APPENDIX

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APPENDIX A

NOTE: This disposition is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2024-1339

ROBERT S. CARLBORG, PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

Filed: November 4, 2024

Before MOORE, *Chief Judge*, CHEN and STOLL, *Circuit Judges*.

PER CURIAM.

Robert S. Carlborg appeals from a decision of the United States Court of Federal Claims (Claims Court), which granted the government's motion for judgment on the administrative record (MJAR) and denied Mr. Carlborg's. *Carlborg v. United States*, 168 Fed. Cl. 371 (2023) (*Decision*). For the reasons discussed below, we *affirm*.

BACKGROUND

Mr. Carlborg served in the United States Marine Corps (USMC) from 1995 through 2015, rising to the rank of Major. *Decision* at 374. On December 9, 2014, Mr. Carlborg's command charged him for violations of Article 133 (conduct unbecoming of an officer and a gentleman) and Article 134 (adultery) of the Uniform Code of Military Justice (UCMJ). *Id.*

In lieu of a court-martial, Mr. Carlborg elected to submit a pretrial agreement (PTA), offering to accept non- judicial punishment (NJP).[1] J.A. 41.[2] The PTA was accepted by the Convening Authority, who agreed to dismiss the charges with prejudice upon sentencing at NJP. *Id.* At a February 5, 2015, NJP hearing, Mr. Carlborg pleaded guilty to all charges. *Decision* at 375. As punishment, Mr. Carlborg received a punitive letter of reprimand and forfeited $7,430.10 of pay. *Id.*

Two weeks later, the Commanding General prepared an NJP report recommending that Mr.

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[1] NJP, as provided in Article 15 of the UCMJ, is a form of military justice to address offenses committed by service members. *Dumas v. United States*, 620 F.2d 247, 250–53 (Ct. Cl. 1980). The NJP process is the least formal option and is conducted by the accused's commanding general. *Id.* at 251. The proceeding is not criminal in nature, as opposed to court-martial, and limited punishments may be imposed. *Id.* at 251–52. An accused service member has the right to elect to proceed with an NJP instead of with a formal court-martial. *Id.* at 251; *see also* 10 U.S.C. § 815.

[2] "J.A." refers to the appendix filed by Mr. Carlborg. *See* ECF No. 30.

Carlborg be required to show cause for retention in the Carlborg's *Id.* In response, Mr. Carlborg stated that he planned to request voluntary early retirement under the Temporary Early Retirement Authority (TERA) program rather than face the BOI. *Id.* at 376.

On March 12, 2015, Mr. Carlborg was served with a formal notice of a BOI ordering him to show cause for retention. *Id.* That same day, Mr. Carlborg submitted his early retirement request under TERA. *Id.*

In May 2015, the BOI convened and substantiated the underlying misconduct. *Id.* The BOI recommended that Mr. Carlborg be separated with an Other Than Honorable characterization of service. *Id.* In July 2015, Mr. Carlborg challenged the BOI's findings on the grounds that he qualified for early retirement and that the BOI proceedings should have been paused during the processing of his March 12, 2015, voluntary retirement request. *Id.* Mr. Carlborg also alleged legal errors in his BOI proceeding, contended that his post-traumatic stress disorder (PTSD) was a mitigating factor, and requested an honorable discharge. *Id.*

In September 2015, the Deputy Commandant rejected Mr. Carlborg's legal arguments and recommended that he be discharged with an Other Than Honorable characterization of service. *Id.* Mr. Carlborg was subsequently ordered to be evaluated by a medical professional to determine whether PTSD contributed to his misconduct. *Id.* After reviewing Mr. Carlborg's records and interviewing him, a Division Psychiatrist concluded that Mr. Carlborg was not

suffering from PTSD. *Id.* The Assistant Secretary of the Navy then approved the Deputy Commandant's recommendation, and on October 9, 2015, Mr. Carlborg was discharged with an Other Than Honorable characterization of service. *Id.*

The next year, in October 2016, Mr. Carlborg filed a disability claim with the Department of Veterans Affairs (VA) for service-connected PTSD and in May 2017, the VA assigned him a 70 percent disability rating. *Id.* at 376–77.

In October 2018, Mr. Carlborg petitioned the Board for Correction of Naval Records (BCNR) for relief, raising a variety of arguments. *Id.* at 377. In April 2020, the BCNR recommended that certain negative comments be removed from Mr. Carlborg's fitness report, but denied all other relief. *Id.*

On October 8, 2021, Mr. Carlborg filed a complaint "for back-pay and collateral injunctive relief" in the Claims Court. Complaint at 1, *Carlborg v. United States*, No. 21- 1994C (Fed. Cl. Oct. 8, 2021), ECF No. 1. Mr. Carlborg and the government eventually filed cross-MJARs. On November 6, 2023, the Claims Court denied Mr. Carlborg's MJAR and granted the government's. In its decision, the Claims Court rejected Mr. Carlborg's arguments that: the USMC violated the terms of the PTA by using his charged conduct as the basis of his separation; he should have been referred to the Disability Evaluation System (DES); the USMC violated applicable rules and regulations; and his proceedings were prejudiced by unlawful command influence. *Decision* at 377–85.

Mr. Carlborg timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

DISCUSSION

"We review a decision of the Court of Federal Claims granting or denying a motion for judgment on the administrative record without deference. That is, we reapply the statutory review standards." *Chambers v. United States*, 417 F.3d 1218, 1227 (Fed. Cir. 2005) (citation omitted). Under that standard, we will not disturb the decision of the BCNR "unless it is arbitrary, capricious, contrary to law, or unsupported by substantial evidence." *Id.*

On appeal, Mr. Carlborg raises the same arguments he made before the Claims Court. We reject each one.

First, Mr. Carlborg argues that the USMC violated the terms of the PTA by failing to dismiss his charges with prejudice. The PTA called for the USMC to initially withdraw Mr. Carlborg's charges from court-martial without prejudice and then for the withdrawal to be converted into a dismissal with prejudice after sentencing at the NJP. J.A. 44. The former step occurred but the latter did not.

The BCNR's conclusion that, despite his charges not being formally dismissed with prejudice, Mr. Carlborg received his benefit of the PTA—the withdrawal of his charges from the court-martial, is in accordance with law. J.A. 172. We agree that "Mr. Carlborg avoided a criminal prosecution and the prospect of a federal criminal conviction, dismissal (i.e., the officer equivalent of a dishonorable

discharge), and possible confinement." *Decision* at 378; J.A. 172. Instead of facing a criminal prosecution, Mr. Carlborg pleaded guilty at the NJP hearing and received a punitive letter of reprimand and reduced pay. *Decision* at 375. As the Claims Court explained, the USMC "effectively dismissed *with prejudice* the charges preferred against Mr. Carlborg in that he was not—and now cannot be—prosecuted under Articles 134 and 135 of the UCMJ." *Id.* at 379.

Relatedly, Mr. Carlborg contends that the USMC improperly used the dismissed court-martial charges as the basis for the BOI that led to his separation. The BCNR's conclusion that the preclusive effect of the PTA does not extend to the convening of a BOI and Mr. Carlborg's related administrative discharge is in accordance with law. J.A. 172; *Decision* at 378. The Commanding General was required to file an NJP report including a recommendation of whether Mr. Carlborg's conduct warrants separation. *See Decision* at 375 n.8; *see also* Marine Corps Order (MCO) P5800.16A ¶ 4004. Furthermore, Department of Defense Instruction (DoDI) 1332.30 provides, among other things, that "military *nonjudicial punishment* in accordance with Article 15, Uniform Code of Military Justice *do[es] not preclude an administrative discharge action*." DoDI 1332.30, Encl. 3, ¶ 6(d) (Nov. 25, 2013) (emphases added). In other words, the resolution of criminal charges does not bar the USMC from administratively discharging someone based on the underlying conduct. The BCNR did not err in concluding the same. *See* J.A. 172.

Second, Mr. Carlborg argues that the USMC should have referred him to the DES as a matter of law.

The "DES is the mechanism for determining a service member 's return to duty, separation, or retirement following a disability diagnosis." *Decision* at 379. In essence, qualified medical authorities refer eligible service members to the DES to be evaluated for permanent unfitness for duty. *Id.* at 379–80.

The Claims Court, crediting the BCNR's analysis, determined that Mr. Carlborg failed to establish that he was unfit for continued service due to PTSD or any other disability. *Id.* at 379–81. We agree. The Claims Court explained that the BCNR's decision was supported by Mr. Carlborg's adequate performance up until allegations of his misconduct and by "overwhelming" medical evidence demonstrating his fitness for duty. *Id.* at 380. For example, in March 2015, Mr. Carlborg represented to a clinician that he was completing his work competently. *Id.* Additionally, the Senior Medical Advisor who reviewed Mr. Carlborg's BCNR application concurred that the evidence did not support referral to the DES. J.A. 46–48.

For his part, Mr. Carlborg primarily relies on a February 20, 2015, note from his Unit Medical Officer that he was "[n]ot currently considered psychiologically [sic] fit for duty." J.A. 71. Both the Claims Court and the BCNR considered this evidence and found it unpersuasive. *Decision* at 380; J.A. 169–70. For example, the statement was made the day after Mr. Carlborg received the NJP report, stood in contrast to evaluations made at the time of his discharge, and indicated that Mr. Carlborg was not currently fit rather than permanently unfit. *Decision* at 380; J.A. 169–70. Accordingly, we agree with the

Claims Court that substantial evidence supports the BCNR's finding that Mr. Carlborg was not required to have been referred to the DES.

Third, Mr. Carlborg argues that the USMC violated various rules and regulations. Specifically, Mr. Carlborg claims the USMC: denied his request for a 20-dayextension to respond to the BOI report; failed to conduct a separation medical evaluation; and failed to forward his retirement request to the Secretary of the Navy. We address each alleged violation in turn.

Regarding the 20-day extension, Mr. Carlborg contends that the request should have been forwarded to the Alternate Show Cause Authority in accordance with regulation. We see no error in the BCNR's determination otherwise. The BCNR explained the extension was properly considered by the Staff Judge Advocate (SJA) "who was, in fact, an alternative show cause authority." J.A. 178; *Decision* at 381–82. The Claims Court recognized that it is "common practice" for the SJA to act on "non- substantive requests," such as extensions of time. *Id.* at 382 (citing *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1338 (Fed. Cir. 2001)). Additionally, the BCNR and Claims Court explained that Mr. Carlborg was not entitled by right to a 20-day extension. J.A. 178; *Decision* at 382 (noting that a party "*may submit* an extension request to the Alternate Show Cause Authority or Show Cause Authority who directed the BOI" (emphasis added) (citation omitted)).

The next alleged violation, that the USMC failed to properly conduct a medical examination upon

separation as required under 10 U.S.C. § 1177, is also unpersuasive. The record evidence indicates that Mr. Carlborg received a PTSD evaluation in conjunction with his separation from the USMC. J.A. 174–75; J.A. 90–95. Further, substantial evidence supports the BCNR's finding that, contrary to Mr. Carlborg's assertion, the chain of command was aware of Mr. Carlborg's medical conditions, and specifically directed that he receive an evaluation to determine whether PTSD contributed to his misconduct. J.A. 174–77; *Decision* at 382; *see also, e.g.*, J.A. 78; J.A. 81–83.

Next, Mr. Carlborg contends that the USMC violated 10 U.S.C. § 1186(a) and Secretary of the Navy Instruction (SECNAVINST) 1920.6C by failing to forward his March 12, 2015, retirement request to the Secretary of Navy. The Claims Court considered and rejected this argument because "he was not eligible for voluntary early retirement." *Decision* at 383–84; *see* 10 U.S.C. § 1186(a)(1) (The Secretary may grant a request "for voluntary retirement, *if the officer is qualified for retirement*") (emphasis added). We agree. Mr. Carlborg sought retirement under TERA. But "officers pending legal action or proceedings, administrative separation, or disability separation or retirement are not eligible for TERA." MARADMIN 155/14, ¶ 2(H) (Mar. 28, 2014); J.A. 173. Mr. Carlborg was therefore not eligible for TERA because he was subject to both legal and administrative separation proceedings at the time he requested retirement. J.A. 173; *Decision* at 383–84.

For these reasons, we agree with the Claims Court that the BCNR did not err in determining that the USMC did not violate the rules and regulations raised

by Mr. Carlborg. *Id.* at 381–84.

Fourth, Mr. Carlborg argues that his proceedings were prejudiced by unlawful command influence. As the Claims Court correctly determined, this argument is forfeited because Mr. Carlborg failed to raise it before the BCNR. *Decision* at 384 ("Unlawful command influence cannot be raised for the first time in [the Claims Court]." (quoting *Pittman v. United States*, 135 Fed. Cl. 507, 528 (2017), *aff'd*, 753 F. App'x 904 (Fed. Cir. 2019) (per curiam))).

Finally, Mr. Carlborg argues that the Claims Court violated his due process rights by *sua sponte* vacating the briefing schedule and issuing its decision without providing him notice and an opportunity to respond. The relevant timeline is as follows. Mr. Carlborg filed his complaint with the Claims Court in October 2021. J.A. 20. After a remand to the BCNR, a five-month stay to allow Mr. Carlborg to substitute counsel, and three extensions to the briefing schedule, Mr. Carlborg filed his MJAR in August 2023. *Id.* at 21–24. The government filed its consolidated response and cross-MJAR in September 2023. *Id.* at 24. Then, without waiting for Mr. Carlborg's consolidated response and reply, the Claims Court issued an opinion and order denying his MJAR, granting the government's, and vacating the remaining briefing schedule. *Id.*; *see also Decision* at 374 n.1 ("Additional briefing and oral argument are unnecessary.").

Generally, a court cannot enter a case-dispositive judgment "without notifying the parties of its intentions and allowing them an opportunity to . . . respond." *English v. Cowell*, 10 F.3d 434, 437 (7th Cir.

1993). For example, district courts are permitted to enter summary judgment *sua sponte*, but this power is tempered by the requirement to first provide "notice and a reasonable time to respond." Fed. R. Civ. P. 56(f).

Although the Claims Court appears to have run afoul of this procedural safeguard, that failure is not necessarily a reversible error requiring remand. Other circuits have recognized that if "the appellant cannot demonstrate [procedural] prejudice—by establishing that as a result of the unfair surprise—the failure to provide notice is harmless error and a remand would be futile." *P.R. Elec. Power Auth. v. Action Refund*, 515 F.3d 57, 65–66 (1st Cir. 2008) (finding harmless error where appellant alleged a due process violation from the district court's failure to provide notice and an opportunity to present evidence), *abrogated on other grounds by Portugues-Santana v. Rekomdiv Int'l*, 657 F.3d 56, 60–61 (1st Cir. 2011); *see also Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 28 F.3d 1388, 1398 (5th Cir. 1994) ("When there is no notice to the nonmovant, summary judgment will be considered harmless *if the nonmovant has no additional evidence* or if all of the nonmovant's additional evidence is reviewed by the appellate court and none of the evidence presents a genuine issue of material fact." (citation omitted)); *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1213 (11th Cir. 1995); *Ward v. Utah*, 398 F.3d 1239, 1245–46 (10th Cir. 2005); *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 139–40 (2d Cir. 2000).

In this case, Mr. Carlborg fails to make any claim

of prejudice. He does not identify any argument or fact that he would have raised that was not already present in his opening brief. Nor does he suggest that the government's motion raised any argument that he had not addressed in his earlier filing. It is telling, too, that Mr. Carlborg's arguments on appeal are substantially identical to those accompanying his MJAR, despite now asserting that the Claims Court erroneously granted the government's motion. Just like the appellant in *Restigouche*, Mr. Carlborg "has now had ample opportunity to marshal facts and arguments, and does not assert on appeal that there exists additional evidence, beyond the record which would have precluded [judgment on the administrative record] in this case." *Restigouche*, 59 F.3d at 1213. Under these circumstances, we find Mr. Carlborg's argument unpersuasive. *See Tex. Advanced Optoelectronic Sols., Inc. v. Renesas Elecs. Am., Inc.*, 895 F.3d 1304, 1316 (Fed. Cir. 2018) (explaining that "unless prejudice is clear even without any explanation, the party seeking reversal normally must explain why the erroneous ruling caused harm" (cleaned up)).

CONCLUSION

We have considered Mr. Carlborg's remaining arguments and find them unpersuasive. For the foregoing reasons, we *affirm*.

AFFIRMED

Costs

No costs.

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

FOR PUBLICATION

No. 21-1994C

ROBERT S. CARLBORG, PLAINTIFF

v.

UNITED STATES, DEFENDANT

Filed: November 6, 2023

OPINION AND ORDER[1]

BONILLA, Judge.

Robert S. Carlborg served in the United States Marine Corps (USMC) as a ground supply officer from 1995 through 2015, rising to the rank of Major. Thirteen days shy of reaching retirement eligibility, the USMC involuntarily separated Mr. Carlborg following his admission to charges of conduct unbecoming an officer and a gentleman, as well as adultery, in violation of Articles 133 and 134 of the

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[1] This case was transferred to the undersigned for adjudication on February 28, 2022, pursuant to Rule 40.1(b) of the Rules of the United States Court of Federal Claims (RCFC). Three days later, the parties filed a joint request to stay

Uniform Code of Military Justice administrative separation, arguing he should have been allowed to retire upon reaching twenty years of military service. Alternatively, Mr. Carlborg asserts the USMC should have either granted his request for voluntary early retirement under the Temporary Early Retirement Authority (TERA) program or formally evaluated him for disability retirement following a diagnosis of post-traumatic stress disorder (PTSD). Pending before the Court are the parties' dispositive cross-motions. For the reasons set forth below, Plaintiff's Motion for Judgment on the Administrative Record (ECF 43) is DENIED and Defendant's Cross-Motion for Judgment on the Administrative Record (ECF 44) is GRANTED.

BACKGROUND

Mr. Carlborg enlisted in the USMC on April 6, 1995, and entered active duty on October 23, 1995. Using the Enlisted Commissioning Program, Mr. Carlborg commissioned as a Second Lieutenant (O-1) on April 2, 1999, and then served as a ground supply officer in roles with varying degrees of responsibility. From January 2006 to January 2007, then-Captain (O-3) Carlborg deployed to Iraq in support of Operation Iraqi Freedom. Following his combat

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proceedings pending further consideration of plaintiff's claims by the Board for Correction of Naval Records (BCNR). As discussed *infra*, the BCNR issued its remand decision on August 31, 2022. Thereafter, between November 1, 2022 and April 16, 2023, this matter was stayed to allow plaintiff to retain new counsel. Briefing on the dispositive cross-motions resolved herein continued through the issuance of this decision. Additional briefing and oral argument are unnecessary.

deployment, Mr. Carlborg earned several military awards, including the Navy and Marine Commendation Medal for "exceptionally meritorious service" from March 2007 to July 2008, and the Joint Service Commendation Medal for "exceptionally meritorious service" from July 2011 to July 2013. In the interim, effective June 1, 2009, Mr. Carlborg was promoted to Major (O-4), the rank in which he served until his administrative separation on October 9, 2015. At the time of his discharge, then-Major Carlborg was thirteen days shy of reaching twenty-year military retirement eligibility. At all relevant times, Mr. Carlborg was married and a Marine.

Between January 2010 and June 2014, while serving on active duty as a Marine officer, then-Major Carlborg posted nude and sexually explicit photographs and videos of himself with women other than his spouse on several adult websites. Mr. Carlborg used these websites to solicit extramarital relationships, advertising himself as a Marine (i.e., posing in his camouflage utility uniform). In May 2014, then-Major Carlborg engaged in an extramarital relationship with a law enforcement officer's spouse. After discovering and confirming the affair, the law enforcement officer reported Mr. Carlborg's conduct to the Naval Criminal Investigative Service which, in turn, reported the behavior to Mr. Carlborg's chain of command.[2]

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[2] The law enforcement officer also posted the explicit materials he uncovered to www.cheaters.com, where junior-enlisted Marines in Mr. Carlborg's unit later found them.

On August 21, 2014, Mr. Carlborg's command initiated an administrative investigation, initially focused on the reported extramarital relationship. During this investigation, the command discovered Mr. Carlborg's sexually explicit online presence. On December 9, 2014, Mr. Carlborg's command preferred two charges against Mr. Carlborg for violations of Article 133 (conduct unbecoming an officer and a gentleman) and Article 134 (adultery) of the UCMJ. After the charges were preferred, Mr. Carlborg agreed to accept nonjudicial punishment (NJP) for all charges and their specifications in lieu of court-martial.[3] On February 5, 2015, during a duly convened NJP hearing (i.e., "office hours"), Mr. Carlborg pleaded guilty to both charges and their underlying specifications.[4]

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[3] NJP is a form of military justice authorized by Article 15 of the UCMJ not constituting a criminal conviction but often filed in the service record of the affected member. The applicable burden of proof in a USMC NJP proceeding is preponderance of the evidence rather than the beyond a reasonable doubt standard required in a court-martial. See 18 U.S.C. § 815. The jurisdictional limits on punishment in this case were:

> (a), Arrest in Quarters for not more than 30 consecutive days; (b), Forfeiture of not more than ½ of 1 month's pay per month for 2 months; (c), Restriction to specified limits, with or without suspension from duty, for not more than 60 consecutive days; and (d), a Punitive Letter of Reprimand.

AR 1048–49. "AR __" is a citation to a Bates numbered page in the administrative record.

[4] During his NJP hearing, Mr. Carlborg offered that untreated PTSD related to his January 2006 to January 2007

After accepting Mr. Carlborg's guilty plea, the Commanding General, Major General (O-8) William D. Beydler, imposed punishment in the form of a punitive letter of reprimand and $7,430.10 in forfeited pay.[5, 6] According to the terms of the NJP Agreement executed by Mr. Carlborg on January 2, 2015,[7] quoted *infra*, the parties agreed the criminal charges would be dismissed with prejudice upon sentencing. The letter of reprimand was issued on February 9, 2015, and Mr. Carlborg forfeited one-half of his pay over the next two months.

Two weeks later, in a February 19, 2015 memorandum reporting the NJP proceedings (NJP Report), Major General Beydler included the following:

> After carefully considering all aspects of this case, including the nature of the misconduct,

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deployment to Iraq, marital issues, and alcohol use contributed to his charged misconduct.

[5] The imposed pay forfeiture was attributed to Mr. Carlborg's reduced performance value and the time and effort exhausted by his command in investigating and prosecuting the alleged misconduct.

[6] For clarity, "Commanding General" and "Convening Authority" are used interchangeably throughout this opinion.

[7] The NJP Agreement dated December 30, 2014, was inadvertently dated "January 2, 2014," by both Mr. Carlborg and his Detailed Military Counsel. See AR 3480–82 (emphasis added). It was signed and dated by the Convening Authority on January 12, 2015.

> I have determined that Major Carlborg's conduct constitutes a significant departure from the behavior expected of officers of his experience and of his experience and grade. Accordingly, I recommend Major Carlborg be required to show cause for retention at a Board of Inquiry.[8]

AR 88–89. Responding to the NJP Report on February 25, 2015, Mr. Carlborg noted he was eight months from retirement eligibility and planned to request voluntary early retirement under the TERA program rather than face a BOI.

By memorandum dated March 12, 2015, then-Major Carlborg was served with formal notice of a BOI convening to assess whether he should be retained on active duty based on the following:

> a. Failure to demonstrate acceptable qualities of leadership required of an officer in the member's grade.

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[8] A Board of Inquiry (BOI) is a panel of senior officers convened to assess whether a commissioned officer's substandard performance or misconduct merits separation for cause, the characterization of military service and, in certain cases, retirement grade recommendations. See generally Secretary of the Navy Instruction (SECNAVINST) 1920.6C, encl. (8) (Dec. 15, 2005). A Show Cause Authority may initiate BOIs on a basis of substandard performance or misconduct, and commanding officers are required to report conduct that may warrant separation to the Show Cause Authority. SECNAVINST 1920.6C, encls. (8)–(9). If the BOI recommends separation, the record of proceedings is then forwarded to the Deputy

b. Failure to properly discharge duties expected of officers of the member's grade and experience.

c. Commission of a military or civilian offense which could be punished by confinement of 6 months or more and any other misconduct which would require specific intent for conviction.

d. Sexual perversion.

AR 95. In response, Mr. Carlborg submitted a "Voluntary Retirement Request in lieu of Further Administrative Processing for Cause" under the TERA program. AR 104–05 (alteration to capitalization). In his formal request dated March 12, 2015, Mr. Carlborg reiterated: "I admit that I am guilty of all the charges/allegations detailed in [the NJP Report]. I admit that I committed misconduct and that my performance of duty was substandard."[9] AR 105.

Mr. Carlborg's BOI convened on May 5, 2015. In a memorandum dated May 11, 2015, the BOI substantiated the underlying misconduct and

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Commandant for Manpower and Reserve Affairs (M&RA) for review and comment before a final determination is made by the Secretary of the Navy regarding the recommended separation and characterization of service. SECNAVINST 1920.6C, encl. (8), ¶ 13.

[9] Acknowledging his misconduct might affect his retirement grade, Mr. Carlborg nevertheless requested to be voluntarily retired as a Major.

recommended Mr. Carlborg be separated with an Other Than Honorable characterization of. service[10,11] AR 680–81. On July 13 and 21, 2015, Mr. Carlborg challenged the BOI's findings and recommendations, errors in his BOI proceedings, asserted his PTSD diagnosis was asserting he qualified for retirement under the TERA program and that his BOI should have been continued during the processing of his March 12, 2015 voluntary retirement request. Mr. Carlborg also alleged legal errors not properly considered as a mitigating factor, and requested that his service be characterized as Honorable.

On September 8, 2015, the Deputy Commandant (M&RA), Lieutenant General (O-9) Mark A. Brilakis, rejected Mr. Carlborg's legal arguments and recommended that Mr. Carlborg be administratively separated with an Other Than Honorable characterization of his service.[12] In reviewing the

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[10] The BOI alternatively recommended Mr. Carlborg be retired in the grade of First Lieutenant (i.e., highest grade of satisfactory service) if he became retirement eligible while his case remained pending.

[11] Addressing the BOI through counsel, Mr. Carlborg apologized and reiterated his ongoing struggles with PTSD and alcoholism.

[12] The proposed separation code was "GKQ – Involuntary Separation, Approved Recommendation of a Board (Misconduct–serious offense)." AR 81.

matter, the Assistant Secretary of the Navy (M&RA) directed that Mr. Carlborg be evaluated by a military mental health professional (psychologist or psychiatrist) to assess whether he suffered from PTSD and, if so, whether the disorder contributed to his misconduct. After reviewing Mr. Carlborg's records and interviewing him on September 25, 2015, Division Psychiatrist, Commander (O-5) George L. Cowan, concluded Mr. Carlborg did not present a clinical diagnosis of PTSD, his prior diagnosis of PTSD did not contribute to his misconduct, and Mr. Carlborg remained fit for duty. On September 29, 2015, the Assistant Secretary of the Navy (M&RA) approved Lieutenant General Brilakis' recommendation. Mr. Carlborg was administratively separated with an Other Than Honorable characterization of service on October 9, 2015.

A year later, on October 14, 2016, Mr. Carlborg filed a disability claim with the Department of Veteran Affairs (VA) for service-connected PTSD. On May 8, 2017, the VA determined Mr. Carlborg's condition was service connected and assigned him a seventy percent disability rating, subject to future review examinations.

The next year, on October 8, 2018, Mr. Carlborg petitioned the BCNR for relief. Specifically, Mr. Carlborg submitted: he was eligible for the Disability Evaluation System (DES) and should have been retired by reason of physical disability; the failure to dismiss his criminal charges with prejudice and their subsequent use in a BOI was arbitrary, capricious, and contrary to law; his request for voluntary early

retirement under the TERA program was not properly processed; the BOI failed to properly consider his PTSD diagnosis as a mitigating factor; the USMC failed to remove erroneous information from a fitness report ending on February 5, 2015, consistent with the decision Performance Evaluation Review Board (PERB); and his involuntary administrative separation thirteen days shy of reaching retirement eligibility was a clear injustice.[13] On April 6, 2020, the BCNR recommended certain negative comments and related information be removed from Mr. Carlborg's February 5, 2015 fitness report. The BCNR otherwise denied relief.[14] Mr. Carlborg commenced this action on October 8, 2021.

DISCUSSION

I. Legal Standard

Decisions issued by military corrections boards are reviewed under an arbitrary, capricious, unsupported by substantial evidence, or contrary to law standard. *Porter v. United States,* 163 F.3d 1304, 1312 (Fed. Cir. 1998). Moreover, where, as here, a civilian judge is

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[13] Mr. Carlborg requested the following relief from the BCNR: disability retirement (seventy percent) for PTSD or, in the alternative, full retirement based upon completion of twenty years of active-duty service; void and expunge his NJP, the BOI, and his administrative separation; and remove the February 5, 2015 fitness report from his Official Military Personnel File.

[14] As noted in *supra* note 1, following a voluntary remand sanctioned by the Court on August 31, 2022, the BCNR denied Mr. Carlborg's request for reconsideration.

called upon to evaluate the propriety of a service member's administrative involuntary discharge, military judgment is entitled to great deference. *Doe v. United States*, 132 F.3d 1430, 1434 (Fed. Cir. 1997) ("When a branch of the armed forces has made a decision concerning who is or who is not fit to serve, (citing *Orloff v. Willoughby*, 345 U.S. 83, 90 (1953); *Maier v. Orr*, 754 F.2d 973, 984 (Fed. Cir. 1985)). The United States Supreme Court's adage "judges are not given the task of running the Army," *see Orloff*, duly authorized military officials adhered to applicable law and implementing regulations and instructions in 345 U.S. at 93, applies with equal force to the USMC. In other words, this Court's role is limited to confirming that making and adequately supporting otherwise unreviewable personnel decisions.

II. Non-Judicial Punishment Agreement

Mr. Carlborg first alleges the failure to dismiss his criminal charges "with prejudice" in accordance with the express terms of the NJP Agreement amounts to legal error. More specifically, Mr. Carlborg asserts that his agreement to resolve all court-martial charges through NJP precluded his command from using the chargedconduct as the basis to convene a subsequent BOI, resulting in his unlawful administrative separation. In support of his claim, Mr. Carlborg points the Court to various claim preclusion authorities and the doctrine of res judicata.

In relevant part, the NJP Agreement provides:

> I agree to accept Nonjudicial Punishment held by the Commanding General, II Marine

> Expeditionary Force, and plead guilty to the charges and specifications as specified [herein] below, provided as follows: (a)[] the Convening Authority agrees to dispose of all charges and specifications which were preferred against me on 9 December 2014, at Nonjudicial Punishment; [and] (b)[] the Convening Authority agrees to withdraw and dismiss, without prejudice, the charges and specifications thereunder to which I enter a plea of guilty, said dismissal to ripen to dismissal, with prejudice, upon imposition of sentencing at Nonjudicial Punishment.

AR 3125. In accordance with the terms of the NJP agreement, immediately upon Mr. Carlborg's February 5, 2015 NJP hearing, where he pled guilty and punishment was imposed, the pending criminal charges were to be dismissed with prejudice. The issue presented in this case is whether the required dismissal was limited to future prosecution under the UCMJ or, as Mr. Carlborg asserts, extended to administrative separation.

> Department of Defense Instruction (DoDI) 1332.30 provides:
>
> Acquittal or not-guilty findings in military or civilian criminal proceedings, conviction or punishment by civilian or military court, *and military nonjudicial punishment in accordance with Article 15, Uniform Code of Military Justice do not preclude an administrative discharge action.*

DoDI 1332.30, encl. (3), ¶ 6(d) (Nov. 25, 2013) (emphasis added). The Instruction makes clear that resolutions of criminal charges through NJP proceedings under Article 15 "do not preclude an administrative discharge action."[15] *Id.* That the charges were initially preferred against Mr. Carlborg and later resolved through an NJP Agreement is of no moment. *See United States v. Nicely*, 147 Fed. Cl. 727, 746 (2020) (crediting the following BCNR statement: "[W]ithdrawal of charges from a court-martial does not preclude the underlying conduct from forming the basis under principles of *res judicata*, which only applied to future judicial action before a court-martial and did preclude administrative punishment before a tribunal."), *aff'd*, 23 F.4th 1364 (Fed. Cir. 2022) (per curiam).[16] Indeed, Mr. Carlborg acknowledged as much

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[15] Mr. Carlborg's reliance upon Cooney v. Dalton, 877 F. Supp. 508 (D. Haw. 1995) is misplaced. Cooney predated DoDI 1332.30. In place at the time was Section 3610260 of the Naval Military Personnel Manual which, unlike the above-quoted instruction, expressly prohibited administrative separation based upon acquitted conduct. Cooney, 877 F. Supp. at 512. At issue in Cooney, moreover, was the commanding officer's interpretation of technical acquittal, not the effect of a voluntary dismissal on later use of charged conduct in administrative proceedings. See id. at 512–13.

[16] The Court rejects Mr. Carlborg's argument that DoDI 1332.30, encl. (3), ¶ 6(d) does not apply simply because the "[a]cquittal and not-guilty findings" but does not include "dismissal" in the first clause. No matter the nomenclature, the import of this Instruction remains the same: the ultimate outcome of a criminal prosecution is not determinative of the military's reliance upon the underlying misconduct in subsequent administrative proceedings. Put simply, if complete exoneration

in his February 25, 2015 response to the NJP Report: "I respectfully request that I not be required to show cause for retention at a Board of Inquiry . . . ." AR 91.

Further, as in *Nicely*, Mr. Carlborg received the benefits of the plea bargain he (represented by counsel) struck with the convening authority: in exchange for his guilty plea in a non-judicial forum, Mr. Carlborg avoided a criminal prosecution and the prospect of a federal criminal conviction, dismissal (i.e., the officer equivalent of a dishonorable discharge), and possible confinement. *See* 147 Fed. Cl. at 746–48. Now separated from the military prior to reaching retirement eligibility, Mr. Carlborg is no longer subject to the UCMJ and cannot be tried by court-martial. *See U.S. ex rel Toth v. Quales*, 350 U.S. 11, 14 (1955) ("It has never been intimated by this Court . . . that Article I military jurisdiction could be extended to civilian ex- soldiers who had severed all relationship with the military and its institutions.").[17]

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following a military or civilian prosecution does not preclude derivative use of previously charged conduct in a subsequent administrative proceeding, neither does the military's voluntary dismissal of criminal charges in connection with a NJP Agreement in exchange for a service member's guilty plea.

[17] The VA is not a part of the military or otherwise one of its institutions. See Kelly v. United States, 69 F.4th 887, 889 (Fed. Cir. 2023) ("The Department of Defense administers military disability retirement pay, see 10 U.S.C. § 1201, and the Department of Veterans Affairs ('VA') administers veteran disability benefits, see 38 U.S.C. § 1110."). Accordingly, even if Mr. Carlborg later qualified for VA benefits, which the record suggests, the Court nevertheless finds he severed all relationship

Additionally, the charged conduct is now well outside the applicable five-year statute of limitations, which expired more than four years ago in June 2019. *See* 10 U.S.C. § 843(b)(1).

In sum, consistent with the NJP Agreement, the convening authority effectively dismissed *with prejudice* the charges preferred against Mr. Carlborg in that he was not–and now cannot be–prosecuted under Articles 134 and 135 of the UCMJ.[18] The claimed preclusive effect of the derivative use of those charges and Mr. Carlborg's NJP guilty plea did not extend to the convening of a BOI and his resulting administrative discharge. As such, any claimed error in the formal documentation of the dismissed charges is harmless. *See, e.g., Nicely*, 147 Fed. Cl. at 746–47.

III. Disability Evaluation System

Mr. Carlborg next contends he should have been referred into DES after he: presented with "symptoms consistent with . . . PTSD" and other disorders during a January 5, 2015 visit to a military clinic, as documented by First Lieutenant (O-2) Anna L. Oberhofer (Group Surgeon, Family Medicine); and was subsequently diagnosed with PTSD and several

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with the military on the date of his separation and is no longer subject to its jurisdiction.

[18] Mr. Carlborg's arguments regarding the implications of "withdrawal" versus "dismissal" and the BCNR's understanding (or application) of the same are unavailing. Similarly, the Court does not share in Mr. Carlborg's interpretative ambiguities, nor are veterans- benefits cases instructive or persuasive to DODI 1332.30's application in this case.

other disorders following evaluations by civilian licensed clinical psychologist Alana R. Hollings on January 22 and February 16, 2015.[19, 20] AR 101, 714. Most relevant here, during a February 20, 2015 follow-up visit, First Lieutenant Oberhofer included the following note in Mr. Carlborg's medical file: "Not currently considered psychologically fit for duty." AR 193. Mr. Carlborg asserts these diagnoses and comments required his referral to DES and a possible suspension of any disciplinary and discharge proceedings under SECNAVINST 1850.4E (Apr. 30, 2002) (Department of the Navy Disability Evaluation Manual). The Court disagrees.

DES is the mechanism for determining a service member's return to duty, separation, or retirement following a disability diagnosis. Under relevant

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[19] In a memorandum dated January 5, 2015, First Lieutenant Oberhofer noted: [Mr. Carlborg] presented to clinic today with concerns that his mental health was deteriorating. [Mr. Carlborg] is now noted to have symptoms consistent with Major Depressive Disorder, Alcoholism, and PTSD as defined in [American Psychiatric Association: Diagnostic and Statistic Manual of Mental Disorders, Fourth Edition, (DSM-IV-TR), Washington, DC APA Press, 2000]. AR 1498.

[20] In a May 4, 2015 memorandum addressed to Mr. Carlborg's then-civilian defense counsel, Mr. Eric M. Kopka, Dr. Hollings opined that Mr. Carlborg's disorders contributed to his misconduct. AR1632, 3058. In addition to Dr. Hollings' diagnosis from January and February 2015, Mr. Carlborg was diagnosed with PTSD on July 7, July 17, and October 5, 2015. AR 2484–88. He was diagnosed with Combat Stress Reaction at least a dozen times between March 12 and June 9, 2015. AR 2487.

Department of Defense Instructions, "medical authorities will refer eligible [s]ervice members into the DES who have . . . [o]ne or more medical conditions that may, singularly, collectively, or through combined effect, prevent the Service member from reasonably performing the duties of their office, grade, rank, or rating DoDI 1332.18 § 5.2(a)(1) (Nov. 10, 2022) (as amended). As explained by the Federal Circuit, upon referral:

> A claim for disability is first considered by a Medical Evaluation Board ("MEB"), which reviews the individual's medical records to determine the nature of the disability. Then, if the disability is found to be permanent, the issue of disability retirement is referred to a Physical Evaluation Board ("PEB"), which provides a formal fitness and disability determination. If the PEB finds the service member unfit for duty and permanently disabled, it assigns a disability rating. If the rating is 30% or more, the PEB can recommend disability retirement. If the rating is less than 30%, the PEB can recommend discharge with the service member's having the option to receive a lump-sum disability severance payment

Barnick v. United States, 591 F.3d 1372, 1375 (Fed. Cir. 2010). In other words, it is the service member's medically diagnosed permanent unfitness for duty–rather than the current presence of a disability–that is determinative.

Reviewing Mr. Carlborg's military and medical records, the BCNR determined Mr. Carlborg was not unfit for continued military service. In reaching this conclusion, the BCNR highlighted two facts. First, Mr. Carlborg "was performing well in his duties up until he committed the misconduct," as evidenced by his promotion to Major two years after his deployment to Iraq.[21] AR 7. Second, in the days leading up to his discharge, Mr. Carlborg was deemed fit for duty by military medical providers, including the Division psychiatrist. Addressing First Lieutenant Oberhofer's February 20, 2015 note in Mr. Carlborg's medical record, the BCNR posited:

> It was not surprising . . . that [Mr. Carlborg] may have been psychologically unfit on that occasion, as that was the day after he received the NJP report where he learned for the very first time that he might have to show cause for retention and his retirement benefits might be in jeopardy.

AR 1958. In arriving at this conclusion, the BCNR noted the isolated comment followed a series of entries by First Lieutenant Oberhofer and other medical providers who not only examined Mr. Carlborg and diagnosed him with various disorders before and after February 20, 2015, but uniformly found him fit for

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[21] Mr. Carlborg cites his January 2006 through January 2007 deployment to Iraq as one of the primary causes for his mental health issues, including PTSD. *See, e.g.*, AR 2855 ("I have some severe, and as so far, untreated PTS[D] upon my return from Iraq in '07. And I committed these misconducts as a coping mechanism along with my drinking.").

duty. The BCNR also highlighted the comment's temporal nature:

> It was a comment upon his fitness for duty at that moment (i.e., "not currently considered . . . fit for duty" (emphasis added), and not indicative that there was some question about [his] medical fitness to continue naval service.[22]

Engaging in a harmless error analysis, the BCNR next concluded the overwhelming evidence in Mr. Carlborg's medical records demonstrated his fitness for continued duty, undermining his case for a DES referral and subsequent PEB assessment. By way of example, the BCNR cited a March 17, 2015 representation Mr. Carlborg made to a treating clinician, wherein he stated: "'completing work in a competent and confident manner daily.'" AR 1959 (quoting AR 2720). The BCNR's findings are

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[22] Mr. Carlborg's reliance upon the VA's May 8, 2017 disability rating is misplaced. Put simply, the evaluation standards are materially different and used for different purposes. *See Keltner v. United States*, 165 Fed. Cl. 484, 492 (2023) ("[T]he VA is authorized to rate any service-connected condition while the military service is only authorized to rate or apply ratings to the conditions which make a service member unfit for continued military service and cause the premature termination of the member's military career.") (internal brackets omitted); see also Kelly, 69 F.4th at 889, 899 ("The existence of a VA rating alone does not mean a service member is entitled to military disability retirement pay . . . To be clear, VA regulations and VA decisions concerning disability are not binding on matters involving military disability retirement pay.").

consistent with applicable Secretary of Navy Instructions See, e.g., SECNAVINST 1850.4E, § 3302a ("A service member shall be considered Unfit when the evidence establishes that the member, due to physical disability, is unable to reasonably perform the duties of his/her office, grade, rank, or rating . . . ."); *id.* § 3303c ("If the evidence establishes that the service member adequately performed his or her duties until the time the service member was referred for physical evaluation, the member may be considered Fit even though medical evidence indicates questionable physical ability to perform duty."). Accounting for Mr. Carlborg's diagnoses from 2014 through 2015, the Court's examination of his voluminous medical records substantiates the BCNR's conclusion that Mr. Carlborg was repeatedly found fit for continued military service in his current role and rank.[23] Indeed, but for his admitted misconduct and resulting discharge, Mr. Carlborg would have reached the twenty-year retirement eligibility milestone and

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[23] See, e.g., AR 1339–40 ("Fit for full duty from psychiatric standpoint.") (Mar. 12, 2015); id. at 1326– 27 ("Fit for full duty from psychiatric standpoint.") (Apr. 14, 2015); id. at 2675 ("Fit for Full Duty.") (May 12, 2015); id. at 1346 ("Fit for Full Duty.") (June 9, 2015); id. at 1333 ("Fit for full duty.") (July 8, 2015); id. at 1634 ("[F]it for full duty.") (July 13, 2015); id. at 1330 ("Fit for full duty.") (Aug. 11, 2015); id. at 1343 ("FFFD" (a/k/a fit for full duty)) (Sept. 15, 2015); id. at 1352–53 ("The patient is psychiatrically fit for full duty.") (Oct. 5, 2015).

beyond if he elected to continue his military service.[24]

Mr. Carlborg also attempts to sidestep a critical DES restriction: disciplinary and misconduct separation "takes precedence over" any contemporaneous disability separation or referral. *Kelly*, 69 F.4th at 890; see SECNAVINST 1850.4E §§ 1002 & 3403. Specifically, Mr. Carlborg argues that he should have been referred to DES on February 20, 2015, because he had not yet been notified of his BOI. But his assertion overlooks the crux of this instruction. Mr. Carlborg could not be referred to DES because his previously charged misconduct could still result in his administrative separation. SECNAVINST 1850.4E § 3403 ("The disability statutes do not preclude disciplinary separation. Such separations as described herein normally supersede disability separation or retirement."). And, even if Mr. Carlborg was referred to DES in February 2015 or thereafter, his medical discharge evaluation would at least have been suspended following the March 12, 2015 "Show Cause" notification. *See id.* In short, Mr. Carlborg was precluded from receiving a disability evaluation because he was ultimately separated for misconduct.[25, 26]

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[24] Mr. Carlborg was repeatedly diagnosed with a "Phase of Life or Circumstances Problem" between October 8, 2014 and April 22, 2015. See AR 2484–88. In the interim, on several occasions between April 9 and May 1, 2015, medical providers found "No Psychiatric Diagnosis or Condition." Id.

[25] The Court finds no evidence the BCNR failed to review or evaluate the full and complete administrative record before it, nor does the record indicate Mr. Carlborg's discharge characterization was upgraded or otherwise changed from October

IV. Board of Inquiry

Mr. Carlborg alleges the USMC violated applicable regulations in the wake of his BOI proceedings. Specifically, Mr. Carlborg claims the following errors: his request for a twenty-day extension to rebut the BOI report was not forwarded to the Alternate Show Cause Authority in accordance with the Notification of Board of Inquiry memorandum dated March 12, 2015; and the USMC failed to properly conduct his separation medical examination as required under 10 U.S.C. § 1177. These issues are addressed seriatim.

In accordance with the BOI notice and appended Rights of a Respondent, Mr. Carlborg was afforded at least thirty days to prepare his defense. In fact, the BOI convened fifty-four days later, on May 5, 2015,and issued its formal report on May 11, 2015. By operation of SECNAVINST 1920.6C encl. (8), ¶ 12e and Marine Corps Order P5800.16A, Ch. 7, § 4007, ¶ 2h(4) (Feb. 10, 2014), Mr. Carlborg was granted ten days to

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October 9, 2015, through the litigation of this case. Cf. Kelly, 69 F.4th at 899 ("We hold that the Record Correction Board's failure to review or evaluate the effect the upgrade change in [a service member's] record had on his eligibility for military retirement disability pay was arbitrary and capricious."); see also AR 1867.

[26] The Court finds no evidence that Mr. Carlborg's PTSD was not liberally considered by the BCNR in accordance with the National Defense Authorization Act, 2018, Pub. L. 115-91, Title V § 520 ("Consideration of additional medical evidence by Boards for the Correction of Military Records and liberal consideration of evidence relating to post-traumatic stress disorder or traumatic brain injury.") (Dec. 12, 2017).

submit a post-board written response.[27] On June 29, 2015, Mr. Carlborg requested an additional twenty days to submit his post-board response, citing to his need for assistance of counsel and a clinical professional.[28] The next day, the Staff Judge Advocate (SJA)–acting on behalf of the Show Cause Authority (i.e., Commanding General, Lieutenant General (O-9) Robert B. Neller)–granted-in- part and denied-in-part Mr. Carlborg's request for additional time. Specifically, the SJA extended Mr. Carlborg's post-board submission deadline by an additional ten days, until July 14, 2015. Mr. Carlborg timely submitted his BOI response on July 13, 2015, and, thereafter, submitted additional materials on July 21, 2015. AR 1623–25.

As an initial matter, Mr. Carlborg was not entitled to the requested extension of time. See SECNAVINST 1920.6C encl. (8), ¶ 12e ("The counsel for respondent (or respondent, if no counsel was elected) shall be provided a copy of the record of proceedings and shall be provided an opportunity to submit written comments to [the Chief of Naval Personnel (CHNAVPERS)] or [Deputy Commandant (DC)] (M&RA) within 10 days of service."); *see also* Marine Corps Order P5800.16A, Ch. 7, § 4007, 2h(4) ("The respondent's counsel (or respondent, if no counsel was

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[27] The ten-day clock started after the record of proceedings was completed, including the publication of the BOI transcript.

[28] Mr. Carlborg acknowledged receipt of the BOI report both

elected) may submit an extension request to the Alternate Show Cause Authority or Show Cause Authority who directed the BOI. Such requests for extension shall not exceed 20 calendar days."). Moreover, in granting his request in part (effectively doubling the response deadline) and then affording Mr. Carlborg the opportunity to supplement his initial response, no credible claim of prejudice exists. Addressing Mr. Carlborg's challenge to the SJA's authority to decide his request for additional time, the BCNR properly concluded the Commanding General, Lieutenant General Neller, was an Alternative Show Cause Authority under the applicable regulation. See Marine Corps Order P5800.16A, Ch. 7, § 4001, ¶ 4 ("Generals and lieutenant generals in command are hereby delegated Show Cause Authority and are hereinafter referred to as Alternative Show Cause Authorities."). As for the SJA's authority to act upon non-substantive requests for extensions of time, the BCNR sanctioned the "common practice" under the presumption of regularity. AR 1967; *see Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F. 3d 1324, 1338 (Fed. Cir. 2001) (discussing the "presumption of regularity" enjoyed by government officials). At most, the SJA's action amounted to harmless error in that Mr. Carlborg ultimately received much more than the requested twenty-day

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in his June 30, 2015 request for an extension, and in his July 13, 2015 response. As a separate basis for requesting the extension, Mr. Carlborg asserts that he requested the additional twenty days because "his assigned military counsel was in the process of a [Permanent Change of Station] move." AR 1031.

extension to respond to the BOI report.[29] See Marine Corps Order P5800.16A, Ch.7, § 4002, ¶ 2f ("This section does not provide an additional procedural basis of appeal or redress for officers.").

Mr. Carlborg's contentions regarding his medical evaluation prior to separation and the command's consideration of his PTSD are similarly unpersuasive. Shortly before Mr. Carlborg's October 9, 2015 separation, the Assistant Secretary of the Navy (M&RA) directed that he be evaluated by a military-affiliated mental health provider "authorized to conduct PTSD evaluations by10 U.S.C. § 1177 para. (a)(3)"– i.e., a psychologist or psychiatrist–to assess whether Mr. Carlborg suffered from PTSD and, if so, whether the disorder contributed to his misconduct. AR 742; *see id.* at 693 ("[Assistant Secretary of the Navy] (M&RA) wants a fresh eval from a psychiatrist/psychologist. I've included the ASN (M&RA)'s impression of [Robert Wilson, Psychiatrist,] endorsement, below. If possible, then I'd recommend the [course of action] that you suggested earlier-having the Division Psych do his own independent

[29] Before the BCNR, Mr. Carlborg alleged "Colonel [G. W.] Riggs, the SJA had previously served as the legal advisor to the BOI in violation of [Marine Corps Order P5800.16A, Ch. 7, § 4007, ¶ 2e(2)(a)] . . . should have been disqualified as the SJA providing advice to the General Court Martial Convening Authority." AR 1031. Even though Marine Corps Order P5800.16A, Ch. 7, § 4007, ¶ 2e(2)(a) precludes "[an] SJA to the [General Court Martial Convening Authority] in the respondent's chain of command" from serving as a legal advisor, the Court finds no evidence in the record suggesting the SJA was biased or otherwise acted improperly as the legal advisor to Mr. Carlborg's BOI.

eval of Carlborg to see (1) whether he actually has PTSD, and (2) whether the PTSD contributed to Carlborg's misconduct.").[30, 31] In accordance with this directive and applicable authorities Division Psychiatrist Commander Cowan reviewed Mr. Carlborg's medical records and interviewed him. In his September 25, 2015 report, Commander Cowan opined Mr. Carlborg did not present a clinical diagnosis of PTSD, his prior diagnosis of PTSD did not contribute to his misconduct, and Mr. Carlborg remained fit for duty.[32] Mr. Carlborg was again found to be "psychiatrically fit for full duty" by Licensed Marriage and Family Therapist Teshia B. Weeks four

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[30] See 10 U.S.C. § 1177(a)(3) ("In a case involving post-traumatic stress disorder, the medical examination shall be performed by a clinical psychologist, psychiatrist, licensed clinical social worker, or psychiatric advanced practice registered nurse. In cases involving traumatic brain injury, the medical examination may be performed by a physician, clinical psychologist, psychiatrist, or other health care professional, as appropriate.").

[31] Since the Assistant Secretary of the Navy (M&RA) explicitly directed (and later considered) the medical examination at issue, at most, the chain of command's consideration (or lack thereof) was harmless. See Marine Corps Order P5800.16A, Ch. 7, § 4002, 2(b)(1) ("The CO, GCMCAs in the chain of command, and the Alternate Show Cause Authority shall review this [medical evaluation] and any post-deployment health assessments for consideration of any medical issues affecting separation.").

[32] Despite email correspondence indicative of a command-wide intent or objective to separate Mr. Carlborg before he

days before his discharge from the USMC. Accordingly, there is no basis in law or fact to disturb the BCNR's conclusions regarding the propriety of the post-BOI proceedings.

V. Voluntary Retirement Request

Mr. Carlborg asserts the USMC violated both 10 U.S.C. § 1186(a) and SECNAVINST 1920.6C by failing to forward his March 12, 2015 voluntary retirement request under either the TERA program or a twenty-year retirement to the Secretary of the Navy for consideration. Relying largely upon the closing of his NJP proceeding in February 2015,[33] and the March 12, 2015 Notification of Board of Inquiry, Mr. Carlborg posits there was no disciplinary action or administrative separation pending when he contemporaneously submitted his March 12, 2015

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reached his twenty-year anniversary in the USMC, the Court finds no evidence in the record suggesting Commander Cowan or any other mental health provider was biased or otherwise acted improperly in rendering a medical opinion in this case. See, e.g., AR 698 ("Again, my concern is that if he were to refuse a voluntary eval it would drag the process past the desired date."); id. at 701 ("[P]sychologists don't throw terms like sociopath around loosely."). Nor do Mr. Carlborg's contentions in this regard overcome the "presumption of regularity" enjoyed by government officials. See Impresa, 238 F. 3d at 1338.

[33] As detailed *supra*, the NJP hearing wherein Mr. Carlborg pleaded guilty and was sentenced took place on February 5, 2015, the letter of reprimand was issued on February 9, 2015, the NJP Report was issued on February 19, 2015, and Mr. Carlborg submitted a response to the NJP Report on February 25, 2015.

retirement request. Upon this premise, Mr. Carlborg argues he was improperly denied the right to have his case for retirement forwarded to and considered by the Secretary of the Navy.

> Title 10, United States Code, Section 1186 provides in relevant part:
>
> At any time during proceedings under this chapter with respect to the removal of an officer from active duty, the Secretary of the military department concerned may grant a request by the officer—
>
> > (1) for voluntary retirement, if the officer is qualified for retirement.

10 U.S.C. § 1186(a); see also SECNAVINST 1920.6C, encl. (4), ¶ 12a ("Officers . . . who are being considered for removal from active duty per this instruction and who are eligible for voluntary retirement under any provision of law on the date of such removal, may, upon approval by [Secretary of the Navy], be retired in the highest grade in which they served satisfactorily . . . ."). As noted by the BCNR, "officers pending legal action or proceedings, administrative separation, or disability separation or retirement are not eligible for TERA." *See* MARADMIN 155/14, ¶ 2(H) (Mar. 28, 2014), *cited with approval at* AR 9 ("The Marine Corps set its TERA policy in MARADMIN 155/14 which states officers pending administrative separation are ineligible to retire under TERA."). Mr. Carlborg's current suggestion that his TERA request thread the needle between the conclusion of his NJP proceedings and the commencement of his BOI

proceedings is belied by the record and his contemporaneous statements. In the February 19, 2015 NJP Report, Major General Beydler "recommend[ed] Major Carlborg be required to show cause for retention at a Board of Inquiry," AR 89, thereby initiating (at least preliminarily) the BOI process. In fact, in his February 25, 2015 response to the NJP Report, Mr. Carlborg stated: "I respectfully request that I not be required to show cause for retention at a Board of Inquiry and that my early retirement package be approved." AR 91. Further, Mr. Carlborg's March 12, 2015 TERA request is notably titled "Voluntary Retirement Request *In Lieu Of Further Administrative Processing For Cause.*" AR 104 (alteration to capitalization; emphasis added).

With regard to Mr. Carlborg's twenty-year retirement request, the BCNR found "no requirement that the Assistant Secretary of the Navy [(M&RA)] review [Mr. Carlborg's] retirement request before his BOI" and concluded that "no violations of regulation or statute occurred." AR 9. Engaging in a harmless error analysis, the BCNR primarily weighed two considerations. First, the BCNR found "it was reasonable for the [USMC] to wait for the BOI recommendation since a retirement grade recommendation was required before the Assistant Secretary of the Navy would process the request." *Id.* Next, since the BOI provided Mr. Carlborg an opportunity "to argue for an appropriate retirement grade," the BCNR determined that "he was not prejudiced by the command's decision not to forward his request prior to the BOI." *Id.* To that end, Mr. Carlborg's retirement request was later

considered by the Assistant Secretary of the Navy (M&RA). AR 81 ("I hereby deny Major Carlborg's retirement request and recommend that [he] be separated with an Other Than Honorable characterization of service. Your approval below will effect the recommended action."). As such, any claimed error in the formal forwarding of his requests on March 12, 2015, or thereafter, was harmless.

Contrary to Mr. Carlborg's assertions, the USMC did not violate applicable law or regulation. By acknowledging the pending BOI, requesting that his "misconduct case be closed" (i.e., future tense), and "voluntarily request[ing] early retirement in lieu of further processing for administrative separation for cause," Mr. Carlborg acknowledged what the record makes clear: at the time Mr. Carlborg submitted the TERA request, he was not eligible for voluntary early retirement.[34] *See id.* (emphasis added). Put simply, the Secretary of the Navy is not required to receive and review retirement requests in cases where a service member fails to meet the basic eligibility TERA requirements. Nor did he complete twenty years of military service prior to his separation. Accordingly, the Court will not disturb the BCNR's conclusion.

CONCLUSION

For the reasons set forth above, the Court

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[34] Paradoxically, under the same statutory and regulatory scheme, Mr. Carlborg's claimed entitlement to disability retirement consideration would similarly render him ineligible under the TERA program.

concludes there is no basis in law or in fact to overturn the decisions of the BCNR, remand this matter for additional proceedings or further consideration, or otherwise grant Mr. Carlborg the relief he seeks. To this point, Mr. Carlborg's current claims of unlawful command influence– largely based upon the claims rejected by the Court–cannot be advanced for the first time in this Court.[35] *See Pittman v. United States*, 135 Fed. Cl. 507, 528 (2017) ("Unlawful command influence cannot be raised for the first time in this court."), *aff'd*, 753 F. App'x 904 (Fed. Cir. 2019) (per curiam) (table); *see also N.G. v. United States*, 94 Fed. Cl. 375, 388 (2010) ("Assuming *arguendo*, that plaintiff has shown facts constituting, [unlawful] command influence, plaintiff failed to adduce them while arguing his case to the military. This is fatal to this position."). The Court considered Mr. Carlborg's remaining allegations–weaved throughout his filings before both the BCNR and this Court–and finds them unpersuasive. Accordingly, Plaintiff's Motion for Judgment on the Administrative Record (ECF 43) is **DENIED** and Defendant's Cross-Motion for Judgment on the Administrative Record (ECF 44) is **GRANTED**. The remaining deadlines included in the

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[35] Similarly, in Count II of his complaint, Mr. Carlborg also challenged the BCNR's composition. Having failed to address this issue in his motion for judgment on the administrative record, it is waived. *See Ironclad/EEI v. United States*, 78 Fed. Cl. 351, 358 (2007) ("[U]nder the law of this circuit, arguments not presented in a party's principal brief to the court are typically deemed to have been waived.") (later quoting *Novosteel SA v. United States*, 284 F.3d 1261, 1274 (Fed. Cir. 2002)).

Court's April 25, 2023 and October 13, 2023 Orders (ECF 36, 46) are **VACATED**. The Clerk of Court is directed to **ENTER Judgment** accordingly.

It is so **ORDERED**.

/s/ ARMANDO O. BONILLA
Armando O. Bonilla
Judge

APPENDIX C

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROBERT S. CARLBORG,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2024-1339

Appeal from the United States Court of Federal Claims in No. 1:21-cv-01994-AOB, Judge Armando O. Bonilla.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.[1]

PER CURIAM.

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[1] Circuit Judge Newman and Circuit Judge Hughes did not participate.

ORDER

On December 18, 2024, Robert S. Carlborg filed a combined petition for panel rehearing and rehearing en banc [ECF No. 40]. The petition was referred to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

FOR THE COURT

Jarrett B. Perlow
Clerk of Court

January 27, 2025
Date

APPENDIX D

U.S. Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

10 U.S.C. § 638b

Sec. 504(a) of P.L. 112-81 125 STAT. 1389 (2011)

Voluntary retirement incentive

(a) Incentive for Voluntary Retirement for Certain Officers.-The Secretary of Defense may authorize the Secretary of a military department to provide a voluntary retirement incentive payment in accordance with this section to an officer of the armed forces under that Secretary's jurisdiction who is specified in subsection (c) as being eligible for such a payment.

(b) Limitations.-

(1) Any authority provided the Secretary of a military department under this section shall expire as specified by the Secretary of Defense, but not later than December 31, 2018.

(2) The total number of officers who may be provided a voluntary retirement incentive payment under this section may not exceed 675 officers.

(c) Eligible Officers.-

(1) Except as provided in paragraph (2), an officer of the armed forces is eligible for a voluntary retirement incentive payment under this section if the officer-

(A) has served on active duty for more than 20 years, but not more than 29 years, on the approved date of retirement;

(B) meets the minimum length of commissioned service requirement for voluntary retirement as a commissioned officer in accordance with section 7311, 8323, or 9311 of this title, as applicable to that officer;

(C) on the approved date of retirement, has 12 months or more remaining on active-duty service before reaching the maximum retirement years of active service for the member's grade as specified in section 633 or 634 of this title;

(D) on the approved date of retirement, has 12 months or more remaining on active-duty service before reaching the maximum retirement age under any other provision of law; and

(E) meets any additional requirements for such eligibility as is specified by the Secretary concerned, including any requirement relating to years of service, skill rating, military specialty or competitive category, grade, any remaining period of obligated service, or any combination thereof.

(2) The following officers are not eligible for a voluntary retirement incentive payment under this section:

(A) An officer being evaluated for disability under chapter 61 of this title.

(B) An officer projected to be retired under section 1201 or 1204 of this title.

(C) An officer projected to be discharged with disability severance pay under section 1212 of this title.

(D) A member transferred to the temporary disability retired list under section 1202 or 1205 of this title.

(E) An officer subject to pending disciplinary action or subject to administrative separation or mandatory discharge under any other provision of law or regulation. (d) Amount of Payment.-The amount of the voluntary retirement incentive payment paid an

officer under this section shall be an amount determined by the Secretary concerned, but not to exceed an amount equal to 12 times the amount of the officer's monthly basic pay at the time of the officer's retirement. The amount may be paid in a lump sum at the time of retirement.

(e) Repayment for Members Who Return to Active Duty.-

(1) Except as provided in paragraph (2), a member of the armed forces who, after having received all or part of a voluntary retirement incentive under this section, returns to active duty shall have deducted from each payment of basic pay, in such schedule of monthly installments as the Secretary concerned shall specify, until the total amount deducted from such basic pay equals the total amount of voluntary retirement incentive received.

(2) Members who are involuntarily recalled to active duty or full-time National Guard duty under any provision of law shall not be subject to this subsection.

(3) The Secretary of Defense may waive, in whole or in part, repayment required under paragraph (1) if the Secretary determines that recovery would be against equity and good conscience or would be contrary to the best interest of the United States. The authority in this paragraph may be delegated only to the Under Secretary of Defense for Personnel and Readiness and the Principal Deputy Under Secretary of Defense of Personnel and Readiness.

10 U.S.C. § 1175a

Voluntary separation pay and benefits

(a) In General.-Under regulations approved by the Secretary of Defense, the Secretary concerned may provide voluntary separation pay and benefits in accordance with this section to eligible members of the armed forces who are voluntarily separated from active duty in the armed forces.

(b) Eligible Members.-

(1) Except as provided in paragraph (2), a member of the armed forces is eligible for voluntary separation pay and benefits under this section if the member-

(A) has served on active duty for more than 6 years but not more than 20 years;

(B) has served at least 5 years of continuous active duty immediately preceding the date of the member's separation from active duty;

(C) has not been approved for payment of a voluntary separation incentive under section 1175 of this title;

(D) meets such other requirements as the Secretary concerned may prescribe, which may include requirements relating to-

(i) years of service, skill, rating, military specialty, or competitive category;

(ii) grade or rank;

(iii) remaining period of obligated service; or

(iv) any combination of these factors; and

(E) requests separation from active duty.

(2) The following members are not eligible for voluntary separation pay and benefits under this section:

(A) Members discharged with disability severance pay under section 1212 of this title.

(B) Members transferred to the temporary disability retired list under section 1202 or 1205 of this title.

(C) Members being evaluated for disability retirement under chapter 61 of this title.

(D) Members who have been previously discharged with voluntary separation pay.

(E) Members who are subject to pending disciplinary action or who are subject to administrative separation or mandatory discharge under any other provision of law or regulations.

(3) The Secretary concerned shall determine each year the number of members to be separated, and provided separation pay and benefits, under this section during the fiscal year beginning in such year.

(c) Separation.-Each eligible member of the armed forces whose request for separation from active duty under subsection (b)(1)(E) is approved shall be separated from active duty.

(d) Additional Service in Ready Reserve.-Of the number of members of the armed forces to be separated from active duty in a fiscal year, as determined under subsection (b)(3), the Secretary concerned shall determine a number of such members, in such skill and grade combinations as the Secretary concerned shall designate, who shall serve in the Ready Reserve, after separation from active duty, for a period of not less than three years, as a condition of

the receipt of voluntary separation pay and benefits under this section.

(e) Separation Pay and Benefits.-

(1) A member of the armed forces who is separated from active duty under subsection (c) shall be paid voluntary separation pay in accordance with subsection (g) in an amount determined by the Secretary concerned pursuant to subsection (f).

(2) A member who is not entitled to retired or retainer pay upon separation shall be entitled to the benefits and services provided under-

(A) chapter 58 of this title during the 180-day period beginning on the date the member is separated (notwithstanding any termination date for such benefits and services otherwise applicable under the provisions of such chapter); and

(B) sections 452 and 453(c) of title 37.

(f) Computation of Voluntary Separation Pay.-The Secretary concerned shall specify the amount of voluntary separation pay that an individual or defined group of members of the armed forces may be paid under subsection (e)(1). No member may receive as voluntary separation pay an amount greater than four times the full amount of separation pay for a member of the same pay grade and years of service who is involuntarily separated under section 1174 of this title.

(g) Payment of Voluntary Separation Pay.-

(1) Voluntary separation pay under this section may be paid in a single lump sum.

(2) In the case of a member of the armed forces who, at the time of separation under subsection (c), has completed at least 15 years, but less than 20 years,

of active service, voluntary separation pay may be paid, at the election of the Secretary concerned, in-

(A) a single lump sum;

(B) installments over a period not to exceed 10 years; or

(C) a combination of lump sum and such installments.

(h) Coordination With Retired or Retainer Pay and Disability Compensation.-

(1) A member who is paid voluntary separation pay under this section and who later qualifies for retired or retainer pay under this title or title 14 shall have deducted from each payment of such retired or retainer pay an amount, in such schedule of monthly installments as the Secretary concerned shall specify, until the total amount deducted from such retired or retainer pay is equal to the total amount of voluntary separation pay so paid.

(2) (A) Except as provided in subparagraphs (B) and (C), a member who is paid voluntary separation pay under this section shall not be deprived, by reason of the member's receipt of such pay, of any disability compensation to which the member is entitled under the laws administered by the Secretary of Veterans Affairs, but there shall be deducted from such disability compensation an amount, in such schedule of monthly installments as the Secretary concerned shall specify, until the total amount deducted from such disability compensation is equal to the total amount of voluntary separation pay so paid, less the amount of Federal income tax withheld from such pay (such withholding being at the flat withholding rate for Federal income tax withholding, as in effect

pursuant to regulations prescribed under chapter 24 of the Internal Revenue Code of 1986).

(B) No deduction shall be made from the disability compensation paid to an eligible disabled uniformed services retiree under section 1413, or to an eligible combat-related disabled uniformed services retiree under section 1413a of this title, who is paid voluntary separation pay under this section.

(C) No deduction may be made from the disability compensation paid to a member for the amount of voluntary separation pay received by the member because of an earlier discharge or release from a period of active duty if the disability which is the basis for that disability compensation was incurred or aggravated during a later period of active duty.

(3) The requirement under this subsection to repay voluntary separation pay following retirement from the armed forces does not apply to a member who was eligible to retire at the time the member applied and was accepted for voluntary separation pay and benefits under this section.

(4) The Secretary concerned may waive the requirement to repay voluntary separation pay under paragraphs (1) and (2) if the Secretary determines that recovery would be against equity and good conscience or would be contrary to the best interests of the United States.

(i) Retirement Defined.-In this section, the term "retirement" includes a transfer to the Fleet Reserve or Fleet Marine Corps Reserve.

(j) Repayment for Members Who Return to Active Duty.-

(1) Except as provided in paragraphs (2), (3), and (4), a member of the armed forces who, after having received all or part of voluntary separation pay under this section, returns to active duty shall have deducted from each payment of basic pay, in such schedule of monthly installments as the Secretary concerned shall specify, until the total amount deducted from such basic pay equals the total amount of voluntary separation pay received.

(2) Members who are involuntarily recalled to active duty or full-time National Guard duty in accordance with section 12301(a), 12301(b), 12301(g), 12302, 12303, 12304, 12304a, or 12304b of this title or section 502(f)(1)(A) of title 32 shall not be subject to this subsection.

(3) Members who are recalled or perform active duty or full-time National Guard duty in accordance with section 101(d)(1), 101(d)(2), 101(d)(5), 12301(d) (insofar as the period served is less than 180 consecutive days with the consent of the member), 12319, or 12503 of this title, or section 114, 115, or 502(f)(1)(B) of title 32 (insofar as the period served is less than 180 consecutive days with consent of the member), shall not be subject to this subsection.

(4) This subsection shall not apply to a member who-

(A) is involuntarily recalled to active duty or full-time National Guard duty; and

(B) in the course of such duty, incurs a service-connected disability rated as total under section 1155 of title 38.

(5) The Secretary of Defense may waive, in whole or in part, repayment required under paragraph

(1) if the Secretary determines that recovery would be against equity and good conscience or would be contrary to the best interests of the United States. The authority in this paragraph may be delegated only to the Undersecretary of Defense for Personnel and Readiness and the Principal Deputy Undersecretary of Defense for Personnel and Readiness.

(k) Termination of Authority.-

(1) The authority to separate a member of the armed forces from active duty under subsection (c) shall terminate on December 31, 2025.

(2) A member who separates by the date specified in paragraph (1) may continue to be provided voluntary separation pay and benefits under this section until the member has received the entire amount of pay and benefits to which the member is entitled under this section.

10 U.S.C. § 1181

Authority to establish procedures to consider the separation of officers for substandard performance of duty and for certain other reasons

(a) Subject to such limitations as the Secretary of Defense may prescribe, the Secretary of the military department concerned shall prescribe, by regulation, procedures for the review at any time of the record of any commissioned officer (other than a commissioned warrant officer or a retired officer) of the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Space Force to determine whether such officer shall be required, because his performance of duty has fallen below standards prescribed by the Secretary of Defense, to show cause for his retention on active duty.

(b) Subject to such limitations as the Secretary of Defense may prescribe, the Secretary of the military department concerned shall prescribe, by regulation, procedures for the review at any time of the record of any commissioned officer (other than a commissioned warrant officer or a retired officer) of the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Space Force to determine whether such officer should be required, because of misconduct, because of moral or professional dereliction, or because his retention is not clearly consistent with the interests of national security, to show cause for his retention on active duty.

10 U.S.C. § 1182

Boards of inquiry

(a) The Secretary of the military department concerned shall convene boards of inquiry at such times and places as the Secretary may prescribe to receive evidence and make findings and recommendations as to whether an officer who is required under section 1181 of this title to show cause for retention on active duty should be retained on active duty. Each board of inquiry shall be composed of not less than three officers having the qualifications prescribed by section 1187 of this title.

(b) A board of inquiry shall give a fair and impartial hearing to each officer required under section 1181 of this title to show cause for retention on active duty.

(c)(1) If a board of inquiry determines that the officer has failed to establish that he should be retained on active duty, it shall recommend to the Secretary concerned that the officer not be retained on active duty.

(2) Under regulations prescribed by the Secretary concerned, an officer as to whom a board of inquiry makes a recommendation under paragraph (1) that the officer not be retained on active duty may be required to take leave pending the completion of the officer's case under this chapter. The officer may be required to begin such leave at any time following the officer's receipt of the report of the board of inquiry, including the board's recommendation for removal from active duty, and the expiration of any period allowed for submission by the officer of a rebuttal to

that report. The leave may be continued until the date on which action by the Secretary concerned on the officer's case is completed or may be terminated at any earlier time.

(d)(1)(A) If a board of inquiry determines that an officer should be retained, the officer's case is closed unless the board substantiated a basis for separation and, upon recommendation from the service chief, the Secretary of the military department determines that the board's retention recommendation is clearly erroneous in light of the evidence considered by the board, a miscarriage of justice, and inconsistent with the best interest of the service. In such cases, the Secretary of the military department may separate the officer after providing a written justification of the decision to separate.

(B) An officer considered for separation under this section must be notified and afforded the opportunity to present matters for the Secretary of the military department to consider when making the separation determination. The Secretary of the military department shall review the case to determine whether the retention recommendation of the board is clearly contrary to the substantial weight of the evidence in the record and whether the officer's conduct discredits the Service, adversely affects good order and discipline, and adversely affects the officer's performance of duty.

(C) Exercise of authority to separate an officer under this section shall be reserved for unusual cases where such action is essential to the interests of justice, discipline, and proper administration of the service.

(2) Authority to direct administrative separation after a board of inquiry's recommendation to retain an officer may only be delegated to a civilian official within a military department appointed by the President, by and with the advice and consent of the Senate. The least favorable characterization in such cases will be general (under honorable conditions).

(3) An officer who is required to show cause for retention on active duty under subsection (a) of section 1181 of this title and who is determined under paragraph (1) to have established that he should be retained on active duty may not again be required to show cause for retention on active duty under such subsection within the one-year period beginning on the date of that determination.

(4)(A) Subject to subparagraph (B), an officer who is required to show cause for retention on active duty under subsection (b) of section 1181 of this title and who is determined under paragraph (1) to have established that he should be retained on active duty may again be required to show cause for retention at any time.

(B) An officer who has been required to show cause for retention on active duty under subsection (b) of section 1181 of this title and who is thereafter retained on active duty may not again be required to show cause for retention on active duty under such subsection solely because of conduct which was the subject of the previous proceedings, unless the findings or recommendations of the board of inquiry that considered his case are determined to have been obtained by fraud or collusion.

10 U.S.C. § 1186

Officer considered for removal:
voluntary retirement or discharge

(a) At any time during proceedings under this chapter with respect to the removal of an officer from active duty, the Secretary of the military department concerned may grant a request by the officer-

(1) for voluntary retirement, if the officer is qualified for retirement; or

(2) for discharge in accordance with subsection (b)(2).

(b) An officer removed from active duty under section 1184 of this title shall-

(1) if eligible for voluntary retirement under any provision of law on the date of such removal, be retired in the grade and with the retired pay for which he would be eligible if retired under such provision; and

(2) if ineligible for voluntary retirement under any provision of law on the date of such removal-

(A) be honorably discharged in the grade then held, in the case of an officer whose case was brought under subsection (a) of section 1181 of this title; or

(B) be discharged in the grade then held, in the case of an officer whose case was brought under subsection (b) of section 1181 of this title.

(c) An officer who is discharged under subsection (b)(2) is entitled, if eligible therefor, to separation pay under section 1174(a)(2) of this title.

10 U.S.C. § 8323

Officers: 20 years

(a) (1) An officer of the Navy or the Marine Corps who applies for retirement after completing more than 20 years of active service, of which at least 10 years was service as a commissioned officer, may, in the discretion of the President, be retired on the first day of any month designated by the President.

(2)(A) The Secretary of Defense may authorize the Secretary of the Navy, during the period specified in subparagraph (B), to reduce the requirement under paragraph (1) for at least 10 years of active service as a commissioned officer to a period (determined by the Secretary) of not less than eight years. (B) The period specified in this subparagraph is the period beginning on January 7, 2011, and ending on September 30, 2018.

(b) For the purposes of this section-

(1) an officer's years of active service are computed by adding all his active service in the armed forces; and

(2) his years of service as a commissioned officer are computed by adding all his active service in the armed forces under permanent or temporary appointments in grades above warrant officer, W–1.

(c) The retired grade of an officer retired under this section is the grade determined under section 1370 or 1370a of this title, as applicable.

(d) A warrant officer who retires under this section may elect to be placed on the retired list in the highest grade and with the highest retired pay to which he is entitled under any provision of this title. If the pay of

that highest grade is less than the pay of any warrant grade satisfactorily held by him on active duty, his retired pay shall be based on the higher pay.

(e) Unless otherwise entitled to higher pay, an officer retired under this section is entitled to retired pay computed under section 8333 of this title.

(f) Officers of the Navy Reserve and the Marine Corps Reserve who were transferred to the Retired Reserve from an honorary retired list under section 213(b) of the Armed Forces Reserve Act of 1952 (66 Stat. 485), or are transferred to the Retired Reserve under section 8327 of this title, may be retired under this section, notwithstanding their retired status, if they are otherwise eligible.

28 U.S.C. § 1491

Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim 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. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning

termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

(b)(1) Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(5) If an interested party who is a member of the private sector commences an action described in paragraph (1) with respect to a public-private

competition conducted under Office of Management and Budget Circular A–76 regarding the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A–76, then an interested party described in section 3551(2)(B) of title 31 shall be entitled to intervene in that action.

(6) Jurisdiction over any action described in paragraph (1) arising out of a maritime contract, or a solicitation for a proposed maritime contract, shall be governed by this section and shall not be subject to the jurisdiction of the district courts of the United States under the Suits in Admiralty Act (chapter 309 of title 46) or the Public Vessels Act (chapter 311 of title 46).

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

37 U.S.C. § 204

Entitlement

(a) The following persons are entitled to the basic pay of the pay grade to which assigned or distributed, in accordance with their years of service computed under section 205 of this title-

(1) a member of a uniformed service who is on active duty; and

(2) a member of a uniformed service, or a member of the National Guard who is not a Reserve of the Army or the Air Force, who is participating in full-time training, training duty with pay, or other full-time duty, provided by law, including participation in exercises or the performance of duty under section 10302, 10305, 10502, or 12402 of title 10, or section 503, 504, 505, or 506 of title 32.

(b) For the purposes of subsection (a), under regulations prescribed by the President, the time necessary for a member of a uniformed service who is called or ordered to active duty for a period of more than 30 days to travel from his home to his first duty station and from his last duty station to his home, by the mode of transportation authorized in his call or orders, is considered active duty.

(c)(1) A member of the National Guard who is called into Federal service for a period of 30 days or less is entitled to basic pay from the date on which the member, in person or by authorized telephonic or electronic means, contacts the member's unit.

(2) Paragraph (1) does not authorize any expenditure to be paid for a period before the date on

which the unit receives the member's contact provided under such paragraph.

(3) The Secretary of the Army, with respect to the Army National Guard, and the Secretary of the Air Force, with respect to the Air National Guard, shall prescribe such regulations as may be necessary to carry out this subsection.

(d) Full-time training, training duty with pay, or other full-time duty performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in his status as a member of the National Guard, is active duty for the purposes of this section.

(e) A payment accruing under any law to a member of a uniformed service incident to his release from active duty or for his return home incident to that release may be paid to him before his departure from his last duty station, whether or not he actually performs the travel involved. If a member receives a payment under this subsection but dies before that payment would have been made but for this subsection, no part of that payment may be recovered by the United States.

(f) A cadet of the United States Military Academy or the United States Air Force Academy, or a midshipman of the United States Naval Academy, who, upon graduation from one of those academies, is appointed as a second lieutenant of the Army or the Air Force is entitled to the basic pay of pay grade O–1 beginning upon the date of his graduation.

(g)(1) A member of a reserve component of a uniformed service is entitled to the pay and allowances provided by law or regulation for a member

of a regular component of a uniformed service of corresponding grade and length of service whenever such member is physically disabled as the result of an injury, illness, or disease incurred or aggravated-

(A) in line of duty while performing active duty;

(B) in line of duty while performing inactive-duty training (other than work or study in connection with a correspondence course of an armed force or attendance in an inactive status at an educational institution under the sponsorship of an armed force or the Public Health Service);

(C) while traveling directly to or from such duty or training;

(D) in line of duty while remaining overnight immediately before the commencement of inactive-duty training, or while remaining overnight, between successive periods of inactive-duty training, at or in the vicinity of the site of the inactive-duty training; or

(E) in line of duty while-

(i) serving on funeral honors duty under section 12503 of title 10 or section 115 of title 32;

(ii) traveling to or from the place at which the duty was to be performed; or

(iii) remaining overnight at or in the vicinity of that place immediately before so serving, if the place is outside reasonable commuting distance from the member's residence.

(2) In the case of a member who receives earned income from nonmilitary employment or self-employment performed in any month in which the member is otherwise entitled to pay and allowances

under paragraph (1), the total pay and allowances shall be reduced by the amount of such income. In calculating earned income for the purpose of the preceding sentence income from an income protection plan, vacation pay, or sick leave which the member elects to receive shall be considered.

(h)(1) A member of a reserve component of a uniformed service who is physically able to perform his military duties, is entitled, upon request, to a portion of the monthly pay and allowances provided by law or regulation for a member of a regular component of a uniformed service of corresponding grade and length of service for each month for which the member demonstrates a loss of earned income from nonmilitary employment or self-employment as a result of an injury, illness, or disease incurred or aggravated-

(A) in line of duty while performing active duty;

(B) in line of duty while performing inactive-duty training (other than work or study in connection with a correspondence course of an armed force or attendance in an inactive status at an educational institution under the sponsorship of an armed force or the Public Health Service);

(C) while traveling directly to or from such duty or training;

(D) in line of duty while remaining overnight immediately before the commencement of inactive-duty training, or while remaining overnight, between successive periods of inactive-duty training, at or in the vicinity of the site of the inactive-duty training; or

(E) in line of duty while-

(i) serving on funeral honors duty under section 12503 of title 10 or section 115 of title 32;

(ii) traveling to or from the place at which the duty was to be performed; or

(iii) remaining overnight at or in the vicinity of that place immediately before so serving, if the place is outside reasonable commuting distance from the member's residence.

(2) The monthly entitlement may not exceed the member's demonstrated loss of earned income from nonmilitary or self-employment. In calculating such loss of income, income from an income protection plan, vacation pay, or sick leave which the member elects to receive shall be considered.

(i)(1) The total amount of pay and allowances paid under subsections (g) and (h) and compensation paid under section 206(a) of this title for any period may not exceed the amount of pay and allowances provided by law or regulation for a member of a regular component of a uniformed service of corresponding grade and length of service for that period.

(2) Pay and allowances may not be paid under subsection (g) or (h) for a period of more than six months. The Secretary concerned may extend such period in any case if the Secretary determines that it is in the interests of fairness and equity to do so.

(3) A member is not entitled to benefits under subsection (g) or (h) if the injury, illness, disease, or aggravation of an injury, illness, or disease is the result of the gross negligence or misconduct of the member.

(4) Regulations with respect to procedures for

paying pay and allowances under subsections (g) and (h) shall be prescribed-

(A) by the Secretary of Defense for the armed forces under the jurisdiction of the Secretary; and

(B) by the Secretary of Homeland Security for the Coast Guard when the Coast Guard is not operating as a service in the Navy.

(j) A member of the uniformed services who is entitled to medical or dental care under section 1074a of title 10 is entitled to travel and transportation allowances, or a monetary allowance in place thereof, for necessary travel incident to such care, and return to his home upon discharge from treatment.

APPENDIX E

Public Law 102-484, 106 Stat. 2702 (1993)

SEC. 4403. TEMPORARY EARLY RETIREMENT AUTHORITY.

(a) PURPOSE.—The purpose of this section is to provide the Secretary of Defense a temporary additional force management tool with which to effect the drawdown of military forces through 1995.

(b) RETIREMENT FOR 15 TO 20 YEARS OF SERVICE.—

(1) During the active force drawdown period, the Secretary of the Army may—

(A) apply the provisions of section 3911 of title 10, United States Code, to a regular or reserve commissioned officer with at least 15 but less than 20 years of service by substituting "at least 15 years" for "at least 20 years" in subsection (a) of that section;

(B) apply the provisions of section 3914 of such title to an enlisted member with at least 15 but less than 20 years of service by substituting "at least 15" for "at least 20"; and

(C) apply the provisions of section 1293 of such title to a warrant officer with at least 15 but less than 20 years of service by substituting "at least 15 years" for "at least 20 years".

(2) During the active force drawdown period, the Secretary of the Navy may—

(A) apply the provisions of section 6323 of title 10, United States Code, to an officer with at least 15 but less than 20 years of service by substituting "at least 15 years" for "at least 20 years" in subsection (a) of that section;

(B) apply the provisions of section 6330 of such title to an enlisted member of the Navy or Marine Corps with at least 15 but less than 20 years of service by substituting "15 or more years" for "20 or more years" in the first sentence of subsection (a), in the case of an enlisted member of the Navy, and in the second sentence of subsection (b), in the case of an enlisted member of the Marine Corps; and

(C) apply the provisions of section 1293 of such title to a warrant officer with at least 15 but less than 20 years of service by substituting "at least 15 years" for "at least 20 years".

(3) During the active force drawdown period, the Secretary of the Air Force may—

(A) apply the provisions of section 8911 of title 10, United States Code, to a regular or reserve commissioned officer with at least 15 but less than 20 years of service by substituting "at least 15 years" for "at least 20 years" in subsection (a) of that section; and

(B) apply the provisions of section 8914 of such title to an enlisted member with at least 15 but less than less than 20 years of service by substituting "at least 15" for "at least 20".

(c) ADDITIONAL ELIGIBILITY REQUIREMENT In order to be eligible for retirement by reason of the authority provided in subsection (b), a member of the Armed Forces shall—

(1) register on the registry maintained under section 1143a(b) of title 10, United States Code (as added by section 4462(a)); and

(2) receive information regarding public and community service job opportunities from the Secretary of Defense or another source approved by

the Secretary and be afforded, on request, counseling on such job opportunities.

(d) REGULATIONS.—The Secretary of each military department may prescribe regulations and policies regarding the criteria for eligibility for early retirement by reason of eligibility pursuant to this section and for the approval of applications for such retirement. Such criteria may include factors such as grade, years of service, and skill.

(e) COMPUTATION OF RETIRED PAY.—Retired or retainer pay of a member retired (or transferred to the Fleet Reserve or Fleet Marine Corps Reserve) under a provision of title 10, United States Code, by reason of eligibility pursuant to subsection (b) shall be reduced by 1/12th of 1 percent for each full month by which the number of months of active service of the member are less than 240 as of the date of the member's retirement (or transfer to the Fleet Reserve or Fleet Marine Corps Reserve).

(f) FUNDING.—

(1) Notwithstandmg section 1463 of title 10, United States Code, and subject to the availability of appropriations for this purpose, the Secretary of each military department shall provide in accordance with this section for the payment of retired pay payable during the fiscal years covered by the other provisions of this subsection to members of the Armed Forces under the jurisdiction of that Secretary who are being retired under the authority of this section.

(2) In each fiscal year in which the Secretary of a military department retires a member of the Armed Forces under the authority of this section, the Secretary shall credit to a subaccount (which the

Secretary shall establish) within the appropriation account for that fiscal year for pay and allowances of active duty members of the Armed Forces under the jurisdiction of that Secretary such amount as is necessary to pay the retired pay payable to such member for the entire initial period (determined under paragraph (3)) of the entitlement of that member to receive retired pay.

(3) The initial period applicable under paragraph (2) in the case of a retired member referred to in that paragraph is the number of years (and any fraction of a year) that is equal to the difference between 20 years and the number of years (and any fraction of a year) of service that were completed by the member (as computed under the provision of law used for determining the member's years of service for eligibility to retirement) before being retired under the authority of this section.

(4) The Secretary shall pay the member's retired pay for such initial period out or amounts credited to the subaccount under paragraph (2). The amounts so credited with respect to that member shall remain available for payment for that period.

(5) For purposes of this subsection—

(A) the transfer of an enlisted member of the Navy or Marine Corps to the Fleet Reserve or Fleet Marine Corps Reserve shall be treated as a retirement; and

(B) the term "retired pay" shall be treated as including retainer pay.

(g) COORDINATION WITH OTHER SEPARATION PROVISIONS

(1) A member of the Armed Forces retired under the authority of this section is not entitled to benefits under section 1174, 1174a, or 1175 of title 10, United States Code.

(2) Section 638a(b)(4)(C) of title 10, United States Code, is amended by inserting "(other than by reason of eligibility pursuant to section 4403 of the National Defense Authorization Act for Fiscal Year 1993)" after "any provision of law".

(h) MEMBERS RECEIVING SSB OR VSL—The Secretary of a military department may retire (or transfer to the Fleet Reserve or Fleet Marine Corps Reserve) pursuant to the authority provided by this section a member of a reserve component who before the date of the enactment of this Act was separated from active duty pursuant to an agreement entered into under section 1174a or 1175 of title 10, United States Code. The retired or retainer pay of any such member so retired (or transferred) by reason of the authority provided in this section shall be reduced by the amount of any payment to such member before the date of such retirement under the provisions of such agreement under section 1174a or1175 of title 10, United States Code.

(i) ACTIVE FORCE DRAWDOWN PERIOD.—For purposes of this section, the active force drawdown period is the period beginning on the date of the enactment of this Act and ending on October 1,1995.

Public Law 112-81, 125 Stat. 1390 (2011)

Sec. 504(b)

(b) REINSTATEMENT OF CERTAIN TEMPORARY EARLY RETIREMENT AUTHORITY

(1) REINSTATEMENT.—Subsection (i) of section 4403 of the National Defense Authorization Act for Fiscal Year 1993 (10 U.S.C. 1293 note) is amended—

(A) by inserting "(1)" before "the period"; and

(B) by inserting before the period at the end the following: ", and (2) the period beginning on the date of the enactment of the National Defense Authorization Act for Fiscal Year 2012 and ending on December 31, 2018".

(2) INAPPLICABILITY OF CERTAIN PROVISIONS.—Such section is further amended by striking subsection (c) and inserting the following new subsection (c):

"(c) INAPPLICABILITY OF CERTAIN PROVISIONS.

"(1) INCREASED RETIRED PAY FOR PUBLIC OR COMMUNITY SERVICE.—The provisions of section 4464 of this Act (10 U.S.C. 1143a note) shall not apply with respect to a member or former member retired by reason of eligibility under this section during the active force drawdown period specified in subsection (i)(2).

"(2) COAST GUARD AND NOAA.—During the period specified in subsection (i)(2), this section does not apply as follows:

"(A) To members of the Coast Guard, notwithstanding section 542(d) of the National

Defense Authorization Act for Fiscal Year 1995 (10 U.S.C. 1293 note).

"(B) To members of the commissioned corps of the National Oceanic and Atmospheric Administration, notwithstanding section 566(c) of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 104– 106; 10 U.S.C. 1293 note).".

(3) COORDINATION WITH OTHER SEPARATION PROVISIONS.— Such section is further amended—

(A) in subsection (g), by striking ", 1174a, or 1175" and inserting "or 1175a"; and

(B) in subsection (h)—

(i) in the subsection heading, by striking "SSB OR VSI" and inserting "SSB, VSI, OR VSP";

(ii) by inserting before the period at the end of the first sentence the following: "or who before the date of the enactment of the National Defense Authorization Act for Fiscal Year 2012 was separated from active duty pursuant to an agreement entered into under section 1175a of such title"; and

(iii) in the second sentence, by striking "under section 1174a or 1175 of title 10, United States Code".