



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

[REDACTED]
Docket No. 6313-22
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]
XXX XX [REDACTED] USMC

Ref: (a) 10 U.S.C. § 1552
(b) MCO 1900.16 w/CH2 (MARCORSEPMAN)
(c) MARADMIN 462-21
(d) MARADMIN 612-21
(e) MCO P1070.12K (IRAM)

Encl: (1) DD Form 149 w/enclosures
(2) Page 11 (6105) counseling entry, 12 Oct 21 and Rebuttal Statement, 12 Oct 21
(3) Page 11 (6105) counseling entry, 27 Oct 21 and Rebuttal Statement, 29 Oct 21
(4) Fitness Report for Reporting Period 27 May 21 to 28 Nov 21
(5) Advisory Opinion by HQMC Memo 1070 JPL, 26 Oct 22

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 her naval record be corrected by removing the Administrative Remarks Page 11 (6105) counseling entries and associated rebuttal statements, enclosures (2) and (3). Additionally, Petitioner requested removal of the adverse fitness report, enclosure (4).

2. The Board, consisting of [REDACTED], [REDACTED], and [REDACTED] reviewed Petitioner's allegations of error and injustice on 8 December 2022, and pursuant to its regulations, determined 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 as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulation within the Department of the Navy with the exception of awaiting a decision by the Performance Evaluation Review Board (PERB) regarding enclosure (4).

b. On 12 October 2021, Petitioner was issued a 6105 counseling entry for refusing inoculation with the COVID-19 vaccine. In response, she submitted a rebuttal statement explaining the Federal Drug Administration (FDA) approved COMIRNATY vaccine was not

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available aboard [REDACTED] or anywhere in the United States. Enclosure (2).

c. On 27 October 2021, Petitioner was issued a second 6105 counseling entry after she again refused inoculation. Additionally, the counseling stated that she was being processed for administrative separation per reference (b) paragraph 6203.7e by reason of convenience of the government due to refusal of medical treatment. In response, Petitioner submitted a rebuttal stating her willingness to comply with the lawful order to take the COMIRNATY vaccine or any other COVID-19 vaccine with full FDA licensure and explaining that she had not been vaccinated because the FDA-approved vaccine was not available aboard [REDACTED] or anywhere in the United States. Enclosure (3).

d. On or about 28 November 2021, Petitioner was relieved for cause from her duties as Company First Sergeant for “willfully disobeying a lawful order to become vaccinated for COVID-19” as outlined by references (c) and (d). As a result of her relief, she received enclosure (4), an adverse fitness report. Petitioner submitted a statement in which she again argued that she could only be ordered to take the FDA-approved COMIRNATY vaccine, and requested the opportunity to take the COMIRNATY vaccine or any other COVID-19 vaccine with full FDA licensure. The Third Officer Sighter found Petitioner’s arguments to be without merit, noting she was authorized to get vaccinated at any vaccination site of her choosing, and that her relief for cause was “a matter of operational readiness and good order and discipline.” Enclosures (4) and (5).

e. On 23 May 2022, an administrative separation board determined that a preponderance of the evidence did not support the basis for separation and voted to retain Petitioner. Enclosure (5).

f. Petitioner contends enclosures (2) through (4) should be removed because the administrative separation board determined the preponderance of the evidence did not prove any of the acts or omissions alleged in the notification. Enclosure (1).

g. By memorandum dated 26 October 2022, Headquarters Marine Corps (HQMC), Military Personnel Law Branch (JPL) furnished an advisory opinion (AO) for the Board’s consideration, recommending Petitioner’s request for relief be denied. The AO was forwarded to Petitioner for review and comment on 28 October 2022, but a rebuttal response was not submitted. The AO addressed the issues as follows:

(1) According to FDA guidance, doses of the Pfizer-BioNTech COVID-19 vaccine authorized under the FDA Emergency Use Authorization produced prior to the issuance of the FDA license may be used interchangeably with doses produced post-licensing by Pfizer (COMIRNATY) because they have the same formulation. Accordingly, commanders may order an unvaccinated Marine to receive the Pfizer produced vaccine regardless of whether the particular dose of the Pfizer vaccine to be administered was produced before or after FDA licensure.

(2) Therefore, Petitioner has not carried her burden to present substantial evidence rebutting the presumption of regularity that her formal counseling entries were proper.

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(3) Further Petitioner's request for removal of the contested fitness report is not ripe for Board consideration. If the Board does consider, request should be denied because the fitness report indicates Petitioner was relieved for cause for willfully disobeying a lawful order and the potential impact to operational readiness and good order and discipline was a reasonable justification to relieve a Company First Sergeant for cause.

Enclosure (5).

CONCLUSION

Upon review and consideration of all the evidence, the Board concurred with the AO at enclosure (5) and concluded Petitioner's request warrants partial relief. In this regard, the Board determined the counseling entries at enclosures (2) and (3), which meet the requirements of reference (b), create a permanent record of matters Petitioner's Commanding Officer deemed significant enough to document and concluded there was insufficient evidence of an error or injustice warranting removal. The Board noted the administrative separation process is not intended as, nor does it function as, a method to overturn or invalidate other procedures or administrative actions. It is conceivable and permissible that the administrative separation and counseling processes, which have separate considerations and purposes, may arrive at different findings. The Board concluded the administrative separation board's determination does not impact the validity of the counseling entries at enclosures (2) and (3).

However, the Board, noting the counseling entry at enclosure (3) stated Petitioner was being processed for administrative separation but that she was ultimately retained, determined the statement regarding administrative separation processing was not in compliance with reference (e).¹ The Board concluded it was in the interest of justice to redact the reference to Petitioner's administrative separation processing from the counseling entry at enclosure (3).

The Board did not consider Petitioner's request to remove the fitness report enclosure (4) because she has not exhausted her administrative remedies. Although she has submitted a request to the PERB, as of the date of the Board, the PERB has not yet ruled on the request so the issue is not ripe for the Board's consideration.

RECOMMENDATION

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

Petitioner's naval record be corrected by redacting the following language from the 6105 counseling entry of 27 October 2021 at enclosure (3): "I understand that I am being processed for the following judicial or adverse administrative action: administrative separation per paragraph 6203.7e MARCORSEPMAN for Convenience of the Government (Refusal of Medical Treatment)."

¹ Reference (e) does not authorize counseling entries which concern administrative discharge proceedings if the proceedings, upon final review, do not result in discharge.

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That part of the Petitioner's request for corrective action that exceeds the foregoing be denied.

That no further changes be made to 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 Regulation, 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.

1/5/2023

[REDACTED]

Deputy Director

Signed by: [REDACTED]