

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-054

XXXXXXXXXXXXXXXXXXXXX
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FINAL DECISION

AUTHOR: Andrews, J.

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on February 10, 2006, upon receipt of the completed application.

This final decision, dated November 2, 2006, is adopted and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, a chief storekeeper (SKC; E-7), was honorably discharged on September 27, 2005, because of "weight control failure" with an RE-3F reenlistment code, which means that he is eligible to reenlist except for a disqualifying factor (exceeds weight standards). Upon his discharge, he had completed 19 years and 2 months of active duty.

The applicant asked the Board either to vacate his discharge and reinstate him on active duty or to award him constructive credit for active duty from September 28, 2005, through July 27, 2006—the date he would have been able to retire with 20 years of active duty—and to award him all back pay and allowances and retirement pay.

SUMMARY OF APPLICANT'S ALLEGATIONS

The applicant alleged that he has had "weight issues" since his initial enlistment in 1986 and has "oscillated in and out of weight standards" throughout his career. Nevertheless, he stated, the Coast Guard retained him on active duty despite his weight

problems and therefore “condoned for 19 years his marginal weight performance. It is wholly inequitable in his last year of service to separate him for a condition which did not stop superior performance warranting multiple individual service awards or approval of his request for retirement.”

The applicant stated that his separation was procedurally incorrect because on April 8, 2005, he was told that he was 70 pounds overweight and 8% over the body fat limit and had to meet the guidelines by November 8, 2005, which was an incorrect deadline under the regulations. He alleged that pursuant to regulations, his weight probationary period was later extended to December 8, 2005. Moreover, after he complained of chest and back pain during exercise in May 2005, his physician suspended his use of Phentermine, an appetite suppressant, as well as his diet program, pending the results of stress cardiolute testing. When he underwent stress cardiolute testing on June 23, 2005, he was referred to a cardiologist for an echocardiogram, which showed that he has mild hypokinesia. The applicant stated that under COMDTINST M1020.8E, the diagnosis should have resulted in the suspension of his weight probationary period.

The applicant further argued that his command’s decision to separate him was due in part to a report he submitted on May 16, 2005, when he assumed the duties of the Supply Officer, relieving a senior chief petty officer, SKCS A, who had occupied that billet for some time. The applicant had arrived at the cutter several months before SKCS A left, and their overlap in essentially the same billet “created significant problems.” The applicant alleged that the command harassed and abused him and that after he submitted his report, he “became a marked man.”

The applicant stated that he first complained about his command’s harassment in an email dated July 27, 2005. In reprisal, on August 2, 2005, his commanding officer (CO) initiated action to discharge him for failing to make progress on his weight loss program. He alleged that this separation action was clearly reprisal because it was premature (the four-month mark of his probationary period was not until August 8, 2005) and because it was discretionary, rather than mandatory, under the regulations. Therefore, on August 4, 2005, he made a formal complaint in a memorandum. The applicant argued that because his command clearly initiated his discharge in reprisal, he should be reinstated on active duty as if he had never been discharged.

The applicant stated that on both September 1 and 2, 2005, he was examined by members outside his chain of command and found to be within the Coast Guard’s body fat standards. However, when he asked the health services specialist on his cutter to measure him on September 3, 2005, she refused to do so because the Executive Officer (XO) of the cutter told her not to. Instead, he was ordered to undergo a hydrostatic test on September 13, 2005, which showed that his body fat exceeded the Service’s limits at 37.7%. On September 12, 2005, he had gone to a health services specialist outside his chain of command, who used a tape measure and found him to be within body fat

standards. Nevertheless, on the basis of the hydrostatic test, the Coast Guard proceeded to separate him even though, he alleged, “[h]ydrostatic testing is not contemplated by Coast Guard regulations, only tape measurement is.” The applicant alleged that because of the regulations, he had relied in good faith on the taped measurements, which showed that he was in compliance with Coast Guard standards. He also alleged that under the Personnel Manual, he could not be separated for obesity unless a doctor stated in writing that his obesity was due to food or beverage intake, which was never done. He argued that these violations of the regulations are additional justifications for vacating his discharge.

The applicant further pointed out that under Coast Guard regulations, he was not even entitled to a hearing prior to his discharge, despite having 19 years and 2 months of active duty, although he would have been entitled to a hearing under the regulations of the other Armed Forces. He argued that the failure to allow him a hearing was “a palpable violation of due process and equal protection” that deprived him of a “substantial property right in continued service and retirement.”

In support of his allegations, the applicant submitted many military and medical records, which are summarized below, and two statements from crewmembers. An SK1 stated that, when the applicant rolled his truck soon after he reported to the cutter or exercised his “open brow” (gangplank) privileges, “the Command accused him of making bad decisions.” In addition, SK1 stated that the applicant was required to train to qualify for inport and underway watches at the same time that he was expected to help the prior Supply Officer prepare for the MLC compliance inspection. The SK1 stated that the Supply Officer and the chief food service specialist on board did not have to stand watches. The SK1 stated that “from the very beginning the Command targeted him on his weight, and he complied with the Command’s demands, while I was on board he was working out regularly and eating healthy.” The SK1 stated that the applicant had a good attitude but that the CO had a “personal vendetta” against him. The SK1 alleged that a second class petty officer was counseled for making one personal phone call on his cell phone, whereas “the CO used his government supplied cell phone for more personal calls than anyone could count.” He further alleged that morale on the cutter was very poor.

A yeoman first class (YN1) stated that when the applicant “hit some black ice” and rolled his truck on the way to the cutter one morning, he was counseled that there had been a storm warning and that he should have come to the cutter the night before. The YN1 stated that there were no posted storm warnings that night. The YN1 stated that when the applicant brought a television to the Supply Office after hours one night, he was later told to remove it because storekeepers were falsely accused of having watched it during the day. The YN1 stated that the applicant was not allowed to take leave until he had qualified for watches. He stated that the Supply Officer once called the applicant a “belittling name” in front of the office personnel. The YN1 stated that

the applicant helped him significantly by having two junior storekeepers "cross-train" so that administrative work would get done when the YN1 went on leave. The YN1 stated that the applicant was "singled out for not being 'more like a Chief.' He has a different leadership style than most E-7s. However, people do things he asks of them because they like and respect him, not because they fear him."

SUMMARY OF THE RECORD

On July 28, 1986, at age 18, the applicant enlisted in the Coast Guard. His records indicate that through most of his career, the applicant was measured as 68 inches tall (5' 8"). He was placed on weight probation for exceeding his maximum allowable weight (MAW) in 1992 and 1993. He was again placed on weight probation in 1998, 2000, 2001, 2002, and 2003. Each time, he was warned about the possibility of being discharged if he did not meet Coast Guard weight policy within the probationary period, and each time he came into compliance with Coast Guard policy through a diet and exercise program.

In his performance evaluations, the applicant received above average marks (on a scale of 1 to 7, with 7 being best) in the different performance categories, but he often received low marks of 2 or 3 in the categories "Health and Well-Being" and "Military Bearing." In 2003, the applicant received six marks of 4, eight marks of 5, and six marks of 6 in other performance categories, but a mark of 2 for "Health and Well-Being" and a mark of 3 for "Military Bearing." On September 30, 2004, he received eleven marks of 4, eight marks of 5, and three marks of 6 in other performance categories, but a mark of 2 for "Health and Well-Being" and a mark of 3 for "Military Bearing."

In January 2004, the applicant was found to be 89 pounds over his MAW and was again placed on weight probation. On April 21, 2004, the applicant asked his command for permission "to have elective abdominoplasty/liposuction surgery." His request was approved. On July 22, 2004, he underwent abdominoplasty on his stomach at his own expense. In August 2004, the applicant weighed 244 pounds but was deemed to have met requirements because his body fat was measured at 25%. On August 19, 2004, the applicant sent an email to an assignment coordinator in which he asked to be transferred to a particular cutter. He noted that the SKCS on board would be transferring during the following fiscal year and that the cutter would be decommissioned the year after that. He "apologize[d] for the trouble that I have caused the CG and [the assignment] office with my weight issues and hope that the corrective surgery that I had performed and funded will ensure no further appearances on the Weight Program."

In October 2004, the applicant was transferred to the cutter, which already had a SKCS serving as the Supply Officer. On March 11, 2005, the XO of the cutter advised the applicant that, although he had qualified as an inport Officer of the Deck (OOD), he

had not shown the requisite judgment to be one. Therefore, the applicant would undergo an additional sixty-day "break in" period, at the end of which the command would reconsider his performance and qualification.

On April 6, 2005, the applicant's CO completed a Command Referral Form, referring him to a medical officer to determine whether it was medically safe for the applicant to lose weight. The form shows that the applicant weighed 259 pounds and had 33% body fat based on a height of 68 3/4 inches and a wrist size of 6 3/4 inches.

On April 8, 2005, the XO of the cutter prepared a Page 7 for the applicant's signature and record, notifying him of the following:

08 APR 05: On this date, you have been determined to be 70 pounds overweight in compliance with your maximum allowance weight/body fat standard. Your measurements are: Height: 70 (inches), Wrist Size: 6.75 (inches), and Weight: 259 (pounds). Your age is: 36 and your percent body fat is: 33%. In accordance with COMDTINST M1020.8 (series), you are hereby notified that you are required to lose 70 pounds or below, lose 8% body fat or more by 08 NOV 05. You are to complete both a personal wellness profile and detailed fitness plan; participate in a mandatory fitness activity at least one hour per day three days per week; and perform a monthly mandatory fitness assessment until your probation period ends. If you fail to reach compliance by the end of this probationary period, you will be recommended for separation. By signature below, you acknowledge both this entry and that you have been afforded the opportunity to review COMDTINST M1020.8 (series).

On April 13, 2005, the applicant was seen by Dr. B, a contract physician for the Coast Guard, pursuant to his weight loss plan. Dr. B noted that the applicant was 36 years old and weighed 271 pounds, with 33% body fat. He noted that the applicant had "weighed 180 pounds out of high school and 170 pounds out of boot camp. Military goal is 189 pounds to get him down to 29% body fat." However, there is also a handwritten note on the same page stating that the goal was 25% body fat, which is in accordance with regulation. Dr. B stated that he and the applicant "discussed diet, nutrition and exercise, and low fat, low cholesterol, and 1,200 [calorie] diet. Put him on Phentermine 15 mg daily. We will send him to the dietitian. We will get him on an exercise program which we discussed in detail. Put him on an aerobic exercise program. Most of his meals are eaten at the ship, so we will have a military dietician work with him." Dr. B certified on the Command Referral Form that there was no underlying medical condition causing the applicant's excess weight, that it was safe for him to exercise and lose the weight, and that the applicant had been counseled on diet and exercise.

On April 27, 2005, the XO prepared a Page 7 for the applicant with the following warning:

On or about 09 MAR 05 you received a page 7 regarding your apparent failure to comply with weight standards and reminded of the requirement to weigh in 01 APR 05. Additionally, on that same date you were counseled by the Commanding Officer, Executive Officer, the CEA [Command Enlisted Advisor] and a fellow chief and given specific tasking to assist you [to] overcome your failure to comply with weight standards. Those tasks were:

1. Exercise daily, work your way up from 10 minutes to 45 minutes per day of aerobic exercise.
2. Have the corpsmen weigh you every week.
3. Make continual progress.

On 01 APR 05 you weighed 259 lbs. On 25 APR 05 you weighed 260 lbs.

On 25 April you again were counseled by the Commanding Officer, Executive Officer, CEA and the Operations Officer regarding your failure to complete the specific tasks assigned by the Commanding Officer during the 09 MAR 05 counseling. During this meeting it was noted that the Commanding Officer provided, through the CEA, the Navy fitness manual for you to read. You admitted you did not read this manual. All Coast Guard members not in compliance with maximum allowable weight standards are required to complete a detailed fitness plan. You admitted you had not filled out a fitness plan.

Through your inaction you have displayed a lackadaisical attitude toward your weight loss program.

If you do not make reasonable progress and consistent progress toward attaining your maximum allowable weight, (lose approximately half of the required weight or half the excess body fat by the midpoint of the probationary period), you shall be processed for separation.

On May 11, 2005, the applicant's weighed 261 pounds. On May 13, 2005, he was ordered to move out of an apartment he had been sharing with a third class petty officer as it was an "unacceptable relationship" under the Personnel Manual.

On May 16, 2005, the applicant, having assumed the duties of Supply Officer upon the senior chief storekeeper's departure, submitted to the CO a memorandum about the "Relief of Assigned Duties" in which he reported deficiencies in the cutter's procurement procedures and thirty-two discrepancies in the cutter's file- and record-keeping procedures, including an allegation that some personnel had abused "some of the unit service contracts (cell phone and waste removal) by personnel for personal use." The CO replied to the applicant with a note stating "(1) Procure the supplies on time for the ship's mission. (2) Keep the ship within current directives. (3) Because you reported [about] 7 months previously, I am considering this letter as more of a snapshot than a starting point. (4) Remember the CG creed: '... I shall endeavor to bring solutions ...'"

On May 30, 2005, the applicant sent the Operations Officer an email concerning a complaint from the Engineering Department about delays in processing procurement requests. He stated, "My intent is not to slow down the pace of the office but to ensure that procurements are processed as regulations dictate. This will inevitably slow down processing in comparison to previous office procedures due to the previous lack of regard to the regulations." The applicant pointed out that his team had been assigned new duties, such as watchstanding; that incomplete or inaccurate procurement requests had to be "returned to the customer for correction ... to ensure that we remain within legal, regulatory and procedural confines"; and that regulations stated that once a "properly prepared procurement request" with a "proper specification or Statement of Work" was received, the award should be within 30 workdays. In addition, he stated that "an emergency procurement should be the exception and not the rule. Lack of planning is not a valid reason to place additional burdens and requirements on Ship Office personnel. Circumstances happen that will dictate immediate actions and that is to be expected but the current expectation by most divisions is that the SK's should drop what they are doing to make a parts run or to issue parts for them as soon as they enter the office with no regard to what the SK may be working on at the moment. ... All current pending PR's [procurement requests] (inbox is clean) will be reviewed by COB on Wednesday. Proper PR's will be processed prior to COB on Friday, while improper PR's will be returned to the requisitioner for corrective actions."

On May 31, 2005, Dr. B stopped the applicant's intake of Phentermine and noted that the applicant was complaining that his left hand tingled and that he got ached "in the left intrascapular area and the base of the neck posteriorly when ... doing an elliptical workout."

On June 10, 2005, the applicant weighed 257 pounds. Dr. B reported that he was "doing well. No tachycardia, palpitations, or arrhythmia. He had some vague paresthesias [numbness] on 5-31-05. Therefore, we held the Phentermine. He is scheduled for stress cardiolite because he has a strong family history of heart disease. If that is unremarkable, then we will continue with Phentermine and diet program."

On June 14, 2005, the applicant refused to sign a Page 7 stating that "[a]s of 13 JUN 05 you are 11 weeks into your mandatory 33 week weight loss period and you weighed 247 pounds. To date your weight loss has not been substantive enough to achieve the mandatory weight loss. You have 5 weeks until mid period evaluation."

On June 15, 2005, the applicant offered his command a revised version of the Page 7, which indicated a revised weight probation termination date of December 8, 2005; a new weight of 248 pounds and body fat of 30.5%; and a determination that his progress "exceed[ed] the 1% body fat per month requirements to demonstrate reasonable and consistent progress as defined [by regulation]."

On June 21 and 22, 2005, the cutter underwent an MLC compliance inspection. The cutter's administrative, personnel, and financial administration programs were found to be in compliance, but "general purpose property" was noted as an area "requiring additional attention." The command was told to submit a plan for correcting the noted discrepancies within sixty days.

On June 23, 2005, the results of "spect myocardial imaging, stress and redistribution" indicated that the applicant had "no classic ischemic change," but a doctor recommended that the applicant undergo a cardiac ultrasound since he had had an abnormal EKG. On June 24, 2005, the results of the applicant's stress cardiolute testing were reported as follows:

- 1) Stress cardiolute stress portion is negative for cardiac ischemia.
- 2) Excellent exercise tolerance.
- 3) Patient asymptomatic during test.
- 4) Normal physiologic response to stress.
- 5) Please correlate with the cardiolute images.

On July 1, 2005, the applicant weighed 261 pounds. Dr. B noted that the applicant's "stress test showed good exercise tolerance. Heart rate 158, 85% protected, mets achieved 14.7. No diagnostic STT-wave changes. His scan showed no evidence of classic ischemia. He had some premature atrial contractions. Left ventricular ejection fraction was only 36%. We are going to arrange for a cardiac ultrasound and because he is having intrascapular pain and base of the neck pain with exercise, I am going to have cardiology see him in consultation to make sure we are not missing some ischemic phenomenon. Cardiac ultrasound pending."

On July 5, 2005, the Chief of the regional contracting office ratified an unauthorized commitment of funds that had been reported by the cutter on October 26, 2004. The funds (\$2,200.00) had been spent for the services of a locksmith to secure a space for handling and routing secure message traffic on the cutter.

On July 6, 2005, the applicant asked to be retired as of September 1, 2006. His request was approved on July 8, 2006.

On July 11, 2005, the applicant underwent a cardiac ultrasound (echocardiogram), which showed normal results except for "mild hypokinesis of the mid interventricular septum." The applicant's ejection fraction was "at the lower limits of normal at 53%" and the color Doppler flow study showed "no significant flow abnormality, with normal peak flow velocities."

On July 22, 2005, a cardiologist reported that the applicant, who was 36 years old, had been on a diet for two months and had complained of shortness of breath and pain under his left arm and in his right chest at times of physical exertion. The applicant told

the cardiologist that he had "stopped working out." The cardiologist reported that although the echocardiogram "showed mild hypokinesis at the interventricular septum, the ejection fraction was calculated [at] 53%, which is normal." He concluded that the applicant's cardiac examination was "normal" and that the applicant could resume full activity with no restrictions on diet or exercise.

On July 22, 2005, a medical officer signed another Command Referral Form to certify that there was no underlying medical condition causing the applicant's excess weight or making it unsafe for him to exercise and lose the weight.

On July 25, 2005, the XO prepared a negative Page 7 for the applicant's record, which the applicant refused to sign. The Page 7 states that on July 18, 2005, when asked about two assignments that the applicant had been given about a month earlier, he stated that neither assignment had been started and he complained that he and his subordinates were overworked because of collateral duties. The XO wrote that he was "concerned that [the applicant was] displaying ineffective leadership and [was] unwilling to support the command."

On July 25, 2005, the applicant sent an email to the cutter's health services specialist, who had been weighing him weekly. He stated that he was not satisfied with the cardiologist's assessment. He stated that he still had "sporadic discomforts/pains in my chest while under exertion and at rest" and that he would "resume my daily workouts as approved by the physician and required by the Coast Guard due to my weight probationary status but have strong reservations concerning this prior to confirmation of my medical status and physical abilities."

On July 27, 2005, the applicant sent the District's Civil Rights Office and Command Master Chief an email with the subject "HARASSMENT COMPLAINT." He stated that he had received seven or eight Page 7s in just nine months aboard the cutter, that he had been "singled out and disciplined" ever since his arrival, and that he was complaining because "enough was enough." He alleged that his department head had told a junior petty officer that "[t]his will teach the Chief a lesson" and that he had been "singled out from others on the weight program to generate a progress chart for and perform weekly weight checks with" his department head. He also complained that he had received a negative Page 7 simply for asking his department head for advice, as he had been advised to do. The applicant pointed out the errors on the Page 7 dated June 14, 2005, and complained that nothing had been done to correct it in response to his email dated June 15, 2005. The applicant also submitted a copy of the report he had made on May 16, 2005, upon relieving the prior Supply Officer. The applicant stated that he had helped to ensure that the cutter passed the MLC compliance inspection in June 2005 and that he met the qualifications for Officer of the Deck (OOD) and Quartermaster of the Watch (QMOW) and the Advanced Damage Control Professional Qualification Standards (DCQPS) in less time than provided by regulations. The applicant

pointed out that although the prior Supply Officer had never qualified as an underway watchstander, he had done so and was standing a "1 in 3 watch as a QMOW." He had also helped two FS3s pass examinations to become FS2s and one SK3 pass an examination to become an SK2. The applicant stated that because of the harassment, he had submitted a letter requesting retirement, but his request seemed to have increased the amount of harassment.

On July 28, 2005, the District Civil Rights Office responded by sending the applicant a "EO Informal Pre-Complaint Form," which they advised him to complete and to submit to an Equal Opportunity Advisor who would contact him and who would then contact the applicant's chain of command on his behalf to try to resolve the complaint.

On July 28, 2005, the XO and the applicant signed another Page 7 to clarify the weight loss probationary period outlined in the Page 7 dated April 8, 2005. The Page 7 stated that the probationary period was originally calculated based on a requirement "to lose 8% body fat over a period of 8 4-week months," which resulted in an end date of November 8, 2005, and a mid point of July 18, 2005. However, that after consulting Headquarters, "it was determined that the 8 month probationary period should be figured on calendar months resulting in your probationary period ending on 12 DEC 05, and a mid period of 01 AUG 05."

On August 1, 2005, the District Civil Rights Office informed the applicant of the name of the Equal Opportunity Advisor who would handle his complaint. The applicant returned the completed EO Informal Pre-Complaint Form by email. On the form, he wrote that he was required to stand a watch that his predecessor did not; that he was required to be weighed weekly; that during counseling on March 16, 2005, his CO had compared the weight loss diet with Jews starving at Auschwitz; that he had been told on March 19, 2005, that he was "on thin ice with this command"; and that he had had difficulty processing his relief letter dated May 16, 2005, "because of the implication of numerous illegal activities."

On August 2, 2005, the Equal Opportunity Advisor explained the complaint process to the applicant by email and advised him that the first step would be for the applicant to submit a written complaint to his command.

On August 2, 2005, the CO informed the applicant in writing that he was initiating the applicant's honorable discharge because "after being placed on a probationary weight loss period you failed to maintain reasonable and consistent progress." The CO noted that the applicant was entitled only to submit a statement on his own behalf.

On August 4, 2005, the applicant responded to the District Civil Rights Office by email and stated that he was generating the necessary memorandum.

On August 4, 2005, the applicant submitted an "Oppression and Harassment Complaint" memorandum in which he alleged that the CO, XO, Operations Officer, Support Officer and prior Supply Officer had or had continued to oppress and harass him since his arrival at the unit. He alleged that his memorandum dated May 16, 2005, "was not well received by the command and indicated numerous inappropriate activities, or lack of procedural adherence that were ignored by the command and [the former Supply Officer]." He complained that since April he had been required to be weighed weekly although no other members were required to do so. He argued that his probationary period should have been suspended while his cardiac complaints were investigated and resolved.

On August 7, 2005, the applicant submitted a statement for retention in response to the CO's action. He wrote that on August 1, 2005—more than a week before the midpoint of his probationary period—his command measured his "circumference value at 26 inches," which meant that his body fat percentage was just 29%. At 29%, he alleged, he had already lost half of the body fat required, which was reasonable progress. The applicant also argued that the termination date of his probationary period had been incorrectly identified as November 8, 2005, and that he did not receive medical clearance to initiate a weight loss program until April 13, 2005. The applicant stated that he had refused to sign the Page 7 dated June 14, 2005, because it did not show that he had made reasonable progress and it inaccurately indicated (a) that he was in the 11th week instead of the 9th week of his probationary period, (b) that his probationary period was 33 weeks long instead of 35 weeks, and (c) that the midpoint was 5 weeks away instead of 8 weeks away. The applicant stated that on June 15, 2005, he had provided his command with a corrected version of the Page 7, but his command did not act upon it until July 28, 2005, the day after he submitted a civil rights complaint by email, and his midpoint was again miscalculated as August 1 instead of August 9, 2005. The applicant also noted that since May 31, 2005, he had been under medical care and undergoing testing for pain in his back, chest, neck, and left arm. Therefore, he had had to discontinue aerobic exercise and Phentermine. The applicant asked that his weight probationary period be held in abeyance "until all medical issues are identified and I am returned to a fit for full duty status."

On August 8, 2005, the CO again referred the applicant to a medical officer, noting that the applicant weighed 254 pounds and had 30% body fat. On August 10, 2005, a Navy doctor signed the Command Referral Form to certify that there was no underlying medical condition causing the applicant's excess weight or making it unsafe for him to diet and exercise to lose the weight.

On August 10, 2005, the XO prepared a Page 7 for the applicant's record, which the applicant refused to sign. It states, "You are 18 weeks into a 36 week probationary period. You weighed 250 pounds and had a calculated 32% body fat. You have failed to maintain reasonable and consistent progress. In accordance with weight/physical

fitness standards for Coast Guard military personnel, COMDTINST M1020.8 (series). You are hereby notified that you will be recommended for separation.”

On August 11, 2005, a health specialist third class from another unit sent an email to the applicant stating that he weighed 246 pounds.

On August 12, 2005, the CO forwarded the applicant’s statement with a letter to the Coast Guard Personnel Command (CGPC) stating that he still recommended the applicant’s discharge for the following reasons:

2. ... [O]n 01 Aug 05, [the applicant’s] neck measurement was 16.5”, his waist was 42.5”, and his weight was 254 lbs. Per Appendix A of COMDTINST M1020.8, his body fat correlated to 30%, not the 29% he asserts. All possible benefits of doubt regarding these measurements were given to the member. It defies logic that since being placed on the program the member could lose 4% body fat while losing 5 pounds without a substantive change of the overall body tone. No such serious revamping has occurred. ...

3. ... [A]fter consultation with [Headquarters], the command extended the probationary period to 8 calendar months vice 8 four-week periods. At no time has [the applicant] been medically unfit to participate in a weight reduction exercise program.

4. ... [R]egardless of probationary period, member was counseled on unsatisfactory progress. Command may assess reasonable and consistent progress at any time. [The applicant] asserts a weight loss of 12 lbs in 9 weeks. A review of the record shows 7 lbs of the 12 lbs were later regained. As of 10 Aug 05, only 9 of the required 70 lbs have been lost.

5. ... [T]he administrative record is an accurate reflection of the events of his weight loss probation.

6. ... [T]he command received informal notification of a civil rights complaint on 02 Aug 05. The page 7 in question was drafted, presented, and signed 28 Jul 05, 4 days before notification of a potential complaint. The Page 7 was a result of consultation with CGPC (epm) on pending discharge for [the applicant] and recognition that probationary period had been extended in June and not documented. The action took place before the command knew of a complaint. The action was a continuation of counseling that began 10 months ago. Allegations of retaliation are groundless. ...

7. ... [O]n 10 Aug 2005, [the applicant’s] neck was 16.5, waist 44, weight 250, and calculated body fat 32%. The XO and OPS officer took the measurements after carefully reviewing the measuring procedures w/ [the applicant]. They obtained a much more consistent result than that of para. 2 above, but it is still well short of satisfactory progress (half-way through probation, only 1 of 8% of body fat lost, only 9 of 70 lbs lost).

8. ... [S]ince being formally put on the program, [the applicant] has put forth a myriad of medical complaints. All complaints were quickly and thoroughly assessed by qualified medical professionals who consistently concluded there were no grounds to cease weight loss activities.

9. ... [The applicant] is and has always been fit for full duty and fitness exercise.

10. This is not a case of a high performing CPO with mild mid-life weight gain and medical complications. A review of the medical and service records attests this is a case of a consistently low performing, over weight, over fat CPO who has not made any serious physical effort or life style changes toward losing weight. Faced with a pending discharge, he now continues to put forth ungrounded medical complaints in an effort to slow the unpleasant but predictable discharge resulting from his lack of substantive effort.

11. Similar to the commands prior to [the cutter], unusual grace has been extended, and again, squandered. [The applicant] reported just after the October 2004 weigh-in was conducted. Though clearly out of compliance w/ CG requirements, in deference to his anchors, he was not embarrassed by being placed on the weight program. On multiple occasions throughout the grace period members of the command informally and formally counseled him on weight, fat, and appearance issues, as well as his lack of effort or progress in addressing these issues. He understood the career risks and agreed to be in compliance by the April 2005 weigh-in. By his own testimony his weight increased during the grace period from 243 to 275 lbs. He squandered the grace. In separate counseling with his direct supervisor, after being placed on the formal program, [the applicant] referred to his potential discharge by saying, "I'm a Chief. I'm over 18 {years of service}. They'll never get {a discharge approved}." This view into his mindset may help explain his abnormal, bold lack of substantive effort or progress toward complying with the CG's weight standards. Any additional grace, while great for [the applicant], is unwarranted. It will counter good order and discipline by introducing doubt in the minds of the crew regarding the Coast Guard's true commitment to or equitable administration of the weight program.

12. In the future, if [the applicant] applies for re-enlistment, I recommend the service carefully verify that his weight, fat, appearance, and matters of record meet both our needs and requirements prior to approving his application for re-enlistment. Viewing his record in its entirety, I would not desire he be reassigned to my command and cannot recommend him for assignment elsewhere.

The CO submitted with his recommendation a chart showing that the applicant was 5 feet, 9 inches tall with a "D" frame size and that his maximum allowed weight was 189 pounds. The chart also showed the following measurements by the cutter's health services specialist:

DATE	WEIGHT [lbs.]	POUNDS OVER	% +FAT
April 2, 2005	259	70	33%
April 25, 2005	260		
May 16, 2005	253		
May 23, 2005	250		
May 31, 2005	253		31%
June 6, 2005	248		
June 20, 2005	253		34%
June 27, 2005	251		30%
July 11, 2005	254		31%
July 19, 2005	258		30%
July 25, 2005	255		31%
August 1, 2005	254		30%

August 10, 2005	250		32%
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On August 12, 2005, the District Commander forwarded the CO's recommendation to CGPC, stating that he concurred with the recommendation after carefully reviewing the case. He wrote that the applicant had "been granted an extraordinary amount of leeway by his current and previous commands. Through this all, he had failed to make significant headway over a period of two years, in resolving his weight issues. He has been promoted and given PCS orders [contrary to regulation]."

On August 19, 2005, a yeoman from another command emailed the applicant and the cutter's health services specialist to report that the applicant had weighed 242 pounds that morning. Another member sent an email stating that he had measured the applicant's body fat at 27%.

On August 21, 2005, the applicant submitted additional information to CGPC. He stated that under Article 3.A.1., a member who incurs an injury or illness during a weight loss probationary period should have his probationary period suspended. He argued that the testing he underwent following his complaints of pain indicate that Dr. B was concerned about his health, and so his probationary period should have been suspended. He stated that since May 31, 2005, he had been told not to take Phentermine. He alleged that he was not told that he could resume normal activity until August 8, 2005. The applicant further alleged that in August 2004, his maximum allowable weight had been adjusted to 244 pounds because he had met the standard of 25% body fat at that weight. He stated that on August 19, 2005, he had been weighed at 242 pounds and 27% body fat.

On August 27, 2005, the applicant formally accused his CO with violating Article 138 of the Uniform Code of Military Justice. He alleged that his command had initiated his separation in reprisal for his relief letter dated May 16, 2005; for his email to the District Civil Rights Office on July 27, 2005; for the command's receipt of "negative grades during a [June 2005] MLC compliance inspection due to the lack of proper general purpose property management for the 3 years prior to my arrival"; and for the command's receipt of "an Unauthorized Commitment Ratification from ISC ... during FY04 which contained negative remarks concerning the previous procurement personnel as well as processes on board the [cutter]." The applicant complained, *inter alia*, that there were errors in the Page 7 dated April 8, 2005; that he never got to meet with a dietician; that his command did not receive Dr. B's notes until August 2, 2005; that his command did not suspend his probationary period when told that he could not diet or exercise due to his medical condition; that body fat measurements made by people outside his chain of command showed that he had made reasonable progress by his probationary period mid point; and that his maximum allowed weight (MAW) was actually 244 instead of 189.

On August 30, 2005, in response to the CO's recommendation, CGPC ordered that the applicant be discharged no later than September 27, 2005, due to "weight control failure."

On September 1, 2005, a boatswain's mate second class from another command sent an email to the applicant stating that according to his measurements, the applicant weighed 244 pounds and had 24% body fat.

On September 12, 2005, the Coast Guard liaison at a Navy hospital sent the command an email stating that he had measured the applicant at 23% body fat.

On September 13, 2005, the applicant underwent hydrostatic testing upon the order of the Coast Guard and was found to be 173 centimeters (68.11 inches) tall, to weigh 109.175 kilograms (240.69 pounds), and to have 37.7% body fat.

On September 14, 2005, the applicant asked that his discharge be suspended and that he be given another probationary period. He asked that he receive hydrostatic testing every month "to ensure a steady and healthy progress towards the goal."

On September 16, 2005, a lieutenant commander reported the results of his inquiry into the applicant's Article 138 complaint to the District Commander. He stated that the request for relief was "not cognizable under an Article 138 complaint" because the CO had enforced the Coast Guard's weight policy "fairly and equitably throughout the ship" and his actions were not unauthorized, unfair, or discriminatory.

On September 20, 2005, the District Commander denied the applicant's request for relief under Article 138 based on his failure to make reasonable progress toward his MAW. The District Commander noted that two other members assigned to the cutter had recently been placed on weight probation and that one had already met his MAW while the other had lost 20 of 22 excess pounds.

On September 23, 2005, the applicant requested through an attorney that his separation orders be canceled so that his probationary period could continue. In the alternative, he asked for an Administrative Discharge Board (ADB). He alleged that he was currently in compliance with Coast Guard weight policy and asked for a chance to prove it. He complained that he had not yet received any response to his harassment and Article 138 complaints.

On September 26, 2005, the applicant requested through a different attorney that his separation orders be canceled. He alleged that he was not really being discharged because of obesity but because he had documented certain deficiencies on the cutter in his memorandum regarding his Relief of Assigned Duties dated May 16, 2005, including "a suggestion that the commanding officer may have improperly used his govern-

ment cell phone privileges.” He alleged that following this memorandum, the command “immediately took a greater interest in [his] weight management.” The applicant further alleged that the water immersion test that was used to determine that he was not in compliance with body fat policy was not common practice even if it “is the gold standard.” He argued that his water immersion test should be the baseline for a new probationary period since theretofore his body fat had always been determined with a tape measure. He further argued that the “weight management program is inherently bankrupt from medical and performance perspectives. It has undergone so many iterations in every service that it has become meaningless.” The applicant also made the same allegations that he later made in his application to this Board.

On September 26, 2005, the acting District Commander responded to the applicant’s complaint dated August 4, 2005. He stated that he had ordered an investigation and found that “there was no oppression or harassment on the part of the [cutter’s] command. ... I do not find that the relief letter you submitted in any way contributed to the command’s decision to commence the administrative discharge. All procedures performed by the command were proper and in keeping with [COMDTINST M1020.8E]” The District Commander stated that after reviewing the applicant’s medical records he agreed with the applicant’s CO that the applicant had failed to make reasonable and consistent progress toward coming into compliance with the Coast Guard’s standards for weight and body fat. He noted that the applicant could appeal his decision.

On September 26, 2005, CGPC denied the applicant’s request to remain on active duty. Commander, CGPC pointed out that the applicant could request reenlistment “should [he] come within compliance of the Coast Guard’s appearance, weight and body fat standards no later than 24 months from date of discharge.”

On September 27, 2005, the applicant received an honorable discharge for “weight control failure.”

VIEWS OF THE COAST GUARD

On July 3, 2006, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny the requested relief.

The JAG stated that the applicant's command acted in accordance with Coast Guard policy in placing him on weight probation. The JAG stated that the command complied with Article 12.B.12. of the Personnel Manual by having a medical officer certify on three occasions—April 6, July 22, and August 8, 2005—that the proximate cause of the applicant's obesity was excessive voluntary intake of food or drink, rather than a medical problem outside of the applicant's control, and that it was safe for him to lose the excess weight by diet and exercise. The JAG alleged that the medical officers' certifications satisfied the requirements of Article 12.B.12.

The JAG stated that the applicant's allegations of retaliation are unfounded because his weight probation began months before he filed his harassment complaints. He noted that the applicant's allegations were investigated by the District Commander, who denied relief.

The JAG pointed out that if the applicant meets Coast Guard policy on weight, body fat, and appearance within two years of his separation, he can request reenlistment to his former rate.

The JAG attached to his advisory opinion and adopted a memorandum on the case prepared by CGPC. CGPC stated that the applicant's discharge occurred in accordance with Coast Guard policy. CGPC stated that based on the applicant's height and wrist size, his MAW is 189 pounds and that because he was 36 years old, his maximum allowable body fat was 25%. CGPC stated that the applicant's probationary period was originally miscalculated but was corrected on July 28, 2005, so that he had five more weeks of probation.

CGPC stated that the applicant's command recommended his discharge "for failure to make satisfactory progress toward attaining the weight/body fat goals. Specifically, on August 10, 2005, the applicant weighed 250 lbs with a body fat of 32% ..., exceeding MAW by 61 pounds and body fat by 7%. CGPC stated that the referral form dated April 6, 2005, with the medical officer's certification shows that the applicant was timely screened by a doctor when placed on weight probation. CGPC stated that that form is used to comply with Article 12.B.12. of the Personnel Manual. CGPC stated that the certifications prove that the applicant was fit to participate in fitness activities. CGPC further stated that even if the applicant had been unfit to participate in fitness activities, he still would have been required to meet his MAW within the probationary period, under Article 2.E. of COMDTINST M1020.8E.

CGPC stated that the record shows that the applicant was counseled by his command about his "'lackadaisical attitude' toward the weight loss plan, specifically that he failed to complete the required fitness plan and ... failed to make 'reasonable and consistent progress'" toward attaining his MAW. CGPC pointed out that the applicant was also warned that he would be recommended for discharge if he did not make reasonable progress by the mid point of his probationary period.

CGPC stated that the applicant was not entitled to an ADB and that he was provided all due process under the Personnel Manual.

CGPC stated that the hydrostatic testing was conducted in response to the applicant's contention that his body fat measurements were inconsistent and because he had undergone abdominoplasty the previous year. CGPC stated that the testing was done pursuant to Article 4.A.2. of COMDTINST M1020.8E, which authorizes Commandant (COMDT-1221) to "make determinations on cases not adequately addressed by the provisions of this manual." CGPC stated that the hydrostatic testing results "were not the basis for the discharge recommendation, but did substantiate that the tape measure method provided the applicant a much lower body fat determination Regardless, at the mid way point, the applicant failed to comply with losing 1/2 the body fat or weight. He was required to lose a total of 35 lbs (1/2 of the 70 pounds) or 4% body fat (1/2 of the 8%). Based upon the command measurements on August 10, 2005, the applicant lost 9 pounds and 1% body fat. Based upon the Command Medical Referral dated August 8, 2005, the applicant only lost 5 pounds and 3% body fat. Clearly the applicant failed to attain the mid point goals." CGPC further alleged that had the applicant undergone hydrostatic testing in April 2005, he would have been discharged immediately instead of being placed on probation.

CGPC alleged that the applicant's harassment and Article 138 complaints "have no significance in the processing of [his] discharge."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 5, 2006, the applicant responded to the views of the Coast Guard. The applicant argued that because he was not cleared for exercise and weight loss until April 13, 2005, his probation should not have begun until that date. Yet, his CO initiated his recommendation for separation on August 2, 2005, before the probation mid point. He stated that the CO's recommendation for discharge was a discretionary action and that the CO abused his discretion because the "history of [the applicant's] career has shown that he would return to compliance in an expedited fashion." The applicant argued that the CO's statements in paragraph 12 of his letter dated August 12, 2005, show that the applicant's discharge was not based solely on his weight.

The applicant repeated his argument that his probation should have been suspended and he should have been put on a not fit for full duty status on June 10, 2005, when he was scheduled for stress cardiolute testing. He alleged that the final determination about his cardiac health was not completed until August 8, 2005. Moreover, he argued that given the medical reports he received, it "is difficult to believe that ... there is not the possibility of an underlying condition." The applicant also alleged that measurements made in September 2005 by members outside his chain of command who found that he had met his body fat requirement should have ended his probationary period.

The applicant alleged that he had in fact made reasonable progress because on August 11, 2005, he had lost 25 pounds and 5% body fat; on August 19, 2005, he had lost 29 pounds and 6% body fat; and on September 1, 2005, he had lost 26 pounds and 9% body fat, thereby meeting the requirement of no more than 25% body fat. He pointed out that he was not ordered to undergo hydrostatic testing until someone outside his chain of command found that he had met Coast Guard policy regarding body fat.

The applicant alleged that the fact that COMDTINST M1020.8E was revised in April 2006 to address the body fat issues of members who had undergone surgery proves that the Coast Guard's prior policies were wrong. He noted that the following language has been added to the manual:

For members pending separation or those whose body morphology renders the tape measure method inaccurate, other methods may be used only after Commandant (CG-122) concurrence. In an unusual circumstance where a member has had elective surgery which has changed their body composition, the tape measure method may create false and inaccurate measurements of percent body fat.

The applicant alleged that he never had a lackadaisical attitude. He pointed out that in 2004, he had undergone the pain and expense of surgery to meet Coast Guard policy. He argued that since he had been found to meet Coast Guard policy regarding body fat three times in September 2005, he should not have been discharged. However, the hydrostatic tests results were improperly used to validate his discharge.

APPLICABLE REGULATIONS

COMDTINST M1020.8E provided the "Weight/Physical Fitness Standards for Coast Guard Military Personnel" in 2005. Article 2.D.1. states that all military personnel will be weighed each October and April, but COs may screen members against standards anytime they deem it necessary. Article 2.D.3. states that all members "exceeding both MAW and body will complete a detailed personal fitness plan." Article 2.D.4. states that members who are found to be overweight or "overfat" will not be advanced, transferred to a new unit, assigned to training, or paid bonus installations until they are in compliance with regulations.

Article 2.E.1. states that members not in compliance with MAW and body fat standards “shall be referred to a medical officer or local physician, who shall make a recommendation to the command as to the member’s health, whether or not weight and/or body fat loss would be detrimental to the member’s health, and the member’s ability to participate in each component of the monthly fitness assessment.” Article 2.E.3. states that a “member with any underlying medical condition that limits or prohibits his/her participation in a specific portion of the fitness assessment will be excused from only that portion of the fitness assessment, but must continue to participate in weekly fitness enhancing activities outlined in his/her detailed fitness plan. The physician will document his or her finding in the member’s health record.” Article 2.E.4. states that a “member found to have an underlying medical condition that would make fitness activities detrimental to his/her health is still responsible for meeting MAW standards within the timeline specified by the probationary period.”

Article 2.F.1. states that “overweight members who also exceed their maximum body fat percentage shall be placed on probation, during which they must lose their excess weight or body fat. The probationary period cannot equal or exceed thirty-six weeks, however.” Article 1.A.3. states that healthy weight loss “should be at a rate of 0.5 to 1.0 pound per week.” Article 2.F.4. states that the probation 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.” Article 2.F.5. states that “[m]embers whose probationary period has been determined to be equal to or greater than 36 weeks both by weight calculations and by body fat calculations ... shall be processed for separation. If the situation exists in which one of the two calculations results in a period in excess of 36 weeks, and one less than 36 weeks, the member shall be assigned a probationary period based upon the calculated period which is less than 36 weeks.”

Article 2.F.2. states that a probationary weight loss period “shall not commence until *after* a medical examination. Therefore, the medical exam must be completed as expeditiously as possible, usually within three to four weeks of the discovery that MAW standards have been exceeded. However, written notification and acknowledgment that the member exceeds the maximum standards shall be completed regardless of any delay.” Article 2.F.3. states that if a doctor determines that the member has a medical condition that prevents him from losing weight or body fat at the required rate, the CO may request permission from Headquarters to hold the probation in abeyance.

Article 2.F.6. states that “[d]uring probation, members should demonstrate reasonable and consistent progress toward attaining their MAW (i.e., lose approximately half of the required weight or half the excess percentage of body fat by the midpoint of the probationary period). Failure to demonstrate such reasonable and consistent prog-

ress may provide sufficient grounds for commanding officers to [initiate discharge] before the probationary period expires.”

Article 2.F.13. states that “[a]ny member who has been in two probationary weight or body fat loss periods in any 365-day period will be processed for separation from the Coast Guard in lieu of being placed in a third probationary period during the same 365-day period.”

Article 2.G.1. states that “[m]embers who exceed their MAW and body fat percentage to such an extent that they would be placed in a probationary period of 36 weeks or more, fail to demonstrate reasonable and consistent progress during probation, or fail to attain their MAW or body fat by the end of their probation ... shall be processed for separation.”

Article 3.A.1. states that a “[m]ember who incurs an injury or illness during a probationary period that may adversely affect their weight loss should be referred to a medical officer or contract physician to determine whether it is medically safe and feasible for the member to continue the weight loss program.” Article 3.A.2. states that if such members are found to have a medical condition that precludes weight loss, their probationary periods should be held in abeyance.

Article 3.C.1. states that if during weight probation a member attains his maximum body fat percentage while remaining above his MAW, “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. ... Should the member exceed the screening weight, he or she will be screened for a new body fat determination. If determined to be over body fat, he or she shall be placed on probation [in accordance with] the standards outlined in Paragraph 2.F. with calculations based upon the member’s original MAW or body fat %, not his or her screening weight.”

Article 3.C.2. states that if “a command believes that unique conditions exist that do not fit under provisions of this Manual, yet special consideration is warranted, the command should contact Commandant ..., which is the final authority for procedural and policy determinations.”

Article 2.H.2. states that “[a]ctive duty enlistment members discharged for exceeding MAW or body fat standards, and now seeking to re-enter the service, may request reenlistment to their former rate provided they comply with MAW or maximum percent body fat, meet appearance standards and have been out of the Service no more than 24 months. Commander (CGPC-epm) will evaluate requests based on Service needs and the member’s past performance.”

Enclosure 1 to the COMDTINST includes a table showing that men whose height is 68 inches and whose wrist size is from 6 3/4 inches to 7 inches (frame size "D") have a MAW of 185 pounds. A man whose height is 69 inches and who has frame size "D" has a MAW of 189 pounds. Enclosure 1 also shows that from age 30 to age 40, a man's maximum body fat percentage is 25%. For men under age 30, the maximum is 23% percent, while for men age 40 or more, the maximum is 27%.

Enclosure 5 provides procedures for measuring percentage body fat with a tape measure. Body fat percentage is determined by subtracting the circumference of a member's neck from the circumference of a member's abdomen, measuring the member's height to the nearest half-inch, and checking a chart.

Article 12.B.12.a.10. of the Personnel Manual states that a member may be discharged for the convenience of the Government due to "[o]besity, provided a medical officer certifies a proximate cause of the obesity is excessive voluntary intake of food or drink, rather than organic or other similar causes apparently beyond the member's control."

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.
2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.
3. The applicant alleged that he was discharged in retaliation for the relief memorandum he submitted on May 16, 2005, and in reprisal for his informal harassment complaint emailed to the District Civil Rights Office on July 25, 2005; for the formal harassment complaint he submitted on August 4, 2005; and for the Article 138 complaint he submitted on August 27, 2005. He argued that the CO's recommendation for discharge was discretionary and that but for his complaints, the CO would not have initiated discharge proceedings on August 2, 2005. The applicant alleged that the timing of the discharge recommendation, his CO's statement in an August 12, 2005, letter that he would not want the applicant reassigned to his unit, and the allegations of two crewmembers about the command's treatment of the applicant were sufficient to prove that the discharge recommendation was retaliatory. However, absent evidence to the contrary, the Board must presume that the applicant's chain of command carried out

their duties “correctly, lawfully, and in good faith.”¹ The record shows that on August 2, 2005, the applicant was almost halfway through an 8-month weight probationary period and had lost only 5 of 70 pounds that he was supposed to be trying to lose. In light of this fact, the Board finds that the timing of the CO’s recommendation, the CO’s statement in the August 12, 2005, letter and the crewmates’ comments are insufficient to prove that the CO’s decision to exercise his discretion and recommend the applicant’s discharge was a matter of retaliation or reprisal. In fact, one crewmate expressly stated that the command “targeted” the applicant about his weight “from the very beginning,” which supports the CO’s claim that his decision was based solely on the applicant’s lack of progress on weight probation rather than on any desire to retaliate against the applicant’s complaints. In the CO’s letter dated August 12, 2005, he stated that allegations of retaliation were groundless and that the command’s actions were “a continuation of counseling that began 10 months ago.” The Board also notes that the applicant submitted his informal harassment complaint to the District Civil Rights Office on July 27, 2005, and it is not at all clear from the record that the applicant’s CO knew about it before he decided to recommend the applicant’s discharge.

4. The applicant alleged that his discharge was unjust because the Coast Guard had “condoned for 19 years his marginal weight performance.” Had the applicant been overweight and never been required to lose it, the Board might agree. However, contrary to this argument, the applicant’s record shows that the Coast Guard habitually and firmly enforced its right to have the applicant adopt a diet and exercise program to meet its weight and body fat standards in the early 1990s when the applicant was first found to exceed the limits, again in 1998, and at least annually from 2000 until his separation. Although he apparently repeatedly fell out of compliance with Coast Guard weight policy, he was, each time, required to regain compliance and warned about the possibility of separation if he did not do so. In light of this longstanding, consistent enforcement of its weight policy, the Board strongly disagrees with the applicant’s allegation that the Coast Guard “condoned” his weight problem for more than 19 years and so should not have enforced it in 2005.

5. The applicant alleged that in 2004, his MAW was determined to be 244 pounds rather than 189 pounds, so that he was only 15 pounds overweight on April 8, 2005, and had attained his MAW before he was discharged in September 2005. The record shows that during weight probation in 2004, the applicant gained compliance with Coast Guard weight policy by reducing his body fat measurement through abdominoplasty to 25% even though he weighed 244 pounds. Therefore, 244 pounds was established as his screening weight, not his MAW. In accordance with Article 3.C.1. of COMDTINST M1020.8E, when the applicant was found to have exceeded the screening weight on April 8, 2005, he was again measured for body fat, found to have exceeded the maximum of 25% for his age, and placed on probation with his original

¹ *Arens v. United States*, 969 F.2d 1034, 1037 (1990); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

MAW standards as provided in the charts in COMDTINST M1020.8E. The applicant has not proved that his MAW during his probationary period in 2005 was incorrectly determined to be 189 pounds.

6. The applicant alleged that his probation was procedurally erroneous because he was initially advised in a Page 7 dated April 8, 2005, that his probation ended on November 8, 2005 when, in fact, it ended on December 12, 2005. The record indicates that the applicant knew that the end date was erroneous on June 14, 2005, and informed his command of this fact, but that the command did not prepare a record entry documenting the correct end date until July 28, 2005. If the applicant's command had made the opposite mistake in calculating the end date—i.e., if the applicant had been initially advised that he had a longer time to lose the excess weight than the rules actually allowed—the correction of the end date to an earlier date might be considered an unfair surprise. However, assuming the applicant was temporarily misled by the end date in the April 8, 2005, Page 7, his own discovery of the error in June and the Coast Guard's documentation of the new end date in July cannot be considered unfair surprise because the corrected end date gave him more time in which to lose the excess weight.

7. The applicant alleged that under Article 12.B.12.a.10. of the Personnel Manual, he should not have been discharged without a certification by a medical officer that the "proximate cause of the obesity is excessive voluntary intake of food or drink, rather than organic or other similar causes apparently beyond the member's control." However, on April 13, July 22, and August 10, 2005, doctors certified on the Command Referral Forms that, *inter alia*, there was no underlying medical condition causing the applicant's excess weight, that it was safe for him to exercise and lose the weight, and that the applicant had been counseled on diet and exercise. The Board finds that although the language on the Command Referral Form does not mirror the language in the Personnel Manual and conforms more closely to the language in Article 2.E.1. of COMDTINST M1020.8E, the purpose and meaning of the certification provided on the form is sufficient to meet the requirement of Article 12.B.12.a.10. of the Personnel Manual because the certifications indicate that the applicant had no underlying medical condition that caused his obesity and that the doctors had counseled him to lose the excess weight by diet and exercise.

8. The applicant alleged that his probationary period should have been suspended because, when he complained of pain and shortness of breath during exercise, Dr. B ordered a stress cardiolite test, which gave an abnormal result, and then an echocardiogram, which showed that he had mild hypokinesia. He alleged that his CO did not receive his medical records until August 2, 2005, and that the medical records prove that he was not fit for duty and could not diet or exercise for several weeks during his probationary period. On June 10, 2005, Dr. B wrote that he had discontinued the applicant's use of Phentermine due to his complaints of "vague paresthesias" and a family

history of heart disease. Dr. B wrote that if the stress cardiolute test was unremarkable “we will continue with Phentermine and diet program.” On June 23, 2005, the stress cardiolute test result was “negative for cardiac ischemia” and the applicant showed “excellent exercise tolerance.” On July 1, 2005, Dr. B wrote that the applicant would undergo an echocardiogram to determine whether his ventricular ejection fraction (a measure of blood flow) was actually 36%. On July 11, 2005, an echocardiogram showed that the applicant’s ejection fraction was normal at 53% and that there was “no significant flow abnormality, with normal peak flow velocities.” The echocardiogram also indicated that the applicant had “mild hypokinesis of the mid interventricular septum.” On July 22, 2005, a cardiologist reported that the applicant told him he had “stopped working out” but that the applicant’s cardiac examination had been normal and the applicant could resume full activity with no restrictions on diet or exercise. However, on August 12, 2005, after the CO received the applicant’s medical records and his request for retention dated August 7, 2005 (wherein the applicant alleged that his probation should have been suspended due to his medical complaints and testing), the CO wrote that “since being formally put on the program, [the applicant] has put forth a myriad of medical complaints. All complaints were quickly and thoroughly assessed by qualified medical professionals who consistently concluded there were no grounds to cease weight loss activities. ... [The applicant] is and has always been fit for full duty and fitness exercise.” The Board finds that although the applicant apparently stopped exercising and dieting during his probationary period, there is insufficient evidence in the record to prove that he did so based on his doctor’s advice. If Dr. B or the cardiologist actually instructed the applicant to stop dieting and exercising, the applicant should be able to produce written confirmation of this fact. The medical notes are too vague about what advice was given and what decisions the applicant made on his own to overcome the presumption that the CO’s statement that the applicant was fit for duty and weight loss activities throughout the probationary period is correct.² The Board finds that the applicant has not proved by a preponderance of the evidence that his command erred in failing to suspend his probationary period under Article 3.A.2. of COMDTINST M1020.8E.

9. The applicant alleged that his CO erred in determining on August 2 and 12, 2005, that he was not making reasonable progress on his weight control program. The applicant was medically cleared for weight probation on April 13, 2005, with a weight of 259 pounds and 33% body fat. He was 70 pounds overweight and needed to have no more than 25% body fat. Under Article 2.F.4. of COMDTINST M1020.8E, he was supposed to implement a diet and exercise plan to lose about 1 pound per week and/or 1% body fat per month. The record shows that on August 1, 2005, he weighed 254 pounds and had a body fat calculated at 30%. Although his body fat percentage had decreased 3%, he had lost only 5 pounds in almost 4 months. On August 10, 2005, the applicant was measured at 250 pounds and 32% body fat, which reflected a weight

² 33 C.F.R. § 52.24(b).

loss of 9 pounds (4 in just 9 days) and a decrease in body fat of just 1%. Given this evidence, the Board finds that the applicant's CO reasonably concluded that the applicant was not making "reasonable and consistent progress" on his weight loss program during the probationary period and was entitled to recommend his discharge in accordance with Article 2.G.1. of COMDTINST M1020.8E. Although the CO could have waited to see if the applicant could gain compliance with Coast Guard policy by the end of the probationary period, such an attempt by the applicant during the last 4 months of his probationary period would have required unhealthy weight loss, under Article 1.A.3. of COMDTINST M1020.8E. In addition, the applicant has not proved that such a delay would have allowed him to remain in the Coast Guard since he has not proved that he met his MAW of 189 pounds or had 25% or less body fat by December 12, 2005.

10. The applicant alleged that the Coast Guard's weight loss program is "bankrupt." The Board notes that some of the increases and decreases in the body fat measurements taken during the course of the applicant's probationary period do not match corresponding increases and decreases in the applicant's weight. Changes in musculature may account for some such variation.³ Moreover, while weight is determined on a simple scale, body fat is normally determined by a health specialist using a tape measure around a member's neck and abdomen, which could result in more variation. The Board notes that all but one (June 20, 2005) of the measurements cited in the chart on page 12 were made by the same health specialist at the applicant's command, which would likely provide some consistency in the technique used. However, in light of the results of the hydrostatic testing done on September 13, 2005, it appears that the calculations of the applicant's body fat by tape measure may have been unnaturally low because of the abdominoplasty he underwent in July 2004, which would have artificially diminished the circumference of his abdomen. The Board is not persuaded, however, that the Coast Guard's weight loss program is "bankrupt" or so imprecise that the applicant should not have been able to follow his own exercise and diet program or that the applicant's command could not reasonably assess his efforts and progress.

11. The applicant alleged that by the time he was discharged on September 27, 2005, he was in compliance with Coast Guard policy. He submitted two emails from members outside his chain of command alleging that he had 24% body fat on September 1, 2005 and 23% body fat on September 12, 2005. However, the CO's recommendation was based on the applicant's lack of progress near the mid point of his probation and the applicant's medical allegations and harassment complaints had already been forwarded to CGPC. CGPC had issued discharge orders on August 30, 2005. Nevertheless, in response to the applicant's allegations and complaints, the Coast Guard had

³ See COMDTINST M1020.8E, Article 2.F.4., which provides that alternate probationary periods based on body fat percentage, instead of weight, "are necessary to accommodate members who gain muscle mass through strength training exercises. In these cases, muscle gain may offset body fat lost through diet and exercise, thus invalidating weight loss as evidence of progress."

him undergo hydrostatic testing, which the applicant himself admitted is the “gold standard” for body measurement. The results of that testing, conducted 5 months into the 8-month probationary period, clearly validated the CO’s contention that the applicant was not making “reasonable and consistent progress during probation,” in accordance with Article 2.G.1. of COMDTINST M1020.8E.

12. Although the applicant alleged that his discharge was based on the results of the hydrostatic testing, whereas COMDTINST M1020.8E mandates measurement by tape, the discharge orders issued on August 30, 2005, were clearly based on the weight and tape-measure body fat measurements made near the mid point of the applicant’s probationary period, not on the hydrostatic testing on September 13, 2005. The hydrostatic testing was apparently performed in response to the applicant’s continued complaints and pursuant to Article 3.C.2. of COMDTINST M1020.8E, which authorizes Commandant to make final determinations when “special consideration is warranted.” The Board is not persuaded that the Headquarters decision to respond to the applicant’s further allegations and complaints by employing hydrostatic testing was erroneous or unfair.

13. The applicant alleged that he never had a “lackadaisical attitude” toward his weight loss program, as stated by the XO on the Page 7 dated April 27, 2005. However, the CO stated that because the applicant reported aboard just after the unit’s October 2004 weigh-in, he had a lengthy “grace period” prior to the April 2005 weigh-in, which he “squandered” even though he had orally agreed to be in compliance by April 2005 and even though he was counseled about his weight problem on multiple occasions. According to the CO’s letter dated August 12, 2005, the applicant’s direct supervisor reported that the applicant told the supervisor after his weight probation began that because he was a chief petty officer with more than 18 years of service, the command would never be able to get a discharge recommendation approved. Moreover, the Board notes that on July 27, 2005, the applicant complained in his email to the District Civil Rights Office in response to his command’s attempts to get him to comply with the weight loss program that “enough was enough,” as if his command’s insistence on enforcing the Coast Guard’s weight standards and refusal to tolerate his obesity in silence constituted harassment.

14. The applicant alleged that his discharge without a hearing before an ADB was very unjust even though the regulations do not require an ADB when a member is discharged due to weight control failure. For purposes of the BCMRs under 10 U.S.C. § 1552, “injustice” is “treatment by military authorities that shocks the sense of justice.”⁴ “The BCMR has the authority to decide on a case-by-case basis if the Coast Guard has

⁴ *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev’d on other grounds*, 930 F.2d 1577 (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976)).

committed an error or injustice.”⁵ Given that a member’s compliance with the Coast Guard’s weight control policy is essentially a matter of medical measurements rather than a matter of subjective opinions about performance, the Board is not persuaded that the Coast Guard’s refusal to convene ADBs in cases of weight control failure is unjust.

15. The applicant also alleged that his separation for obesity, without retirement, after completing 19 years and 2 months of active duty was very unjust. The applicant’s separation without retirement after 19 years and 2 months of service may seem shocking, but the Board finds that it was not the applicant’s “treatment by military authorities”⁶ that was shocking. The record indicates that in 2005 the Coast Guard enforced its weight standards, as it had done consistently during the applicant’s career whenever he exceeded those standards, by insisting that he meet the standards during a probationary period or be discharged. The Coast Guard gave him several warnings in 2005 and throughout his career about the consequence (discharge) of failing to meet the standards. Instead of heeding those warnings in 2005, as he had done in the past, the applicant lost only 5 of 70 pounds by August 2, 2005—about a week before his probation mid point—when he was told that he would in fact be discharged as he had been warned. Moreover, under Article 2.H.2. of COMDTINST M1020.8E, the applicant may apply for reenlistment as a chief petty officer if he meets Coast Guard weight or body fat policies within two years of his separation. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that the Coast Guard committed error or injustice when it discharged him for weight control failure on September 27, 2005. The Board is not persuaded that the Coast Guard was not entitled to enforce its weight control policy because he had more than 19 years of service.

16. The applicant has made numerous allegations with respect to the actions and attitudes of various members of the Coast Guard as well as his doctors. Those allegations not specifically addressed above are considered to be not dispositive of the case.

17. Accordingly, the applicant’s request should be denied. However, if the applicant is denied reenlistment after meeting the Coast Guard’s weight or body fat standards as required under Article 2.H.2. of COMDTINST M1020.8E, within two years of his discharge, the Board will grant further consideration.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁵ Decision of the Deputy General Counsel, BCMR Docket No. 2002-040.

⁶ *Sawyer*, at 868.

ORDER

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

Harold C. Davis, M.D.

James E. McLeod

Dorothy J. Ulmer