

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-140

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

FINAL DECISION

This is a proceeding 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 upon receipt of the applicant's completed application and military records on March 26, 2010, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated January 13, 2011, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

REQUEST

The applicant asked the Board to correct her record to show that she remained on active duty and was not discharged because of weight control failure on December 18, 2009. She also requested that all administrative remarks pages (page 7s) generated by Sector Delaware Bay be removed from her military record. Additionally, the applicant requested to be restored to the rank of YN1. She was demoted from YN1 to YN2 because of incompetency prior to her discharge from the Coast Guard.

ALLEGATIONS

The applicant's last weight and body fat measurements occurred on November 2, 2009. At that time, she was 65 inches tall and weighed 172 pounds. Her waist measured 33 inches, her neck measured 14 inches, and her buttocks measured 43 inches. She had 37% body fat. Based on these measurements, the applicant was determined to be 7 pounds overweight and 3% over her allowable body fat percentage. The November 2, 2009, page 7 advised the applicant that this was her third consecutive semiannual weigh-in period in which she exceeded the maximum allowable weight (MAW)¹ and body fat percentage, which was a basis for separation from the Coast Guard. The command informed the applicant that instead of placement on weight probation, she would be recommended for separation from the Coast Guard. The applicant

¹ MAW is the weight permitted for a member based on body mass index.

alleged that although she met her MAW on November 24, 2009, prior to her discharge, the Coast Guard separated her anyway. She alleged that she was told by LT K that the discharge would be stopped since she met her MAW, but according to the applicant, the LT failed to promptly input her November 24 2009 weight compliance data into Direct Access.

The applicant alleged that her command violated the Coast Guard's Weight and Body Fat Program Manual (COMDTINST M1020.8G) by requiring her to lose 7 pounds in 7 days between April and May 2009. She stated that the regulation requires a loss of one pound per week or 1% body fat per month. She also alleged that her MAW kept changing without restarting or adjusting her probationary period. For instance, the applicant's MAW was 180 pounds on November 13, 2008, 173 pounds on May 4, 2009, and, 165 pounds on November 2, 2009.

The applicant also alleged that her supervisor, a CWO2 retaliated against her by using her weight as a reason to discharge her from the Coast Guard and to reduce her in rate because she accused the supervisor of violating Article 117 of the Uniform Code of military Justice by using provoking speech and gestures toward the applicant. The applicant asked to be reinstated to YN1.

Pertinent Page 7s Pertaining to the Applicant's Weight Control Failure

The applicant's military record reveals that she had weight control problems off and on during her Coast Guard career.

On August 30, 2002, a page 7 was entered into the applicant's record noting her compliance with the weight requirement. Her wrist measurement was 7½ inches, her height was 65 inches and her MAW was 190 pounds.

On May 25, 2006, a page 7 was entered into the applicant's record placing her on probation because she was 15 pounds over her MAW of 180 pounds. Her wrist size was between 7½ and 7¾ inches, her height was 65 inches, and her weight was 195 pounds.

On May 16, 2007, a page 7 was entered into the applicant's record advising her that she was 7 pounds overweight. According to the page 7, she was 65 inches tall, had a wrist measurement of between 7½ to 7¾ inches, and weighed 187 pounds. Her MAW at this time was 180 pounds.

On November 13, 2008, an administrative remarks page (page 7) was entered into the applicant's record counseling her that she was 7 pounds overweight and had 8% excess body fat. The page 7 noted her weight to be 187 pounds and her height to be 65 inches. The page 7 advised the applicant that she was required to lose the weight and/or body fat by July 17, 2009, and that if she failed to reach weight compliance by the end of the probationary period, she would be recommended for separation. The applicant acknowledged the page 7 with her signature on that date.

On April 21, 2009, a page 7 was entered into the applicant's record advising her that she was weight compliant and that her weight probationary period had ended.

On May 4, 2009, the applicant was advised on a page 7 that she was 7 pounds overweight. She weighed 180 pounds, stood 64.5 inches tall, and had a wrist measurement of between 7 and 7.25 inches. She also had a 34-inch waist and a 14.5-inch neck, with 39% body fat. The page 7 notified the applicant that she was required to lose 7 pounds or drop below 35% body fat by September 4, 2009. The applicant acknowledged the entry with her signature.

On June 9, 2009, the applicant acknowledged a page 7 informing her that her probationary period had ended because she weighed 171 pounds and was compliant with her MAW.

On November 2, 2009, the following page 7 was placed in the applicant's record which she acknowledged with her signature:

On this date you have been determined to be 7 pounds over your MAW and 3% over your maximum allowable body fat. Your measurements are: Height: 65 (inches), Weight: 172 pounds, Waist 33 (inches), Neck 14 (inches), Buttocks 43 (inches). Your age is: 34 and your percent body fat is 37%. In accordance with reference (a) [Coast Guard Weight and Body Fat Standards Program Manual, COMDTINST M1020.8 (series)] this is your third consecutive semiannual weigh-in period over the maximum weight and body fat %. Therefore, you are hereby notified that, instead of probation, 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 November 19, 2008, Commander, Coast Guard Personnel Service Center (PSC) approved the applicant discharge from the Coast Guard because she exceeded the weight and body fat standards.

On December 18, 2009, the applicant was honorably discharged from the Coast Guard because of weight control failure. At that time she had served on active duty for sixteen years, five months, and twenty-six days.

Reduction in Rate

On October 2, 2008, the applicant was counseled that she was not meeting her responsibilities as auditor/PAO for her unit. She was informed that she was not fully researching and using current instructions to complete pay transactions and that she was blaming others for her mistakes. She was advised that failure to adhere to the Commandant's policy and to her supervisor's direction would result in a mark of "not recommended for advancement" on her performance evaluation and in placement on performance probation.

In October 2008, the applicant was informed that she was a candidate for reduction-in-rate by reason of incompetence and that she would be evaluated over a three-month period. The applicant acknowledged the page 7 entry.

On November 5, 2008, the applicant was counseled on a page 7 that she was not performing her duties as auditor/PAO because she failed to ensure that members' pay entitlements were accurate. She was reminded to be diligent in her research and to consult the chief petty officer when in doubt. She was told that further mistakes of the same nature would result in disciplinary action. The applicant acknowledged the entry.

On December 1, 2008, the applicant was counseled again about her poor performance of duty. Her authority to sign documents on behalf of the command was revoked. The applicant acknowledged this entry.

On December 23, 2008, the applicant was provided with performance feedback and told that she was progressing. She was told that a review of her work showed a lack of attention to detail and diligence by not ensuring that all documents were correct.

On January 29, 2009, the applicant's competency evaluation period ended. The commanding officer told the applicant that rather than incompetence, her performance issues were more a matter of lack of diligence and indolent behavior. The CO stated that the applicant continued to produce work of poor quality and he gave the applicant 10 examples of her work that required improvement. The CO stated that rather than a reduction in rank, he would recommend performance probation.

On March 6, 2009, the CO informed the applicant that she was being placed on a twelve-month performance probationary period and he provided her with guidance on what was required to successfully complete the probationary period. In addition, the CO stated that "you will be observed, counseled, and mentored to ensure you have the necessary tools available to you to successfully complete this probation. Should you fail to successfully complete this probationary period, you are subject to being processed for separation from the Coast Guard by reason of unsuitability. The CO also told the applicant that he was authorized to recommend her separation at any time prior to the expiration of the probationary period if she failed to make a conscientious effort to overcome her deficiencies or if she violated the conditions of her probation.

On March 6, 2009, the administration officer (AO) provided the applicant with details of her probation and told her that she would no longer be supervisor of the SPO (servicing personnel office) staff but would be assigned to be a record's yeoman. The applicant acknowledged the entry.

On May 8, 2009, the AO told the applicant that she was not meeting the requirements of her probation as spelled out in the March 6, 2009 page 7.

On May 29, 2009, the CO removed the applicant from the SPO and assigned her as the command administrative assistant to work for LT K because she had failed to meet the expectations of her probation.

On June 11, 2009, the CO told the applicant that her probation had ended because of her change in primary duties and reduction in pay grade.

VIEWS OF THE COAST GUARD

On August 10, 2010, the Judge Advocate General (JAG) of the Coast Guard adopted the comments from PSC as the Coast Guard's advisory opinion. PSC recommended that the Board deny the requested relief. In this regard, the PSC argued that the Coast Guard is presumptively correct and the applicant has failed to substantiate any error or injustice in her record.

PSC stated that on November 2, 2009, the Coast Guard determined that the applicant was not in compliance with the weight and body fat standards for the third consecutive time in less than 12 months. PSC stated that Article 3.3.1 of COMDTINST M1020.8G, permits the separation of a member who has been non-compliant with the weight and body fat standards for three consecutive weight-ins. According to PSC, the applicant's situation met the requirements of Article 3.3.1. of COMDTINST M1020.8G and she was properly separated from the Coast Guard in accordance with that policy.

The Coast Guard did not address the applicant's request to be reinstated to pay grade E-6 (YN1).

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 14, 2010, the Board received the applicants reply to the views of the Coast Guard. She restated contentions that she had made earlier. She also alleged that in April 2009, the AO (the CWO2) changed the applicant's weight characteristics by entering incorrect numbers into Direct Access. The applicant complained that there is no recourse for the member when data is input incorrectly into Direct Access. The applicant also appeared to allege that she had an underlying medical condition (Lyme disease) that made losing weight difficult. She submitted copies of medical records showing that she was treated for Lyme disease. She alleged that during her probationary periods, she did not receive meaningful weight loss or dietary counseling.

With regard to reinstatement to YN1, the applicant stated that according to the Personnel Manual, "[a]fter 6 months you are authorized to regain your original rank after reduction." She also stated that the removal of all page 7s from her record that were prepared by Sector Delaware will allow for a fresh start with the Coast Guard.

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 question before the Board is whether the Coast Guard committed an error by discharging the applicant under Article 3.3.1 of COMDTINST M1020.8G. because she exceeded the weight and/or body fat standards on three consecutive weigh-ins. For the reasons discussed below, the Board finds that the Coast Guard did not commit an error in this regard.

3. On September 8, 2009, the Coast Guard issued ALCOAST 512/09, with an effective date of October 1, 2009. Under this ALCOAST, the Coast Guard implemented a new standard for determining a member's MAW based on Body Mass Index (BMI).² The ALCOAST contained a chart that listed the MAW based on a member's height and a BMI of 27.5, regardless of age and gender.³ The applicant was 65 inches tall, so under the BMI standard her MAW was 165 pounds. She exceeded her MAW by 7 pounds on November 2, 2009.

4. According to ALCOAST 512/09, although a member's MAW and body fat number will change under the new standard, the process and procedures of the Weight and Body Fat Program (COMDTINST M1020.8 (series)) remained in effect. Therefore, under COMDTINST M1020.8 (series) and ALCOAST 512/09, because the applicant exceeded her MAW, she was subject to a body fat measurement to determine whether she exceeded her maximum body fat allowance. According to the November 2, 2009 page 7, she exceeded her maximum allowable body fat by 3%.

5. Because the applicant exceeded her MAW and her maximum allowable body fat, she was not in compliance with the Coast Guard's Weight and Body Fat Program, as amended by ALCOAST 512/09. Because the November 2, 2009 weigh-in was her third consecutive weigh-in in which she was not in compliance with the Coast Guard's weight and body fat program, she was subject to separation. In this regard, the applicant was not in compliance on November 13, 2008, May 4, 2009, and November 2, 2009. Paragraph 6.D of ALCOAST 512/09 states the following: "If a member is found non-compliant with weight/body fat standards during this October weigh-in, and it is their third consecutive non-compliant weigh-in they shall be processed for separation."

6. The applicant argued that she met her weight requirements on November 24, 2009, but she was discharged anyway. She provided no evidence to support this allegation. Even if she did meet weight standards by November 24, 2009, the Commandant had approved her discharge on November 19, 2009. Moreover, the Coast Guard was not obligated to consider such information because she was not on weight probation and nothing in the regulation stated that a discharge for non-compliance would be terminated because the applicant stated that she had met her weight and/or body fat requirement prior to her discharge date. Moreover, since she was not on weight probation, the Coast Guard had no duty to monitor her weight and/or body fat after the November 2, 2009 weigh-in. Accordingly, the applicant has not shown by a preponderance of

² ALCOAST 469/08 issued in September 2008 and ALCOAST 168/09 issued on March 21, 2009, advised members that effective October 1, 2009, the Coast Guard would be implementing a new standards for determining MAW based on the BMI.

³ Prior to October 1, 2009, the Coast Guard used a member's wrist measurement and height to determine their MAW.

the evidence that the Coast Guard committed an error by discharging her for non-compliance with the weight and body fat requirements of ALCOAST 512/09.

7. The applicant's request for reinstatement to YN1 is denied because the applicant has submitted insufficient evidence that she performed at a higher level than indicated by her command. She indicated in her statements that her supervisor was rude to her and treated her unfairly because she had attempted to place her on report for using provoking speech towards the applicant, but there is no evidence, except for the applicant's allegations, that this treatment was prevalent throughout the probationary period and that it was so severe that the applicant was unable to perform the duties of a YN1. It appears that the applicant's unit complied with Article 5.C.38.c. of the Personnel Manual in reducing the applicant to YN2 because of failure to successfully complete her probationary period. The applicant did not provide the Board with a specific regulation, and the Board is aware of none, which stated that a member reduced for incompetency will be reinstated to the grade from which reduced after a six-month period. Therefore, the applicant's request for reinstatement to YN1 should be denied due to insufficient evidence of error or injustice.

8. The applicant requested to have all page 7s prepared while assigned to CG Sector Delaware Bay removed from her military record. However, there is insufficient evidence that any of the page 7s are erroneous. All of the allegations have been considered, and those are not discussed in the findings and conclusions are considered not to be dispositive of the issues in this case.

9. Under the regulation, members like the applicant who are discharged for non-compliance with the Weight and Body Fat program can request reenlistment provided the member is within their MAW, meets appearance standards, and has been out of the service for less than 24 months. However, the decision to authorize such reenlistment will be based on service need and the member's past performance. The applicant indicated in an email to that she is weight compliant and has been denied reenlistment on three separate occasions. The Board is not aware of the reason for the Coast Guard's refusal to reenlist the applicant, but service need, if that is the reason, is a legitimate reason for not doing so.

10. Accordingly, the applicant has failed to prove that the Coast Guard committed an error or injustice.

ORDER

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

Donna M. Bivona

Evan R. Franke

Dorothy J. Ulmer