

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2015-175**




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**FINAL DECISION**

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. After receiving the completed application on July 30, 2015, the Chair docketed the case and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated July 30, 2016, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**THE APPLICANT'S REQUEST AND ALLEGATIONS**

The applicant, an  on active duty, asked the Board to correct her record by raising a "below standard" mark of 3 (on a scale of 1 to 7) she received for the performance category "Health and Well-Being" to a standard mark of 4 on her semiannual Enlisted Employee Report (EER) dated November 30, 2013. She alleged that the mark of 3 was a result of her failing to meet the weight standards<sup>1</sup> and that she should have received an abeyance.

The applicant stated that at the time of her unit's fall weigh-in in October 2013, she was recovering from the surgical removal of her gall bladder on August 5, 2013, as well as life-threatening post-operative complications that required three additional surgeries from August 12 through 22, 2013. The applicant stated that upon her release from the hospital on August 23, 2013, she was placed on convalescent leave, followed by light duty only status, and was advised by her doctors not to undertake any strenuous activity. At a follow-up appointment on October 4, 2013, she was advised not to undertake any strenuous activity for three months, but she was found fit for full duty (FFD) on October 18, 2013.

On October 9, 2013, however, while still in a limited-duty status, she was found to be 6 pounds overweight during her unit's semiannual weigh-in, and she had 3% excess body fat. The

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<sup>1</sup> On an EER form, CG-3788B, the "Health and Well-Being" mark concerns a member's compliance with the weight standards, use of alcohol, and adherence to a fitness program. To receive a "standard" mark of 4, the member must have maintained the Coast Guard's weight standards during the marking period.

applicant alleged that her command refused to consider her unique situation and would not postpone her weigh-in or consider her medical limitations. Although her command placed her on weight probation and assigned her a low mark on her EER, the Sector Command prepared and submitted a request for an abeyance of the weight standards for her based on her medical condition and circumstances, which was denied by Commander, Personnel Service Center (PSC).

The applicant alleged that while restricted in her activity by her doctor's orders, she followed a healthy diet. Then on November 16, 2016, she began training for a half marathon and started a regimented diet, exercise, and weight loss program on which she lost the 6 pounds in 6 weeks so that she was back in compliance with the weight standard by December 30, 2013.

The applicant also alleged procedural irregularities with regard to the preparation of the disputed EER. She recited the deadlines for EER preparation, implying that they were not met, and she claimed that her EER reviewer did not review and approve the EER.<sup>2</sup>

The applicant stated that the mark of 3 is unjust because she wants to apply to Officer Candidate School and the mark of 3 may prevent her from being selected.

In support of her allegations, the applicant submitted the following:

- A surgical report dated August 5, 2013, shows that the applicant underwent a laparoscopic cholecystectomy (gall bladder removal) at a medical center in Key West.
- A medical report dated August 8, 2013, shows that the applicant was complaining of post-surgical abdominal pain. The applicant was admitted to a hospital in Miami, where her weight was recorded as 81.65 kilograms
- A surgical report dated August 16, 2013, shows that the applicant underwent a choledochojejunostomy, Hutson-Russell subfascial enterostomy, and defunctionalizing enteroenterostomy that day in a Miami hospital due to injuries to her bile duct incurred during her surgery on August 5, 2013, which were causing bile to leak into her abdomen.
- A medical report dated August 26, 2013, shows that the applicant attended a follow-up appointment for "duty status update after recent surgical complication. ... She is recovery [sic] after being discharged last Friday. She is scheduled to see her surgeon this coming Monday." The doctor stated that her duty status was "sick at home/quarters ...CVL for 30 days." The report states that she weighed 188 pounds.
- A medical report dated October 4, 2013, shows that the applicant attended a follow-up visit with her primary care provider to determine her duty status. The doctor noted that she was "2. [status post] choledochojejunostomy, [date of service]. 16AUG13; stable and recovering. No strenuous physical activities for three months. Reassurance and education. 3. Overweight: Dietary counseling provided." The doctor released her without

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<sup>2</sup> Under Article 5.D.3. of COMDTINST M1000.2, the Enlisted Accessions, Evaluations, and Advancements Manual (hereinafter, "Enlisted Manual"), each enlisted member is evaluated by a "rating chain" consisting of a Supervisor, who recommends the marks; a Marking Official, who assigns the marks; and an Approving Official, which approves the marks.

limitations and advised her to follow-up in one month or sooner if she encountered problems.

- On a Page 7 dated October 9, 2013, the applicant was advised that at a height of 5'10", she weighed 197 pounds and was 6 pounds over her maximum allowed weight (MAW) of 191 pounds, and she had 3% excess body fat. The Page 7 states that she had to lose the excess weight and/or body fat by January 9, 2014; complete a fitness plan; participate in a fitness activity at least one hour per day, three days per week; and undergo a monthly fitness assessment. The Page 7 advises that if she did not meet the weight or body fat standards by the deadline, she would be discharged.
- A medical report dated October 18, 2013, shows that the applicant attended a follow-up visit with her primary care provider. The doctor noted the following: "1. Aftercare Following Surgery: [status post] choledochojejunostomy 3 months ago; stable and recovered. Member is cleared. No restrictions. FFD. Reassurance and general education. 2. Overweight: Lifestyle interventions with dietary modification and more physical activities. She is also clear for [the weight management program] participation."
- On a Command Medical Referral Form, the applicant's commanding officer (CO) noted that she was being referred for a medical screening because she was 6 pounds overweight and had 3% excess body fat. On October 18, 2013, a doctor signed this form to certify that the applicant had no underlying medical condition for her excess weight; that she had no underlying medical condition that would make fitness activities detrimental to her health; that it was safe for her to comply with the weight standards; and that it was safe for her to run and do push-ups and sit-ups.
- In a memorandum dated November 13, 2013, the Sector Commander asked PSC to grant an abeyance of the weight standards for the applicant as a result of her post-surgical status. He stated that she had been on convalescent leave, followed by limited duty, and was found FFD on October 23, 2013. He noted that after she failed to meet the weight standards on October 8<sup>th</sup> she underwent the required medical screening on October 18<sup>th</sup>, and the doctor found that it was safe for her to participate in the weight probation program. The Sector Commander stated that he thought she met the criteria for a medical abeyance of the weight standards because of the life-threatening nature of the surgeries and prolonged complications.
- On the applicant's EER dated November 30, 2013, she received primarily good marks of 4, 5, and 6, with one mark of 7 for "Stamina" and one mark of 3 for "Health and Well-Being." She was recommended for advancement. Her supervisor noted that she had "shown great Stamina despite having dealt with health issues. Despite being ordered to stay home for eight weeks after a complication during surgery, she came back to work and continued her break-in process. She quickly became a qualified OU despite health issues and family scheduling conflicts. During her break-in process she showed great stamina by coming in on her off time to get familiar with Sector Key West AOR with Station area familiarization rides." Another comment signed by the applicant's Marking Official on January 8, 2014, states that he counseled her on behalf of the Approving Official and that he had verified that the EER was correct and was properly routed through the rating chain. The applicant signed the EER the same day and acknowledged that she had 15 calendar days to appeal her marks.

- A print-out of the results of a half marathon (undated) shows that the applicant completed it in 3 hours and 2 minutes.
- A letter from a surgeon at the University of Miami's School of Medicine dated January 21, 2015, states that he performed life-saving surgery on the applicant on August 16, 2013; that her recovery time should have been "three plus months," which would make her FFD no sooner than November 16, 2013; and that in his opinion, the applicant should not have been subject to strenuous activity or weigh-ins until November 16, 2013.

### **VIEWS OF THE COAST GUARD**

On December 16, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case and adopting the findings and analysis provided in a memorandum on the case prepared by PSC.

PSC noted the applicant's medical reports but stated that under COMDTINST M1020.8H, the Weight and Body Fat Standards Manual, medical abeyance requests based on medical conditions that restrict a member's ability to exercise but otherwise have no physiological impact on the member's ability to lose weight and/or body fat through diet or exercise will not be approved. Therefore, the request for an abeyance for the applicant was denied on December 5, 2013. PSC submitted a memorandum dated December 5, 2013, which denied the Sector Commander's request for an abeyance with the following comment:

As a matter of policy, all medically related weight abeyance requests are treated as unique and reviewed by the Medical Evaluations Branch located at the Coast Guard Personnel Service Center prior to final determination. In this particular case, [the applicant] does not have a physiological condition that contributed to her excessive weight gain. [She] is encouraged to maintain a healthy diet and seek the opportunity to receive nutritional counseling.

PSC stated that although the applicant was not to engage in strenuous activity, her doctor certified on October 18, 2013, that there was no underlying medical condition causing her excessive weight or preventing her from losing weight and that it was safe for her to diet and exercise to lose weight. PSC stated that the applicant's medical condition did not prevent her from maintaining a proper diet.

PSC stated that the determinations by Coast Guard officials, including the applicant's doctor and the Medical Evaluations Branch, are presumptively correct and the applicant has not overcome the presumption. Therefore, PSC recommended denying relief.

### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On February 4, 2016, the Board received the applicant's response to the views of the Coast Guard. The applicant repeated her allegation that the disputed EER violated policy because it was submitted late. She pointed out that the EER shows that she was counseled on her marks on January 8, 2014, whereas the manual requires counseling by the 21<sup>st</sup> day after the end of the rating period, so she should have been counseled about her marks by December 21, 2013.

The applicant also alleged that her “marks stopped” with the Marking Official and were not reviewed by the Approving Official. She alleged that the Approving Official “never saw or signed off on” the disputed EER and that her Marking Official was not allowed to serve as both her Marking Official and her Approving Official.

The applicant also alleged that she was marked down because she had a “limited opportunity to perform” due to her medical condition, but COMDTINST M1000.2 states that members should not receive adverse marks if they have a limited opportunity to perform due to a medical condition. She also complained that it was inconsistent for her Marking Official to assign a mark of 3 for Health and Well-Being but a mark of 7 for Stamina.

The applicant stated that she did not appeal the marks because she received them late and was counseled on them past the 21-day deadline. In addition, she alleged, she was suffering from sleep deprivation, for which she was taking Ambien, and anxiety, for which she was taking Xanax. She stated that her anxiety was caused by the multiple life-saving surgeries she had undergone and their effects on her and her family.

The applicant alleged that the Coast Guard’s advisory opinion does not acknowledge the life-and-death severity of the surgical procedures she underwent due to complications following her gall bladder removal. She stated that she was transported from Key West to Miami by ambulance after the doctors discovered her bile was leaking into her abdomen and in Miami, she was hospitalized for 13 days and underwent six procedures. The surgical wound was closed with 20 staples, which were not removed until August 28, 2013, but just 6 weeks later, she was required to weigh-in. The applicant also noted that the Coast Guard contradicted her surgeon, who submitted a letter on her behalf dated January 21, 2015, stating that she should not have been subject to strenuous activity or weigh-ins until November 16, 2013.

The applicant alleged that the advisory opinion ignores how traumatic and anxiety-provoking her life-threatening condition and multiple procedures were. She sought counseling and was prescribed Xanax and Ambien. She argued that her “weight gain was directly caused by an extensive series of life-saving surgeries and major struggles to care for my family during this period. If not reviewed and changed, this single unsatisfactory mark could have significant repercussions on my CG career, preventing my goal of accession into the Officer Corps.”

In support of her allegations, the applicant submitted more copies of her medical records, including records showing treatment for symptoms of anxiety and depression following her surgeries, as well as photographs.

### **APPLICABLE LAW AND POLICY**

Article 5.A.2. of COMDTINST M1000.2 (hereinafter, “Enlisted Manual”) states the following:

Each commanding officer/officer in charge must ensure all enlisted members under their command receive accurate, fair, objective, and timely enlisted employee reviews. To this end, the Service has made enlisted performance criteria as objective as possible, within the scope of jobs

and tasks enlisted personnel perform. In using the Enlisted Employee Review System, strict and conscientious adherence to the specific wording of the standards is essential to realizing the purpose of the enlisted employee review process.

Article 5.D.1.d. states that every unit is responsible for ensuring that EERs are completed, including the signed counseling sheet, no more than 21 days after the end of the rating period. Article 5.D.3.a.(2) states that each rating official shall—

- (a) Review and correct any inconsistencies found in employee reviews when considering an individual's performance compared to the written standards;
- (b) Hold the next lower supervisory level accountable for their employee reviews by observing the accuracy and quality of the employee reviews they submit, and by reporting the same on their EER or OER.

Article 5.D.3.b. states that the member's Supervisor prepares the EER with recommended marks and comments and forwards it to the Marking Official no more than 9 days before the end of the rating period. The Supervisor also counsels the member about the EER after the Approving Official approves it.

Article 5.D.3.c. states that the Marking Official assigns recommended marks, after discussing any of the Supervisor's recommended marks that seem inaccurate or inconsistent with the Supervisor, and forwards the EER to the Approving Official no more than five days after the end of the rating period.

Article 5.D.3.d. states that the Approving Official reviews the recommended marks, discusses recommended marks that seem inaccurate or inconsistent with the Marking Official, and forwards the EER to the Supervisor to ensure that the member is counseled and to PSC so that the EER can be posted in Direct Access no more than 30 days after the end of the rating period.

Article 5.F.1.c. states the following regarding members who have "a limited opportunity to perform for reasons such as illness, injuries, and pregnancy":

- (1) Occasionally, circumstances resulting from a temporary condition may limit a member's opportunity to perform. These circumstances may cause specific performance restrictions; e.g., those imposed by a medical authority, and may even require restructuring or reassigning duties. While rating chains shall not give preferential treatment, commanding officers shall ensure these individuals do not receive adverse employee reviews solely for these circumstances.
- (2) In consultation with the health care provider, the commanding officer must establish a "reasonable expectation of performance" in the member's current circumstances. In particular, the commanding officer must determine whether a member requires reassignment to a different work environment, restrictions on performing specific types of tasks, or reduced work hours. When considering reassigning or restructuring duties, commanding officers shall strive to identify service needs, which compliment the member's temporary limited abilities.

Article 5.I.1.b. states that within 15 days of signing the counseling sheet for an EER, a member may appeal her EER marks based on claims of incorrect information, prejudice, discrimination, or "disproportionately low marks for the particular circumstances." If more than

15 days have passed, the member must explain the circumstances that prevented her from submitting the appeal within 15 days of signing the counseling sheet.

Chapter 5.A. of COMDTINST M1020.8H (hereinafter, "Weight Manual") provides the rules regarding abeyances of the weight standards for medical reasons and states the following:

1. Approving Authority. CG PSC-psd is the approving official for all medical abeyance/exemption requests. Each medically related abeyance request will be treated as unique and evaluated on a case-by-case basis. Commands should not forward requests for medical abeyances to CG PSC-psd until a diagnosis is made. Awaiting a medical diagnosis or abeyance decision does not constitute reason to waive or delay weight screening, documentation, and/or probation procedures.

2. Intent. The intent of authorizing a medical abeyance is to avoid penalizing a member who may be non-compliant due to medical conditions/medications that directly contribute to weight gain. Injuries or illnesses that interfere with a member's ability to exercise are not grounds for a medical abeyance. Commands do not have to wait until a member is found non-compliant to request a medical abeyance.

3. Abeyance Examples.

a. Medical abeyance requests will only be granted for cases involving diagnosed physiological medical conditions or use of prescription medications (which are not disqualifying for continued service) that contribute to the member's inability to maintain compliance with weight standards.

b. Abeyance requests that stem from medical conditions which may restrict a member's ability to exercise, but otherwise have no physiological impact on the member's ability to lose weight/body fat through proper diet or exercise, will not be approved.

c. The following chart provides some representative examples of qualifying and non-qualifying medical conditions:

**Qualifying Medical Examples**

- Hypothyroidism
- Polycystic Ovarian Syndrome
- Prescribed Corticosteroids

**Non-qualifying Medical Examples**

- Depression
- Twisted ankles
- Pulled muscles
- Broken bones
- Lower back pain

**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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely because it was filed within three years of the applicant's discovery of the alleged error or injustice.

2. The applicant alleged that the mark of 3 she received on her November 30, 2013, EER because she had exceeded the Coast Guard's weight standards during the rating period was erroneous and unjust. In 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 his/her record, and the applicant bears the burden of proving by a preponderance



of the evidence that the disputed information is erroneous or unjust.<sup>3</sup> Absent evidence to the contrary, the Board presumes that Coast Guard officials have carried out their duties “correctly, lawfully, and in good faith.”<sup>4</sup>

3. The records show that on August 5, 2013, the applicant underwent a laparoscopic gall bladder removal that critically injured her bile duct and required hospitalization, diagnostic procedures, and three life-saving surgical procedures on August 16, 2013. Following her surgery, she was placed on convalescent leave for at least 30 days, followed by light duty. She was instructed not to undertake strenuous activity during her recovery, and she also suffered and was treated for symptoms of anxiety and depression. Her medical records also show that at her follow-up appointment on August 26, 2013, the applicant weighed 188 pounds, which was under her MAW of 191. According to the Page 7, by October 9, 2013, she weighed 197 pounds, which was 6 pounds over her MAW. Because she exceeded her MAW and did not meet the weight or body fat standards, she did not meet the criteria for a mark of 4 for “Health and Well-Being” on her EER dated November 30, 2013, and received a mark of 3 instead.

4. The applicant argued that her Sector Commander’s request for a weight abeyance on her behalf was erroneously and unjustly denied and that she met the criteria for an abeyance of the weight standards because she was not fit for duty on the date of the weigh-in, because she was prohibited from strenuous activity due to her recent surgery, and because she was suffering from anxiety and depression. Chapter 5.A.3. of the Weight Manual provides the policy for abeyances and states the following:

a. Medical abeyance requests will only be granted for cases involving diagnosed physiological medical conditions or use of prescription medications (which are not disqualifying for continued service) that contribute to the member’s inability to maintain compliance with weight standards.

b. Abeyance requests that stem from medical conditions which may restrict a member’s ability to exercise, but otherwise have no physiological impact on the member’s ability to lose weight/body fat through proper diet or exercise, will not be approved.

The Board finds that under these policies, the applicant has not proven by a preponderance of the evidence that the Coast Guard committed an error or injustice by refusing to grant her an abeyance of the weight standard. Whether she was fit for duty or limited duty on the date of the weigh-in is not dispositive of the issue under Chapter 5.A.3. The fact that she could not exercise strenuously also does not warrant an abeyance according to Chapter 5.A.3.b. Nor has she shown that her depression, anxiety, life-saving surgery, or prescriptions warranted an abeyance of the weight standards as physiological conditions or prescriptions that physiologically cause weight gain, such as those listed under Chapter 5.A.3.c. The Board cannot conclude, based on the evidence of record, that the physician who, knowing her medical issues and prescriptions, certified on October 18, 2013, that there was no underlying medical cause for her excess weight committed an error or injustice.

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<sup>3</sup> 33 C.F.R. § 52.24(b).

<sup>4</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).



5. The applicant submitted a letter from her surgeon dated January 21, 2015, stating that the applicant should not have been required to perform strenuous activity or to undergo a weigh-in for three months after her surgery—until November 16, 2013. The Coast Guard did not require her to perform strenuous activity, however, and under Chapter 5.A.3. of the Weight Manual, the inability to perform strenuous activity does not justify an abeyance as even members with a broken leg must meet the weight standards through diet and whatever non-strenuous exercise they can do. Nor does the Board find the surgeon's opinion as to whether the applicant should have been weighed on October 9, 2013, convincing. The surgeon is apparently not a military doctor, and he provided no basis for his opinion that the Coast Guard should not have weighed her. Weighing, *per se*, could not have hampered her recovery from surgery, and the surgeon's statement does not show that the surgeries or medications warranted an abeyance under the policies in Chapter 5.A.3. or that they physiologically prevented her from dieting and exercising (non-strenuously) to maintain her weight within the Coast Guard's weight standards. The surgeon's letter does not persuade the Board that the military physician's certification dated October 18, 2013, was erroneous or unjust.

6. In light of the above, the Board finds that the applicant has not proven by a preponderance of the evidence that the mark of 3 she received for Health and Well-Being on her November 30, 2013, EER was erroneous or unjust since she was not entitled to a weight abeyance under Chapter 5.A.3. of the Weight Manual, and a higher mark of 4 was not permitted according to the written criteria on the EER form. The Board notes that although the applicant claimed that her command was unsupportive, her Sector Commander submitted an abeyance request on her behalf, and her rating chain appears to have tried to minimize the negative effect of the mark of 3 by assigning the applicant the highest possible mark of 7 for Stamina.

7. The applicant alleged that her November 30, 2013, EER was erroneous and unjust because it was not completed within 21 days of the end of the reporting period. The EER shows that she was counseled about the EER by her Supervisor, in accordance with Article 5.D.3.b., on January 8, 2014, instead of by December 21, 2013, as required by Article 5.D.1.d. of the Enlisted Manual. However, this Board has long held that the late preparation of an otherwise valid performance evaluation does not warrant removal of the evaluation.<sup>5</sup> Lateness, *per se*, does not invalidate an EER, and the applicant has not shown that the late preparation prejudiced her. Although she did not appeal the EER, the lateness of the EER did not prevent her from appealing because, under Chapter 5.I.1. of the Enlisted Manual, members may submit an appeal within 15 days of their EER counseling—whenever it occurs—and may even appeal it after more than 15 days have passed.

8. The applicant alleged that her EER Approving Official did not review and approve the EER. She submitted no evidence supporting this allegation, and the EER appears on its face to have been properly completed. If she believed this and felt that the alleged lack of review by the Approving Official was prejudicial, she should have and could have appealed the EER to ensure that it was reviewed by the Approving Official. Absent evidence supporting her

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<sup>5</sup> See, e.g., CGBCMR Docket Nos. 2015-159, 2012-073, 2010-141, 2005-053, 2003-110; 2002-015; 43-98; 183-95 (Concurring Decision of the Deputy General Counsel Acting Under Delegated Authority); and 475-86.

allegations of error and prejudice, this Board must accord her rating officials a presumption of regularity<sup>6</sup> with regard to their preparation of the EER, which she has not overcome.

9. The applicant alleged that the EER is unjust because the policy in Article 5.F.1.c. of the Enlisted Manual regarding members who have “a limited opportunity to perform for reasons such as illness, injuries, and pregnancy” should have applied. The record indicates that the applicant was on convalescent leave for several weeks followed by light duty for a few weeks during the six-month rating period. The Board finds that she has not shown that she had so little opportunity to perform duty during the rating period that the provisions of Article 5.F.1.c. should have applied or prevented her rating chain from preparing an EER. Moreover, even if that article, which provides for the restructuring or reassignment of duties for injured members, did apply, she has not shown that she was required by her command to perform strenuous activities or other duties that she should not have been required to perform. The Board notes in this regard that her EER states that she voluntarily returned to duty when she had been granted convalescent leave and was not required to return.

10. The applicant has not proven by a preponderance of the evidence that her November 30, 2013, EER is erroneous or unjust. Accordingly, relief should be denied.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

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<sup>6</sup> 33 C.F.R. § 52.24(b); *Arens*, 969 F.2d at 1037; *Sanders*, 594 F.2d at 813.

**ORDER**

The application of [REDACTED], USCG, for correction of her military record is denied.

July 21, 2016

