



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

[REDACTED]  
Docket No: 8310-20  
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED], USN,  
XXX-XX-[REDACTED] (RET)

Ref: (a) Title 10 U.S.C. § 1552  
(b) Title 10 U.S.C. § 1372

Encl: (1) DD Form 149 w/attachments  
(2) COMNAVPERSCOM MILLINGTON TN 021303Z Jan 18  
(3) SECNAV WASHINGTON DC 061500Z Jul 18 (ALNAV 054/18)  
(4) COMNAVPERSCOM (PERS-954) ltr 1850 Ser 954/2389 of 28 Sep 20  
(5) COMNAVPERSCOM (PERS-95) ltr 1850 Ser 95/165 (undated)  
(6) Deputy AJAG (Administrative Law) ltr 1850 Ser 13/3BC0679.21 of 1 Nov 21  
(7) Statement of Service of 12 Feb 21

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting that her naval record be corrected by changing her retirement grade to Commander (CDR/O-5), correcting her length of service to reflect 23 years, 5 months and 24 days, and payment of any allowances due to her.

2. The Board, consisting of [REDACTED], [REDACTED], and [REDACTED] reviewed Petitioner's allegations of error and injustice on 9 November 2021 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, relevant portions of Petitioner's naval records, and applicable statutes, regulations, and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, found that, before applying to this Board, she exhausted all administrative remedies available under existing law and regulations within the Department of the Navy. The Board made the following findings:

a. On 27 March 2018, the Fiscal Year (FY) 2019 Active Duty Navy CDR Staff Corps (Supply Corps) Promotion Selection Board (PSB) convened. Petitioner was on active duty, eligible for promotion, and her record was properly considered by the promotion selection board members.

b. On 29 March 2018, Petitioner was transferred to the Temporary Disability Retired List (TDRL) in the grade O-4. See enclosure (2).

c. On 30 March 2018, the FY 2019 Active Duty Navy CDR Staff Corps (Supply Corps) PSB adjourned and reported Petitioner's name on the list of officers selected for promotion to the grade CDR.

d. On 6 July 2018, the Secretary of the Navy (SECNAV) announced Petitioner's selection for promotion to CDR. See enclosure (3).

Subj: REVIEW OF NAVAL RECORD OF [REDACTED], USN,  
XXX-XX-[REDACTED] (RET)

e. On 31 July 2018, the Senate confirmed Petitioner's nomination for promotion.

f. On 1 October 2020, Petitioner was placed the Permanent Disability Retired List (PDRL) in the grade O-4. See enclosure (4).

g. Petitioner contends that according to reference (b), she should have been promoted to CDR upon retirement. Reference (b) provides, "Unless entitled to a higher retired grade under some other provision of law, any member of an armed force who is retired for physical disability under section 1201 or 1204 of this title, or whose name is placed on the temporary disability retired list under section 1202 or 1205 of this title, is entitled to the grade equivalent to the highest of the following: . . . (3) The permanent regular or reserve grade to which he would have been promoted had it not been for the physical disability for which he is retired and which was found to exist as a result of a physical examination."

h. The advisory opinion (AO) furnished by PERS-95 noted that Petitioner was still on the active duty list (ADL) during the selection process, and determined that Petitioner would have been promoted to CDR had it not been for her physical disability. See enclosure (5).

i. The AO furnished by the Deputy Assistant Judge Advocate General for Administrative Law (Code 13) determined that Petitioner's request for promotion should be granted. In this regard, the AO explained that the promotion of an officer in the Regular Navy to the grade of CDR is an appointment governed by the Appointments Clause and that there are three steps in the constitutional appointment process: (1) the President's nomination of an officer to the Senate, (2) the Senate's advice and consent to the nomination, and (3) the President's delivery of the appointment to the officer. The AO noted that Petitioner was on the ADL and was legally eligible for consideration by the PSB when it convened and only two of the three steps in the constitutional appointment process were completed: (1) the President's nomination of the Petitioner was submitted to the Senate; and (2) the Senate rendered its advice and consent on the nomination.

The AO also noted that, based on the administrative record, it appears that the Navy Personnel Command (NPC) (PERS-806) did not deliver Petitioner's promotion to the grade of CDR because Petitioner "was already retired" and opined that Code-13 is not clear on what authority NPC relied to forgo delivery of Petitioner's promotion. The AO noted, too, that under 10 U.S.C. § 629(d), an administrative removal is authorized if an officer on the ADL is recommended for promotion to a higher grade by a PSB and then transferred to a retired status before being promoted. The AO explained that an administrative removal is conditioned on there being a promotion recommendation that occurs *before* the transfer to a retired status. The AO also explained, when a promotion selection board adjourns, the board members formally document, certify, sign, and submit a report to the SECNAV, an officer is recommended for promotion when the board adjourns and submits its report. The AO determined that in Petitioner's case, the board adjourned on 30 March 2018, if Petitioner had been placed on the TDRL *after* the board adjourned, then administrative removal would have been authorized because the promotion recommendation would have preceded the transfer to retired status. However, Petitioner was transferred to a retired status (the TDRL) while the board was still in session.

The AO thus provides that the legal issue presented, is what occurred first— the Petitioner's transfer to a retired status or the board's recommendation for Petitioner's promotion, and if it is the former, then administrative removal under subsection 629(d) is not authorized because the statutory prerequisite for the removal action, the board's recommendation for promotion, has not been met. The AO determined that the administrative removal of Petitioner's name from the FY 2019 Promotion List was not authorized as a matter of law because the Petitioner's transfer to the TDRL occurred *before* the board's recommendation for Petitioner's promotion was formally documented, certified, and signed by the

Subj: REVIEW OF NAVAL RECORD OF [REDACTED], USN,  
XXX-XX-[REDACTED] (RET)

members in the report of the board on the date of adjournment. The AO also determined that since administrative removal was not authorized, the only available statutory authority to remove Petitioner's name from the promotion list was a Presidential removal action under 10 U.S.C. § 629(a).3. The AO noted that no such action was ever pursued and Petitioner's name remains on the FY 2019 Active-Duty Navy Commander Staff Corps (Supply Corps) Promotion List because no authorized removal action was ever approved by the President, Secretary of Defense, or Secretary of the Navy.

The AO concluded that, according to reference (b), Petitioner is entitled to the grade of CDR, which is the highest permanent Regular grade to which she would have been promoted had it not been for the physical disabilities for which she was retired. The AO also concluded that the Navy committed prejudicial error by failing to advance Petitioner to the grade of CDR on the TDRL pursuant to reference (b), with an effective date of rank consistent with what she would have received during FY 2019 had she remained on the ADL. See enclosure (6).

#### CONCLUSION

Upon review and consideration of all the evidence of record, the Board finds the existence of an error warranting corrective action. The Board noted the AO furnished by PERS-95 and determined that the AO did not provide sufficient justification for the determination that Petitioner would have been promoted to CDR had it not been for her physical disability. Conversely, the Board substantially concurred with the AO furnished by Code-13. In this regard, the Board noted that Petitioner was on the ADL and she was eligible for promotion consideration when the FY 2019 Active Duty Navy CDR Staff Corps (Supply Corps) PSB convened, Petitioner was transferred to the TDRL before the PSB adjourned, and Petitioner's name remains on the FY 2019 Promotion List. The Board determined that since administrative removal was not authorized, and since a Presidential removal action under 10 U.S.C. § 629(a).3 was never pursued, according to reference (b), Petitioner is entitled to the grade of CDR, which is the highest permanent Regular grade to which she would have been promoted had it not been for the physical disabilities for which she was retired. The Board thus concluded that a prejudicial error was committed by failing to advance Petitioner to the grade of CDR.

Concerning Petitioner's request for correction to her total active years of service, the Board noted that Petitioner's statement of service provides that she completed 23 years, 5 months, and 24 days of total active service. The Board determined that Petitioner's record accurately reflects her total years of service and that no action is necessary to correct her record. See enclosure (7).

#### RECOMMENDATION

In view of the above, the Board directs the following corrective action.

Petitioner's naval record be corrected to reflect that she was advanced to the grade of CDR/O-5 on the TDRL pursuant to reference (b), with an effective date of rank consistent with what she would have received during FY 2019 had she remained on the ADL.

Petitioner be issued a Correction to DD Form 214, Certificate of Release or Discharge from Active Duty (DD Form 215) that reflects she was advanced to the grade of CDR/O-5 with an effective date of rank consistent with what she would have received during FY 2019 had she remained on the ADL.

Any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed, or completely expunged from Petitioner's record, and that no such entries or material be added to the record in the future. This includes, but is not limited to, all information systems or database entries.

Subj: REVIEW OF NAVAL RECORD OF [REDACTED], USN,  
XXX-XX-[REDACTED] (RET)

The Defense Finance and Accounting Service (DFAS) complete an audit of Petitioner's records and make payment of any money that Petitioner may be entitled.

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

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

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

12/6/2021

[REDACTED]

Deputy Director

Signed by: [REDACTED]