

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

**Application for Correction
of Coast Guard Record of:**

XXXXXXXXXXXX
XXXXXXXXXXXX

**BCMR Docket
No. 2002-073**

FINAL DECISION

This is a proceeding under section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on March 22, 2002 upon the Board's receipt of the applicant's complete application for the correction of her military record.

This final decision, dated December XX, 2002, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant asked the Board to correct her record by removing a negative administrative remarks (page 7) entry documenting the commanding officer's (CO's) six-month suspension of his recommendation for her advancement to chief petty officer (pay grade E-7). Also, she requested that the Board set aside her involuntary discharge for weight noncompliance and restore her to active duty with back pay and allowances. She further requested that her DD Form 214 be corrected to show that she contributed to the Montgomery G I Bill (MGIB) and that she is entitled to education benefits under that program.

The applicant enlisted in the Coast Guard on October 15, 199X. She served on active duty until XXXXXXXXXXXX, when she was honorably discharged due to weight control failure. She was assigned an RE-3F (eligible for reenlistment except for disqualifying factor: exceeds weight standards) reenlistment code.

SUMMARY OF RECORD AND SUBMISSIONS

Beginning in XXXXX, the applicant was placed on probation several times because she failed to meet the weight and body fat requirements contained in COMDTINST M1020.8C (Allowable Weight Standards for Coast Guard Military Personnel). This instruction promulgates policy and procedures for the administration of the allowable weight standards of the Coast Guard and the processing of members for separation who fail to meet the standards. The instruction contains the following pertinent provisions:

Paragraph 3.B. states "All military personnel shall be screened against the maximum allowable weight standards [MAW] . . . at least annually . . . Personnel failing the initial screen will be measured against the percentage of body fat standards . . . to determine if they are in compliance with Coast Guard weight/body fat standards."

Paragraph 3.C. states "Unless granted an exemption . . . overweight members who also exceed their maximum body fat percentage (overfat) will be placed in a probationary period to allow them to come within their [MAW] or body fat percentage."

Paragraph 3.H. states "Members failing to reach compliance with their [MAW] or body fat standard by the end of a probationary period will be processed for separation."

Paragraph 5.C. States "All overweight members who exceed the maximum body fat standards shall be referred to a medical facility to . . . determine if there is an underlying medical cause and whether it is medically safe for the member to lose the excess fat."

On XXXXXXXXXXXXX, the applicant was determined to be 24 pounds overweight. As required by the regulation, she was referred to a medical officer to determine whether it was medically safe for her to lose the excess weight. At the time of referral, the applicant's maximum allowable weight (MAW) was 170 pounds, but she weighed 194 pounds. Her body fat measured 41%, which was 6% above the maximum allowable body fat standard.¹ The medical officer stated that she had slow metabolism and a hormone imbalance causing weight gain and severe fatigue, but the conditions were resolving. He also stated that it was safe for the applicant to lose the weight and that he expected her to meet the weight standards within one year with the proper diet and exercise. The applicant was placed on weight probation for a period of 12 months and was expected to lose the excess weight within that period.

On XXXXXXXXXXXXX, the applicant was removed from weight probation because she had met the requirements of the Coast Guard weight program. At this time she weighed 186 pounds and had 33% body fat.

On XXXXXXXXXXXXX, the applicant was again referred to a medical officer (not the one she had seen earlier) because she exceeded her MAW by 31 pounds and her

¹ Enclosure (3) to COMDTINST 1 lists the maximum body fat percentage for women. They are 33% for women less than 30 years of age, 35% for women less than 40 years of age, and 37 percent for women 40 years of age and older.

maximum allowable body fat by 6%. The applicant's MAW was 177 pounds,² but she weighed 210 pounds. Her body fat was at 41%. The medical officer stated that the applicant was suffering from XXXXXXXXXXXXX and XXXXXXXXXXXX, which contributed to her weight gain. He stated that the conditions had stabilized with medication. Also, he stated that it was safe for the applicant to lose the excess weight and he recommended that she meet with the physiologist to obtain an exercise regime.

On December 27, 199X, the applicant was notified that she was being placed on weight probation because she had exceeded her MAW. The page 7 entry stated that she was 33 pounds overweight and had 41% body fat. She was told that she was required to lose 33 pounds and to reduce her body fat below 35% by August 23, 2000, and if she failed to meet this standard she would be recommended for separation. She was also advised "all actions listed in Chapter three of COMDTINST M1020.8 will be withheld until [she] complied with weight and body fat standards."³ The applicant acknowledged this page 7 with her signature.

On May 19, 2000, the medical officer wrote a letter to whom it may concern explaining the applicant's situation. He stated that he was evaluating the effectiveness of the medication used to treat the applicant's hyperthyroidism. He stated, "Thyroid disease can contribute to weight gain. With respect to a weight loss plan, he wrote the following: "I would recommend that any plan not exceed one pound per week of weight loss. Programs which would lose more weight than this amount may well be harmful to the patient in the long-term." He encouraged the applicant to consult with a naval station physiologist.

On July 18, 2000 the applicant was advised that she was eligible to reenlist for up to six years and to receive a selective reenlistment bonus (SRB) with a multiple of 1. She was further advised that she would receive 50% of the SRB upon reenlistment/extension, but the remaining 50% would be withheld until she complied with weight and body fat standards.

On XXXXXXXXXXXX, the applicant was disenrolled from the weight program for approximately eight weeks to allow her time to adjust to new thyroid medication that had been prescribed by a third medical officer. At the end of the eight-week period, she would be medically evaluated for reenrollment into the weight program.

² It was later determined that from December 27, 1999 forward, the applicant had an adjusted MAW of 186 pounds.

³ Chapter three of COMDTINST M1020.8C states the following pertinent actions will be withheld for those members who have been notified and acknowledged that they have exceeded their MAW and maximum body fat percentage: advancement or promotion; assignment to command position both ashore and float; assignment to resident training, advanced training, etc; and SRP payment beyond the initial 50% payment.

On a page 7 entry, dated XXXXXXXXXX, the applicant was informed that on XXXXXXXXXXXXX, she had been cleared by the medical officer to continue with the Coast Guard's weight loss program. The applicant claimed that she was never counseled about this and acknowledged the page 7 on February 1, 2001, the date she became aware of it. The page 7 advised the applicant of the following:

You have this date been re-screened and determined to be 46 pounds overweight. Your measurements are: Height: 64", wrist size 7.5", weight: 223 pounds. Your age is 34 and your percent body fat is 45%. In accordance with COMDTINST M1020.8, you are hereby notified that you are required to lose 43 pounds or drop below 35% body fat by [September 15, 2001]. You must show satisfactory progress through out the period. If after 5 months, approximately half of the weight has not been shed, then you will be recommended for separation. Furthermore, until you are in compliance with weight or body fat standards, all actions listed in Chapter three of COMDTINST M1020.8 will be withheld. By signature below, you acknowledge both this entry and that you have been afforded the opportunity to review COMDTINST M1020.8.

On XXXXXXXXXX, the applicant was informed by her commanding officer (CO) that he had begun action to discharge her from the Coast Guard due to her failure to maintain Coast Guard weight standards. The CO told the applicant that she was at the midway point of her most recent probationary period and she had not lost half of the 46 pounds as he directed in the November 2000 page 7. The CO explained to the applicant that rather than discharging her in November 2000 he had requested that the Commandant grant her a waiver. He stated, "the waiver was approved with the stipulation that half way through the probation, [the applicant] must loose half of [her] excess weight." He stated that, on May 14, 2001, the applicant had lost 7 pounds and 2 percent body fat, which demonstrated that she was not making reasonable progress toward losing the excess weight.

On XXXXXXXXXX a page 7 counseling entry was placed in the applicant's record documenting that she was not recommended for advancement on her most recent performance evaluation. The CO advised her that he was suspending his recommendation that she be advanced to chief petty officer (pay grade E-7) for six months. The page 7 provided the applicant with the reasons for the suspension and with guidance on improving her performance in order to obtain a recommendation for advancement. It stated the following, in pertinent part:

You have failed to demonstrate consistently, the leadership and performance factors that are necessary for advancement to Chief Petty Officer. Your lack of motivation and enthusiasm not only has discredited

yourself, but is being passed on to your subordinates. You clearly have the knowledge and expertise to be a Chief Petty Officer, but you need to consistently demonstrate the attributes that I feel are necessary to be advanced. Due to my belief that you can perform up to the standards if you put your mind to it, I will re-evaluate this suspension on 31 October 2001.

On XXXXXXXXXX, the CO recommended that the Coast Guard discharge the applicant because she had failed "to maintain Coast Guard weight standards." The CO stated that the applicant had been given "more than ample time to comply with the Coast Guard weight standards and has shown little progress towards reaching her weight loss goals." He stated that the applicant had been informed of the recommendation to discharge her and had been advised of her right to submit a statement in her own behalf, which she did objecting to the discharge.

In her statement, dated XXXXXXXXXX, the applicant objected to being discharged from the Coast Guard before she completed her probationary period. She asked to remain in the Coast Guard, and in support of that request she cited her above average performance. She further stated as follows:

I was placed on a six-month probationary period on 27 December 99 under Dr. [J.'s] care. He was subsequently transferred overseas and in the following six months I was shuffled from one doctor to another . . . never seeing one more than twice. I continually complained of debilitating fatigue, muscle aches and depression . . . Because my thyroid-stimulating hormone was fluctuating above, below and within the normal range, each doctor changed my XXXXXXXXXX dosage at every appointment.

[Finally] I was referred to a Dr. [C.] for my symptoms. [He] was familiar with the T3 treatment and I was prescribed it as part of my thyroid treatment and I began to feel almost immediate relief. At this point I was re-screened and placed back on a probationary period. I did not believe, nor do I still believe that a waiver would have been necessary if the full details of the shoddy medical treatment I had received up until Dr. [C.] assumed my case . . . There was a complete medical background to explain my case.

I will admit that when I signed the page 7 placing me on current probation that I did not fully read the probationary stipulations and was unaware that I had to have half of my weight off by the mid-period. I was concentrating on the end of my probation in September and was caught completely by surprise by the command's decision to discharge me at this point. I had shown progress in losing inches and weight up until the May

Servicewide [advancement examination (SWE)], when I was concentrating more on the test than losing the weight, believing my deadline was September and I still had time. I also concede that I could have shown more progress by now.

On XXXXXXXXXXXX, the Commandant directed the applicant's discharge no later than XXXXXXXXXXXX. He directed that a page 7 entry containing the following information be placed in the applicant's record: "Active duty enlisted members discharged for exceeding the maximum allowable weight or for appearance shortcomings may request reenlistment to their former rate provided she is within the maximum allowable weight, meet appearance standards and have been out of the service at least 6, but no longer than 12 months. The service's decision to authorize reenlistment will be based on its needs and the member's past performance." He also authorized the recouping of any unearned reenlistment bonus.

The applicant was honorably discharged on XXXXXXXXXXXX due to weight control failure. She was given the corresponding JCR separation code and a RE-3F⁴ reenlistment code.

Applicant Allegations

The applicant alleged that starting with her XXXXXXXXXXXX weight probationary period, her command improperly stated her MAW. She stated that her MAW should have been 186 pounds rather than the 177 pounds. She stated that the incorrect 177 pound MAW was used from XXXXXXXXXXXX until her discharge.

The applicant complained that the XXXXXXXXXXXX page 7 placing her back on probation for failure to meet weight standards was not given to her to sign until XXXXXXXXXXXX. She stated that she was not counseled that this would happen and objected to it. She states the page 7 is incorrect in that she was not 46 pounds overweight but rather 37 pounds overweight, using the 186 -pound adjusted MAW.

The applicant alleged that her superiors told her that if she showed significant progress in losing weight they "would stop the [discharge] process." She stated that she had lost 15 pounds by XXXXXXXXXXXX and had lost 23 pounds by XXXXXXXX. She stated that on XXXXXXXXXXXX, she was told by the CO that "the process cannot be stopped unless [she lost] all the weight before XXXXXXXXXXXX and it may not be able to be stopped then." According to the applicant, losing all of the weight prior to the end of the probationary period would have been at a faster rate than deemed safe by her

⁴ The JCR separation code and the RE-3F reenlistment code represent the "involuntary discharge directed by established directive . . . when a member fails to meet established weight control standards." See the Separation Designator Handbook.

doctor, which was 4 pounds per month. She stated that when she was discharged on XXXXXXXXXXXX, she was 9 pounds over her MAW of 186 pounds.

The applicant alleged that the individuals who made the decision to discharge her were prejudiced against her. In particular, she stated that the detailer was biased against her because of the problems he encountered in attempting to transfer her to another duty station because of her overweight status.

The applicant alleged that she was not counseled on or notified about the contents of XXXXXXXXXXXX page 7 entry documenting the CO's suspension of his recommendation for her advancement before it was placed in her record. She stated that she signed the page 7 under duress, which she attributed to the events surrounding her overweight status. She further stated that while her performance did not decline, "[her] usual out-going demeanor had stopped and [she] no longer spoke to anyone other than professionally prior to [receiving the page 7]."

Views of the Coast Guard

On September 25, 2002, the Board received an advisory opinion from the Chief Counsel of the Coast Guard. He recommended that the Board deny relief in this case.

The Chief Counsel stated that Article 5.H.4. of COMDTINST M1020.8C (Allowable Weight Standard for the Health and Well-Being of Coast Guard Military Personnel) requires that any active duty enlisted member who exceeds the maximum allowable weight and percent body fat standards at the end of the member's probationary period shall be processed for separation.

The Chief Counsel admitted that the applicant's CO applied an incorrect MAW during the applicant's last two probationary periods. The applicant's MAW was listed as 177 pounds when it should have been 186 pounds.

The Chief Counsel stated that when the applicant's CO decided to terminate her probationary period, which began on XXXXXXXXXXXX, at its mid-point, the applicant remained 30 pounds overweight using the correct MAW standard of 177 pounds. He stated that the CO's decision to terminate the probationary period was not arbitrary and capricious because the applicant could not have lost the weight, at a medically safe rate, by the end of the probationary period. The Chief Counsel stated that the errors committed by the Coast Guard in calculating the applicant's MAW were harmless and do not rise to the level of unjust or unfair treatment.

The Chief Counsel stated that the page 7 dated XXXXXXXXXXXX, was issued for the purpose of notifying the applicant that her CO was not recommending her advancement. The Chief Counsel agreed with the comments of Commander, Coast

Guard Personnel Command (CGPC) with respect to this issue. CGPC stated, in enclosure (1) to the advisory opinion, that "while it is good practice to verbally counsel member's on their performance during an evaluation period, it is not required to be . . . documented." CGPC further stated that the "applicant maybe correct that she was unaware of her performance problems, but she presents no evidence that the information contained in the [page 7] is in error or unjust."

With respect to the applicant's contention that she did not receive proper medical treatment, CGPC offered the following:

The record contains several documents showing that Applicant's condition was evaluated and monitored in connection with her placement on weight probation. She was actually removed from the program for an 8-week period so she could adjust to new medication to treat her hyperthyroid condition. Per the Medical Manual, member's suffering from this condition may be retained in the Service if it responds well to medication and permits the members to perform their duties. The applicant's record indicates that this was the case . . . therefore she was not considered for disability separation The record shows that her condition probably contributed to her weight gain, but the record also shows that her condition did not prevent her from losing weight, and that her condition was taken into account when determining her status in the weight program.

The Chief Counsel stated that the applicant has misinterpreted block 15a of the DD Form 214, which applies to VEAP and not MGIB. He stated that because the applicant had contributed to MGIB program and completed a minimum of three years of service, she has satisfied the requirements pertaining to MGIB benefits.

Applicant's reply to the Views of the Coast Guard

On September 30, 2002, a copy of the Coast Guard views was mailed to the applicant for a reply. She did not submit a reply to the Coast Guard views.

FINDINGS AND CONCLUSIONS

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

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

2. The applicant has not demonstrated by a preponderance of the evidence that the Coast Guard committed an error or injustice by discharging her from the Service due to her failure to meet the weight standards required by COMDTINST M120.8C. The Coast Guard incorrectly stated the applicant's MAW in both the XXXXXXXXXXXX and the XXXXXXXXXXXX page 7s documenting her probationary status. However, the Board finds that this error did not prejudice the applicant. Even using the correct MAW, the applicant was 24 pounds over her MAW in XXXXXXXXXXXX and 37 pounds beyond her MAW in XXXXXXXXXXXX. In neither of these instances did the applicant show evidence that she came close to complying with the weight standards. However after learning of the command's intent to discharge her, she appeared to put forth some real effort toward losing weight. At the time of her discharge, she admitted that she was still 9 pounds beyond her MAW of 186 pounds. Accordingly, the Board finds that the applicant would have failed to comply with the weight requirement even if her correct MAW had been stated.

3. It was permissible for the applicant's CO to request her discharge at the midpoint of her probationary period, which began on XXXXXXXXXXXX. Section 3.C.3 of COMDTINST M1020.8C gave CO's the authority to request the discharge of a member in the middle of a probationary period if the member was not making reasonable progress toward the weight loss goal. At the time he requested the applicant's discharge, the CO stated that she had lost only 7 of the excess pounds and only 2% body fat. Moreover, the applicant acknowledge by signing the XXXXXXXXXXXX page 7 entry that she was required to lose half of her excess weight by the midpoint of the probationary period. She did not meet this requirement and claimed that she was not aware of this requirement because she did not read the page 7 carefully before signing it. She even admitted in her statement objecting to her discharge that she could have lost more weight than she had by that time. The applicant complained that she was not notified about the XXXXXXXXXXXX probationary period until XXXXXXXXXXXX and that losing all of the excess weight by XXXXXXXXXXXX would be medically unsafe. However, the applicant has not shown that from February 1, 2001 until May 14, 2001 she was losing weight at the medically recommended rate of four pounds per month. Counting from February 1, 2001 until May 14, 2001, the applicant could have safely lost 14 pounds, but only lost 7. Under the circumstances presented here, the Board finds that the CO acted reasonably and in accordance with the regulation in requesting the applicant's discharge from the Coast Guard before the end of the probationary period.

4. The applicant blamed her inability to lose weight on poor medical care she allegedly received for her doctors. While it is true that more than one doctor treated the applicant, there is no evidence that this was prejudicial to her situation. She was referred to a medical officer before being placed on weight probation. None of the medical officers recommended against placing the applicant in a weight loss program or stated that because of her medical conditions it was impossible for her to comply with weight standards, except for one eight-week period in which she was removed

from weight probation to allow for the adjustment of her medication. The applicant has not submitted any medical evidence to the contrary. In XXXXXXXXXX, the CO removed her from weight probation for eight weeks to allow her time to adjust to a new Thyroid medication. Subsequently, she was placed back on the weight probation with her doctor's approval. The Board finds that the applicant was not required to lose weight until it was medically appropriate for her to do so. Moreover, it is not unusual for military members to be treated by more than one doctor due to the rotation of military personnel.

5. The applicant has failed to prove the CO committed an error or injustice by withdrawing his recommendation for her advancement to the next pay grade. A recommendation for advancement lies within the discretion of the CO. There is no requirement that counseling be documented, other than the page 7 withdrawing the recommendation. See Article 10-B-7-3 of the Personnel. This provision also requires that the CO to inform the applicant of the steps necessary to regain a recommendation for advancement. The CO complied with this requirement.

6. As an E-6 with over nine years of experience, the applicant should have inquired about and been tuned into the expectations of her supervisors. She has not shown that the contents of the page 7 are in error. Her statement that she discontinued her usual out going behavior and spoke to others only when it involved work" corroborates the CO's comments in the page 7 that she lacked motivation in and enthusiasm for her job.

7. The applicant's DD Form 214 correctly reflects her MGIB information. The Coast Guard indicated that she contributed to the plan and completed the necessary years of service to be eligible for benefits.

8. Accordingly, the applicant's request for relief should be denied.

ORDER

The application of former XXXXXXXXXXXXXXXXXXXXXXXX USCG, for correction of her military record is denied.

Astrid Lopez-Goldberg

Michael K. Nolan

Kathryn Sinniger