



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

██████████
Docket No: 3174-19
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER ██████████
XXX-XX-██████ USNR

Ref: (a) Title 10, United States Code, Section 1552
(b) SECNAVINST 5420.193
(c) USD memo, "Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations," of 25 July 18

Encl: (1) DD Form 149 w/attachments
(2) Commissioned in the U.S. Navy on 27 May 1992 and DD Form 214 of 31 Aug 2000
(3) DD Form 214 of 30 September 2007
(4) Notification of PFA Failure of 4 January 2013
(5) Notification of PFA Failure of 8 July 2013
(6) ADSEP of 5 November 2013
(7) Notification of PFA Failure of 25 November 2013
(8) Naval Medical Center ██████████ of 13 January 2014
(9) Notification of Administrative Show Cause Proceedings of 11 March 2014 and BOI
(10) ADSEP/BOI findings of 20 June 2014
(11) ASN (M&RA) Decision of 25 June 2014
(12) DD Form 214 of 31 August 2014 and DD Form 215 of 15 December 2014
(13) Department of Veterans Administration Rating of 8 April 2016
(14) Naval Discharge Review Board Decision of 12 July 2018

1. Pursuant to the provisions of reference (a), Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting to change the 31 August 2014 type separation to "Released From Active Duty" and narrative reason for separation to "Completion of Required Active Service" or "Secretarial Authority;" and restore of all pay, allowances, entitlements, rights, and privileges, affected by the separation. Specifically, restore retirement, or returned to active duty for completion of time required for retirement.

2. A three-member panel of the Board, sitting in executive session, considered Petitioner's application on 7 May 2020. The names and votes of the members of the panel will be furnished upon request. Petitioner's 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 Petitioner's application, together

Subj: REVIEW OF NAVAL RECORD OF FORMER [REDACTED]
XXX-XX [REDACTED] USNR

with all material submitted in support thereof, relevant portions of his naval record, and the enclosures, as well as applicable statutes, regulations, and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds 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.

b. Although enclosure (1) was not filed in a timely manner, it is in the interest of justice to review the application on its merits.

c. Petitioner commissioned as an ensign in the U.S. Navy on 27 May 1992 following graduation from the U.S. Naval Academy. On 31 August 2000 she was discharged with an honorable characterization of service at the completion of her required active service. On 8 February 2004, Petitioner returned to active duty service and she received an honorable characterization of service on 30 September 2007 and then immediately continued her active service on 1 October 2007. See enclosures (2) and (3)

d. On 4 January 2013, Petitioner received a notification of a physical fitness assessment (PFA) failure for failing to meet the required body composition assessment (BCA) standards in October 2012 (Cycle 2 2012). Her PFA notification expressly informed her that this was Petitioner's second PFA failure in the most recent 4-year period. Her first PFA failure occurred during Cycle 2 2011. The notification also clearly informed Petitioner that a third PFA failure in the most recent 4-year period would require mandatory administrative separation processing. See enclosure (4)

e. On 8 July 2013, Petitioner received another notification of a PFA failure for failing to meet the required BCA standards in June 2013 (Cycle 1 2013). The PFA notification expressly informed her that this PFA failure was the third in the most recent 4-year period. Petitioner's fitness report for the period ending 13 October 2013 documented her third PFA failure and the corresponding promotion recommendation was "Significant Problems." See enclosure (5)

f. On 5 November 2013, Petitioner's command re-routed the administrative separation (ADSEP) package through the immediate superior in the chain of command. Her Commanding Officer (CO) recommended separation, however, he requested that Petitioner be allowed to finish her 20-year career at his command. Commander, Navy Reserve Forces Command endorsed the ADSEP package on 19 November 2013 and concurred with the CO's recommendation that Petitioner be required to show cause for retention. See enclosure (6)

g. In the interim, on 25 November 2013, Petitioner received another PFA failure notification for not meeting the BCA standards in October 2013 (Cycle 2 2013). This was her fourth PFA failure in the most recent 4-year period. The PFA failure notification documented that her

Subj: REVIEW OF NAVAL RECORD OF FORMER [REDACTED]
XXX-XX- [REDACTED] USNR

weight had increased to 184 pounds from 165 pounds in June 2013. On 13 January 2014, Petitioner underwent a total laparoscopic hysterectomy at Naval Medical Center [REDACTED] due to abnormal uterine bleeding. See enclosures (7) and (8)

h. On 11 March 2014, Navy Personnel Command (NPC) notified Petitioner that she was required to show cause for retention in the naval service, and NPC also directed that Commander, Navy Region Mid-Atlantic (CNRMA) convene a Board of Inquiry (BOI). The NPC letter informed Petitioner that the show cause action was initiated based on substandard performance of duty by failing to conform to prescribed standards of dress, weight, personal appearance, or military deportment. The NPC letter placed Petitioner on notice that the least favorable characterization of service that may be recommended in her case was honorable, and informed her of certain rights in connection with the BOI. On 24 March 2014, Petitioner acknowledged her rights and elected to appear before a BOI. CNRMA requested defense counsel on her behalf on 24 March 2014, and the Defense Service Office Southeast (DSO) in [REDACTED] assigned her counsel on 27 March 2014. CNRMA's defense counsel request to the DSO specifically noted that the BOI was scheduled for 22 April 2014. See enclosure (9)

i. On 22 April 2014, a BOI convened in Petitioner's case. Following the presentation of evidence and witness testimony, the BOI members unanimously determined that Petitioner failed to conform to prescribed standards of military dress, weight, personal appearance, or military deportment. Based on their unanimous findings, the BOI members recommended that she: (a) be separated from the naval service, and (b) receive an honorable characterization of service. On 24 April 2014, CNRMA forwarded the BOI report of proceedings to the Secretary of the Navy via NPC. See enclosure (9)

j. On 20 June 2014, CNP forwarded the BOI findings to the ASN (M&RA) with a recommendation that Petitioner be separated with an honorable discharge and assigned a separation code of "JCR" (weight control failure). On 25 June 2014, ASN (M&RA) approved the separation and directed an honorable discharge with a "JCR" separation code. Ultimately, on 31 August 2014, Petitioner was administratively separated from the Navy with an honorable characterization of service and \$83,497.41 in separation pay. See enclosures (10) and (11)

(1) On her separation date, Petitioner had completed approximately 18 years, 11 months, and 11 days of active duty service. The active service computations were calculated based on the final DD Form 214 (as corrected by a DD Form 215 issued on 15 December 2014). The Board observed that Petitioner's counsel mistakenly argued that her discharge occurred only two months prior to retirement eligibility date. See enclosure (12)

k. On 8 April 2016, the Department of Veterans Administration adjudicated Petitioner with an overall or combined disability rating of 80% for certain service-connected mental health and medical issues. See enclosure (13)

l. On 12 July 2018, the Naval Discharge Review Board (NDRB) determined that Petitioner's discharge was proper as issued and that no change was warranted. The NDRB concluded that there was no impropriety and that the command followed applicable regulations and procedures. See enclosure (14)

Subj: REVIEW OF NAVAL RECORD OF FORMER [REDACTED]
XXX-XX- [REDACTED] USNR

CONCLUSION:

After careful and conscientious consideration of the entire record, the Board found the evidence submitted was insufficient to establish the existence of probable material error or injustice.

The Board carefully weighed all potentially mitigating factors, such as Petitioner's contentions that included, but were not limited to, that:

(a) she was only made aware of the BOI a week before it was set to convene and just two months after major surgery - and that was not proper notice and did not allow for adequate preparation;

(b) it was unjust for Petitioner to be discharged without the opportunity to fully and fairly defend herself at the BOI, and this effectively constituted a denial of due process of law;

(c) being discharged just shy of retirement eligibility was fundamentally unfair;

(d) consideration by this Board is not limited to the events leading up to her separation and the Board can consider other factors, as well as equitable principles and clemency;

(e) Petitioner's discharge with no misconduct involved was unwarranted and unfair;

(f) that she should not have been processed for separation on the eve of her retirement and that Petitioner had earned the right to complete twenty years of active service and retire;

(g) the Navy's historic handling of these types of cases;

(h) that chronic anemia and its related symptoms have prevented Petitioner from exercising as much as she would like, and

(i) that Petitioner received ineffective assistance of counsel during her BOI proceedings. However, the Board concluded these contentions and mitigating factors were not sufficient to set aside Petitioner's administrative separation, restore her back to active duty to complete the time required for retirement, remove corresponding derogatory material, make remedial changes to her DD Form 214, or grant any other requested relief in her case.

The Board determined that Petitioner's proffered arguments, albeit compelling, were not persuasive. Moreover, the Board found that the BOI findings were legally and factually sufficient, and the Board did not identify any substantive, evidentiary, or procedural BOI defects that prejudiced her. Additionally, the Board concluded that Petitioner's separation processing was in compliance with all Department of the Navy directives and policy at the time of her discharge.

The Board was aware of the timing of the BOI and separation as Petitioner approached retirement eligibility. However, weight control failure is a mandatory basis for separation processing, and once she failed her third PFA in a four-year period, the command did not have

Subj: REVIEW OF NAVAL RECORD OF FORMER [REDACTED]
XXX-XX- [REDACTED], USNR

any discretion on whether or not to initiate separation proceedings regardless of Petitioner's seniority or time in service. The Board observed that the triggering event for the administrative separation - the 2013 PFA failure - occurred more than twenty-six months prior to her projected initial retirement eligibility date in September 2015. Petitioner's command did not unreasonably delay before taking steps to initiate the ADSEP process, and from the time she failed the third PFA in 2013 to the BOI and ultimate separation in August 2014, the entire process took less than 15 months. Thus, the Board determined that the timing issue was largely irrelevant to the analysis of the case, and also concluded that there was no evidence in the record regarding any command misconduct, improper motives, or abuses of discretion in the investigating, handling, and processing of the BOI and discharge.

The Board also observed after the command initiated ADSEP processing, Petitioner failed a fourth PFA in October 2013 by exceeding the BCA standards and that she had gained an additional nineteen pounds since the June 2013 PFA measurements. Further, the Board determined that if Petitioner's medical conditions or symptoms were of such severity to prevent her from maintaining a proper fitness regimen, it was incumbent upon the Petitioner to seek any applicable medical waivers in advance.

The Board concluded that the Petitioner had adequate time to prepare the BOI defense and that no ineffective assistance of counsel (IAC) occurred. For Petitioner to prevail on the IAC issue, the Board determined that she would need to show that not only was there an error, but that the error prejudiced her. In other words, Petitioner must show that there was a reasonable probability that, but for the error, her discharge results would have been different. The Board unequivocally determined that she failed to meet the burden to show that defense counsel's performance was deficient and fell below an objective standard of reasonableness, or that there was a reasonable probability of a more favorable result had the alleged deficiencies actually occurred. The Board concluded that no IAC occurred and that any such suggestion or argument was without merit.

The fact remains that Petitioner failed not only three, but four PFAs by exceeding the BCA standards. Following each PFA failure, she was clearly put on notice of the repercussions of future failures. The command processed her for separation following the third BCA failure and her case was presented to and heard by a BOI panel comprised of senior naval officers. The BOI members voted to discharge Petitioner and she was ultimately separated with an honorable discharge. Accordingly, the Board did not find any evidence of an error or injustice in this application.

Additionally, the Board reviewed Petitioner's application under reference (c), the recent guidance provided in the Under Secretary of Defense's memorandum dated 25 July 2018 entitled, "Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Regarding Equity, Injustice, or Clemency Determinations" (USD Memo). The purpose of the USD Memo is to ease the process for veterans seeking redress and assist Boards for Correction of Military/Naval Records "in determining whether relief is warranted on the basis of equity, injustice, or clemency." The USD Memo noted that "increasing attention is being paid to...the circumstances under which citizens should be considered for second chances and the restoration of rights forfeited," and that "BCM/NRs have the authority to

Subj: REVIEW OF NAVAL RECORD OF FORMER [REDACTED]
XXX-XX-[REDACTED] USNR

upgrade discharges or correct military records to ensure fundamental fairness.” The USD Memo sets clear standards and principles to guide BCM/NRs in application of their equitable relief authority, and further explains that boards shall consider a number of factors to determine whether to grant relief, including any arrests, criminal charges, and convictions. However, even in light of the USD Memo, the Board still concluded that, given the totality of the circumstances, Petitioner’s request does not merit relief.

RECOMMENDATION:

That Petitioner’s request be denied.

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

That, upon request, the Department of Veterans Affairs be informed that Petitioner’s application was received by the Board on 18 March 2019.

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. The foregoing action of the Board is submitted for your review and action.

7/23/2020

[REDACTED]

Executive Director

ASSISTANT SECRETARY OF THE NAVY (M&RA) DECISION:

JUN 23 2021

Reviewed and Approved Petitioner Request (Grant Relief)

Reviewed and Approved Board Recommendation (Deny Relief)

[REDACTED]

Acting