No. 20-

In The
Supreme Court of the United States

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Walter N. Strand, III,
Petitioner,

v.

United States of America,
Respondent.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the wake of World War II, Congress established corrections boards for military records to help ensure that military members had a way to seek relief from harsh outcomes in the military justice system that hampered their reintegration into civilian life. In establishing the boards, Congress required service secretaries to "act[] through boards of civilians" to correct the records of servicemembers. 10 U.S.C. § 1552(a)(1). These boards receive tens of thousands of applications every year from servicemembers seeking record corrections. Currently, there is a split in authority over whether the statutory language requiring the Secretary of a military department to "act[] through boards of civilians" permits the Secretary to overrule a Board's decision that is supported by the record.

The question presented is whether the Secretary of the Navy, is "acting through" the Board for Correction of Naval Records as required by statute when he reweighs evidence and sets aside a decision of that Board that was supported by substantial evidence.

PARTIES TO THE PROCEEDING AND RELATED CASES

All of the Parties to the Case are set out in the caption on the cover page.

These other proceedings are directly related to the case:

- *Strand v. United States*, No. 15-601C, United States Court of Federal Claims. Judgment entered June 13, 2016.

- *Strand v. United States*, No. 2016-2450, 2016-2484. United States Court of Appeals for the Federal Circuit. Judgment entered Sept. 7, 2017.

- *Strand v. United States*, No. 15-601C, United States Court of Federal Claims. Judgment entered July 31, 2018.

- *Strand v. United States*, No. 2019-1016, United States Court of Appeals for the Federal Circuit. Judgment entered Mar. 3, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Walter N. Strand, III respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Federal Circuit (App. 1a-29a) is reported at 951 F.3d 1347 (Fed. Cir. 2020) ("*Strand IV*"). The Court of Federal Claims opinion and order (App. 30a-56a) is reported at 138 Fed. Cl. 633 (Fed. Cl. 2018)("*Strand III*"). The Federal Circuit's first opinion (App. 69a-81a) was non-precedential, but is reported at 706 Fed. Appx. 996 (Fed. Cir. 2017) ("*Strand II*"). The Court of Federal Claims' initial opinion and order (App. 82a-99a) is reported at 127 Fed. Cl. 44 (Fed. Cl. 2016) ("*Strand I*").

JURISDICTION

The Federal Circuit issued its decision and accompanying order on March 3, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari. On March 19, 2020, this Court extended filing deadlines for petitions for writ of certiorari to 150 days in light of the ongoing COVID-19 pandemic. *See* Supreme Court of the United States Order 589, March 19, 2020.

STATUTORY PROVISIONS INVOLVED

10 U.S.C. § 1552

(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. The Secretary of Homeland Security may in the same manner correct any military record of the Coast Guard.

(2) The Secretary concerned is not required to act through a board in the case of the correction of a military record announcing a decision that a person is not eligible to enlist (or reenlist) or is not accepted for enlistment (or reenlistment) or announcing the promotion and appointment of an enlisted member to an initial or higher grade or the decision not to promote an enlisted member to a higher grade. Such a correction may be made only if the correction is favorable to the person concerned

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(4)(A) Subject to subparagraph (B), a correction under this section is final and conclusive on all officers of the

United States except when procured by fraud.

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STATEMENT OF THE CASE

Prior to World War II, requests by servicemembers for corrections to their military records were handled through private bills to Congress. General Accounting Office, FPCD-80-13, *Military Discharge Policies and Practices Result in Wide Disparities: Congressional Review is Needed* (Feb. 1980) at 75. After World War II, Congress established boards in each of the military departments to handle these functions. *See* Legislative Reorganization Act of 1946 § 131, 10 U.S.C. §§ 1552, 1553. For the Navy, these boards are the Board for Correction of Naval Records ("BCNR") and the Navy Discharge Review Board ("NDRB"). At issue in this case is a decision concerning the correction of Mr. Strand's naval record by the BCNR to remove an injustice. Congress directed that such corrections by the board "shall be made by the Secretary *acting through boards of civilians*. . ." 10 U.S.C. § 1552(a)(1)(emphasis added). The Federal Circuit nonetheless upheld the Secretary's decision to *ignore* the BCNR and unilaterally reject Mr. Strand's request for correction. That decision was not made "acting through" the board, and it therefore violated Section 1552(a)(1). This Court should grant certiorari to correct the Federal Circuit's erroneous interpretation of the statute.

Mr. Strand served his country honorably and without disciplinary incident for nearly 19 and a half

years in the Navy. App. 70a. Despite his disadvantaged start in life,[1] Mr. Strand rose to become a "dynamic leader" in the Navy, praised as a "[s]uperb manager" and a "pillar for subordinates and juniors alike to emulate." App. 34a (quoting administrative record). During his service, Mr. Strand spent more than 11 years of that time deployed overseas, including deployments in support of combat operations in Iraq and Afghanistan. App. 33a.

These continuous deployments demanded by our Nation's wars took their toll on this dedicated sailor. After returning from his last deployment, Mr. Strand found that his wife had, without telling him, moved out, cleaned out his bank account, taken his possessions, was filing for divorce, and was refusing to let him see his children. App. 33a. In a split-second lapse of judgment caused by frustration and anger, Mr. Strand fired a weapon next to a vehicle carrying his estranged wife and her male companion. *Id.* No one was injured, but Mr. Strand was arrested and later convicted of attempted malicious wounding, attempted unlawful wounding, and use of a firearm in the commission of a felony on February 4, 2009. *Id.*; *see also* App 3a. After his conviction, the Navy administratively separated Mr. Strand and discharged him with an Other Than Honorable discharge. App. 2a-3a. Mr. Strand was sentenced to six years in prison, but was released after three years based upon his model conduct. App. 3a. Mr. Strand

[1] Mr. Strand grew up in the Philadelphia suburb of Chester, Pennsylvania, one of Pennsylvania's poorest jurisdictions. *See* Chester City Act 47 Exit Plan, Adopted 2018-10-10 at 42 (median income of Chester is only about 40% of the income of the county in which it sits).

has since been trying to put his life back together, in part by seeking to correct his military record and the characterization of his discharge. *See* App. 34a.

Recipients of any discharge that is not honorable are disadvantaged upon their return to civilian life. *See* Christopher H. Lunding, *Judicial Review of Military Administrative Discharges*, 83 Yale. L. J. 33, Nov. 1973 at 33. In addition to the stigma and effects on employment and education prospects, such discharges also cut off access to Veterans Administration ("VA") services. That may spell crisis at a time when it is estimated that 20 veterans commit suicide per day.[2] *See* Major Bryant A. Boohar, *Combat Stress Claims: Veterans' Benefits and Post Separation Character of Service Upgrades for "Bad Paper" Veterans After The Fairness for Veterans Act*, 227 Mil. L. Rev. 95, 2019, at 95.

Today, Mr. Strand is underemployed, works multiple jobs, and provides all of his available income to support his children. App. 139a. Although Pennsylvania, where Mr. Strand lives, has adopted "ban the box" laws to prevent minorities like Mr. Strand from suffering disproportionately in employment decisions based on criminal records checks,[3] there is no such prohibition on reviewing a potential employee's service record. This undermines

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[2] Even with his discharge upgraded to a General Under Honorable Conditions, Mr. Strand has encountered difficulty in applying for VA benefits.

[3] *See* Pennsylvania Office of Administration, Fair-Chance Hiring, HR-TM001, May 5, 2017; Philadelphia Code, Chapter 9-3500.

Mr. Strand's ability to use his service record to document his valuable training and certifications,[4] and his uncorrected record provides a backdoor for employers to deny him gainful employment and prevent him from fully reintegrating into civilian life. App. 139a-140a. For these reasons, Mr. Strand sought to have his record corrected.

While proceeding *pro se* for four years following his release from prison, Mr. Strand requested correction of his records from both the NDRB and the BCNR on numerous occasions. App. 34a-35a. Both forums granted him relief from the conditions of his initial discharge from the Navy. First, the NDRB granted Mr. Strand an upgrade to his Characterization of Service from Other than Honorable to General Under Honorable Conditions.[5] App. 34a. Then in December 2014, after careful consideration of all the evidence, the BCNR found that Mr. Strand had "suffered long enough for his indiscretion" and granted him further relief in the form of correction of his naval record "to show he was honorably retired with 20 years of service vice issued a discharge under honorable conditions by reason of misconduct." App. 35a.

Under Section 1552(a)(1), the BCNR's decision should have been binding on the Secretary because

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[4] Mr. Strand held the rate of Information Systems Technician, and had been trained on sensitive information systems technology and operations. He held a Top Secret security clearance.

[5] The NDRB's decision was not challenged by the Navy, is now final and unreviewable, and has not been the subject of litigation.

the statute requires the Secretary to act "through" the Board. Instead, however, the Secretary of the Navy's Assistant General Counsel for Manpower and Reserve Affairs ("AGC") reviewed the BCNR's decision and tersely overruled it in a two-paragraph decision. App. 97a-98a.

In *Strand I*, Mr. Strand challenged the AGC's decision in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491. Review in these cases is conducted under the Administrative Procedures Act ("APA") and courts determine whether the Secretary's actions are "arbitrary, capricious, unsupported by substantial evidence, or in violation of the law." 5 U.S.C. § 702; *see also Strickland v. United States*, 423 F.3d 1335, 1339 (Fed. Cir. 2005). Mr. Strand also invoked the money mandating statutes of 10 U.S.C. § 6333 and 10 U.S.C. § 204. Mr. Strand prevailed in showing that the AGC's reversal was arbitrary, capricious, an abuse of discretion and unsupported by substantial evidence in the Court of Federal Claims. App. 95a. On the Navy's appeal in *Strand II*, the Federal Circuit agreed that Mr. Strand had shown there was no substantial evidence in support of the AGC's decision. App. 74a-75a. Because the AGC had relied on "intertwined reasons" in rejecting the BCNR's recommendation, the Federal Circuit remanded for further proceedings. App. 75a.

On remand, the AGC again rejected the BCNR's recommendation, and without involving the BCNR, issued a seven-page letter applying Navy Core Values to again deny Mr. Strand the relief recommended by the Board. App. 56a-68a. The AGC's second reversal: relitigated a lone alcohol incident

from when Mr. Strand was 18 years old (Plaintiff-Appellee's Brief at 22-23, *Strand v. United States*, No. 2019-1016 (Fed. Cir filed Mar. 28, 2019)); applied core values that were not in existence at that time of this conduct (*id.* at 23); classified his conduct as violative of the core values even though Mr. Strand received a Good Conduct Medal for that period and was promoted and reenlisted (*id*. at 23-24); relied on cases from forums where Mr. Strand never appeared and which do not address the core values (*Id*. at 24-26);[6] failed to apply the Navy's core values reciprocally as required (*id.* at 35-36); focused on the conduct for which Mr. Strand was convicted in violation of the BCNR's regulations (*id.* at 28); and accepted the recommendation of a retired military officer in overturning the BCNR's decision in violation of *Proper v. United States,* 139 Ct. Cl. 511, 526 (Ct. Cl. 1957).[7] *Id*. at 30-33.

All of this is arbitrary decision making at odds with the BCNR's well-supported decision. And none of this was done "*through [a] board[] of civilians*. . ." as required by 10 U.S.C. § 1552(a)(1). Rather, the AGC acted herself without any indication to Mr. Strand what the AGC would focus on, and without providing him any opportunity to address her specific

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[6] One cited case was from the Air Force which has different core values entirely. Plaintiff-Appellee's Brief at 25, fn. 10, Strand v. United States, No. 2019-1016 (Fed. Cir filed Mar. 28, 2019)

[7] The United States Court of Claims was the predecessor Court to the Federal Circuit, which adopted the Court of Claims decisions as binding precedent in *South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982).

concerns or offer additional evidence to rebut them before issuing her decision.[8]

Mr. Strand successfully challenged this second denial in the Court of Federal Claims in *Strand III*. App. 53a. In particular, Mr. Strand argued that the Secretary does not have absolute discretion to reject the recommendation of the Board because he is required by statute to "act[] through" the Board. *See* Supplemental Complaint at ¶ 55, *Strand v. United States*, No. 15-601C (Fed. Cl. filed Mar. 21, 2018); Corrected Plaintiff-Appellee's Brief at 10, 15 *Strand v. United States*, No. 2019-1016 (Fed. Cir filed Mar. 28, 2019) (arguing that BCNR decisions are not merely advisory). On the Navy's second appeal in *Strand IV*, the Navy argued that the Secretary is free to reject the Board's decision based on a reweighing of the evidence before the Board.[9] *See* Reply Brief of Defendant-Appellant at 6-9, No. 2019-1016 (Fed. Cir. filed Apr. 18, 2019). The Federal Circuit this time sided with the Navy. It held that its prior binding precedent, which contained strong language restricting the Secretary's ability to reject the Board's recommendation, was applicable only in narrow

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[8] The AGC sent Mr. Strand a letter allowing him to submit additional information, but never informed him that her decision would range beyond the original rationale advanced by the first AGC, and did not inform him of her specific concerns with the record. App. 142a-143a.

[9] The Navy also argued that Mr. Strand had waived his right to challenge the aspects of the decision which had never been previously disclosed to him. *See* Defendant's Motion to Dismiss the Supplemental Complaint or in the Alternative for Judgment on the Administrative Record, No. 1:15-cv-00601 (Fed. Cl. filed May 14, 2018) at 13-14.

circumstances involving the recommendation of a military officer. App. 13a-14a. According to the Federal Circuit, absent such circumstances, service Secretaries are free to disregard the recommendations of the Boards where the evidence is subject to varying interpretations. App. 14a.

This decision allows the Secretary to act without involving the Board even though 10 U.S.C. § 1552(a)(1) requires the Secretary to "act[] through boards of civilians" to correct records. If the Secretary may reweigh the evidence and overrule the board, he is not "acting through" the Board.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT'S DECISION WIDENS A SPLIT IN AUTHORITY AMONG THE CIRCUITS, SOME OF WHICH WOULD DECIDE THE QUESTION PRESENTED DIFFERENTLY

The Federal Circuit's decision in *Strand IV* widens a split among the circuits on the discretion of the Secretary to reverse the Board based on a reweighing of the evidence. If left unresolved, this leaves servicemembers subject to inconsistent applications of the law. Under the correct rule, where the Board's recommendations are justified by the record, the Secretary has no discretion to deviate from them.

The Third Circuit has cited the correct rule that the Secretary is not "acting through" the Board if he overrules Board recommendations that are justified by the record. *See Neal v. Sec'y of the Navy and*

Commandant of the Marine Corps, 639 F.2d 1029, 1043, n.13 (3d Cir. 1981). This rule was first announced in in the early cases of *Proper,* 139 Ct. Cl. at 526, and *Weiss v. United States*, 187 Ct. Cl. 1, 10 (Ct. Cl. 1969). The Third Circuit holds that the Secretary may not "arbitrarily overrule the recommendations of the Board where the findings of the Board are justified by the record." *See Nelson v. Miller*, 373 F.2d 474, 478 (3d Cir. 1967) *cert. denied* 387 U.S. 924 (1967).[10]

In *Neal,* the Third Circuit explained that this rule applies even though "the decision of the BCNR is in the form of a recommendation to the Secretary". 639 F.2d at 1043, n.13; *see also Nelson v. Miller*, 373 F.2d at 478. Courts within the Third Circuit have cited this rule in response to government arguments that the Secretary of a military department has final discretion to overrule a Board. *See Waudby v. United States*, No. 2:09-cv-1167, 2010 WL 324521 at *8-9 (D. N.J. 2010) (citing *Neal, Weiss,* and *Proper* and denying government motion for summary judgment because Secretary's rejection of a Board decision could be arbitrary if Board decision was supported by substantial evidence). The Third Circuit thus looks to see whether the Board's decision is justified by the record, and if so, the Secretary will not be permitted to reweigh the evidence and set aside the Board's decision.

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[10] Although it indicated that it felt the Chief of Naval Personnel's rejection of a board decision was improper, the Third Circuit did not reach this ultimate question but instead allowed the district court to retain jurisdiction while the plaintiff pursued relief through the BCNR.

Though none have clearly ruled on the exact question presented here, several other Circuits have favorably cited the Third Circuit's articulation of the rule when examining the powers of the Secretary and the Boards.

The Second Circuit has cited *Neal*, as persuasive authority in cases involving Board review. *See Blasingame v. Sec'y of the Navy*, 866 F.2d 556, 558-559 (2d Cir. 1989)(reversing grant of summary judgment in case referred to Commandant of the Marine Corps for advisory opinion); *see also Dibble v. Fenimore*, 545 F.3d 208, 215 (2d Cir. 2008) (citing *Neal* as persuasive authority in case involving Air Force Board for Correction of Military Records).[11] The Eighth Circuit has cited the Third Circuit's *Nelson* decision, and *Proper, Weiss,* and *Hertzog v. United States*, 167 Ct. Cl. 377 (Ct. Cl. 1964), from the Court of Claims in explaining that the Secretary cannot arbitrarily overrule Board decisions. *Horn v. Schlesinger*, 514 F.2d 549, 553 (8th Cir. 1975)(deciding case on failure to exhaust administrative remedies). The Seventh Circuit also cites the rule followed by the Third Circuit. *See Champagne v. Schlesinger*, 506 F.2d 979, 983 (7th Cir. 1974) (citing *Hertzog* and explaining that rejection is allowable only on narrow grounds). Finally, the Fifth Circuit has cited *Proper, Weiss,* and *Hertzog* from the Court of Claims, and *Nelson* from the Third Circuit in

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[11] *Cf. Falk v. Sec'y of the Army*, 870 F.2d 941, 945 (2d Cir. 1989). In *Falk,* the Second Circuit held that the Board's power to correct was discretionary. *Id.* This holding, however, did not examine a secretary's rejection of a Board decision supported by substantial evidence, and instead involved an examination of the Board's decision in the first instance. *Id.*

explaining that the Secretary cannot arbitrarily overrule the Board. *See Hodges v. Callaway,* 499 F.2d 417, 423 (5th Cir. 1974). These Circuits' citation of the strong rule preventing arbitrary reversal of Board decisions by the Secretary indicates that they would side with the Third Circuit.

By contrast, the Federal Circuit's decision here permits the Secretary to overrule the board based on his own view of the evidence. In addition to the Federal Circuit, the Ninth, and D.C. Circuits appear to provide the Secretary discretion to overrule the Board by reweighing the evidence. *See, e.g., Barber v. Widnall*, 78 F.3d 1419, 1423 (9th Cir. 1996); *Miller v. Lehman*, 801 F.2d 492, 497 (D.C. Cir. 1986).

This split in authority means that some circuits will permit the Secretary to reweigh evidence and set aside a Board decision whereas others will not.[12] The Court should grant this petition to resolve this conflicting authority from the Circuits on an important right Congress granted to servicemembers based upon the Nation's experience in World War II.

A. The Earliest Cases Correctly Restricted The Secretary's

[12] The decision in *Strand IV* is also a significant shift because the majority of these cases proceed in the Federal Circuit as the United States Court of Federal Claims has exclusive jurisdiction over monetary claims against the government in excess of $10,000. *See* 28 U.S.C. § 1491(a).

Discretion Based On The Statutory Language

The Court of Claims, acting close in time to the enactment of the statute,[13] initially strongly rejected the idea that the Board's recommendations are "merely advisory". *See, e.g., Proper,* 139 Ct. Cl. at 526 (Ct. Cl. 1957). In *Proper*, the court said

> But defendant urges that the Secretary did not need to act through a civilian board and that the recommendations of the Correction Board were merely advisory, leaving the Secretary free to accept and act favorably on the findings and recommendations, or to ignore them, as he saw fit. Such an interpretation of [the statute] makes the words 'acting through boards of civilian officers or employees' superfluous. Neither the act itself nor

[13] A handful of initial cases held that decisions of the Boards were not reviewable by the Courts. *See Gentila v. Pace*, 193 F.2d 924, 927 (D.C. Cir. 1951) *cert. denied* 342 U.S. 943 (1952). These conflicted with law developed in the Court of Claims finding such claims reviewable. *See Prince v. U.S.*, 119 F. Supp. 421, 423-424 (Ct. Cl. 1954). In *Harmon v. Brucker*, the majority of the Court found that a district court had jurisdiction over a servicemember's claim challenging the characterization of his discharge. 355 U.S. 579, 581-582, (1958). Since then, Courts have reviewed such claims. *See, e.g., Guerrero v. Stone*, 970 F.2d 626, 628 (9th Cir. 1992)("the federal courts are open to assure that, in applying the regulations, commanders do not abuse the discretion necessarily vested in them." citing *Sec'y of Navy v. Huff*, 444 U.S. 453, 458 n.5 (1980)).

> its legislative history warrants such an interpretation.

Id. As the *Proper* court explained, "[s]ince 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." *Id*.

Accordingly, the court determined that under certain circumstances, the Secretary could be bound by the BCNR's findings. *See Weiss*, 187 Ct. Cl. at 10 (citing *Hertzog*, 167 Ct. Cl. at 387). These initial decisions focused on the findings of the board, and where those findings were warranted and supported by substantial evidence, the Secretary was not permitted to overrule the Board without additional evidence to the contrary. *Proper*, 139 Ct. Cl. at 527-28; *Weiss*, 187 Ct. Further, the court also initially took the position that the Secretary could not simply reverse the Board because he disagreed with the decision. *See Betts v. United States*, 145 Ct. Cl. 530, 535-36 (Ct. Cl. 1959). Moreover, the Secretary was not free to reach a decision that is contrary to the evidence. *Hertzog*, 167 Ct. Cl. at 387. As the court stated, "a decision contrary to all the evidence, and for which, even on post audit, no reason can be given except an irrelevant reason, cannot be characterized as other than capricious. As such it deserves only to be ignored, and we ignore it." *Id*.

These earliest cases correctly recognized that Congress intended to place decision making authority over record corrections cases in the hands of civilians as an oversight mechanism. *Proper,* 139 Ct. Cl. at 526. As the Third Circuit has explained in *Neal*:

> The statute establishing military review tribunals explicitly obligates them to act to 'remove an injustice,' a task which necessarily entails an inquiry by the tribunal as to whether the individual has been treated in a manner comporting with traditional notions of fairness. In essence, the military correction boards were established to provide an institutional check on arbitrary action. Before the legislation which authorized creation of administrative boards, Congress itself reviewed military discharges on an ad hoc basis. When Congress determined to change the previously prevailing system, it did so by providing for tribunals with broad, not restricted review power. It need not have done so. It could have, without any constitutional impediment, maintained or perpetuated the practice by which military personnel decisions were the sole prerogative of the commanding officers. Instead, when Congress established civilian boards to review military personnel decisions, it did not provide for boards limited, as the names may erroneously imply, to the clerical function of making technical correction of records of military personnel.

639 F.2d at 1042 (internal citation omitted).

As observed by the Third Circuit, it was not necessary for Congress to create the Boards, and Congress could have left complete discretion for record corrections to the military chain of command. Indeed, 10 U.S.C. § 1552(a)(2) shows that Congress was well aware of this possibility as that provision allows Secretaries to act *without* Board involvement in certain cases. By treating corrections under 1552(a)(1) differently, and requiring the Secretary to act "through" the Board, it is clear that Congress did not intend simply to preserve total discretion for the Secretary. Courts in the Third Circuit have interpreted the history of the statute to prohibit the Secretary from reversing the Board where the Board's decisions are supported by the record. *See Waudby*, 2010 WL 324521 at *8-9.

B. By Contrast, The Federal Circuit Has Eroded An Important Procedural Protection For Service Members.

Despite the strong initial precedent protecting servicemembers from arbitrary reversal of board decisions by the Secretary, more recent cases in the Federal Circuit have drifted away from this standard. In *Boyd v. United States*, the Court of Claims found that the secretary could reverse the Board where the Board's findings were not justified on the record before the Board. 207 Ct. Cl. 1, 9 (Ct. Cl. 1975). In *Sanders v. United States*, the Court of Claims then cited *Boyd* and held that secretaries were free to differ with the recommendations of the Boards where the evidence is susceptible to varying interpretations. 594 F.2d 804, 812 (Ct. Cl. 1979). Courts nonetheless

continued to apply *Weiss* and *Proper* to prevent reversal where the Board's decisions were supported. *See, e.g, Laningham v. United States*, 30 Fed. Cl. 296, 308-09 (Fed. Cl. 1994) ("*Weiss* stands for the proposition that the Secretary of a military department does not have the unilateral authority to set aside the findings of a correction board where such findings are supported by the evidence.").

More recently, *i*n *Strickland v. United States*, the Federal Circuit relied on *Sanders* and *Boyd* to reverse the Court of Federal Claims' decision that the BCNR's determination was binding on the Secretary by operation of the statute. 423 F.3d at 1337-38. In *Strickland*, the Federal Circuit held that the Secretary (through the AGC) could reject the BCNR's decision, but such rejection was subject to review under the APA standard. *Id*. at 1343. Yet even under that weakened standard, the strong language from earlier cases like *Proper, Weiss* and *Hertzog* continued to be applied if the Board's decision was justified by the record. *See, e.g.,* App. 93a ("Ultimately, because the function of the BCNR is not merely advisory, the Secretary is not free to reject a recommendation without proper justification.").

In the *Strand IV* case, the Federal Circuit has now walked this back further, and erroneously distinguished *Proper, Weiss*, and *Hertzog* on the basis that those cases apply only in instances where the Secretary rejects the Board's recommendation on the advice of a military officer.[14] *See* App. 13a (stating

[14] In Mr. Strand's case, the AGC accepted the recommendation of Mr. Robert O'Neill, a recently retired Judge Advocate General Corps officer, to revisit the BCNR's decision. *See* App. 10a. The

that *Proper* and *Weiss* have "no application" without military officer involvement). The Federal Circuit then held that without military officer involvement, "the Secretaries are free to differ with recommendations of correction boards where the evidence is susceptible to varying interpretations." App. 13a-14a (internal ellipsis and brackets omitted)(citing *Sanders v. United States*, 594 F.2d 804, 812 (Ct. Cl. 1979).

By allowing service secretaries total deference to overrule the Boards, the Federal Circuit has now placed the decision-making power back into the military chain of command with the Secretary. The earliest decisions of its predecessor, the Court of Claims, correctly held that this was not what Congress intended when it required the Secretary to "act[] through" the Board to correct records. The Federal Circuit has strayed so far from the original meaning of the statute intended by Congress as to render it meaningless. This Court should grant certiorari to restore the balance created by Congress.

Federal Circuit found *Proper* and *Weiss* inapplicable because Mr. O'Neill was retired and thus a civilian when he wrote the memo recommending the AGC review the BCNR's decision. App. 13a. The Federal Circuit's holding that *Proper* and *Weiss* are inapplicable in Mr. Strand's case ignores that in *Proper*, the recommendation was also made by a *retired* officer. *Proper*, 139 Ct. Cl. at 526; *see also Hertzog*, 167 Ct. Cl. at 382 (recommendation also made by *retired* officer).

II. THE FEDERAL CIRCUIT'S DECISION IS INCONSISTENT WITH THE EXPRESS DICTATE OF 10 U.S.C. § 1552

The Federal Circuit's decision in *Strand IV* allows the Secretary to act without involving the Board. 10 U.S.C. § 1552(a)(1) requires the Secretary to "act[] *through* boards of civilians" when correcting records. (emphasis added). The Federal Circuit's decision permits the Secretary to disagree with the Board's conclusions about the record and to reach a different decision, and upon different bases than the Board.[15] But if the Secretary is permitted to reweigh the evidence and decide however he sees fit, he is not "acting through" the Board, and the Board serves no purpose.

A. The Plain Language of 10 U.S.C. § 1552 Limits The Secretary's Discretion

In interpreting statutory language, the Court first looks to the ordinary meaning of the language. *See Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 407 (2011). An "act" is "something done or performed." *Act*, Black's Law Dictionary (11th ed. 2019). Additionally, "acting" when used as a verb without an object means "to reach, make, or issue a decision on some matter." Dictionary.com, *Acting*,

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[15] The statute requires that where the Board makes a preliminary determination that there are insufficient documents or information to support a claim, the claimant must be notified in writing and given an opportunity to provide the records. 10 U.S.C. § 1552(a)(3)(B-C). Here the AGC did not inform Mr. Strand of the bases upon which she found his claim insufficient prior to issuing her decision.

https://www. dictionary.com/browse/acting (last visited July 20, 2020). Here, the "act" is the correction of a military record and the Secretary is supposed to be "acting"—reaching the decision—"through" the Board.

"Through" is "used as a function word to indicate means, agency, or intermediacy: such as a: by means of : by the agency of." Merriam-Webster.com Dictionary, Merriam-Webster, *Through*, https://www. merriam-webster.com/dictionary/through (last visited July 19, 2020). Here, Congress granted the power to "correct an error or remove an injustice" from a military record. 10 U.S.C. § 1552(a)(1). In so doing, Congress mandated that "such corrections shall be made by the Secretary acting *through* boards of civilians of the executive part of that military department." *Id*. (emphasis added). The act of correcting records has been delegated by Congress to the Boards. "[A]cting through" the Boards means that the Secretary is required to rely on the Boards when making these decisions. At the very minimum, this language means that the Secretary can't reject the Board's conclusion when that conclusion is supported by the record. If the Secretary could just reject the Board's decision in such circumstances, that would effectively render the Board's input irrelevant.

B. Permitting A Secretary To Substitute His Judgment For The Board's Violates Canons Of Statutory Construction

Under the mandatory/permissive canon of statutory construction, mandatory words like "shall" impose a duty. *See Kingdomware Techs., Inc. v.*

United States, 136 S. Ct. 1969, 1977 (2016). The statute says that "corrections *shall* be made by the Secretary *acting through* boards of civilians of the executive part of that military department." 10 U.S.C. § 1552(a)(1)(emphasis added). The Secretary thus has a duty to act through the Boards when correcting errors or injustices and cannot substitute his own judgment in place of the Boards.

Although the statute begins with language that says "[t]he Secretary of a military department *may* correct any military record . . ." (emphasis added), the following sentence requires corrections "shall" be done "*through*" the boards. 10 U.S.C. § 1552(a)(1)("such corrections *shall be made* by the Secretary acting through boards of civilians…"). The permissive language in the first sentence of the statute only clarifies that records may be corrected,[16] but the statute imposes a duty that any such corrections are determined by the Boards.

The Federal Circuit's decision also violates the canon against surplusage. It is the Court's "duty to 'give each word some operative effect' where possible." *Duncan v. Walker*, 533 U.S. 167, 175 (2001). Under this canon, no word should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence. *See Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality

[16] This reading of the permissive language in the first sentence of the statute is consistent with the Navy's regulations that state that correction will not be denied solely on ground that initial record was correct when made. 32 C.F.R. § 723.3(e)(2). If corrections could be denied for this reason alone, the Secretary could take the position that corrections were not permitted if the records had been correctly made.

opinion of Scalia, J.) (citing the "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant"). By allowing the Secretary to decide cases as he sees fit without regard to the Board's decision, the Federal Circuit has rendered the words "through boards of civilians" surplusage. *See Proper*, 139 Ct. Cl. at 526.

The Secretaries of the military departments have always had inherent authority and discretion to make military records and to correct the records they have made. *See, e.g., Carney v. Sec'y of Defense*, 462 F.2d 606, 607 (1st Cir. 1972)(noting that Secretary of the Navy has inherent authority to issue or modify orders). In creating the Boards, Congress took some of that discretion and curtailed it, requiring that Secretaries act "through" boards of civilians. In other words, Congress introduced a requirement that the Secretary's authority to "remove an injustice" from military records could not be exercised independent of civilian boards. This understanding of the words "acting through boards of civilians" is consistent with Congress' civilian oversight role via private bills that it sought to supplant by establishing the Boards. If Congress intended only for the Secretary to have absolute discretion to correct records, it did not have to create the Boards at all, or to use language requiring the Secretary to "act[] through boards of civilians." This language cannot be treated as superfluous.

Finally, under the whole-text canon, the text of a statute must be construed as a whole. A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) (explaining that "the whole-text

canon" requires consideration of "the entire text, in view of its structure" and "logical relation of its many parts"). Subsection (a) of the statute divides the universe of decisions into two parts: for some decisions the Secretary must "act[] through boards of civilians"; and for other decisions "[t]he Secretary concerned is not required to act through a board".[17] *Compare* 10 U.S.C. § 1552(a)(1) *with* § (a)(2). Taken as a whole, this provision alone shows that the final decision under section (a)(1) does not belong to the Secretary and demonstrates that Congress knew how to state such discretionary authority in section (a)(2). However, the other provisions of the statute speak of the *Board* making the determination on record corrections (subsections (a)(3), (4), (g), (h)) and one provision permits the Secretary himself to *request* correction from the Board. 10 U.S.C. § 1552(b) ("the Secretary concerned files a *request* for the correction" and "[t]he Secretary concerned may file a *request* for correction of a military record" (emphasis added)). If the statute had placed discretion to correct records with the Secretary, then the Secretary would not have to request correction from the Board. This overall scheme is inconsistent with the idea, as now expressed by the Federal Circuit, that all corrections are at the Secretary's sole discretion. The Court should grant this petition to ensure that courts are correctly interpreting the law as intended by Congress.

C. The Federal Circuit's Opinion In Strand IV Is Inconsistent With The

[17] This second category of decisions include those concerning enlistment, re-enlistment or promotion. *See* 10 U.S.C. § 1552(a)(2). In such cases, the Secretary can only act if his action is favorable to the servicemember. *Id.*

Legislative History Of The Statute Showing That The Boards Were Established To Provide Civilian Oversight Of Military Decision Making

By using the language "acting through boards of civilians," Congress clearly did not intend for the Secretary to have final discretion over records corrections because the Boards were established to mimic Congress' civilian oversight of the military. Prior to World War II, requests by servicemembers for corrections to their records were handled through private bills to Congress. General Accounting Office, *supra*, at 75. Congress established the NDRB and the BCNR at the end of World War II due in part to concerns that Congress was not properly equipped to handle the volume of requests. *See* Legislative Reorganization Act of 1946 § 131 (outlawing private bills to correct military records)(codified at 2 U.S.C. § 190g); *see also* John. J. Field, *Waiving the Discretionary Statute of Limitations Governing the Boards for Correction of Military Records*, 62 Geo. Wash. L. Rev. 920 (1993) (quoting S. Rep. No. 79-1400 (1946) and explaining year-long study determining that Congress was not organized and equipped to supervise execution of programs).

Additionally, Congress was concerned that military members did not receive the same legal and procedural protections in the military justice system that they would be entitled to in civilian courts. *See* Michael J. Wishnie, *"A Boy Gets Into Trouble": Service Members, Civil Rights, And Veterans' Law Exceptionalism*, 97 B.U.L. Rev. 1709, 1726-27 (2017)

(citing S. Rep. No 78-755, at 2 (1944) and 78 Cong. Rec. 4538 (1944)). Accordingly, Congress first established Discharge Review Boards in 1944, and then in 1946 directed that civilian boards review military records to correct errors or injustice. 10 U.S.C. § 1552;[18] *see also, e.g.*, John. J. Field, *Waiving the Discretionary Statute of Limitations Governing the Boards for Correction of Military Records*, 62 Geo. Wash. L. Rev. 920, 932-935 (1993) (discussing legislative history of creation of the Boards). The broad purpose of the Acts that established the Boards in the wake of World War II was to create a "bill of rights to facilitate the return of service men and women to civilian life." S. Rep. No. 78-755, at 2 (1944). Shortly after the creation of the Boards, the Attorney General opined that the Boards were established "as a substitute for a disapproved system (relief by private acts) and should be so construed, if possible, as to make unnecessary further resort to the old method." 40 Op. Att'y Gen. 504, 508 (1947) (Attorney General Tom C. Clark).

"If courts read the grant to permit the Secretaries unbridled discretion to decide whether or not to correct an injustice, then the courts would alter substantially the Act's purpose because such a reading would make resort to the old method necessary to obtain relief." John J. Field, *Waiving the Discretionary Statute of Limitations Governing the Boards for Correction of Military Records*, 62 Geo. Wash. L. Rev. 920 (1993) at 935. "Thus, 'the conjunction of section 131 [disallowing private bills]

[18] The Boards were originally codified at 5 U.S.C. § 191a, but this was moved to the current location in the Code by Aug. 10, 1956, c. 1041, 70A Stat. 116.

with section 207 [establishing the Boards] implies that the Secretaries have a duty as well as the power to afford servicemembers proper relief." *Id.*; *see also* 40 Op. Att'y Gen. 504, 505 ("These two sections must be read together.").

Recognizing that it faces a public health crisis with the Nation's veterans after nearly two full decades of continuous fighting, Congress continues to try to implement protections for servicemembers through the Boards. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 535, 130 Stat. 2000, 2919 (2016), amended by National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 520, 131 Stat. 1332 (2017)("Fairness for Veterans Act") (requiring boards to give "liberal consideration" to claims by service members suffering from PTSD or related behavioral health conditions); *see also* 10 U.S.C. § 1552 (h) (codification of the Fairness for Veterans Act). Yet, despite Congress' clear intention that the Boards should provide equitable relief to servicemembers to soften the impact of harsh military justice in subsequent civilian life, that goal continues to be frustrated by eroded judicial oversight and near complete deference, in some circuits, to Secretarial reversals of the recommendations of the Boards.[19]

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[19] The judiciary's reluctance to exercise proper oversight is also inconsistent with the legislative history of revisions to the statute. Pub. L. No. 82-220, 65 Stat. 655 (1951). Congress had expressly considered and rejected language that Board actions "shall be final and conclusive on all officers of the Government, *including review by the courts of the United States* except when procured by means of fraud." *See Friedman v. United States*, 158 F. Supp. 364, 375 (Ct. Cl. 1958) (emphasis added) (citing H.R. Rep. No. 82-449 (1951)). The emphasized language was deleted

III. MR. STRAND'S CASE PRESENTS A CLEAN AND CLEAR ISSUE UPON WHICH THE COURT CAN RULE

The Navy has never contended that the BCNR did not have the power to grant Mr. Strand the relief it did. In fact, before the Federal Circuit, the Navy conceded that the BCNR's decision was supported by the record. *See* Brief of Defendant-Appellant at 23-24 *Strand IV*, Case No. 19-1016 (Fed. Cir. filed Feb. 19, 2019) ("[t]o be sure, before the Secretary were evidence and arguments that supported granting the BCNR's recommendation, and we recognize that a reasonable person perhaps could have reached a different result after considering them."). That concession sets up the perfect test and should prove determinative. *Proper, Weiss*, *Neal, Hertzog*, *Betts,* and others, have correctly held that where the Board's recommendations are justified by the record, the Secretary has no discretion to deviate from them. The rule in *Proper* is consistent with Congress' intent that corrections to military records be made by the Secretary "acting through boards of civilians."

Mr. Strand's is exactly the type of case Congress envisioned when it brought the Boards into existence – the servicemember who "gets into trouble." After a stellar 19½ year career, Mr. Strand committed one split-second instance of misconduct that is now over 12 years old. As a result, Mr. Strand now has a black mark in his record that is preventing his

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after hearings. *Id.* (citing Hearings on H.R. 1181 Before a Subcomm. Of the House Comm. On Armed Service, 82 Cong., 1st Sess. 391-93 (1951)).

reintegration into civilian life. The BCNR saw the injustice in continuing to punish Mr. Strand under these circumstances and granted him relief. That decision is fully supported by the record, but it was summarily reversed twice by the AGC. Contrary to the intent of Congress, the Federal Circuit has permitted the AGC to revert to a harsh standard of military justice that needlessly continues to punish Mr. Strand, without any perceptible benefit for the Navy. Indeed, the AGC's current position that Mr. Strand's conduct is so violative of the core values as to preclude further relief is inconsistent with the current characterization of his discharge—General (Under *Honorable* Conditions) (emphasis added).

Today, the Boards receive tens of thousands of cases every year from servicemembers like Mr. Strand seeking corrections to their service records. Although the Boards are required by 10 U.S.C. § 1552(i) to post information on the number of claims considered and corrected, this information is difficult to obtain. The most recent statistics available from the BCNR show that it receives over 12,000 applications annually.[20] Current statistics for the Army Board for Correction of Military Records are not available, but commentators have noted that the board received 17,674 applications in fiscal year 2012, of which 9,314 were considered by three-member panels. *See* The Boards for Correction of Military and Naval Records: An Administrative Law Perspective, 65 Admin. L. Rev. 499, 502 (Spring 2013). Current Air Force Board

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[20] *See* Board for Correction of Naval Records, FAQ and Key Information, https://www.secnav.navy.mil/mra/bcnr/Pages/FAQ_and_Key_Information.aspx#0 (last visited, July 1, 2020).

for Correction of Military Records statistics are not available. Even with this imperfect information, we know that tens of thousands of servicemembers seek relief from the Boards every year.

Mr. Strand's treatment is representative of the challenges faced by tens of thousands of other servicemembers trying to obtain relief from the Boards as Congress intended so that they can fully integrate back into civilian life. After those servicemembers have served in our Nation's continuing and longest war effort, under incredible personal stress upon themselves and their families, they often find themselves subject to harsh military justice. These veterans suffer from high rates of Post-Traumatic Stress Disorder and Traumatic Brain Injury,[21] which Congress has recognized and directed the military to address in a lenient manner. *See* 10 U.S.C. §§ 1552(g)(2), (h). But some courts have allowed a system designed by Congress to show leniency to those who have served to be replaced by the same harsh military system Congress intended to soften. The Court should act to eliminate the current uncertainty as to whether courts should show virtually total deference to a military Secretary's reversal of a Corrections Board. By doing so it will ensure the return of the power to correct service records to the Boards as Congress intended.

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[21] *See* Boohar, *supra* at 105-06 (noting that between 2000 and 2015 approximately 177,461 servicemembers were diagnosed with Post Traumatic Stress Disorder, and 327,299 were diagnosed with Traumatic Brain Injury).

CONCLUSION

The Court should grant the petition for a writ of certiorari in order to remedy the degradation of a remedy for thousands of servicemembers who seek corrections to their service records. This Court should reverse the Federal Circuit and afford such other and further relief as the Court deems proper.

Respectfully submitted,

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July 31, 2020

APPENDIX

APPENDIX

United States Court of Appeals for the Federal Circuit

WALTER N. STRAND, III,
Plaintiff-Appellee

v.

UNITED STATES,
Defendant-Appellant

2019-1016

Appeal from the United States Court of Federal Claims in No. 1:15-cv-00601-TCW, Judge Thomas C. Wheeler.

Decided: March 3, 2020

LUCAS TAYLOR HANBACK, Rogers Joseph O'Donnell, Washington, DC, argued for plaintiff-appellee. Also represented by JEFFERY M. CHIOW; NEIL H. O'DONNELL, San Francisco, CA.

DANIEL KENNETH GREENE, Commercial Litigation Branch, Civil Division, United States

Department of Jus-tice, Washington, DC, argued for defendant-appellant. Also represented by JOSEPH H. HUNT, ROBERT EDWARD KIRSCHMAN, JR., DOUGLAS K. MICKLE; STEPHEN ROBERT STEWART, Office of the Judge Advocate General, General Litigation Division, United States Department of the Navy, Washington, DC.

Before REYNA, HUGHES, and STOLL, Circuit Judges.

Opinion for the court filed by Circuit Judge HUGHES.

Dissenting opinion filed by Circuit Judge REYNA.

HUGHES, Circuit Judge.

The government appeals a decision of the United States Court of Federal Claims setting aside the Secretary of the Navy's denial of Walter Strand's request to correct his military service records. Against the recommendation of a records correction board, the Secretary denied Mr. Strand's request for a six-month service credit to become eligible for military retirement benefits. Because the Secretary did not exceed his authority in rejecting the board's recommendation and substantial evidence supports his decision, we reverse and thereby reinstate the Secretary's decision to deny the correction.

I

Mr. Strand served in the Navy for roughly nineteen and a half years until June 2009 when he was discharged under other than honorable conditions for firing a gun at his estranged wife and her companion. Mr. Strand was convicted in state court of three felonies: attempted malicious wounding, attempted unlawful wounding, and use of a firearm in the commission of a felony. He was sentenced to six years in prison, with three years suspended for good behavior. Since his release, Mr. Strand has sought various "corrections" to his naval service records, including a six-month credit so that he would have 20 years of service and be eligible for military retirement benefits.[1]

A

In 2014, the Board for Correction of Naval Records (BCNR or Board) recommended granting Mr. Strand's requested correction. The Board weighed "the seriousness of [Mr. Strand's] disciplinary infractions" against his "overall record of more than 19 years and six months of satisfactory service [including receiving numerous medals,] . . . . his good post service conduct[,] and his early release from civil confinement due to good behavior." J.A. 32. Finding that he had "suffered long enough for his indiscretion," the Board recommended correcting Mr. Strand's record to reflect 20 years of service. J.A. 32–33. That recommendation has now been twice considered—and twice rejected—by the

[1] As discussed below, 10 U.S.C. § 1552 authorizes corrections of military records when "necessary to correct an error or remove an injustice."

Secretary of the Navy.[2]

First, in February 2015, the Secretary rejected the Board's recommendation in a short, two-paragraph decision. The Secretary's decision generally referenced the seriousness of Mr. Strand's felony convictions, the Navy's core values, its practice in similar cases, and Mr. Strand's supposed "long-standing history of FAP [Family Advocacy Program] involvement and domestic violence issues." J.A. 25. Mr. Strand challenged this decision in the Court of Federal Claims, which reversed the Secretary's 2015 decision as arbitrary and capricious and instructed the Navy to retire Mr. Strand. *Strand v. United States* (*Strand I*), 127 Fed. Cl. 44, 51 (2016).

On appeal, we agreed that the Secretary's 2015 decision was not supported by substantial evidence, but we reversed and remanded to allow the Secretary an opportunity for further review. *Strand v. United States* (*Strand II*), 706 F. App'x 996, 998, 1001 (Fed. Cir. 2017) (nonprecedential). In *Strand II*, we found a lack of substantial evidence specifically because the Secretary's statement that Mr. Strand had a history of FAP involvement and domestic violence issues lacked record support. *Id.* at 1000. Recognizing that

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[2] The Secretary has delegated authority to act on BCNR recommendations to the Assistant Secretary, Manpower and Reserve Affairs, SECNAVINST 5420.193 at 1¶ 3(b), who in turn delegated that authority to the Assistant General Counsel for Manpower and Reserve Affairs, Appellant's Br. 4 n.1. Here, different Assistant General Counsels issued the two rejection decisions, but for clarity we refer to both as decisions of the Secretary.

the Secretary relied on "a combination of intertwined reasons," at least one of which Mr. Strand had shown was not supported by substantial evidence, we remanded because the Secretary had not yet considered whether the Board's decision "should be upheld in the absence of any evidence of a 'long-standing history' of FAP involvement." *Id*.

On remand following *Strand II*, the Secretary considered the Board's 2014 recommendation anew and in January 2018—after inviting and receiving supplemental information from Mr. Strand—again rejected the recommendation. The Secretary this time issued a seven-page memorandum explaining the decision to deny the re-quested correction. The Secretary found that Mr. Strand's overall periods of service and post-service conduct did not "overcome the seriousness of the misconduct that resulted in his civilian conviction," and that the "passage of time . . . does not warrant overlooking the seriousness of the conviction that led to his discharge" and his resultant ineligibility for retirement. J.A. 283.

The Secretary also noted that two early "counseling/warning" entries added to Mr. Strand's record in February 1992 and September 1993 gave him "clear and repeated notice" that he could be separated from service for disobeying military regulations and civilian laws.[3] J.A. 118, 121, 283.

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[3] It is unclear from the record whether the 1992 and 1993 entries addressed the same underlying act(s) of misconduct. The parties take opposing stances, with Mr. Strand urging that the 1993 entry was merely a follow-up for the same misconduct that prompted the 1992 entry. Even assuming the Secretary erred in stating that Mr.

The Secretary then described how Mr. Strand's "history of performance and conduct" did not align with each of the Navy's core values—Honor, Courage, and Commitment. J.A. 283–85. Finally, the Secretary noted that Mr. Strand's offenses were equivalent to a violation of Uniform Code of Military Justice Article 128 (Assault), which authorizes a maximum penalty of dishonorable discharge and confinement for eight years. Citing several military justice cases, the Secretary further noted that it was "very likely" Mr. Strand would have received a punitive discharge had he been prosecuted by the Navy, rather than civilian authorities. J.A. 285. The Secretary concluded:

> In sum, I commend Petitioner's efforts to engage in rehabilitation following his conviction and incarceration, as well as his efforts to rebuild his life. However, I do not find that relief is warranted and that Petitioner should be granted credited time served for retirement when, in fact, the basis for his inability to retire was not an error or an injustice, but his own deliberate misconduct despite being on clear notice of the consequences of his actions. To grant relief under the circumstances of this matter wholly ignores the high standards that the

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Strand "again engaged in misconduct in 1993," J.A. 283, we would find this error harmless. No matter the number of early instances of misconduct, the Secretary's rejection decision is supported by substantial evidence.

> Navy expects our military members to demonstrate.

J.A. 285–86. The Secretary also added that Mr. Strand had already received "appropriate relief" from another records review board that upgraded his service characterization from "Under Other Than Honorable Conditions" to "General Under Honorable Conditions." J.A. 52, 286. The Secretary found this partial relief—reflecting Mr. Strand's "satisfactory service and post-incarceration efforts to re-build his life"—further reason to deny additional relief. J.A. 286.

B

Mr. Strand filed a supplemental complaint in the Court of Federal Claims contesting the Secretary's 2018 decision. On cross-motions for judgment upon the administrative record, the Court of Federal Claims again found the Secretary's decision arbitrary and capricious. *Strand v. United States* (*Strand III*), 138 Fed. Cl. 633, 643 (2018). Specifically, the trial court found it arbitrary and capricious for the Secretary to view Mr. Strand's early counseling entries as providing notice of his obligation to comply with Navy core values that did not exist at the time of the 1992 entry;[4] and for the Secretary to engage in "hypothetical forecasting" by "comparing Mr. Strand's civil case to military cases that do not apply the same analysis." *Id.* at 641. As to consideration of Mr.

[4] The government concedes that the Navy adopted its core values of Honor, Courage, and Commitment in late 1992, after Mr. Strand received his 1992 counseling entry. Appellant's Br. 9, 26.

Strand's 2009 convictions, the trial court determined that this Court, in *Strand II*, already "found that Mr. Strand's conduct did not constitute substantial evidence to support the Secretary's decision." *Id.* at 642 (citing *Strand II*, 706 F. App'x at 1000). Finally, the trial court faulted the Secretary for "fail[ing] to give any real consideration to Mr. Strand's post-service conduct." *Id.* at 643. The court concluded that, given these deficiencies and the Board's "thorough consideration of the evidence of record," it could not uphold the Secretary's "decision to overrule the Board." *Id.* The trial court therefore again directed the Navy to retire Mr. Strand with all appropriate back pay, benefits, and allowances. *Id.* at 643–44.

The government now appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

II

We review de novo the Court of Federal Claims' decision to grant or deny judgment on the administrative record. *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004). In reviewing an adverse decision of a records correction board, we apply the same standard of review that the Court of Federal Claims applied, without deference. *See id.* Here we are called to review not the action of a correction board, but action by the Secretary of the Navy to overrule that correction board. While the parties dispute the circumstances in which a service secretary may reject a board's recommendation, they agree that the substantial-evidence standard generally applies here. That is, we must "determine whether the Secretary's rejection of the Board recommendation was arbitrary

or capricious, unsupported by substantial evidence, or otherwise contrary to the law." *Strickland v. United States*, 423 F.3d 1335, 1343 (Fed. Cir. 2005). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938).

A

The statute establishing civilian military-records correction boards, such as the BCNR, provides: "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 in-justice." 10 U.S.C. § 1552(a)(1). Except in circumstances not present here, "such corrections shall be made by the Secretary *acting through boards of civilians* of the executive part of that military department." *Id.* (emphasis added).

Records correction boards were first authorized in 1946 to "relieve Congress of the burden of considering private bills to correct alleged errors and injustices in the military system . . . ." *Martinez v. United States*, 333 F.3d 1295, 1306–07 (Fed. Cir. 2003) (en banc). Concerned that service members returning to civilian life after World War II might be "handicapped by bad military records created without due process in the hurly-burly of the war," and that career military officials "would not be much interested in effecting corrections," Congress required the service secretaries to act "through boards of civilians." *Boyd v. United States*, 207 Ct. Cl. 1, 14 (1975) (Nichols, J., concurring).

Under Naval Service regulations, the BCNR can take corrective action on behalf of the Secretary in many situations. *See* 32 C.F.R. § 723.6(e)(1). But any petition that the Secretary or the BCNR Executive Director determines warrants Secretarial review is "reserved for decision" by the Secretary. *Id.* § 723.6(e)(2)(iii). In Mr. Strand's case, BCNR Executive Director Robert O'Neill—a retired Navy JAG Corpsman—requested that the Secretary review the Board's 2014 recommendation.[5] In cases designated for Secretarial review, the record of proceedings "will be forwarded to the Secretary who will direct such action as he or she determines to be appropriate . . . ." 32 C.F.R. § 723.7(a). "If the Secretary's decision is to deny relief, such decision shall be in writing and, unless he or she expressly adopts in whole or in part the findings, conclusions and recommendations of the Board, or a minority report, shall include a brief statement of the grounds for denial" satisfying 32 C.F.R. § 723.3(e)(4).[6] *Id.*

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[5] Mr. O'Neill's handwritten memo reads in full:

> Please prepare this decision for [Manpower and Re-serve Affairs] review. It is my opinion, based on the seriousness of the offense and the significant grant of relief, that [the Secretary] should review this case for decision.

J.A. 35.

[6] Section 723.3(e)(4), in turn, requires that the "brief statement of the grounds for denial" include

> the reasons for the determination that relief should not be granted, including the applicant's claims of constitutional, statutory and/or regulatory violations that were rejected, together with all the essential facts upon which the denial is based, including, if applicable,

B

This appeal raises the question of how much constraint a substantiated Board recommendation places on a Secretary's discretion to deny record correction requests. Relying on language in *Strickland v. United States*, 423 F.3d 1335, 1340–41 (Fed. Cir. 2005), the government asserts that the Secretary may reject a Board recommendation "on the basis of either explicitly stated policy reasons or evidence in the record." Appellant's Br. 19 (quoting *Strickland*). In *Strickland*, we held that Board recommendations are not binding on the Secretary since "Congress clearly has delegated the final authority regarding any correction of military records to the Secretary, not the correction board." 423 F.3d at 1340; *see id.* at 1337 (concluding that the "the trial court erred in interpreting § 1552(a) to man-date that the . . . Secretary cannot reject a Board recommendation"). We did not address the merits of whether the Secretary's rejection was permissible in that instance, in-stead remanding for the trial court to "determine whether the Secretary's rejection of the Board recommendation was arbitrary or capricious, unsupported by substantial evidence, or otherwise contrary to the law." *Id.* at 1343. Thus, our observation that "[o]ther circuits too have held that the Secretary is authorized to reject a Board recommendation so long as he acts on the basis of either explicitly stated policy reasons or evidence in the record," *id.* at 1341, did not adopt such a standard for future cases.

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factors required by regulation to be considered for determination of the character of and reason for discharge.

For his part, Mr. Strand argues that, under precedent from our predecessor court, the Secretary may not alter a correction board's recommendation unless the board's findings are unsupported by the administrative record. Appellee's Br. 14–17. In his view, rejecting a substantiated board recommendation amounts to ignoring the board, rather than "acting through" it, as § 1552(a) requires. We acknowledge that strong language in some of our adopted precedent would seem to support Mr. Strand's position. *See, e.g.*, *Proper v. United States*, 154 F. Supp. 317, 326 (Ct. Cl. 1957) (rejecting the proposition that a secretary is "free to accept and act favorably on the [board's] findings and recommendations, or to ignore them, as he [sees] fit" be-cause such an interpretation of § 1552 "makes the words 'acting through boards of civilian officers or employees' superfluous" (quoting the predecessor to § 1552)); *Weiss v. United States*, 408 F.2d 416, 421 (Ct. Cl. 1969) ("The thrust of the *Proper* opinion is that a Secretary of a military department cannot overrule the recommendations of a civilian correction board *on the advice of a military officer* unless the findings of the board are not justified by the record before it." (emphasis added)).

However, as the above-quoted language in *Weiss* suggests, the decisions on which Mr. Strand relies were rendered in the context of service secretaries being influenced by—or outright adopting—the opinions of military officers in rejecting otherwise substantiated board recommendations. *See Weiss*, 408 F.2d at 420–21 (Navy Secretary rejecting a BCNR recommendation in an opinion that JAG likely

prepared for the Secretary's signature); *Hertzog v. United States*, 167 Ct. Cl. 377, 385 (1964) (Army Secretary's rejection decision was "induced and influenced" by general's memorandum stating "I think the approval of this recommendation would be a very bad precedent"); *Proper*, 154 F. Supp. at 324–25 (Army Secretary merely signed an order attached to the oppositional memorandum of a retired general who was not a civilian employee of the Army).

We have since held that *Proper* and *Weiss* "have no application" without military officer involvement. *See Strick-land*, 423 F.3d at 1341–42 (noting that in those cases—which "had as a precondition the involvement of a uniformed military officer"—the Secretary "effectively deferred to a professional military officer over the reasonable decision of the Board"). We therefore find these cases inapplicable here. Although BCNR Executive Director O'Neill is a retired military officer, his memo requesting Secretarial review does not constitute undue officer influence. Mr. O'Neill was a civilian employee of the Navy when he wrote the memo, *cf. Proper*, 154 F. Supp. at 325 (finding it "important" that the memo in question was "rendered by a military officer . . . , and not by a civilian employee" of the Army); and his memo merely states that the Secretary "should review this case for decision," J.A. 35, without advocating a particular outcome of that review.

Indeed, in cases without military officer involvement, our predecessor court "ha[s] held that the Secretaries are free to . . . differ with the recommendations of [correction] boards where the evidence is susceptible to varying interpretations."

Sanders v. United States, 594 F.2d 804, 812 (Ct. Cl. 1979) (citing *Boyd v. United States*, 207 Ct. Cl. 1, 11 (1975)). In *Boyd*, the court upheld the Air Force Secretary's rejection of a board recommendation, finding the board's conclusion "d[id] not withstand the contrary analysis and conclusion made in good faith, within the law, and without arbitrariness or caprice by the Assistant Secretary." 207 Ct. Cl. at 12–13. In so holding, the *Boyd* court applied the standard that courts "may reject the decision of a Secretary only if he has exercised his discretion arbitrarily, capriciously, in bad faith, contrary to substantial evidence, or where he has gone outside the board record, or fails to explain his actions, or violates applicable law or regulations." *Id*. at 8–9. We reaffirm that standard today.

We hold that, where a military officer has not unduly influenced the secretary's decision, a service secretary may reject the recommendation of a records correction board—even a recommendation supported by the administrative record—so long as the secretary's rejection decision is not arbitrary or capricious, unsupported by substantial evidence, or otherwise contrary to the law. *See Strickland*, 423 F.3d at 1343; *Boyd*, 207 Ct. Cl. at 8–9.

C

The Secretary's 2018 decision satisfies this standard. It must therefore be reinstated.

The Secretary's thorough consideration of the serious-ness of Mr. Strand's criminal misconduct, alone, justifies his decision to deny the requested

relief. The Secretary undertook a broad review of Mr. Strand's record, but in our view the heavy weight he ascribed to Mr. Strand's "cho[ice] to take a gun and attempt[] to cause his former wife and another individual substantial harm by discharging the weapon," J.A. 284, fully supports denying him credit for six months of service he did not perform.

The trial court misread our decision in *Strand II* when it stated that we "found that Mr. Strand's conduct did not constitute substantial evidence" and that we had "rejected" his prior conviction as a justification for overruling the Board's recommendation. *See Strand III*, 138 Fed. Cl. at 642–43. We took no such position. In *Strand II*, we considered an extremely brief Secretarial decision which generally relied on four "intertwined reasons" to reject the Board's recommendation. 706 F. App'x at 999–1000. Because we found no record support for one of those reasons—the alleged FAP involvement and domestic violence issues—we remanded for the Secretary to consider whether the Board's recommendation "should be upheld in the absence of any evidence of a 'long-standing history' of FAP involvement and domestic violence issues." *Id.* at 1000. We expressed no view on the hypothetical sufficiency of the other three reasons the Secretary mentioned in the 2015 rejection—(1) the seriousness of Mr. Strand's convictions; and (2) that granting relief would be inconsistent with the Navy's core values and (3) its practice in similar cases—in the absence of the unsupported domestic violence reason. *Id*. The Secretary's 2018 decision makes it abundantly clear that his decision remains the same even without evidence of FAP involvement or domestic violence

issues. The trial court's misinterpretation of *Strand II* notwithstanding, the Secretary remained free to rest his decision on the seriousness of Mr. Strand's offenses.[7]

Mr. Strand objects that Naval Service regulations prohibit denying relief solely because the original discharge decision was correctly made, citing 32 C.F.R. § 723.3(e)(2).[8] Even assuming § 723.3(e)(2) applies to decisions of the Secretary (and not only to Board consideration of initial applications), and assuming Mr. Strand's interpretation is correct, that regulation does not undermine the Secretary's 2018 decision. The Secretary did not reject the Board's recommendation simply because he thought the

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[7] In *Strand II*, the Secretary's brief reference to Mr. Strand's "serious felonies" was not enough for us to uphold his 2015 decision, given its simultaneous reference to un-supported domestic violence issues. J.A. 25.

[8] Section 723.3(e)(2) provides, in relevant part:

> The Board may deny an application in executive session if it determines that the evidence of record fails to demonstrate the existence of probable material error or injustice. The Board relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties. Applicants have the burden of overcoming this presumption *but the Board will not deny an application solely because the record was made by or at the direction of the President or the Secretary* in connection with proceedings other than proceedings of a board for the correction of military or naval records.

32 C.F.R. § 723.3(e)(2) (emphasis added).

Navy's 2009 discharge decision was correct. Nowhere in the 2018 rejection decision do we find discussion of the propriety of the original discharge. Rather, we find a full analysis of the seriousness of Mr. Strand's conduct underlying the dis-charge.[9]

D

Beyond considering the seriousness of Mr. Strand's conviction-related conduct, the Secretary's seven-page memorandum also discussed several other reasons for denying the service-credit correction—more than satisfying the requirement to provide a "brief statement of the grounds for denial." *See* 32 C.F.R. §§ 723.3(e)(4), 723.7(a). Mr. Strand and the trial court take issue with various aspects of the Secretary's additional reasoning. But none of the identified issues brings the Secretary's 2018 decision into the realm of arbitrary or unlawful agency action.[10]

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[9] At oral argument, Mr. Strand's counsel seemed to suggest that § 723.3(e)(2) also prohibits relying solely on the seriousness of the conduct underlying the discharge. *See* Oral Argument at 19:40–20:00 (Q: "Are you saying that because he was administratively discharged from the . . . Navy because of this felony conviction and jail time, that they can't further use that as a basis . . . for not giving him relief under the corrections board decision? A: I'm saying it can't be the sole basis, Your Honor.") and 31:01–10 (stating that under § 723.3(e)(2) the Secretary cannot rely on "the initial incident" as "the sole basis"), http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2019-1016.mp3. We find nothing in the text of § 723.3(e)(2) prohibiting consideration of the seriousness of prior misconduct.

[10] Mr. Strand has moved to strike the government's reply brief, arguing that it raises new issues not presented in the government's opening brief, though addressed by the trial court. We agree that the government forfeited the justiciability and

First, both the trial court and Mr. Strand, on appeal, ascribe error to the Secretary's use of the Navy's core values to assess Mr. Strand's request for relief. Mr. Strand objects both to the retroactive application of the core values to his 1992 conduct predating their establishment, and to the Secretary's invocation of the core values in general to overrule the Board's recommendation. Although the Navy admittedly had not adopted its core values of Honor, Courage, and Commitment when Mr. Strand received his 1992 counseling entry, we see nothing arbitrary about analyzing his overall history of performance and conduct under the values existing at the time of the 2018 decision. While we agree that the 1992 counseling entry could not have provided Mr. Strand notice to comply with not-yet existing standards, it still could—and did—warn him of the consequences of future misconduct. J.A. 121 (stating that failure to adhere to cited guidelines in the future "will make you eligible for administrative separation action"). Even leaving aside Mr. Strand's early counseling entries, one does not need any degree of "notice" to know not to shoot at un-armed civilians.

As we read the 2018 decision, the Secretary merely used the core values as a general framework to assess Mr. Strand's request. Although Mr. Strand portends that allowing this core-values framework will provide the Secretary unlimited discretion to overrule Board recommendations, we are unwilling to

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waiver arguments asserted in its reply brief, and we have not considered those arguments in resolving this appeal. Given that the government has prevailed on its other arguments, however, we deny Mr. Strand's motion as moot.

mandate that the Secretary take—or avoid—any particular analytical approach in his review of Board recommendations. The requirement that the Secretary's rejection decision not be arbitrary or capricious, unsupported by substantial evidence, or contrary to the law will continue to provide adequate accountability.

Likewise, the trial court and Mr. Strand read too much into the Secretary's citation to military justice cases and observation that Mr. Strand likely would have received harsher punishment had he been prosecuted by military, rather than civil, authorities for the shooting. We disagree with the trial court that the Secretary "relie[d] upon" the cited cases or "use[d] these cases to justify" his decision. *Strand III*, 138 Fed. Cl. at 642. Rather, after a full analysis of how Mr. Strand's illegal behavior did not align with the Navy's core values, the Secretary briefly delved into military justice standards to emphasize that "the nature of [Mr. Strand's] conduct leading to his civilian conviction cannot be overlooked." J.A. 285. Far from denying Mr. Strand's request just because he might have been punished more harshly in military court, the Secretary cited military sources simply to provide further points of comparison for assessing the nature and severity of Mr. Strand's conduct.

Finally, we reject the notion that the Secretary's decision should be reversed for insufficient consideration of Mr. Strand's positive service record and post-service conduct. True, the Secretary's 2018 decision makes little mention of the many medals, high performance marks, and promotions Mr. Strand received over the course of his career. But there is no

requirement that the Secretary's "brief statement" address every aspect of a petitioner's record. *See* 32 C.F.R. §§ 723.3(e)(4), 723.7(a).[11]

The Secretary reviewed the same administrative record as the Board and drew a different, but still supported, conclusion from it. That the Secretary weighed certain aspects of the record differently than did the Board does not mean that the Secretary's conclusions were arbitrary or unsubstantiated. While the Board's contrary conclusion may also be supported by substantial evidence, that conclusion is not under review here. *See Strickland*, 423 F.3d at 1339 ("If . . . the Secretary disagrees with the Board and rejects its recommendation, ... the court reviews the decision on the basis of the Secretary's written statement."). "[W]hereas the Secretary in correcting a military record is to act through a board of civilians, as required by [§ 1552], he has . . . retained the authority to take such final action on board recommendations as

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[11] We note that the 2018 decision did acknowledge several positive aspects of Mr. Strand's record. The Secretary (1) noted Mr. Strand's "*satisfactory* service, including various medals and personal awards" and his "'*good post service conduct* and his early release from civil confinement due to good behavior,'" J.A. 281 (emphases in original) (quoting J.A. 32); (2) acknowledged the personal character references and personal statements showing Mr. Strand's commitment to supporting his children and reconciliation with his ex-wife (while noting that no statement from Mr. Strand's ex-wife appears among the many statements of support), J.A. 282; (3) "commend[ed]" Mr. Strand's efforts toward post-conviction rehabilitation, J.A. 285; and (4) recognized that Mr. Strand had obtained an equitable upgrade of his service characterization, recognizing his "19.5 years of satisfactory service and post-incarceration efforts to rebuild his life", J.A. 286.

he determines to be appropriate." *Boyd*, 207 Ct. Cl. at 8 (discussing an Air Force regulation containing the same operative language as Navy regulation 32 C.F.R. § 723.7(a)). As we noted in *Strickland*, "'[i]t is clear *from the statute* that the Secretary's decision is a discretionary one.'" 423 F.3d at 1338 (alteration and emphasis in original) (quoting *Boyd*, 207 Ct. Cl. at 7). The Secretary properly exercised the discretion given to him by § 1552(a) in considering the Board's reasoning and disagreeing with its recommendation to grant additional relief to Mr. Strand.

III

We have considered the parties' remaining arguments and find them unpersuasive. The Secretary acted within his discretion in rejecting the recommendation of the Board. His 2018 rejection decision was supported by substantial evidence and was not arbitrary, capricious, or contrary to the law. We therefore reverse the judgment of the Court of Federal Claims.

REVERSED

No costs.

United States Court of Appeals for the Federal Circuit

WALTER N. STRAND, III,
Plaintiff-Appellee

v.

UNITED STATES,
Defendant-Appellant

2019-1016

Appeal from the United States Court of Federal Claims in No. 1:15-cv-00601-TCW, Judge Thomas C. Wheeler.

REYNA, *Circuit Judge*, dissenting.

The majority upholds an agency decision that relies on an unsupported factual finding: that Mr. Strand "engaged in misconduct in 1993." J.A. 283. Because that finding was an integral part of the Secretary's decision, our law requires that we remand to the Secretary for further review. I respectfully dissent.

The Secretary's decision is based, at least in part, on two distinct events of misconduct: one in 1992, one in 1993. The Secretary found that "in 1992, [Mr. Strand] was counseled for abuse of alcohol, which resulted in disorderly conduct, and he was issued

nonjudicial punishment for assault and disorderly conduct." J.A. 283. The Secretary also found that Mr. Strand "again engaged in misconduct in 1993." *Id.*

The record supports the Secretary's finding of misconduct in 1992. Two documents—a two-page "Court Memorandum" and one-page of "Administrative Remarks"—show that Strand was involved in an alcohol-related incident on February 27, 1992, and that Strand received non-judicial punishment for violating UCMJ Article 128 (as-sault) and Article 134 (disorderly conduct). J.A. 119–121. The administrative remarks identify the "deficiencies in [Strand's] performance and/or conduct" as "abuse of alcohol which results [sic] in disorderly conduct." J.A. 121.

There is no similar evidence that would support the Secretary's finding that Strand "again engaged in misconduct in 1993." The Secretary cites one document in sup-port: a single page of "Administrative Remarks," dated September 29, 1993. But the 1993 administrative remarks do not identify an act of misconduct that occurred in 1993. J.A. 118. Instead, the document identifies the "deficiencies in [Strand's] performance and/or conduct" as:

> Violation of UCMJ Articles 128 (Assault) and 134 (Disorderly conduct) as evidenced by CO's NJP of ***27 February 1992*** and documented in your service record on NAVPERS 1070/607 and NAVPERS 1070/609.

J.A. 118 (emphasis added). The 1993 administrative remarks do not reference any other dates, incidents, or misconduct. Nor does the record contain any other evidence showing a 1993 act of misconduct or related punishment.

The government admits that the record lacks support for the Secretary's finding that Strand "again engaged in misconduct in 1993." At oral argument, counsel for the government agreed that the Secretary had found two separate acts of misconduct stemming from two separate events: "[t]he Secretary's decision makes clear that the 1992 nonjudicial punishment was one event and . . . what-ever the event was that resulted in the counseling entry in 1993 was a separate event." Oral Arg. at 1:45–2:13. Counsel for the government also recognized that the record contained no support for that finding.

> Q: The 1993 counseling is not the result of the 1992 event?
>
> A: Correct.
>
> . . .
> Q: What was the 1993 event?
>
> A: It's unclear your Honor . . . the record does not describe the event.

Id. at 2:55–3:05; 3:39–3:46. When pressed, counsel for the government simply said, "I would defer to the Secretary . . . I don't have any reason to doubt the Secretary's characterization of these being two separate incidents." *Id*. at 7:34–8:05.

The Secretary expressly relied on the illusory "misconduct in 1993" when it ruled against Mr. Strand. J.A. 283–285. For example, the Secretary concluded that Mr. Strand failed to "rehabilitate himself while in the Naval service" because "Strand again engaged in misconduct in 1993." J.A. 283. The Secretary also found that Mr. Strand's "conviction for felony offenses, *as well as his history of performance and conduct*, does not align with the Navy [C]ore [V]alues." *Id.* (emphasis added). Because the Secretary refers generally to Mr. Strand's "misconduct" throughout its decision, it is impossible for this court to determine the extent to which the Secretary's error compromised the Secretary's decision. *See* J.A. 284 ("This was not [Mr. Strand's] first instance of misconduct leading to harm of others."); J.A. 286 ("Petitioner's misconduct is inconsistent with the Navy's [C]ore [V]alues of honor, courage, and commitment and runs counter to granting relief.").

In a footnote, the majority sidesteps the Secretary's unsupported finding of 1993 misconduct by characterizing the error as "harmless." Slip op. at 5 n.3. The majority opines that "[n]o matter the number of early instances of misconduct, the Secretary's rejection decision is supported by substantial evidence." *Id*. I disagree. We soundly rejected this reasoning in *Strand II*.

In *Strand II*, we explained that the Secretary's decision was based on "the sum of two facts in the record and two policy reasons": (1) Mr. Strand's history of domestic violence issues; (2) the seriousness

of Mr. Strand's 2008 actions; (3) the Navy's Core Values; and (4) the Navy's practice in similar cases. *Strand v. United States*, 706 F. App'x 996, 1000 (Fed. Cir. 2017) ("*Strand II*"). We concluded, however, that the Secretary's finding that Mr. Strand had a history of domestic violence issues was not supported by substantial evidence. *Id.* In response, the government encouraged us to "uphold the Secretary's decision because it sets forth other policy rationales and evidence." *Id.* But we rejected that argument, explaining:

> [B]ecause the Secretary relied on a combination of intertwined reasons, and Mr. Strand has shown that at least one of those reasons is not supported by substantial evidence, the record is not clear as to whether the Secretary would still reach the same conclusion.
>
> . . .
>
> It is an established principle of administrative law that courts should not intrude upon the domain which Congress has exclusively entrusted to an administrative agency, and that a judicial judgment cannot be made to do service for an administrative judgment. Thus, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. Here, the Secretary has not yet considered whether the [Board's] decision to grant

> Mr. Strand partial relief should be upheld in the absence of any evidence of a long-standing history of FAP involvement and domestic violence issues. We find no special circumstances that would support determining this question in the first instance. Therefore, this case must be re-manded back to the Secretary for further review of the [Board's] decision.

Id. (internal quotations omitted) (citing *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006); *INS v. Ventura*, 537 U.S. 12, 16 (2002); *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943)).

The majority theorizes that "the Secretary's thorough consideration of the seriousness of Mr. Strand's criminal misconduct, alone, justifies his decision to deny the requested relief." Slip op. at 12–13 (explaining that the "heavy weight" the Secretary ascribed to Mr. Strand's actions in 2008 "fully supports denying him credit for six months of service he did not perform"). But the Secretary did not determine that Mr. Strand's 2008 actions were alone sufficient to warrant rejecting the Board's decision. To the contrary, the Secretary expressly stated that Mr. Strand's "conviction for felony offenses, *as well as his history of performance and conduct*," does not align with the Navy Core Values. J.A. 283 (emphasis added).

As in *Strand II*, the Secretary's decision is based on an unsupported fact finding. The Secretary has not yet considered whether it would uphold the

Board's decision in the absence of that finding. Nor has the majority identified any special circumstances that would permit this court to determine this question in the first instance. This case, therefore, must be returned to the Secretary for further review. Because the majority upholds the Secretary's flawed decision, I dissent.

United States Court of Appeals for the Federal Circuit

WALTER N. STRAND, III,
Plaintiff-Appellee

v.

UNITED STATES,
Defendant-Appellant

2019-1016

Appeal from the United States Court of Federal Claims in No. 1:15-cv-00601-TCW, Judge Thomas C. Wheeler.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

REVERSED

ENTERED BY ORDER OF THE COURT

March 3, 2020 /s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

In the United States Court of Federal Claims

No. 15-601C

(Filed: July 31, 2018)

WALTER N. STRAND, III,	*
	*
Plaintiff,	*
	*
v.	*
	*
THE UNITED STATES,	*
	*
Defendant.	*
	*

Action for Review of Military Records; Assistant General Counsel's Reversal of Decision by Board for Correction of Naval Records; Decision on Remand from Federal Circuit; Standard of Review; Substantial Evidence

Jeffery M. Chiow, with whom was *Lucas T. Hanback*, Rogers Joseph O'Donnell, P.C., Washington, D.C., for Plaintiff.

Daniel K. Greene, with whom were *Chad A. Readler*, Acting Assistant Attorney General, *Robert E. Kirschman, Jr.*, Director, and *Douglas K. Mickle*, Assistant Director, Commercial Litigation Branch,

Civil Division, U.S. Department of Justice, Washington, D.C., as well as *Lieutenant Maryam Austin*, Office of the Judge Advocate General, U.S. Navy, for Defendant.

OPINION AND ORDER

WHEELER, Judge.

Plaintiff, an enlisted serviceman in the United States Navy, brings this action to correct the manner by which he was separated from the military after more than nineteen years of largely exemplary service. In a proceeding before the Board for Correction of Naval Records, the Board primarily agreed with Plaintiff's position, but the favorable ruling was promptly reversed by the Assistant General Counsel for Navy Manpower and Reserve Affairs. The Court held that the Assistant General Counsel's reversal of the Board's decision was arbitrary, capricious, an abuse of discretion, and not supported by substantial evidence. The U.S. Court of Appeals for the Federal Circuit upheld this Court's ruling and ordered the Court to remand the case to the Navy. The new Assistant General Counsel again reversed the Board's favorable ruling. The Court must now review whether the new Assistant General Counsel's reversal was arbitrary, capricious, an abuse of discretion, or not supported by substantial evidence.

Factual and Procedural Background[1]

[1] The facts in this decision are taken from the administrative record ("AR") and the administrative record volume II ("AR II"). The pages in both volumes of the administrative record are

Plaintiff, Walter N. Strand, III, brings claims before this Court which involve the manner in which he was separated from the Navy. Mr. Strand enlisted in the Navy in 1988 and served for more than nineteen years, rising to the rank of Chief Petty Officer. He spent more than eleven of those years deployed abroad, including deployments in support of Operations Iraqi Freedom and Enduring Freedom. Pl.'s Mot. for J. on the Admin. R. ("MJAR") at 4, Dkt. No. 23. Mr. Strand earned several commendations and personal awards during his service, including four Navy and Marine Corps Achievement Medals and four Good Conduct Medals. Id. Mr. Strand's service record reflects high marks for military performance and confirms his qualification as an "information assurance professional" whom the military trusted with classified information. Id. at 4–5.

Prior to the incident that led to his separation from the Navy, Mr. Strand's evaluations portray an exemplary officer ripe for further promotion.[2] See AR 105 ("His contributions to ENTERPRISE and the

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numbered in sequence. The Court's citations to both volumes of the administrative record are to the AR page numbers.

[2] There is one much older negative conduct offense reflected in Mr. Strand's record. While serving on the USS Thomas C. Hart as a new Radioman Petty Officer, Third Class, in 1992, at the age of twenty-two, Mr. Strand was counseled for "ABUSE OF ALCOHOL WHICH RESULTS IN DISORDERLY CONDUCT" and instructed to "REFRAIN FROM OVERINDULGENCE IN ALCOHOLIC BEVERAGES." Am. Compl. at 3–4, Dkt. No. 16 (citing NAVSPERS 1070-613, February 26, 1992). The same incident was addressed in a counseling form dated September 29, 1993. Id. Mr. Strand served without incident from 1993 to 2007.

Navy have been exemplary. He is ready for greater responsibility. Promote to Senior Chief Petty Officer."); AR 107 ("Petty Officer Strand is a dynamic leader. . . . Continue to select for the most challenging assignments and promote ahead of his peers."); AR 109 ("Superb Manager. . . . An extraordinary coach and mentor. He is a pillar for subordinates and juniors alike to emulate. . . . Ready for Chief NOW! Petty Officer Strand has my highest personal recommendation for advancement to Chief Petty Officer.").

After returning from his final combat deployment in the spring of 2007, Mr. Strand discovered that his wife had emptied his bank account and left home without explanation, taking his children and belongings with her. AR 059. A heated confrontation at his wife's new apartment building in June 2007 led to Mr. Strand's first negative fitness report. Pl.'s MJAR at 5, Dkt. No. 23; AR 103 ("Chief Strand displayed unsatisfactory conduct and decision making for a Chief Petty Officer."). In February 2008, Mr. Strand was arrested after shooting at the car his wife and her boyfriend were driving. As a result of that incident, Mr. Strand was convicted of attempted malicious wounding, attempted unlawful wounding, and use of a firearm in the commission of a felony. AR 009. Following his conviction, Mr. Strand was administratively separated from the Navy. His discharge was characterized as "under other than honorable circumstances" with less than twenty years of service. Id. Mr. Strand was released from prison for good behavior after serving three years of his six-year sentence. Id.

Upon his release, Mr. Strand asked the Navy Discharge Review Board ("NDRB") to upgrade his service characterization and change his reentry code. AR 078. Although it initially denied Mr. Strand's requests, the NDRB eventually granted Mr. Strand partial relief when he appeared before them on December 12, 2013. The NDRB agreed to change the characterization of Mr. Strand's service from "under other than honorable conditions" to "general under honorable conditions," but declined to revise the narrative reason for discharge in his record. AR 032.

After his success before the NDRB, Mr. Strand petitioned the Board for Correction of Naval Records ("BCNR"), "requesting six months retirement credit with an honorable characterization of service, or an upgrade of his general discharge to honorable, a change of his narrative reason for separation, and a favorable reenlistment code." AR 008. On December 15, 2014, after a full review of Mr. Strand's application, naval record, record evidence, and deliberations by a quorum, the BCNR came to the following conclusion:

> Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants partial favorable action. Nonetheless, the Board initially notes the seriousness of Petitioner's disciplinary infractions and does not condone his misconduct. However, the Board also notes Petitioner's overall record of more than 19 years and six months of satisfactory service, which

> included being awarded four Navy and Marine Corps Achievement Medals, four Good Conduct Medals, and personal awards. The Board further notes his good post service conduct and early release from civil confinement due to his good behavior.
>
> The Board considered the fact that NDRB upgraded the characterization of service to general under honorable conditions based, in part, on Petitioner's overall record of service and good post service conduct. With that in mind, the Board concluded that Petitioner has suffered long enough for his indiscretion and should be granted relief in the form of credited time served for retirement, i.e., approximately six months . . . .

AR 010–11, BCNR Decision dated December 15, 2014. Based on its consideration of all of the evidence of record, the BCNR recommended "[t]hat Petitioner's naval record be corrected to show he was honorably retired with 20 years of service vice issued a general discharge under honorable conditions by reason of misconduct (civil conviction) on 26 June 2009." AR 011.

The Secretary of the Navy is authorized under 10 U.S.C. § 1552, as implemented by SECNAVINST 5420.193, to correct a Navy member's service record when "necessary to correct an error or remove an injustice." In exercising this authority, the Secretary

must act through a board of civilians, in this case the BCNR, who shall review and evaluate an applicant's claim. SECNAVINST 5420.193 at 3. Although not required, the Executive Director of the BCNR chose to seek secretarial approval of the BCNR's recommendation to correct Mr. Strand's record.[3] On December 15, 2014, the same day that a quorum of the BCNR unanimously recommended correcting Mr. Strand's naval record, Executive Director Robert J. O'Neill unilaterally opted to seek review of the BCNR's recommendation, writing "[i]t is my opinion, based on the seriousness of the offense and the significant grant of relief, that SECNAV should review this case for decision." AR 013.

On February 3, 2015, Robert L. Woods, Assistant General Counsel, Navy Manpower and Reserve Affairs, rejected the BCNR's decision in a two-paragraph memorandum.[4] AR 003. Mr. Woods gave two rationales for overturning the BCNR's

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[3] Section 6(e)(1) allows that "[w]ith respect to all petitions for relief properly before it, the Board is authorized to take final corrective action on behalf of the Secretary…" except under three circumstances, the last of which being that "[i]t is in the category of petitions reserved for decision by the Secretary of the Navy." SECNAVINST 5420.193, Section 6(e)(1)(c). Section 6(e)(2)(c), cited in the secretarial review memorandum, is a discretionary catchall category that references "[s]uch other petitions as, in the determination of the Office of the Secretary or the Executive Director, warrant Secretarial review."

[4] The Secretary of the Navy delegated to the Assistant Secretary, Manpower and Reserve Affairs the authority to review BCNR petitions if required. SECNAVINST 5420.193 at 1–2 (¶b) (Nov. 1997). The Assistant Secretary in turn delegated that authority to the assistant general counsel of Manpower and Reserve Affairs. Def.'s Cross-MJAR at 11 n.6, Dkt. No. 35.

decision. First, he stated that granting the recommended relief would contravene "Navy core values and practice in similar cases." Id. Second, quoting an April 3, 2009 Administrative Separation Memorandum prepared by Mr. Strand's commanding officer, Mr. Woods stated that Mr. Strand "had a 'long-standing history of FAP [Family Advocacy Program] involvement and domestic violence issues.'" Id.

On June 15, 2015, Mr. Strand challenged Mr. Wood's decision before this Court. Strand v. United States, 127 Fed. Cl. 44, 46 (2016). Mr. Strand initially brought this action by filing a complaint as a *pro se* plaintiff. Id. Shortly thereafter, Mr. Strand was able to secure representation through this Court's pro bono referral program and subsequently filed an amended complaint on October 8, 2015. Id. Mr. Strand prevailed, showing that Mr. Woods' disapproval of the BCNR's recommendation was arbitrary, capricious, an abuse of discretion, and not supported by substantial evidence. Id. at 51. On appeal, the U.S. Court of Appeals for the Federal Circuit found that "the Secretary's finding that Mr. Strand had a long-standing history of domestic violence issues and FAP involvement is not supported by substantial evidence." Strand v. United States, 706 Fed. Appx. 996, 1000 (Fed. Cir. 2017) ("Strand II"). The court then directed this Court to remand the case to the Navy, requiring that the Secretary consider whether he or she would reach the same conclusion to deny Mr. Strand relief in the absence of such substantial evidence. Id. at 1001–02. This Court issued an Order on November 21, 2017, remanding the case to the Secretary of the Navy in accordance with the Federal Circuit's Mandate. See Dkt. No. 67.

The new Assistant General Counsel for Manpower and Reserve Affairs, Catherine L. Kessmeier ("Ms. Kessmeier" or "the Secretary"), sent a letter to counsel for Plaintiff identifying the references she would be using to review Mr. Strand's case and inviting him to submit any additional information for review. AR II 001. Counsel responded by confirming that the documents Ms. Kessmeier planned to review were appropriate, and explained the background of the case. AR II 002–03. Counsel for Plaintiff also mentioned that the BCNR granted Mr. Strand relief based on more than just his prior service alone. AR II 003. Plaintiff's counsel then continued to state that both this Court and the Federal Circuit declined to adopt the rationale that denying Mr. Strand relief on the Navy core values alone was sufficient. AR II 004. Additionally, Plaintiff's counsel contended that each case should be judged on its own merits as to whether or not it conforms to the Navy's core values—not on the Navy's practice in similar cases. AR II 004 n.2.

On January 5, 2018, Ms. Kessmeier again denied Mr. Strand relief. AR II 013. In her memorandum, Ms. Kessmeier expanded on the core values in relation to both the incident for which Mr. Strand was convicted, as well as a counseling and non-judicial punishment for an alcohol-related incident from 25 years ago. AR II 009–12. Ms. Kessmeier explained that the counseling and non-judicial punishment Mr. Strand received for this alcohol-related incident should have been "clear and repeated notice" that his conduct did not comport with the Navy's core values. AR II 010. Ms. Kessmeier also

compared Mr. Strand's case to other cases before the military justice system—forums in which Mr. Strand has never appeared. See AR II 012; see also Supplemental Compl. ¶ 49, Dkt. No. 80 ("Suppl. Compl."). Ultimately, Ms. Kessmeier concluded that Mr. Strand's application did not warrant relief and that his discharge to "general under honorable conditions" sufficed to "reflect[] his 19.5 years of satisfactory service and post-incarceration efforts to rebuild his life." AR II 013.

In response to Ms. Kessmeier's decision, Mr. Strand filed a supplemental complaint before this Court. In his supplemental complaint, Mr. Strand argues that Ms. Kessmeier's decision was arbitrary, capricious, an abuse of discretion, and not supported by substantial evidence, and urges this Court to give effect to the BCNR's initial recommendation. Suppl. Compl. at 18. Mr. Strand asks that the Court direct the Navy to correct Mr. Strand's record consistent with the BCNR's decision granting him retirement with twenty years of service and seeks monetary relief in the form of back pay calculated from his date of separation on June 26, 2009, up to the present based on his retirement credit, with interest, and applicable pay and benefits moving forward. Id. The Government maintains that Ms. Kessmeier properly rejected the BCNR's recommendation and that Mr. Strand waived his right to judicial review of certain issues by failing to raise them to the Navy on remand.

Discussion

A. Subject Matter Jurisdiction

In the Court of Federal Claims, "[b]ecause subject matter jurisdiction is a threshold matter, it must be established before the case can proceed on the merits." Sellers v. United States, 110 Fed. Cl. 62, 66 (2013) (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998)). In this case, the Court's subject matter jurisdiction is derived 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 Congress 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)(1). 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). Thus, in conjunction with the APA, this Court has jurisdiction pursuant to the Tucker Act to review a decision by a corrections board, or a decision to override a corrections board recommendation, "[t]o provide an entire remedy and to complete the relief afforded by the judgment" by issuing an "order directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records." 28 U.S.C. § 1491(a)(2); see also Weaver, 46 Fed. Cl. at 76–77.

The Tucker Act, however, does not confer any substantive rights upon a plaintiff, and a plaintiff may not rely on the APA as an independent source of jurisdiction, as it does not mandate payment of money damages. Thus, 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 source is 10 U.S.C. § 6333, which provides the schedule according to which military retired and retainer pay are computed.

B. Standard of Review

1. Rule 12(b)(6) Motion to Dismiss

When considering a motion to dismiss a complaint for failure to state a claim upon which relief may be granted under Rule 12(b)(6), the Court must accept as true all factual allegations submitted by the plaintiff. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Accepting those allegations as true, for the plaintiff to survive dismissal, the Court must conclude that "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Twombly, 550 U.S. at 556). The plaintiff's factual allegations must be substantial enough to raise the right to relief above the speculative level, accepting all factual allegations in the complaint as true and indulging all reasonable inferences in favor of the non-movant. Twombly, 550 U.S. at 545; Chapman Law Firm Co. v. Greenleaf Constr. Co., 490 F.3d 934, 938 (Fed. Cir. 2008).

In this case, the Government first argues that Mr. Strand's supplemental complaint must be dismissed pursuant Rule 12(b)(6) because it presents a nonjusticiable controversy in which the Court is unable to grant relief. See Def.'s Mot. to Dismiss & MJAR at 17–18, Dkt. No. 84. In so arguing, the Government opines that a plaintiff can only challenge a Secretary's procedural errors and may not challenge the merits of that Secretary's decision, further arguing that Mr. Strand has improperly challenged the latter. Id. at 17. The Court finds the Government's argument unavailing. To start, this Court and the Federal Circuit have already issued decisions on the merits in earlier iterations of this case where Mr. Strand has challenged the merits of the Secretary's decision to deny him relief. See Strand, 127 Fed. Cl. 44; Strand II, 706 Fed. Appx. 996. Moreover, even if a plaintiff may only challenge a Secretary's procedural errors, the Court agrees that Mr. Strand's allegations against the Secretary's decision can be viewed as procedural in nature and present a justiciable controversy in which this Court has the ability to grant relief. See Pl.'s Cross-MJAR at 7–8, Dkt. No. 85. As such, the Court DENIES the Government's motion to dismiss pursuant to Rule 12(b)(6) and turns next to the parties' cross-motions for judgment on the administrative record.

2. Motion for Judgment on the Administrative Record

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 the actions of a military correction board, this Court must apply the standard of review set forth in the APA, 5 U.S.C. § 706. Under section 706(2)(A), the 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 . . . ." 5 U.S.C. § 706(2)(A). The Court shall overturn a correction board'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 v. United States, 30 Fed. Cl. 296, 310 (1994). Substantial evidence includes "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 217 (1935).

Although the Court reviews a service Secretary's decision to overrule a corrections board recommendation pursuant to the same standard, its review nevertheless "is limited in nature." Moehl v. United States, 34 Fed. Cl. 682, 690 (1996). Thus, a Secretary's decision may "differ with a board's

recommendations where the evidence is susceptible of varying interpretations." Id. at 690 (citing Sanders v. United States, 219 Ct. Cl. 285, 299 (1979)). However, a Secretary may not "arbitrarily refuse to follow the fact findings of the correction board where all the evidence supports the board's findings." Moehl, 34 Fed. Cl. at 690 (citing Hertzog v. United States, 167 Ct. Cl. 377 (1964)); see also Boyd v. United States, 207 Ct. Cl. 1, 8 (1975) ("The court, in turn, may reject the decision of a Secretary only if he has exercised his discretion arbitrarily, capriciously, in bad faith, contrary to substantial evidence, or where he has gone outside the board record, or fails to explain his actions, or violates applicable law or regulations. Then we will not hesitate to set him right.").

C. Waiver of Mr. Strand's Arguments

The Government first contends that Mr. Strand waived his right to judicial review by failing to raise all but one of his arguments before the Navy on remand. Def.'s Mot. To Dismiss & MJAR at 14, Dkt. No. 84. It has long been held that once a party has availed him or herself to the administrative process of an agency, "he [or she] is bound by it unless the decision is unsupported by substantial evidence, arbitrary, capricious, or contrary to law." Doyle v. United States, 220 Ct. Cl. 285, 311 (1998) (citing Sanders v. United States, 219 Ct. Cl. 285, 298 (1979)). The reason for this rule is so that plaintiffs cannot "stand on their objections waiting to see if they [are] retroactively promoted by the [BCNR] and only upon the [BCNR's] adverse recommendations, contend that the remedy did not achieve its intended result." Id. at 312. "Absent a showing of good cause and prejudice,

an appellant's failure to raise his constitutional claims in the military court system bars him from raising them in federal court." Martinez v. United States, 914 F.2d 1486, 1488 (Fed. Cir. 1990).

Contrary to the Government's assertions, Mr. Strand raised his arguments prior to remand during the first time this case was litigated before this Court. Both parties agreed that the Navy would reference four documents in its review: (1) the Remand Order of this Court, (2) the judgment of the Federal Circuit, (3) the judgment of this Court, and (4) the Administrative Record Volume I. AR II 001–02. Therefore, by incorporating the decisions of the courts in the Secretary's review on remand, Mr. Strand sufficiently raised the following three arguments that the Government alleges he waived in the Amended Complaint: (1) that the Assistant General Counsel lacked the discretion to reject the BCNR's recommendation without justification, see Am. Compl. at 8, Count I, Dkt. No. 16; (2) that it was improper to compare Mr. Strand's case to cases tried in the military justice system, see id.; and (3) that Mr. Strand was entitled to the protection of 10 U.S.C. § 1176, see id. at Count III.

The one argument that Mr. Strand concedes he did not raise prior to remand was that "reliance on the core values alone as a basis to deny relief is specious when those values are untethered to any statute or regulation, and are not themselves determinant of punishment." Pl.'s Cross-MJAR at 12, Dkt. No. 85. This argument, however, is attached to the argument that the Secretary acted arbitrarily and without substantial evidence, since Mr. Strand alleges that

the core values standing alone are arbitrary. Thus, having found that Mr. Strand did not waive any of the above arguments, the Court must now look to whether Ms. Kessmeier's decision was arbitrary and capricious, an abuse of discretion, or not supported by substantial evidence.

D. Ms. Kessmeier's Decision to Overrule the BCNR's Recommendation

1. Application of the Navy's Core Values

The Secretary of a military department is required to act through boards of civilian officers or employees in reviewing and correcting military records. 10 U.S.C. § 1552. Generally, after reviewing a service member's record, the BCNR is authorized to take final corrective action based on its findings. SECNAVINST 5420.193, Section 6(e)(1). Even in those instances where secretarial review or approval is sought or required, the Secretary must nevertheless justify a decision to overturn a recommendation that is supported by the record. Thus, when a Secretary goes outside of the record before the board, the Secretary "must justify such a departure by explicitly stating the 'policy reasons' behind such action." Hertzog, 167 Ct. Cl. at 387. In Hertzog, the Court held that in the absence of such an explanation, the Secretary's discretionary action was arbitrary and capricious. Id. at 388. Although "the final authority regarding requested corrections is vested in the Secretary," such authority must be exercised in accordance with the law. Strickland v. United States, 423 F.3d 1335, 1342 (Fed. Cir. 2005).

Mr. Strand alleges that the Secretary's reliance on the core values alone is arbitrary, capricious, an abuse of discretion, and not supported by substantial evidence. In her decision, Ms. Kessmeier relied upon the following facts to deny Mr. Strand relief: (1) two counselings and a non-judicial punishment stemming from an alcohol-related incident 25 years ago; (2) other cases from the military justice system; and (3) the conduct that led to Mr. Stand's conviction. Pl.'s Cross-MJAR at 13, Dkt. No. 85. Mr. Strand argues that these facts provide no basis to deny him relief because the facts are too "sparse" and the Secretary relies too heavily on her own subjective understanding and application of the Navy's "core values" to Mr. Strand's conduct. Id. The Government counters that Ms. Kessmeier's decision is supported by substantial evidence because of the two disciplinary entries Mr. Strand received early in his enlistment from alcohol-related incident in the early 1990s, as well as the BCNR's statement of recommendation for review by the Secretary and the characterization of his service. Def.'s Resp. at 11, Dkt. No. 86.

Ms. Kessmeier contends that Mr. Strand's counselings and non-judicial punishment from 25 years ago gave him "notice" of his obligation to comply with the Navy's standards and relies on this argument to show Mr. Strand's alleged lack of courage and commitment. AR II 010–12. The Navy's present core values, however, including courage and commitment, did not exist at the time of Mr. Strand's alcohol-related incident. See Pl.'s Cross-MJAR at 13, Dkt. No. 85. Thus, to give Mr. Strand retroactive "notice" of his obligation to comply with not-yet existing core values or standards is irrational, irrelevant, and certainly

arbitrary and capricious. Betts v. United States, 145 Ct. Cl. 530, 535 (1959) ("A decision . . . for which, even on post audit, no reason can be given except an irrelevant reason, cannot be characterized as other than capricious."). The Court also notes that Mr. Strand was awarded a Good Conduct medal for the period covering the second counseling related to this incident. Pl.'s Cross-MJAR at 15, Dkt. No. 85 (citing Suppl. Compl. ¶ 63; AR 194 (first Good Conduct Award on "96JAN01")). Therefore, when assessing the record as a whole, Ms. Kessmeier's reliance on Mr. Strand's pre-2008 disciplinary entries and her retroactive application of Mr. Strand's earlier mishap to the Navy's not-yet existing core values render her decision arbitrary, capricious, and not supported by substantial evidence.

2. Reliance on Cases From Other Military Tribunals

Ms. Kessmeier also cites to four military justice cases as further evidence that Mr. Strand should be denied the relief he requested. AR II 012 (citing United States v. Sexton, 1 M.K. 679 (N.C.M.R. 1975); United States v. Gutierrez, 11 M.K. 122 (C.M.A. 1981); United States v. Wall, 2013 CCA LEXIS 418 (A.F. Ct. Crim. App. 2013); United States v. Knowles, 2016 CCA LEXIS 236 (N-M Ct. Crim. App. 2016)). The Secretary contends that the NRDB's decision granting Mr. Strand partial relief is inconsistent with the Navy's practice in similar cases. AR II 013. Mr. Strand contends that comparing his case to these cases is erroneous because the Navy could have, but did not, prosecute Mr. Strand for his conduct in the military courts. Pl.'s Cross-MJAR at 15, Dkt. No. 85. Therefore,

any comparison to the military justice system is speculation based on hypothetical facts. Id. at 16.

As Mr. Strand correctly points out, none of the cases the Secretary relies upon "apply the core values to the facts of the respective case, and none deal with post-service efforts at rehabilitation." Id. By comparing Mr. Strand's civil case to military cases that do not apply the same analysis, and by claiming Mr. Strand would have received a punishment (which he did not), Ms. Kessmeier acted speculatively. Rather than basing her decision on facts in the record, Ms. Kessmeier based her decision on hypothetical forecasting. Thus, in the absence of providing a sufficient justification for her decision, the Court finds that the Secretary acted arbitrarily and capriciously in using these cases to justify her decision. Hertzog, 167 Ct. Cl. at 387–88 (holding that in the absence of a justification for departing from the record before the board, the Secretary's discretionary action was arbitrary and capricious).

The Government further contends that the NDRB compared Mr. Strand's conviction to analogous convictions as well, and that this fact supports the Secretary's decision to deny Mr. Strand relief. Def.'s Resp. at 11, Dkt. No 86. However, the NDRB merely explained the usual procedure for someone convicted of the same offenses as Mr. Strand in the military courts, *not* in the civil courts. AR 063. Moreover, the NDRB did not cite to any actual cases in its decision. Id. What is more, the NDRB's regulations state:

> The primary function of the NDRB is to exercise its discretion on issues of

> equity by reviewing the individual merits of each application on a case-by-case basis. Prior decisions in which the NDRB exercised its discretion to change a discharge based on issues of equity (including the factors cited in such decisions or the weight given to factors in such decisions) do not bind the NDRB in its review of subsequent cases because no two cases present the same issues of equity.

32 C.F.R. § 724.902(c). Thus, the NDRB's own regulations state that it should not be relying on other cases regardless, as it must view each case as a separate issue of equity. As such, the NDRB's decision provides no support for Ms. Kessmeier's reliance on the military justice cases, but rather shows that she acted arbitrarily and capriciously in reaching her decision. See Dodson v. United States Gov't, Dep't of the Army, 988 F.2d 1199, 1204–05 (Fed. Cir. 1993) ("The boards for correction of military records may be reviewed for failure to correct plain legal error committed by the military . . . [including] the military's 'violation of statute, or regulation.'" (citations omitted)).

3. Mr. Strand's Prior Conviction

Finally, as to Mr. Strand's prior conviction, the Government has already argued before this Court and the Federal Circuit that Mr. Strand's conduct in 2008 was inconsistent with the core values and showed a longstanding history of domestic violence. See Strand, 127 Fed. Cl. 44; Strand II, 706 Fed. Appx. 996. Both

courts have rejected these arguments, however, and the Federal Circuit found that Mr. Strand's conduct did not constitute substantial evidence to support the Secretary's decision, ordering the Secretary's decision to be reversed and remanded. Strand II, 706 Fed. Appx. at 1000 ("We conclude that the Secretary's decision is not supported by substantial evidence. The Secretary relied on the sum of two facts in the record and two policy reasons to reject the BCNR's decision [including the Navy's core value]. . . . [B]ecause the Secretary relied on a combination of intertwined reasons, and Mr. Strand has shown that at least one of those reasons is not supported by substantial evidence, the record is not clear as to whether the Secretary would still reach the same conclusion.").

The Government also argues that BCNR Executive Director Robert O'Neill's recommendation that the Secretary review the BCNR's decision "based on the seriousness of the offense and the significant grant of relief" supports the Secretary's contention that Mr. Strand's offense on its own and its application to the core values is enough to deny him relief. Def.'s Resp. at 11, 15, Dkt. No. 86. Mr. O'Neill, however, did not sit on the Board when the Board reviewed Mr. Strand's case; rather, he was still an officer of the Navy and is now retired. See AR 008; see also Pl.'s Rep. at 11, Dkt. No. 87. The Government argues that "by deciding to make a recommendation instead of a final decision, the BCNR [specifically Mr. O'Neill] invited the Secretary to second-guess its recommendation." Def.'s Mot. to Dismiss & MJAR at 16, Dkt. No. 84. However, this Court already held that the Secretary may not rely on the advice or recommendation of a military officer in reversing the

recommendation of the BCNR. See Strand, 127 Fed. Cl. at 51 ("[T]his Court cannot uphold [the Secretary's] decision to overrule [the BCNR's] findings on the basis of a military official's statement."); see also Strand II, 706 Fed. Appx. at 1000.

Further, Ms. Kessmeier failed to give any real consideration to Mr. Strand's post-service conduct. Instead, the Secretary relies almost solely on Mr. Strand's conduct that occurred prior to the creation of the Navy's current core values as well as the conduct for which Mr. Strand already served civil time, whereas the BCNR recognized that Mr. Strand satisfactorily served his country for nineteen years and six months, was granted partial relief by the NDRB "based, in part, on [his] overall record of service and good post service conduct," and paid his debt to society, earning "early release from civil confinement due to his good behavior." See AR 010. Ms. Kessmeier not only failed to give due consideration to the all the evidence before the BCNR and in the administrative record, but also failed to provide any substantial evidence to support her decision to deny Mr. Strand relief. Given that the BCNR's findings are based on a thorough consideration of the evidence of record, this Court cannot uphold Ms. Kessmeier's decision to overrule the Board on the basis of (1) core values alone and the retroactive application of Mr. Strand's singular alcohol-related incident from 1992 to those core values, especially since those core values did not yet exist at the time of this incident; (2) decisions of other military tribunals; and (3) Mr. Strand's prior conviction—a justification that has been rejected twice by this Court and the Federal Circuit. Consequently, the Court must hold that the

Secretary's decision to overturn the BCNR's recommendation was arbitrary and capricious, and not supported by substantial evidence. See Hertzog, 167 Ct. Cl. at 387.

Finally, both parties agree that 10 U.S.C. § 1552(f)(2) grants the BCNR clemency power to strike evidence of Mr. Strand's criminal conviction from his records and upgrade his discharge conditions. Def.'s Resp. at 18, Dkt. No. 86; Pl.'s Rep. at 15, Dkt. No. 87. The Government argues only that 10 U.S.C. § 1552(f)(2) does not allow the BCNR to remove evidence of a court martial from the record. Def.'s Resp. at 18, Dkt. No. 86. However, Mr. Strand was not court martialed. Therefore, 10 U.S.C. § 1552(f)(2) provides no additional basis to deny Mr. Strand relief.

Conclusion

Ultimately, Ms. Kessmeier's decision to overrule the BCNR's reasoned recommendation is simply not justified in her memorandum that is before this Court. Considering the entire administrative record, the Court finds the Secretary's disapproval of the BCNR's recommendation to be arbitrary, capricious, an abuse of discretion, and not supported by substantial evidence. The Court directs the Navy to carry out the BCNR's recommendation "[t]hat Petitioner's naval record be corrected to show he was honorably retired with 20 years of service vice issued a general discharge under honorable conditions by reason of misconduct (civil conviction) on 26 June 2009."

Accordingly, the Court GRANTS Plaintiff's cross-motion for judgment on the administrative record, and DENIES Defendant's motion to dismiss and motion for judgment on the administrative record. The Court directs the Navy to correctly retire Mr. Strand with all appropriate back pay, benefits, and allowances. The Clerk shall enter judgment in accordance with this opinion.

IT IS SO ORDERED

s/ Thomas C. Wheeler
THOMAS C. WHEELER
Judge

DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
(MANPOWER AND RESERVE AFFAIRS)
1000 NAVY PENTAGON
WASHINGTON, D.C. 20350-1000

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

Subj: BCNR PETITION OF FORMER MEMBER WALTER N. STRAND, USN, ON REMAND FROM THE U.S. COURT OF FEDERAL CLAIMS

Background

The Secretary of the Navy is authorized under 10 US.C. § 1552, as implemented by SECNAVINST 5420.193, to correct a Navy member's service record when "necessary to correct an error or remove an injustice." In exercising this authority, the Secretary acts through the Board for Correction of Naval Records (BCNR). Pursuant to authority granted by the Secretary of the Navy, the Director of the BCNR may in certain matters choose to seek Secretarial approval of the BCNR's decisions. The Secretary of the Navy delegated to the Assistant Secretary of the Navy (Manpower & Reserve Affairs) (ASN (M&RA)) the authority to review BCNR petitions if required and the ASN (M&RA) in tum delegated this authority to the Assistant General Counsel (M&RA).

Walter N. Strand filed a petition with the BCNR on February 14, 2014, requesting "six months retirement credit and or a re-entry code upgrade from RE-4 to a waiv[]able re-code for the purpose of retiring due to [his] recent general discharge upgrade" and "this incident being close to an[] otherwise stella[r] 20 year career." Administrative Record, Volume I (AR) at 016.

As set forth in the administrative record and undisputed, the incident that led to Petitioner's discharge involved him firing a firearm at his former spouse and another individual. For this incident, the Circuit Court of the City of Virginia Beach, Virginia, convicted Petitioner of the following felonies: attempted malicious wounding, attempted unlawful wounding, and use of a firearm in the commission of a felony. The court sentenced Petitioner to a total of six years in prison. Ultimately, Petitioner served only three years of a six-year sentence.

In March 2011 , Petitioner initially submitted an application to BCNR requesting a change to his reentry code; however, BCNR denied his request determining that his reentry code was properly assigned based on his other than honorable (0TH) discharge. AR 077-078. Petitioner then sought an upgrade of his discharge from the Naval Discharge Review Board (NDRB), which ultimately (after a second filing) granted him partial relief by changing his characterization of service to general under honorable conditions with a narrative reason recognizing the commission of a serious offense (civil conviction). AR 032-034. Petitioner subsequently sought corrective action from the BCNR.

Mr. Strand, a former enlisted member of the Navy, requested that the BCNR grant him "six months retirement credit and or a re-entry code upgrade from RE-4 to a waiverable RE-code for the purpose of retiring due to my recent general discharge upgrade and this incident being close to and other wise stella 20 year career." AR 016. In a statement attached to the petition, Mr. Strand requested a review of his discharge status and the opportunity to upgrade his discharge and retire. AR 017. Mr. Strand acknowledged that he "violently attacked [his] ex-wife." Id. Mr. Strand stated he "served honorably and re-enlisted term after term with retirement being [his] end goal." He concluded that he "believe[s] and continue[s] to live by the Navy's core values of honor, courage, and commitment" and that he is "very proud of [his] otherwise pristine service record." AR 017-018

Upon review and consideration of the administrative record, the hoard concluded that the request warranted partial favorable action. AR 008-011. Specifically, the board, while noting "the seriousness of Petitioner's disciplinary infractions" and "not condon[ing] his conduct" granted Petitioner relief in the form of credited time served for retirement, i.e., approximately six months. AR 010. In reaching this conclusion, the board considered that Petitioner's overall record of more than 19 years and six months reflected *satisfactory* service, including various medals and personal awards. See id. (emphasis added). The board also noted Petitioner's *"good post service conduct* and his early release from civil confinement due to his good behavior." Id. (emphasis added). The board considered the NDRB

upgrade of the characterization of service to general under honorable conditions and "with that in mind" concluded that "Petitioner *has suffered long enough for his indiscretion* and should be granted relief in the form of
credited time served for retirement." Id. (emphasis added). The board recommended relief in the form of credited time served for retirement, but concluded that the reenlistment code should not be changed because non-recommendation for retention and/or reenlistment was based solely on his civil conviction. Id. It is this board recommendation that was reviewed and disapproved by the former AGC (M&RA). AR at 0 11. Mr. Strand then judicially appealed the Secretary's decision.

Following the U.S. Court of Appeals for the Federal Circuit decision in Strand v. United States, Nos. 2016-2450, -2484, 2017 WL 3911801 (Fed. Cir. Sept. 7, 2017), the United States Court of Federal Claims issued an order remanding this case to the Secretary of the Navy for further proceedings consistent with the Federal Circuit's opinion. Specifically, the remand requires that the Secretary consider whether, "in the absence of any evidence of a long-standing history" of F AP involvement and domestic violence issues, the board's decision to grant Petitioner partial relief should be upheld.

Prior to reviewing this matter and reaching a decision, I notified Petitioner's counsel that I would be reviewing: (1) the remand order of the Court of Federal Claims (COFC); (2) the Opinion of the Court of Appeals for the Federal Circuit; (3) the Judgment of the COFC; and (4) the Administrative Record, Volume

I. I invited Petitioner to provide any additional information for my consideration prior to rendering a decision on remand.

Petitioner via his counsel submitted a written response dated December 7, 2017, for my consideration in reviewing the matter. In this letter, Petitioner identifies his periods of enlisted service and references his fitness reports, commendations and awards. See Reply at 1. Petitioner does not dispute the misconduct for which he was convicted and sentenced and for which he served time in prison. Id. at 2. The reply identifies the materials submitted by Petitioner to the BCNR, including personal references and statements by Petitioner. The reply states that the BCNR decision was not founded solely upon Petitioner's prior service, but also the additional information related to his postservice conduct and efforts to rebuild his life. The reply offers Petitioner's views on why the courts declined to uphold the initial AGC (M&RA) decision and argues that Mr. Strand's case should be decided on its own merits. See id. at 3, n.2. The reply offers that "Mr. Strand has reconciled with his ex-wife[1]... and plays an active role in the lives of their children ... lives effectively homeless on a couch so that he can provide support for his family." Id. at 4. Petitioner states that his uncorrected record, which contains information about his criminal record, provides a backdoor for employers to deny him gainful employment and prevent him from fully integrating

[1] Although Petitioner states that he and his former spouse have reconciled, I note that there is no statement from his spouse in support of his character or his petition for relief despite his submission of statements of support from his mother, former Navy colleagues, professors, and parole/probation officers.

into civilian life. Id. Petitioner contends that he has paid for the "sole indiscretion that he committed over the course of a stellar 20-year career," and that "most who commit similar mistakes will not have Mr. Strand's long and impeccable record of honorable service *combined* with a demonstrated commitment to atonement and post-service reintegration .... " Id. Petitioner asks to be retired. Id. at 5.

Decision

Since 'the early days of Naval service, there have been three bedrock principles or core values that guide our military members: honor, courage and commitment. Honor requires our service members to be honest and trustworthy with each other and those outside the Navy, to be accountable for professional and personal behavior, and to recognize that illegal or improper behavior or even the appearance of such behavior will not be tolerated, and to always be mindful that it is a privilege to serve. Courage is the value that gives our service members the moral and mental strength to do what is right, even in the face of personal or professional adversity. Commitment requires a service member to show respect toward all, to treat each individual with human dignity, and to exhibit the highest degree of moral character, technical excellence, and competence.

I do not find that Petitioner's overall periods of enlisted service (commencing in 1988) and post-service conduct (discharged in 2009) are sufficient to overcome the seriousness of the misconduct that resulted in his civilian conviction for felony offenses and, ultimately, caused him to be discharged from

Naval service prior to reaching his eligibility for retirement. Petitioner engaged in substantial illegal behavior: attempted malicious wounding, attempted unlawful wounding, and use of a firearm in the commission of a felony. Clearly, as reflected in the sentence meted out by the Circuit Court of the City of Virginia Beach, the court did not view his crime as inconsequential or a minor error in judgment. The passage of time, which has allowed Petitioner the ability to reflect on his misconduct, to accept responsibility for his actions, and to begin to rehabilitate himself, does not warrant overlooking the seriousness of the conviction that led to his discharge from the Naval service, and his resultant inability to complete twenty years of service that may have otherwise made him eligible for retirement. It was not an error or injustice that led to Petitioner's inability to meet the requirements for retirement eligibility, but rather it was Petitioner's own intentional misconduct that prevented him from completing his twenty years of military service.

The record shows that in 1992 Petitioner was counseled for abuse of alcohol, which resulted in disorderly conduct, see AR at 99, and he was issued non-judicial punishment for assault and disorderly conduct under the UCMJ, see AR at 097-098, which led to a reduction in his enlisted rank. Despite the Navy's attempt to allow Petitioner the opportunity to rehabilitate himself while in the Naval service, Petitioner again engaged in misconduct in 1993 for which he was issued a counseling/ warning entry and directed to attend courses such as building effective anger management or stress management skills and to not violate the UCMJ or civil laws. See AR at 096.

As with the first counseling, Petitioner was advised that his failure to adhere to the guidelines would make him eligible for administrative separation action. Id. Thus, well before his civilian conviction for felony offenses, Petitioner had clear and repeated notice of his obligation to comply with both military regulations and civilian laws and that his failure to adhere and measure up to the high standards of performance required of all members of the U.S. Navy could lead to his separation from service. See id.

In my view, Petitioner's conviction for felony offenses, as well as his history of performance and conduct, does not align with the Navy's core values and does not warrant the provision of credit for six months of Naval service he did not perform. Again, there is no error or injustice in Petitioner's service record. Rather, the record clearly shows that Petitioner's own misconduct caused him to be separated from service before he could attain twenty years of service. Petitioner is not an individual whom the Navy would laud as an example of its core values, and his separation even at 19.5 years of service aligns with how the Navy addresses misconduct by individuals who do not conform to Naval standards of conduct, discipline, and performance. See MILPERSMAN 1910-144; MILPERSMAN 1910-212; MILPERSMAN 1910-214; MILPERSMAN 1910-233; MILPERSMAN 1910-010; MILPERSMAN 1910-302; and MILPERSMAN 1910-306.

Honor. Petitioner did not show honor towards his colleagues when he engaged in his illegal behavior, and he did not demonstrate honorable behavior towards those outside the Navy, including his former

spouse, the victim of his crime. He neither fulfilled nor exceeded his legal responsibilities in his public and personal life. His actions led to his incarceration, which precluded him from executing his responsibilities as a service member and necessarily required others to complete the duties that could have been assigned to him had he been available for service. In my view, it is an aggravating factor that Petitioner was offered counseling early on in his career to be prepared to act honorably. However, Petitioner, despite the counseling he received from the Navy, allowed his personal emotions to overtake the privilege he had to serve his fellow Americans with honor.

Courage. While Petitioner is remorseful for his crime, which some may view as courageous, the Navy expects our service members to do what is right at all times even in the face of personal adversity. Instead of engaging in a crime of passion, Petitioner could have demonstrated the Navy core value of courage by walking away. He instead chose to take a gun and attempted to cause his former wife and another individual substantial harm by discharging the weapon during his crime. This was not Petitioner's first instance of misconduct leading to harm of others. In fact, Petitioner received non-judicial punishment with a reduction in rank for assault and disorderly conduct. See AR at 097-098. Petitioner was warned to get his anger in check or to face the consequences if he failed to align to the high standards required of service members. See AR 096-099. Taking responsibility and learning from your mistakes requires courage; however, courage also presumes that you learn from your mistakes and do not repeat

them. As Petitioner recognizes, it is fortuitous that his felonious conduct did not result in anyone's death. An attempt to maliciously wound someone using a firearm outside of an authorized military action and because you are not in control of your personal emotions is not courageous behavior. In the Naval service, failure to control personal emotions during times of great adversity could have significant impacts that are adverse to the interest of the Navy and the Nation.

Commitment. Commitment requires a service member to care for the safety, professional, and personal well-being of all individuals and to make decisions that are in the best interest of the Navy and the Nation without regard to personal consequences. When Petitioner elected to take a gun and attempted to harm his former spouse, he was moved by personal emotions and had no regard for our Nation's laws or its people. If Petitioner had been committed to the care of others, he would have been cognizant of the repeated counseling he received early in his Naval career, see AR 096-099, and he likely would have demonstrated his commitment to meeting the high standards of performance required of all service members. His conduct does not reflect this commitment and, in fact, demonstrates a lack of respect for our Nation's laws and individual human dignity and is not in keeping with the Navy's core values.

In addition to my points above, I note that the nature of Petitioner's conduct leading to his civilian conviction cannot be overlooked. As explained by the NDRB, "Violations of UCMJ Article 128 (Assault),

which is equivalent to the offenses [Petitioner] was convicted [of] in civil Court, warrant processing for administrative separation regardless of grade, performance, or time in service. This usually results in an unfavorable characterization of discharge or, at a maximum, a punitive discharge and possible confinement if adjudicated and awarded as part of a sentence by a special or general court-martial. [Petitioner's] command did not pursue a punitive discharge but opted instead for the more lenient administrative discharge." (AR 063).

UCMJ Article 128 (Assault) states: "Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct. Any person subject to this chapter who commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm ... is guilty of aggravated assault and shall be punished as a court-martial may direct." The maximum punishment set forth in the Appendix 12 to the Manual for Court-Martial for aggravated assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm, when committed with a loaded firearm, is "Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 8 years."

Further, a brief review of military justice cases indicates that most persons convicted of similar assaults in the military justice system receive punitive discharges in addition to confinement. See

e.g. · United States v. Sexton, 1 M.J. 679 (N.C.M.R. 1975) (affirming award of a Bad Conduct Discharge following conviction for an assault with a firearm and discharge thereof); United States v. Gutierrez, 11 M.J. 122 (C.M.A. 1981) (affirming award of a Dishonorable Discharge following conviction for an assault with a dangerous weapon); United States v. Wall, 2013 CCA LEXIS 418 (A.F. Ct. Crim. App. 2013) (affirming award of a Dishonorable Discharge following conviction for an assault with a firearm and discharge thereof); United States v. Knowles, 2016 CCA LEXIS 236 (N-M. Ct Crim. App. 2016) (affirming award of a punitive discharge following conviction for assault where defendant used his hands to choke his spouse). In my view, it is very likely Petitioner would have received a punitive discharge had he been prosecuted by the Navy, rather than civilian authorities, for his misconduct.

In sum, I commend Petitioner's efforts to engage in rehabilitation following his conviction and incarceration, as well as his efforts to rebuild his life. However, I do not find that relief is warranted and that Petitioner should be granted credited time served for retirement when, in fact, the basis for his inability to retire was not an error or an injustice, but his own deliberate misconduct despite being on clear notice of the consequences of his actions. To grant relief under the circumstances of this matter wholly ignores the high standards that the Navy expects our military members to demonstrate. Petitioner's misconduct is inconsistent with the Navy's core values of honor, courage, and commitment and runs counter to granting relief. Moreover, the relief offered by the board is inconsistent with the Navy's practice in

similar cases involving discharge for criminal conduct and criminal conviction. Further, I believe that the Petitioner has been afforded appropriate relief as evidenced by the actions of the NDRB, which upgraded his discharge from OTH to GENERAL UNDER HONORABLE CONDITIONS based upon post-service factors. The NDRB decision to characterize Petitioner's service as GENERAL UNDER HONORABLE CONDITIONS reflects his 19 .5 years of satisfactory service and post-incarceration efforts to rebuild his life.

Accordingly, it is my decision that the petition be denied.

s/Catherine L. Kessmeier
Catherine L. Kessmeier
Assistant General Counsel
(Manpower and Reserve Affairs)

NOTE: This disposition is nonprecedential

United States Court of Appeals for the Federal Circuit

WALTER N. STRAND, III,
Plaintiff-Cross-Appellant

v.

UNITED STATES,
Defendant-Appellant

2016-2450, 2016-2484

Appeals from the United States Court of Federal Claims in No. 1:15-cv-00601-TCW, Judge Thomas C. Wheeler.

Decided: September 7, 2017

LUCAS TAYLOR HANBACK, Rogers Joseph O'Donnell, Washington, DC, argued for plaintiff-cross-appellant. Also represented by JEFFERY M. CHIOW; NEIL H. O'DONNELL, San Francisco, CA.
DANIEL KENNETH GREENE, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for

defendant-appellant. Also represented by BENJAMIN C. MIZER, ROBERT E. KIRSCHMAN, JR., DOUGLAS K. MICKLE.

Before LOURIE, HUGHES, and STOLL, *Circuit Judges*.

HUGHES, *Circuit Judge*.

The Government appeals a decision from the United States Court of Federal Claims reversing the Secretary of the Navy's decision denying Walter Strand's request to correct his military records and Mr. Strand appeals a finding in favor of the Government on its counterclaim seeking to recover $74,486.33 that it had erroneously paid to Mr. Strand during his civil confinement. While we agree with the trial court that the Secretary's decision is not supported by substantial evidence, because further administrative proceedings could remedy the defects in the Secretary's decision, we reverse with instructions to remand to the Secretary for further proceedings. Because the Government's counterclaim is not barred by the statute of limitations, we affirm.

I

Mr. Strand is a native of Chester, Pennsylvania, who upon graduation from high school enlisted in the Navy. He served for nearly nineteen and a half years, including spending over eleven years deployed in combat during the Persian Gulf War and War on Terror in Iraq and Afghanistan. Mr. Strand's commendations and personal awards include the

Navy and Marine Achievement Medal (four awards), Good Conduct Medal (four awards), Meritorious Unit Commendation, National Defense Service Medal (two awards), Southwest Asia Service Medal (two awards), Global War on Terrorism Expeditionary Medal, Global War on Terrorism Service Medal, Military Outstanding Volunteer Medal, Sea Service Deployment Ribbon (two awards), Kuwait Liberation Medal, Enlisted Aviation Warfare Specialist, and Enlisted Surface Warfare Specialist.

In the spring of 2007, Mr. Strand finished his final combat deployment aboard the USS Enterprise aircraft carrier. His performance evaluations praised his "superb leadership and management skills," noted that his "leadership and technical expertise have been pivotal," and described him as a "dynamic leader" who should be "select[ed] for the most challenging assignments and promote[d] ahead of his peers." J.A. 183–86.

When he returned home, Mr. Strand discovered that his wife had moved out, emptied his bank account, taken his children and possessions, and filed for divorce. He attempted to reconcile and had a conversation with her about potentially getting together for dinner. Shortly after this conversation, he saw her sitting with a male companion in a car. Mr. Strand flew into a "fit," J.A. 31, and with "passion-fueled anger" discharged his gun at them, J.A. 122. He was subsequently arrested and convicted of attempted malicious wounding, attempted unlawful wounding, and use of a firearm in the commission of a felony. On February 9, 2009, he was sentenced to six years in prison.

On June 26, 2009, following his conviction, the Navy administratively separated Mr. Strand from service. However, until this date, the Navy had continued paying Mr. Strand his salary even though he had been in civil confinement since his arrest. Because he had at least 90 days of leave accrued, Mr. Strand waited three months after being in custody before seeking confirmation from his command that he was entitled to continue receiving pay. He was informed that the command was aware of his civil confinement and that he was entitled to continue receiving pay.

On September 24, 2010, Mr. Strand was released early from prison because of his model conduct. After his release, he sought employment, eventually moving back to Pennsylvania to work at a Hibachi Restaurant washing dishes and cleaning. He used his earnings to pay child support and court costs in full. He also attended school at Delaware Community College, where he took various Network Engineering classes.

In 2011, Mr. Strand learned that the Navy was attempting to collect $74,486.33 of basic pay plus fees and interest that was paid to him while he was civilly confined. He disputed the debt with the Department of Treasury but was informed that the United States was not liable for the negligent or erroneous acts of its employees.

Around the same time, Mr. Strand petitioned the Board for Correction of Naval Records (BCNR) for a change to his naval record granting six months

retirement credit so that he would have completed 20 years of service and be eligible for retirement benefits. On December 15, 2014, the BCNR considered Mr. Strand's conduct, the fact that he accepted responsibility for his misconduct, his rehabilitation, character references, and other evidence. The BCNR weighed "the seriousness of [Mr. Strand's] disciplinary infarctions and [that it did] not condone his misconduct" against Mr. Strand's "overall record of more than 19 years and six months of satisfactory service [and] his good post service conduct and his early release from civil confinement due to his good behavior." J.A. 89. Ultimately, the BCNR concluded that Mr. Strand "should be granted relief in the form of credited time served for retirement, i.e., approximately six months [and] that the reenlistment code should not be changed because his nonrecommendation for retention and/or reenlistment was based solely on his civil conviction." J.A. 89. Therefore, the BCNR recommended that Mr. Strand's naval record be revised "to show he was honorably retired with 20 years of service vice (sic) issued a general discharge under honorable conditions by reason of misconduct (civil conviction) on 26 June 2009." J.A. 90.

The Executive Director of the BCNR chose to seek Secretarial approval of the decision. On February 3, 2015, Mr. Robert Woods, the Navy's Assistant General Counsel for Manpower and Reserve Affairs, through delegated authority from the Secretary, rejected the BCNR's recommendations in a two-paragraph decision and refused to grant Mr. Strand his requested relief. According to Assistant General Counsel Woods, Mr. Strand was not entitled to relief

in light of the Navy's core values, its practice in similar cases, and Mr. Strand's "long-standing history of FAP [Family Advocacy Program] involvement and domestic violence issues." J.A. 166–67.

On June 15, 2015, Mr. Strand appealed the Secretary's decision *pro se* to the Court of Federal Claims, and subsequently obtained counsel through the trial court's pro bono program. On December 28, 2015, the Government filed a counterclaim to recover the amounts that it had paid to Mr. Strand during his civil confinement.

On June 3, 2016, the trial court ruled in favor of Mr. Strand on his claim that the Secretary's decision to deny relief was arbitrary and capricious and ruled in favor of the Government on its counterclaim to recover its payments to Mr. Strand. Both parties appeal. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

II

We review the trial court's decision granting or denying a motion for judgment upon the administrative record without deference, applying the same standard of review that the trial court applied. *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004).

The Government argues that the trial court erred by disregarding the substantial evidence supporting the Secretary's decision. We must reverse the Secretary's decision if it is arbitrary or capricious, unsupported by substantial evidence, or otherwise not

in accordance with law. *Walls v. United States*, 582 F.3d 1358, 1367 (Fed. Cir. 2009). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Snyder v. Dep't of Navy*, 854 F.3d 1366, 1372 (Fed. Cir. 2017).

We conclude that the Secretary's decision is not supported by substantial evidence. The Secretary relied on the sum of two facts in the record and two policy reasons to reject the BCNR's decision: (1) Mr. Strand's longstanding history of domestic violence issues and FAP involvement; (2) the seriousness of Mr. Strand's convictions arising out of his February 2008 actions; and that granting relief would be inconsistent with (3) the Navy's core values and (4) the Navy's practice in similar cases. J.A. 82.

The Secretary's finding that Mr. Strand had a "longstanding history of FAP involvement and domestic violence issues" is not supported by substantial evidence. The Secretary's sole basis for this statement is an April 2009 memorandum prepared by Captain H. D. Starling II, Mr. Strand's former commanding officer. Captain Starling's statement, however, is conclusory and unsupported by the administrative record. Prior to 2007 and the events that gave rise to Mr. Strand's separation from service, the administrative record reflects no history of FAP participation or domestic violence issues. For example, the record does not contain a non-judicial punishment, counseling entry, court-martial entry, or military protective order. While the Government argues that Mr. Strand's conduct giving rise to his civil confinement supports the Secretary's conclusion, Mr. Strand's conduct, though serious, does not reflect

a "long-standing history" of issues. Therefore, the Secretary's finding that Mr. Strand had a long-standing history of domestic violence issues and FAP involvement is not supported by substantial evidence.

Despite the foregoing, the Government argues that we should still uphold the Secretary's decision because it sets forth other policy rationales and evidence. But because the Secretary relied on a combination of intertwined reasons, and Mr. Strand has shown that at least one of those reasons is not supported by substantial evidence, the record is not clear as to whether the Secretary would still reach the same conclusion. Thus, the Secretary's decision must be reversed.

The Government submits that even if we find the Secretary's decision unsupported by substantial evidence, this case should be remanded to the Secretary for further investigation. It is an established principle of administrative law that courts should not "intrude upon the domain which Congress has exclusively entrusted to an administrative agency," *INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam) (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943)), and that "a judicial judgment cannot be made to do service for an administrative judgment," *Chenery*, 318 U.S. at 88. Thus, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Gonzalez v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam) (quoting *Ventura*, 537 U.S. at 16). Here, the Secretary has not yet considered whether the BCNR's decision to grant Mr. Strand partial relief should be upheld in the absence of any evidence of a "long-

standing history" of FAP involvement and domestic violence issues. We find no special circumstances that would support determining this question in the first instance. Therefore, this case must be remanded back to the Secretary for further review of the BCNR's decision.

III

Turning to the cross-appeal, Mr. Strand argues that the Government's counterclaim seeking the salary paid to him during his civil confinement is untimely.[1] We review de novo whether the Court of Federal Claims possesses jurisdiction over a claim. *Estes Exp. Lines v. United States*, 739 F.3d 689, 692 (Fed. Cir. 2014).

In general, the government has six years to file suit seeking money damages based upon a contract. 28 U.S.C. § 2415(a). However, § 2415 expressly provides that the six-year limitation period does not prevent the government from asserting its claim as a counterclaim that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. 28 U.S.C. § 2415(f). Here, Mr. Strand filed a claim seeking an entitlement to the wages paid to him between his civil confinement and separation from the Navy. J.A. 36. The Government's counterclaim seeking recovery of those same wages "arises out of the transaction or occurrence that is the subject matter of" Mr. Strand's claim. *Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc.*, 200 F.3d 795, 801 (Fed.

[1] The Government did not challenge the trial court's decision to preclude the recovery of interest, fees, or penalties as the payments in question were due solely to the Government's error.

Cir. 1999). Therefore, the Government's counterclaim is timely under § 2415(f).

Next, Mr. Strand contends that the Government's counterclaim is untimely under 28 U.S.C. § 2501, which states that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." However, since the Court of Federal Claims may only hear claims against the government, § 2501 governs claims against the government. The counterclaim is a claim *by* the government and is controlled by the limitations periods set forth in § 2415 (titled, "Time for commencing actions brought by the United States"). As a result, the Government's counterclaim is not barred by § 2501.

Finally, Mr. Strand argues that the Government did not file its pleading containing a counterclaim within a timely manner under the Rules of the United States Court of Federal Claims. A trial court's application of its rules is reviewed for abuse of discretion. *Keranos, LLC v. Silicon Storage Tech., Inc.*, 797 F.3d 1025, 1035 (Fed. Cir. 2015) (citations omitted). The Government filed its counterclaim on December 28, 2015, more than a month after the trial court's November 26, 2015 scheduling deadline. Mr. Strand filed a motion to strike, arguing that the counterclaim was untimely. The trial court, after deciding the parties' motions for judgment on the administrative record and ruling on the counterclaim, found the motion to strike moot. Despite the untimeliness of the pleading, Mr. Strand had the full opportunity to oppose the counterclaim and does not

argue that he was prejudiced in his ability to oppose it. Thus, the trial court did not abuse its discretion in allowing the Government's counterclaim.

IV

We have considered the parties' remaining arguments but find them unpersuasive. Accordingly, we reverse the trial court's ruling on Mr. Strand's claim, and instruct the trial court to remand this case to the Secretary of the Navy for further proceedings consistent with this opinion. On the Government's counterclaim, we affirm.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

No costs.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 09/07/2017

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing en banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

No costs were taxed in this appeal.

Regarding exhibits and visual aids: Your attention is directed Fed. R. App. P. 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.)

FOR THE COURT
/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

cc: Jeffery M. Chiow
Daniel Kenneth Greene

Lucas Taylor Hanback
Neil H. O'Donnell

16-2450, -2484: Strand v. US
United States Court of Federal Claims, Case No. 1:15-cv-00601-TCW

In the United States Court of Federal Claims

No. 15-601C

(Filed: June 3, 2016)

WALTER N. STRAND, III,	*
	*
Plaintiff,	*
	*
v.	*
	*
THE UNITED STATES,	*
	*
Defendant.	*
	*

Action for Review of Military Records; Assistant General Counsel's Reversal of Decision by Board for Correction of Naval Records; Standard of Review; Counterclaim for Return of Funds Erroneously Paid to Plaintiff.

Jeffery M. Chiow, with whom was *Lucas T. Hanback,* Rogers Joseph O'Donnell, P.C., Washington, D.C., for Plaintiff.

Daniel K. Greene, with whom were *Benjamin C. Mizer,* Principal Deputy Assistant Attorney General, *Robert E. Kirschman, Jr.,* Director, and *Douglas K. Mickle,* Assistant Director, Commercial Litigation

Branch, Civil Division, U.S. Department of Justice, Washington, D.C., for Defendant.

OPINION AND ORDER

WHEELER, Judge.

Plaintiff, an enlisted serviceman in the United States Navy, brings this action to correct the manner by which he was separated from the military after more than 19 years of largely exemplary service. In a proceeding before the Board for Correction of Naval Records, the Board primarily agreed with Plaintiff's position, but the favorable ruling was promptly reversed in a two-paragraph memorandum by the Assistant General Counsel for Navy Manpower and Reserve Affairs. The Court must review whether the Assistant General Counsel's reversal of the Board's decision is arbitrary, capricious, an abuse of discretion, or not supported by substantial evidence.

Factual and Procedural Background[1]

Plaintiff, Walter N. Strand, III, commenced this action on June 15, 2015 requesting the correction of his military records along with back pay and entitlement to future pay. Mr. Strand initially brought this action by filing a complaint as a *pro se* plaintiff. Shortly thereafter, Mr. Strand was able to secure representation through this Court's pro bono referral program and subsequently filed an amended

[1] The facts in this decision are taken from the administrative record ("AR"). The pages in the administrative record are numbered in sequence. The Court's citations to the administrative record are to the AR page numbers.

complaint on October 8, 2015. On January 15, 2016, the Court denied the Government's motion to dismiss each of Plaintiff's four asserted claims. Currently pending before the Court are Plaintiff's motion for judgment on the administrative record (Dkt. No. 23), Defendant's motion to supplement the administrative record (Dkt. No. 33), Defendant's cross-motion for judgment on the administrative record (Dkt. No. 35), Defendant's first counterclaim (Dkt. No. 36), Plaintiff's second motion to strike (Dkt. No. 37), Plaintiff's motion to dismiss the counterclaim (Dkt. No. 42), and Defendant's motion to remand (Dkt No. 52).

Mr. Strand's claims before this Court involve the manner in which he was separated from the Navy. Mr. Strand enlisted in the Navy in 1988 and served for more than 19 years, rising to the rank of Chief Petty Officer. He spent more than eleven of those years deployed abroad, including deployments in support of Operations Iraqi and Enduring Freedom. Pl.'s Mot. for Judgment on the Administrative Record ("MJAR") at 4. Mr. Strand earned several commendations and personal awards during his service, including four Navy and Marine Corps Achievement Medals and four Good Conduct Medals. Id. Mr. Strand's service record reflects high marks for military performance and confirms his qualification as an "information assurance professional" whom the military trusted with classified information. Id. at 4-5.

Prior to the incident that led to his separation from the Navy, Mr. Strand's evaluations portray an

exemplary officer ripe for further promotion.[2] See AR 105 ("His contributions to ENTERPRISE and the Navy have been exemplary. He is ready for greater responsibility. Promote to Senior Chief Petty Officer."); AR 107 ("Petty Officer Strand is a dynamic leader . . . . Continue to select for the most challenging assignments and promote ahead of his peers."); AR 109 ("Superb Manager. . . . An extraordinary coach and mentor. He is a pillar for subordinates and juniors alike to emulate. . . . Ready for Chief NOW! Petty Officer Strand has my highest personal recommendation for advancement to Chief Petty Officer.").

After returning from his final combat deployment in the spring of 2007, Mr. Strand discovered that his wife had emptied his bank account and left home without explanation, taking his children and belongings with her. AR 059. A heated confrontation at his wife's new apartment building in June 2007 led to Mr. Strand's first negative fitness report. Pl.'s MJAR at 5; AR 103 ("Chief Strand displayed unsatisfactory conduct and decision making for a Chief Petty Officer."). In February 2008, Mr. Strand was arrested after shooting at the car his wife and her boyfriend were driving. As a result of that incident, Mr. Strand was convicted of attempted

[2] There is one much older negative conduct offense reflected in Mr. Strand's record. While serving on the USS Thomas C. Hart as a new Radioman Petty Officer, Third Class in 1992, at the age of twenty-two, Mr. Strand was counseled for "ABUSE OF ALCOHOL WHICH RESULTS IN DISORDERLY CONDUCT" and instructed to "REFRAIN FROM OVERINDULGENCE IN ALCOHOLIC BEVERAGES." Am. Compl. at 3-4, citing NAVSPERS 1070-613, February 26, 1992. Mr. Strand served without incident from 1992 to 2007.

malicious wounding, attempted unlawful wounding, and use of a firearm in the commission of a felony. AR 009. Following his conviction, Mr. Strand was administratively separated from the Navy. His discharge was characterized as "under other than honorable circumstances" with less than 20 years of service. Id. Mr. Strand was released from prison for good behavior after serving three years of his six-year sentence. Id.

Upon his release, Mr. Strand asked the Navy Discharge Review Board ("NDRB" or "Discharge Board") to upgrade his service characterization and change his reentry code. AR 078. Although it initially denied Mr. Strand's requests, the Discharge Board eventually granted Mr. Strand partial relief when he appeared before the NDRB on December 12, 2013. The Discharge Board agreed to change the characterization of Mr. Strand's service from under other than honorable conditions to general under honorable conditions, but declined to revise the narrative reason for discharge in his record. AR 032. After his success before the Discharge Board, Mr. Strand petitioned the Board for Correction of Naval Records ("BCNR" or "Board for Correction"), "requesting six months retirement credit with an honorable characterization of service, or an upgrade of his general discharge to honorable, a change of his narrative reason for separation, and a favorable reenlistment code." AR 008. On December 15, 2014, after a full review of Mr. Strand's application, naval record, record evidence and deliberations by a quorum, the Board for Correction came to the following conclusion:

> Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants partial favorable action. Nonetheless, the Board initially notes the seriousness of Petitioner's disciplinary infractions and does not condone his misconduct. However, the Board also notes Petitioner's overall record of more than 19 years and six months of satisfactory service, which included being awarded four Navy and Marine Corps Achievement Medals, four Good Conduct Medals, and personal awards. The Board further notes his good post service conduct and early release from civil confinement due to his good behavior.
>
> The Board considered the fact that NDRB upgraded the characterization of service to general under honorable conditions based, in part, on Petitioner's overall record of service and good post service conduct. With that in mind, the Board concluded that Petitioner has suffered long enough for his indiscretion and should be granted relief in the form of credited time served for retirement, i.e., approximately six months. . . .

AR 010-011, BCNR Decision dated December 15, 2014. Based on its consideration of all of the evidence of record, the Board for Correction recommended

"[t]hat Petitioner's naval record be corrected to show he was honorably retired with 20 years of service vice issued a general discharge under honorable conditions by reason of misconduct (civil conviction) on 26 June 2009." AR 011.

The Secretary of the Navy is authorized under 10 U.S.C. § 1552, as implemented by SECNAVINST 5420.193, to correct a Navy member's service record when "necessary to correct an error or remove an injustice." In exercising this authority, the Secretary must act through a board of civilians, in this case the BCNR, who shall review and evaluate an applicant's claim. SECNAVINST 5420.193 at 3. Although not required, the Executive Director of the BCNR chose to seek secretarial approval of the BCNR's recommendation to correct Mr. Strand's record.[3] On December 15, 2014, the same day that a quorum of the BCNR unanimously recommended correcting Mr. Strand's naval record, Executive Director Robert J. O'Neill unilaterally opted to seek review of the BCNR's recommendation, writing "[i]t is my opinion, based on the seriousness of the offense and the significant grant of relief, that SECNAV should review this case for decision." AR 013.

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[3] Section 6(e)(1) allows that "[w]ith respect to all petitions for relief properly before it, the Board is authorized to take final corrective action on behalf of the Secretary . . ." except under three circumstances, the last of which being that "[i]t is in the category of petitions reserved for decision by the Secretary of the Navy." SECNAVINST 5420.193, Section 6(e)(1)(c). Section 6(e)(2)(c), cited in the secretarial review memorandum, is a discretionary catchall category that references "[s]uch other petitions as, in the determination of the Office of the Secretary or the Executive Director, warrant Secretarial review."

On February 3, 2015, Robert L. Woods, an Assistant General Counsel, Navy Manpower and Reserve Affairs, rejected the BCNR's decision in a two-paragraph memorandum.[4] AR 003. Mr. Woods gave two rationales for overturning the BCNR's decision. First, he stated that granting the recommended relief would contravene "Navy core values and practice in similar cases . . . ." Id. Second, quoting an April 3, 2009 Administrative Separation Memorandum prepared by Mr. Strand's commanding officer, Mr. Woods stated that Mr. Strand "had a 'long-standing history of FAP [Family Advocacy Program] involvement and domestic violence issues.'" Id.

Before this Court, Mr. Strand argues that Mr. Woods's decision was arbitrary and capricious and not supported by substantial evidence, and urges this Court to give effect to the Board for Correction's recommendation. Alternatively, Mr. Strand argues that he was denied his right to an administrative review board. Mr. Strand seeks monetary relief in the form of active duty pay, back pay, and applicable pay going forward, and asks that the Court deny the Government's counterclaim. The Government maintains that the Secretary properly rejected the BCNR's recommendation and that Mr. Strand's claim for retirement is based on equity rather than legal error and therefore not eligible for review before this Court. Additionally, the Government contends that

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[4] The Secretary of the Navy delegated to the Assistant Secretary, Manpower and Reserve Affairs the authority to review BCNR petitions if required. SECNAVINST 5420.193 at 1-2 (¶b) (Nov. 1997). The Assistant Secretary in turn delegated that authority to the assistant general counsel of Manpower and Reserve Affairs. Gov't MJAR at 11, n.6.

Mr. Strand waived his right to judicial review of certain issues by failing to raise them before the NDRB, the BCNR, or the Secretary. The Government also argues that Mr. Strand's challenge to the Secretary's decision and request for reinstatement of the BCNR's recommendation present nonjusticiable claims. Finally, in its counterclaim, the Government claims that it is entitled to an award "based upon overpayments made to Mr. Strand in the amount of $79,626.61 for which he was not entitled, plus interest, fees, and penalties . . . ." Gov't Counterclaim at ¶ 21(A).

Discussion

A. Subject Matter Jurisdiction

In the Court of Federal Claims, "[b]ecause subject matter jurisdiction is a threshold matter, it must be established before the case can proceed on the merits." Sellers v. United States, 110 Fed. Cl. 62, 66 (2013) (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998)). In this case, the Court's subject matter jurisdiction is derived from both the Tucker Act, 28 U.S.C. § 1491, and the Administrative Procedures 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 Congress 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)(1). 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). Thus, in conjunction with the APA, this Court has jurisdiction pursuant to the Tucker Act to review a decision by a corrections board, or a decision to override a corrections board recommendation, "[t]o provide an entire remedy and to complete the relief afforded by the judgment" by issuing an "order directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records . . . ." 28 U.S.C. § 1491(a)(2); see also Weaver, 46 Fed. Cl. at 76-77.

The Tucker Act, however, does not confer any substantive rights upon Plaintiff and Plaintiff may not rely on the APA as an independent source of jurisdiction as it does not mandate payment of money damages. Thus, 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 10 U.S.C. § 6333, which provides the schedule according to which military retired and retainer pay are computed, and 37 U.S.C. § 204, which governs the portion of Mr. Strand's pay the Government argues should be disgorged.

B. Standard of Review

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 the actions of a military correction board, 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 . . . ." 5 U.S.C. § 706(2)(A). The Court shall overturn a correction board'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 v. United States, 30 Fed. Cl. 296, 310 (1994). Although the Court reviews a service secretary's decision to overrule a corrections board recommendation pursuant to the same standard, its review nevertheless "is limited in nature." Moehl v. United States, 34 Fed. Cl. 682, 690 (1996). Thus, a secretary's decision may "differ with a board's recommendations where the evidence is susceptible of varying interpretations." Id. at 690 (citing Sanders v. United States, 594 F.2d 804, 812 (1979)). Nevertheless, a

secretary may not "arbitrarily refuse to follow the fact findings of the correction board where all the evidence supports the board's findings." Moehl, 34 Fed. Cl. at 690 (citing Hertzog v. United States, 167 Ct. Cl. 377 (1964); see also Boyd v. United States, 207 Ct. Cl. 1, 8 (1975) ("The court, in turn, may reject the decision of a Secretary only if he has exercised his discretion arbitrarily, capriciously, in bad faith, contrary to substantial evidence, or where he has gone outside the board record, or fails to explain his actions, or violates applicable law or regulations. Then we will not hesitate to set him right.").

C. Mr. Wood's Decision to Overrule the BCNR Recommendation

The Secretary of a military department is required to act through boards of civilian officers or employees in reviewing and correcting military records. 10 U.S.C. § 1552. Generally, after reviewing a service member's record, the Board for Correction is authorized to take final corrective action based on its findings. SECNAVINST 5420.193, Section 6(e)(1). Even in those instances where secretarial review or approval is sought or required, the Secretary must nevertheless justify a decision to overturn a recommendation that is supported by the record. Thus, when a secretary goes outside of the record before the board, the secretary "must justify such a departure by explicitly stating the 'policy reasons' behind such action." Hertzog v. United States, 167 Ct. Cl. 377, 387 (1964). In Hertzog, the Court held that in the absence of such an explanation, the Secretary's discretionary action was arbitrary and capricious. Id. at 388.

"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 hand of civilians." Id. at 386 (quoting Proper v. United States, 139 Ct. Cl. 511 (1957)). Accordingly, a Secretary may not rely on the advice of a military officer as justification for overruling a reasoned BCNR recommendation. Weiss v. United States, 187 Ct. Cl. 1, 11 (1969) (explaining that "[t]he thrust of the Proper opinion is that a Secretary of a military department cannot overrule the recommendations of a civilian correction board on the advice of a military officer unless the findings of the board are not justified by the record before it."). Ultimately, because the function of the BCNR is not merely advisory, the Secretary is not free to reject a recommendation without proper justification. See Weiss, 187 Ct. Cl at 10; Hertzog, 167 Ct. Cl. at 386-87; Proper, 139 Ct. Cl. at 526. Although, "the final authority regarding requested corrections is vested in the Secretary," such authority must nevertheless be exercised in accordance with the law. Strickland v. United States, 423 F.3d 1335, 1342 (Fed. Cir. 2005).

In this case, Mr. Woods overruled the BCNR's recommendation to grant partial relief to Mr. Strand on two grounds. As the first ground for overruling the BCNR, Mr. Woods stated that "the relief recommended by the Board is wholly inconsistent with Navy core values and practice in similar cases involving discharge for criminal conduct and conviction." AR 003. However, notwithstanding his reference to "core values," Mr. Woods failed to cite a

single specific core value or explain how the Board's recommendation ran counter to any such value. If the Secretary goes beyond the record before the Board for Correction in overruling a recommendation, the Secretary must explicitly set forth the policy reasons for doing so. Hertzog, 167 Ct. Cl. at 386-87. Here, a mere reference to "core values" provides no reasoning for this Court to review. In the absence of further explanation, Mr. Woods's vague and imprecise proffered justification for overruling the BCNR's reasoned recommendation "cannot be characterized as other than capricious." Betts v. United States, 145 Ct. Cl. 530, 535 (1959) (explaining that "[a] decision contrary to all evidence, and for which, even on post audit, no reason can be given except an irrelevant reason, cannot be characterized as other than capricious. As such it deserves only to be ignored, and we ignore it.").

As the second ground for his decision, Mr. Woods quoted from a memorandum prepared by Mr. Strand's former commanding officer, Captain H. D. Starling II, claiming that Mr. Strand had a "long-standing history of FAP [Family Advocacy Program] involvement and domestic violence issues." AR 003 (quoting AR 088, Administrative Separation Memorandum, April 3, 2009). This statement is not supported by the record before the Court and, other than a passing reference to Captain Starling's statement, the Board for Correction's recommendation memorandum includes no discussion of such history. Instead, the Board for Correction explicitly noted "the seriousness of [Plaintiff's] disciplinary infractions," and explained that it did "not condone his misconduct." AR 010. However, the

BCNR also recognized that Mr. Strand (1) satisfactorily served his country for nineteen years and six months, (2) was granted partial relief by the Naval Discharge Review Board "based, in part, on [his] overall record of service and good post service conduct," and (3) paid his debt to society, earning "early release from civil confinement due to his good behavior." AR 010. Given that the BCNR's findings are based on a thorough consideration of the evidence of record, this Court cannot uphold Mr. Woods's decision to overrule those findings on the basis of a military official's statement, especially where there is no evidentiary support for that statement in the record before the BCNR.

Conclusion

Ultimately, Mr. Woods's decision to overrule the BCNR's reasoned recommendation is simply not justified in the two-paragraph memorandum that is before this Court. Considering the entire administrative record, the Court finds the Secretary's disapproval of the Board for Correction's recommendation arbitrary, capricious, an abuse of discretion, and not supported by substantial evidence. The Court directs the Navy to carry out the BCNR's recommendation "[t]hat Petitioner's naval record be corrected to show he was honorably retired with 20 years of service vice issued a general discharge under honorable conditions by reason of misconduct (civil conviction) on 26 June 2009." The Court need not reach the separate issue of whether Mr. Strand was denied his right to an administrative separation board.

Accordingly, the Court GRANTS Plaintiff's cross-motion for judgment on the administrative record, and DENIES Defendant's motion for judgment on the administrative record. The Court directs the Navy to retire Mr. Strand with all appropriate back pay, benefits, and allowances. The Court GRANTS IN PART Defendant's counterclaim and DENIES Plaintiff's motion to dismiss the counterclaim. The Government may deduct no more than $79,626.61, the amount the Navy claims it erroneously paid to Mr. Strand, from the amount due to Mr. Strand pursuant to this opinion. The Government explicitly is not entitled to any interest, fees, or penalties on its counterclaim, as the payments in question were due solely to the Government's error. Defendant's motion to supplement the administrative record and motion to remand are DENIED as MOOT, as is Plaintiff's second motion to strike. The Clerk shall enter judgment in accordance with this opinion.

IT IS SO ORDERED

s/Thomas C. Wheeler
THOMAS C. WHEELER
Judge

DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
(MANPOWER AND RESERVE AFFAIRS)
1000 NAVY PENTAGON
WASHINGTON DC 20350-1000

February 3, 2015

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

Subj: BCNR PETITION OF FORMER ITC WALTER STRAND, USN, Dkt. #NR4145-14

You forwarded the subject petition to me pursuant to the provisions of the SECNAVINST 5420.193, Section 6.e.(2)(c) because you determined that this is a petition that warrants Secretarial review. Further, the Secretary has delegated authority to me to render decisions in such cases. Pursuant to this authority, and for the reasons stated below, the recommendation of the Board for Correction of Naval Records to grant the Petitioner's request for relief is disapproved.

I disagree with the Board's reasoning that petitioner should be granted relief because previous to his felonious misconduct he had a good service record and he was released early from his prison sentence for good behavior while incarcerated and, as such he has "suffered long enough." Granting the relief recommended by the Board is wholly inconsistent with Navy core values and practice in similar cases

involving discharge for criminal conduct and criminal conviction. According to the uncontroverted comments of the Commander, Naval Network Warfare Command, in his letter to the Commander, Naval Personnel Command, dated 3 April, 2009, recommending petitioner's administrative separation under other than honorable conditions, petitioner was not only convicted of serious felonies he also had a "long-standing history of F AP [Family Advocacy Program] involvement and domestic violence issues." Petitioner's separation short of retirement is consistent with standard Navy practice in similar cases. As such, I find that his petition is denied.

s/Robert L. Woods
Robert L. Woods
Assistant General Counsel
(Manpower and Reserve Affairs)

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

HCG
Docket No.: 4145-14
15 December 2014

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

Subj: REVIEW NAVAL RECORD OF EX-ITC WALTER N. STRAND, USN XXX-XX-[REDCATED]

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

Encl: (1) DD Form 149 with attachments
(2) Case summary
(3) Subject's naval record (excerpts)
(4) NDRB Decisional Docket, ND11-0886, 3May12
(5) NDRB Decisional Docket, ND13-01170, 12 DEC13

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the Navy, filed enclosure (1) with this Board requesting six months retirement credit with an .honorable characterization of service, or an upgrade of his general discharge to honorable, a change of his

narrative reason for separation, and a favorable reenlistment code. Enclosures (2) and (3) apply.

2. The Board, consisting of Messrs. Clemmon, Glover, and Rothlein, reviewed Petitioner's allegations of error and injustice on 10 December 2014 and, pursuant to its regulations, determined that the partial corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

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

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

b. Although enclosure (1) was not filed in a timely manner, it is in the interest of justice to waive the statute of limitations and review the application on its merits.

c. Petitioner enlisted in the Navy, began a period of active duty on 27 December 1988, and served without disciplinary incident for more than 19 years. However, on 16 February 2008, he was arrested and held in confinement by civil authorities. As a result, on 4 February 2009, he was convicted by civil authorities of attempted malicious wounding, attempted unlawful wounding, and use of a firearm in the commission of a

felony, and was sentenced to six years confinement. Three years of the confinement was suspended due to his good behavior.

d. Based on the foregoing civil conviction, Petitioner was administratively processed for separation by reason of misconduct due to commission of a serious offense. When notified of the administrative separation processing, using board procedures, he refused to sign or retain copies of the documentation which constituted the waiving of his rights to consult with a qualified counsel, submitting a written statement, and/or requesting an administrative discharge board (ADB). Nonetheless, his commanding officer recommended separation under other than honorable conditions, stating in part, that he had a longstanding history of Family Advocacy Program (FAP) involvement and domestic violence issues, and that his behavior did not align with the Navy's core values. The separation authority, in concurrence with the commanding officer's recommendation, directed separation under other than honorable conditions by reason of misconduct due to commission of a serious offense, and on 26 June 2009, he was so discharged and assigned an RE-4 reentry code due to his not being recommended for reenlistment.

e. On 18 November 2010, Petitioner submitted an application to this Board requesting a change of his reentry code. On 9 March 2011, the Board denied his request after determining that his RE-4 reentry code was properly assigned as based on the other than honorable discharge by reason of misconduct due commission of a serious offense as evidenced by civil conviction. At that time the Board did not consider

whether his characterization of service should be changed since he did not initiate such a request for consideration. However, he was advised that he had not exhausted his administrative remedies by applying to the Naval Discharge Review Board (NDRB).

f. On 3 May 2012, the NDRB conducted a documentary review, regarding Petitioner's characterization of service and narrative reason for separation. In this regard, NDRB denied his request and he was informed that he was eligible for a personal appearance. The following year, on 12 December 2013, he appeared before NDRB and again requested an upgrade of his discharge and a change of the narrative reason for separation. At that time NDRB determined that partial relief was warranted in that the characterization of service would be changed to general under honorable conditions. The NDRB decisional document stated, in part, that full relief was not warranted because of the seriousness of Petitioner's misconduct, and for that same reason, the narrative reason for discharge would remain misconduct due to commission of a serious offense (civil conviction). Enclosures (4) and (5) apply.

g. With his application, Petitioner provided a written statement which notes in part, that he was humbled by the fact that nearly twenty years of faithful and dedicate service had been wiped away by a moment of confusion and passion fueled anger; and that he remained remorseful and had completed his civil confinement/sentence as a model inmate. Additionally, he states that he served honorably, and

reenlisted term after term with retirement being his goal.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner's request warrants partial favorable action. Nonetheless, the Board initially notes the seriousness of Petitioner's disciplinary infractions and does not condone his misconduct. However, the Board also notes Petitioner's overall record of more than 19 years and six months of satisfactory service, which included being awarded four Navy and Marine Corps Achievement Medals, four Good Conduct Medals, and personal awards. The Board further notes his good post service conduct and his early release from civil confinement due to his good behavior.

The Board considered the fact that NDRB upgraded the characterization of service to general under honorable conditions based, in part, on Petitioner's overall record of service and good post service conduct. With that in mind, the Board concluded that Petitioner has suffered long enough for his indiscretion and should be granted relief in the form of credited time served for retirement, i.e., approximately six months. The Board further concluded that the reenlistment code should not be changed because his nonrecommendation for retention and/or reenlistment was based solely on his civil conviction. In accordance with the foregoing, the Board concluded that the record should be corrected to reflect that Petitioner was honorably retired with 20 years of service.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show he was honorably retired with 20 years of service vice issued a general discharge under honorable conditions by reason of misconduct (civil conviction) on 26 June 2009.

b. That no further relief be granted.

c. That a copy of this report of proceedings be filed in Petitioner's naval record.

d. That upon request, the Department of Veterans Affairs be informed that Petitioner's application was received on 18 February 2014.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

s/ T.J. Reed
T.J. REED
Recorder

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

/s Robert J. O'Neill
ROBERT J. O'NEILL
Executive Director

Reviewed and ~~approved~~

Disapproved RJW see attached decisional memo.

s/Robert L. Woods
ROBERT L. WOODS
Assistant General Counsel
(Manpower and Reserve Affairs)
1000 Navy Pentagon, Rm 4D548
Washington, DC 20350-1000

DEPARTMENT OF THE NAVY
NAVAL DISCHARGE REVIEW BOARD (NDRB)
DISCHARGE REVIEW DECISIONAL DOCUMENT

APPLICANT'S ISSUES

1. The Applicant contends his misconduct was an isolated incident in almost 20 years of service.
2. The Applicant contends his post service conduct warrants consideration for an upgrade.

DECISION

Date: 20131212 PERSONAL APPEARANCE HEARING
Location: WASHINGTON D.C.
Representation: NONE

By a vote of 5-0 the Characterization shall change to GENERAL (UNDER HONORABLE CONDITIONS)
By a vote of 5-0 the Narrative Reason shall remain MISCONDUCT (CIVIL CONVICTION)

DISCUSSION

The NDRB, under its responsibility to examine the propriety and equity of an Applicant's discharge, is authorized to change the character of service and the reason for discharge if such change is warranted, In reviewing discharges, the Board presumes regularity in the conduct of governmental affairs unless there is substantial credible evidence to rebut the presumption, to include evidence submitted by the Applicant. The Applicant's record of service included

one civilian conviction for attempted malicious wounding, attempted unlawful wounding, and use of a firearm in the commission of a felony. Based on the Applicant's civilian conviction, his command administratively processed him for separation. When notified of administrative separation processing using the administrative board procedure, the Applicant failed to complete and sign the notification, which constituted a waiving of his rights to consult with a qualified counsel, submit a written statement, and request an administrative board.

Issue 1: (Decisional) (Propriety/Equity) RELIEF NOT WARRANTED. The Applicant contends his misconduct was an isolated incident in almost 20 years of service. The Applicant received Honorable discharges for his first three enlistments from December 1988 to December 2004. Each period of enlistment is an independent obligation and characterization is determined for that specific period of time. During his fourth enlistment, the Applicant was convicted of a civilian felony. Based on the Applicant's record of service in his fourth enlistment, the NDRB determined the Applicant engaged in conduct involving one or more acts or omissions that constituted a significant departure from the conduct expected of members of the Naval Service, and the awarded characterization of service was warranted. Relief denied.

Issue .2~ (Decisional) (Equity) PARTIAL RELIEF WARRANTED. The Applicant contends his post-service conduct warrants consideration for an upgrade. The NDRB is authorized to consider post-service factors in the re-characterization of a

discharge. However, there is no law, or regulation, that provides that an unfavorable discharge may be upgraded based solely on good conduct or achievements in civilian life subsequent to leaving the service. Normally, to permit relief, a procedural impropriety or inequity must have been found to exist during the period of enlistment in question. The NDRB conducted a thorough review of the available records, to include significant, credible evidence submitted by the Applicant. After detailed analysis and careful consideration of the facts and unique circumstances surrounding the Applicant's record, and the substantial post-service testimony, the NDRB determined partial relief was warranted in this case. Accordingly, the Applicant's characterization of service shall change to General (Under Honorable Conditions). Partial relief granted. The NDRB determined full relief was not warranted based on the seriousness of the Applicant's misconduct.

Summary: After a careful review of the Applicant's post-service documentation and official service records, and the facts and circumstances unique to this case, the Board found the discharge was proper and equitable at the time of discharge. However, the NDRB determined partial relief is warranted based on equitable grounds. The NDRB voted unanimously to upgrade the characterization of service to GENERAL (UNDER HONORABLE CONDITIONS) but the narrative reason for separation shall remain MISCONDUCT (CIVIL CONVICTION). The Applicant is not eligible for any further reviews from the NDRB. The Applicant may petition the Board for Correction of Naval Records, 701 South Courthouse Road, Suite 1001, Arlington, VA 22204-2490 for

further review using DD Form 149. Their website can be found at http://www.donhg.navy.mil/benr/benr.htm

DEPARTMENT OF THE NAVY
NAVAL DISCHARGE REVIEW BOARD (NDRB)
DISCHARGE REVIEW DECISIONAL DOCUMENT

APPLICANT'S ISSUES

1. The Applicant contends his honorable 19 years of service outweighs his misconduct.

DECISION

Date 20120503 DOCUMENTARY REVIEW
Location: WASHINGTON D.C.
Representation: NONE

By a vote of 5-0 the Characterization shall remain UNDER OTHER THAN HONORABLE CONDITIONS.
By a vote of 5-0 the Narrative Reason shall remain MISCONDUCT (CIVIL CONVICTION).

DISCUSSION

The NDRB, under its responsibility to examine the propriety and equity of an Applicant's discharge, is authorized to change the character of service and the reason for discharge if such change is warranted. In reviewing discharges, the Board presumes regularity in the conduct of governmental affairs unless there is substantial credible evidence to rebut the presumption, to include evidence submitted by the Applicant. The Applicant's record of service included no misconduct resulting in nonjudicial punishment or court-martial. The Applicant had one civilian conviction for Attempted Malicious Wounding,

Attempted Unlawful Wounding, and Use of a Firearm in the Commission of a Felony. He was sentenced to six years incarceration. Based on the offenses committed by the Applicant, his command administratively processed him for separation. When notified of administrative separation processing using the administrative board procedure, the Applicant refused to sign his election or waiver of rights, thus constituting waiver of his rights to consult with qualified counsel, submit a written statement, and request an administrative board.

Issue I: (Decisional) (Equity) RELIEF NOT WARRANTED). The Applicant contends his honorable 19 years of service outweigh his misconduct. Certain serious offenses, even though isolated, warrant separation from the service in order to maintain proper order and discipline. Violations of UCMJ Article 128 (Assault), which is equivalent to the offenses the Applicant was convicted of in civil court, warrant processing for administrative separation regardless of grade, performance, or time in service. This usually results in an unfavorable characterization of discharge or, at a maximum, a punitive discharge and possible confinement if adjudicated and awarded as part of a sentence by a special or general court-martial. The command did not pursue a punitive discharge but opted instead for the more lenient administrative discharge. The NDRB determined an upgrade would be inappropriate'. Relief denied.

Summary: After a thorough review of the available evidence, to include the Applicant's summary of service, service record entries, and discharge process,

the Board found the discharge was proper and equitable. Therefore, the awarded characterization of service shall remain UNDER OTHER THAN HONORABLE CONDITIONS and the narrative reason for separation shall remain MISCONDUCT (CIVIL CONVICTION). The Applicant remains eligible for a personal appearance hearing for a period of fifteen years from the date of his discharge. The Applicant is directed to the Addendum. specifically the paragraphs titled *Additional Reviews, Automatic Upgrades, and Post-Service Conduct*.

10 U.S.C. § 1552: Correction of military records: claims incident thereto

(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. The Secretary of Homeland Security may in the same manner correct any military record of the Coast Guard.

(2) The Secretary concerned is not required to act through a board in the case of the correction of a military record announcing a decision that a person is not eligible to enlist (or reenlist) or is not accepted for enlistment (or reenlistment) or announcing the promotion and appointment of an enlisted member to an initial or higher grade or the decision not to promote an enlisted member to a higher grade. Such a correction may be made only if the correction is favorable to the person concerned.

(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.

(B) If a board makes a preliminary determination that a claim under this section lacks sufficient information or documents to support the claim, the board shall notify the claimant, in writing, indicating the specific information or documents

necessary to make the claim complete and reviewable by the board.

(C) If a claimant is unable to provide military personnel or medical records applicable to a claim under this section, the board shall make reasonable efforts to obtain the records. A claimant shall provide the board with documentary evidence of the efforts of the claimant to obtain such records. The board shall inform the claimant of the results of the board's efforts, and shall provide the claimant copies of any records so obtained upon request of the claimant.

(D) Any request for reconsideration of a determination of a board under this section, no matter when filed, shall be reconsidered by a board under this section if supported by materials not previously presented to or considered by the board in making such determination.

(4)(A) Subject to subparagraph (B), a correction under this section is final and conclusive on all officers of the United States except when procured by fraud. (B) If a board established under this section does not grant a request for an upgrade to the characterization of a discharge or dismissal, that declination may be considered under section 1553a of this title.

(5) Each final decision of a board under this subsection shall be made available to the public in electronic form on a centralized Internet website. In any decision so made available to the public there shall be redacted all personally identifiable information.

(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. A board established under subsection (a)(1) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(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. (2) If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid-

(A) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(B) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or

(C) as otherwise prescribed by the law applicable to that kind of payment.

(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.

(4) If the correction of military records under this section involves setting aside a conviction by court-martial, the payment of a claim under this subsection in connection with the correction of the records shall include interest at a rate to be determined by the Secretary concerned, unless the Secretary determines that the payment of interest is inappropriate under the circumstances. If the payment of the claim is to include interest, the interest shall be calculated on an annual basis, and compounded, using the amount of the lost pay, allowances, compensation, emoluments, or other pecuniary benefits involved, and the amount of any fine or forfeiture paid, beginning from the date of the conviction through the date on which the payment is made.

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Secretary of Veterans Affairs.

(f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under subsection (a) may extend only to-

(1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or

(2) action on the sentence of a court-martial for purposes of clemency.

(g)(1) Any medical advisory opinion issued to a board established under subsection (a)(1) with respect to a member or former member of the armed forces who was diagnosed while serving in the armed forces as experiencing a mental health disorder shall include the opinion of a clinical psychologist or psychiatrist if the request for correction of records concerned relates to a mental health disorder.

(2) If a board established under subsection (a)(1) is reviewing a claim described in subsection (h), the board shall seek advice and counsel in the review from a psychiatrist, psychologist, or social worker with training on mental health issues associated with post-traumatic stress disorder or traumatic brain injury or other trauma as specified in the current edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association.

(3) If a board established under subsection (a)(1) is reviewing a claim in which sexual trauma, intimate partner violence, or spousal abuse is claimed, the board shall seek advice and counsel in the review from an expert in trauma specific to sexual assault,

intimate partner violence, or spousal abuse, as applicable.

(h)(1) This subsection applies to a former member of the armed forces whose claim under this section for review of a discharge or dismissal is based in whole or in part on matters relating to post-traumatic stress disorder or traumatic brain injury as supporting rationale, or as justification for priority consideration, and whose post-traumatic stress disorder or traumatic brain injury is related to combat or military sexual trauma, as determined by the Secretary concerned.

(2) In the case of a claimant described in paragraph (1), a board established under subsection (a)(1) shall-

(A) review medical evidence of the Secretary of Veterans Affairs or a civilian health care provider that is presented by the claimant; and

(B) review the claim with liberal consideration to the claimant that post-traumatic stress disorder or traumatic brain injury potentially contributed to the circumstances resulting in the discharge or dismissal or to the original characterization of the claimant's discharge or dismissal.

(i) Each board established under this section shall make available to the public each calendar quarter, on an Internet website of the military department concerned or the Department of Homeland Security, as applicable, that is available to the public the following:

(1) The number of claims considered by such board during the calendar quarter preceding the calendar quarter in which such information is made available, including cases in which a mental health condition of the former member, including post-

traumatic stress disorder or traumatic brain injury, is alleged to have contributed, whether in whole or part, to the original characterization of the discharge or release of the former member.

(2) The number of claims submitted during the calendar quarter preceding the calendar quarter in which such information is made available that relate to service by a former member during a war or contingency operation, catalogued by each war or contingency operation.

(3) The number of military records corrected pursuant to the consideration described in paragraph (1) to upgrade the characterization of discharge or release of former members.

(4) The number and disposition of claims decided during the calendar quarter preceding the calendar quarter in which such information is made available in which sexual assault is alleged to have contributed, whether in whole or in part, to the original characterization of the discharge or release of the former member.

(j) In this section, the term "military record" means a document or other record that pertains to (1) an individual member or former member of the armed forces, or (2) at the discretion of the Secretary of the military department concerned, any other military matter affecting a member or former member of the armed forces, an employee or former employee of that military department, or a dependent or current or former spouse of any such person. Such term does not include records pertaining to civilian employment matters (such as matters covered by title 5 and chapters 81, 83, 87, 108, 747, 855, 857, 871, and 947 of this title).

(Aug. 10, 1956, ch. 1041, 70A Stat. 116 ; Pub. L. 86–533, §1(4), June 29, 1960, 74 Stat. 246 ; Pub. L. 96–513, title V, §511(60), Dec. 12, 1980, 94 Stat. 2925 ; Pub. L. 98–209, §11(a), Dec. 6, 1983, 97 Stat. 1407 ; Pub. L. 100–456, div. A, title XII, §1233(a), Sept. 29, 1988, 102 Stat. 2057 ; Pub. L. 101–189, div. A, title V, §514, title XVI, §1621(a)(2), Nov. 29, 1989, 103 Stat. 1441 , 1603; Pub. L. 102–484, div. A, title X, §1052(19), Oct. 23, 1992, 106 Stat. 2500 ; Pub. L. 105–261, div. A, title V, §545(a), (b), Oct. 17, 1998, 112 Stat. 2022 ; Pub. L. 107–296, title XVII, §1704(b)(1), Nov. 25, 2002, 116 Stat. 2314 ; Pub. L. 110–417, [div. A], title V, §592(a), (b), Oct. 14, 2008, 122 Stat. 4474 , 4475; Pub. L. 113–291, div. A, title V, §521(a), Dec. 19, 2014, 128 Stat. 3360 ; Pub. L. 114–92, div. A, title V, §521, Nov. 25, 2015, 129 Stat. 811 ; Pub. L. 114–328, div. A, title V, §§533(a), 534(a), (b), Dec. 23, 2016, 130 Stat. 2121 , 2122; Pub. L. 115–91, div. A, title V, §§520(a), 521(a), (c)(1), title X, §1081(a)(27), Dec. 12, 2017, 131 Stat. 1379 , 1380, 1595; Pub. L. 115–232, div. A, title VIII, §809(a), Aug. 13, 2018, 132 Stat. 1840 ; Pub. L. 116–92, div. A, title V, §§521(a), 523(b)(2)(A), Dec. 20, 2019, 133 Stat. 1353 , 1354.)

HISTORICAL REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
1552(a)	5:191a(a)(less 2d and last provisos). 5:275(a) (less 2d and last provisos).	Aug. 2, 1946, ch. 753, § 207; restated Oct. 25, 1951, ch. 588, 65 Stat. 655.

1552(b)	5:191a(a) (2d and last provisos). 5:275(a) (2d and last provisos).	
1552(c)	5:191a(b), (c). 5:275(b), (c).	
1552(d)	5:191a(d). 5:275(d).	
1552(e)	5:191a(f). 5:275(f).	
1552(f)	5:191a(e). 5:275(e).	

In subsection (a), the words "and approved by the Secretary of Defense" are substituted for 5:191a(a) (1st proviso). The words "when he considers it" are substituted for the words "where in their judgment such action is", in 5:191a and 275. The words "officers or employees" and "means of", in 5:191a and 275, are omitted as surplusage. The word "naval", in 5:191a and 275, is omitted as covered by the word "military".

In subsection (b), the words "before October 26, 1961" are substituted for the words "or within ten years after the date of enactment of this section", in 5:191a and 275. The last sentence of the revised subsection is substituted for 5:191a(a) (last proviso) and 275(a) (last proviso).

In subsection (c), the words "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" are substituted for the words "which are found to be due on account of

military or naval service as a result of the action * * * hereafter taken pursuant to subsection (a) of this section", in 5:191a and 275. The words "heretofore taken pursuant to this section", in 5:191a and 275, are omitted as executed. The words "of any persons, their heirs at law or legal representative as hereinafter provided", "(including retired or retirement pay)", "as the case may be", "duly appointed", "otherwise due hereunder", "decedent's", "precedence or succession", and "of precedence", in 5:191a and 275, are omitted as surplusage. The last sentence is substituted for 5:191a(c) and 275(c).

In subsection (d), the word "but" is substituted for the words "That, continuing payments are authorized to be made to such personnel", in 5:191a and 275. The words "if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate" are substituted for the words "without the necessity for reenlistment, appointment, or reappointment to the grade, rank, or office to which such pay (including retired or retirement pay), allowances, compensation, emoluments, and other monetary benefits are attached", in 5:191a and 275. The words "or one year following the date of enactment of this section", in 5:191a and 275, are omitted as executed. The words "for payment of such sums as may be due for", in 5:191a and 275, are omitted as surplusage. The words "(including retired or retirement pay)", in 5:191a and 275, are omitted as covered by the definition of "pay" in section 101(27) of this title.

In subsection (e), the words "No payment may be made under this section" are substituted for the words "Nothing in this section shall be construed to

authorize the payment of any amount as compensation", in 5:191a and 275.

REFERENCES IN TEXT

The Uniform Code of Military Justice (Public Law 506 of the 81st Congress), referred to in subsec. (f), is act May 5, 1950, ch. 169, §1, 64 Stat. 107 , which was classified to chapter 22 (§551 et seq.) of Title 50, War and National Defense, and was repealed and reenacted as chapter 47 (§801 et seq.) of this title by act Aug. 10, 1956, ch. 1041, §53, 70A Stat. 641 , the first section of which enacted this title.

AMENDMENTS

2019-Subsec. (a)(4). Pub. L. 116–92, §523(b)(2)(A), amended par. (4) generally. Prior to amendment, par. (4) read as follows: "Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States."

Subsec. (g). Pub. L. 116–92, §521(a), designated existing provisions as par. (1) and added pars. (2) and (3).

2018-Subsec. (j). Pub. L. 115–232 substituted "chapters 81, 83, 87, 108, 747, 855, 857, 871, and 947" for "chapters 81, 83, 87, 108, 373, 605, 607, 643, and 873".

2017-Subsec. (h). Pub. L. 115–91, §520(a)(2), added subsec. (h). Former subsec. (h) redesignated (i). Subsec. (i). Pub. L. 115–91, §1081(a)(27), substituted "calendar" for "calender" wherever appearing. Pub. L. 115–91, §520(a)(1), redesignated subsec. (h) as (i). Former subsec. (i) redesignated (j). Subsec. (i)(1). Pub.

L. 115–91, §521(c)(1)(A), substituted "former member" for "claimant" in two places.
Subsec. (i)(2). Pub. L. 115–91, §521(c)(1)(B), substituted "former member" for "claimant".
Subsec. (i)(3). Pub. L. 115–91, §521(c)(1)(C), substituted "former members" for "claimants".
Subsec. (i)(4). Pub. L. 115–91, §521(a), added par. (4).
Subsec. (j). Pub. L. 115–91, §520(a)(1), redesignated subsec. (i) as (j).

2016-Subsec. (a)(3). Pub. L. 114–328, §534(a), designated existing provisions as subpar. (A) and added subpars. (B) to (D).
Subsec. (a)(5). Pub. L. 114–328, §534(b), added par. (5).
Subsecs. (h), (i). Pub. L. 114–328, §533(a), added subsec. (h) and redesignated former subsec. (h) as (i).

2015-Subsec. (b). Pub. L. 114–92 substituted "(or the claimant's heir or legal representative) or the Secretary concerned" for "or his heir or legal representative", "discovering" for "he discovers", and "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. A board" for "However, a board".

2014-Subsecs. (g), (h). Pub. L. 113–291 added subsec. (g) and redesignated former subsec. (g) as (h).

2008-Subsec. (c). Pub. L. 110–417 designated existing provisions as pars. (1) to (3), redesignated former pars. (1) to (3) as subpars. (A) to (C), respectively, of par. (2), and added par. (4).

2002-Subsec. (a)(1). Pub. L. 107–296 substituted "Secretary of Homeland Security" for "Secretary of Transportation".

1998-Subsec. (c). Pub. L. 105–261, §545(a), inserted ", or on account of his or another's service as a civilian employee" before period at end of first sentence. Subsec. (g). Pub. L. 105–261, §545(b), added subsec. (g).

1992-Subsec. (a)(2). Pub. L. 102–484 substituted "announcing the promotion and appointment of an enlisted member to an initial or higher grade or the decision not to promote an enlisted member to a higher grade" for "announcing a decision not to promote an enlisted member to a higher grade".

1989-Subsec. (a). Pub. L. 101–189, §514(a), amended subsec. (a) generally. Prior to amendment, subsec. (a) read as follows: "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. Under procedures prescribed by him, the Secretary of Transportation may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States."

Subsec. (b). Pub. L. 101–189, §514(b), substituted "subsection (a)(1)" for "subsection (a)" in two places.

Subsec. (e). Pub. L. 101–189, §1621(a)(2), substituted "Secretary of Veterans Affairs" for "Administrator of Veterans' Affairs".

1988-Subsec. (b). Pub. L. 100–456, §1233(a)(1), substituted "for the correction within three years after he discovers the error or injustice" for "therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later".
Subsec. (c). Pub. L. 100–456, §1233(a)(2), substituted "The Secretary concerned" for "The department concerned".

1983-Subsec. (f). Pub. L. 98–209 added subsec. (f).

1980-Subsec. (a). Pub. L. 96–513 substituted "Secretary of Transportation" for "Secretary of the Treasury".

1960-Subsec. (f). Pub. L. 86–533 repealed subsec. (f) which required reports to the Congress every six months with respect to claims paid under this section.

EFFECTIVE DATE OF 2018 AMENDMENT

Amendment by Pub. L. 115–232 effective Feb. 1, 2019, with provision for the coordination of amendments and special rule for certain redesignations, see section 800 of Pub. L. 115–232, set out as a note preceding section 3001 of this title.

EFFECTIVE DATE OF 2008 AMENDMENT

Pub. L. 110–417, [div. A], title V, §592(c), Oct. 14, 2008, 122 Stat. 4475 , provided that: "The amendment made by subsection (a) [amending this section] shall apply with respect to any sentence of a court-martial set aside by a Corrections Board on or after October 1, 2007, when the Corrections Board includes an order or recommendation for the payment of a claim for the

loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, that arose as a result of the conviction. In this subsection, the term 'Corrections Board' has the meaning given that term in section 1557 of title 10, United States Code."

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–296 effective on the date of transfer of the Coast Guard to the Department of Homeland Security, see section 1704(g) of Pub. L. 107–296, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96–513 effective Dec. 12, 1980, see section 701(b)(3) of Pub. L. 96–513, set out as a note under section 101 of this title.

CORRECTION OF CERTAIN DISCHARGE CHARACTERIZATIONS

Pub. L. 116–92, div. A, title V, §527, Dec. 20, 2019, 133 Stat. 1356 , provided that:"(a) IN GENERAL.-In accordance with this section, and in a manner that is consistent across the military departments to the greatest extent practicable, the appropriate board shall, at the request of a covered member or the authorized representative of a covered member-
"(1) review the discharge characterization of that covered member; and
"(2) change the discharge characterization of that covered member to honorable if the appropriate board

determines such change to be appropriate after review under paragraph (1).

"(b) APPEAL-A covered member or the authorized representative of that covered member may seek review of a decision by the appropriate board not to change the discharge characterization of that covered member. Such review may be made pursuant to section 1552 of title 10, United States Code, section 1553 of such title, or any other process established by the Secretary of Defense for such purpose.

"(c) CHANGE OF RECORDS.-For each covered member whose discharge characterization is changed under subsection (a) or (b), the Secretary of the military department concerned shall issue to the covered member or the authorized representative of the covered member a corrected Certificate of Release or Discharge from Active Duty (DD Form 214), or other like form regularly used by an Armed Force that-

"(1) reflects the upgraded discharge characterization of the covered member; and

"(2) does not reflect the sexual orientation of the covered member or the original stated reason for the discharge or dismissal of that covered member.

"(d) DEFINITIONS.-In this section:

"(1) The term 'appropriate board' means a board for the correction of military or naval records under section 1552 of title 10, United States Code, or a discharge review board under section 1553 of such title, as the case may be.

"(2) The term 'authorized representative' means an heir or legal representative of a covered member.

"(3) The term 'covered member' means any former member of the Armed Forces who was discharged

from the Armed Forces because of the sexual orientation of that member.
"(4) The term 'discharge characterization' means the characterization assigned to the service of a covered member on the discharge or dismissal of that covered member from service in the Armed Forces."

PILOT PROGRAM ON USE OF VIDEO TELECONFERENCING TECHNOLOGY BY BOARDS FOR THE CORRECTION OF MILITARY RECORDS AND DISCHARGE REVIEW BOARDS

Pub. L. 115–91, div. A, title V, §524, Dec. 12, 2017, 131 Stat. 1381 , provided that:
"(a) PILOT PROGRAM AUTHORIZED.-The Secretary of Defense may carry out a pilot program under which boards for the correction of military records established under section 1552 of title 10, United States Code, and discharge review boards established under section 1553 of such title are authorized to utilize, in the performance of their duties, video teleconferencing technology, to the extent such technology is reasonably available and technically feasible.
"(b) PURPOSE.-The purpose of the pilot program is to evaluate the feasibility and cost-effectiveness of utilizing video teleconferencing technology to allow persons who raise a claim before a board for the correction of military records, persons who request a review by a discharge review board, and witnesses who present evidence to such a board to appear before such a board without being physically present.
"(c) IMPLEMENTATION.-As part of the pilot program, the Secretary of Defense shall make funds available to develop the capabilities of boards for the

correction of military records and discharge review boards to effectively use video teleconferencing technology.
"(d) NO EXPANSION OF ELIGIBILITY.-Nothing in the pilot program is intended to alter the eligibility criteria of persons who may raise a claim before a board for the correction of military records, request a review by a discharge review board, or present evidence to such a board.
"(e) TERMINATION.-The authority of the Secretary of Defense to carry out the pilot program shall terminate on December 31, 2020."

TRAINING OF MEMBERS OF BOARDS

Pub. L. 116–92, div. A, title V, §525(a), Dec. 20, 2019, 133 Stat. 1356 , provided that: "The curriculum of training for members of boards for the correction of military records under section 534(c) of the National Defense Authorization Act for Fiscal Year 2017 [Pub. L. 114–328] (10 U.S.C. 1552 note) shall include training on each of the following:
"(1) Sexual trauma.
"(2) Intimate partner violence.
"(3) Spousal abuse.
"(4) The various responses of individuals to trauma."
Pub. L. 114–328, div. A, title V, §534(c), Dec. 23, 2016, 130 Stat. 2122 , as amended by Pub. L. 115–91, div. A, title V, §523(a), Dec. 12, 2017, 131 Stat. 1381 , provided that:
"(1) IN GENERAL.-Not later than one year after the date of the enactment of this Act [Dec. 23, 2016], each Secretary concerned shall develop and implement a comprehensive training curriculum for members of boards for the correction of military records under the

jurisdiction of such Secretary in the duties of such boards under section 1552 of title 10, United States Code. The curriculum shall address all areas of administrative law applicable to the duties of such boards. This curriculum shall also address the proper handling of claims in which a sex-related offense is alleged to have contributed to the original characterization of the discharge or release of the claimant, including guidelines for the consideration of evidence substantiating such allegations in accordance with the requirements of section 1554b(b) of title 10, United States Code, as added by section 522 of the National Defense Authorization Act for Fiscal Year 2018 [Pub. L. 115–91].

"(2) UNIFORM CURRICULA.-The Secretary of Defense and the Secretary of Homeland Security shall jointly ensure that the curricula developed and implemented pursuant to this subsection are, to the extent practicable, uniform.

"(3) TRAINING.-

"(A) IN GENERAL.-Each member of a board for the correction of military records shall undergo retraining (consistent with the curriculum developed and implemented pursuant to this subsection) regarding the duties of boards for the correction of military records under section 1552 of title 10, United States Code, at least once every five years during the member's tenure on the board.

"(B) CURRENT MEMBERS.-Each member of a board for the correction of military records as of the date of the implementation of the curriculum required by paragraph (1) (in this paragraph referred to as the 'curriculum implementation date') shall undergo training described in subparagraph (A) not later than 90 days after the curriculum implementation date.

"(C) NEW MEMBERS.-Each individual who becomes a member of a board for the correction of military records after the curriculum implementation date shall undergo training described in subparagraph (A) by not later than 90 days after the date on which such individual becomes a member of the board.
"(4) REPORTS.-Not later than 18 months after the date of the enactment of this Act [Dec. 23, 2016], each Secretary concerned shall submit to Congress a report setting forth the following:
"(A) A description and assessment of the progress made by such Secretary in implementing training requirements for members of boards for the correction of military records under the jurisdiction of such Secretary.
"(B) A detailed description of the training curriculum required of such Secretary by paragraph (1).
"(C) A description and assessment of any impediments to the implementation of training requirements for members of boards for the correction of military records under the jurisdiction of such Secretary.
"(5) SECRETARY CONCERNED DEFINED.-In this subsection, the term 'Secretary concerned' means a 'Secretary concerned' as that term is used in section 1552 of title 10, United States Code."

BOARD FOR CORRECTION OF MILITARY RECORDS

Pub. L. 101–225, title II, §212, Dec. 12, 1989, 103 Stat. 1914 , provided that: "Not later than 6 months after the date of the enactment of this Act [Dec. 12, 1989], the Secretary of Transportation shall-
"(1) amend part 52 of title 33, Code of Federal Regulations, governing the proceedings of the board

established by the Secretary under section 1552 of title 10, United States Code, to ensure that a complete application for correction of military records is processed expeditiously and that final action on the application is taken within 10 months of its receipt; and

"(2) appoint and maintain a permanent staff, and a panel of civilian officers or employees to serve as members of the board, which are adequate to ensure compliance with paragraph (1) of this subsection."

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ROGERS JOSEPH O'DONNELL

December 7, 2017

Catherine L. Kessmeier
Assistant General Counsel (Manpower and Reserve Affiars)
Department of the Navy
Office of the Assistant Secretary
(Manpower and Reserve Affairs)
1000 Navy Pentagon
Washington, DC 20350-1000

Re: Walter Strand Request To Be Retired

Dear Ms. Kessmeier:

We provide this response to your letter of November 28, 2017 allowing Mr. Strand to submit additional information for your consideration in rendering a new decision on his case. We appreciate the opportunity to provide you this input, and hope that it will favorably influence the outcome for Mr. Strand.

Your letter includes four references that you will review: the Remand Order of the Court of Federal Claims (COFC); the Opinion of the Court of Appeals for the Federal Circuit; the Judgment of the COFC; and Administrative Record Volume I (AR). These are the appropriate materials for your review. We would note that much of the Administrative Record, in particular, was developed over a course of four years while Mr. Strand proceeded through the record-correction process *pro se* after his release from prison.[1] During this journey, two different Navy boards, including the Board for Correction of Naval Records (BCNR), granted Mr. Strand relief. Upon review of the record materials, it is easy to see why-while many service members seek correction of their records, Mr. Strand's is a rare case where relief is clearly in order.

Mr. Strand honorably served for 19½ years in the Navy, spending a total of 11 years, 2 months and 15 days of that time deployed, including deployments in support of combat operations in Iraq and Afghanistan; he earned top ratings on his fitness reports as well as numerous commendations and personal awards. Appx089, Appx161, Appx183-213. He was a recognized leader and a shining example of how a career in the Navy can change the trajectory of a person's life. After returning from his last deployment, Mr. Strand was arrested on February 16, 2008, for firing a weapon at a vehicle carrying his estranged wife during a dispute about Mr. Strand's desire to reconcile with his wife and gain access to his children. Appxl22-23, Appxl36-39, Appxl52, Appxl66.

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[1] In this document, citations to the AR will use the Bates numbers applied by the Navy to the Joint Appendix during the prior litigation in the Federal Circuit.

Mr. Strand was convicted on February 4, 2009 and subsequently discharged by the Navy on June 26, 2009, after his 20- year retirement date had passed. Appx088. Although sentenced to six years in prison, Mr. Strand was released after three years based upon his model conduct. Appx088. Mr. Strand then embarked on a four-year campaign to correct his record, finish his service and put his life back together. *See* Appx087-90, Appx093-95, Appxl02-03, Appxl07-12, Appxl 17-18, Appxl41-46, Appxl55-57, Appx160. On May 3, 2012, the Naval Discharge Review Board first upgraded the characterization of Mr. Strand's service to general under honorable conditions. Appxll 1-13. Then on December 15, 2014, the BCNR ultimately considered all available evidence in the AR and granted Mr. Strand relief in the form of correction of his Naval record "to show that he was honorably retired with 20 years of service vice issued a general discharge under honorable conditions by reason of misconduct (civil conviction) on 26 June 2009." Appx087-90.

It should be noted that Mr. Strand was not granted relief based on his prior service alone. Rather, the BCNR considered materials submitted by Mr. Strand and his witnesses, and Mr. Strand's own personal testimony, about his post-service conduct and efforts to rebuild his life. The BCNR, through which Congress has directed the Secretary of the Navy to act in correcting service records *(see* 10 U.S.C. § 1552), saw merit in Mr. Strand's case and granted him some, though not all, of the relief requested. Specifically, though Mr. Strand had long fought to reenter the Navy to complete his 20 years of service to earn his retirement, and possibly serve more,

advancing further in rank, rebuilding his reputation, and obtaining better pay and benefits, the BCNR denied this relief. Instead, the BCNR retired Mr. Strand with time credited for retirement purposes and allowed him to continue on with his new civilian life.

Your predecessor, AGC Robert L. Woods reviewed the BCNR's decision and disapproved it on two grounds. First, he said that "[g]ranting the relief recommended by the Board is wholly inconsistent with Navy core values and practice in similar cases involving discharge for criminal conduct and criminal conviction." Appx082. Second, he said that Mr. Strand had a "long-standing history ofF AP [Family Advocacy Program] involvement and domestic violence issues." *Id.* The litigation in COFC and the Federal Circuit followed. The COFC rejected both of the rationales and found in Mr. Strand's favor. As to the second rationale, the Federal Circuit's affirmation of the COFC's judgment has now established the law of the case that "the Secretary's finding that Mr. Strand had a long-standing history of domestic violence issues and F AP involvement is not supported by substantial evidence." *See* Ref. (b) at 6. The Federal Circuit observed that "[w]hile the Government argues that Mr. Strand's conduct giving rise to his civil confinement supports the Secretary's conclusion, Mr. Strand's conduct, though serious, does not reflect a 'long-standing history' of issues." *Id.* In other words, a key issue is settled- there are no facts in the record upon which the Navy can deny Mr. Strand relief.

Regarding Mr. Woods' other rationale, the Federal Circuit continued:

> Despite the foregoing, the Government argues that we should still uphold the Secretary's decision because it sets forth other policy rationales and evidence. But because the Secretary relied on a combination of intertwined reasons, and Mr. Strand has shown that at least one of those reasons is not supported by substantial evidence, the record is not clear as to whether the Secretary would still reach the same conclusion. Thus, ***the Secretary's decision must be reversed.***

Id. at 7 (emphasis added). The "other policy rationales and evidence" referred to were the Navy's arguments in support of Mr. Woods statement that "[g]ranting the relief recommended by the Board is wholly inconsistent with Navy core values and practice in similar cases involving discharge for criminal conduct and criminal conviction." It is important for your office to note that, although presented with an opportunity to adopt this independent rationale of Mr. Woods, which the Navy had briefed and argued extensively in both courts, both the COFC and the Federal Circuit declined to adopt the position that this rationale, standing alone, was sufficient to deny Mr. Strand relief.

One reason the courts declined to accept that argument, we believe, is that the Navy's core values of honor, courage, and commitment are a two-way street. Just as Mr. Strand owes honor, courage, and commitment to the Navy, so too does the Navy owe honor, courage, and commitment to Mr. Strand. Mr.

Woods stated that granting Mr. Strand relief would be *inconsistent* with those core values, but there is no possible explanation why continuing to deny relief that the BCNR saw fit to grant Mr. Strand is *consistent* with Navy core values. To the contrary, the concept of redemption recognized by the BCNR that is at issue in Mr. Strand's case is wholly consistent with the Navy's core values.[2]

Mr. Strand has reconciled with his ex-wife (though they are divorced) and he plays an active role in the lives of their children, including a stepson who has a serious medical condition. Mr. Strand works multiple jobs, provides all of his available income to support his children, and lives effectively homeless on a couch so that he can provide support for his family. Mr. Strand's current state is traceable directly to the existing record that the BCNR attempted to correct. Although Pennsylvania, where Mr. Strand lives, has adopted "ban the box" laws to prevent minorities like Mr. Strand from suffering disproportionately in employment decisions based on criminal records checks, there is no such prohibition on reviewing a potential employee's service record. Mr. Strand's service record contains all of the training and

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[2] There is also a second obvious problem with the Navy's contention. It is simply not true that the Navy's practice in similar cases dictates the result. Every case should be judged on its own merits. And you need to look no further than the facts of *Strickland v. United States,* to see a situation where a former sailor was convicted of a civilian offense just shy of reaching his 20-year retirement date, but was subsequently retired notwithstanding the severe matter of child sexual abuse that was at issue in his case. In other words, the merits of an individual case may counsel in favor of retirement, notwithstanding serious criminal conduct.

certifications he has achieved that would be necessary for him to obtain employment commensurate with his skills, but it also still contains information about his criminal record that the BCNR decided to remove. Thus, among other things, Mr. Strand's uncorrected record provides a backdoor for employers to deny him gainful employment and prevent him from fully reintegrating into civilian life.

Regarding core values, Mr. Strand does not deny that the act for which he was convicted and discharged from the Navy violated them. Indeed, it is precisely because he understands that, accepts responsibility for his action, and has tried to make amends and lead an exemplary life, that he merits relief. He is not a trouble-maker who flew under the radar until caught, and now seeks to advance his cause on a technicality.

In the courts, the Navy took the position that granting Mr. Strand relief ran counter to core values because it equated Mr. Strand with sailors who served honorably. This is based on a mistaken comparison. Mr. Strand will never be able to serve further in a career that he loved and excelled at, attain higher rank, achieve additional recognition and awards, or better training and credentials that he can leverage in civilian life. He will not qualify for better benefits or higher retirement pay. Those privileges are reserved for sailors who do not make the mistake that Mr. Strand did. No one will view Mr. Strand as someone who has not paid a steep price for his serious mistake. And most who commit similar mistakes will not have Mr. Strand's long and impeccable record of honorable service *combined* with a demonstrated commitment to

atonement and post-service reintegration to stand upon when they come before the BCNR.

Mr. Strand has paid for the sole indiscretion he committed over the course of a stellar 20-year career, and there is nothing honorable, courageous, or committed about continuing to needlessly and punitively penalize a former sailor who spent a lifetime defending this nation, made a split second error in judgment while under intense emotional stress, and then immediately accepted responsibility and has spent close to a decade trying to atone for it.

It is time for the Navy to retire Mr. Strand, just as the BCNR decided to do nearly three years ago. If I can be of any further assistance, please feel free to contact me at 202-777-8955, or lhanback@rjo.com.

Sincerely,

/s Lucas T. Hanback
Lucas T. Hanback

DEPARTMENT OF THE NAVY
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November 28, 2017

Mr. Jeffery M. Chiow
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SUBJECT: WALTER N. STRAND III, BCNR
DOCKET NUMBER: NR4145-14

Ref: (a) Remand Order, Court of Federal Claims
(b) Court of Appeals for the Federal Circuit Opinion
(c) Judgment, Court of Federal Claims
(d) Administrative Record Volume I

Mr. Chiow:

I will act on Mr. Strand's case on remand. In order to come to a complete and impartial determination, I will be reviewing references (a)-(d). If you desire, you may submit any additional information to me within 10 days from the date of this letter. I will then review the matter and issue a decision by January 5.

Sincerely,

/s Catherine L. Kessmeier
Catherine L. Kessmeier
Assistant General Counsel
(Manpower and Reserve Affairs)