IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NICHOLAS BASSEN, *et al.*, ***Plaintiffs*,** **v.** **UNITED STATES OF AMERICA,** ***Defendant.***	**No. 23-211** **Judge T. Dietz**

<u>JOINT RULE 52.2 NOTICE</u>

Pursuant to the Court's May 6, 2026, Order (ECF 128), the parties respectfully submit this Joint Notice.

The Court requires the parties to file a Notice under Rule 52.2(e)(1) "within 30 days after the filing of the final decision." *Id*. The notice must identify (A) whether the respective military board's final decision provides a satisfactory basis for disposition of their respective case; or (B) whether further proceedings before the court are required, and if so, the nature of such proceedings." Order, RCFC 52.2(e)(1).

Plaintiff received the attached BCNR decision, Ex. 1, April 30, 2026. Given that he is set to return to active duty shortly and the nature of the issues involving his pay, Plaintiff provides the following Notice:

a. Plaintiff Connor Matisoo, one of the (Additional) plaintiffs on the Second Amended Complaint (SAC), ECF 123, received BCNR decision No. 12163-25, attached to this Notice.

b. Shortly after, the Plaintiff provided tax and income documents for the period of his discharge and constructive service, and then the Defense Finance and

Accounting Service (DFAS) sent the proposed concomitant financial relief on May 6, 2026, in light of the constructive service ordered by the Secretary of the Navy on the Board's decision, and the Plaintiff's financial information. That proposed relief comes in the form of two documents: the DFAS-DE Form 0-110, the Corrected Records Computation Estimate, and the DFAS-DE Form 67, Military Pay and Allowance Voucher Estimate.[1]

c. Plaintiff Matisoo is satisfied with the Board's decision and relief ordered by the SecNav and accepts it – and is returning to the Navy in due course;

d. Plaintiff Matisoo is NOT satisfied, however, with the proffered financial relief for two reasons, and requests "light," additional briefing for the Court on an abbreviated schedule, given the narrow legal issues involved, set forth below.

PLAINTIFF'S POSITION

Factual and Legal Predicates

Plaintiff's BCNR decision, Ex. 1, p. 6, provides understandably contingent, but significant, relief. Plaintiff was originally near completion of officer's candidate school in Newport, RI, thence on to flight training in Pensacola, FL, when he was discharged over the Mandate. Plaintiff will re-commence OCS this summer, and –

> Upon Petitioner's successful completion of OCS and acceptance of a commission in the U.S. Navy, the Board directs the following corrective action:
>
> Petitioner's naval record will be corrected as necessary to reflect that he was not discharged on 7 December 2021 but rather continued to serve honorably with no break in service. As such, Petitioner's

[1] Both documents are attached as Ex. 2.

> discharge of 7 December 2021 will be rescinded, and he is to receive constructive service credit for the period from 8 December 2021 until the date he is reinstated in the U.S. Navy. To effectuate this relief, NPC is directed to expunge Petitioner's record and remove any and all references to Petitioner's previous discharge, including but not limited to his DD Form 214. Note: NPC will ensure restoration of all associated pay and benefits are restored once service credit periods are adjusted.
>
> Petitioner will be appointed to Ensign/O-1 effective 7 January 2022 and then appointed to Lieutenant Junior Grade/O-2 with an effective date of 7 January 2024. Note: By removing the break in service and establishing appointment to Lieutenant Junior Grade, Petitioner may be eligible for consideration for Lieutenant/O-3. NPC will determine eligibility and conduct a Special Selection Board if applicable.

BCNR #12163-25, p. 6

DFAS has calculated Plaintiff's various entitlements for this constructive service period from 2022- 2026, tallied these sums up, and then subtracted out the government's offsets of petitioner's civilian earnings during that same period of time, when he was living at his own expense.[2] *See* Ex. 2, DFAS Accounting Documents.

Plaintiff's Two Issues

1. <u>Tax Gross-Up for Lump Sum Payment</u>. Assuming *arguendo* that all of the DFAS numbers are correct as entered on Exhibit 2, Plaintiff's lump sum payment will be taxed by the government at 22%. Had he received that money in the normal course of affairs over those same years of constructive service he would not have paid 22% tax on it. The government is giving itself back a windfall, money it otherwise would not have gotten, and does not make plaintiff whole. *See Attia v. US*, 176 Fed.Cl. 36 (2025). By Plaintiff's calculations, the difference is at least $10,000, but detailed

[2] *Motto v U.S.*, 175 Ct.Cl. 862 (1966); *Craft v. U.S.*, 218 Ct.Cl. 579 (1978)

breakdown will be provided in the additional proposed briefing. Additionally, BAS, which is non-taxable, is treated dollar-for-dollar the same as taxable income. Plaintiff's award includes more than $15,000 of non-taxable income.

2. <u>"BAQ Partial" For an Officer Living in Pensacola, FL</u>. The DFAS calculations at Exhibit 2 outline what should be Plaintiff's housing allowance (BAH), and in the item he receives only "BAQ-Part". This code means that DFAS is presuming that Plaintiff lived in military provided housing during the periods of constructive service listed from "20211208" as an "E5/0" for 23 days, running all the way through "2600507" as an "O02/4" for 4 months. Ex. 2, p. 4.

    a. 37 USC §403 governs the military's statutory entitlement to BAH. Plaintiff Matisoo as an O-1 or O-2 has the statutory right to refuse being assigned to government quarters and instead collect the full amount of BAH appropriate to his grade and location. *See* 37 USC §403(e)(2).

    b. The DoD Financial Management Regulation (DoDFMR), Vol 7B, Chapter 10, paragraph 3.1 ("Pay Computation"): Payments "must be made in the amounts determined to be due by applying pertinent laws and regulations to all the material facts shown in the corrected record."

    c. The difference in the DFAS presumption takes away 57 months and 7 days (through May 6, 2026) of full BAH, all of which is nontaxable income. At Pensacola, FL BAH rates ($1,494/mo. as an O-1 in 2022, $1614 in 2023, climbing to $1842 as an O-2 in 2026) through his constructive service time yields ~$84,000, without even calculating the tax benefit under *Attia*.

d. DFAS is pretending, for purposes of constructive service, that Plaintiff was assigned to quarters during the period of constructive service when "in fact" Plaintiff was forced to live out in town because of Defendant's actions, while Defendant simultaneously takes a credit dollar-for-dollar on Plaintiff's income necessary to pay for the out-of-town costs. That's not accounting for a "legal fiction," it's picking and choosing which presumption applies on which side of the ledger. It's double-dealing and runs contrary to the statutory entitlement that should obtain.

Plaintiff believes that these issues being both related and narrow, Plaintiff requires and requests the following briefing schedule:

An initial brief of no more than 8 pages by Plaintiff filed by 1 July;

Defendant's Response of no more than 12 pages by 15 July; and

An optional, waivable Reply of 4 pages for Plaintiff by July 22.

Plaintiff will waive oral argument.

DEFENDANT'S POSITION

The United States provides, in accordance with RCFC 52.2, the following notice regarding: (a) whether the respective military board's final decision provides a satisfactory basis for disposition of their respective case; or (b) whether further proceedings before the court are required, and if so, the nature of such proceedings.

The United States contends that (a) the board's final decision satisfactorily disposes of this case, and that (b) no further proceedings are required.

However, we acknowledge that Mr. Matisoo asserts that he is unsatisfied with the financial relief he has received from the board, and contends that he is entitled to a tax gross-up for receiving a lump sum payment and also contends that the housing allowance afforded him is incorrect because it does not account for his actual living situation.

These United States asserts that Mr. Matisoo's contentions are incorrect. Regarding his request for a tax gross-up, citing *Attia v. United States*, 176 Fed. Cl. 36 (2025) as support, no law or regulation supports his claim for a tax gross-up. In fact, the case he cites in support acknowledges that this is a novel issue under the Tucker Act. The judgment in the *Attia* case was issued on or about May 14, 2026, and the appeal period has not yet run regarding that judgment.

Regarding his claim related to the housing allowance afforded him, the records available to DFAS demonstrated that Mr. Matisoo lived in military provided housing prior to his separation. Mr. Matisoo is now being reinstated in the Navy, and the Board has determined that he will therefore also receive all associated pay and benefits. To calculate those benefits, DFAS used the information available and calculated benefits for the reinstatement period using the same entitlements that Mr. Matisoo had received prior to his separation, which included information establishing that he lived in military housing. Mr. Matisoo characterizes this information as a presumption and seeks to replace this presumption with an assumption more beneficial to him, namely that DFAS should instead assume that had he not separated he would have moved off base into the exact living situation he was in while he was separated. Mr. Matisoo's assumption, however, is untethered to information in his military records. Further, as discussed above, his secondary assertion to a tax gross-up for the housing allowance is also unsupported.

The United States also contends that plaintiffs' counsel's proposed schedule is untenable. At a minimum, based on consultation with agency personnel, the United States will not be able to provide an administrative record before June 26, 2026.

Moreover, given the novel nature of the tax gross-up issue, the United States also disagrees with plaintiffs' counsel's proposal to severely limit the pages allotted for briefing these issues. But we recognize the Court's desire as indicated during the status hearing held on June 1, 2026 to limit briefing to the extent practicable. Therefore, the United States contends that a 25-page limit for opening briefs may be attainable, but we ask for the ability to request additional pages up to the 40-page limit afforded by Rule 5.4 of the Rules of the United States Court of Federal Claims. We also contend that a 10-page limit on reply briefs may also be attainable, but we request the same ability to request additional pages if necessary.

On timing, the United States requests that the Court afford the parties the standard briefing schedule allowed under RCFC 7.2, which affords the parties 28 days for opening briefs and 14 days for reply briefs. Thus, the schedule would be as follows:

- The United States provides the administrative record on June 26, 2026
- Plaintiff files his motion for judgment on July 24, 2026
- The United States files its motion for judgment on August 21, 2026
- Plaintiff files his reply on September 4, 2026
- The United States files its reply on September 18, 2026

The United States defers to the Court's discretion concerning whether oral argument would be of benefit in this matter.

Dated: June 5, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2026, I electronically filed the foregoing notice with the Clerk of the Court by using the CM/ECF system, which will notify all attorneys of record of the filing.

/s/ Dale Saran