

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-127

FINAL DECISION

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This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on May 26, 2004, upon receipt of the applicant's completed application and military records.

This final decision, dated February 10, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his military record by setting aside his involuntary discharge for weight noncompliance and reinstating him into the Coast Guard Reserve, although he was discharged from the regular Coast Guard.

APPLICANT'S ALLEGATIONS

The applicant alleged that Coast Guard committed an error by discharging him due to weight control failure, without first assigning him a probationary period to lose the weight. He alleged that he was never placed on probation as required by (COMDTINST) M1020.8D. The applicant argued that the maximum allowable weight (MAW) used in his December 7, 2002, weight screening was erroneous. He further alleged that if his correct MAW had been used, he would not have been subject to involuntary discharge but would have been placed on weight probation.

According to Commandant Instruction (COMDTINST) M1020.8D, with a height of 67 inches and a wrist size of 7 1/2 inches, the applicant's MAW was 193 pounds and his maximum allowable fat (MAF) was 27%. The applicant argued that on June 20, 2001, he was assigned a new MAW of 225 pounds, which should have been used on December 7, 2002, rather than 193 pounds. He stated that if 225 pounds had been used as his MAW, he would have been only 20 pounds overweight in December 2002 and eligible for a 36-week probationary period to lose the excess weight. However based on a 193-pound MAW, the applicant was found to be 52 pounds overweight with 39% body fat. Therefore, the applicant was processed for discharge rather than for probation because it would have taken more than the allowed 36-week probationary period for the applicant to lose all the excess weight and body fat based on the calculation contained in the regulation that required a member to lose one pound per week and/or 1% body fat per month.

The applicant submitted a statement entitled "summary of Coast Guard Career." He stated that he served during the first Gulf war and that he was recalled immediately after September 11, 2001. He also wrote of alleged mistreatment. He claimed that he was ordered to refer himself for a psychiatric examination. He further claimed that a petty officer first class (PO1) had harassed him for about a year. According to the applicant the PO1 stated at one point "aren't you ashamed to wear that achievement ribbon? You're an old man and don't deserve it. Don't worry I will do everything to make sure you are not integrated and thrown out of the Coast Guard." The applicant stated that he wrote a complaint against the PO1, which resulted in his removal from the public affairs office. He stated that he was sent to another unit, where a chief warrant officer, a senior chief petty officer and a petty officer placed him in a room and yelled and screamed all sort of profanity at him. He stated he was treated as a leper.

SUMMARY OF THE RECORD

On May 23, 1985, the applicant enlisted in the Coast Guard Reserve.

On January 27, 1996, an administrative remarks page (page 7) was entered in the applicant's record documenting that the applicant was 73 pounds overweight with 35% body fat. The applicant was given until June 22, 1997 to reduce his weight to 197 pounds and his body fat to 27%. The entry advised the applicant that if he failed to bring his weight and body fat into compliance by June 22, 1997, he would be transferred to the individual ready reserve (IRR).

On June 4, 1996, a page 7 was placed in the applicant's record documenting a mark of 2 in the Health and Well-Being category on his performance evaluation for the period ending May 31, 1996. The page 7 also states that the applicant reported for duty approximately 70 pounds over his MAW.

In June 2001, the applicant reentered the Selected Reserve after a number of years in the IRR, according to his CO.

On June 20, 2001, a page 7, acknowledged by the applicant, was entered into his record stating that he was in compliance with his maximum allowable weight/body fat standard. The entry noted that the applicant was 68 inches tall. The entry further stated the following:

Your age is 48 and your percent body fat is 22% based on a Bioelectrical Impedance Analysis conducted by Fitness Consultant Personal Training Center on 20 June 01 and approved by ISC Boston medical on 5 July 01. In accordance with COMDTINST M1020.8 (series), you are assigned a maximum allowable weight for screening purposes of 225 (pounds). Should you exceed this maximum allowable weight in the future, you will be required to complete a body fat determination.

According to the applicant and his then-supervisor, the applicant began serving a period of extended active duty, in the fall of 2001. In the spring of 2002, the applicant applied for integration into the regular Coast Guard. In a March 28, 2002, letter supporting the applicant's request for integration, the then-supervisor wrote that the applicant volunteered for recall and had been on extended active duty since September 11, 2001.

An April 22, 2002, message from CGPC approved the applicant's request for integration provided he was fully qualified.

On July 1, 2002, the applicant enlisted in the regular Coast Guard for four years.

On August 1, 2002, the applicant was screened for weight compliance. Based on a height of 66.5 inches, a wrist size of 7 3/4 inches, and a weight of 221 pounds, he was found to be 26 pounds over weight. Therefore, he was required to have a body fat measurement. He was determined to have 39% body fat, which meant that he exceeded his allowable body fat by 12%. The applicant's command attempted to place him on weight probation by ordering him to lose the weight and fat by May 1, 2003. According to his CO, the probationary period was never perfected (discussed below).

On December 7, 2002, the applicant underwent another weight screening. He was measured as being 67 inches tall, having a 7 1/2 inch wrist size, weighing 245 pounds, and having 39% body fat. The applicant was advised in a page 7 that he was considered to be 52 pounds over weight. He was further informed, "In accordance with allowable weight standards for Coast Guard military personnel . . . your probationary period would require 36 weeks or more, therefore you are hereby notified that, instead of probation, you will be recommended for separation."

On January 31, 2003, the applicant's commanding officer (CO) requested that the applicant be discharged from the Coast Guard because the applicant's excessive weight and body fat would require a probationary period longer than 36 weeks. The CO explained that the attempt to place the applicant on weight probation in August 2002 was ineffective for two reasons. (1) The applicant should not have been subject to a body fat determination because he did not exceed his screening weight of 225 pounds. (2) The command failed to obtain a medical examination of the applicant prior to attempting to place him on probation. However, the CO stated the applicant's acknowledgement of the August 1, 2002 page 7 entry, as well as counseling from a chief warrant officer (CWO) placed the applicant on notice to lose weight not gain it.

The CO stated that because the applicant appeared to be gaining weight, he was weighed on December 7, 2002. The CO stated that his request for discharge was based on the results of the December 2002 screening. The CO stated that there was no underlying medical condition or abnormal metabolic functions that prevented the applicant from losing weight.

The CO attached a statement from a CWO who reported to the unit in late August 2002 to his request for the applicant's discharge. The CWO stated that in September 2002 he received an unsigned page 7 stating that the applicant was on weight probation, but that he was not able to learn more about the probation. He stated that on November 20, 2002, he discovered a local August 1, 2002 page 7 with the applicant's then-supervisor's signature placing the applicant on weight probation. He stated that on November 21, 2002, the applicant agreed to sign the August 1, 2002 page 7. The CWO stated, "I expressed that this was an advisory notifying him that he exceeded his maximum allowable weight, that he was given time to lose the excess weight, and that if he did not, he was subject to discharge. " The CWO stated that he counseled the applicant on a weekly basis about diet and exercise. The CWO further stated the following:

On 4 Dec 2002, I asked [the applicant] to report to the clinic to measure his progress to lose weight. I hoped that if he improved on his 1 Aug screening, it would have given him additional motivation to continue his program. If it showed an increase from Aug 1, it would have validated my suspicion that he did very little to lose the weight. He came in 52 pounds overweight, double the excess weight from the 1 Aug screening. Immediately following this screening [the applicant] sent me an email admitting that he hadn't been exercising, and that he would take then take my advice more seriously.

On January 13, 2003, the applicant submitted a statement objecting to his discharge. He stated that on July 16, 2001 he was given a weight waiver and that

subsequent to September 11, 2001, he was approved for integration into the regular Coast Guard. The applicant further denied that he had ever been counseled on a weight program, but that he had been told to diet and exercise. He alleged that a personality conflict with a CWO was relevant to his weight issue.

On March 11, 2003, a page 7 advised that applicant that he could apply for reenlistment to his former rate provided that he was within the MAW, met appearance standards, and had been discharged for at least six but not more than twelve months.

On March 12, 2003, the applicant was honorably discharged from the Coast Guard due to weight control failure, with a JCR separation code, and a RE-3F reenlistment code.

VIEWS OF THE COAST GUARD

On September 20, 2004, the Judge Advocate General (TJAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. He stated that the applicant failed to provide sufficient evidence to overcome the presumption of regularity afforded to the Coast Guard. He stated, citing Arens v. United States, 969 F.2d 1034, 1037 (D.C. Cir. 1992), that absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith.

TJAG acknowledged that the August 1, 2002 page 7 (attempted probation) was made in error, but that the error was not relevant to the relief sought by the applicant. He argued that the applicant was properly separated based on the weight screening conducted on December 7, 2002. He further stated that the applicant was not entitled to a probationary period after the December 7, 2002 screening because the probationary period that would have been required would have exceeded the 36 weeks allotted by the instruction.

TJAG stated that although the August 1, 2002 page 7 was prepared in error, it should remain in the applicant's record. TJAG stated that the page 7 is referenced and discussed in the CO's request for discharge and its removal would cause confusion in the record.

TJAG attached a memorandum from Commander Coast Guard Personnel Command (CGPC) as Enclosure (1) and asked the Board to accept it as part of the advisory opinion. CGPC recommended that the applicant's request be denied and offered the following comments in support of his recommendation:

1. [T]he [MAW] standards are based on a person's age, height and frame size. This program was established to contribute to the fitness for duty

and appearance of its members. To meet our operational challenges as part of the Armed Services, all members must be fit for duty and appear so in uniform.

2. The applicant's allegation that the Coast Guard violated COMDTINST M1020.8D by not placing him on probation is in error. . . . [T]he applicant, upon determination that his body fat was within standards, was assigned a *screening weight* on June 20, 2001 . . . equal to his weight when the body fat determination was made. This did not establish a new [MAW]. The applicant's MAW for screening purposes was established to prevent the applicant from having to perform additional body fat determinations as long as he did not gain additional weight. [However] if he exceeded the screening weight, he would be screened for a new body fat determination. The applicant acknowledged on the June 20, 2001 page 7 that he was given the opportunity to review COMDTINST M1020.8D and fully understood that if determined to be over fat after being found to be over his screening weight, he would be placed on probation IAW [in accordance with] the standards outlined in Article 3.C. with calculations based upon his original MAW weight, not his screening weight.

3. [I]t was acknowledged "there were a number of aspects that make [the August 1, 2002 page 7] and the assigned probationary period incorrect" and that the applicant was not over his MAW for screening purposes that was established in June 2001. [The August 1, 2002 page 7] should be considered void and invalid. At the point the applicant was allowed to be below his MAW for screening purposes, no further actions should have been taken upon the applicant.

4. An evaluation of the applicant's weight was performed on December 7, 2002, because the applicant appeared to be gaining weight. This observation, we can presume, would have been made even in the absence of the August 1, 2002, page 7. Since the applicant served in the Public Affairs Detachment and had regular interaction with the public, it is expected that he would be evaluated upon such an observation. It was in this evaluation that the applicant was found to weigh 245 pounds (52 pounds above his maximum of 193) with a body fat of 39% (12% above his maximum of 27%) and established the basis for his discharge. The applicant was then referred for a medical evaluation that indicated there was no underlying medical condition causing the applicant's excess weight or body fat. Since he exceeded his [MAW] and maximum allowable fat to the point by which it would take more than 36 weeks to be within standards, he was processed for separation without a probationary period in accordance with Coast Guard policy.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 14, 2004, the BCMR received the applicant's reply to the advisory opinion. The applicant disagreed that the August 1, 2002, page 7 was irrelevant to his case. He implies that the Coast Guard argued that the August 1, 2002 page 7 was irrelevant because it did not help their case. The applicant argued that the Coast Guard believes it is relevant because it shows the Coast Guard's failure to follow the requirements of the regulation when placing him on probation. He asserted that the Coast Guard's failure in this regard denied him the opportunity for a 36-week probationary period. "I was never allowed as per rules and regulations to have 36 weeks to be counseled and lose weight."

The applicant stated that he was never counseled, sent to a corpsman, or told about a weight program that he should follow. He stated, "While covering a story I discovered a nutritionist who put me on a program of diet and exercise. I was doing well, but not given a chance, because [a] CWO . . . [was] clairvoyant and [knew] how much weight I would lose in 36 weeks." In subsequent correspondence, he argued that under the regulation, an overweight person should receive diet counseling.

The applicant commented how strange it was that he was awarded an Achievement Medal with Operational Distinguishing Device and a few weeks later the same people who praised him placed him in a room and verbally abused him.

The applicant also submitted copies of several articles that he wrote for the Coast Guard, a copy of the citation accompanying the Transportation 9-11 Ribbon presented to him by the Secretary, and a copy of the last page of his performance evaluation for the period ending June 27, 2002. On the evaluation in the Professional Qualities factor, he received marks 7 (on a scale of 1 to 7, with 7 being the highest) in the loyalty and respecting others categories. A June 11, 2002, page 7 documents and justifies the 7s in these areas.

APPLICABLE LAW

Allowable Weight Standards for Coast Guard Personnel (COMDTISNT M1020.8D)

Article 1.A. defines MAW, maximum percent body fat (MAF), and Screening MAW as follows:

[MAW]. [MAW] permitted for a member based upon height, frame size and gender. If this weight is exceeded, the member is referred for a

percent body fat determination. Ordinarily, MAW is well above ideal or healthy weight norms . . . and members should strive to attain and maintain a body weight below their MAW.

Maximum Percent Body Fat. Maximum body fat permitted for a member based upon gender and age . . .

Screening [MAW]. A screening weight is given to a member who exceeds his or her MAW but has been determined to be within his or her maximum body fat. It assumes that as long as the member's weight remains below his or her screening weight, he or she is still within maximum percent body fat. This removes the need to recalculate body fat each time he or she is found to exceed MAW.

Article 2.B. states that all military personnel shall be screened against the maximum weight standards at least annually and prior to certain personnel actions, such as the assignment of reservists to long-term active duty and to high visibility assignments. This Article further provides for screenings as necessary at the discretion of the CO.

Article 3.B. provides that all overweight members who exceed the MAF standards shall be referred to a medical facility to receive counseling on proper nutrition and methods to reduce the excess body fat.

Article 3.C. states that members exceeding their weight and fat standards shall be placed on probation to lose the excess weight and fat. Also it stated that the probationary period shall equal the amount of time it would take the member to lose all excess weight at an average of one pound per week or one percent body fat per month, whichever is greater. It further states that if the probationary period would require more than 36 weeks, the member is to be discharged.

Article 4.c. is entitled "Assigning a New Maximum Weight." It provides for the following:

Some members' physical makeup, primarily due to high muscle mass, puts him or her in an overweight category even though their body fat percentage is within limits. In each case such as this, upon determination that the member's body fat is within standards, the member will be assigned a screening weight equal to the member's weight when the body fat determination is made. This does not establish a new MAW. It is designed to avoid requiring the member to have additional body fat determinations as long as he or she does not gain additional weight . . . If the member exceeds the screening weight, he or she will be screened for a

new body fat determination. If determined to be over fat, he or she shall be placed on probation IAW the standards outlined in Article 3.C. with calculations based upon the member's original MAW, not his or her screening weight. [Emphasis added.]

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant was discharged as a result of a December 2002 weight screening that found him to be 52 pounds over his MAW of 193 pounds and 12% over his body fat of 27%. The applicant has not shown that the Coast Guard violated the regulation by using his original MAW of 193 pounds rather than the 225-pound screening MAW to determine his excess weight in December 2002. In accordance with the regulation, on June 20, 2001, the applicant was given a screening MAW of 225 pounds, because at that time, although he exceeded his 193-pound MAW, he was below his body fat maximum of 27%. According to article 1.A of the COMDTINST M1020.8D as long as the applicant remained at or below his screening weight of 225 pounds, he was not required to undergo future body fat measurements. Clearly in December 2002, the applicant, at 245 pounds, had exceeded his screening MAW of 225 pounds and was required to undergo a body fat measurement.

3. Article 4.c. of COMDTINST M1020.8D states that the assignment of a new screening weight does not establish a new MAW. This provisions states that the screening weight is designed to avoid having a member undergo additional body fat determinations as long as the member does not gain additional weight. It further states the following.

If the member exceeds the screening weight, he or she will be screened for a new body fat determination. If determined to be over fat, he or she shall be placed on probation IAW the standards outlined in Article 3.C. with calculations based upon the member's original MAW, not his or her screening weight. [Emphasis added.]

4. The above provision established that when the applicant exceeded his screening weight he was to receive a new body fat determination and that the calculation to determine any excessive weight would be based upon his original MAW, which in the applicant's case was 193 pounds. The Coast Guard acted in accordance

with regulations when it used the applicant's original MAW to determine whether he should be placed on weight probation or discharged. Discharge was appropriate because Article 3.C. states that if a probation would require a period longer than 36 weeks the member is to be discharged. Under the regulation, the Coast Guard uses a calculation of one pound per week or 1% body fat per month to determine how long it would take a member to lose excess weight. Losing one pound per week would have required a probationary period in the applicant's case of 52 weeks, far more than the 36-week probationary period allowed in the regulation. Even if the excess body fat had been used to calculate the probationary period, it would have taken the applicant 12 months to lose the excess body fat losing 1% body fat per month, which would have also exceeded the 36 weeks probationary period. According to the medical examination subsequent to the applicant's December 7, 2002 screening, there was no underlying medical reason that prevented the applicant from losing weight.

6. Other than his allegation, there is no evidence in the record that the applicant was given a weight waiver. However in June 2001, the applicant was given a screening MAW of 225 pound, as discussed above.

7. The applicant's argument that the Coast Guard's failure to perfect its attempt to place him on probation in August 2002, denied him the opportunity for a probationary weight period is without merit. In this regard, the Board notes that the attempted probation was in violation of the regulation and that it was never enforced. The Board fails to see any prejudice to the applicant as a result of the Coast Guard's failed attempt to illegally place him on weight probation. Moreover, the applicant could have benefited from this mistake by heeding the fact that he exceeded his MAF by 12% and deciding to do something about it. Instead, by the time the applicant was screened in December 2002 he had gained an additional 24 pounds. Rather than gaining weight, if the applicant had lost weight, the December discharge probably would not have occurred. The applicant does not deny that he was aware on August 1, 2002 that he had exceeded his body fat measurement.

8. Regarding the applicant's assertion that he was never counseled about a weight loss program from medical personnel, the Board finds that he was not eligible for a medical referral resulting from either the August 1, 2002, or December 7, 2002 screenings. According to Article 3.B. of COMDTINST M1020.8D excessive body fat is required for a medical referral. The applicant did not meet this requirement because on August 1, 2002, he was below his screening MAW. Any body fat measurement taken while he was below his screening MAW violated the regulation, because Article 1.A of the COMDTINST M1020.8D provides that as long as the applicant remained at or below his screening weight of 225 pounds, he was not required to undergo body fat measurements. Although a referral after the August 1, 2002, screening may have been helpful to the applicant, the Coast Guard did not err by not doing so. The December 7, 2002, screening did not require a referral for counseling because under the weight

instruction the applicant was to be discharged because his probationary period would have exceeded the 36 weeks allowed under regulation. Moreover, the Board notes that the applicant received counseling about his weight. A CWO from the applicant's unit stated that he counseled the applicant weekly about dieting and exercising to bring his weight into compliance. While the applicant complains about the Coast Guard's failures, he does not offer any evidence that he sought counseling from Coast Guard Personnel about losing weight.

9. The applicant complained that each of the weight screenings stated a different height (5'6", 5'8", and 5'7") and wrist size (7 1/2 and 7 3/4 inches). This complaint is without merit because any combination of the various height and wrist measurements would produce a MAW that is well below the applicant's December 7, 2002 weight of 245 pounds. Using a height of 68 inches and a wrist measurement of 7 3/4 inches, the applicant's MAW would have been 201 pounds.

10. The applicant also alleged that maltreatment by his unit personnel contributed to his weight problem. However, the applicant offered no evidence on this point, except for his own allegations. The applicant's sole statement in this regard is insufficient to persuade the Board that he was harassed and abused by his unit. In passing, the Board notes that the applicant failed to explain how such alleged treatment contributed to his weight gain.

11. Last, the Board notes that Article 2.J. of the weight instruction allows members discharged for exceeding their MAWs or body fat standards to request reenlistment to their former rates provided they comply with their MAW or maximum body fat standards and have not been out of the service for more than 24 months. This provision further provides that each request will be evaluated based on service need, the member's past performance, and previous appearance problems. A March 11, 2003, page 7 advising the applicant of this benefit stated that he had to request reenlistment between six and 12 months. Which ever period is correct, there is no evidence that the applicant sought reenlistment. It appears to the Board that if the applicant were serious about wanting to stay in the Coast Guard, he would have taken the opportunity to become weight and body fat compliant and requested reenlistment.

12. There is disagreement between TJAG and CGPC on whether the August 1, 2002 page 7 placing the applicant on probation should be removed from the military record, although each has agreed that it was prepared in error. If the document is erroneous and not marked as such, it may prove to be prejudicial to the applicant in the future. However, since the applicant has not requested the removal of this document, the Board will not do so. The Board is hesitant to make a correction to a record that has not been requested by an applicant.

13. The applicant has failed to prove by a preponderance of the evidence that his discharge by reason of weight failure was in error or unjust. Accordingly, the applicant's request should be denied.

ORDER

The application of _____ USCG, for correction of his military record is denied.

James G. Parks

Dorothy J. Ulmer

Darren S. Wall

