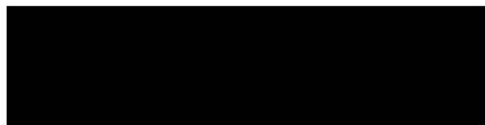


**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2015-019



FINAL DECISION

This proceeding was conducted according to the provisions of section 10 U.S.C. § 1552 and 14 U.S.C. § 425. After receiving the applicant's completed application on January 29, 2015, the Chair docketed the case and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated November 20, 2015, 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, a [REDACTED] asked the Board to expunge her non-selection for promotion by the June 2014 [REDACTED] selection board and to backdate her [REDACTED] date of rank (DOR) to what it would have been had she been selected for promotion by that board, instead of by the following [REDACTED] selection board, which convened in January 2015. The applicant also asked to be awarded associated back pay with the DOR change.

The applicant alleged that when her record was reviewed by the selection board in June 2014, it contained Page 7s¹ and other prejudicial documentation of her non-compliance with weight standards, which was later determined to be the result of an undiagnosed medical condition that qualified her for a medical abeyance of the weight standards. Therefore, she argued, her record was unfairly prejudiced before the June 2014 selection board.

SUMMARY OF THE RECORD

The applicant, while serving as [REDACTED], was screened for weight standards compliance in October 2013. The applicant was found to be 14 pounds over the standard for her height and

¹ An Administrative Remarks record entry, form CG-3307, known as a "Page 7," is used to document a member's notification of important information, achievements, or counseling about positive or negative aspects of a member's performance in the member's military record.

gender and was placed on weight probation by her commanding officer (CO). She was required to lose the 14 pounds by March 23, 2014. As a result of this probation, the applicant was prohibited from receiving a mark above a 3 for “Health & Well Being”² on her officer evaluation report (OER). Additionally, the applicant received several Page 7s denoting counseling sessions for the applicant’s weight issue.

The applicant was not selected for promotion to [REDACTED] in June 2014. The notification included an excerpt from the selection board’s report setting forth specific reasons:

The Board determined that this officer is not fully-qualified for selection for promotion to the rank of [REDACTED] due to a failure to comply with policy as outlined in the Coast Guard Weight and Body Fat Standards Program Manual, COMDTINST M1020.8(series). Specifically, she did not meet weight and body fat standards during a mandatory semi-annual weigh-in, and was subsequently unable to gain compliance at the conclusion of her probationary period as documented in an Officer Evaluation Report (OER) with a period of report of 2013/05/22 to 2014/03/31.

Shortly thereafter, the applicant was diagnosed with thyroid cancer and Polycystic Ovarian Syndrome. She received a six-month medical abeyance on June 27, 2014.

The applicant applied to the Personnel Records Review Board (PRRB) on September 5, 2014, and requested the following relief:

- a. Removal of weight related comments on her OER and raise the mark of 3 to 5 for the “Health & Well Being” dimension, for period of reporting ending March 31, 2014, from her personnel data record;
- b. Removal of Page 7s from her record associated with weight/body fat non-compliance; and
- c. Should the OER comments, low mark, and Page 7s be removed, convening of a special selection board to consider her record for promotion.

The PRRB granted relief by removing the OER comments and Page 7s, and raising the mark for Health & Well Being to 5. The PRRB noted that it took almost six months to confirm the PCOS diagnosis once it was suspected, due to a variety of factors beyond the applicant’s control. These included inadequate radiographic facilities near the applicant’s remote duty station, delays related to Tricare, and scheduling conflicts due to the unit’s underway schedule.

The PRRB recommended that, if the applicant was selected by the next [REDACTED] selection board, the applicant’s package be forwarded to the BCMR with the recommendation that the Board grant additional relief regarding the applicant’s DOR.

² Coast Guard officers are evaluated in 18 performance categories, such as “Teamwork” and “Judgment,” on a scale of 1 (worst) to 7 (best). Article 11.C.5.e. of the Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1A, prohibits a mark of 4 or above on the category of “Health & Well Being” when an officer is found to be not compliant with weight and body fat standards.

The applicant was selected for promotion by the next [REDACTED] selection board, which convened on January 15, 2015.³

VIEWS OF THE COAST GUARD

On June 10, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant relief in accordance with a memorandum submitted by Commander, Personnel Service Center (PSC).

PSC recommended granting relief to the applicant as follows:

- a. Remove the applicant's non-selection by the June 2014 [REDACTED] selection board from her record;
- b. Adjust her [REDACTED] DOR to November 22, 2014, to reflect selection by the June 2014 [REDACTED] selection board; and
- c. Award her associated back pay based on the DOR adjustment.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 12, 2015, the BCMR sent the applicant a copy of the Coast Guard's views and invited her to respond within 30 days. On August 10, 2015, the applicant responded, stating that she agrees with the Coast Guard's advisory opinion.

APPLICABLE REGULATIONS

COMDTINST M1020.8H (series) provides the Coast Guard's weight and fitness standards and regulations. Article 2.D.1. states that all military personnel will be weighed each October and April, but COs may screen members against standards any time they deem it necessary. Article 2.D.4. states that members who are found to be overweight will not be advanced, transferred to a new unit, assigned to training, or paid bonus installations until they are in compliance with regulations.

Article 5.A.2. states that the Coast Guard may authorize medical abeyances to avoid penalizing a member who may be non-compliant due to medical conditions/medications that directly contribute to weight gain. Among the examples of such medical conditions provided in the manual is Polycystic Ovarian Syndrome.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.

³ ALCGPSC 005/15 (listing the names of officers selected by the January 2015 [REDACTED] selection board).

2. 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 by 10 U.S.C. § 1552(b).

3. The applicant alleged that her non-selection for promotion in 2014 was erroneous and unjust because her record contained a low mark and comments in her OER as well as Page 7s stating that she was non-compliant with the weight standards when in fact she had Polycystic Ovarian Syndrome, which prevented her compliance. When considering allegations of error and injustice, the Board begins its analysis 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.⁴

4. The record shows that the June 2014 [REDACTED] selection board failed to select the applicant for promotion because of the documentation of her weight probation, which the PRRB has already removed from her record. As the applicant argued, a diagnosis of Polycystic Ovarian Syndrome justifies abeyance of the Coast Guard weight standards,⁵ and the applicant was in fact granted an abeyance just days after the selection board convened. The Board agrees with the PRRB and the Coast Guard that the applicant's record was prejudiced by a material error when it was reviewed by the June 2014 [REDACTED] selection board because non-compliance with the weight standards is generally considered a negative entry in a member's service record and detrimental to promotion competitiveness.

5. When an applicant proves that her military record contained a prejudicial error or injustice when it was reviewed by a selection board, this Board must determine whether the applicant's failure of selection should be removed by answering two questions: "First, was [the applicant's] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [the applicant] would have been promoted in any event?"⁶ When an officer shows that her record was prejudiced before a selection board by error, "the end-burden of persuasion falls to the Government to show harmlessness—that, despite the plaintiff's *prima facie* case, there was no substantial nexus or connection" between the prejudicial error and the failure of selection.⁷ To void a failure of selection, the Board "need not find that the officer would in fact have actually been promoted in the absence of the error, but merely that promotion was not definitely unlikely or excluded."⁸

6. The applicant's record contained all the Page 7s, the low mark of 3 for Health and Well-Being and negative comments when it was reviewed by the June 2014 [REDACTED] selection board. And at the time the applicant had not received a medical abeyance, so the board was unaware of the medical cause of the weight standard issue. Therefore, the applicant's record was

⁴ 33 C.F.R. § 52.24(b).

⁵ COMDTINST M1020.8H, Article 5.A.2.

⁶ *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

⁷ *Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003), citing *Engels*, 678 F.2d at 175; *Quinton*, 64 Fed. Cl. at 125.

⁸ *Engels*, 678 F.2d at 175.

clearly prejudiced by error when the selection board reviewed it, and the first prong of the *Engels* test is met. The second prong of the test has also been met because there are no other negative marks, comments, or other entries in the applicant's military record that would have precluded her being found fully qualified for promotion to [REDACTED]. Moreover, the applicant was selected for promotion in January 2015 after the documentation of her weight probation had been removed by the PRRB. Accordingly, the applicant's non-selection for promotion in June 2014 should be removed.

7. The applicant asked the Board to backdate her promotion. When the Board corrects an officer's record by removing a non-selection, the applicant is normally entitled to a backdated date of rank, as well as corresponding back pay and allowances, if she is selected for promotion by the next such selection board to review her record as corrected.⁹ Since the applicant was selected for promotion in January 2015, she should receive the appropriate date of rank and corresponding back pay and allowances to reflect her selection by the June 2014 [REDACTED] selection board.

8. Accordingly, relief should be granted.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁹ See *Sanders v. United States*, 219 Ct. Cl. 285 (1979).

ORDER

The application of [REDACTED], for correction of her military record is granted:

- Her non-selection for promotion by the June 2014 [REDACTED] selection board shall be removed from her record.
- Her [REDACTED] date of rank shall be backdated to what it would have been had she been selected for promotion in June 2014, and the Coast Guard shall pay her the corresponding back pay and allowances.

November 20, 2015

