS AND PROVIDE GUIDANCE CONCERNING YOUR HHG SHIPMENT MONDAY THROUGH FRIDAY 0800-1700 EASTERN TIME AT 1-855-HHG-MOVE OR BY EMAIL AT: HOUSEHOLDGOODS@NAVY.MIL.
- MEMBER DIRECTED: FOR INFORMATION REGARDING YOUR ULTIMATE DUTY STATION

CONTACT THE NEAREST DEPARTMENT OF DEFENSE FAMILY SERVICE CENTER OR RELOCATION ASSISTANCE OFFICE. 1-800-372-5463.
- YOU ARE ORDERED TO TEMPORARY ACTIVE NAVAL SERVICE FOR THE PURPOSE OF PHYSICAL EXAMINATION AND CONSIDERED IN TEMPORARY ACTIVE DUTY STATUS DURING TIME REQUIRED AND TRAVEL NECESSARY.
- IF FOUND NOT PHYSICALLY QUALIFIED EXAMINING MEDICAL OFFICER ADVISE NPC BY MESSAGE, (ATTN: PERS-448) REFERENCING THESE ORDERS, STATING DEFECTS IN DETAIL WITH ACTION TAKEN AND RECOMMENDATIONS, IF ANY, WITH INFORMATION COPIES TO BUMED AND COURTESY COPY ADDRESSEES ON THIS ORDER.
- MEMBER ADVISED: TRAVEL VIA PRIVATE OWNED CONVEYANCE IS PERMITTED AT YOUR OPTION FOR YOUR CONVENIENCE.
- IF SERVING UNDER ORDERS AUTHORIZING YOUR PARTICIPATION IN THE NAVAL RESERVE TRAINING PROGRAM IN A PAY OR NONPAY STATUS, YOU ARE DIRECTED TO REQUEST TERMINATION OF YOUR INACTIVE DUTY TRAINING ORDERS, VIA THE APPROPRIATE CHAIN OF COMMAND, TO BE EFFECTIVE NOT LATER THAN THE DAY PRECEDING THE DATE OF REPORTING TO ACTIVE DUTY IN COMPLIANCE WITH THESE ORDERS.
- AS SOON AS PRACTICAL FOLLOWING RECEIPT OF THESE ORDERS (IMMEDIATELY IF DETACHMENT IS IN LESS THAN 90 DAYS) COMMANDS SHALL ENSURE MEMBERS ACCESS THEIR NSIPS/ESR SELF SERVICE ACCOUNT TO COMPLETE/SUBMIT THE PCS TRAVEL INFORMATION. TO ACCESS THE AU-

TOMATED SYSTEM, THE MEMBER SHOULD LOGON TO THEIR ESR ACCOUNT, THEN SELECT THE 'UPDATE PCS TRAVEL' LINK ON THEIR ESR HOMEPAGE. FOR CONVENIENCE, THERE IS AN 'AUTO-FILL' FEATURE THAT AUTOMATICALLY COMPLETES THE PCS ITINERARY FROM THE MEMBER'S CURRENT ACTIVE ORDERS. MEMBERS NEED ONLY COMPLETE OR ADJUST PCS DETAILS SPECIFIC TO DEPENDENT TRAVEL, HOUSEHOLD GOODS WEIGHTS AND/OR POV SHIPMENTS. USE OF THE HARDCOPY PCS TRAVEL INFORMATION FORM (NAVPERS 7040/1) SHOULD ONLY OCCUR IF NSIPS ACCESS IS UNAVAILABLE. IN THOSE RARE CASES THAT NSIPS CANNOT BE USED, OBTAIN THE NAVPERS 7040/1 FROM YOUR COMMAND PASS COORDINATOR AND SUBMIT TO THE PERMANENT CHANGE OF STATION VARIANCE COMPONENT VIA YOUR SERVICING PERSONNEL SUPPORT DETACHMENT/PERSONNEL OFFICE. FURTHER DETAILS CAN BE OBTAINED IN BUPERSINST 7040.6 (SERIES) OR BUPERSINST 7040.7 (SERIES) INSTRUCTIONS TO CREATE/ACCESS A SELF SERVICE ESR ACCOUNT ARE LOCATED ON THE NSIPS SPLASH SCREEN, HTTPS://NSIPSPROD.NMCI.NAVY.MIL/NSIPSCLO / JSP/INDEX.JSP (UNDER 'USER INFORMATION').

- PASS COPIES OF THESE ORDERS TO PERS-9.
- FOR COMMAND MAILING ADDRESS CONSULT THE STANDARD NAVAL DISTRIBUTION LIST (SNDL) ONLINE AT HTTP://DONI.DAPS.DLA.MIL/SNDL.ASPX OR VISIT YOUR PSA, PSD OR ADMIN OFFICE.

(SIGNED)

R. A. BROWN
REAR ADMIRAL, U. S. NAVY
COMMANDER NAVY
PERSONNEL COMMAND
FORMAT 401: REMEMBER TO READ YOUR ORDERS IN THEIR ENTIRETY
THIS MESSAGE HAS BEEN SENT IN A SECURE ENVIRONMENT. HOWEVER, IF IT MUST BE FORWARDED VIA EMAIL TO PERSON(S) WITH A NEED TO KNOW, YOU MUST ENSURE PROPER SAFEGUARDS ARE TAKEN TO PROTECT THE CONTENTS SINCE IT MAY CONTAIN SENSITIVE PII. YOU MUST ENCRYPT AND DIGITALLY SIGN ALL EMAILS THAT CONTAIN SENSITIVE PII. IF THE EMAIL FAILS TO SEND BECAUSE OF ENCRYPTION ISSUES, DO NOT SEND UNENCRYPTED AS THAT ACTION CONSTITUTES A PII BREACH AND MUST BE REPORTED. INSTEAD, CONTACT YOUR IAM FOR ASSISTANCE. SENSITIVE PII IS DEFINED AS THAT INFORMATION ABOUT AN INDIVIDUAL THAT, IF LOST, STOLEN OR COMPROMISED WOULD CAUSE UNDUE HARM AND AN UNWARRANTED INVASION OF PERSONAL PRIVACY.
PERS462 NNNN

APPENDIX O

[SEAL]

DEFENSE FINANCE
AND ACCOUNTING SERVICE
8899 E. 56TH STREET
INDIANAPOLIS, IN 46249

John F Sharp
13088 Lighthouse Lane
Carrollton VA 23314

Dear Mr. Sharp:

We received a copy of Directive 4284-14/10521-12 issued by the Office of the Secretary Navy. This directive places you on active duty during the period 01 Oct 2009 to your reporting date.

Before settlement can be made, we need certain information from you for the period 01 Oct 2009 through your reporting date. Although you may not know the date that you will report for duty at this time, the information we are requesting must cover through the day prior to your reporting date. This information is necessary to determine if you are due a payment.

Please send us a copy of the Internal Revenue Service Form(s) 1040, US Individual Income Tax Return, with all attachments, that you filed with the Internal Revenue Service along with your TD Form(s) W-2, Wage and Tax Statement, for the year(s 2009, 2010, 2011, 2012, 2013, 2014, 2015 and 2016. If you filed jointly, we also require your spouse's tax documents to verify the amount shown on your Form 1040. For the current year please send us a copy of the earnings statement your employer provided you for each pay period from 01 Jan 2017

through your reporting date. Also, please furnish us the following:

a. A chronological explanation of civilian employment and gross wages earned that coincides with the above requested documents. The date you began and the date you ended your duties with each employer and the gross wages earned for each period of employment. Be sure to include the name of each employer.

b. If you were self-employed, the nature of employment, period of employment, and gross wages earned. We also need copies of the forms you submitted to the Internal Revenue Service to report your gross wages.

c. If you received unemployment compensation in lieu of earnings during any part of the above period, provide the period that compensation was received and the address of the office from which it was paid.

d. If you performed any active duty tours, unit training assemblies, or additional flight training periods in either the reserve or National Guard, of any branch of service, the dates and amount of funds received must be provided to our office.

e. Furnish a copy of your DD Form 214, Certificate of Release or Discharge from Active Duty, for your separation on 30 Sep 2009. If you received benefits from the Department of Veterans Affairs (VA), list the period, type, and amount of benefits. If your VA benefits were reduced for the collection of a separation benefit, provide the debt amount, total deductions, and debt balance. Provide the address of the VA regional office that you received benefits. Note: If VA benefits were received during the dates mention above, the total amount of VA benefit received will be reduced from your calculated payment, if applicable.

f. Provide the names and relationships of your

dependents during the above period. Please indicate if your spouse is affiliated with any branch of military service. If so, please provide the social security number and branch of service.

g. You may submit a claim to our office for medical and dental expenses incurred during the period of restoration. We require legible copies of bills marked "paid," and, if possible, supported by proof of payment. In addition, we require an affidavit in support of the claim. In the affidavit, you must swear under penalty of perjury that the amount claimed has not been and will not be reimbursed by insurance of any form, nor will any agency, public or private, pay or reimburse any part of the claim submitted. Only paid bills will be considered.

h. The Defense Finance and Accounting Service (DFAS) is required to make all payments via direct deposit. Please provide our office a clear copy/scan of your government- issued photo identification, along with an SF 1199A (Direct Deposit Authorization, available from your financial institution) completed and signed by a bank representative, or a copy of a voided check.

We cannot process your case without the requested information and documentation. This is per the Department of Defense Financial Management Regulation (DoDFMR), Volume 16, Chapter 4, paragraph 040602. Please note that failure to provide this information will delay your payment. We will reopen your case when we receive a reply from you. Please note that you have six years from the date of the directive to provide this information or your claim will be barred under the Barring Act of 1940, as amended by 31 U.S.C 3702.

Under the Privacy Act of 1974, we advise that the authority for soliciting this information will be used

to determine your entitlement to pay and allowances as a result of the correction to your records.

Upon receipt of all requested information, from all sources, including other Government agencies; we can begin to process your case. Our normal processing is approximately 90 days after receipt of all information. Cases are processed on a "first in, first out" basis. We regret the inconvenience caused by this delay, but ask that you please allow 90 days before inquiring about your case.

When providing all information to our office please reference your account number MSFSKT5RG. You may submit all items to our office at DFAS-IN/JFEAA, 8899 E. 56th St., ATTN: COR/Claims, Indianapolis, IN, 46249-3300. You can reach Correction of Records/Claims customer service by calling, toll free, 1-866-912-6488, option 2. Our fax number is (317)275-0279. For tracking purposes, we request you send a brief email letting us know when a fax has been sent. Our office can be contacted at the following e-mail address: dfas.indianapolis-in.jfe.mbx.cor-claims@mail.mil.

Sincerely,

/s/
S. McFadden
Financial Management
Specialist
Directorate of Debt and
Claims Management

Enclosures: As stated

APPENDIX P

United States Court of Federal Claims

No. 15-1087C
Filed: March 1, 2017

JOHN F. SHARPE,	*	
Plaintiff	*	No.: 1:15-cv-01087
	*	Judge: Thomas C.
v.	*	Wheeler
THE UNITED STATES,	*	
Defendant.	*	

JOINT STATUS REPORT

Pursuant to this Court's January 10, 2017 Order (Order), the parties submit this Joint Status Report with their respective positions relative to the implementation of the recommendations of the Board for Correction of Naval Records (BCNR). In their previous status update, the parties updated the Court regarding the implementation of the relief directed by the BCNR, as approved by the Secretary of the Navy (SECNAV) on April 25, 2016, relative to Mr. Sharpe's claims for back pay, reinstatement, correction of his naval record and other relief. The Navy informed the Court that Mr. Sharpe's naval record had been corrected and orders to

get Mr. Sharpe back on active duty had been issued. Joint Status Report (Dec. 8, 2016), ECF No. 20, at 1. The parties subsequently jointly sought leave of the Court to file a supplement to the December 8, 2016 report. The parties informed the Court that the Navy annotated the Naval Inspector General's case on Mr. Sharpe as "not substantiated" and the Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN) issued an amended order to clarify the mechanism by which Mr. Sharpe's promotion would be implemented. Joint Motion to Supplement the Joint Status Report (filed Jan. 6, 2017), ECF No. 22, at 1-2.

The Parties' Joint Position

The parties now report that Mr. Sharpe reported on Active Duty on February 13, 2017, and is currently assigned to temporary duty (TDY) until March 30, 2017, following which he will report in May to his final permanent duty station (PDS). His promotion package has been routed successfully through the offices of Commander, Navy Personnel Command and the Chief of Naval Personnel. The promotion package is currently being processed by the Office of Judge Advocate General, Administrative Law Branch. The package will then make its way to the Judge Advocate General, the Chief of Naval Operations, the Assistant Secretary of the Navy (Manpower & Reserve Affairs), and the Office of the Secretary of Defense, before going to the Senate for confirmation.

Additionally, the Navy reports that the Defense Finance and Accounting Service (DFAS) provided a letter to Mr. Sharpe requesting documentation from Mr. Sharpe in order for DFAS to calculate the appropriate back pay due to him. *See* Exhibit 1 (February 10, 2017, Letter from DFAS to Mr. Sharpe). Mr. Sharpe sent DFAS a packet which was delivered on February 27, 2017, and which he believes contains all the information DFAS requested. DFAS will review the

information that Mr. Sharpe provided and let him know if it believes any additional information is necessary. As the Navy previously informed this Court in the parties' Joint Motion to Supplement, DFAS has begun calculating the back pay amounts. Joint Motion to Supplement the Joint Status Report, at 22. Once the information from Mr. Sharpe is reviewed by DFAS, DFAS will complete the calculations and provide Mr. Sharpe with final amounts it believes he is due.

Finally, the parties also report that Mr. Sharpe is working with points of contact inside the Navy to ensure that various electronic records and database entries which previously reflected his separation from the Navy are corrected, consistent with the BCNR's approved recommendations, and as has already been done with regard to Mr. Sharpe's Official Military Personnel File, as the Navy previously reported in the letter of December 6, 2016, from Navy Personnel Command to Mr. Sharpe, Joint Status Report (Dec. 8, 2016), Appendix A, at 1. Mr. Sharpe is also working with Navy administrative personnel to ensure that the appropriate entry is made in his record explaining the gap resulting from the setting aside of his separation and his return to duty. *See id.*, at 2.

Navy's Position

The Navy now requests that the Court continue the stay it granted in its Order to afford the Navy time to continue effectuating Mr. Sharpe's promotion, to finalize the calculation of the appropriate back pay due to Mr. Sharpe, and to provide the parties an opportunity to assess the impact of the Navy's actions on Mr. Sharpe's claims currently pending before this Court. The Navy further proposes that the parties file a joint status report in 60 days. At that time, the parties can apprise the Court of the progress in this case and which issues, if any, remain outstanding.

Plaintiff's Position

Mr. Sharpe believes that, regarding the promotion package and the back-pay calculations, awaiting an additional 60 days for another update to the Court is unnecessary, and instead requests that the Navy be required to update the Court no later than March 17, 2017, regarding the status of his promotion package and to provide final back pay calculations. The reasons for this request are set forth briefly *infra*.

Regarding the promotion. First, it is unlikely that Mr. Sharpe's promotion will proceed through the Executive Branch and the Senate in 60 days; consequently, there is no ground to support any suggestion by the Navy that the additional two months is necessary so that it can be allowed to report significant and substantial progress on the promotion outside the Department of the Navy (DON). Second, the administrative "tasker" (Tasker) currently being used by the Navy to track Mr. Sharpe's nomination package reflects a deadline for action by the ASN of March 13, 2017. *See* Appendix A (General Tasker FY-09 Active Duty Navy Officer Nomination ICO LCDR John F. Sharpe, USN, 1650 (accessed on Feb. 15, 2017)), at 1. As the Tasker reflects and as the Navy herein reports, *supra*, review by ASN constitutes the final step for approval of his promotion package prior to action that will be taken outside the DON. Consequently, a March 17, 2017, deadline for another update to the Court 1) allows the Navy a week more that its self-imposed deadline for completion of all intra-DON, pre-confirmation action on his promotion, 2) will require that the Navy brief the Court and Mr. Sharpe either as to its having completed DON action on his promotion (assuming that it occurs on schedule or only slightly thereafter) or as to its current status, the reason for any delay, and a new projected timeline.

Regarding the back pay calculations. Mr. Sharpe provided the Navy with a "claim for settlement and payment" pursuant to 32 C.F.R. 732.10(b)(2) (2015) on September 30, 2015, when he submitted his final records-correction request

to BCNR. His submission included a detailed breakdown of Mr. Sharpe's claimed entitlements, with variations accounted for based upon his years of service, his cumulative sea-duty time, and annual changes in entitlement rates. Later, on April 28, 2016, BCNR "authorized [DFAS] to pay all monies lawfully found to be due [to Plaintiff] as a result of the . . . correction to [his] naval record." *See* Joint Motion to Supplement the Joint Status Report, Appendix S, at 1 (BCNR letter to Commander, Navy Personnel Command, copy to DFAS, April 28, 2016). The parties reported to the Court in May that BCNR outlined a 90-day approximate timeline of payment of pay and allowances due to Mr. Sharpe. *See* Joint Status Report (May 2, 2016), ECF No. 10, at 1, Exhibit 2, at 1. Finally, the Navy again now reports that it already told the Court on January 6, 2017, that DFAS has begun calculating back pay amounts. What this means, in essence, from Mr. Sharpe's point of view, is that: 1) DFAS has been on notice for many months of a pending claim for back pay and allowances starting on October 1, 2009 (the date after Mr. Sharpe's separation) and running through the end of 2015 (and now all of 2016 and into 2017); 2) since the date DFAS was advised, on April 28, 2016, of SECNAV's decision to grant Mr. Sharpe relief, it has had plenty of time to complete calculations up to and through 2016; 3) since Mr. Sharpe returned to active duty, DFAS only needs to calculate a month-and-a-half worth of entitlements for 2017 (surely a prospect of a few hours' work); and 4) the bottom line is that since the Navy indicated in early January 2017 that DFAS had begun calculations, they should be finished.

Because, as the parties reported, Mr. Sharpe has now provided to DFAS the material that he believes fully satisfies DFAS's request for information, the work remaining to DFAS should be to first decide upon and then deduct any amounts that it believes should be offset from Mr. Sharpe's settlement. This should be a simple matter of making a legal determination as to whether Mr. Sharpe's unemployment

compensation and interim civilian earnings should be offset (regarding which Mr. Sharpe provided to DFAS, for its convenience, a comprehensive discussion of applicable statutes, regulations, and administrative and judicial case law). If DFAS decides that matter in the affirmative, no calculations should remain to be done; if in the negative, it is a simple a matter of subtracting the unemployment and/or the civilian earnings from the subtotal of Mr. Sharpe's entitlements – surely no more than a day's work.

Two final points argue in favor of, respectfully, putting DFAS and the Navy on a relatively short leash. First, this Court has in similar cases afforded defendants on the order of 30 to 60 days to calculate back entitlements owed even where the defendant had no "head start," such as it has now had, in this case, for ten months (reckoning from the date of BCNR's advice to DFAS). *See*, e.g., *Pride v. U.S.*, 40 Fed. Cl. 730 (1998) (giving defendant 30 days for pay calculations after DFAS refused to move on a claim); *Kindred v. U.S.*. (40 days); *Carmichael v. U.S.*, 66 Fed. Cl. 115 (2005) (60 days); *Germano v. U.S.*, 26 Cl. Ct. 1446 (1992) (same). Given that there is, or should be, nothing more to do than to subtract offsets, if any, from Mr. Sharpe's settlement, a tighter timeline than this Court has offered in other circumstances, where there was more to be done, is surely appropriate.

Second and finally, as Mr. Sharpe briefed the Navy and this Court in his two previous submissions, there may be (if there is not already) a substantive disagreement between the parties regarding Mr. Sharpe's pay and allowances. This is because the Navy is currently treating Mr. Sharpe as if he were assigned to his home during his constructive-service period (October 1, 2009, the date following his voided separation, to February 12, 2017, the date prior to the day he reported TDY under his current orders). *See* Appendix B, Chief of Naval Operations N130 letter to Mr. Sharpe (Feb. 13, 2017), at 1 (advising Mr. Sharpe of housing-allowance entitlement based on his home rather than based on the geo-

graphic location of Mr. Sharpe's previous PDS). Mr. Sharpe, however, believes that statute, regulation, and administrative and judicial case law stand for the proposition that when a separation is voided and a service member is restored to duty, the record must necessarily show that he continued to serve at the PDS to which he was assigned on the date of his unlawful separation, and that the logical conclusion follows, for pay and allowance purposes, that his back pay should be calculated on the basis of the law and facts relevant to the pay he was receiving on the date of his separation.

It is possible that DFAS's calculations will be consistent with Mr. Sharpe's view of his entitlements; if not, further administrative or judicial proceedings will be necessary to resolve the disagreement between Mr. Sharpe and the United States as to his back pay and allowances due. Judicial economy as well as sensitivity to the time and expense of the parties both dictate that DFAS should be required to expeditiously provide its calculations to the parties and the Court so that all may know, promptly, whether further proceedings will be necessary to settle any disagreement that may arise on the basis of those calculations, and so that, if necessary, those proceedings may be initiated and competed swiftly and efficiently.

Respectfully submitted,

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March 1, 2017

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APPENDIX Q

United States Court of Federal Claims

No. 15-1087C
Filed: March 31, 2017

JOHN F. SHARPE,	*	
Plaintiff	*	No.: 1:15-cv-01087
	*	Judge: Thomas C.
v.	*	Wheeler
THE UNITED STATES,	*	
Defendant.	*	

JOINT STATUS REPORT

Pursuant to this Court's March 2, 2017 Order, ECF No. 27 (Order), the parties submit this Joint Status Report with their respective positions relative to the implementation of the recommendations of the Board for Correction of Naval Records (BCNR). In their previous status update, the parties updated the Court regarding the implementation of the relief directed by the BCNR, as approved by the Secretary of the Navy (SECNAV) on April 25, 2016, relative to Mr. Sharpe's claims for back pay, reinstatement, correction of his naval record and other relief. The Navy informed the Court that Mr. Sharpe's naval record had been corrected and orders to

return Mr. Sharpe to active duty had been issued. Joint Status Report (Dec. 8, 2016), ECF No. 20, at 1. The parties subsequently jointly sought leave of the Court to file a supplement to the December 8, 2016 report. The parties informed the Court that, among other things, the Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN) issued an amended order to clarify the mechanism by which Mr. Sharpe's promotion would be implemented. Joint Motion to Supplement the Joint Status Report (filed Jan. 6, 2017), ECF No. 22, at 1-2.

The Parties' Joint Position

The parties now report that Mr. Sharpe's promotion package has been routed successfully through the offices of Commander, Navy Personnel Command, the Chief of Naval Personnel, the Office of Judge Advocate General, Administrative Law Branch, the Judge Advocate General, the Chief of Naval Operations, and the Assistant Secretary of the Navy (Manpower & Reserve Affairs). On March 8, 2017, the Assistant Secretary signed an Action Memo for the Deputy Secretary of Defense, recommending that a "nomination scroll containing the name of [Mr.] Sharpe [be forwarded] to the President, recommending he nominate [Mr.] Sharpe for promotion." Exh. A. As of March 27, 2017, the Deputy Secretary of Defense signed the nomination package and it is being routed to the President and then the Senate. In the past, this part of the confirmation process has taken several months.

Additionally, the Navy reports that the Defense Finance and Accounting Service (DFAS) provided a letter to Mr. Sharpe on March 22, 2017, requesting two additional documents from Mr. Sharpe in order for DFAS to process his back pay. *See* Exh. B. Via government counsel, Mr. Sharpe provided DFAS with one of the documents on March 22, 2017, and with the other on March 27, 2017, when he received it from the Internal Revenue Service (IRS). Further,

the Navy reports that DFAS has received the required verification from the Department of Veterans Affairs and that Mr. Sharpe has no file regarding retirement, obviating the need to verify his retirement pay. DFAS indicates that it has completed its preliminary calculations for Mr. Sharpe's back pay, and is in the process of reviewing and certifying the calculations, after which point the back pay due to Mr. Sharpe will be disbursed. DFAS has informed counsel that once it receives all the necessary documentation, the remainder of the process would take a maximum of thirty days.

Finally, the parties also report that Mr. Sharpe is working with points of contact inside the Navy to ensure that various electronic records and database entries which previously reflected his separation from the Navy are corrected, consistent with the BCNR's approved recommendations. Mr. Sharpe is also working with Navy administrative personnel to ensure that the appropriate entry is made in his record explaining the gap resulting from the setting aside of his separation and his return to duty.

Navy's Position

The Navy now requests that the Court continue the stay it granted in its Order to afford the Navy time to receive a response from the Department of Defense and the President regarding Mr. Sharpe's promotion, to review and certify the calculation of the appropriate back pay due to Mr. Sharpe, and to provide the parties an opportunity to assess the impact of the Navy's actions on Mr. Sharpe's claims currently pending before this Court. The Navy further proposes that the parties file a joint status report in 45 days. At that time, the parties can apprise the Court of the progress in this case and which issues, if any, remain outstanding.

Plaintiff's Position

Mr. Sharpe understands that the United States requires additional time to effect his promotion, given that a number of further reviews and follow-on administrative actions remain necessary. He agrees, therefore, that submission of a subsequent joint status report addressing progress relative to the promotion would be appropriate, and respectfully asks the Court to require such a report no more than 30 days hence.

Mr. Sharpe does, however, object to any further stay with respect to the calculation and disbursement of back pay due. On March 22, 2017, DFAS informed Mr. Sharpe by telephone that all back-pay calculations had been completed on the basis of documentation he provided in February in response to DFAS's February 10, 2017, request. Specifically, DFAS reported that the examiner assigned to his case had noted in the case file that he had gone "as far as he [could]" with calculations pending the receipt of the two additional documents recently requested. *See* Exhibit B. As it happens, the two requested documents (an IRS verification of non-filing for 2011 and Mr. Sharpe's 2016 tax return) add no figures to DFAS's calculations – they merely confirm that Mr. Sharpe did not file a tax return for 2011, as he initially reported to DFAS in February, and that his civilian earnings for 2016 were in fact those already reported to DFAS by way of Mr. Sharpe's submission, also in February, of his only Form W-2 for 2016. The upshot of the foregoing is that DFAS has no outside, interim civilian earnings to take into account for 2011 and no additional such earnings, beyond those reported a month ago, for 2016. The calculations should be complete.

Because there are several areas as to which Mr. Sharpe and the United States may disagree in terms of the amount of back pay to be disbursed – such as, for example, the amount of Basic Allowance for Housing (which depends upon the geographic location of Mr. Sharpe's presumed permanent duty station during his constructive-service period), Career Sea Pay, and Career Sea Pay Premium due; the amounts to

set off against the balance of the disbursement based upon outside, interim civilian earnings and/or unemployment compensation; and amounts to deduct for Servicemembers Group Life Insurance premiums – efficiency and economy dictate that DFAS's calculations be provided to the parties immediately so that they may assess both the extent of any disagreement, if any, as to the amounts due, and the nature of the proceedings required to resolve any such disagreement.

Finally, Mr. Sharpe has requested that the United States afford him the opportunity to accept any amount that DFAS deems due to him based on its current calculations while reserving the right and opportunity to object to those calculations, should he wish to do so, and to receive any additional amounts due should he prevail on his objections before this Court or any other competent administrative or judicial body. This would amount to a stipulation of waiver by the United States of its defense against further claims for damages by Mr. Sharpe, arising from his claims before the BCNR and this Court, based upon his acceptance of any partial settlement from DFAS. *See* 10 U.S.C. § 1552(c)(3) ("[A]cceptance of a settlement . . . fully satisfies the claim concerned."); *accord* 32 C.F.R. § 723.10(c)(2). The government has not replied to Mr. Sharpe's request, so he now requests that this Court facilitate resolution of this narrow issue so that a maximum of progress may be made as to payment of amounts due.

Respectfully submitted,

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March 29, 2017

APPENDIX R

United States Court of Federal Claims

No. 15-1087C
Filed: May 2, 2017

JOHN F. SHARPE,	*	
Plaintiff	*	No.: 1:15-cv-01087
	*	Judge: Thomas C.
v.	*	Wheeler
THE UNITED STATES,	*	
Defendant.	*	

JOINT STATUS REPORT

Pursuant to this Court's April 4, 2017 Order (Order), the parties submit this Joint Status Report with their respective positions relative to the implementation of the recommendations of the Board for Correction of Naval Records (BCNR). In their previous status update, the parties updated the Court regarding the implementation of the relief directed by the BCNR, as approved by the Secretary of the Navy (SECNAV) on April 25, 2016, relative to Mr. Sharpe's claims for back pay, reinstatement, correction of his naval record and other relief. The Navy informed the

Court that Mr. Sharpe's naval record had been corrected and orders to return Mr. Sharpe to active duty had been issued. Joint Status Report (Dec. 8, 20 16). ECF No. 20, at 1. The parties subsequently jointly sought leave of the Court to file a supplement to the December 8. 20 16 report. The parties informed the Court that, among other things, the Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN) issued an amended order to clarify the mechanism by which Mr. Sharpe's promotion would be implemented. Joint Motion to Supplement the Joint Status Report (filed Jan. 6, 2017), ECF No. 22, at 1-2.

The Navy's Position

The Navy now reports that Mr. Sharpe's promotion package has been routed successfully through the offices of Commander, Navy Personnel Command, the Chief of Naval Personnel, the Office of Judge Advocate General, Administrative Law Branch, the Judge Advocate General, the Chief of Naval Operations, and the Assistant Secretary of the Navy (Manpower & Reserve Affairs). On March 8, 20 17, the Assistant Secretary signed an Action Memo for the Deputy Secretary of Defense, recommending that a "nomination scroll containing the name of [Mr.] Sharpe [be forwarded] to the President, recommending he nominate [Mr.] Sharpe for promotion." · As of March 27, 20 17, the Deputy Secretary of Defense signed the nomination package, which was then routed to the President and then the Senate. On April 16, 2017, the Senate received the nomination from the President. On May 1, 20 17, the Senate confirmed the nomination by a voice vote. See Exh. 1.

Additionally, the Navy reports that the Defense

Finance and Accounting Service (DFAS) indicated that it has completed its preliminary calculations for Mr. Sharpe's back pay, and is reviewing and certifying the calculations. Preliminary figures have been provided to Mr. Sharpe. However, DFAS recently indicated to counsel that it has authority to pay only base pay, basic allowance for housing (BAH) and basic allowance for subsistence (BAS). For payment of any additional entitlements – such as Career Sea Pay (and Career Sea Pay Premium), BAH for a location other than the one reflected in Mr. Sharpe's Master Military Pay Account as of the date of his separation, or the non-offset of wages Mr. Sharpe earned while moonlighting – DFAS requires a memorandum from the Navy's Chief of Naval Personnel, reflecting the personnel decisions on which these entitlements would be based.

The complications arise from the fact that Mr. Sharpe's situation is highly unusual. He has been separated from the Navy for approximately eight years. The BCNR directed the Navy to restore Mr. Sharpe to active duty as though the eight-year separation never took place. The Navy is now tasked with reconstructing Mr. Sharpe's personnel record for those eight years. As just one example, during those eight years the ship to which Mr. Sharpe was assigned changed ports (going from a locale with a lower BAH to a higher one), and this move raises the question of the proper geographic locale to use for computing BAH, which is intended to compensate for higher costs of living in a particular area.

The Navy is currently drafting the memorandum to the Chief of Naval Personnel, which will reflect all the entitlements the Navy believes should be accorded to Mr. Sharpe to restore him to a position he would have been in but for the separation – to the

greatest extent possible without creating an undue windfall. Although the parties appear to agree on some entitlements, they disagree as to others. The Navy – through counsel – has been working with Mr. Sharpe to understand his position with respect to certain entitlements and to see if the parties can reach agreement on the identification or resolution of the particular pay issues.

Once the Chief of Naval Personnel signs the memorandum, it will be sent to DFAS to include additional entitlements in the payment due Mr. Sharpe, if any. To the extent that Mr. Sharpe disagrees with the Navy's view of which additional entitlements he would have received but for the separation, he would be entitled to dispute it. It is the Navy's position that in such a dispute, the BCNR is the proper entity to opine on the correctness of the reconstructed record in the first instance.

Finally, the Navy understands that Mr. Sharpe is continuing to work with points of contact inside the Navy to ensure that various electronic records and database entries which previously reflected his separation from the Navy are corrected, consistent with the BCNR's approved recommendations.

The Navy now requests that the Court continue the stay it granted in its Order to afford the Navy time to receive a response from the President and the Senate regarding Mr. Sharpe's promotion. to provide to DFAS the Navy's memorandum on the appropriate entitlements due to Mr. Sharpe, and to provide the parties an opportunity to assess the impact of the Navy's actions on Mr. Sharpe's claims currently pending before this Court. The Navy further proposes that the parties file a joint status report in 45 days. At that time, the parties can apprise the Court of the progress in this case and which issues, if any,

remain outstanding. Once the Navy's position with respect to Mr. Sharpe's constructive personnel record is finalized in the memorandum from the Chief of Naval Personnel, a remand under Rule 52.2 may be an appropriate vehicle to have the BCNR correct the personnel record.

Plaintiff's Position

Mr. Sharpe respectfully submits to the Court his view that the pace of DFAS's action (amounting almost to inaction) on payment of amounts due under 10 U.S.C. § 1552(c)(1) (2016) incident to BCNR's correction of his record, should be considered unacceptable. In support whereof Mr. Sharpe offers the following brief summary of relevant events.

On April 25, 2016, SECNAV approved BCNR's decision to restore Mr. Sharpe to active duty for the period between October 1, 2009, and the date of SECNAV's approval. Joint Status Report Ex. 1, at 1–19, May 2, 2016, ECF No. 10-1 (SECNAV-approved BCNR decision of April 25, 2016). Three days later, by copy of a letter to the Commander, Navy Personnel Command, BCNR notified DFAS of the approved recommendation and authorized DFAS to "pay all monies lawfully found to be due as a result of the . . . correction to [Mr. Sharpe's] record." *See* Exhibit 2, at 1 (BCNR letter of April 28, 2016). BCNR simultaneously notified Mr. Sharpe that DFAS "*will make payment* of any money" found due. Joint Status Report Ex. 2, at 22, May 2, 2016, ECF No. 10-1 (BCNR forwarding letter of April 28, 2016) (emphasis supplied). As the parties reported to this Court at the time, BCNR's April 28, 2016, letter also suggested "approximate timelines" for implementation of its decision, Joint Status Report 1, May 2, 2016, which

included, for purposes of payment of money due, a projection of 90 days from April 28, 2016, i.e., July 27, 2016.

Though Mr. Sharpe attempted move the process along by informing the Court on December 12, 2016, that (as of that time) nothing had been done by way even of calculation let alone payment of amounts due, Joint Status Report 3, Dec. 12, 2016, ECF No. 20, DFAS still did not even acknowledge receipt of BCNR's decision until February 10, 2017, *see* Exhibit 3, at 1 (DFAS letter to Mr. Sharpe, undated but signed and received February 10, 2017),[2] and did not begin back-pay calculations until March 24, 2017, *see* Exhibit 4, at 1 (DFAS-DE Form 67 of March 24, 2017).

The Defendant maintains that that it was impossible for DFAS to have "calculate[d] the [back] pay [due] until Mr. Sharpe report[ed] to active duty, which [was then] scheduled to take place in early February 2017." Motion to Supplement Joint Status Report App. 1, at 22, Jan. 6, 2017, ECF No. 22-1. Hindsight shows the assertion to be baseless, because DFAS's first set of back-pay calculations, Ex. 4, at 1, only calculates amounts due through April 24, 2016 – a date more than *nine months prior* to Mr. Sharpe having reported to active duty pursuant to BCNR's decision.[3] So, in fact, DFAS, on the very day (April 25, 2016) BCNR's decision was approved, certainly and easily could have calculated (or begun calculating) the pay due between October 1, 2009, and April 24, 2016 – and which course of action BCNR

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[2] DFAS's letter was referenced as Exhibit 1 in, but not included with, the Joint Status Report of March 1, 2017.

[3] DFAS subsequently provided a second set of calculations covering the period April 25, 2017, to February 12, 2017. *See* Exhibit 5, 1–4 (DFAS-DE Form 0-110 of March 27, 2017).

apparently envisioned when it informed Mr. Sharpe that DFAS "will make payment" of amounts due within roughly 90 days of BCNR's decision. Instead, however, DFAS elected to do precisely *nothing* until March 24, 2017 – eleven months following BCNR's advice.

Now, even though the Defendant reported on March 31, 2017, that 1) Mr. Sharpe had provided to DFAS (as of March 27, 2017) all of the documentation that was requested to enable the calculation of his back pay, Joint Status Report 2, Mar. 31, 2017, and that 2) DFAS had informed Defendant's counsel that following receipt of that documentation "the remainder of the [back-pay] process would take a *maximum of thirty days*," *id.* (emphasis supplied), Mr. Sharpe still has not received a dime from DFAS,[4] notwithstanding its effective acknowledgement, *see* Exhibit 4, at 1; Exhibit 5, at 1, that it owes Mr. Sharpe at the very least something along the lines of $600,000. Given the "abiding moral sanction" of the military-correction-board process to "appropriately and fully erase . . . error [and to] compensate . . . injustice," *Caddington v. U.S.*, 147 Ct. Cl. 629, 632, 634 (1959), it is ironic that the United States not only may but must impose administrative charges, penalties, and interest upon military members who fail to fully discharge any debt owed thereto, *see generally* 31 U.S.C. § 3717 (2016); Department of Defense Financial Management Regulation, Volume 16 (2016), while the United States' agent, DFAS, is apparently permitted interminable delay as to payment of amounts it *concedes* are due. No wonder this Court was prompted to observe, on the basis of DFAS's

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[4] Perhaps "D-SLO" would be a more accurate, if less technically correct, acronym.

conduct in another correction-board case, that the former was "troubled that the [DFAS] can unilaterally circumvent the powers granted to the Secretary to fashion relief." *Pride v. U.S.*, 40 Fed. Cl. 730, 735 n.8 (1998).

Finally, adding insult to injury are two additional facts. First, counsel for DFAS now informs the Court that the former has literally nothing to show for how it has used the last thirty-plus days in terms of progress in this case: the only so-called "update" relative to the back pay due is that DFAS has "completed its preliminary calculations . . . and is reviewing and certifying the calculations" – which is precisely, *in haec verba*, what was reported to the Court on March 31, 2017. *See* Joint Status Report 2, Mar. 31, 2017 (stating that DFAS has "completed its preliminary calculations . . . , and is . . . reviewing and certifying the calculations."). Indeed, both sets of back-pay calculations were *already complete* when the parties' previous status update was submitted, and *nothing* on this front has been done since. Moreover, the news today is *worse* than what it was more than a month ago, because the commitment made in March – that review and certification of the back-pay amounts and their disbursement would take "a maximum of thirty days" – is *nowhere to be found* in today's report, giving rise to the not unreasonable question: is there a payment of monies the United States admits are owed to Mr. Sharpe *anywhere* in our future?

The second disturbing fact about the newest update from the Navy is that the Defendant appears *only now* to be coming to the realization that Mr. Sharpe's entitlement to certain pay and allowances depends upon a correct (or at least a definite and identifiable) conception of his status during the con-

structive-service period between October 1, 2009 (when he was unlawfully separated), and February 12, 2017 (when he began reporting for duty pursuant to his current orders). The Defendant apparently envisions that establishing such a clear a conception of Mr. Sharpe's status during the constructive-service period should be arrived via a new chapter in this seemingly interminable saga whereby the Chief of Naval Personnel prepares a memorandum *de novo* for the purpose of "reconstructing Mr. Sharpe's personnel record for those eight years."

But Plaintiff strongly objects to such a process, first because he already placed the issue of his claimed entitlements before the BCNR *nineteen months ago*, on September 30, 2015, by means of his inclusion with his application for correction of his naval record a "claim for settlement and payment," pursuant to 32 C.F.R § 723.10(b)(1) (2016). *See* Exhibit 6, at 1–5 (Claim for Settlement and Payment). This claim, *inter alia*, claimed an entitlement to payment of Career Sea Pay (CSP) for the duration of Mr. Sharpe's constructive-service period and to Basic Allowance for Housing (BAH) at the San Diego rate for the portion of that period during which his previous permanent duty station had San Diego as its geographic location. Several months later, and still over a year ago, BCNR advised DFAS of its obligation to "pay all monies lawfully found to be due as a result of the . . . correction to [Mr. Sharpe's] record," Ex. 2, at 1, suggesting that perhaps it was time to begin making the determination as to monies that might be "found to be due." Mr. Sharpe again, five months ago, advised counsel for the Navy as well as this Court of his claimed entitlement to CSP and San Diego BAH based upon the key fact in his case, namely, that the USS CARL VINSON (CVN 70) was

his Permanent Duty Station (PDS) on the date of his illegal separation and that, pursuant to the constructive-service doctrine, it necessarily so continued from that date until his recent reassignment. Joint Status Report 4–5, Dec. 12, 2016. And Mr. Sharpe *again* identified these specific entitlements, as well as others, as potential sources of disagreement, more than a month ago. Joint Status Report 4, Mar. 31, 2017. And, finally, since receiving DFAS's draft back-pay calculations on March 31, 2017, Mr. Sharpe has repeatedly advised both DFAS and counsel of his disagreements with aspects of those calculations and of the reasons therefore.[5] But rather than respond to Mr. Sharpe's claims or communications, the Navy now advises the Court that (in effect) it has ignored both the claim in his BCNR Application as well as his repeated attempts to flag these issues for resolution, and has (apparently) only just now realized that a reinstatement and back-pay case involves the need to "reconstruct[] Mr. Sharpe's personnel record for [the] eight years[']" worth of his constructive-service period.[6]

Plaintiff also objects to a *de novo* reconstruction of his record, because the large volume of case law developed by the United States Court of Appeals (CA) for the District of Columbia Circuit, this Court, its predecessors, and its superior court, the CA for the Federal Circuit, already provides guidance for the military services regarding back pay arising from the setting aside of an illegal separation. This guidance suggests that the military should determine entitle-

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[5] Mr. Sharpe's advice consisted of ten emails to counsel (sent on March 31, April 1, April 4, April 6, and April 27, 2017) and three emails to the chief of DFAS's Claims Division (dating April 5 and 6, 2017). None were answered substantively.

[6] The separation period is closer to seven years.

ments due by applying the relevant law to the status that a successful plaintiff or correction-board applicant possessed on the day he was unlawfully separated;[7] this is, indeed, the heart of the constructive-service doctrine: the entitlement of a restored service member to his "*position*, rank, and pay," *Doyle v. U.S.*, 220 Ct. Cl. 285, 306 (1979) (emphasis supplied); *accord Dilley v. Alexander*, 627 F.2d 407, 413 (D.C. Cir. 1980), from the date of his unlawful separation until he is legally released from the service.

In view of the foregoing, therefore; because the public interest, "strongly favors the prompt disposition of cases by trial courts," *Bennett v. United States*, No. 77-005T, 2002 U.S. Claims LEXIS 353, at *5 (Fed. Cl. Dec. 2, 2002); given the Court's aim to secure "the just, speedy, and inexpensive determination of every action and proceeding," U.S. Ct. Fed. Claims R. 1; and since, "[i]n the context of the correction of a military record, . . . once a discretionary decision is made to correct a record, the grant of appropriate money relief *is not discretionary but automatic*," *Denton v. U.S.*, 204 Ct. Cl. 188, 195 (1974) (citation omitted) (emphasis supplied), Mr. Sharpe strongly objects to any further stay with respect to the disbursement of back pay due and instead implores the Court to Order:

Respectfully submitted,

CHAD A. READER
Acting Assistant Attorney General

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[7] Numerous cases are cited and discussed in Appendix 1 of the Motion to Supplement Joint Status Report.

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May 2, 2017

Attorneys for Defendant

APPENDIX S

[SEAL]

DEFENSE FINANCE
AND ACCOUNTING SERVICE
8899 E. 56TH STREET
INDIANAPOLIS, IN 46249

[undated – rcvd. ca. June 25, 2017]

John F Sharpe
13088 Lighthouse Lane
Carrollton VA 23314

Dear LCDR Sharpe:

We determined that you are due money as a result of the recent correction of your military records by the Office of the Secretary of the Navy. There will be two payments as follows because the money is funded from two separate accounts:

1) from 01 Aug 2008 - 24 Apr 2016 (the beginning of your reinstatement period up to the day before the date of the Board of Corrections ruling)

2) from 25 Apr 2016 - 12 Feb 2017 (the date of the Board of Corrections ruling up to the day before your accession back into military service)

The payments will each be electronically transferred to the bank account reflected on the enclosed DFAS-DE Form 67, Military Pay and Allowance Voucher. Your account should reflect the first direct deposit within 10 days from the date of this let-

ter and for the second deposit, please allow 30 days from the date of this letter for processing.

The following are enclosed for your use and information:

a. Treasury Department Form W-2, Wage and Tax Statement, indicating taxable income that must be reported on your next tax return (for the first payment)

b. Tax forms will be mailed by January 31 of next year. If you do not receive the tax forms, please contact DFAS at 1-800-332-7411, select Navy (for the second payment).

c. DFAS-DE Form 0-110, Corrected Records Computations

d. DFAS-IN Form 0-642, Statement of Military Leave Computation

e. Wage and Tax Computation

If you agree with this settlement, you need not reply to this letter. Expenditure of these funds means you accept the settlement, and you have no further claim on the United States that is based on this correction to your records.

Should you disagree with the settlement or the tax information reported, contact us by phone or e-mail immediately, giving your reason for disagreement. You may be required to return the payment while we reexamine your case. You may contact us by writing DFAS IN, 8899 East 56th Street, De-

partment 3300 (Attn: Claims/COR), Indianapolis, IN 46249-3300, or by calling on our commercial toll free line at 866-912-6488. Please provide either your full social security number, or your full account number.

Sincerely,

/s/
Jerome Davis
Chief, Correction of Records and
Out-of-Service Claims Branch
Debt and Claims Management

Enclosures:
As stated
Account #: MSFSKT5RG

*****

Base Pay Calculations for GRADE Change	Old PEBD:	930526	Base Pay Diff:
	New PEBD:	930526	$0.00

MSFSKT5RH Sharpe, John

1st GRADE Calculations

Start Date	Stop Date	Longevity	Grade	Monthly Rate	Daily Rate	# of Days	Total
10/1/2009	10/31/2009	OVER 16 YRS	O5	$7,287.30	$242.91	30	$7,287.30
11/1/2009	11/30/2009	OVER 16 YRS	O5	$7,287.30	$242.91	30	$7,287.30
12/1/2009	12/31/2009	OVER 16 YRS	O5	$7,287.30	$242.91	30	$7,287.30
1/1/2010	1/31/2010	OVER 16 YRS	O5	$7,535.10	$251.17	30	$7,535.10
2/1/2010	2/28/2010	OVER 16 YRS	O5	$7,535.10	$251.17	30	$7,535.10
3/1/2010	3/31/2010	OVER 16 YRS	O5	$7,535.10	$251.17	30	$7,535.10
4/1/2010	4/30/2010	OVER 16 YRS	O5	$7,535.10	$251.17	30	$7,535.10
5/1/2010	5/31/2010	OVER 16 YRS	O5	$7,535.10	$251.17	30	$7,535.10
6/1/2010	6/30/2010	OVER 16 YRS	O5	$7,535.10	$251.17	30	$7,535.10
7/1/2010	7/31/2010	OVER 16 YRS	O5	$7,535.10	$251.17	30	$7,535.10
8/1/2010	8/31/2010	OVER 16 YRS	O5	$7,535.10	$251.17	30	$7,535.10
9/1/2010	9/30/2010	OVER 16 YRS	O5	$7,535.10	$251.17	30	$7,535.10
10/1/2010	10/31/2010	OVER 16 YRS	O5	$7,535.10	$251.17	30	$7,535.10
11/1/2010	11/30/2010	OVER 16 YRS	O5	$7,535.10	$251.17	30	$7,535.10
12/1/2010	12/31/2010	OVER 16 YRS	O5	$7,535.10	$251.17	30	$7,535.10
1/1/2011	1/31/2011	OVER 16 YRS	O5	$7,640.70	$254.69	30	$7,640.70
2/1/2011	2/28/2011	OVER 16 YRS	O5	$7,640.70	$254.69	30	$7,640.70
3/1/2011	3/31/2011	OVER 16 YRS	O5	$7,640.70	$254.69	30	$7,640.70
4/1/2011	4/30/2011	OVER 16 YRS	O5	$7,640.70	$254.69	30	$7,640.70
5/1/2011	5/25/2011	OVER 16 YRS	O5	$7,640.70	$254.69	25	$6,367.25
5/26/2011	5/31/2011	OVER 18 YRS	O5	$7,856.70	$261.89	5	$1,309.45
6/1/2011	6/30/2011	OVER 18 YRS	O5	$7,856.70	$261.89	30	$7,856.70

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APPENDIX T

In the Board for Correction of Naval Records

JOHN F. SHARPE, PETITIONER

CLAIM FOR SETTLEMENT AND PAYMENT

Enclosure (15) to
Application for Correction of Naval Record

September 3, 2015

1. Pursuant to 32 C.F.R. § 723.10(b)(1) Applicant submits the following claim for regular or special pay, allowances, allotments, compensation, emoluments, or other pecuniary benefits accruing on the assumption that the correction of his record has the effect of voiding his 30 September 2009 discharge and his 27 May 2008 removal from the Fiscal Year ("FY") 2008 Active-Duty Navy Commander Line Promotion List. This claim sets forth merely the minimum believed to be due and does not waive any

entitlements otherwise owed under any applicable law or regulation.

2. Applicant claims entitlement to the following:

a. Amounts due pre-separation, arising from the difference between the O-4 and O-5 pay grades and accruing between Applicant's planned date of rank (1 August 2008) and his separation on 30 September 2009:

(1) Base pay ("BP"):

(a) At 14 years of service:

1. In FY 2008 (from 1 August inclusive), $307.50 per month ("mo.") for 5 months ("mos.").

2. In FY 2009 (to 25 May inclusive), $319.50 per mo. for 4 mos. 25 days.

(b) At 16 years of service (26 May 2009 to 30 September 2009 inclusive), $633.30 per mo. for 4 mos. 5 days.

(2) Basic Allowance for Housing ("BAH"), with dependants, for the VA298 (Norfolk/Portsmouth, Va.) Military Housing Area ("MHA"), based upon the Permanent Duty Station ("PDS") zip code of 23511:

(a) For FY 2008 (from 1 August inclusive), BAH $152.00 per mo. for 5 months.

(b) For FY 2009 (through 30 September inclusive), $233.00 per mo. for 9 mos.

(3) Career Sea Pay ("CSP"):

(a) At 5 years of sea duty:

1. For FY 2008 (from 1 August inclusive), $35.00 per mo. for 5 mos.

2. For FY 2009 (to 8 June inclusive), $35.00 per mo. for 5 mos. 8 days.

(b) At 6 years of sea duty, in FY 2009 (from 9 June to 30 September 2009 inclusive), $30.00 per mo. for 3 mos. 22 days.

b. Amounts due post-separation, based upon the O-5 pay grade and accruing from 1 October 2009 to the date Applicant is restored to active duty in a pay status.[1]

(1) BP:

(a) At 16 years of service:

1. For FY 2009 (1 October to 31 December inclusive), $7,287.30 per mo. for 3 mos.

2. For FY 2010, $7,535.10 per mo. for 12 mos.

3. For FY 2011 (1 January to 25 May inclusive), $7,640.70 per mo. for 4 mos. 25 days.

(b) At 18 years of service:

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[1] *See, e.g., Verbeck v. U.S.*, 118 Fed. Cl. 420, 430 (2014) (noting payment of back pay up to the date a prevailing plaintiff is reinstated to duty).

1. For FY 2011 (26 May to 31 December inclusive), $7,856.70 per mo. for 7 mos. 5 days.

2. For FY 2012, $7,982.40 per mo. for 12 mos.

3. For FY 2013 (1 January to 25 May inclusive), $8,118.00 per mo. for 4 mos. 25 days.

(c) At 20 years of service:

1. For FY 2013 (26 May to 31 December inclusive), $8,338.80 per mo. for 7 mos. 5 days.

2. For FY 2014, $8,422.20 per mo. for 12 mos.

3. For FY 2015 (1 January to 25 May inclusive), $8,506.50 per mo. for 4 mos. 25 days.

(d) At 22 years of service:

1. For FY 2015 (26 May to 31 December inclusive), $8,762.40 per mo. for 7 mos. 5 days.

2. For FY 2016 (1 January to the date Applicant is restored to active duty in a pay status), $8,876.40 per mo. for the relevant number of days and months.

(2) Basic Allowance for Subsistence ("BAS"):

(a) For FY 2009 (1 October 2009 to 31 December inclusive), $223.04 per mo. for 3 mos.

(b) For FY 2010, $223.04 per mo. for 12 mos.

(c) For FY 2011, $223.84 per mo. for 12 mos.

(d) For FY 2012, $239.96 per mo. for 12 mos.

(e) For FY 2013, $242.60 per mo. for 12 mos.

(f) For FY 2014, $246.24 per mo. for 12 mos.

(g) For FY 2015, $253.38 per mo. for 12 mos.

(h) For FY 2016 (1 January to the date Applicant is restored to active duty in a pay status), $253.38 per mo. for the relevant number of days and months.

(3) BAH with dependants:

(a) For the VA298 (Norfolk/Portsmouth, Va.) MHA, based upon the PDS zip code of 23511:

1. For FY 2009 (1 October 2009 to 31 December inclusive), $2,320.00 per mo. for 3 mos.

2. For FY 2010 (through 11 April inclusive), $2,358.00 per mo. for 3 mos. 11 days.

(b) For the CA038 (San Diego, Calif.), MHA, based upon the PDS zip code of 92135:[2]

1. For FY 2010 (from 12 April inclusive), $2,793.00 per mo. for 8 mos. 19 days.

2. For FY 2011, $3,054.00 per mo. for 12 mos.

3. For FY 2012, $2,871.00 per mo. for 12 mos.

4. For FY 2013, $3,117.00 per mo. for 12 mos.

5. For FY 2014, $3,003.00 per mo. for 12 mos.

6. For FY 2015, $3,141.00 per mo. for 12 mos.

7. For FY 2016 (1 January to the date Applicant is restored to active duty in a pay status), $3,117.00 per mo. for the relevant number of days and months.

(4) CSP:

(a) At 6 years of sea duty:

1. In FY 2009 (1 October to 31 December inclusive), $315.00 per mo. for 3 mos.

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[2] Applicant's PDS, the USS CARL VINSON (CVN 70), transferred to Naval Air Station North Island effective 12 April 2010.

2. In FY 2010 (1 January to 8 June inclusive), $315.00 per mo. for 5 mos. 8 days.

(b) At 7 years of sea duty:

1. In FY 2010 (9 June to 31 December inclusive), $320.00 per mo. for 6 mos. 22 days.

2. In FY 2011 (1 January to 8 June inclusive), $320.00 per mo. for 5 mos. 8 days.

(c) At 8 years of sea duty:

1. In FY 2011 (9 June to 31 December inclusive), $345.00 per mo. for 6 mos. 22 days.

2. In FY 2012 (1 January to 8 June inclusive), $345.00 per mo. for 5 mos. 8 days.

(d) At 9 years of sea duty:

1. In FY 2012 (9 June to 31 December inclusive), $350.00 per mo. for 6 mos. 22 days.

2. In FY 2013 (1 January to 8 June inclusive), $350.00 per mo. for 5 mos. 8 days.

(e) At 10 years of sea duty:

1. In FY 2013 (9 June to 31 December inclusive), $365.00 per mo. for 6 mos. 22 days.

2. In FY 2014 (1 January to 8 June inclusive), $365.00 per mo. for 5 mos. 8 days.

(f) At 11 years of sea duty:

1. In FY 2014 (9 June to 31 December inclusive), $370.00 per mo. for 6 mos. 22 days.

2. In FY 2015 (1 January to 8 June inclusive), $463.00 per mo. for 5 mos. 8 days.

(g) At 12 years of sea duty:

1. In FY 2015 (9 June to 31 December inclusive), $463.00 per mo. for 6 mos. 22 days.

2. For FY 2016 (1 January to the date Applicant is restored to active duty in a pay status, but exclusive of 9 June and following[3]), $463.00 per mo. for the relevant number of days and months.

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[3] Assuming Applicant is restored to active duty in a pay status before 9 June 2016, when his sea-duty counter would reach 13 years and thus alter the monthly CSP amount.

APPENDIX U

[SEAL]

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

JLB
Docket No. 4284-14/
10521-12
8 Feb 16

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

Subj: REVIEW NAVAL RECORD OF LCDR JOHN F. SHARPE, USN, XXX-XX-3671/1650

Ref: (a) 10 U.S.C. § 1552
(b) 32 C.F.R. Part 723
(c) DODI 1320.04
(d) SECNAVINST 1420.lB
(e) 10 U.S.C. § 5947

Encl: (1) DD Form 149 (w/attachments provided electronically)
(2) BCNR memo BJG Docket No. 10521-12 of 25 OCT 12
(3) OJAG Code 20 memo 5819 Ser 20/31 dtd 31 AUG 15
(4) OJAG Code 20 e-mail dtd 1 OCT 15
(5) Petitioner ltrs dtd 6 and 7 OCT 15

1. Pursuant to the provisions of reference (a), subject former naval officer (hereinafter "Petitioner") filed with this Board enclosure (1), consisting of a letter with 18 enclosures, including the DD Form 149, and requesting, in effect, that his naval record be corrected by removing all documentation pertaining to the nonjudicial punishment (NJP) of 16 May 2007, and its administrative consequences, i.e., the detachment for cause (DFC) of 2 January 2008, the board of inquiry (BOI) of 17 June 2008, and administrative separation (ADSEP) of 30 September 2009; and the removal from the Fiscal Year (FY) 2008 (FY-08) Active-Duty Navy Commander (CDR) Line Promotion List (Promotion List) of 27 May 2008. Petitioner also requests further correction of his record to reflect that his promotion was not withheld but rather effected as originally scheduled pursuant to applicable regulations and that he was not separated from the Naval Service. Finally, Petitioner requests the back payment of all regular or special pay, allowances, allotments, compensation, emoluments, or other pecuniary benefits due, along with constructive-service credit and accrued leave, in support of which he has submitted a claim for settlement and payment under reference (b) section 723.lO(b).

2. The Board, consisting of Mr. Thompson, Mr. Relyea, and Ms. Trucco, reviewed Petitioner's allegations of error and injustice on 7 October 2015 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the evidence of record. Documentary material considered by the Board consisted of the enclosures, Petitioner's naval record, and applicable statutes, regulations, and policies. Subsequent to the Board, Petitioner re-

quested additional time to submit material evidence prior to forwarding the case for Secretary review. This case is being forwarded for Secretary review because the Petitioner is a former commissioned officer requesting to change the character and reason for discharge.

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. Prior to the development of the issues that gave rise to the application at enclosure (1), Petitioner's record in the naval service was unblemished. He graduated from the U.S. Naval Academy in the top 4 percent of his class and was accepted into the submarine community where he was certified as a Submarine Officer and Nuclear Engineer Officer before transferring into the Public Affairs Officer (PAO) community in November 1999. On 1 December 2002, he accepted a permanent appointment to Lieutenant Commander.

d. In June 2004 Petitioner was assigned to the Pentagon as the Director for Plans and Policy in the office of the Navy Chief of Information (CHINFO). He was highly regarded for his performance, as his fitness reports and receipt of additional awards reflect.

e. During portions of 2004 and 2005, Petitioner co-edited a two-volume anthology of articles critical of the Iraq war. Together the two volumes ran to more 1300 pages, included 86 articles by more than 90 authors, and comprised more than a half-million words. The books were simultaneously published in April of 2005. Petitioner did not write any of the articles contained in the anthology.

f. The volumes did not identify Petitioner as a Naval Officer nor did they mention in any way his active-duty status, rank, position, or duties. Petitioner's name did not appear on the front or back covers of the books. The single mention of Petitioner occurs on a single interior page, as a co-editor. Petitioner used "J. Forrest Sharpe" as his name in order to create a separation between his active-duty status and his persona as co-editor of the books.

g. A "To the Reader" page, printed at the front of each book and jointly attributed to "[t]he Editors," provided that the volumes "[were] about Iraq, and Iraq alone" (emphasis in original), and that the editors' views "[did] not, strictly speaking, appear" therein.

h. Petitioner and his co-editor co-authored 71 brief summaries of the contents of nearly all of the books' chapters. Together this introductory content ran to roughly 23,000 words. Each introduction was entitled "The Editors' Gloss" and appeared just prior to the article that it introduced. The introductions averaged roughly 300 to 400 hundred words long. Also, Petitioner and his co-editor each authored, respectively, a dedication to the first and second vol-

umes of the anthology; neither exercised any control over the other's text.

i. Chapter 24 of the second volume of the anthology - an article by two international lawyers entitled "The United Nations Charter and the Invasion of Iraq" - was introduced by a 419-word editors' gloss. Several words from 2 sentences of the gloss, amounting together to roughly 40 words, were charged, as Specification 5 of Petitioner's May 2007 NJP, under 10 U.S.C. § 888 (2006), Article 88 (Contempt toward officials) of the Uniform Code of Military Justice (UCMJ) (hereinafter "Art. 88"), as follows:

> In his published book neo-Conned again, [Petitioner] did state, "So how credible is it for Bush and Co. to run roughshod over the UN Charter and then maintain that their regime-change operation was based upon their unilateral enforcement of UN decrees? 'Hypocrisy' is not even the half of it" or words to that effect.

(See Enclosure (1), Tab A: Petitioner's original enclosure (2), OMPF123.)

j. Petitioner denies having had any intention of speaking contemptuously against the President in the gloss and denies having known that the words he used were contemptuous, were directed against the President personally, or would be so understood by readers.

k. On 31 October 2005, the United States Fleet Forces Inspector General (USFF IG) received a hotline complaint alleging Petitioner's improper participation in the "anti-war movement." The USFF IG

forwarded the complaint to the Navy Inspector General (NAVIG), who had cognizance over the matter because of Petitioner's assignment to CHINFO's office. The NAVIG conducted a preliminary inquiry (PI).

l. On 21 November 2005, the NAVIG, VADM Ronald A. Route, USN, reported to CHINFO by memorandum the results of his PI. In his memo, VADM Route noted that Petitioner's personal writing and speaking "predated the war in Iraq" and were "primarily based on his Catholic faith." VADM Route also said that he did not find any instances in which Petitioner drew attention to his status or referred to his position or duties. Regarding the Iraq-war books, VADM Route said that they "are anti-war to the ninth degree, but in a very academic and reasoned way." NAVIG further noted that the second of the Iraq-war volumes contained language in its dedication that was potentially problematic under UCMJ Article 88. The evidence of record suggests that NAVIG was unaware that the language cited was drafted by Petitioner's co-editor, effectively because NAVIG declined to further investigate the allegation and instead referred it to Petitioner's chain of command. The rest, VADM Route said, was "more or less a case of LCDR Sharpe exercising his free speech rights under the Constitution." NAVIG closed the relevant case file on 9 January 2006, neither taking nor recommending any action, but rather, as his memo stated, "refer[ing the] matter for information and disposition action as deemed appropriate by the chain of command." (See Enclosure (1), Tab B: Petitioner's original enclosure (2), OMPFll0-11.) On 25 May 2006 NAVIG informed the original hotline complainant of his action, and explained that Petitioner's

activities "do not violate the UCMJ." (See Enclosure (1), Tab C: Petitioner's enclosure (9), DOCS107.)

m. On or about 22 November 2005, after reviewing NAVIG's memo, CHINFO, RDML T. McCreary, USN (then Petitioner's Reporting Senior), had a meeting with Petitioner. An attorney from the Judge Advocate General's Corps (JAGC) from the Office of the Vice Chief of Naval Operations, the General Courts-Martial Convening Authority (GCMCA) in Petitioner's chain of command, was present at the meeting.

n. During the meeting RDML McCreary administered a nonpunitive letter of caution (NPLOC) to Petitioner as an administrative corrective measure. It explicitly referenced the NAVIG memo and memorialized RDML McCreary's beliefs that Petitioner made an "error in judgment" in having been "an editor of two books commenting on the Iraq War" and that they contained comments that "could be considered as contemptuous toward officials." RDML McCreary's letter concluded by saying that it was addressed to Petitioner "as a corrective measure" and that he was expected, in the future, "to exercise greater care in the performance of [his] duties in order to measure up to the high standards of CHINFO and the Navy public affairs community." (See Enclosure (1), Tab D: Petitioner's enclosure (9), DOC~108.)

o. Also, during the same meeting, Petitioner informed CHINFO that at that time he had several private, personal, and unofficial telephone interviews scheduled over the then-coming months to promote discussion and sale of the Iraq-war books. RDML McCreary informed Petitioner that he was not re-

quired to cease any ongoing activity supporting or promoting the circulation, sale, or distribution of the Iraq-war books, that he was not required to impede their circulation, sale, or distribution, and that any personal activities along the aforementioned lines were to comply with applicable statutes and regulations and were to avoid creating any association between Petitioner's official status or duties and those private activities. RDML McCreary later indicated, in a letter dated 3 July 2007, that the advice he provided to Petitioner was based upon his view that the latter had "some element of free speech" as a private citizen, distinct from his persona as a Naval Officer. (See Enclosure (1), Tab E: Petitioner's original enclosure (2), OMPF115-16.)

p. During the meeting, RDML McCreary also indicated that no punitive action would be taken with respect to Petitioner's above-described activities on the basis of the language in the Iraq-war books, provided that he did not write or edit anything further on the war. Petitioner agreed and complied; the evidence reflects that after co-editing the books, he neither wrote nor edited any material on the war in Iraq. The meeting concluded with Petitioner's counter-signing a copy of the NPLOC in the presence of CHINFO and the VCNO JAGC officer. CHINFO took no other action on the matter.

q. On 17 May 2006, Petitioner participated, via telephone, in an hour-long interview regarding the Iraq-war books with an Internet radio talk-show host, Meria Heller, for her program focusing on "politics and spirituality." The interview was never openly available for public listening or download via the Internet; instead, its access was limited to subscrib-

ers to Heller's program.

r. Petitioner participated in the interview as a private citizen, off-duty, and not as a member of the armed forces. When the interview was arranged, Petitioner was presented to Heller as "J. Forrest Sharpe," based upon the name appearing inside the Iraq-war books. Petitioner's active-duty status, rank, position, and duties were not mentioned during the interview. At the beginning of the interview, Petitioner was introduced as a Naval Academy graduate and former submarine officer; Petitioner emphasized this status to avoid giving any impression that he was an active-duty officer.

s. During the interview, a several-minute exchange took place, from which several of Petitioner's words were charged under UCMJ Article 88 as Specification 2 at the May 2007 NJP, as follows:

> In an internet interview with Meria Heller on or about 17 May 2006, [Petitioner] was describing a scenario in which United States Service personnel would be standing before God on judgment day, [Pe ti ti oner] commented, "When He [God] says, 'Hey you murdered all those Iraqis' [and the service members respond] . 'Well George Bush said I don't know that that is going to be a persuasive answer." To which Meria Heller replied, "Right, to say, George Bush said or Adolph Hitler said, or any other psychotic dictator." To which Petitioner replied, "Yeah," or words to that effect.

(See Enclosure (1), Tab A: Petitioner's original enclosure (2), OMPF122.)

t. Petitioner denies having had any intention of speaking contemptuously against the President in the interview and denies having known that the words he used were contemptuous, were directed against the President personally, or would be so understood by listeners. Petitioner also denies having endorsed Heller's reference to the President during the exchange and maintains that when he said "yeah" he was signaling to Heller that she understood his larger point and not that he agreed with her characterization of the President.

u. In his 17 November 2008 letter, RDML McCreary explained his view of Petitioner's participation in this interview as follows:

> I do not now and have never considered [his] having conducted this Maria [sic] Heller interview after our discussion to have constituted [him] disregarding in any way my direction and guidance . I know that [he] left the conversation with the intention and understanding I wished for him to have, and, rather than raise any doubts in my mind, his subsequent conduct, for me, confirmed that he had adhered to our mutual understanding.

(See Enclosure (1), Tab F: Petitioner's enclosure (9), DOCS114-15.)

v. On 15 June 2006, upon Petitioner's transfer from the Pentagon, RDML McCreary gave him a Meritorious Service Medal and a transfer Fitness Report and Counseling Record (FITREP) containing his "strong recommendation for [Petitioner's] rapid

promotion to [CDR] ." The FITREP did not mention the NAVIG PI memo, the NPLOC, or any of the underlying matters. As RDML McCreary explained on 3 July 2007:

> [the] award citation and transfer [FITREP] I provided to [Petitioner] upon completion of his tour of duty with me in June 2006 was based upon the fact that I considered his possible violation of [Art. 88] to have been a closed issue, which he accepted and acted upon, notwithstanding the continued sale or availability of the work containing the words that I warned him about. At the time I recommended him strongly for promotion, as I believed that he had taken my counseling to heart, and - notwithstanding the books' continued availability - that he had acted upon it. I am not aware of anything that would alter my perspective, my recollection, or my recommendation.

(See Enclosure (1), Tab E: Petitioner's original enclosure (2), OMPF115-16.)

w. On 20 June 2006, Petitioner checked in to CVN 70 as PAO and Media Department Head, and reported to the Media Department, located on the 8th floor of the "Bank Building," at 3101 Washington Ave., part of the Northrop Grumman Newport News (NGNN) complex in downtown Newport News, Va. This was Petitioner's regular, assigned place of work during his entire assignment to the command.

x. On 28 November 2006, the Commanding Officer (CO) of CVN 70 awarded Petitioner a fourth Navy Marine Corps Commendation Medal for his

outstanding contribution to the public and Naval media coverage of CVN 70's refueling and complex overhaul (RCOH).

y. On 13 February 2007, based on his outstanding performance and qualifications, the FY-08 Active Duty CDR Restricted Line Selection Board selected Petitioner for promotion to CDR. (See Enclosure (1), Tab G: Petitioner's enclosure (9), DOCS694.)

z. On 6 March 2007 a Media Relations Officer (MRO) in the office of the USFF PAO received a query from a reporter with Portfolio Weekly, a small free publication in the Norfolk, Va., area. The reporter asked the MRO about an allegation in a nongovernmental report that Petitioner was involved in "hate group" activity.

aa. That afternoon, the MRO prepared an E-Mail summarizing the query for the PAO assigned to Commander, Naval Air Force, Atlantic (CNAL), the immediate superior in command (ISIC) of the CVN 70 CO. The MRO allowed CDR Donald A. Sewell, USN, the Deputy USFF PAO, to write a message to the CNAL PAO and insert it in the body of the MRO's e-mail.

bb. Subsequent to this initial communication, CDR Sewell was routinely copied on e-mail correspondence between CNAL and USFF personnel regarding Petitioner's disciplinary and administrative proceedings. The correspondence addressed issues such as the start and progress of the inquiry into the allegations against Petitioner, the imposition of NJP, and the possibility of Petitioner's being made to show cause for retention in the Naval Service. CDR Sewell

saw this correspondence because of the agreement between the offices of the USFF and CNAL PAOs establishing that USFF would handle all public communications regarding Petitioner, because, given "the likelihood that any possible judicial or administrative action that might be taken concerning [him] would be handled by CNAL, as the [GCMCA] in [his] chain of command," it would be inappropriate to staff proposed replies to media queries through the CNAL leadership. (See Enclosure (1), Tab H: Petitioner's enclosure (9), DOCS218.)

cc. CDR Sewell later served on Petitioner's BOI. (See Enclosure (1), Tab I: Petitioner's enclosure (9), DOCS208-9.)

dd. Following the Portfolio query, on 7 March 2007, the Executive Officer of CVN 70 ordered Petitioner to turn over his duties to his deputy, and to report to his home at 13088 Lighthouse Ln., Carrollton, Va., as his assigned place of duty until further notice. Petitioner was relieved from the 8 March 2007 watch he was scheduled to stand, removed from the command's watch bill, and performed no duties there after 7 March 2007. On 1 April 2007, Petitioner began a temporary assignment to CNAL in Norfolk, Va., that continued until his separation from the Naval Service on 30 September 2009.

ee. On 9 March 2007, the Naval Criminal Investigative Service (NCIS) initiated an investigation on the basis of the Portfolio query. NCIS ran reports on Petitioner against databases maintained by the Virginia Employment Commission, the National Crime Information Center, the Defense Central Index of Investigations, the Federal Bureau of Investigation,

and the Central Intelligence Agency, all of which were "negative" and revealed "no derogatory information." On 30 April 2008 NCIS closed the investigation, having found "no substantive link" between Petitioner and any "unlawful extremist groups." (See Enclosure (1), Tab J: Petitioner's enclosure (9), DOCS233-37.)

ff. On 2 May 2007, at a meeting with the CVN 70 Command Judge Advocate (CJA) in downtown Newport News, Va., Petitioner was informed that the CO was considering the imposition of NJP and presented with six specifications alleging violations of UCMJ Article 88. Four specifications were later dismissed. Petitioner then asked how to demand a trial by court-martial (CM) in lieu of accepting NJP. The CJA informed Petitioner that because he was assigned to CVN 70 he had no right to do so. At no time did Petitioner make a knowing, voluntary, and intelligent written waiver of his right to trial by CM in lieu of NJP.

gg. On 16 May 2007, more than 2 years after the Iraq-war books were published and 17 months after they were reviewed by NAVIG, more than a year after the Heller interview, and 11 months after Petitioner reported to CVN 70, the CO awarded Petitioner a punitive letter of reprimand (PLOR) for 2 alleged violations of UCMJ Article 88 (Specifications 2 and 5). (See Enclosure (1), Tab A: Petitioner's original enclosure (2), OMPF120-26.)

hh. To deny Petitioner's demand for trial by CM, the CO invoked the "vessel exception" to Article 15 of the UCMJ, which withdraws from service members "attached to or embarked in a vessel" the right to re-

fuse NJP and demand trial by CM in lieu thereof.

ii. At the time of the NJP, CVN 70 was midway through a 43-month RCOH. The ship had just come out of an 18-month dry-dock period, was wholly non-operational, had 25 months' worth of the RCOH to complete. Petitioner never lived, worked, or stood watch aboard.

jj. On 14 May 2007, the Secretary of the Navy (SECNAV) submitted the report of the FY-08 Active Duty Commander Line Selection Board with corresponding nomination scrolls to the Deputy Secretary of Defense (DEPSECDEF). On 18 May 2007, the Principal Deputy Under Secretary of Defense (Personnel and Readiness) approved the report, which included Petitioner's name, "for the President." SECNAV withheld from the scrolls the names of five officers (including Petitioner) "whose files and records contain[ed] potential adverse information[,] to permit a more thorough consideration of their conduct." Petitioner's withhold was predicated upon the then-open NCIS investigation and the NAVIG PI, as recommended by the Chief of Naval Personnel (CNP) on 15 March 2007. (See Enclosure (1), Tabs Kand L: Petitioner's enclosure (9), DOCS074-79, 401-2, and 631.)

kk. On 25 June 2007, in a report (NJP Report) to the Commander, Navy Personnel Command (CNPC), the CO memorialized Petitioner's NJP and recommended that he be detached for cause, removed from the Promotion List, and made to show cause for retention. (See Enclosure (1), Tab M: Petitioner's original enclosure (2), OMPF118-19.)

ll. On 13 July 2007, Petitioner requested an extension of time to submit his reply to the NJP Report and DFC recommendation. Petitioner also submitted a complaint under 10 U.S.C. § 938 (2006), Article 138 of the UCMJ (138 Complaint). On 16 July 2007, the CJA asked Petitioner if he wished the 138 Complaint to serve as his reply to the PLOR and DFC recommendation. Petitioner replied by e-mail on the same day, saying that he would await the CO's decision on the request for extension before deciding whether or not to submit the 138 Complaint as his reply. On 23 July 2007, notwithstanding the exchange between the CJA and Petitioner, the CO forwarded the NJP Report to CNPC and included Petitioner's 138 Complaint as his reply. (See Enclosure (1), Tab N: Petitioner's enclosure (9), DOCS251-252.)

mm. On 31 October 2007, the CO issued a periodic FITREP to Petitioner. Aside from adverse marks in "Command or Organizational Climate/Equal Opportunity" (Block 34), "Military Bearing/Character" (Block 35), and the promotion recommendation (Block 42), based on the NJP, the CO awarded Petitioner grades of 5.0 in "Professional Expertise" (Block 33) and "Mission Accomplishment and Initiative" (Block 37) and 3.0 in "Teamwork" (Block 36) and "Leadership" (Block 38) . The CO also substantiated (in Block 41) the positive marks as follows: "Outside the actions resulting in Commanding Officer's Nonjudicial Punishment (NJP) [Petitioner] is an Outstanding Naval Officer and Public Affairs Officer." (See Enclosure (1), Tab 0: Petitioner's original enclosure (2), OMPF059-060.)

nn. On 2 January 2008, CNP approved, on the basis of alleged misconduct and by exclusive refer-

ence to the CO's 25 June 2007 NJP Report, the request for Petitioner's DFC from CVN 70. (See Enclosure (1), Tab P: Petitioner's original enclosure (2), OMPF157.)

oo. On 13 June 2007, CNPC notified Petitioner that his nomination for promotion to CDR was being withheld pending a review of adverse information. The notification stated, in pertinent part:

> A review of Department of Defense records following the adjournment of subject board revealed that you were the subject of a [NAVIG PI] into alleged inappropriate anti-war activities and you received [NJP] for violation of [UCMJ Art. 88) (Contempt toward officials) .

No other reason, including the open NCIS investigation, was cited as possibly rendering Petitioner disqualified for promotion. (See Enclosure (1), Tab Q: Petitioner's enclosure (9), DOCS265-266.)

pp. On 9 April 2008, the Judge Advocate General (JAG) of the Navy informed the Chief of Naval Operations (CNO) that the recommendation to remove Petitioner's name from the Promotion List was "legally unobjectionable." The JAG based his conclusion upon the fact that "CNO specifically disregards consideration of anti-war activities by [Petitioner], which had previously been investigated [sic] by the [NAVIG] 's office." (See Enclosure (1), Tab R: Petitioner's enclosure (9), DOCS084-085.)

qq. On 30 May 2008, CNPC notified Petitioner that on 27 May 2008 SECNAV approved CNO's recommendation to remove his name from the Promo-

tion List, in which the latter stated:

> In reaching my removal recommendation, I have disregarded general allegations that [Petitioner] engaged in anti-war activities, instead focusing solely on the facts and process relevant to the . . . [NJP].

The removal constituted a failure of selection. (See Enclosure (1), Tab S: Petitioner's original enclosure (2), OMPF158-160.)

rr. On 16 January 2008, CNPC notified Petitioner that a review of his case revealed "sufficient evidence of record to require [him] to show cause for retention in naval service based on [his] misconduct as alleged in reference (a)." Reference (a) was the NJP Report of 25 June 2007. In response to CNPC's solicitation, Petitioner elected to appear before a BOI rather than tender a resignation. (See Enclosure (1), Tabs T and U: Petitioner's enclosure (9), DOCS275-277.)

ss. On 12 June 2008, CNAL appointed CAPT Jeffrey K. Gruetzmacher, USN, CAPT Paul D. Ashcraft, USN, and CDR Don A. Sewell, USN, to Petitioner's BOI, and informed them, in pertinent part, as follows:

> [Petitioner] is being considered for administrative separation for the following reason(s):
>
> a. Misconduct. Commission of a military or civilian offense which, if prosecuted under the UCMJ, could be punished by confinement of six months or more; specifically:
>
> (1) Two specifications of Violation of the

UCMJ, Article. 88 (Contempt Toward Officials), as evidenced by reference (d).

b. Substandard performance of duty.

(1) Failure to demonstrate acceptable qualities of leadership required of an officer in his grade, as evidenced by reference (d); and

(2) Failure to conform to prescribed standards of military deportment, as evidenced by reference (d)."

The "reference (d)" cited as evidence for the reasons alleged to warrant Petitioner's separation from the naval service was the NJP Report of 25 June 2007. CNAL also provided that the procedures of SECNAVINST 1920.6C "shall be strictly adhered to." (See Enclosure (1), Tab I: Petitioner's enclosure (9), DOCS208-209.)

tt. The BOI convened on 17 June 2008 and concluded the following day. The report of findings and recommendations signed by its members recited a 3 to O finding of misconduct and a 2 to 1 recommendation for separation. The report also recorded a 3 to o vote, but no decision as to characterization of service, even though CNPC later recommended that Petitioner receive a General (under Honorable conditions) discharge. (See Enclosure (1), Tab V: Petitioner's original enclosure (2), OMPF161-163.)

uu. On 24 November 2008, Petitioner submitted, by counsel, a letter of deficiencies (LOD) assigning errors to the BOI.

vv. On 10 February 2009, Petitioner was considered above zone and passed over by the FY 2010 Ac-

tive Duty Commander Line Selection Board, resulting in a second failure of selection. (See Enclosure (1), Tab G: Petitioner's enclosure (9), DOCS694.)

ww. on 29 June 2009, CNPC recommended to the Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN) that Petitioner be discharged based on the BOI's recommendation. CNPC wrote:

> 1. Discussion. LCDR Sharpe is a restricted line officer (public affairs) with 16 years commissioned service and total active duty service.
>
> a. Enclosure (1) reported that on 16 May 2007 nonjudicial punishment (NJP) was imposed on [Petitioner] for violation of Uniform Code of Military Justice, Article 88 (Contempt towards officials) [Petitioner] was awarded a punitive letter of reprimand. He appealed his NJP conviction and requested a General Court Martial (GCM) . The appeal and request for a GCM were denied.
>
> b. Enclosure (2) notified LCDR Sharpe of the initiation of administrative proceedings requiring him to show cause for retention in the naval service before a board of inquiry (BOI) . . . .
>
> c. On 17 June 2008 a BOI convened, and by a vote of 2 to 1, recommended [Petitioner] be separated from the naval service with a General, under Honorable conditions, discharge, (enclosure(4)).
>
> 2. Recommendation. Separate [Petitioner] with a General, under Honorable conditions, discharge, separation code GNC (Unacceptable

conduct)."
On 9 July 2009, ASN approved Petitioner's separation from the Naval Service, and Petitioner separated on 30 September 2009. (See Enclosure (1), Tabs Wand X: Petitioner's original enclosure (2), OMPFOOl, 175-176.)

xx. Enclosure (2) requested an advisory opinion from the Office of the Judge Advocate General (OJAG Code 20-Criminal Law) (hereinafter "Code 20") regarding several principal errors and injustices assigned by Petitioner's original application. In pertinent part, it asked:

> a. Was [Petitioner]'s nonjudicial punishment (NJP) void due to the improper invocation of the vessel exception?
>
> b. Was the imposition of NJP and follow-on adverse actions substantively infirm and contrary to law because [Petitioner]'s conduct did not violate [Art. 88, UCMJ], pursuant to constitutional, statutory, and regulatory authorities?
>
> c. Did [Petitioner]'s commanding officer abuse his discretion in cognizing offenses as "minor" in view of his not being attached to or embarked in a vessel, given the serious constitutional and statutory-construction questions implicated in punishment for violation of Article 88, UCMJ, under the applicable facts?
>
> d. Was imposition of NJP for the April 2005 language contrary to the statute of limitations, 10 United States Code 843(b)(2), and inequitable under established doctrines of estoppel and administrative res judicata?
>
> e. Was denial of [his] promotion to pay

grade 0-5 contrary to law and regulation?

f. Was [his] discharge void due to flawed [BOI] composition?

g. Was [his] discharge void due to an "inherently unfair" after[-]the[-]fact switch in the reason for discharge?

h. Was [his] discharge void because it was predicated on an invalid NJP?

i. Was [his] discharge void due to the absence of a required minority report from the non-concurring BOI member?

yy. In enclosure (3) Code 20 replies, noting that the NJP "was not improper as a result of any error materially prejudicial to the substantial rights of the accused," while declining to address the errors unrelated to the NJP because, in its opinion, they "deal solely with the administrative consequences of . . a legally sound exercise of disciplinary discretion."

zz. With regard to the NJP-related errors, Code 20 cites the language of Article 15 providing that NJP may not be imposed upon any service member who "demand[s] trial by court-martial in lieu of such punishment," unless the member is "attached to or embarked in a vessel." Code 20 also refers to the Manual for Courts-Martial (MCM) Part V, ¶ 3 (2012), for the proposition that

> [a] person is attached to or embarked in a vessel if, at the time the nonjudicial punishment is imposed, he is assigned or attached to a vessel, is on board for passage, or is assigned or attached to an embarked staff, unit, detachment, squadron, team, air group, or other regularly organized body.

Code 20 concludes that the MCM language disposes of Petitioner's claim that the vessel exception was improperly applied because Petitioner had orders to CVN 70 "which was and remains a vessel as the term is used in the UCMJ." Code 20 further opines that Article 88 properly proscribed Petitioner's speech, that his CO had the discretion to impose NJP for the alleged offenses, and that the assigned equitable and statute-of-limitations errors were unpersuasive because the cited equitable doctrines were inapplicable and the statute-of-limitations issue was merely a "minor defect in pleading" at NJP.

aaa. In enclosure (4) Code 20 states that Petitioner's reliance upon United States v. Edwards, 46 M.J. 41 (C.A.A.F. 1997), is misplaced. (See enclosures (1) and (5), including Petitioner's brief on the vessel exception, enclosure (3) to his revised application.) Decisions of the United States Court of Appeals for the Armed Forces (CAAF), Code 20 opines, are not binding on the Board, while, Code 20 further suggests, the decision of the U.S. District Court for the District of Columbia (DDC) in Piersall v. Winter, 507 F. Supp. 2d 23 (D.D.C. 2007), is binding, and argues for a "broader, plain[-] language" approach to the vessel exception.

bbb. Petitioner replies in enclosures (1) and (5) by elaborating upon and clarifying his original arguments and drawing to the Board's attention those arguments that he believes Code 20 failed to address adequately or to acknowledge in the first instance.

ccc. In Edwards, the CAAF set forth the factors to be considered "in determining whether withdrawing the right to demand trial is consistent with the con-

gressional intent behind the vessel exception." Among these are: (1) whether a service member's "relationship to [his] ship [is] sufficient to satisfy what Congress intended by the words "attached to or embarked in" and, (2) [whether] the ship [is] a "vessel" within the meaning of Article 15." Both of these questions, the CAAF noted, are questions of fact.

ddd. The DDC noted in Piersall that proper application of the vessel exception assumes the existence of exigencies associated with ships in certain circumstances that justify dispensing with time-consuming [CM] procedures and instead dealing with disciplinary issues in a swift, efficient, and effective manner.

eee. Petitioner's BOI was controlled by the regulations in effect when it convened. These include Department of Defense Instruction (DoDI) 1332.40, Separation Procedures for Regular and Reserve Commissioned Officers, dated 16 September 1997, and Secretary of the Navy Instruction (SECNAVINST) 1920.6C, Administrative Separation of Officers, dated 15 December 2005 (with change 1, dated 19 September 2007). Paragraph E4.4.2 of DoDI 1332.40 provides that "[al commissioned officer may not serve on a [BOI] unless he or she is serving in a grade *above* lieutenant colonel or commander." Enclosure (8) paragraph 4h of SECNAVINST 1920.6C stipulates that "[o]fficers with personal knowledge pertaining to the particular case shall not be appointed to the Board considering the case."

CONCLUSION:

Upon review and consideration of all of the evidence

of record, the Board concludes that Petitioner's request warrants favorable action. Notwithstanding Code 20's advice as reflected in enclosures (2) and (3), the Board finds that the evidence provided by Petitioner in enclosures (1) and (5) establishes the existence in his Naval Record of error and injustice that warrant relief, specifically, the setting aside of the NJP and its administrative consequences, which include the DFC, ADSEP, and removal from the Promotion List.

With respect to the NJP, the Board does not believe it is necessary to resolve the issue raised by Code 20 as to which federal-court decisions are strictly binding on the Board, because considerations of equity more than suffice to warrant reliance upon the factors the CAAF articulated in Edwards for the purpose of assessing the validity of Petitioner's NJP. And in light of the DDC's remark, in the case referred to by Code 20 in enclosure (4), that vessel-exception cases "have generally . . looked not to literal definitions but to multiple factors that affect the propriety of allowing or denying the right to refuse mast," the Board feels that the totality of this case's factual circumstances make it appropriate to apply the Edwards factors as a matter of equity.

Among the more important of the relevant circumstances, in the Board's view, is the fact that ten weeks passed between the time Petitioner was ordered home, away from CVN 70, and the time NJP was imposed. The Board also notes that Petitioner could have been reassigned to a nonpublic duty during the pendency of the command's investigation, given the absence of any indication in the record that his alleged conduct had any nexus with good order

and discipline aboard the ship. Rather than choose this course, however, the command elected to send him home and then assign him to duty ashore on a basically permanent basis. Furthermore, CVN 70 was undergoing its mid-life RCOH, rendering it completely non-operational, during the entirety of Petitioner's assignment to the ship. Moreover, neither his regular place of work, nor his NJP rights-advice session or NJP hearing, were aboard ship. Given these and similar circumstances, including the apparent absence of any nexus between discipline and Petitioner's alleged conduct, the Board believes that the Edwards factors warrant a finding that his right to refuse NJP and demand trial by CM was improperly withdrawn, and that the imposition of NJP was consequently invalid as a matter of equity.

In determining to set aside Petitioner's NJP, the Board also relies upon RDML McCreary's letter of 3 July 2007, and agrees with his view that any possible offense arising from the Iraq-war books was resolved by the NPLOC, and that no further action was to be taken, provided Petitioner complied (as the evidence of record reflects he did) with the letter and spirit of the admiral's counseling.

As to the DFC, the ADSEP, and the removal from the Promotion List, the Board agrees with Code 20 that those actions are mere "administrative consequences" of the NJP. Since the record reflects that they were based upon the NJP and upon no other reason, the Board concludes that, given its recommendation to set aside the NJP, the DFC, the ADSEP, and the removal from the Promotion List must also be set aside.

The Board further notes that although the ADSEP proceedings are invalidated by the set aside of the NJP upon which they were based, BOI composition errors also independently void those proceedings. One member was only serving in the grade of Commander, contrary to DoDI 1332.40. Furthermore, CDR Sewell's substantial prior knowledge of the case, based in part upon his exposure to information regarding the investigation into the initial allegations against Petitioner and the administrative and disciplinary actions that followed, rendered his membership contrary to SECNAVINST 1920.6C. While it does not appear that CDR Sewell's disqualification was addressed during the voir dire of the BOI members, the record does reflect that Petitioner's counsel raised the issue in his Letter of Deficiencies. Furthermore, neither the DoDI nor the SECNAVINST authorizes a waiver of either rule. Consequently, and independent of the Board's decision to set aside the NJP, these composition errors render the BOI void due to plain legal error and require that the ADSEP predicated upon it be set aside.

Finally, with regard to the removal of Petitioner's name from the Promotion List, the Board notes that JAG found it to be "legally unobjectionable" partly because CNO "disregard[ed] consideration of anti-war activities by [Petitioner], which had previously been investigated [sic] by the [NAVIG] 's office," and that CNO's removal recommendation was based "solely on the facts and process relevant to the imposition of [NJP] ." Consequently, in light of the Board's recommendation to set aside Petitioner's NJP, the Board concludes that his removal from the Promotion List must also be set aside.

Because the invalidity of the NJP and the BOI-composition errors fully dispose of Petitioner's request for relief, the Board finds that his other claims of Constitutional, statutory, regulatory, and equitable error and injustice need not be addressed. The Board likewise believes it unnecessary to consider whether withholding Petitioner's name from the Commander nomination scroll on the basis of the NAVIG PI was improper, because it is clear that CNO and SECNAV believed that only the NJP was a potential ground for finding him unqualified for promotion.

RECOMMENDATION:

That Petitioner's naval record be corrected, where appropriate, to show:

a. The removal of all documentation pertaining to the NJP of 16 May 2007, including but not limited to the 25 June 2007 NJP Report (with all enclosures and endorsements thereto).

b. The removal of all documentation pertaining to the DFC, including but not limited to the 2 January 2008 DFC approval.

c. The removal of all documentation pertaining to the 17 June 2008 BOI and the consequent administrative separation, including but not limited to the BOI Report of 17-18 June 2008, the ADSEP letter of 29 June 2009, the DD Form 214 (Certificate of Discharge from Active Duty) of 30 September 2009, the NPC (PERS-48) e-mail letter of 12 February 2008, and the CNPC messages pertaining to Petitioner's

ADSEP dated 151230ZSEP09, 151231ZSEP09, 151632ZJUL09, and 151633ZJUL09.

d. The removal of all documentation pertaining to the removal of Petitioner's name from the Promotion List, including but not limited to CNPC's letter of 30 May 2008 (with its enclosed CNO Action Memo for SECNAV dated 27 May 2008) and Petitioner's letter of 7 May 2009.

e. That the FITREP of 31 October 2007 be corrected as follows:

1. Remove the 1.0 and 3.0 marks in "Command or Organizational Climate/Equal Opportunity" (Block 34), "Military Bearing/Character" (Block 35), "Teamwork" (Block 36), and "Leadership" (Block 38).

2. Insert "Fleet PAO" and "TYCOM PAO" in Block 40, consistent with Petitioner's previous CVN 70 FITREPs.

3. In Block 41, delete the statement "Outside the actions resulting in Commanding Officer's Non-judicial Punishment (NJP)"; replace "he" with "Sharpe"; delete the explanation for Blocks 34, 35, and 42 and the statement "LCDR Sharpe is not recommended for promotion."

4. Remove the "Significant Problems" promotion recommendation (Blocks 42 and 43) ."

5. Enter correct averages per the above changes in Block 45.

6. Delete the mark in Block 46 referring to Peti-

tioner's intent to submit a statement.

f. The insertion of an entry covering 1 November 2007 to the appropriate end date stating, "By direction of the Secretary of the Navy, fitness reports [for the relevant period] are not available for inclusion in SNO's Naval Record and no speculation or inferences as to the nature or contents of such reports may be made by selection boards or other reviewing authorities," or words to that effect.

g. That Petitioner's name was never removed from the Promotion List, that he was not considered above zone by any subsequent promotion selection board, and that he has had no failures of selection.

h. That the record be further corrected, pursuant to references (c), (d) and (e), by way of the Chief of Naval Operations submitting his recommendation to the Secretary to either promote the Petitioner or remove him from the promotion list, as he would have in April 2008 if petitioner's record reflected the above corrections.

i. That, if Petitioner is nominated and his nomination is confirmed, the record reflect that Petitioner was appointed to the rank of CDR with a date of rank and effective date for pay and allowances of 1 August 2008, and that he have the same lineal precedence and position on the Active Duty List as he would have had if his name had not been withheld and removed from the Promotion List.

j. That Petitioner was not discharged from the Naval Service, but has continued to serve on active duty without interruption.

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

4. Pursuant to reference (b) 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.

/s/
STEVEN J. NEAL
Recorder

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

/s/
SCOTT F. THOMPSON
Executive Director

Reviewed and approved/~~disapproved~~:

Apr. 25, 2016

/s/
Franklin R. Parker
Assistant Secretary of the Navy
(Manpower and Reserve Affairs)

APPENDIX V

ROUTINE ZYUW RUCLFVA0000 0871159
R 281159Z MAR 06
FM CHNAVPERS WASHINGTON DC//PERS448B //
CHINFO WASHINGTON DC//JJJ//
USS CARL VINSON//JJJ//
FLETRACEN NORFOLK VA//JJJ//
PERSUPP DET NAVSTA NORFOLK VA//JJJ//
PERSUPP DET WASHINGTON DC//JJJ//
COMNAVSUBFOR NORFOLK VA//JJJ//
COMNAVAIRPAC SAN DIEGO CA//JJJ//

UNCLAS //N01321//
MSGID/GENADMIN/CHNAVPERS//
SUBJ/BUPERS ORDER//
RMKS/
BUPERS ORDER: 0876 561-43-3671/1650 (PERS-448B)
OFFICIAL CHANGE DUTY ORDERS FOR
LCDR JOHN FORREST SHARPE, USN
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
IN CARRYING OUT/PROCESSING THESE ORDERS, BOTH PARTS ONE AND TWO MUST BE READ AND LISTED INSTRUCTIONS COMPLIED WITH.
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
P A R T O N E
------- DETACHING ACTIVITY (M) -------
WHEN DIRECTED BY REPORTING SENIOR, DETACH IN JUN 06 EDD: JUN 06
FROM DEPT OF NAVY STAFF UIC: 66760
OFF/PAO
PERMANENT DUTY STATION VA, ARLINGTON

FROM DUTY ACC: 100
PERSONNEL ACCOUNTING SUPPORT PERSUPPDET WASHINGTON DC UIC: 42557
------- INTERMEDIATE (01) ACTIVITY (M) -------
REPORT NET 17 JUN 06 BUT NLT 19 JUN 06 EDA: 19 JUN 06
TO STU FLT TRA CEN NORFOLK UIC: 30811
LOCATION: VA, NORFOLK
FOR TEMPORARY DUTY UNDER INSTRUCTION ACC: 341
FOR APPROXIMATELY 1 DAY(S)
PERSONNEL ACCOUNTING SUPPORT PUBLIC WORKS DEPT NSA NORFOLK UIC: 42574
TO INCLUDE 1 DAY(S) AT GEN SHBD FF TRN
CLASS: 65201 CONV: 060619 GRAD: 060619 CDP: 3716
UPON COMPLETION OF TEMPORARY DUTY UNDER INSTRUCTION AND WHEN DIRECTED, DETACH. EDD: 19 JUN 06
- REPORT NOT LATER THAN 0730 19 JUN 06 AND NOT EARLIER THAN 17 JUN 06 . REPORTING PRIOR TO NOT EARLIER THAN DATE WILL TERMINATE LEAVE STATUS AND RESULTS IN NON-PAYMENT OF PER DIEM FOR PERIOD PRIOR TO THE NOT EARLIER THAN DATE SPECIFIED UNLESS AUTHORIZED UNDER MILPERSMAN 1320-140.
- MEMBER DIRECTED: FOR EACH INTERMEDIATE STOP(S), IF GOVERNMENT QUARTERS ARE AVAILABLE (BOQ) AND THE BASE HAS A GOVERNMENT MESS APPROPRIATED FUND FOOD SERVICE ACTIVITY/GALLEY AVAILABLE TO THE TRAVELER, USE OF THE GOVERNMENT

MESS AND GOVERNMENT MEAL PER DIEM RATE IS DIRECTED. IF GOVERNMENT MESSING IS NOT AVAILABLE OR IS PARTIALLY AVAILABLE, OBTAIN AN ENDORSEMENT TO THAT EFFECT FROM THE HOST COMMAND. JFTR PARA U4400 AND CNO WASHINGTON DC NAVADMIN 223/96 (172134Z SEP 96) AND NAVADMIN 223/96 (302056Z SEP 96) APPLY. NO PER DIEM/LODGING REIMBURSEMENT IS AUTHORIZED IF THIS INTERMEDIATE STOP IS IN THE SAME GEOGRAPHIC LOCATION AS ULTIMATE STATION.

------- ULTIMATE ACTIVITY (M) -------

REPORT NOT LATER THAN JUN 06	EDA: JUN 06
TO CVN 70 VINSON	UIC: 20993
HOMEPORT VA, NORFOLK	
FOR DUTY	ACC: 100
	BSC: 00160
	PRD: 0806
PERSONNEL ACCOUNTING SUPPORT: CVN 70 VINSON	UIC: 20993

- REPORT AS 00160 PUBLIC AFFAIRS OFFICER.
- BECAUSE ABOVE SHIP, OR SHIP BASED UNIT, MAY BE DEPLOYED AWAY FROM ITS HOME PORT, MEMBER DIRECTED TO PROCEED TO THE PORT IN WHICH ABOVE UNIT MAY BE LOCATED. UPON ARRIVAL REPORT CO OF UNIT FOR ABOVE DUTY.
- WELCOME ABOARD THE USS CARL VINSON (CVN-70). FOR COMMAND INFORMATION, VISIT OUR WEBSITE AT: HTTP://WWW.CVN70.NAVY.MIL/ OR E-MAIL THE SHIP'S SECRETARY AT SHIPSEC@VINSON.NAVY.MIL OR THE ADMIN LCPO AT C0 ADMIN@VINSON.NAVY.MIL.

------- ACCOUNTING DATA -------

MAC CIC: 3N4F65614336710
CIC: A34F61SB
PCS ACCOUNTING DATA:
N4F6 1761453.2252 U 068566 A3 4F6/1/S/B 4F6561433671 TEMDUINS ACCOUNTING DATA FOR FY-06
1761804.22MB 000 00022/0 068566 4F6/1/S/B 4F6561433671
P A R T T W O
BUPERS ORDER: 0876 561-43-3671/1650 (PERS-448B)
OFFICIAL CHANGE DUTY ORDERS FOR
LCDR JOHN FORREST SHARPE, USN
------- DETACHING ACTIVITY (M) -------
- DETACHING COMMAND AND PERSONNEL SUPPORT OFFICE DIRECTED TO ENSURE MEMBER COMPLETES, WITHIN THREE DAYS PRIOR DETACHMENT, APPLICABLE ITEMS ON BOTH SIDES OF TRAVEL INFORMATION FORM (NAVPERS 7041/1) AS REQUIRED BY BUPERSINST 7040.6 OR 7040.7. UPON COMPLETION SUBMIT FORM TO DIRECTOR, PERMANENT CHANGE OF STATION, VARIANCE COMPONENT, 1240 EAST 9TH STREET, SUITE 967, CLEVELAND, OHIO 44199-2088.
- IF DETACHING FROM OR REPORTING TO A UNIT WHEN IT'S AWAY FROM HOMEPORT/PDS, MEMBER IS AUTHORIZED TRAVEL VIA THE UNIT'S HOMEPORT/ PDS UNDER JFTR U5120F TO ASSIST WITH TRANSPORTATION OF DEPENDENTS AND/OR HHG, PICK UP PERSONAL ITEMS OR PERSONALLY DRIVE HIS/HER POV FROM THE HOMEPORT.
- COMMAND DELIVERING ORDERS AND ULTIMATE COMMAND: DIRECTED TO COMPLY WITH MILPERSMAN 1740-010 REGARDING THE

NAVY SPONSOR PROGRAM. MEMBER ADVISED: INFORMATION ON ULTIMATE DUTY STATION CAN BE OBTAINED FROM YOUR LOCAL FAMILY SERVICE CENTER.
- MEMBER ADVISED: REQUIRED TO CONTACT HIS/HER NEAREST MILITARY TREATMENT FACILITY (MTF), MEDICAL DEPARTMENT REPRESENTATIVE, OR TRICARE SERVICE CENTER PRIOR TO TRANSFER FOR COUNSELING ON URGENT OR EMERGENCY MEDICAL CARE DURING PCS MOVES. UPON ARRIVAL AT NEW DUTY STATION, MEMBER IS REQUIRED TO CONTACT THE NEAREST MTF, MEDICAL DEPARTMENT REPRESENTATIVE, OR TRICARE SERVICE CENTER TO SELECT A PRIMARY CARE PROVIDER. THESE POINTS OF CONTACT CAN ALSO PROVIDE INFORMATION ON HEALTH CARE OPTIONS AVAILABLE FOR FAMILY MEMBERS NOT ENROLLED IN TRICARE PRIME. GENERAL TRICARE INFORMATION IS AVAILABLE ON THE WEB AT: HTTP://WWW.TRICARE.OSD.MIL.
- FOR MORE INFORMATION ON YOUR NEXT PERMANENT CHANGE OF STATION (PCS) VISIT HTTP://WWW.HOUSING.NAVY.MIL THIS WEBSITE PROVIDES ON AND OFF BASE HOUSING AND GENERAL INFORMATION ABOUT NAVY AND MARINE CORPS LOCATIONS WORLDWIDE.
- DETACHING COMMAND: IF TRANSOCEANIC TRAVEL WILL BE PERFORMED BY MEMBER, PORT CALL ASSIGNED BY THE NAVY PASSENGER TRANSPORTATION OFFICE WILL CANCEL THE REPORT NOT LATER THAN DATE, AT RECEIVING COMMAND, AND SHALL CONSTITUTE THE SPECIFIC DATE MEMBER IS TO REPORT FOR TRANSPORTATION. IF THIS IS AN ORDER

MODIFICATION, CANCELLATION OR MODIFICATION OF PORT CALL MAY BE REQUIRED. IF SO, IMMEDIATELY CONTACT SERVICING NPTO. OPNAVINST 4650.1S SERIES REFERS.
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
- MEMBER ADVISED: UPON ARRIVAL AT NEW DUTY STATION, ENSURE UPDATED PHONE/FAX NUMBER AND EMAIL ADDRESS ARE FORWARDED FOR INCLUSION IN THE PAO DIRECTORY. THE REGISTRATION FORM IS LOCATED AT: HTTP://WWW.NAVY.MIL/SUBMIT/PA-REG-FORM.ASP
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
- DETACHING COMMAND: IF AT THE TIME MEMBER IS BEING DETACHED FROM OR REPORTING TO A VESSEL/UNIT WHICH IS DEPLOYED AWAY FROM ITS HOMEPORT/ PDS, MEMBER MAY BE PAID PCS ALLOWANCES FROM THE LOCATION AT WHICH
PCS TRAVEL BEGINS TO THE NEW/OLD PDS TO THE NEW/OLD UNIT VIA ITS OLD/ NEW HOMEPORT/PDS AND/OR ANY TDY STATION(S) JFTR U5120.F REFERS
- DETACHING COMMAND: PRIOR TO TRANSFER OF MEMBER TO OVERSEAS ACTIVITIES OR DEPLOYABLE UNITS ENSURE THE FOLLOWING IS COMPLETED:
A. PERSONNEL SUPPORT DETACHMENT OR PERSONNEL OFFICERS SHALL VERIFY DEERS ENROLLMENT VIA DEERS/REALTIME AUTOMATED PERSONNEL IDENTIFICATION SYSTEM (RAPIDS) CRT (WHERE AVAILABLE, TELEPHONE IF DEERS/RAPIDS CRT UNAVAILABLE), OR DD FORM 1172 VERIFICATION (WHERE CRT AND TELEPHONE ACCESS IS UNAVAILABLE). IN CASES WHERE A SERVICE RECORD ENTRY

CONFIRMS THAT A DEERS CHECK WAS MADE WITHIN NINETY DAYS PRECEDING THE MEMBER'S TRANSFER, A NEW DEERS CHECK IS NOT REQUIRED.
B. ADD, CHANGE OR TERMINATE ENROLLMENT DATA AS NECESSARY UNDER OPNAVINST 1750.2
C. A SERVICE RECORD ENTRY (TYPED OR STAMPED) WILL BE MADE ON NAVPERS 1070/613 CERTIFYING THE MEMBER'S DEPENDENTS ARE ACCURATELY ENROLLED IN THE DEERS DATA BASE.
- DETACHING COMMAND: MEMBER IS DIRECTED TO COMPLETE OPERATIONAL DUTY SCREENING PER MILPERSMAN 1300-800 WITHIN 30 DAYS OF RECEIPT OF THESE ORDERS. IF ORDERS ARE A RESULT OF COMPLETION OF LIMDU OR HAVING BEEN FOUND FIT BY PEB, UTILIZE MILPERSMAN 1300-801 AND REPORT RESULTS WITHIN 15 DAYS OF RECEIPT OF THESE ORDERS. UPON COMPLETION, SUBMIT RESULTS VIA MESSAGE TO NPC PERS-40BB FOR ENLISTED AND RESPECTIVE DETAILER FOR OFFICERS.
------- INTERMEDIATE (01) ACTIVITY (M) -------
- MEMBER ADVISED: BRING MEDICAL RECORDS TO FIREFIGHTING CLASS. ATTENDEES MUST BE MEDICALLY SCREENED PRIOR TO CLASS START AND BRING CLEARANCE FOR FIREFIGHTING TRAINING TO CHECK-IN. NON-LOCAL PCS PERSONNEL MAY USE LOCAL MEDICAL CLINIC 1-5 DAYS PRIOR. ILLNESS, LACK OF SLEEP, USE OF ALCOHOL WITHIN 8 HOURS WILL CAUSE DROP. BRING STEEL-TOED BOOTS AND CHANGE OF CLOTHING (LONG-SLEEVED WASH KHAKIS, FLIGHT SUIT,

FLIGHT DECK JERSEY-NOT RED, OR BLUE COVERALLS) FOR PRACTICAL TRAINING. AT ALL LOCATIONS OTHER THAN NORFOLK, REPORT NLT 0700, 16 OCT-14 MAY OR NLT 0600 15 MAY-15 OCT. IN NORFOLK, REPORT NLT 0700, 16 OCT-8 MAY OR NLT 0530, 9 MAY-15 OCT. OFFICERS ATTENDING FIREFIGHTING IN BANGOR, WA MUST CHECK IN AT BLDG 2000 (ADJACENT TO FF BLDG) PRIOR TO CLASS START AT 0700. NAS WHIDBEY ISLAND ATTENDEES REPORT TO BLDG R2 NLT 0700.

- MEMBER ADVISED: SECURITY CLEARANCE NEED TO BE RECEIVED FIVE (5) WORKING DAYS PRIOR TO CLASS CONVENING. FAILURE TO DO SO MAY RESULT IN NON-ADMISSION TO COI. IF ATTENDING CLASS AT CIT LS NORFOLK, SECURITY CLEARANCES CAN BE FAXED TO DSN: 564-4194, COMM:(757)444- 4194. CHECK IN AT ELECTRONICS TRAINING SCHOOL, BLDG N25 AT NAVAL STATION NORFOLK. ADDRESS IS: ELECTRONICS TRAINING SCHOOL, 9550 FARRAGUT AVE. NORFOLK, VA 23511, DSN 524-1262 EXT 0, COMM (757)444-1262 EXT 0. INSTRUCTOR'S OFFICE: DSN 524-1262 EXT 3035, COMM(757)444-1262 EXT 3035. AFTER HOURS CHECK-IN, REPORT TO BLDG. N19, 9549 BAINBRIDGE AVE. DSN 524-2996 EXT 0, COMM (757)444-2996 EXT 0.

- DIRECTIONS TO FIRE FIGHTING SCHOOL FROM NOB GATES 1 & 2: SOUTH ON HAMPTON BLVD TO NORTHGATE RD (TRAFFIC LIGHT AND RAILROAD CROSSING). GO THROUGH THE NORFOLK INTERNATIONAL TERMINAL GATE AND MAKE FIRST LEFT. FIRE FIGHTING SCHOOL IS APPROXIMATELY 1 MILE ON THE RIGHT, LOOK FOR BLUE SIGN. FIRE FIGHTING

SCHOOL, BLDG SDA 309, NORFOLK VA 23511, COMM (757) 444-5585 DSN 565-6490.
- MEMBER ADVISED: STUDENTS WHO WILL BE ATTENDING INSTRUCTOR TRAINING SCHOOL (NEC 9502), ARE RECOMMENDED TO ACCESS COMPUTER BASED TRAINING (CBT) COURSE TITLED INSTRUCTIONAL DELIVERY CONTINUUM JOURNEYNMAN (IDC JOURNEYMAN) PRIOR TO REPORT DATE. TO ACCESS COURSE: LOG ONTO NAVY KNOWLEDGE ONLINE (NKO) WEBSITE AT: HTTPS://WWWA.NKO.NAVY.MIL, LAUNCH NAVY E-LEARNING, BROWSE CATEGORIES, U.S. DEPT OF THE NAVY (DON), INSTRUCTIONAL DELIVERY CONTINUUM (IDC), IDC JOURNEYMAN COURSE: CNL-JIT-0010.
------- ULTIMATE ACTIVITY (M) -------
- MEMBER ADVISED: FOR NAVY LODGE INFORMATION VISIT WEBSITE WWW.NAVY-LODGE.COM CALL THE NAVY LODGE CENTRAL RESERVATION TOLL FREE (1-800- NAVY-INN/1-800-628-9466) TO DETERMINE NAVY LODGE AVAILABILITY IN THE VICINITY OF OLD AND NEW PERMANENT DUTY STATIONS. RESERVATIONS ARE REQUIRED TO ENSURE ROOM AVAILABILITY. FOR A MEMBER TRAVELING IN A "PCS WITH FAMILY" STATUS, RESERVATIONS MAY BE MADE ANYTIME. REFER TO SECNAVINST 11107.2 SERIES.
- SAVE MONEY THE WELCOME CENTERS HAVE NEW PROGRAM INITIATIVES THAT SAVE MONEY ON RENT, SECURITY DEPOSITS, AND HOME BUYING COST. REDUCE TIME SPENT ON FINDING SUITABLE AND AFFORDABLE HOUSING. LEARN ABOUT PROGRAMS THAT WILL SAVE TIME AND MONEY BY VISITING THE LOCAL WELCOME CENTER.

- NUMERICAL RELIEF FOR SCOTT D MCILNAY.
- UNIT TO WHICH ORDERED IS DESIGNATED, BY SECNAVINST 4650.19 (SERIES), AS UNUSUALLY ARDUOUS SEA DUTY. FOR TRANSPORTATION ENTITLEMENTS OF DEPENDENTS AND HOUSEHOLD GOODS SEE JFTR, PAR. U5222-D AND U5350-D-E.
------- SPECIAL INSTRUCTIONS -------
- MEMBER ADVISED: FOR QUESTIONS AND GUIDANCE CONCERNING SHIPMENT OF YOUR HOUSEHOLD GOODS, TRANSPORTATION SPECIALIST ARE ON DUTY TO SERVE YOU AND CAN BE CONTACTED AT 1-800-444-7789 MONDAY THROUGH FRIDAY 0800-1700 EASTERN TIME. ARRANGE YOUR HOUSEHOLD GOODS SHIPMENT (S) ONLINE USING SMARTWEB MOVE (SWM) AT WWW.SMARTWEBMOVE.NAVSUP.NAVY.MIL
SWM HANDLES MOST PCS MOVE ARRANGEMENTS AND ELIMINATES THE NEED FOR A PERSONAL VISIT TO YOUR LOCAL PERSONAL PROPERTY OFFICE FOR A COUNSELING SESSION. WHEN YOU KNOW YOUR NEW ADDRESS, YOU CAN USE THE FREE ON-LINE NEX MOVING CENTER AT WWW.NAVY-NEX.COM TO SET UP ESSENTIAL UTILITIES AND SERVICES FOR YOUR NEW HOME ANYWHERE IN CONUS AND HAWAII.
- MEMBER DIRECTED: FOR INFORMATION REGARDING YOUR ULTIMATE DUTY STATION CONTACT THE NEAREST DEPARTMENT OF DEFENSE FAMILY SERVICE CENTER OR RELOCATION ASSISTANCE OFFICE.
- COMPLY WITH MILPERSMAN 1320-090 AND 1320-100 REGARDING TRAVEL AND AUTHORIZED PROCEED TIME IN EXECUTION OF THESE

ORDERS.
- WHEN PCSING, AN EXCELLENT AND VERY USEFUL SOURCE OF INFORMATION IS THE NAVY AND MARINE CORPS LIFELINES SERVICES NETWORK (LSN) AVAILABLE ON THE INTERNET AT HTTP://WWW.LIFELINES.NAVY.MIL. YOU'LL FIND TIPS ON MOVING YOUR HOUSEHOLD GOODS OR SHIPPING YOUR CAR, INFORMATION ON YOUR NEW DUTY STATION, HOW TO STAY CONNECTED WITH FAMILIES, MOVING PETS, HOW TO FIND HOUSING AT YOUR NEW DUTY STATION, AND A WEALTH OF RELOCATION AND SUPPORT RESOURCES FOR YOU AND YOUR FAMILY.
- FOR COMMAND MAILING ADDRESS CONSULT THE STANDARD NAVAL DISTRIBUTION LIST (SNDL) ONLINE AT HTTP://NEDS.NEBT.DAPS.MIL/SNDL.HTM OR VISIT YOUR PSA, PSD OR ADMIN OFFICE.
- COMMANDING OFFICER: ENSURE SERVICEMEMBER COMPLETES ARGUS QUESTIONNAIRE (AS REQUIRED BY OPNAV 1040.10) PRIOR TO EXECUTION OF ORDERS. WEBSITE: HTTP:WWW.BOL.NAVY.MIL
(SIGNED)
A. A. GOVE,
REAR ADMIRAL, U. S. NAVY
COMMANDER NAVY
PERSONNEL COMMAND
PERS433G PERS448
NNNN

APPENDIX W

ROUTINE ZYUW RUCLFVA0000 3061118
R 021118Z NOV 06
FM CHNAVPERS WASHINGTON DC//PERS448B //
USS CARL VINSON//JJJ//
USS ENTERPRISE//JJJ//
CHINFO WASHINGTON DC//JJJ//
COMNAVAIRLANT NORFOLK VA//JJJ//
COMNAVSUBFOR NORFOLK VA//JJJ//
COMNAVAIRPAC SAN DIEGO CA//JJJ//

UNCLAS //N01321//
MSGID/GENADMIN/CHNAVPERS//
SUBJ/BUPERS ORDER//
RMKS/
BUPERS ORDER: 3066 XXX-XX-3671/1650 (PERS-448B)
OFFICIAL CHANGE DUTY ORDERS FOR
LCDR JOHN FORREST SHARPE, USN
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
IN CARRYING OUT/PROCESSING THESE ORDERS, BOTH PARTS ONE AND TWO MUST BE READ AND LISTED INSTRUCTIONS COMPLIED WITH.
. FOR OFFICIAL USE ONLY
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
P A R T O N E
------- DETACHING ACTIVITY (M) -------
WHEN DIRECTED BY REPORTING SENIOR, DETACH IN JAN 07 EDD: JAN 07
FROM CVN 70 VINSON UIC: 20993
HOMEPORT VA, NORFOLK
FROM DUTY ACC: 100
PERSONNEL ACCOUNTING SUPPORT: CVN 70 VINSON UIC: 20993

------- ULTIMATE ACTIVITY (M) -------
REPORT NOT LATER THAN JAN 07 EDA: JAN 07
TO CVN 65 ENTERPRISE UIC: 03365
HOMEPORT VA, NORFOLK
FOR DUTY ACC: 100
BSC: 07040
PRD: 0901
PERSONNEL ACCOUNTING SUP-
PORT: CVN 70 VINSON UIC: 03365
- REPORT AS PAO (BSC 07040).
- WELCOME ABOARD "THE BIG E" USS ENTERPRISE (CVN-65). FOR COMMAND INFORMATION, VISIT OUR WEBSITE AT: WWW.ENTERPRISE.NAVY.MIL OR E-MAIL US AT: SHIPSEC@ENTERPRISE.NAVY.MIL OR XO@ENTERPRISE.NAVY.MIL.
P A R T T W O
BUPERS ORDER: 3066 XXX-XX-3671/1650 (PERS-448B) OFFICIAL CHANGE DUTY ORDERS FOR
LCDR JOHN FORREST SHARPE, USN
------- DETACHING ACTIVITY (M) -------
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
- MEMBER ADVISED: UPON ARRIVAL AT NEW DUTY STATION, ENSURE UPDATED PHONE/FAX NUMBER AND EMAIL ADDRESS ARE FORWARDED FOR INCLUSION IN THE PAO DIRECTORY. THE REGISTRATION FORM IS LOCATED AT: HTTP://WWW.NAVY.MIL/SUBMIT/PA-REG-FORM.ASP
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
- DETACHING COMMAND: IF AT THE TIME MEMBER IS BEING DETACHED FROM OR REPORTING TO A VESSEL/UNIT WHICH IS DEPLOYED AWAY FROM ITS HOMEPORT/ PDS, MEMBER MAY BE PAID PCS ALLOWANCES FROM THE LOCATION AT WHICH PCS TRAVEL

BEGINS TO THE NEW/OLD PDS TO THE NEW/OLD UNIT VIA ITS OLD/ NEW HOMEPORT/PDS AND/OR ANY TDY STATION(S) JFTR U5120.F REFERS
- BECAUSE ABOVE SHIP, OR SHIP BASED UNIT, MAY BE DEPLOYED AWAY FROM ITS HOME PORT, MEMBER DIRECTED TO PROCEED TO THE PORT IN WHICH ABOVE UNIT MAY BE LOCATED. UPON ARRIVAL REPORT CO OF UNIT FOR ABOVE DUTY.
- DETACHING COMMAND: IF AT THE TIME MEMBER IS BEING DETACHED FROM OR REPORTING TO A VESSEL/UNIT WHICH IS DEPLOYED AWAY FROM ITS HOMEPORT/ PDS, MEMBER MAY BE PAID PCS ALLOWANCES FROM THE LOCATION AT WHICH PCS TRAVEL BEGINS TO THE NEW/OLD PDS TO THE NEW/OLD UNIT VIA ITS OLD/ NEW HOMEPORT/PDS AND/OR ANY TDY STATION(S) JFTR U5120.F REFERS
- DETACHING COMMAND: PRIOR TO TRANSFER OF MEMBER TO OVERSEAS ACTIVITIES OR DEPLOYABLE UNITS ENSURE THE FOLLOWING IS COMPLETED:
A. PERSONNEL SUPPORT DETACHMENT OR PERSONNEL OFFICERS SHALL VERIFY DEERS ENROLLMENT VIA DEERS/REALTIME AUTOMATED PERSONNEL IDENTIFICATION SYSTEM (RAPIDS) CRT (WHERE AVAILABLE, TELEPHONE IF DEERS/RAPIDS CRT UNAVAILABLE), OR DD FORM 1172 VERIFICATION (WHERE CRT AND TELEPHONE ACCESS IS UNAVAILABLE). IN CASES WHERE A SERVICE RECORD ENTRY CONFIRMS THAT A DEERS CHECK WAS MADE WITHIN NINETY DAYS PRECEDING THE MEMBER'S TRANSFER, A NEW DEERS CHECK IS

NOT REQUIRED.
B. ADD, CHANGE OR TERMINATE ENROLLMENT DATA AS NECESSARY UNDER OPNAVINST 1750.2
C. A SERVICE RECORD ENTRY (TYPED OR STAMPED) WILL BE MADE ON NAVPERS 1070/613 CERTIFYING THE MEMBER'S DEPENDENTS ARE ACCURATELY ENROLLED IN THE DEERS DATA BASE.
- MEMBER DIRECTED: CONTACT THE NAVY HOUSING WELCOME CENTER, HAMPTON BOULEVARD AND· BAKER STREET, BUILDING SDA 337, NORFOLK, VA.(23505) PRIOR TO NEGOTIATING ANY RENTAL OR SALES AGREEMENT FOR OFF-BASE HOUSING. FOR ADDITIONAL INFORMATION CALL TOLL FREE 1-800-628-7510. (OPNAVINST 1101.13 AND OPNAVINST 11101.21 SERIES)
- MEMBER ADVISED: WHEN MOVING TO THE SAN DIEGO OR NORFOLK REGION, MEMBER CAN UTILIZE THE NEW "NAVY EXCHANGE MOVING CENTER". THE NEX MOVING CENTER IS A FREE ONLINE SERVICE, WHICH ENABLES THE MEMBER TO SET UP HOUSEHOLD UTILITY AND OTHER NEEDED SERVICES. THIS SERVICE PROVIDES THE CONVENIENCE OF ONE STOP SHOPPING AND RATE COMPARISONS FOR UTILITIES I.E. ELECTRIC, CABLE, PHONE, GAS ETC. VISIT THE NAVY EXCHANGE WEBSITE AT: HTTP://WWW.NAVY-NEX.COM, AND CLICK ON THE NEX MOVING CENTER LINK OR HTTPS://WWW.MILITARYMOVINGCENTER.COM/NEXCOM/ (LOWER CASE).
- DETACHING COMMAND: MEMBER IS DIRECTED TO COMPLETE OPERATIONAL DUTY SCREENING PER MILPERSMAN 1300-800 WITH-

IN 30 DAYS OF RECEIPT OF THESE ORDERS. UPON COMPLETION, ISSUE PG 13 AS DIR FOR SUITABLE SVC MBRS OR SUBMIT UNSUITABILITY FOR OPERATIONAL DUTY MESSAGE TO NPC PERS-40BB FOR ENLISTED AND RESPECTIVE DETAILER FOR OFFICERS. IF ORDERS ARE A RESULT OF COMPLETION OF LIMDU OR HAVING BEEN FOUND FIT BY PEB, UTILIZE MILPERSMAN 1300-801 AND REPORT FINDINGS IF SVC MBR FAILS TO SCREEN WORLDWIDE ASSIGNABLE WITHOUT LIMITATIONS WITHIN 15 DAYS OF RECEIPT OF THESE ORDERS VIA MESSAGE TO NPC PERS-40BB FOR ENLISTED AND RESPECTIVE DETAILER FOR OFFICERS.

------- ULTIMATE ACTIVITY (M) -------

- NUMERICAL RELIEF FOR LCDR DAVID L NUNNALLY.
- UNDER THE NAVY SPONSOR PROGRAM MEMBER ADVISED, TELEPHONE NUMBERS FOR FLEET AND FAMILY SUPPORT CENTERS OF HAMPTON ROADS, NORFOLK, VA ARE 24 HOURS, AUTOVON 564-6289, COMMERCIAL (757) 444-6289 AND 1-800- 372-5463 (1-800-FSC-LINE). VISIT US AT OUR WEBSITE: WWW.FFSCNORVA.NAVY.MIL (LOWERCASE LETTERS). ADDITIONALLY, PLEASE VISIT THE RELOCATION WEBSITE AT: WWW.NAVYNORFOLK.COM (LOWERCASE).
- UNIT TO WHICH ORDERED IS DESIGNATED, BY SECNAVINST 4650.19 (SERIES), AS UNUSUALLY ARDUOUS SEA DUTY. FOR TRANSPORTATION ENTITLEMENTS OF DEPENDENTS AND HOUSEHOLD GOODS SEE JFTR, PAR. U5222-D AND U5350-D-E.
- WHEN SHIP/UNIT IS DEPLOYED FROM HOMEPORT ALL PERSONNEL MUST REPORT

TO TRANSIENT PERSONNEL UNIT (TPU) NORFOLK, VA TO ARRANGE FOR PORT CALL OR WAIT RETURN OF SHIP/UNIT.
------- SPECIAL INSTRUCTIONS -------
- IF DETACHING FROM OR REPORTING TO A UNIT WHEN IT'S AWAY FROM HOMEPORT/PDS, MEMBER IS AUTHORIZED TRAVEL VIA THE UNIT'S HOMEPORT/PDS UNDER JFTR U5120F TO ASSIST WITH TRANSPORTATION OF DEPENDENTS AND/OR HHG, PICK UP PERSONAL ITEMS OR PERSONALLY DRIVE HIS/HER POV FROM THE HOMEPORT.
- MEMBER ADVISED: REQUIRED TO CONTACT HIS/HER NEAREST MILITARY TREATMENT FACILITY (MTF), MEDICAL DEPARTMENT REPRESENTATIVE, OR TRICARE SERVICE CENTER PRIOR TO TRANSFER FOR COUNSELING ON URGENT OR EMERGENCY MEDICAL CARE DURING PCS MOVES. UPON ARRIVAL AT NEW DUTY STATION, MEMBER IS REQUIRED TO CONTACT THE NEAREST MTF, MEDICAL DEPARTMENT REPRESENTATIVE, OR TRICARE SERVICE CENTER TO SELECT A PRIMARY CARE PROVIDER. THESE POINTS OF CONTACT CAN ALSO PROVIDE INFORMATION ON HEALTH CARE OPTIONS AVAILABLE FOR FAMILY MEMBERS NOT ENROLLED IN TRICARE PRIME. GENERAL TRICARE INFORMATION IS AVAILABLE ON THE WEB AT: HTTP://WWW.TRICARE.OSD.MIL.
- FOR MORE INFORMATION ON YOUR NEXT PERMANENT CHANGE OF STATION (PCS) VISIT HTTP://WWW.HOUSING.NAVY.MIL THIS WEBSITE PROVIDES ON AND OFF BASE HOUSING AND GENERAL INFORMATION ABOUT NAVY AND MARINE CORPS LOCATIONS WORLDWIDE.

- MEMBER ADVISED: FOR QUESTIONS AND GUIDANCE CONCERNING SHIPMENT OF YOUR HOUSEHOLD GOODS, TRANSPORTATION SPECIALIST ARE ON DUTY TO SERVE YOU AND CAN BE CONTACTED AT 1-800-444-7789 MONDAY THROUGH FRIDAY 0800-1700 EASTERN TIME. ARRANGE YOUR HOUSEHOLD GOODS SHIPMENT (S) ONLINE USING SMARTWEB MOVE (SWM) AT WWW.SMARTWEBMOVE.NAVSUP.NAVY.MIL
SWM HANDLES MOST PCS MOVE ARRANGEMENTS AND ELIMINATES THE NEED FOR A PERSONAL VISIT TO YOUR LOCAL PERSONAL PROPERTY OFFICE FOR A COUNSELING SESSION. WHEN YOU KNOW YOUR NEW ADDRESS, YOU CAN USE THE FREE ON-LINE NEX MOVING CENTER AT WWW.NAVY-NEX.COM TO SET UP ESSENTIAL UTILITIES AND SERVICES FOR YOUR NEW HOME ANYWHERE IN CONUS AND HAWAII.
- MEMBER ADVISED: IAW MILPERSMAN 1320-308, AUTHORIZE TRANSPORTATION COST REIMBURSEMENT FOR EXCESS BAGGAGE UP TO AND NOT TO EXCEED THE FOLLOWING: (A) ONE (1) PIECE FOR PILOTS, AIRCREW, DIVERS, AND PERSONNEL WHO MUST CARRY SPECIAL ISSUE GEAR WITH THEM (B) TWO (2) PIECES FOR ATTACHES. SERVICE MEMBERS IN RECEIPT OF PCS ORDERS TO FORWARD DEPLOYED UNITS ARE ADVISED THAT CERTAIN AIRLINES MAY CHARGE EXCESS BAGGAGE FEES. REIMBURSEMENT MAY BE REQUESTED IN ACCORDANCE WITH JOINT FEDERAL TRAVEL REGULATIONS (JFTR) U3015-B UPON REPORTING TO YOUR ULTIMATE DUTY STATION. CONTACT PERS-40CC FOR ENLISTED PERSON-

NEL OR COGNIZANT DETAILER FOR OFFICERS. CONSULT YOUR LOCAL HOUSEHOLD GOODS (HHG) PERSONAL PROPERTY OFFICE REGARDING SPECIFIC HHG AND PERSONAL PROPERTY SHIPMENT ENTITLEMENTS.

- MEMBER DIRECTED: FOR INFORMATION REGARDING YOUR ULTIMATE DUTY STATION CONTACT THE NEAREST DEPARTMENT OF DEFENSE FAMILY SERVICE CENTER OR RELOCATION ASSISTANCE OFFICE.
- THESE ORDERS ISSUED WITHOUT ACCOUNTING DATA SINCE IT APPEARS THAT IT CAN BE EXECUTED WITHOUT COST.
- NO PERMANENT CHANGE OF STATION (PCS) ENTITLEMENTS WILL BE PROVIDED BECAUSE THESE ORDERS REASSIGN MEMBER BETWEEN TWO NON-SHIPBOARD ACTIVITIES OR UNITS LOCATED AT THE SAME PERMANENT DUTY STATION (PDS). RELOCATION OF HOUSEHOLD GOODS WITHIN THE SAME PDS IS NOT AUTHORIZED AT GOVERNMENT EXPENSE UNLESS AUTHORIZED UNDER MILPERSMAN 1300-100.
- IF COST OR ENTITLEMENTS WILL ACCRUE, MEMBER DIRECTED TO REQUEST AND RECEIVE PRIOR TO EXECUTION OF THESE ORDERS, WRITTEN AUTHORIZATION (INCLUDING ACCOUNTING DATA) FROM THE CHIEF OF NAVAL PERSONNEL. CONTACT YOUR DETAILER FOR MORE INFORMATION.
- WHEN PCSING, AN EXCELLENT AND VERY USEFUL SOURCE OF INFORMATION IS THE NAVY AND MARINE CORPS LIFELINES SERVICES NETWORK (LSN) AVAILABLE ON THE INTERNET AT HTTP://WWW.LIFELINES.NAVY.MIL. YOU'LL

FIND TIPS ON MOVING YOUR HOUSEHOLD GOODS OR SHIPPING YOUR CAR, INFORMATION ON YOUR NEW DUTY STATION, HOW TO STAY CONNECTED WITH FAMILIES, MOVING PETS, HOW TO FIND HOUSING AT YOUR NEW DUTY STATION, AND A WEALTH OF RELOCATION AND SUPPORT RESOURCES FOR YOU AND YOUR FAMILY.

- FOR COMMAND MAILING ADDRESS CONSULT THE STANDARD NAVAL DISTRIBUTION LIST (SNDL) ONLINE AT HTTP://NEDS.NEBT.DAPS.MIL/SNDL.HTM OR VISIT YOUR PSA, PSD OR ADMIN OFFICE.

- COMMANDING OFFICER: ENSURE SERVICEMEMBER COMPLETES ARGUS QUESTIONNAIRE (AS REQUIRED BY OPNAV 1040.10) PRIOR TO EXECUTION OF ORDERS. WEBSITE: HTTP:WWW.BOL.NAVY.MIL

(SIGNED)
A. A. GOVE,
REAR ADMIRAL, U. S. NAVY
COMMANDER NAVY PERSONNEL COMMAND
PERS433G PERS448
NNNN

APPENDIX X

ROUTINE ZYUW RUCLFVA0000 3391232
R 051232Z DEC 06
FM CHNAVPERS WASHINGTON DC//PERS448B //
TO USS CARL VINSON//JJJ//
USS ENTERPRISE//JJJ//
CHINFO WASHINGTON DC//JJJ//
COMNAVAIRLANT NORFOLK VA//JJJ//
COMNAVSUBFOR NORFOLK VA//JJJ//
COMNAVAIRPAC SAN DIEGO CA//JJJ//

UNCLAS //N01321//
MSGID/GENADMIN/CHNAVPERS//
SUBJ/BUPERS ORDER//
RMKS/
BUPERS ORDER: 3066 (01) XXX-XX-3671/1650 (PERS-448B)
OFFICIAL CANCELLATION OF ORDERS FOR
LCDR JOHN FORREST SHARPE, USN
- ORDERS AND ANY MODIFICATIONS(S) THERE TO CANCELLED. CONTINUE PRESENT DUTY
(SIGNED)
D. A. GOVE,
REAR ADMIRAL, U. S. NAVY
COMMANDER NAVY
PERSONNEL COMMAND
PERS433G PERS448
NNNN

APPENDIX Y

ROUTINE ZYUW RUCLFVA0000 2581230
R 151230Z SEP 09
FM COMNAVPERSCOM MILLINGTON TN//PERS82 //
TO USS CARL VINSON//JJJ//
BUPERS MILLINGTON TN//JJJ//
DFAS CLEVELAND OH//JJJ//
BUMED WASHINGTON DC//JJJ//
COMSUBFOR NORFOLK VA//JJJ//
COMNAVAIRPAC SAN DIEGO CA//JJJ//
COMNAVCRUITCOM MILLINGTON TN//JJJ//

UNCLAS //N01321//
MSGID/GENADMIN/CHNAVPERS//
SUBJ/BUPERS ORDER//
RMKS/
BUPERS ORDER: 2589 XXX-XX-3671/1650 (PERS-82)
OFFICIAL SEPARATION ORDERS FOR
LCDR JOHN FORREST SHARPE, USN
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
IN CARRYING OUT/PROCESSING THESE ORDERS, BOTH PARTS ONE AND TWO MUST BE READ AND LISTED INSTRUCTIONS COMPLIED WITH.
. FOR OFFICIAL USE ONLY
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
P A R T O N E
------- DETACHING ACTIVITY (M) -------
WHEN DIRECTED BY REPORTING SENIOR, DETACH IN SEP 09 EDD: SEP 09
FROM CVN 70 VINSON UIC: 20993
HOMEPORT VA, NORFOLK

FROM DUTY ACC: 100
PERSONNEL ACCOUNTING SUP-
PORT: CVN 70 VINSON UIC: 20993
- ACCORDANCE MILPERSMAN 1910-812 REPORT PRESENT CO FOR TEMPORARY DUTY IN CONNECTION WITH SEPARATION PROCESSING.
- UPON COMPLETION AND WHEN DIRECTED DETACH.
- BY DIRECTION OF THE PRESIDENT, AND PURSUANT TO PROVISIONS OF SECNAVINST 1920.6 (SERIES) AND 10 U.S.C. SEC. 1184/1186, DISCHARGE FROM THE U.S. NAVAL SERVICE TO TAKE EFFECT AT 2400 ON DATE OF DETACHMENT FROM ACTIVITY AT WHICH SEPARATED.
------- ACCOUNTING DATA -------
MAC CIC: 3N5I9XXXX336710
CIC: AE5I919W
PCS ACCOUNTING DATA:
N5I9 1791453.2254 U 068566 AE 5I9/1/9/W 5I9XXXX33671
P A R T T W O
BUPERS ORDER: 2589 XXX-XX-3671/1650 (PERS-82)
OFFICIAL SEPARATION ORDERS FOR
LCDR JOHN FORREST SHARPE, USN
MEMBER ADVISED: NO PERDIEM/LODGING REIMBURSEMENT AUTHORIZED AT ANY INTERMEDIATE STOP(S) IN THE SAME GEOGRAPHIC LOCATION AS THE ULTIMATE DUTY STATION.
------- DETACHING ACTIVITY (M) -------
- PERMANENT CHANGE OF STATION (PCS) TRAVEL INFORMATION DETAILS: PER BUPERSINST 7041 (SERIES): TRANSFERRING COMMANDS PASS/PERSONNEL SERVICING OFFICES ARE RESPONSIBLE FOR ENSURING

MEMBERS FULLY COMPLETE THE PCS TRAVEL INFORMATION FORM (NAVPERS 7041/1) WITHIN 3 DAYS OF TRANSFER. COMMANDS USING NSIPS WEB SHOULD DIRECT MEMBER TO CREATE AND THEN USE THEIR OWN SELF SERVICE ACCOUNT TO COMPLETE AND SUBMIT THE 7041/1 ON-LINE. INSTRUCTIONS TO CREATE A SELF SERVICE ESR (ELECTRONIC SERVICE RECORD) ACCOUNT ARE LOCATED ON THE NSIPS SPLASH SCREEN, HTTPS://NSIPS.NMCI.NAVY.MIL/ (UNDER'USER INFORMATION'). MEMBER SHOULD LOGON TO THEIR ESR ACCOUNT, THEN DOUBLE-CLICK THE 'UPDATE PCS TRAVEL' ICON ON THEIR HOMEPAGE TO ACCESS THE AUTOMATED NAVPERS 7041 TRAVEL INFORMATION FORM. FOR CONVENIENCE, THERE IS AN 'AUTO-FILL' FEATURE WHICH AUTOMATICALLY COMPLETES THE PCS ITINERARY FROM THE MEMBER'S CURRENT ACTIVE ORDERS. MEMBER NEED ONLY COMPLETE OR ADJUST PCS DETAILS SPECIFIC TO DEPENDENT TRAVEL, HOUSEHOLD GOODS WEIGHTS AND/OR POV SHIPMENTS. COMMANDS PASS/PERSONNEL SERVICING OFFICES NOT USING NSIPS WEB SHOULD PROVIDE THE NAVPERS 7041/1 FORM TO MEMBER, AND UPON MEMBER'S COMPLETION, VERIFY THEN MAIL TO: DIRECTOR, PERMANENT CHANGE STATION VARIANCE COMPONENT, 1240 EAST 9TH STREET, SUITE 967, CLEVELAND OH 44199-2088.

- DETACHING COMMAND: IF TRANSOCEANIC TRAVEL WILL BE PERFORMED BY MEMBER, PORT CALL ASSIGNED BY THE NAVY PASSENGER TRANSPORTATION OFFICE WILL CANCEL THE REPORT NOT LATER THAN DATE, AT RE-

CEIVING COMMAND, AND SHALL CONSTITUTE THE SPECIFIC DATE MEMBER IS TO REPORT FOR TRANSPORTATION. IF THIS IS AN ORDER MODIFICATION, CANCELLATION OR MODIFICATION OF PORT CALL MAY BE REQUIRED. IF SO, IMMEDIATELY CONTACT SERVICING NPTO. OPNAVINST 4650.1S SERIES REFERS.
- COMPLY WITH MILPERSMAN 1320-110 REGARDING TRAVEL TIME AUTHORIZED IN EXECUTION OF THESE ORDERS.
- DETACHING COMMAND: IF AT THE TIME MEMBER IS BEING DETACHED FROM OR REPORTING TO A VESSEL/UNIT WHICH IS DEPLOYED AWAY FROM ITS HOMEPORT/ PDS, MEMBER MAY BE PAID PCS ALLOWANCES FROM THE LOCATION AT WHICH PCS TRAVEL BEGINS TO THE NEW/OLD PDS TO THE NEW/OLD UNIT VIA ITS OLD/ NEW HOMEPORT/PDS AND/OR ANY TDY STATION(S) JFTR U5120.F REFERS
- BECAUSE ABOVE SHIP, OR SHIP BASED UNIT, MAY BE DEPLOYED AWAY FROM ITS HOME PORT, MEMBER DIRECTED TO PROCEED TO THE PORT IN WHICH ABOVE UNIT MAY BE LOCATED. UPON ARRIVAL REPORT CO OF UNIT FOR ABOVE DUTY.
------- SPECIAL INSTRUCTIONS -------
- MEMBER ADVISED: SHIPPING HHG? HAVE MOVE QUESTIONS? WANT TO MAKE A DIFFERENCE? NEED ASSISTANCE WITH UTILITIES? NOW YOU CAN PROCESS YOUR HHG SHIPMENT APPLICATION AND RECEIVE COUNSELING ON LINE AT YOUR CONVENIENCE AT: WWW.SMARTWEBMOVE.NAVSUP.NAVY.MIL. CONTACT TRANSPORTATION SPECIALIST TO

ANSWER QUESTIONS AND PROVIDE GUIDANCE CONCERNING YOUR HHG SHIPMENT MONDAY THROUGH FRIDAY 0800-1700 EASTERN TIME AT 800-444-7789 OR BY EMAIL AT WWW.NVTRNSHHGHELPLINE@NAVY.MIL.
COMPLETE A CUSTOMER SATISFACTION SURVEY AT THE END OF YOUR MOVE AT: HTTPS://ICSS.ETA.SDDC.ARMY.MIL BECAUSE PERFORMANCE VICE LOWEST COST DRIVES WHICH TRANSPORTATION SERVICE PROVIDER WILL MOVE YOUR PROPERTY IN THE FUTURE.
TO SET UP ESSENTIAL UTILITIES AND SERVICES FOR YOUR NEW HOME ANYWHERE IN CONUS AND HAWAII USE THE FREE ON-LINE NEX MOVING CENTER AT: WWW.NAVYNEX.COM.
- WHEN PCSING, AN EXCELLENT AND VERY USEFUL SOURCE OF INFORMATION IS THE NAVY AND MARINE CORPS LIFELINES SERVICES NETWORK (LSN) AVAILABLE ON THE INTERNET AT HTTP://WWW.LIFELINES.NAVY.MIL. YOU'LL FIND TIPS ON MOVING YOUR HOUSEHOLD GOODS OR SHIPPING YOUR CAR, INFORMATION ON YOUR NEW DUTY STATION, HOW TO STAY CONNECTED WITH FAMILIES, MOVING PETS, HOW TO FIND HOUSING AT YOUR NEW DUTY STATION, AND A WEALTH OF RELOCATION AND SUPPORT RESOURCES FOR YOU AND YOUR FAMILY.
- COMMANDING OFFICER: ENSURE SERVICEMEMBER COMPLETES ARGUS QUESTIONNAIRE (AS REQUIRED BY OPNAV 1040.10) PRIOR TO EXECUTION OF ORDERS. WEBSITE: HTTPS://WWW.BOL.NAVY.MIL
- GENERAL DISCHARGE CERTIFICATE SIGNED

BY THE SECRETARY OF THE NAVY BEING RETAINED IN CHNAVPERS AND WILL BE MAILED TO MEMBER'S HOME SUBSEQUENT TO SEPARATION. CO OF ACTIVITY AT WHICH SEPARATED DIRECTED TO ADVISE CHNAVPERS (PERS-834) EFFECTIVE DATE OF DISCHARGE AND ADDRESS FOR MAILING PURPOSES.
- CO OF ACTIVITY AT WHICH SEPARATED DIRECTED TO FAX COPY OF COMPLETED DD-214 TO OFFICER PERFORMANCE SEPARATIONS BRANCH (PERS-834). (901) 874-2625 DSN: 882-2625. VOICE DSN: 882-4424/2090.
- IF SHIP OR FLEET COMMAND FROM WHICH DETACHED LOCATED CONUS AT TIME OF DETACHMENT, REPORT FOR SEPARATION PROCESSING ACCORDANCE MILPERSMAN 1920-130, INSTEAD OF AS DIRECTED ABOVE.
- THE SECRETARY OF THE NAVY HAS APPROVED YOUR SEPARATION FROM THE NAVY. YOUR SERVICE WILL BE CHARACTERIZED AS GENERAL AND YOUR SEPARATION PROGRAM DESIGNATOR CODE WILL BE GNC IN ACCORDANCE WITH BUPERSINST 1900.8 SERIES UNDER THE AUTHORITY OF SECNAVINST 1920.6 SERIES.
(SIGNED)
D. P. QUINN
REAR ADMIRAL, U. S. NAVY COMMANDER NAVY PERSONNEL COMMAND

APPENDIX Z

[SEAL]

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

JLB
Docket No. 4017-18
AUG 12 2018

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

Subj: REVIEW OF NAVAL RECORD ICO CDR JOHN F. SHARPE, USN, [redacted]-3671

Ref: (a) Title 10 U.S.C. § 1552

Encl: (1) DD Form 149 w/attachments
(2) Subject's naval record

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 show that the Petitioner declined enrollment in the Servicemembers' Group Life Insurance (SGLI) from 1 October 2009 until 12 Februar:y 2017.

2. The Board, consisting of Mr. Mizerak, Mr. Ferraro, and Mr. Spooner, reviewed Petitioner's allegations of error and injustice on 24 May 2018 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, relevant portions of your naval record, 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. On 30 September 2009, Petitioner was discharged from the Navy.

c. On 7 October 2015, the Assistant Secretary of the Navy, Manpower and Reserve Affairs (ASN (M&RA)), changed the Petitioner's record to reflect that he was not discharged from the naval service, but continued to serve on active duty without interruption. Petitioner was placed back on active duty effective 13 February 2017.

CONCLUSION

Upon review and consideration of all the evidence of record, the Board finds the existence of an injustice warranting the following corrective action. Petitioner was discharged from active duty on 30 September 2009. ASN (M&RA) directed that the Petitioner be placed back on active duty, effective 13 February 2017. As a result, the Defense Finance and Account-

ing Service (DFAS) took steps to correct the pay and entitlements for the period of constructive service which ran from 1 October 2009 and 12 February 2017. Prior to Petitioner' s discharge, he was enrolled in coverage under the SGLI, therefore DFAS calculated a debt associated with the SGLI premiums during the period of constructive service. However, Petitioner was not actually covered by the SGLI during this period and instead obtained life insurance from another provider at his own expense. The Board concluded that it would be unjust to make the Petitioner pay premiums on two insurance policies covering the same period. Further, the Board highlighted that had the Petitioner passed away during this period of constructive service, the SGLI would not have paid out the benefit. As such, a measure of relief is warranted in this case.

RECOMMENDATION

That Petitioner' s naval record be corrected, where appropriate, to show that:

On 1 October 2009, Petitioner provided the Navy Personnel Command (NPC) with a SGLI Election Certificate (SGL V 8286) declining enrollment in the SGLI. Note: on 13 February 2017, Petitioner provided the NPC with a SGL V 8286 form electing enrollment in the SGLI.

A copy of this Report of Proceedings will be filed in Petitioner's naval record .

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.

/s/
DAVID J. CASH
Recorder

5. Pursuant to the delegation of authority set out in 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.

/s/
ELIZABETH A. HILL
Executive Director

APPENDIX AA

[SEAL]

DEFENSE FINANCE
AND ACCOUNTING SERVICE
8899 E. 56TH STREET
INDIANAPOLIS, IN 46249

OCT 22 2018

Commander John F Sharpe
13680 Bold Venture Drive
Glenelg, Maryland 21737

Dear Commander Sharpe:

Your waiver request, file number MSFSKT5RG, has been forwarded to the Defense Office of Hearings and Appeals for a final determination. We will notify you of the decision upon receipt.

Notify this office of your new address in the event you move before a determination is received. Our point of contact is the undersigned, at (866) 912-6488 or email: dfas.iridianapolis-in.jfe.mbx.remission-waiver-indy@mail.mil.
Sincerely,

/s/
Carrie A. Dillon-Illy
Chief, Remissions and Waivers Branch
Debt and Claims Management

APPENDIX BB

[SEAL]

DEFENSE FINANCE
AND ACCOUNTING SERVICE
8899 E. 56TH STREET
INDIANAPOLIS, IN 46249

FEB 20 2019

Commander John F Sharpe
13680 Bold Venture Drive
Glenelg, Maryland 21737

Dear Commander Sharpe:

This is in reference to your waiver request and file number MSFSKT5RG. You applied for waiver consideration under Title 10, United States Code, Section 2774 of a $13,308 indebtedness resulting from recoupment of Lump-sum Leave sold.

Based on the facts presented the Office of Hearing and Appeals (DOHA) has determined that waiver of the $13,308 indebtedness is in the best interest of the Government. Therefore, your waiver is approved.

Your debt with Defense Finance and Accounting Service, Out of Service Debts has been canceled. All monies collected towards the debt will be refunded. Allow 30-60 days for payment.

Questions regarding waivers may be directed to (866) 912-6488, Monday through Friday, 7:30 a.m. to 4:00 p.m., Eastern Time, or email: dfas.indianapolis-in .jfe.mbx.remission-waiver-indy @mail.mil.

APPENDIX CC

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

MAR 17 2010

MEMORANDUM FOR ASSISTANT SECRETARY OF THE NAVY (MANPOWER AND RESERVE AFFAIRS)

Subj: BCNR ANNUAL REPORT FOR CY2010

Encl: (1) BCNR Annual Statistical Report

1.Workload/Productivity

A. In CY 2010 BCNR received 13,836 applications and 6,595 of these were accepted for review. The comparable figures for CY 2009 were 13,461 received and 6,604 accepted.

B. A total of 6,729 cases were finalized and closed in CY 2010 as compared to 5,875 in CY 2009. The table below reflects the Board's workload over the course of several years.

Calendar Year	Appl Recd	Appl Accepted	Cases Closed	Cases Pending
1966	N/A	963	1,004	587
1991	18,171	12,449	11,068	4,534
2004	10,430	5,473	5,409	2,277

2005	12,454	5,410	5,193	2,441
2006	11,325	5,792	5,192	2,970
2007	11,355	5,554	5,295	3,104
2008	12,506	6,151	6,153	2,991
2009	13,461	6,604	5,875	3,600
2010	13,836	6,595	6,729	3,343

*****

/s/
W. DEAN PFEIFFER
Executive Director

APPENDIX DD

Statutory, Regulatory, and Other
Relevant Authorities

---

1. U.S. Const. art. I, § 9, cl. 7 provides, in pertinent part:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.

Correction of Military Records

2. The Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 207, 60 Stat. 812, 837, provides:

> The Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or to remove an injustice.

3. The Act to Amend Section 207 of the Legislative Reorganization Act, Pub. L. No. 82-220, § 1, 65 Stat. 655, 655-56 (1951), provides, in pertinent part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that section 207 of the Act of August 2, 1946 (60 Stat. 812), is hereby amended to read as follows:

"SEC. 207. (a) The Secretaries of the Army, Navy, and Air Force and the Secretary of the Treasury (with respect to the Coast Guard), respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective Departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice, and corrections so made shall be final and conclusive on all officers of the Government except when procured by means of fraud.

"(b) The Department concerned is authorized to pay out of applicable current appropriations, claims of any persons, their heirs at law or legal representatives as hereinafter provided, of amounts paid as fines, forfeitures, or for losses of pay (including retired or retirement pay), allowances, compensation, emoluments, or other monetary benefits, as the case may be, which are found to be due on account of military or naval service as a result of the action heretofore taken pursuant to section 207 of the Legislative Reorganization Act of 1946, or hereafter taken pursuant to subsection (a) of this section.

"(c) The acceptance by the claimant of any settlement made pursuant to subsection (b) of this section shall constitute a complete release by the claimant of any claim against the united States on account of such correction of rec-

ord."

4. 10 U.S.C. § 1552 provides, in pertinent part:

(a)(1) 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. Except as provided in paragraph (2), such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department.

* * * * *

(3)(A) Corrections under this section shall be made under procedures established by the Secretary concerned. In the case of the Secretary of a military department, those procedures must be approved by the Secretary of Defense.

* * * * *

(4) Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

* * * * *

(b) No correction may be made under subsection (a)(1) unless the claimant (or the claimant's heir or legal representative) or the Secretary concerned files a request for the correction within three years after discovering

the error or injustice. The Secretary concerned may file a request for correction of a military record only if the request is made on behalf of a group of members or former members of the armed forces who were similarly harmed by the same error or injustice.

5. 10 U.S.C. § 8013 provides, in pertinent part:

(a)(1) There is a Secretary of the Navy, appointed from civilian life by the President, by and with the advice and consent of the Senate.

*****

The Secretary is the head of the Department of the Navy.

6. Secretary of the Navy (SECNAV) Instruction 5420.193, *Assignment of Responsibilities and Authorities in the Office of the Secretary of the Navy*, provides, in pertinent part:

5. Scope. Within the area of responsibility assigned in subparagraphs 7a and 7b, each civilian executive assistant is the principal civilian advisor and assistant to the SECNAV and UNSECNAV on the administration of the affairs of the DON. Each staff assistant is the principal advisor and assistant to the SECNAV and UNSECNAV, for their assigned duties, per subparagraphs 7a and 7c.

*****

b. Civilian Executive Assistants

*****

(3) The Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN (M&RA)).

*****

The ASN (M&RA) shall:

*****

(f) Oversee the:

*****

3. Board for Correction of Naval Records.

7. SECNAV Instruction 5420.193, *Board For Correction of Naval Records*, provides, in pertinent part:

3. Action

a. BCNR shall consider and either take corrective action on the Secretary's behalf, when authorized, or make appropriate recommendations to the Secretary regarding applications for the correction of military records following the procedures in enclosure (1).

b. The Assistant Secretary of the Navy (Manpower and Reserve Affairs), under references (b) and (c), has been assigned the responsibility for the overall supervision of BCNR and is delegated authority to take final action on BCNR cases forwarded for review.

*****

4. Execution of BCNR Decisions. The Chief of Naval Operations and the Commandant of the Marine Corps shall ensure that action is taken to make the military record corrections directed by the Secretary or BCNR. The applicant and Executive Director will be advised of the action taken.

8. 32 C.F.R. provides, in pertinent part:

§723.3. Application for correction.

(a) *General requirements.* (1) The application for correction must be submitted on DD 149 (Application for Correction of Military Record) or exact facsimile thereof.

*****

(2) Except as provided in paragraph (a)(3) of this section, the application shall be signed by the person requesting corrective action with respect to his/her record and will either be sworn to or will contain a provision to the effect that the statements submitted in the application are made with full knowledge of the penalty provided by law for making a false statement or claim. (18 U.S.C. 287 and 1001).

*****

§723.7 Action by the Secretary.

(a) *General.* The record of proceedings, ex-

cept in cases finalized by the Board under the authority delegated in §723.6(e), and those denied by the Board without a hearing, will be forwarded to the Secretary who will direct such action as he or she determines to be appropriate, which may include the return of the record to the Board for further consideration.

9. Bureau of Naval Personnel Instruction (BUPERSINST) 5420.21A, *Administration of Board for Correction of Naval Records Applications Within the Bureau of Naval Personnel*, provides, in pertinent part:

3. Background. Reference (a) is the statutory basis for correction of military records and authorizes Service Secretaries, acting through their civilian boards, to correct errors and remove injustices from the service record. Reference (b) is the guidance for preparing BCNR correspondence. Reference (c) provides the function of the BCNR and to determine the existence of errors or injustices in the service record and to make appropriate recommendations for correction to the Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN) (M&RA). BUPERS assists the BCNR by providing advisory opinions and implementing the approved corrections.

Payment and Settlement of Claims Arising from a Correction of a Military Record

10. 10 U.S.C. § 1552 provides, in pertinent part:

(c)(1) The Secretary concerned may pay,

from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, or on account of his or another's service as a civilian employee.

*****

(3) A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

11. Department of Defense (DoD) *Financial Management Regulation* (DoD FMR), DoD 7000.14-R, Volume 7B, Chapter 10, Correction of Records, provides, in pertinent part:

1001 AUTHORITY

*****

100103. If there is a proper correction and a right to the payment of money as a result of that proper correction, then there must be a change of facts as set out in the original record, or an addition or deletion of a fact.

*****

1002 PAY COMPUTATION

100201. Payment based on a correction of military records must be made in the amounts determined to be due by applying pertinent laws and regulations to all the material facts shown in the corrected record.

*****

100205. A claimant's acceptance of settlement fully satisfies the claim concerned. Settlement of this claim does not preclude payment of a separate and distinct claim and acceptance of settlement does not preclude recomputation and adjustment when there is a mutual mistake. Payments are not authorized for any claim compensated by private law before October 25, 1951.

*****

BIBLIOGRAPHY

CHAPTER 10 – CORRECTION OF RECORDS

1001 – CORRECTION OF RECORDS

100101	10 U.S.C. 1552
100103	39 Comp Gen 178
100104	10 U.S.C. 1552(a) and (b)

1002 – PAY COMPUTATION

100204	10 U.S.C. 1552(c)

12. 32 C.F.R. provides, in pertinent part:

§723.10 Settlement of claims.

(a) *Authority.*

(1) The Department of the Navy is authorized under 10 U.S.C. 1552 to pay claims for amounts due to applicants as a result of corrections to their naval records.

(2) The Department of the Navy is not authorized to pay any claim heretofore compensated by Congress through enactment of a private law, or to pay any amount as compensation for any benefit to which the claimant might subsequently become entitled under the laws and regulations administered by the Secretary of Veterans Affairs.

(b) *Application for settlement.*

(1) Settlement and payment of claims shall be made only upon a claim of the person whose record has been corrected or legal representative, heirs at law, or beneficiaries. Such claim for settlement and payment may be filed as a separate part of the application for correction of the record.

(2) When the person whose record has been corrected is deceased, and where no demand is presented by a duly appointed legal representative of the estate, payments otherwise due shall be made to the surviving spouse, heir or beneficiaries, in the order prescribed by

the law applicable to that kind of payment, or if there is no such law covering order of payment, in the order set forth in 10 U.S.C. 2771; or as otherwise prescribed by the law applicable to that kind of payment.

(3) Upon request, the applicant or applicants shall be required to furnish requisite information to determine their status as proper parties to the claim for purposes of payment under applicable provisions of law.

(c) *Settlement.*

(1) Settlement of claims shall be upon the basis of the decision and recommendation of the Board, as approved by the Secretary or his designee. Computation of the amounts due shall be made by the appropriate disbursing activity. In no case will the amount found due exceed the amount which would otherwise have been paid or have become due under applicable laws had no error or injustice occurred. Earnings received from civilian employment, self employment or any income protection plan for such employment during any period for which active duty pay and allowances are payable will be deducted from the settlement. To the extent authorized by law and regulation, amounts found due may be reduced by the amount of any existing indebtedness to the Government arising from military service.

(2) Prior to or at the time of payment, the person or persons to whom payments are to be

made shall be advised by the disbursing activity of the nature and amount of the various benefits represented by the total settlement and shall be advised further that acceptance of such settlement shall constitute a complete release by the claimants involved of any claim against the United States on account of the correction of the record.

Settlement of Claims Generally in the Department of Defense Relating to Service Member Pay and Allowance

13. The Legislative Branch Appropriations Act, Pub. L. No. 104-53, § 211, 109 Stat. 514, 535 (1995), provides, in pertinent part:

> (a) Effective June 30, 1996, the functions of the Comptroller General identified in subsection (b) are transferred to the Director of the Office of Management and Budget, contingent upon the additional transfer to the Office of Management and Budget of such personnel, budget authority, records, and property of the General Accounting Office relating to such functions as the Comptroller General and the Director jointly determine to be necessary. The Director may delegate any such function, in whole or in part, to any other agency or agencies if the Director determines that such delegation would be cost-effective or otherwise in the public interest.
>
> *****
>
> (b) The following provisions of the United

States Code contain the functions to be transferred pursuant to subsection (a):

*****

[S]ections 1304, 3702, 3726, and 3728 of title 31.

14. Office of Mgmt. & Budget, Exec. Office of the President, DETERMINATION WITH RESPECT TO TRANSFER OF FUNCTIONS PURSUANT TO PUBLIC LAW 104-53, Attachment A, at 1 (1996), provides, in pertinent part:

> I have determined that it would be cost-effective and otherwise in the public interest for the functions identified in Sec. 21 1(b) to be delegated in whole to other agencies, in the manner specified in Attachment A. Accordingly, effective June 30, 1996, such functions are delegated, in whole, to the respective agencies as specified in Attachment A (the functions under 31 U.S.C. 3702 are delegated in part to the Department of Defense, in part to the General Services Administration, and in part to the Office of Personnel Management).

*****

Attachment A

Delegated Functions and
Statutory Authorities

*****

Department of Defense

-- Claims related to uniformed services members' (does not include civilian employees of the service) pay, allowances, travel, transportation, retired pay, and survivor benefits: and claims by transportation carriers for amounts collected from them for loss or damage incurred to property incident to shipment at government expense. 31 U.S.C. § 3702

15. 61 Fed. Reg. 50285, *Claims Settlement Authority Issuance to Defense Office of Hearings and Appeals*, provides, in pertinent part:

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EFFECTIVE DATE: September 25, 1996.

*****

SUPPLEMENTARY INFORMATION: Pursuant to the Legislative Branch Appropriations Act of 1996, most of the claims settlement functions of the U.S. General Accounting Office were transferred to the Director of OMB. See Sec. 211, Pub. L. 104–53, 109 Stat. 535. Subsequently, the Acting Director delegated these functions to various components within the Executive branch in a determination order dated June 28, 1996. This order delegated to the Department of Defense the authority to settle the following classes of claims against the United States: a. Claims related to uniform services members' pay, allowances, trav-

el, transportation, retired pay, and survivor benefits.

*****

Effective September 4, 1996, the Secretary of Defense further delegated the authority to DOHA. Before the effective date of the transfer, these claims were subject to the procedures prescribed by the Comptroller General at 4 C.F.R. Chapter 1, Subchapter C (1996). Until DOHA issues its own regulations implementing its new claims authority, DOHA's policy will be to apply these procedures and the U.S. General Accounting Office's practices to claims submitted to DOHA for settlement. As an exception, the authority to issue decisions in review of settlements will be exercised by a Claims Appeals Board on behalf of the Secretary of Defense. For each of the types of claims described above, claimants should submit their claims to the agencies out of whose activity the claim arose and it is the agency's responsibility to forward the claim to DOHA with its comments.

16. The General Accounting Office Act of 1996, Pub. L. No. 104-316, § 202, 110 Stat 3826, 3843, provides, in pertinent part:

(n) CLAIMS SETTLEMENT.–

(1) IN GENERAL.-Section 3702 of title 31, United States Code, is amended–

(A) in the heading by striking "of the

Comptroller General";

(B) by amending subsection (a) to read as follows:

"(a) Except as provided in this chapter or another law, all claims of or against the United States Government shall be settled as follows:

"(1) The Secretary of Defense shall settle–

"(A) claims involving uniformed service members' pay, allowances, travel, transportation, retired pay, and survivor benefits."

17. 31 U.S.C. § 3702 provides, in pertinent part:

(a) Except as provided in this chapter or another law, all claims of or against the United States Government shall be settled as follows:

(1) The Secretary of Defense shall settle-
(A) claims involving uniformed service members' pay, allowances, travel, transportation, payments for unused accrued leave, retired pay, and survivor benefits.

18. DoD FMR, Volume 5, Chapter 12, Questionable and Fraudulent Claims (2016), provides, in pertinent part:

1201 GENERAL

*****

120103. Authoritative Guidance

*****

B. See 31 U.S.C. § 3702 for the authority on settling claims against the United States.

1202 DETERMINATIONS OF FRAUD

120201. Discrepancies

*****

The Defense Office of Hearings and Appeals (DOHA) considers appeals of claims for uniformed services pay and allowances. Refer to 31 U.S.C. § 3702; 32 CFR 282.5(b)(2); and 32 CFR 282, Appendix E for additional information on appeals.

19. 32 C.F.R § 281 provides, in pertinent part:

.4 Policy.

It is DoD policy that:

(a) The claim settlement and advance decision authorities that, by statute or delegation, are vested in the Department of Defense or the Secretary of Defense shall be exercised by the officials designated in this part. The appendix to this part describes the claims included under these functional authorities.

(b) Claims shall be settled and advance decisions shall be rendered in accordance with

pertinent statutes and regulations, and after consideration of other relevant authorities.

.5 Responsibilities.

(a) The *General Counsel of the Department of Defense* shall:

(1) Settle claims that the Secretary of Defense is authorized to settle under 31 U.S.C. 3702.

*****

(4) Develop overall claim settlement and advance decision policies; and promulgate procedures for settling claims, processing requests for an advance decision (including overseeing the submission of requests for an advance decision arising from the activity of a DoD Component that are addressed to officials outside the Department of Defense), and rendering advance decisions. Procedures for settling claims shall include an initial determination process and a process to appeal an initial determination.

(b) The Heads of the DoD Components shall:

(1) Establish procedures within their organization for processing claims and for submitting requests for an advance decision arising from it's activity in accordance with this part and responsibilities promulgated under paragraph (a)(4) of this section.

*****

Appendix to Part 281—Claims Description

The Secretary of Defense is authorized to perform the claim settlement and advance decision functions for claims under the following statutes:

(a) 31 U.S.C. 3702, concerning claims in general when there is no other settlement authority specifically provided for by law.[1]

---

[1] This includes claims involving Uniformed Services members' pay, allowances, travel, transportation, payment for unused accrued leave, retired pay, and survivor benefits, and claims for refunds by carriers for amounts collected from them for loss or damage to property they transported at Government expense; also included are other claims arising from the activity of a DoD Component.

20. 32 C.F.R § 281 provides, in pertinent part:

.1 Purpose.

This part implements policy under 32 CFR part 281 and prescribes procedures for processing and settling personnel and general claims under 31 U.S.C. 3702.

*****

.5 Responsibilities.

*****

(b) The *Director, Defense Office of Hearings and Appeals* (DOHA), or designee, under the GC, DoD (as the *Director, Defense Legal Services Agency*), shall:

*****

5.2.2. Consider appeals from an initial determination, and affirm, modify, reverse, or remand the initial determination in accordance with 32 CFR part 281, this part, and relevant DoD Office of General Counsel opinions.

(c) The Heads of the DoD Components, or designees, shall:

(1) Process claims under 31 U.S.C. 3702

*****

in accordance with this part.

*****

(3) Pay claims as provided in a final action in accordance with this Instruction.

Appendix C to Part 282—Submitting a Claim

(b) *Where to Submit a Claim.* A claimant must submit a claim to the Component concerned in accordance with guidance provided by that Component.

Military Duty Assignments

21. MILPERSMAN Article 1910-812, *Place of Separation* (2005), provides, in pertinent part:

> 1. Policy
>
> a. **Inside continental United States (CONUS):** Members eligible for separation while serving in the 48 contiguous United States (U.S.) will normally be separated on board their current command.

22. MILPERSMAN 1320-030, *Delegation of Authority to Issue Orders and Administrative Control of Orders and Travel* (2002), provides, in pertinent part:

> 1. Authority to Issue Orders
>
> a. Competent orders for officers are issued and approved by Chief of Naval Personnel (CHNAVPERS), or commands authorized by CHNAVPERS.

23. Chief of Naval Personnel, *Appointment to Deputy Chief of Naval Personnel and Delegation of Authority*, to Commander, Navy Personnel Command (2010), provides, in pertinent part:

> 3. You are responsible for the routine, day-to-day operations of the Bureau of Naval Personnel that normally come within the cognizance of DCNP or CNPC. Accordingly, you are hereby delegated the authority to act on behalf of the Chief of Naval Personnel in the follow-

ing capacities:

*****

c. Officer and enlisted assignments and detailing;

24. BUPERSINST 5400.61, *Bureau of Naval Personnel Millington Organization Manual* (2014), provides, in pertinent part:

BUPERS-OOJ

Office of Legal Counsel

Serves as the principal advisor and staff assistant in an additional duty capacity to DEPCHNAVPERS concerning the interpretation and application of law and policy. Provides legal advice to BUPERS Millington (BPM) and NAVPERSCOM, field activities, and the fleet on military personnel law to include promotions and advancements; administrative separations; detailing; uniformed personnel entitlements and benefits; retirements; separation pay; casualty affairs, to include survivor benefits; and veteran's affairs.

25. DoDI 1315.18, *Procedures for Military Personnel Assignments* (2005), provides, in pertinent part:

E1. REFERENCES.

*****

(h) Joint Federal Travel Regulations (JFTR), current edition

*****

E2.1.37. Permanent Change of Station (PCS). See reference (h).

26. Joint Federal Travel Regulations (JFTR), Appendix A, Definitions and Acronyms, Part 2, Definitions (UNIFORMED MEMBER ONLY) (2010), provides, in pertinent part:

> PERMANENT CHANGE OF STATION (PCS). In general, the assignment, detail, or transfer of a member or unit to a different PDS under a competent order that does not specify the duty as temporary, provide for further assignment to a new PDS, or direct return to the old PDS.

27. MILPERSMAN 1306-122, *Permanent Change of Station (PCS) and Permanent Change of Activity (PCA) Move Determination* (2007), provides, in pertinent part:

1. General Information

*****

b. Moves are classified as either permanent change of station (PCS) or permanent change of activity (PCA) as defined below:

(1) PCS: The assignment, detail, or transfer of a member of a unit to a different PDS under competent orders that do not specify the duty

as temporary nor provide for further assignment to a new PDS, or direct return to the old PDS.

28. MILPERSMAN 1320-300, *Types of Orders* (2005), provides, in pertinent part:

1. Types of Orders

*****

b. Change of duty orders are orders which detach members from one duty station and assign them to another station.

29. Joint Travel Regulations, Chapter 5, Permanent Duty Travel, Part A, General, provides, in pertinent part:

5006 PCS ORDER

A. General. ***A PCS order must direct a PCS.***

Basic Allowance for Housing

30. 37 U.S.C. § 403 provides, in pertinent part:

(a) General Entitlement.–

(1) Except as otherwise provided by law, a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for housing at the monthly rates prescribed under this section or another provision of law with regard to the applicable component of the

basic allowance for housing. The amount of the basic allowance for housing for a member will vary according to the pay grade in which the member is assigned or distributed for basic pay purposes, the dependency status of the member, and the geographic location of the member.

*****

(k) Administration.–

(1) The Secretary of Defense shall prescribe regulations for the administration of this section.

31. JFTR, Chapter 10, Housing Allowances (2010), provides, in pertinent part:

U10002 HOUSING ALLOWANCE

A. General. Effective 1 January 1998, in general, a member on active duty entitled to basic pay is authorized a housing allowance based on the member's grade, dependency status, and location. Rates are prescribed depending on the member's grade and whether or not the member has a dependent. The location determines the rate, and whether the allowance is BAH or OHA. The BAH rate is based on median housing costs and is paid independently of a member's actual housing costs. It is paid for housing in the U.S. OHA is a cost-reimbursement based allowance. The authorization depends on other elements that factor in such as sharers, utilities, and owner vs.

renter. OHA is paid for housing outside the U.S. The member is reimbursed actual rental costs NTE the maximum OHA rate for each locality and grade.

*****

U10402 MEMBER WITH DEPENDENT

*****

B. Location Rate. Ordinarily a housing allowance is paid based on the member's PDS, or the home port for a member assigned to a ship or afloat unit. However, the Service may determine that a member's assignment to a PDS or the circumstances of that assignment requires the dependent to reside separately. The Secretary Concerned or the Secretarial Process, at Service discretion, may authorize/approve a housing allowance based on the dependent's location or old PDS.

*****

4. Home Port Changes. Change the housing allowance to the new home port rate on the home port change effective date prescribed by the Service, if a member:

a. Is currently assigned to a ship or other afloat unit with an announced home port change, or

*****

U10416 MEMBER IN TRANSIT

*****

B. Old PDS in the U.S. A member's old PDS is the PDS for BAH purposes from the day the member departs the old PDS through the day before the member reports to the new PDS in compliance with a PCS order (if the member had been residing in GOV'T QTRS at the old PDS, the member is authorized BAH as of the GOV'T QTRS termination date). See Tables U10E-12, U10E-16 and U10E-17 for further guidance.

*****

F. Decision Logic Table

MEMBER IN TRANSIT

Table U10E-12

RULE	If the member	and	then (NOTES 1 and 2)
1	is en route PCS	from a PDS in the U.S.	Continue old PDS-based BAH through the day before the day the member reports to the new PDS, to include TDY en route. New PDS-based BAH or OHA authorization begins on the day the member reports to the new PDS.

32. Chief of Naval Operations Instruction (OPNAVINST) 7220.12, *Basic Allowance for Housing Entitlements*, provides, in pertinent part:

> 3. Background. Effective 1 January 1998, BAH replaced Basic Allowance for Quarters (BAQ) and Variable Housing Allowance (VHA). BAH is paid to assist service members in acquiring housing in the vicinity of the permanent duty station consistent with housing occupied by non-service members with comparable income levels in the same geographic location. BAH rates vary based the geographic location of the member's permanent duty station (PDS), on grade, and dependency status.

33. JFTR, Appendix A, Definitions and Acronyms, Part 2, Definitions (UNIFORMED MEMBER ONLY) (2010), provides, in pertinent part:

> PERMANENT DUTY STATION (PDS). *Also called OFFICIAL STATION.* The post of duty or official station of a member or invitational traveler, including a ship (for the purpose of personal travel and transportation of the member's UB located on board the ship). The home port of a ship or of a ship-based staff to which a member is assigned or attached for duty other than TDY is the PDS for dependents' transportation, and transportation of HHG, mobile homes, and/or POVs, CONUS COLA, and geography-based station allowances and OHA.

34. DoDI 1315.18, *Procedures for Military Personnel Assignments* (2005), provides, in pertinent part:

E1. REFERENCES.

*****

(h) Joint Federal Travel Regulations (JFTR), current edition

*****

E2.1.38. Permanent Duty Station. See reference (h).

35. MILPERSMAN 1320-300, *Types of Orders* (2005), provides, in pertinent part:

4. PCS Orders. The assignment, detail, or transfer of a member or unit to a different PDS under a competent travel order that does not specify the duty as temporary, provide for further assignment to a new PDS, or direct return to the old PDS. A PDS is the post of duty/official station of a member, including a ship. The homeport of a ship or of a ship-based staff to which a member is assigned or attached for duty (other than TEMDU) is the PDS for dependents' transportation, and transportation of household goods (HHG), mobile homes, and/or privately owned vehicles, continental United States (CONUS) cost of living allowance (COLA), geography-based station allowances, and overseas housing allowances.

Career Sea Pay

36. 37 U.S.C. § 305a provides, in pertinent part:

(a) Availability of Special Pay.–A member of a uniformed service who is entitled to basic pay is also entitled, while on sea duty, to special pay at the applicable rate under subsection (b).

****

(c) Premium.–A member of a uniformed service entitled to career sea pay under this section who has served 36 consecutive months of sea duty is also entitled to a career sea pay premium for the thirty-seventh consecutive month and each subsequent consecutive month of sea duty served by such member. The monthly amount of the premium shall be prescribed by the Secretary concerned, but may not exceed $350.

(d) Regulations.–The Secretary concerned shall prescribe regulations for the administration of this section for the armed force or armed forces under the jurisdiction of the Secretary. The entitlements under this section shall be subject to the regulations.

(e) Definition of Sea Duty.–

(1) In this section, the term "sea duty" means duty performed by a member–

(A) while permanently or temporarily assigned to a ship and–

(i) while serving on a ship the primary mission of which is accomplished while under way.

*****

37. DoD FMR, Volume 7A, Chapter 18, Special Pay – Career Sea Pay (2011), provides, in pertinent part:

1801 GENERAL PROVISIONS

180101. Entitlement

A member who is entitled to basic pay is entitled to career sea pay (CSP) and career sea pay premium (CSP-P) while serving on sea duty under regulations prescribed by the Secretary concerned and the provisions of this chapter.

*****

C. Sea Duty. For the purpose of entitlement to CSP and CSP-P, the term "sea duty" means duty performed by a member under orders meeting on of the following conditions:

1. While permanently assigned for duty to a ship, ship-based staff, or ship-based aviation unit and serving in a ship with a primary mission that is accomplished underway (includes ships designated as destroyer or submarine tenders)/ Periods when the member is on temporary duty, on leave, hospitalized, or otherwise temporarily absent under orders, not to

exceed the first 30 consecutive days of each occurrence, are also counted.

*****

E. Ship. For the purpose of entitlement to CSP and CSP-P, the term "ship" means a self-propelled vessel in an active status, in commission, or in-service.

1802 CONDITIONS OF ENTITLEMENT

180201. General Conditions

The general conditions of entitlement to CSP are in Table 18-1. Additionally, entitlement to and the rate of CSP is dependent upon the branch of service, pay grade, and total cumulative years of sea duty applicable to the member. All members in pay grades E-1 through O-6 are eligible for payment of CSP, except commissioned offcers of the Army and Air Force with 3 or less years of cumulative sea duty and enlisted members of the Air Force in pay grades below E-4.

180202. Career Sea Pay - Premium Conditions

The conditions of entitlement to CSP-P require the member to first be entitled to CSP. The CSP-P is additional to CSP; however, for certain pay grades, it has been included in the CSP rate tables and is not payable as a separate item. When payable as a separate item, CSP-P accrues from the first day following the

completion of the 36th month of consecutive sea duty, and will be prorated if beginning on other than the first day of a calendar month. For example, a member beginning a period of sea duty on January 15, 1999 would accrue CSP-P beginning January 15, 2002. The CSP-P is payable for the 37th and each subsequent consecutive month of sea duty regardless of the member's pay grade when the sea duty began, provided the member is concurrently entitled to CSP.

A. The following members of the Navy and Marine Corps may become entitled to CSP-P as a separate item of pay:

1. All officers in pay grades O-1 through O-6.

*****

Table 18-1. Career Sea Pay – Conditions of Entitlement

RULE	A	B	C	D	E
		is serving on a ship whose primary mission is accomplished			
	When an eligible member	underway	in port	and	then Career Sea Pay
1	reports for permanent duty defined as sea duty	X			starts on the date of reporting
			*****		
15	is permanently or temporarily	X	X (note 5)	ship remains in	continues to accrue

	assigned to duty on a ship which is undergoing alterations or repairs			an active status (in commission or in-service) (note 6)	

*****

NOTES:

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6. OPNAVINST 4700.8 series defines ship status assignments for USN ships.

*****

BIBLIOGRAPHY

CHAPTER 18 –
SPECIAL PAY – CAREER SEA PAY

1801 – GENERAL PROVISIONS 37 U.S.C. 305a

180102 37 U.S.C. 305a(e)

*****

1803 – RATES PAYABLE 37 U.S.C. 305a(b)

180302 37 U.S.C. 305a(c)

1804 – RESTRICTIONS 37 U.S.C. 305a(d)

38. OPNAVIST 7220.14, *Career Sea Pay and Ca-*

reer Sea Pay Premium, provides, in pertinent part:

5. Designation. The Chief of Naval Operations will designate vessels in one of two categories for purposes of CSP in enclosure (2). Only those ship or craft classes and individual ships or craft listed in enclosure (2) are designated for CSP.

*****

6. Personnel Eligibility for CSP. A member who is entitled to basic pay is entitled to CSP while serving on a qualifying sea duty assignment.

*****

7. Assignment Eligibility for CSP

a. Permanently assigned to and serving in a vessel designated as a Category A ship or the off-crew of a "two crew" Category A submarine.

*****

8. 30-Day Rule.

*****

c. Members permanently assigned to CSP-eligible vessels in regular overhaul periods (to include staffs complying with the "embarked and serving in" policy aboard that ship), who must move certain workcenters or staff spaces

(e.g., Integrated Logistics Office (ILO), Ground Support Equipment (GSE) rework, etc.), ashore for either overhaul management effectiveness or loss of shipboard working spaces, need not be issued TAD orders if the members are mustered daily and the location of their workcenter is in the same geographic location as the overhaul site as determined by the ship's Commanding Officer. If TAD orders are not issued in this specific circumstance the 30-Day Rule is not applicable and continuous entitlement to CSP remains.

Enclosure (2)
CATEGORIES OF VESSELS
FOR ENTITLEMENT TO CSP

1. Category "A" CSP Vessels (Navy)

*****

CVN

Hazardous Duty Pay

39. 37 U.S.C. § 235 (1952) provides, in pertinent part:

Subject to such regulations as may be prescribed by the President, members of the uniformed services entitled to receive basic pay shall, in addition thereto, be entitled to receive incentive pay for the performance of hazardous duty required by competent orders. The following duties shall constitute hazardous duties:

*****

(3) duty involving frequent and regular participation in aerial flights not as a crew member pursuant to part (1) of this subsection.