

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-174

**XXXXXXXXXXXX
XXXXXXXXXXXX**

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 after receiving the applicant's completed application and military records on May 14, 2010, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 24, 2011, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to void her discharge from the Reserve. She alleged that when she failed to achieve the Coast Guard weight or body fat standard while on weight probation, she asked to transfer from the Ready Reserve to the Inactive Status List (ISL), and she was told that she had until February 2010 to meet the standards and return to an active status. However, she was discharged from the Reserve on December 2, 2009, without notice. When she asked why she had been discharged, she was told that her enlistment, which would have ended on May 25, 2009, had been extended only through December 2, 2009, and that her request to extend her enlistment for two years had not been processed. The applicant alleged that if she had known of her discharge date, she would have reported to weigh in earlier because she met the body fat standard before December 2, 2009. However, because she had been told she needed to meet the standards only by February 2010, and she wanted to meet the weight standards, as well as the body fat standard (meeting only one of the standards is required), she did not weigh in before she was discharged without warning on December 2, 2009. The applicant noted that she had 19 years and 9 months of service in the Reserve when she was discharged.

In support of her request, the applicant submitted a copy of a Page 7 dated January 16, 2009, which states the following:

On this date, your probationary period has come to an end. You weighed 189 pounds and had a calculated 38% body fat. You have not achieved your maximum allowable weight and percent body fat. In accordance with the weight and body fat standards for Coast Guard military personnel, COMDTINST M1020.G8, you are hereby notified that you will be transferred to the ISL. If

transfer to the ISL is granted, you have 12 months to reduce your weight to 179 pounds or body fat to 37% or below. If you do not meet Coast Guard weight standards within 12 months, you will be recommended for discharge.

In addition, the applicant submitted a copy of her approved request to transfer to the ISL, which is dated January 20, 2009, and a copy of a Coast Guard weigh-in form, dated February 12, 2010, showing that she weighed 182 pounds and her body fat percentage was 37%. The form is signed by the applicant, a petty officer, and a lieutenant junior grade and shows that it was completed pursuant to the applicant's request to transfer back to the Selected Reserve.

VIEWS OF THE COAST GUARD

On September 29, 2010, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief. In so doing, he adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

PSC stated that after the applicant did not meet her MAW when her probationary period ended on January 16, 2009, she was transferred to the ISL on February 19, 2009, and "given 12 months to meet requirements." However, she was discharged on December 2, 2009, before those 12 months ended, even though she had until February 19, 2010, to be in compliance with the weight standards. PSC noted that Chapter 3.3.5. of COMDTINST M1020.8G states that members who are transferred to the ISL have one year to attain their proper weight or body fat and that the applicant was discharged 79 days before the end of her year on the ISL.

PSC recommended that the applicant be allowed to extend her Reserve enlistment and be placed into the ISL and given 79 days to meet the weight or body fat standards. If she can meet the standards, then she would be retained in the Reserve for the duration of her enlistment, but if not, she would be discharged.

PSC also submitted a copy of ALCOAST 512/09, dated September 8, 2009, which authorizes new weight and body fat standards that became effective on October 1, 2009. The ALCOAST shows that the MAW of a member who is, like the applicant, 67" tall, is 175 pounds and the maximum allowable body fat percentage of any female over 40 years old is now 36%. Paragraph 6 of the ALCOAST states the following:

Members currently on weight probation (based on current [old] standards) set to expire after 1 October 2009, shall adhere to the terms of that probation until the expiration of probation. ...

C) If a member on weight probation becomes compliant with the terms of their current probation (based on old standards) during or after the October 2009 weigh-in but before the expiration of their probationary period, they will be removed from probation and will be subsequently screened against the new weight/body fat standards. If the member is non-compliant with the new weight/body fat standards, a supplemental probationary period will commence for an appropriate period as outlined in 3.2.4. of [COMDTINST M1020.8 (series)]. This supplemental probationary period shall not count for the purposes of the 14-month probationary period rule, where members are subject to separation for being placed on probation three times within 14 months.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 10, 2010, the Board received the applicant's reply to the views of the Coast Guard. She stated that she did not object to the recommendation.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on the applicant's submissions and military records, 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 is timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in her record, as required under 10 U.S.C. § 1552(b).

2. The applicant alleged that she was improperly discharged from the Reserve, without notice and contrary to regulations. The Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in her record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust. 33 C.F.R. § 52.24(b). Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

3. Under Chapter 3.3.5. of COMDTINST M1020.8G, a reservist who fails to meet both the weight and the body fat standards during a weight probationary period is normally transferred to the ISL for one year, during which the reservist may try to meet the standards. According to PSC and the Page 7 dated January 16, 2009, because the applicant did not meet the standards while on weight probation, she was transferred to the ISL on February 19, 2009, pursuant to Chapter 3.3.5. The record shows and the Coast Guard has admitted, however, that the applicant was erroneously discharged from the ISL on December 2, 2009, 79 days shy of one full year.

4. Under Chapter 3.3.5. of COMDTINST M1020.8G, if a reservist achieves either the weight or body fat standard during her year in the ISL, she may request transfer back into the Ready Reserve. If not, she may be discharged or retired. Therefore, to avoid discharge, the applicant had to meet either the weight or the body fat standard by February 19, 2010. The Page 7 dated January 16, 2009, and the weigh-in form dated February 12, 2010, show that her weight standard was 179 pounds and her body fat standard was 37%. The weigh-in form shows that she weighed 182 pounds but met the body fat standard of 37% on that date. Therefore, the Board finds that, had she not been erroneously discharged on December 2, 2009, the applicant would have been able to request to transfer back to the Ready Reserve in accordance with Chapter 3.3.5. of COMDTINST M1020.8G because she met the body fat standard prescribed in the Page 7 before the expiration of her year on the ISL.

5. PSC recommended that the Board grant relief by returning the applicant to the ISL and giving her 79 days to meet the standards because on December 2, 2009, she was dis-

charged 79 days shy of one full year on the ISL. Although the applicant agreed with this recommendation, the Board finds it a bit arbitrary because (a) the applicant actually met her body fat standard on February 12, 2010, before the expiration of her year on the ISL; (b) more than a year has passed in the interim; and (c) the applicant was unaware of her discharge and so was not knowingly deprived of 79 days in a way that can now be restored to her in a meaningful way. What the applicant lost because of the erroneous discharge was not 79 days in which to lose weight, but the opportunity to return to the Ready Reserve when she in fact met her body fat standard on February 12, 2010. Thus, PSC's recommendation for relief does not put the applicant back in the position she would have been in had the Coast Guard not erroneously discharged her because, if she had not been discharged, she would likely have been transferred to the Ready Reserve when she met the body fat standard during her weigh-in on February 12, 2010. Under 10 U.S.C. § 1552, an applicant is entitled to "placement in the same position he would have been had no error been made."¹ Although it cannot now be known whether the applicant's request to transfer from the ISL to the Ready Reserve would have been granted in February 2010 had she not been erroneously discharged in December 2009, the Board finds that she should be returned to the Ready Reserve (either the Selected Reserve or the Individual Ready Reserve) because the Coast Guard's error deprived her of the opportunity.²

6. Under ALCOAST 512/09, the applicant's weight standard has been reduced from 179 to 175 pounds, and the body fat standard for a female over 40 years old has been reduced from 37% to 36%. The ALCOAST does not address how or when the new standards were to be implemented for reservists on the ISL trying to meet the old standards prescribed in their Page 7s. (Nor is it clear whether reservists on the ISL were informed of the new standards.) However, paragraph 6(C) of the ALCOAST provided that members on weight probation who met the old standards but not the new standards by the end of their probationary period would receive a supplemental probationary period in which to meet the new standards in accordance with Chapter 3.2.4. of COMDTINST M1020.8G.³ Therefore, the Board finds that upon her return to the Ready Reserve, the applicant should be weighed and, if she does not meet the new standards prescribed in ALCOAST 512/09, she should have a supplemental probationary period to meet the new standards in accordance with Chapter 3.2.4.

7. PSC stated that because the applicant's enlistment has expired, a new extension contract should be entered in her record. PSC did not recommend a term for the new contract, and there is apparently no contract covering her service after May 22, 2009, even though she was

¹ *Denton v. United States*, 204 Ct. Cl. 188, 199-200, *cert. denied*, 421 U.S. 963 (1975), *cited in Bliss v. Johnson*, 279 F. Supp. 2d 29, 35 (D.D.C. 2003); *see Kimmel v. United States*, 196 Ct. Cl. 579, 591 (1971) ("The injustice was removed by placing plaintiff in the same position he would have been had no error been made."); *Hamrick v. United States*, 120 Ct. Cl. 17, 25, 96 F. Supp. 940, 943 (1951) (holding that "full correction of the error would require plaintiff's being put in the same position he would be in had the erroneous determination not been made"), *cited in Ramsey v. United States*, 123 Ct. Cl. 504, 506 (1952), *cert. denied*, 345 U.S. 994 (1953).

² The Ready Reserve consists of the Selected Reserve, in which members are assigned to a limited number of paid billets in which they drill on a regular schedule, and the Individual Ready Reserve, in which members do not fill a billet but may drill for pay and retirement points. The Board notes that Chapter 3.3.5. of COMDTINST M1020.8G does not guarantee a return to the Ready Reserve, much less to a billet in the Selected Reserve.

³ Chapter 3.2.4. of COMDTINST M1020.8G states that "[t]he probationary weight loss 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."

not discharged until December 2, 2009. Therefore, the Board finds that her record should be corrected to show that she signed a three-year extension contract on May 22, 2009.

8. Accordingly, relief should be granted by correcting the applicant's record to show that she signed a three-year extension contract on May 22, 2009, and that she was not discharged on December 2, 2009, but instead remained in the ISL. Furthermore, the Coast Guard should transfer the applicant from the ISL to the Ready Reserve—either the Selected Reserve or the Individual Ready Reserve—within 120 days of the date of this decision and may, if she does not meet the weight or body fat standard under ALCOAST 512/09, impose a supplemental weight probationary period on her in accordance with ALCOAST 512/09 and Chapter 3.2.4. of COMDTINST M1020.8G.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of her military record is granted as follows:

The Coast Guard shall correct her record to show that on May 22, 2009, she extended her Reserve enlistment for three years and that she was not discharged on December 2, 2009, but instead remained in the ISL. In addition, the Coast Guard shall transfer the applicant from the ISL to the Ready Reserve within 120 days of the date of this decision and may then, if she does not meet the new weight or body fat standard under ALCOAST 512/09, impose a supplemental weight probationary period on her in accordance with ALCOAST 512/09 and Chapter 3.2.4. of COMDTINST M1020.8G.

Troy D. Byers

Katia Cervoni

Francis H. Esposito