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

[redacted]
Docket No. 7016-21
1034-79
Ref: Signature Date

[redacted]

Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code. After careful and conscientious consideration of relevant portions of your naval record and your application, the Board for Correction of Naval Records (Board) found the evidence submitted insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

Although your application for reconsideration was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider your application on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 9 February 2023. The names and votes of the members of the panel will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your applications, for the current case as well as Docket No. 1034-79 for which you sought reconsideration, together with all material submitted in support thereof, relevant portions of your naval record and applicable statutes, regulations and policies, as well as the 8 August 2022 Advisory Opinion (AO) provided to the Board by the Office of Legal Counsel (BUPERS-00J)) and your rebuttal statement dated 5 October 2022.

The Board determined your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Therefore, the Board determined a personal appearance was not necessary and considered your case based on the evidence of record.

The Board carefully considered your request to correct your Official Military Personnel File (OMPF) as follows:

1) Set aside your discharge on 10 June 1973 and change your record to reflect continuous service from that date until you reentered as a Navy Judge Advocate General (JAG);

2) Reinstatement of your Pay Entry Base Date of 2 August 1968 and all adjustments required, including but not limited to pay, benefits, promotion selection, promotion eligibility, and retirement pay; and

3) Redaction of the fitness reports from [redacted] in 1971 to 1972.

The Board noted your previous submission, Docket No. 1034-79, requested similar corrections which were stated as "elimination of my 10 June 1973 honorable discharge with a correction of my Naval Record to show continuous active duty since my initial date of active duty 2 August 1968" and "back pay and allowances." The previous Board denied all requested relief. Specifically, the previous Board found you were "not discharged pursuant to regulations which mandated [your] discharge and that, as a matter of law, the holding in *Crawford* v. *Cushman, 531 F.2d 1114 (2d Cir. 1976)* did not mandate relief in [your] case." The previous Board found that your discharge was not mandatory and you could have requested retention on active duty or inactive duty in the Naval Reserve at the time you submitted your resignation. Additionally, as a matter of equity, the previous Board determined relief was not warranted.

In your current request, you have submitted detailed explanation of new evidence in support of your previous contentions, reemphasized previous contentions, and introduced new contentions. The Board carefully considered each of your contentions. Specifically, the Board considered your extensive briefs, AO rebuttals, and the following summarized contentions, explanations, and statements:

1) You are seeking vindication for the Navy's violation of your due process rights under the Fifth Amendment, including the equal protection component, because you were discharged pursuant to an arbitrary and unconstitutional regulation.

2) You are seeking vindication for violation of your constitutionally protected freedoms in personal choice in matters of marriage and family life and your constitutionally protected freedom to decide to procreate. These rights were chilled in being forced to decide between a child and a career. This freedom was continually chilled by senior officers in the Navy.

3) You suffered the following injustices:

a) Labeled a "troublemaker," and a "target of intimidation and retaliation for filing the original petition;"

b) Called "an embarrassment to the Navy JAG Corps for being pregnant at Justice School" resulting in a six-month delayed recall to active duty;

c) Deemed "ineligible" for O-6 promotion because you were a "mother of three kids;"

d) Significant intimidation and retaliation for writing a Navy Inspector General minority report, exposing sexual assault malfeasance by Naval Investigative Services, which still causes you anxiety for yourself, your granddaughters, and women in the military; and

e) For 20 years, you were treated as a "second class citizen" by the Navy by its invasion of your equal protection and due process rights related to pregnancy and motherhood.

4) Request reconsideration of the 1979 petition for correction of your record for the injury sustained by an involuntary termination of your commission due to pregnancy and a recall to active duty influenced by the same objectionable pregnancy regulation.

5) The Assistant JAG (AJAG) for Civil Law was biased in his recommendation to the Board [regarding the 1979 petition], made *ex parte* comments, intimidated you after you filed, and called your Commanding Officer (CO) to discuss your impertinence in filing a petition.

6) The AJAG exerted undue influence over the Board's Executive Director.

7) The Executive Director did not disclose his conflict of interest and bias created by "years of arguing a position against relief to a position allowing relief when your former influential boss is unequivocally telling you what to do in a *quid pro quo'd* situation."

8) The previous Board failed to follow precedent, even though specifically identified by your rebuttal packages.

9) The "Preliminary Review" in the previous case file was replete with speculation and conjecture inapposite to sworn facts submitted by you and not refuted by any evidence, misstated or misapplied the correct law, misstated facts surrounding Bureau of Personnel (BUPERS) Articles and BUPERSNOTES on mandatory pregnancy discharges, applied wild conjectures and suppositions that were unsupported by any evidence, and incorrectly applied "*laches*."

10) Regardless of the policy allowing waivers on a case by case basis, the regulation itself was unconstitutional. The question of whether you would have been granted a waiver, had you known they existed, is moot in light of the unlawfulness of the controlling regulation. The demands of equal protection were not met by this regulation, and you were separated pursuant to an unconstitutional regulation.

11) Contentions regarding the Board's decision letter dated 2 October 1981:

a) The Board misstated what actually happened. A BUPERSNOTE (waiver potential), a note NOT an article, was issued in October 1972. The BUPERSMAN Article was not changed until late 1975 or early 1976.

b) The accuracy of the Board cases referenced in the decision could not be substantiated because the cases were not given to you nor were they retrievable in the current Board reading room.

c) The totality of the evidence before this Board supports only that you were unaware and not informed of any waiver provision. There is no mention or references in the discharge documents to this new waiver provision, BUPERSNOTE 1070100.

d) A waiver does not cure the constitutional infirmity of the existing and operative regulation.

e) It is irrelevant that the Navy granted four waivers as far back as 1970. Four waivers in 11 years is not impressive in light of the thousands who were involuntarily discharged under an unconstitutional regulation.

f) The Board arrived at a conclusion based on a misinterpretation of the law and the unconstitutional effect of the Navy policy. The application of the BUPERSMAN Article mandating discharge for pregnancy was a denial of your due process and equal protection rights.

g) It is pure speculation for the Board to find that because you were a law student during litigation involving pregnancy policies, you "should have known of the possibility." By the date of the *Crawford* decision, you had been accepted into the JAG reserve program and had been actively seeking reinstatement since 1973. Constitutional law classes in those years did not study military pregnancy regulations.

h) You continued your naval career at the earliest possible time and was prevented from recall in August 1976 because you were pregnant with your second child and even though the Navy obstetrician had certified your ability to attend Naval Justice School.

i) The Captain, Chief Nurse, and BUPERS all failed to [inform] you that you could get a waiver, and "there is no evidence to the contrary anywhere in the record." In order to waive rights, you had to be informed of those rights, and you were not informed.

12) The ability to request a discretionary waiver does not cure the constitutional infirmity of the regulation.

13) Due to the prejudice and inequity in the case, you were denied:

a) Three and a half years of credit toward rank and retirement,

b) An opportunity for a financed legal education,

c) Earlier unbiased and non-prejudiced Promotion Board members, and

d) The necessity of arguing your case against an arbitrary denial of your civil rights.

14) You had an outstanding Navy record.

15) The courts have ordered significant remedies for women discharged for pregnancy.

16) Congress has introduced two bills to provide "equitable relief" to women mandatorily discharged for pregnancy until 1976: HR 5447 and HR 2385.

17) After the decision in *Crawford*, the argument could be made that the Secretary of Defense or his service Secretaries should have filed a request for correction of a military record on behalf of a group of members or former members who were similarly harmed by the same error or injustice.

The Board, noting the length of time since the contended error and injustice, considered your new contentions regarding bias, undue influence, conflict of interest, and being labeled a troublemaker upon your first request, and concluded your implied reason for the delay was protection of your JAG career. However, the Board, puzzled by your conscious decision to wait an additional 29+ years after your retirement in 1992, noted your statement that "with the Trump administration's bullying and retaliatory behavior, [you] felt [you] needed to seek some kind of remedy for the continuing equal protection and due process violations related to [your] two pregnancies and [your] status as a mother in the U.S. Navy." Further, the Board considered your explanation that you now have "female descendants" and are anxious about them joining the military because they are female. You stated that you "want them to know [your] story" and are "motivated by their hopes and dreams to tell [your] unresolved story and to seek redress to benefit them." The Board further noted your statements that you are seeking vindication from the injustices suffered, as noted above. Despite the excessive delay, the Board determined it would reconsider its 1981 decision and thoroughly review and consider your current request for relief.

Upon review and consideration of all the evidence of record, this Board concurred with and affirmed the previous Board's determination you were not discharged pursuant to regulations which mandated discharge. Although the current Board acknowledged the underlying pregnancy policy was wrong, the Board noted that one could request a waiver of the policy. The Board substantially concurred with the BUPERS-00J AO's discussion that there is no requirement to inform service members that a waiver existed and, in response to your contention you were not properly informed of the waiver provision, the Board, noting there was no requirement for the reviewing chain of command to annotate that you were counseled regarding the waiver policy, presumed regularity in the chain of command's conduct regarding its handling of your request to terminate your commission. Further, the Board concluded your awareness of the potential for a waiver was irrelevant because the record reflects you voluntarily and immediately sought to resign your commission.

After an in-depth review of the available evidence, the Board concluded you took actions to voluntarily resign your commission and those actions did not exhibit an officer who wanted to remain in the Navy. Specifically, the Board noted your 12 March 1973 request to terminate your commission and discharge from the Naval Service "not later than 1 June 1973" due to "personal reasons" as evidenced by an enclosure not available to the Board. The Board further noted you submitted the request upon confirmation of your pregnancy and prior to the completion of your first trimester. Additionally, the Board noted your request to leave "not later than 1 June 1973" even though your current release from active duty date was not until September 1973. The Board concluded nothing in the record or submitted by yourself for consideration painted a picture that you were "ordered to tender [your] resignation immediately" upon confirmation of your pregnancy or that you were forced to resign your commission.

The Board noted you had recently reported to [redacted], in August 1972 after your previous orders to detach and report to [redacted] were canceled at your request because you "plan[ned] to be married on 26 June 1971" and desired to "maintain a home" in the [redacted] area for your husband. The Board further noted your first classes at law school started in September 1973 which indicates the preparations for entering law school began much earlier than your required September 1973 release from active duty date. The Board concluded your actions of immediately requesting release from active duty and not waiting until the prescribed release date indicated an officer who planned for, and voluntarily resigned her commission. For a "struggling and unemployed family," as stated by your spouse in his affidavit, to leave "no later than June 1973" appeared to the Board to be a voluntary decision.

Notwithstanding its finding that you voluntarily resigned your commission, the Board considered your additional arguments that equity and justice mandated your requested relief. The Board determined there was insufficient evidence to support your contentions regarding the injustices you suffered. Specifically, the Board considered your contentions you were labeled a "troublemaker," called an embarrassment to the Navy JAG Corps for being pregnant at Naval Justice School, deemed "ineligible" for promotion to O-6 because you were a "mother of three kids," experienced significant intimidation and retaliation for exposing sexual assault malfeasance, and treated as a "second class citizen" and determined there is insufficient evidence in the record and/or provided by you to establish a material error or injustice in your record warranting your requested relief.

Although the Board did not explicitly rely on the 30 July 1979 AO provided by the AJAG, the Board considered your contentions regarding the bias, undue influence, and conflict of interest that allegedly existed between the AJAG and the Executive Director of the Board. Specifically, the Board considered your contentions that *ex parte* communications can "reasonably be implied or suspected" because of their "relationship" and the fact their "relationship" was not disclosed. The Board also considered your statement that "one can only imagine the old shipmates of Civil Law getting together to fix the troublemaker." Further, the Board considered your contention that "it is human nature" to assume that the Executive Director, after defending the litigation and petitions for mandatory pregnancy discharges for years on behalf of the Navy, was conflicted because "[o]ne does not go from years of arguing a position against relief to a position allowing relief when your former influential boss is unequivocally telling you what to do in a *quid pro quo* situation." The Board determined the record does not contain evidence, nor does your submission, of bias, undue influence, or a conflict of interest and concluded your assertions are mere speculation, and there is insufficient evidence of error or injustice warranting your requested relief.

Although this Board completely reconsidered the 1979 submission and your current submission, the Board still considered the alleged errors and injustices regarding the 1981 decision. The Board considered your contentions the previous Board ignored the sworn and uncontroverted facts, misstated/misapplied the correction law, misstated facts surrounding mandatory pregnancy discharges, applied wild conjectures and suppositions (such as you were law student) that were unsupported by evidence, and incorrectly applied *laches* and determined these contentions did not require specific comment because the current Board completed its own independent review.

The Board also considered the contentions you raised regarding the preliminary review which you state was "replete with speculation and conjecture, inaccuracies, omissions, and mischaracterizations" and determined these contentions also did not require specific comment because the current Board completed its own independent review of the evidence of record. However, the Board noted the previous Board, in its decision letter, did not specifically address the two precedent cases you raised in your supplemental information provided on 15 September 1980, although the preliminary review noted your submission of the Marine Corps cases in which "the Board has given relief." This Board substantially concurred with the BUPERS-00J AO's discussion of the two previous cases you contend are precedent that must be followed. The Board concurred with the AO's position that the prior cases can be distinguished from your case. The Board noted the repeated efforts by the Marines to contest the discharge and/or seek reinstatement. The Board considered your contention that from December 1973 to March 1974, you sought a reserve commission as an Army nurse and subsequently as a Navy Nurse but determined the evidence you submitted in support of this contention was insufficient to establish you were immediately seeking reinstatement. Further, the Board noted your voluntary request to terminate your commission "not later than 1 June 1973" although your anticipated end of active duty date was September 1973 and determined the record and the evidence you submitted were insufficient in establishing that you, unlike the Marine officers, made repeated efforts to contest your discharge. Further, the Board concurred that your case can be distinguished from the Marine cases because the Marine cases were governed by different regulations specific to Marines. The Board also considered your contention that your case is different because the AJAG did not support your request for relief whereas the Marines' requests were supported by the Commandant of the Marine Corps. The Board considered your contentions regarding the AJAG's bias and his treatment of the Navy's mandatory pregnancy discharge cases, as noted by the counsel's letter you submitted, and concluded there was insufficient evidence of error or injustice in the AJAG's involvement in your 1979 request for relief. Based on its review of the precedent cases, and relying on the BUPERS-00J AO, the Board concluded the decisions in the submitted precedent cases were not binding on the 1981 board members and is not binding on the current Board.

The Board also considered your repeated contention that the "ability to request a discretionary waiver does not cure the constitutional infirmity of the regulation" and your contention the courts have ordered significant remedies for women discharged for pregnancy. As discussed above, this Board acknowledges the error and injustice of the pregnancy policy at the time of your discharge and agrees that the ability to seek a waiver did not transform the discharge policy into an acceptable policy. However, as discussed at length above, this Board concluded there was insufficient evidence to support your contention that your resignation was not voluntary, or that you were forced to resign despite your desire to remain in the Navy. The record itself does not support your contention that you unwillingly resigned your commission due to your pregnancy; it reflects you voluntarily requested to resign your commission several months earlier than required.

The Board noted the evidence you have provided, to include your spouse's declaration and a copy of an Army Nurse Corps recruiting advertisement, attempts to prove that you were forced to resign by establishing the fact that you immediately sought to reenter the Navy. However, this

Board concluded the evidence provided is insufficient to establish an error or injustice occurred which resulted in your forced resignation due to pregnancy. The record could, just as easily, support the position that, in March 1973, when you requested to terminate your commission earlier than required, you were making a decision that was in the best interest of your growing family at that time – a decision that opened the door for you to attend law school and potentially change your career path. You contend you were denied "an opportunity for a financed legal education" but the record does not reflect, nor do you contend, that you attempted to pursue a financed legal education while in the Navy. Therefore, the error and injustice of the Navy's pregnancy policy preceding your discharge, at the time of your discharge, and after your discharge does not impact the Board's determination that there is insufficient evidence of an error or injustice in your June 1973 discharge that warrants your requested relief.

The Board considered your "outstanding Navy record" and noted your specific and laudatory accomplishments but determined the evidence of your accomplished career as a Navy JAG does not warrant a different decision regarding your 1973 discharge. The Board considered your contentions you suffered injustices due to your status as a woman and a mother in the JAG Corps and determined your contentions were without merit and lacked sufficient evidence. However, even assuming *arguendo* that your contentions of mistreatment by your JAG chain of command due to your status as a mother had merit, the Board determined that these contentions do not allege an error or injustice in your OMPF, and there would still be insufficient evidence of an error or injustice that would warrant your requested relief.

With respect to your contentions regarding Congressional bills that have been introduced to provide equitable relief to women mandatorily discharged for pregnancy, the Board substantially concurred with the BUPERS-00J AO discussion that the new evidence only indicates that Congress was considering some mechanism for relief but also highlights that Congress did not definitively take action. Further, the Board noted Congress continues to refrain from taking specific action regarding women who were involuntarily separated due to pregnancy as evidenced by section 530 of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023. In that section, Congress makes findings and states "it is the sense of Congress that women who served in the Armed Forces before February 23, 1976, should not have been involuntarily separated or discharged due to pregnancy or parenthood." The Board again reiterates its determination that your resignation does not fall into the category of "involuntary" but, even assuming it did, this Board also notes the absence of even a hint of relief suggested by Congress and concludes there is insufficient evidence of an error or injustice warranting your requested relief.

Additionally, having determined your request to resign your commission was voluntary, based on your contention you were called "an embarrassment to the Navy JAG Corps for being pregnant at Justice School," the Board considered your contention that your pregnancy resulted in a six-month delay in being recalled to active duty. The Board, noting various manpower and scheduling factors can potentially impact when a lawyer in the student program begins instruction at the Naval Justice School, determined there is insufficient evidence indicating you were delayed in your recall to active duty or that your start at Naval Justice School was intentionally delayed due to your pregnancy.

Lastly, the Board considered your request to redact your fitness reports from [redacted] in 1971 to 1972 but, noting you did not specify what errors and/or injustices existed in those fitness reports, concluded there was insufficient evidence to warrant your requested relief.

Upon review and consideration of all the evidence of record, to include the declarations and advocacy letters considered but not specifically discussed above, and applicable references, the Board again determined there is insufficient evidence of an error or injustice warranting your requested relief. Based on these findings, the Board determined there was no basis to set aside your June 1973 discharge from active duty and correct your record to reflect continuous active service or reinstate your pay entry base date of 2 August 1968 with the required adjustments for pay, benefits, promotion selection, promotion eligibility, and retirement pay. Further, the Board also determined there was insufficient evidence to support redaction or removal of your fitness reports from [redacted]. As more specifically requested in your rebuttal to the BUPERS-00J wherein you ask "only for the restitution of the period of active service from 10 June 1973 to 4 January 1977," the Board determined there was no basis to grant your request.

You are entitled to have the Board reconsider its decision upon submission of new matters, which will require you to complete and submit a new DD Form 149. New matters are those not previously presented to or considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

2/17/2023

[redacted]

Deputy Director
Signed by: [redacted]