



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

█  
Docket No. 7680-22  
Ref: Signature Date



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.

A three-member panel of the Board, sitting in executive session, considered your application on 23 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 application, together with all material submitted in support thereof, relevant portions of your naval record and applicable statutes, regulations, and policies. In addition, the Board considered the advisory opinion by the Assistant Commander, Navy Personnel Command for Career Progression letter 5420 PERS-8 of 20 December 22 and your response to the opinion.

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

On 20 December 2002, you signed an Officer Appointment Acceptance and Oath of Office (NAVPERS 1000/4) in the active U.S. Navy Reserve as an Ensign with a permanent grade date/present grade date of 20 December 2002 with a designator code of 2905 (A Nurse Corps Officer).

On 20 December 2004, you were appointed to Lieutenant Junior Grade (LTJG) (O2E) pursuant to SECNAVINST 1412.6K.

You were issued a Periodic Fitness Report (FITREP) for the period of 1 June 2004 to

28 February 2005, while you were serving as a LTJG. During this period, you were serving as a Staff Nurse. You received a “Significant Problems” promotion recommendation on this FITREP.

You were issued a Detachment of Reporting Senior FITREP for the period of 1 March 2005 to 24 June 2005, while you were still serving as a LTJG and Staff Nurse. You again received a “Significant Problems” promotion recommendation.

You were issued a Periodic FITREP for the period of 25 June 2005 to 28 February 2006 while continuing to serve as a LTJG. During this period, you served as a Division Officer for the Nursing Research and Analysis Department, and received a “Promotable” promotion recommendation on this FITREP.

You were subsequently discharged for substandard performance on 28 February 2006, and later applied to this Board requesting relief.

On 29 September 2008, this Board recommended a change to your naval record to reflect that you were not discharged on 28 February 2006 but rather continued to service until you were transferred to the Retired List at the earliest possible date. The findings of the Board were forwarded to the Assistant General Counsel (Manpower & Reserve Affairs) (AGC (M&RA)) for review and approval, and on 6 October 2008 the AGC (M&RA) approved the Board’s recommendation.

On 14 July 2009, this Board amended its decision in your case by stating: “That Petitioner's naval record be further corrected to show that he be given active duty credit and back pay in the rank of ██████████ (pay grade E-5). That Petitioner be transferred to the fleet reserve with 20 years of active duty as an ██████████. He will be eligible to receive retired pay in the highest rank satisfactorily served (LT(jg)) after 30 years.”

As a result of this amendment, you were transferred to the Fleet Reserve with an Honorable character of service and were issued a Certificate of Release or Discharge from Active Duty (DD Form 214), for the period of 24 April 1989 to 30 April 2009, upon having sufficient service for retirement.

Section 8334 of Title 10, U.S. Code, provides as follows:

- (a) Each member of the naval service covered by subsection (b) who, after December 4, 1987, is retired with less than 30 years of active service or is transferred to the Fleet Reserve or Fleet Marine Corps Reserve is entitled, when his active service plus his service on the retired list or his service in the Fleet Reserve or the Fleet Marine Corps Reserve totals 30 years, to be advanced on the retired list to the highest grade in which he served on active duty satisfactorily, as determined by the SECNAV.
- (b) This section applies to—(1) warrant officers of the naval service; (2) enlisted members of the Regular Navy and Regular Marine Corps; and (3) reserve enlisted members of the Navy and Marine Corps who, at the time of retirement or transfer to the Fleet Reserve or Fleet

Marine Corps Reserve, are serving on active duty.

(c) An enlisted member of the naval service who is advanced on the retired list under this section is entitled to re-compute his retired or retainer pay under formula A of the following table, and a warrant officer of the naval service so advanced is entitled to re-compute his retired pay under formula B of that table. The amount recomputed, if not a multiple of \$1, shall be rounded to the next lower multiple of \$1.

Upon reaching eligibility for consideration to be advanced to your highest grade of satisfactory service, you submitted a request to be advanced.

On 28 April 2021 the Acting Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN (M&RA)) notified you that she determined your highest grade and rank of satisfactorily service to be that of an Ensign (O-1E). She authorized your advancement on the retired list to O-1E effective January 26, 2019.

On 8 July 2021, the Defense Finance and Accounting Service (DFAS) notified you that the Secretary of your branch of service advanced you to the rank of ENS on the retired list. Based on this change, your pay was recomputed as of the effective date of January 26, 2019.

After a delay in updating your pay account, on June 25, 2021, DFAS corrected your military retired pay rank, and recalculated your monthly gross pay. On July 12, 2021, DFAS issued you a retroactive payment to your bank account on record. This payment was for January 26, 2019, through June 30, 2021.

In your current application, you requested to be advanced on the retired list in the rank of LTJG (O-2E) effective May 1, 2019, that you be awarded all back pay and allowances as a result of the correction, and that the BCNR grant any other corrections deemed necessary to effectuate full and effective relief.

As part of the Board's review, the Assistant Commander, Navy Personnel Command for Career Progression reviewed your request and provided an advisory opinion (AO) for the Board's consideration. The AO stated in pertinent part:

“Upon reaching 30 years of service and being transferred from the Fleet Reserve to the Retired List a member can "request" in accordance with Title 10, USC 8334 to be retired at the highest grade held. PERS 835 received and processed a Highest Grade Held request [in your case] in Jan 2021. The Action Memo was forwarded and approved for Ensign (O-1E) by Assistant Secretary of the Navy (Manpower and Reserve Affairs), ... on April 28, 2021.

After review of the service record, the member had two adverse "significant problem" fitness reports as a LTJG (O-2E) and was approved for the last highest grade held satisfactorily. This decision was approved by ASN (M&RA) and PERS 8-35 has no authority to override that decision.”

The advisory opinion concluded, “[m]ember's DFAS retired pay has been credited in accordance with the Highest Grade Held, O-1E, as approved by ASN (M&RA).”

On 14 February 2023, your Counsel provided a response to the aforementioned AO. This response stated:

As a preliminary matter, the advisory opinion by its own terms states that PERS-835 has no authority to “override” the decision by the Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN (M&RA)) to retire [you] as an LTJG (O-2E). While this may be an accurate statement of PERS-835’s authority, the BCNR is not subject to the same limitations and has full authority under 10 U.S.C. § 1552 to make the corrections to [your] record... Consequently, other than providing some clarity on the procedural posture of the case, the advisory opinion has little utility to the Board’s review. In any event, the ASN (M&RA)’s putative reasoning for retiring [you] in the lower grade is unjust for several reasons.

First, the ASN (M&RA)’s finding contravenes the clear records-correction directive by the BCNR in 2009 when the BCNR determined there was an error or injustice in [your] record. Its corrective relief specifically contemplated that, when [you] reached 30 years of combined active service and service in the Fleet Reserve, [you] would “be eligible to receive retired pay in the highest rank satisfactorily served” which it specifically stated would be “LT(jg),” which is in the grade of “O-2E.” AV003; see also 10 U.S.C. § 8334. Indeed, the BCNR’s decision was made on the heels of a valid, lawful exercise of the BCNR’s authority under 10 U.S.C. § 1552 concomitant with its obligations to determine the true nature of an error or injustice and to then provide full and effective relief. See *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (“The role of a correction board is to decide if an applicant has demonstrated the existence of a material error or injustice that can be remedied effectively through correction of the applicant’s military record, and, if so, what corrections are needed to provide full and effective relief.”) (quotation omitted). However, at the time, the BCNR was constrained to granting records corrections to existing records and unable to grant prospective relief on [your] retired grade for which [you] would become eligible years in the future. Nonetheless, they clearly expected that [you] would be retired as an O-2E, as a component of their records-correction relief under Section 1552. On this point alone, the Board should now close the loop and finalize the relief the BCNR granted in 2009.

Second, the ASN (M&RA)’s decision unfairly draws adverse conclusions from [your] service record that are tainted by injustices and incomplete by virtue of the constructive service the BCNR granted. The BCNR’s findings of error or injustice were based, in large part, on a finding that the Navy improperly denied [your] right to appear before a Nursing Clinical Competency Review Panel. AV031. The Board adopted the findings of an advisory opinion from the Deputy Assistant Judge Advocate General (Administrative Law) (“DJAG”) opined that the Navy violated regulation in failing to afford [you] Review Panel hearing that

would have included the right to be present at the hearing, present evidence, and be represented by legal counsel. See enclosed DJAG advisory opinion. DJAG further noted that [your] performance issues came at a time of serious difficulties in [your] personal life and [your] involuntary separation without a Review Panel hearing amounted to a \$500,000 lost retirement “fine” that was disproportionate in light of the circumstances. The board agreed and, in doing so, granted him constructive service credit for approximately three years of active-duty time. However, as a necessary byproduct of granting him constructive service credit, [your] record reflects three years of service for which [you] had no performance documentation for the ASN (M&RA) to evaluate to determine whether his service was satisfactory. As matters of fairness and equity, these facts counsel in favor of finding [your] service as satisfactory and retiring [you] as an O-2E like the BCNR initially intended.

Third, the available record is free of misconduct. Further, as discussed in [your] October 2022 reconsideration request, any determination that [you] somehow did not serve satisfactorily as an O-2E is unsupported by the record or otherwise unjust because his record is free of any incidents of misconduct. The record is clear that [you] experienced severe personal difficulties due to the sudden death of [your] mother and the serious illness of [your] father and that [you] sought to balance [your] Navy responsibilities and duties with the care of [your] parents. The Navy accused [you] of substandard duty performance against [you] (and did not provide due process for [you] to contest the allegations), but nonetheless [your] personal conduct was not called into question. [You were] never to punishment through Captain’s Mast (Article 15, UCMJ) or court-martial proceedings.

Your counsel’s response concluded, “[w]hen a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate.” *Yee v. United States*, 512 F.2d 1383, 1387 (Ct. Cl. 1975). Further, the BCNR has “an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief.” *Caddington v. United States*, 178 F. Supp. 604, 607 (Ct. Cl. 1959). “Here, in light of the particular circumstances of this case, principles of equity and fairness provide compelling reason for the board to finally and conclusively make [you] whole.”

The Board, in its review of your entire record and application, carefully weighed all potentially mitigating factors, to include your assertion that the ASN (M&RA)’s finding contravened the clear records-correction directive by the BCNR as expressed in the 2009 amendment. Specifically, that you would be eligible to receive retired pay in the highest rank satisfactorily served after 30 years, which rank was specified as “LT(jg).” However, the Board is empowered only to correct errors and/or remove injustices. As such, it can only act to change the effect of actions or decisions previously made on the basis of an error or injustice. It is not empowered to direct future decisions or outcomes. When the amendment to the Board’s recommendation in Docket No. 9339-08 was issued on 14 July 2009, no determination had yet been made regarding the highest grade in which you served satisfactorily for retirement purposes. Accordingly, that portion of the 2009 amendment to the Board’s decision in Docket No. 9339-08 which suggested that the highest rank in which you served satisfactory was LTJG can only be read as a



recommendation to the decision authority. Indeed, this statement was made under the heading "RECOMMENDATION," for which the ASN (M&RA) was ultimately the approval authority when the time came for such a decision. The Acting ASN (M&RA)'s determination on 28 April 2021 that the highest grade and rank in which you served satisfactorily was Ensign (O-1E) effectively rejected that recommendation. This does not represent a contravention of the relief directed by the Board in Docket No. 9339-08 as you described it, but rather a rejection of a non-binding recommendation made by the Board. The Board finds no error or injustice in this decision. The Acting ASN (M&RA)'s determination that Ensign (O-1E) was the highest grade in which you served satisfactorily was rationally based upon several adverse FITREPs that you received as a LTJG (O-2E). Further, a review of the Board's original decision in Docket No. 9339-08 reveals that the Board did not find your service in the rank of LTJG to be satisfactory, as it determined that your restoration to active duty would be inappropriate given your "unsatisfactory performance." Accordingly, the Board found no error or injustice in the determination of the Acting ASN (M&RA) that the highest rank in which you served satisfactorily was LTJG, contrary to the non-binding recommendation provided in the 2009 amendment to Docket No. 9339-08.

The Board also disagreed with your contention that the Acting ASN (M&RA)'s decision essentially perpetuated the injustice which the Board addressed in Docket No. 9339-08 (i.e., the disproportionate "fine" amounting to approximately \$500,000 in lost retirement benefits). By granting you constructive service credit sufficient to reach eligibility for transfer to the Fleet Reserve and subsequently for retirement, the Board ensured your retirement benefits based upon the highest grade that you served satisfactorily which otherwise would have been entirely denied. That you may only receive retirement benefits based upon your O-1E retirement rank, rather than the O-2E rank in which the Acting ASN (M&RA) determined that you did not serve satisfactorily, does not undermine the relief that the Board directed in Docket No. 9339-08 in any way. It was the inequity of your discharge after so many years of satisfactory performance due to your unsatisfactory performance over such a short period in a position for which you clearly were not suited that the Board sought to remedy in Docket No. 9339-08, and not the perception that your performance in the rank of O-2E was unsatisfactory.

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,

3/10/2023

[REDACTED]

Executive Director

Signed by: [REDACTED]