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

[redacted]
Docket No. 6863-24
Ref: Signature Date

[redacted]

Dear [redacted]:

This is in reference to your application for reconsideration of the decision made by the Assistant General Counsel (Manpower and Reserve Affairs) (AGC (M&RA)) on behalf of the Secretary of the Navy (SECNAV) disapproving the finding of the majority in Docket No. 6197-18 that you should have been eligible for Family Separation Allowance (FSA).[1][2] Upon careful review and consideration of all the evidence of record, the Board found insufficient evidence of any error or injustice in the AGC (M&RA)'s decision. In addition to finding no error or injustice in this decision, the Board noted that the substance of your reconsideration request misconstrues the role and authority of this Board and therefore requests relief beyond its authority to grant. Accordingly, your application has been denied.

A three-member panel of the Board, sitting in executive session, reconsidered the decision of the AGC (M&RA) in light of your reconsideration request on 1 August 2024. The names and votes of the panel members of the panel will be furnished upon request. Your allegations of error or injustice were reviewed in accordance with the administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board included your application, together with all material submitted in support thereof; the entire case file for Docket No. 6197-18; relevant portions of your naval record; and applicable statutes, regulations, and policies.

The Board determined that your personal appearance, with or without counsel, would not materially add to its understanding of the issues involved in your case. Accordingly, the Board

[1] You mistakenly attribute this decision to the Executive Director of the Board for Correction of Naval Records [hereinafter referred to as the Board] and the minority member of the Board. This decision was made by the AGC (M&RA) on behalf of the SECNAV because the Executive Director of the Board determined that the majority's decision warranted Secretarial review in accordance with Section 6(e)(2)(c) of Enclosure (1) to SECNAVINST 5420.193. The authority to conduct such reviews on behalf of the SECNAV was delegated to the AGC (M&RA) by memorandum dated 19 April 2011.

[2] The Board acknowledges that you requested reconsideration of the decision in Docket No. 2997-23 in addition to that of the AGC (M&RA) in Docket No. 6197-18. Reconsideration of the former is being conducted separately under Docket No. 1790-24.

determined that your personal appearance was not necessary and considered your case based on the evidence of record.

Your primary argument for reconsideration of the AGC (M&RA)'s decision in Docket No. 6197-18 was that the Department of Defense (DOD) implementing regulation for FSA, upon which the AGC (M&RA) relied to deny relief in Docket No. 6197-18, is inconsistent with Federal law. Specifically, you asserted that the DOD Financial Management Regulation (FMR)[3] is inconsistent with 37 U.S.C. § 427 because the latter does not limit entitlement to FSA for a Service member married to another Service member who is entitled to FSA.[4] Your request for relief on this basis misconstrues the authority and function of this Board. In accordance with 10 U.S.C. § 1552 and SECNAVINST 5420.193, the Board is empowered to change a naval record in any way deemed necessary to correct an error or remove an injustice. The Board is not, however, a judicial body with the authority to judge the lawfulness of military regulations. It is not empowered to adjudge the lawfulness of Department of the Navy (DON) regulations, so it is certainly not empowered to adjudge the lawfulness of regulations promulgated under the authority of the Secretary of Defense. The Board operates under the authority of the SECNAV, and the SECNAV himself is bound by the DOD FMR. Therefore, the Board is also bound by the DOD FMR. As such, even if the Board agreed with your theory that the DOD FMR is inconsistent with 37 U.S.C. § 427, it could not grant you relief on this basis.[5] Because your spouse received FSA during the period in question, you were not entitled to simultaneously receive FSA in accordance with subparagraph 270203D.1.a. of Volume 7A of the DOD FMR.

The Board found that the majority's recommendation in Docket No. 6197-18 was neither supported by the evidence nor feasible. As discussed above, you clearly were not eligible to receive FSA in accordance with subparagraph 270203D.1.a. of Volume 7A of the DOD FMR, and as discussed further below the exception of subparagraph 270203D.2. clearly did not apply to your case. As such, the majority's conclusion in Docket No. 6197-18 was simply wrong and unsupported by the evidence. The majority's error was compounded by the fact that it recommended relief which could not be executed. Specifically, the majority recommended that your record be corrected, where appropriate, to reflect that you were entitled to FSA from 1 August 2016 through 31 July 2017. Because your spouse received FSA for the same period, there was no correction to your record which could have been made which would reflect your eligibility for FSA during this period. Even if you were otherwise eligible for FSA, of which the Board was not convinced you could receive the allowance for this period under the circumstances only if your spouse's military record was corrected to reflect that she was not entitled to FSA. This would entail recoupment of all FSA that was paid to her during this period. As your spouse has not requested this correction to her naval record, the Board lacks the

[3] DoD 7000.14R. Volume 7A, Chapter 27, governs entitlement to FSA. All references to the DOD FMR herein refer to the version in effect at the time in question. The effective date for that Volume 7A, Chapter 27, was November 2015.

[4] Subparagraph 270203D.1.a. provides that "not more than one monthly [FSA] allowance may be paid with respect to a married military couple for any month. Each member may be entitled to FSA within the same month, but both cannot simultaneously be entitled." Subparagraph 270203D.2 provides the only exception to this rule. Specifically, it permits payment of FSA to both married members "when they reside together with their dependents immediately before being separated from dependents, by competent orders to assignments [authorized for FSA]."

[5] To be clear, the Board found no merit to this argument which you did not previously raise in Docket No. 6197-18.

authority to order such action. Accordingly, it was prudent for the Board's Executive Director to recommend that the majority's findings and recommendation be disapproved in Docket No. 6197-18, and entirely appropriate and necessary for the AGC (M&RA) to act as he did pursuant to that recommendation. Likewise, even if the Board believed now that you were entitled to FSA during the period in question, there is no change to your naval record that it could direct to make this so. The Board is empowered to correct naval records; it is not empowered to simply declare you entitled to allowances to which you were not otherwise entitled.

The Board found no merit or relevance to the clarification you provided that your spouse and daughter resided with you in [redacted] until 1 August 2016. This fact actually undermines your claim. The exception to the general rule that both married members cannot simultaneously receive FSA states that "FSA is payable to both married members when they reside together with their dependents immediately before being separated from dependents, by competent orders to assignments prescribed in subparagraphs 270203.A.1 through 3. *Each member's entitlement is determined individually based on assignment and separation from dependents* (*emphasis added*)."[6] Your spouse executed her FSA-eligible orders on 6 April 2016, nearly two months before your daughter was born. As such, you were not residing together with your dependent immediately before being separated – you had no dependents with whom to reside together with at that time. The relevant date of separation from dependents under this exception is obviously intended to be the date that the orders were executed. The Board found no merit to your contention that the exception applied under the unique and unpredictable circumstances that you described. If anything, the circumstances you describe would call into question the propriety of the FSA received by your spouse for the period from 6 April 2016 to 31 July 2016 since you were not separated, but that is beyond the Board's purview. Further, the exception clearly applies only when both members receive assignment orders eligible for FSA. Your wife's orders were prescribed in these subparagraphs, as evidenced by the fact that she received FSA, but yours were not. In fact, you did not execute or receive any new assignment orders. As such, you never elected to serve an unaccompanied tour as you claim – you simply continued serving in an accompanied tour while unaccompanied.[7] Such a voluntary decision does not entitle any member to FSA. In this regard, your claim that your daughter could not accompany you at your duty station for certified medical reasons is fatally undermined by your assertion that she was living with you at that duty station for the first two months of her life.[8]

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

[6] See subparagraph 270203D.2.

[7] In accordance with 37 U.S.C. § 427(c), "a member who elects to serve a tour of duty unaccompanied by his dependents at a permanent station to which the movement of his dependents is authorized at the expense of the United States … is not entitled to [FSA] (emphasis added)."

[8] In this regard, the Board does not question the value or importance of breastfeeding but does reject the novel contention that breastfeeding would ever constitute a certified medical reason which would prevent your daughter from residing at a CONUS-based duty station in [redacted]. No medical reasons prevented this occurrence; rather, it was a discretionary parental choice regarding how to nourish the child which precluded her from living with you in [redacted]. The Board believes that the difficulty that naval authorities may have had in explaining the medical certification requirement that you described in Docket No. 6197-18 was most likely due to the absurdity of your insistence that this circumstance entitled you to FSA – it can be sometimes difficult to explain what is patently obvious.

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,

9/13/2024

[redacted]

Deputy Director

Signed by: [redacted]