

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-111



FINAL DECISION

This proceeding was conducted according to 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 completed application on April 26, 2016, and assigned it to staff attorney [REDACTED] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated March 3, 2017, 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 retired [REDACTED] asked the Board to remove two Page 7s¹ from his record and to raise a mark of 3 to a mark of 4 on his April 30, 2015, Officer Evaluation Report (OER) in the performance category "Health and Well-Being."² The applicant stated that his command failed to follow the Coast Guard Weight and Body Fat Standards Program Manual, that one of the Page 7s in question was altered after he had signed it, and that there is a policy gap for people who are on limited duty as a result of having surgery.

The applicant stated that in December 2014, he was bleeding from the rectum and was diagnosed with having an anal fistula which required surgery. Prior to surgery, it was discovered that his EKG results were abnormal and that he may have suffered heart trauma or a heart attack. The applicant stated that he was scheduled to have surgery on April 13, 2015, and was placed on convalescent leave for two weeks with an estimated healing time of six weeks. Therefore, the applicant argued, he would not be cleared to resume normal activity until June 1, 2015. He stated that when he returned to his unit from convalescent leave on April 29, 2015, he was asked to complete the semiannual weigh-in. He was determined to be 1% over the maximum allowable

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.

² Coast Guard officers are evaluated in various performance categories, such as "Teamwork" and "Health and Well-Being," on a scale of 1 (worst) to 7 (best).

body fat percentage of 26%. The applicant stated that four days later, on May 4, 2015, he was weighed again and was found to be in compliance with Coast Guard standards.

On May 6, 2015, the applicant stated, he was presented with two Page 7s – one placing him on weight probation and the other taking him off weight probation. The applicant stated that he initially refused to sign the Page 7s and asked about a medical abeyance, as he was not able to participate in physical activity. He stated that his Chief, a chief warrant officer (CWO), yelled at him and said “the medical staff at Base...doesn’t know the Coast Guard weight program and should stick to medical issues.” The applicant then alleged that the CWO crossed out a statement in the first Page 7 requiring him to submit a fitness plan and participate in fitness activity. The applicant then signed both Page 7s on May 6, 2015. The texts of the two Page 7s are below:

30 Apr 2015: You have this date been determined to be 41 pounds overweight. Your measurements are: Height: 76 (inches), Weight: 266 (pounds), Waist: 46 (inches), Neck: 19.5 (inches). Your age is: 54 and your percent body fat is: 27. In accordance with Coast Guard Weight and Body fat Standards Program Manual, COMDTINST M1020.8 (series), you are hereby notified that you are required to lose 41 pounds or drop to at least or below 26% body fat by 31 May 2015.

In addition, you are to complete both a personal wellness profile and a ~~detailed fitness plan; participate in a mandatory fitness activity at least one hour per day three days per week;~~ and perform a monthly mandatory fitness assessment until your probationary period ends. You are required to contact LT [] for assignment of a Unit Health Promotion Coordinator to work with you. You are counseled that compliance is a condition of continued service. This non-compliant semiannual weigh-in is considered your first strike. If you fail to reach compliance by the end of this probationary period, you will be recommended for separation.

By signature below, you acknowledge both this entry and that you have been afforded the opportunity to review the Coast Guard Weight and Body Fat Standards Program Manual, COMDTINST M1020.8 (series).

May 04, 2015: On this date your probationary period has come to an end. You achieved 26% body fat and have successfully met the requirements of the Weight/Physical Fitness Standards for Coast Guard Weight and Body Fat Standards Program Manual, COMDTINST M1020.8 (series).

The applicant alleged that after he signed the Page 7s, someone wrote in “on limited duty” and then submitted the document into his military record. He stated that he only found out because he requested an electronic copy of his record and caught the addition then. The applicant stated that it was unethical “[r]egardless of what was written, nothing should have ever been added to a [Page 7] without the member’s knowledge.”

The applicant alleged that according to COMDTINST M1020.8H, Chapter 3.C.1., when a member is found to be non-compliant with weight standards, the member must see a Coast Guard Medical Officer in order to be medically screened and must contact the Regional Health Promotion Manager (HPM). The applicant claimed that he was never asked to do either of these following his non-complaint weigh-in. He stated that he contacted the Unit Health Promotion Coordinator (HPC) individually to seek health advice. The applicant alleged that the HPC stated that she had never heard of a scenario like the applicant’s and that she had concerns as to whether the applicant’s measurements were taken properly. The applicant further alleged that the HPC stated “just from a metabolic/physiologic standpoint, it’s not possible to lose 1% body fat in 4 days.” The applicant stated that he did meet with the HPC as was directed by the first

Page 7 on May 6, 2015, who stated there was nothing the applicant needed to do because he had already been found to be in compliance.

The applicant stated that according to ALCGPSC 034/13, an officer who is found non-complaint with weight standards is not eligible to receive a mark of 4 or higher in “Health and Well-Being” on an OER.³ Therefore, the applicant alleged, because he was weighed on April 30, 2015, the last day of his OER reporting period, he was given a 3 in Health and Well Being. He stated that he received marks of 6 and 7 in the rest of his OER. The applicant stated that the 3 was the “lowest and only mark of its kind in [his] Coast Guard career [and] may have been the deciding factor in [his] failure for selection for promotion to O5 which resulted in...receiving orders for involuntary retirement.”

The applicant stated that at his age, he must be able to exercise to maintain his health and weight. He alleged that when he is healthy, he was at the gym nearly every day doing cardio activities and/or weight lifting. He stated that he has never been outside of the maximum weight and body fat standards in his nearly 38 years of active duty service. The applicant further stated that he felt he “was being punished for taking the time to take care of [himself.] Had [he] waited and weighed in on Monday, May 4, 2015, [he] may have been scolded for being late for weigh-in but this administrative nightmare would have never happened.”

The applicant appealed this matter to the Personnel Records Review Board (PRRB). The decision was split two-to-one against granting the applicant relief. He stated that he had asked the PRRB to exercise common sense because he felt that “a reasonable person would understand there were extenuating circumstances in [his] case and that [his] Command should have been understanding and supportive.” The applicant stated that he provided positive endorsements from several people to the PRRB, although the endorsement provided by the CWO was not positive. The applicant stated that for the CWO to state that the applicant’s limited duty was for a short period of time was misleading because the applicant was under a doctor’s care for nearly five months prior to the weigh-in.

In summary, the applicant stated, “my Coast Guard career was potentially tanked because my command failed to follow the Coast Guard Weight and Body Fat Manual, COMDTINST M1020.8H correctly, in its entirety and somebody at Coast Guard District...altered a document after I signed it and submitted it for entry into my service record without my knowledge.”

In support of his claims, the applicant submitted a detailed timeline of events, the PRRB decision and supporting documents (summarized below), medical records, three Page 7s (one placing him on weight probation, one taking him off, and one placing him on weight probation with “on limited duty” handwritten), his April 30, 2015, OER and comments, and an email from the District Chief of Staff.

The medical records provided by the applicant recount what the applicant had summarized in his application. On March 18, 2015, the applicant received a letter from his

³ 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.

gastroenterologist stated that the applicant “is having a surgical procedure on 04/13/2015 and will be able to return to work on 04/27/2015 but will need periodic return visits in the future.” On May 5, 2015, the applicant received another letter which stated that the applicant “underwent surgery (Fistulotomy) on 4/13/2015. [The applicant] is restricted in what activities he can do. In regards to exercising he cannot do any [sic] that puts any type of pressure on anal wound and he cannot do any heavy lifting. He has a post-operative visit on 06/01/2015 at which point further determination will be made.”

The applicant’s April 30, 2015, OER contained all high marks of 6 and 7 except for “Health and Wellbeing,” for which he received a low mark of 3. Attached to the OER was a Reviewer Comments page, which stated the following:

[The applicant] had an unavoidable and extended period of authorized absence prior to and during the final month of the marking period, which restricted his ability to exercise up until the end of April. He did not return to work until the final few days of the semi-annual weigh in period. Unfortunately he was found to be non-compliant with USCG standards on the final day of the marking period. The circumstances did not justify an abeyance as per COMDTINST. However, there is little doubt in my mind that [the applicant’s] ability to comply with USCG standards was understandably hampered by the situation surrounding his absence. [The applicant] was found to be within standards 4 days later. He was removed from weight probation on 4 May 2015. [The applicant] is an excellent officer and highly valued member of the...team. I would ask that the circumstances surrounding his non-compliance be considered the unfortunate result of his unavoidable absence rather than the member’s inability to comply with health and fitness requirements.

The applicant also submitted an email conversation with the District Chief of Staff. In his email on March 25, 2016, he summarized what had happened surrounding the Page 7s and the April 30, 2015, OER. He also stated, “I was hoping that somebody could see that it wasn’t that I didn’t want to comply. It was due to a series of medical issues. They may have felt their hands were tied because in accordance with ALLCGPSC 034/13 any officer who...is not compliant with USCG weight and body fat standards has not met the expected standards of performance for Health and Well-Being performance dimension. Therefore, a mark of ‘4’ or higher...is not authorized.” In response, the Chief of Staff stated, “I want the best for you, and was concerned about the issue too. I’m not sure of what your outcome would be, but you could apply to the BCMR to have your record corrected – i.e. remove the page 7 and raise the 3 in your OER.”

PRRB DECISION

On October 28, 2015, the applicant received a decision from the PRRB denying his request for relief. The applicant requested that the PRRB remove the two disputed Page 7s from his record. His reasoning was that “common sense should prevail” and he asked that “consideration be given for his extenuating circumstance (medical condition) which prevented him from working out.” The PRRB noted that the applicant did not submit an OER reply to the April 30, 2015, OER, as is authorized by policy. The decision stated that a reply “provides an opportunity for a Reported-On Officer to express views about their performance which differs from that of a rating chain member.” The decision stated that it took into account COMDTINST M1020.8H (the Coast Guard Weight and Body Fat Standards Program Manual) and declarations provided from the applicant’s rating chain.

The PRRB noted that according to Chapter 5 of COMDTINST M1020.8H, a medical abeyance request will only be granted for cases with a qualifying medical condition or prescription, which are listed as hypothyroidism, polycystic ovarian syndrome, and prescribed corticosteroids. The PRRB found that there was not clear and convincing evidence that the applicant's medical diagnosis qualified for a medical abeyance of the weight standards. The PRRB therefore concluded that there was no evidence to remove the Page 7s or to change the rating of 3 in Health and Well-Being.

One member of the PRRB issued a dissenting opinion. This member concluded that the Page 7s should be removed and that the mark of 3 should be removed from the April 30, 2015, OER. The opinion noted that the applicant had a well-documented medical reason for being unable to exercise for about seven weeks in the last three months of the OER cycle. The dissent included the following:

It is well documented medical fact that times of stress can cause weight gain as well as make it difficult to lose weight. The hormone cortisol is often called the "stress hormone" because it is secreted during times of physical or psychological stress. It is also known that exercise is the best method for reducing cortisol that has risen during these times. So, imagine that you are abnormally bleeding from the rectum. You are referred to a specialist and told that you need surgery in the anal area to make a surgical correction to eliminate the bleeding. Then, as part of the pre-operative process you are told that you have an abnormal EKG and may in fact had a heart attack in the recent past. A cardiology evaluation is then required before you can have the surgery. You may not exercise during the cardiology evaluation, and then you may not exercise for several weeks post surgery. Additionally, during this time you have two high profile [temporary assignments] representing the CG... The fact that he was within [body fat] standards after such a short period of time provides at least the question of measurement accuracy... [Regarding COMDTINST M1020.8H:] This policy provides no element for discretion based on what a reasonable person may consider extenuating circumstances, such as recovering from surgery, hospitalization etc... Even if [the applicant] had been at or below his allowable [body fat], the significant stressors related to his medical condition during this period of time coupled with the strict medical advice not to exercise at first due to potential heart problem, and then later to aid in his surgical recovery could have easily caused him to exceed his [body fat] maximum. An exception to policy is warranted.

A declaration was provided from the applicant's Primary Care Manager. Following the surgery, she stated that the applicant was placed on convalescent leave for two weeks. She stated, "Per the recommendation of the surgeon, [the applicant] was placed on a limited duty status and instructed to refrain from any activity that would put pressure on the anal wound and to refrain from any heavy lifting for a duration of 6 weeks. On 20 May 15, [the applicant] was...authorized to resume all normal activities. In my medical opinion, given the prolonged duration of his most recent medical issue as well as the nature of the medical issue, it would have been detrimental to [the applicant's] health had he participated in a regimented fitness program until such time as he was authorized to do so."

A declaration was provided by the Health Program Manager. She stated that the applicant had contacted her for feedback on his weigh-in situation. She stated that she was immediately concerned for the applicant's well-being, "as he was quite distressed about the weigh-in chain of events and this on top of the 5+ months of stress prior experiencing several medical issues impacting his ability to perform physical exercise and even daily activity, as well as the number of medications he was prescribed." In addition, she stated the following in her declaration:

There are several questionable occurrences related to his case that I can speak to professionally. Beginning with the validity of the initial body fat measurement of 30 April 2015. In my professional opinion, losing 1% body fat in 4 days' time is not possible unless he was already in a weight lost behavior change mode for many weeks prior and he finally measured with a cumulative 1% body fat loss on 4 May 2015. This was not the case though as he'd just returned from 2 weeks convalescent leave and been given the diagnosis that he still had an open wound... Even four days of following a restricted, low calorie diet would only yield a quick and temporary weight loss of a few pounds, but not a 1% body fat loss given no previous weight loss/exercise efforts were being taken. Policy is policy but with this said, [the applicant] had a series of unfortunate medical issues that extended through the entire year to date. His mark of a "3" in health and well-being was clearly not about an unwillingness to comply with the [maximum allowable weight] requirements...It was possibly a product of an incorrect initial body fat measurement and the timing of his OER coinciding with the weigh-in. Additionally, [the applicant] states that health and fitness are an important part of his life and when he is not physically restricted, as he has been for all of 2015 thus far, he would be in the gym working out nearly every day. In his 37 years of active duty service, he has never been outside of the maximum weight and body fat standards and it appears he is well regarded in his work and has had a stellar professional career. I believe the most relevant part of this argument that the [Pages 7s] should be removed from his record is that [the applicant] did have medically-related extenuating circumstances that limited his ability to participate in regular workouts that he typically would have done had he not been completely physically restricted as he was...[The applicant] was homebound post op so he could take sitz baths 3 times a day after bowel movements...He was doing as he was directed but had no control over his ability to even control his eating habits much less exercise/be active prior to the weigh-in. I hope that his case will be looked at individually for the unique circumstances surrounding it. I am often consulted with by [sic] Commands for Weight Program cases and in my 22 years as a Coast Guard Health Promotion Manager, this is the first I've heard of a case like this. I support that [the applicant's Page 7s] be removed from his record.

The applicant's Reporting Officer provided a declaration as well. He stated that he was the Branch Chief during the period in question, and he often provided direct supervision to the applicant. He stated that he did not review or see the Page 7s in question prior to preparing this declaration. He also stated the following:

[The applicant] is a valued and outstanding officer and a strong performer in a challenging position. I have no doubt his medical issues and demanding schedule contributed to his failure to stay within Coast Guard weight standards. I was surprised his circumstances did not rate an exception, abeyance, or that there was no apparently policy discretion allowed for someone who was able to so quickly get in compliance (was so close) and had well documented and legitimate extenuating circumstances. [The applicant] did travel extensively prior to and during the month of April. I did ensure [the applicant] was screened by a cardiologist and cleared for duty prior to resuming work/travel...I utilize the gym almost daily and when he was not on limited duty I frequently observe [the applicant] exercising.

The Chief of Response for the applicant's district provided a declaration. He stated that although he was the applicant's supervisor's supervisor, he often interacted with the applicant on a nearly daily basis. He added that he was the OER reviewer for the April 30, 2015, OER. He stated the following:

[The applicant] had a very unfortunate, and painful, medical situation which forced him into a period of convalescence for all of April 2015...I exercise daily in the gym...and I usually see [the applicant] in there as well. He was notably absent during this medical period. While his medical condition didn't warrant an abeyance for Commandant weight standards, I have no doubt that his inability to exercise directly caused his placement on the weight program. Once he could exercise, he lost the excess weight and was in compliance within four days...[The applicant] is a solid officer who has made significant leadership and policy contributions to arguably, the busiest operational office in the U.S. Coast Guard. He does not shy

away from work, rather he engages with energy and strategic intent...I strongly recommend that [the applicant's] request be considered. He can provide valuable service, as a cutterman, to the Coast Guard for many years to come.

Lastly, the Chief of the Administration Staff, CWO, provided a declaration. He stated that he was responsible for managing the Coast Guard Weight and Body Fat Standards Program for the District's military personnel. He provided the following statements:

I do not agree that [the applicant's] two [Page 7s] dated 30 April and 4 May 2015 be removed due to "medically-related extenuating circumstances and his limited ability to work out." These entries were approved...and are in accordance with...COMDTINST M1000.14 (series) and Coast Guard Weight and Body Fat Standards Program Manual, COMDTINST M1020.8 (series). [The applicant] reported...on 29 April 2015 for his weigh-in. He was 41 pounds over his Maximum Allowable Weight (MAW) and 1% over his Maximum Allowable Body Fat (MABF). [The applicant] returned on 30 April for another try with the same results. He was measured three times each by YN2 [] and witnessed by YN1 []. [The applicant] informed me that he recently had surgery...and that the Physician Assistant (ENS) from Base...told him that they would give him a medical abeyance. I advised [the applicant] that Medical cannot authorize a medical abeyance from weight standards...I advised him that he was not eligible for a medical abeyance quoting the manual "injuries or illnesses that interfere with a member's ability to exercise are not grounds for a medical abeyance." I further elaborated and provided examples from the manual that would qualify for a medical abeyance, i.e. hypothyroidism, polycystic ovarian syndrome, and prescribed corticosteroids...On 30 April 2015, I sent an e-mail to Capt [S], MD...explaining [the applicant's] situation and the fact that he wanted to request a medical abeyance. Capt [S] responded stating that [the applicant] did not have any medical condition that would support a medical abeyance...On 1 May 2015, I sent an e-mail to Capt [B], Chief of Staff explaining [the applicant's] circumstances and that I needed to place him on weight probation. I advised her that he requested but was not eligible for a medical abeyance and that Capt [S] did not support it either. I copied [the applicant's] chain of command on the e-mail so they were aware of his weight probation. On 4 May 2015, [the applicant] returned...to weigh-in again. He was 36 pounds over his MAW [maximum allowed weight] and exactly at his MABF [maximum allowed body fat] (26%). Measurements were completed by YN1 [] and witnessed...Since [the applicant] was in compliance with his MABF, I advised the Chief of Staff that we needed to remove him from weight probation. I recommended that we forego sending him to Medical for a Command Medical Referral Form...since he was in compliance, but we should still refer him to our Unit Health Promotion Coordinator (UHPC) since he was overweight. She concurred with my recommendation... [The applicant] acknowledged and signed both [Page 7s] on 6 May 2015 but challenged some of the wording in the...template. Specifically "you are to complete...a detailed fitness plan; participate in a mandatory fitness activity at least one hour per day three days a week." Since he was on limited duty and could still lose weight without physical activity, I lined out that sentence. Keep in mind that it was limited duty for a short period in time and he already obtained his MABF without working out. He accepted the entries and I filed them in his [record].

VIEWS OF THE COAST GUARD

On November 3, 2016, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant partial relief. The JAG conceded that the phrase "on limited duty" may have been added after the applicant signed the Page 7. However, the JAG argued that the applicant did not raise any argument that the addition of this phrase had a substantial connection to the action of the promotion board. Therefore, the JAG argued, the applicant's burden has not been met. While the phrase in question should be removed, additional relief is not warranted. The JAG stated that although the applicant did not specifically request one, a special selection board in order to retroactively promote the applicant is not warranted and should not be granted by the Board.

The JAG claimed that there was nothing “inherently prejudicial” against the applicant regarding the addition of “on limited duty” on his Page 7. The JAG argued that, given the location of the entry, it was likely added to explain the lined-out portion of the standard entry regarding non-compliance with weight standards. If anything, the JAG claimed, the phrase may have benefitted the applicant by providing evidence of some mitigating circumstances surrounding his non-compliance. Additionally, even if given the opportunity to object, the applicant would have had no right to have it removed. The JAG also stated that even without the entry, the lined out portion reasonably leads to the inference that the applicant was on limited or light duty. The JAG added that there is nothing inherently prejudicial about being on limited duty, and the applicant did not explain why a promotion board would consider that against him. Therefore, the JAG argued that the applicant failed to show a nexus between the error and the failure of selection for promotion.

The JAG also attached to the advisory opinion a memorandum on the case prepared by the Personnel Service Center (PSC). PSC recommended redacting the written statement “on limited duty” from the applicant’s Page 7 but granting no other relief. PSC stated that COMDTINST M1020.8H, Chapter 3.D.7. states that non-compliant members who have an injury or illness should be referred to their primary care manager. PSC pointed out that according to Chapter 5.3.a., abeyance requests that stem from a medical condition which may restrict a member’s ability to exercise but otherwise has no physiological impact on the member’s ability to lose weight through proper diet or exercise will not be approved. PSC concluded that the applicant was therefore ineligible for an abeyance.

PSC noted that according to the applicant’s pre-operation evaluation on February 12, 2015, the applicant already weighed 276 pounds and had a body mass index of 33.6%. Due to the irregular EKG results, the applicant was unable to exercise between this date and March 17, 2015. On April 30, 2015, the applicant weighed 266 pounds and had a 27% body mass index. PSC stated that this shows that the applicant had lost 10 pounds since February, which demonstrates that the applicant was able to lose weight despite the fact that he was unable to work out during this period. The applicant was found to be compliant with weight standards within four days.

PSC stated that pursuant to COMDTINST M1020.8H, Chapter 3.C.3., if a member comes into compliance within 30 days, they must still sign the Page 7 documenting their non-compliance unless covered by an abeyance. Therefore, PSC argued, it was not required that the applicant meet with his HPC, contact the regional HPM, or schedule an appointment with a medical officer; it was only required that he sign the Page 7.

The applicant claimed that “on limited duty” was hand written onto the Page 7 after he signed it. This version of the Page 7 was uploaded to the applicant’s electronic record, and would have been what the promotion board reviewed, according to PSC. PSC concurred with the applicant’s contention that the Page 7 should not have been altered after he had reviewed and signed it.

Regarding the mark of 3 for “Health and Well-Being” in the applicant’s OER, PSC stated that a mark of 4 would require that a member “maintained weight standards and adhered to the

Coast Guard Fitness Program.” Because the applicant did not maintain weight standards during this reporting period, PSC argued that a mark of 3 was justified.

Additionally, PSC noted that the PRRB found that there was not clear and convincing evidence that the applicant’s medical diagnosis qualified for an abeyance. The PRRB therefore found no grounds to grant the applicant relief.

PSC noted that while this period was challenging and stressful for the applicant, he was not precluded from weight loss through means such as a healthy diet. This is further demonstrated by the fact that the applicant lost ten pounds between February and April 2015. PSC contended that the applicant did not provide sufficient evidence to prove that his mark of 3 was unjustified or that the Page 7s were unwarranted. However, PSC recommended that the handwritten addition of “on limited duty” be redacted, as the evidence showed it was added after the applicant had reviewed and signed the Page 7.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 9, 2016, the BCMR sent the applicant a copy of the Coast Guard’s views and invited him to respond within 30 days. On December 1, 2016, the applicant responded, and stated that he did not agree with the Coast Guard’s advisory opinion. The applicant stated that policy requires that a member meet with the HPC, contact the regional HPM, and schedule an appointment with a medical officer. He argued that these are requirements and not optional. The applicant stated that according to Chapter 3.C.3., one could interpret these as optional, but that is not specifically stated. He argued that these mandates are in place to benefit the member and should always be followed. The applicant claimed that he was only instructed to meet the HPC, and he did so the same day as signing the Page 7s. However, he stated that he was not instructed to contact the HPM or schedule an appointment with a medical officer.

In regards to PSC conceding that “on limited duty” was added after the applicant signed it, he stated “rest assured it was added by a CWO4 PERS after I signed the document. Had I not obtained a copy of my [electronic record] I would have NEVER known about it.” The applicant claimed that, had he known about the addition, he would have included a statement to the effect of “I have been under a doctor’s care since Dec 2015. Throughout this period, I have been deployed 4 times, on convalescent leave and currently on light duty. I will not be cleared for full time duty until 01JUL2015.”

He further stated that he put too much trust in the process and the staff. He stated that if he could do it again, he would refuse to sign the Page 7s.⁴ The applicant argued that the CWO’s honesty and integrity is in question for willfully abusing his position of power and authority by adding the handwritten note. The applicant claimed that the Page 7 placing him on weight probation is the only negative entry in his military record in nearly 38 years of service. He felt it was unjust to place such a large consequence on him for one day of 365 days, as the last day in the reporting period was April 30, 2015. He stated that it is impossible to tell why he was not chosen for promotion, but he stated that a bad mark on an OER is detrimental to a member’s

⁴ A member signs a Page 7 to acknowledge notification. If the member does not sign, the member’s refusal to sign is noted on the Page 7 before it is entered in the member’s record.

selection. The applicant pointed out that he was on weight probation May 1 – 4 2015, yet he did not receive a 3 in Health and Well-Being on his October, 2015 OER.

The applicant added, “I am extremely frustrated that common sense was not exercised in my unique situation. What could I have possibly done in 3 days’ time to go from non-compliance into compliance while having a 2” open wound...? I have no desire and nor have I never [sic] requested a retro-active selection for promotion or opening a special promotion board. I appealed to the PRRB and to the BCMR based on principle. To receive a negative mark in my OER for a event [sic] occurring on a single day of a 365 day evaluation doesn’t make sense to me. I find it troubling that senior members within the Coast Guard organization abuse their position of authority and pick & chose which parts of COMDT Policy they are willing to comply with and which ones they do not.”

APPLICABLE STANDARDS

Chapter 5.A.4.c.4.b. of COMDTINST M1000.3 states that to complete an OER for each evaluation area, the Supervisor shall review the reported-on officer’s performance and qualities observed during the reporting period. Then, for each of the performance dimensions, the Supervisor shall carefully read the standards and compare the officer’s performance to the level of performance described by the standards. The Supervisor shall take care to compare the officer’s performance and qualities against the standards, and not to others officers and not to the same officer in a previous reporting period.

Chapter 5.A.4.c.4.d. of COMDTINST M1000.3 states that the “comments” block following each evaluation area is for the Supervisor to include comments citing specific aspects of the officer’s performance and behavior for each mark that deviates from a 4. The Supervisor shall draw on his or her observations and information accumulated during the reporting period.

Chapter 5.A.2.c. of COMDTINST M1000.3 states that, while no preferential treatment shall be given, commanding officers must ensure that individuals who experience a limited opportunity to perform due to illness or injury do not receive substandard evaluations strictly as a consequence of these circumstances.

Chapter 3.B.1. of COMDTINST M1020.8H states that members found to be non-compliant with weight standards must sign the Page 7 documenting their non-compliance unless covered by an abeyance or exemption.

Chapter 3.C.1. of COMDTINST M1020.8H states that members who are found to be non-compliant with weight standards must meet with their UHPC, contact the regional HPM, and schedule an appointment with a Coast Guard medical officer or civilian medical provider within 30 days of a non-compliant weight screening.

Chapter 3.C.3. of COMDTINST M1020.8H states that if members come into compliance within 30 days, they must still comply with Chapter 3.B.1. and all documentation of the member’s non-compliance must remain in their record.

Chapter 5.A.3. of COMDTINST M1020.8H states that medical abeyance requests will only be granted for cases involving a diagnosed physiological medical condition or use of prescription medication that contributes to the member's inability to maintain compliance with weight standards. Listed as qualifying medical examples are hypothyroidism, polycystic ovarian syndrome, and prescribed corticosteroids. Chapter 3.D.7. of COMDTINST M1020.8H states that members who are unable to exercise due to injury or illness must utilize healthy eating habits in order to maintain a healthy weight.

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 law:

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

2. The applicant alleged that the Coast Guard did not follow policy contained in COMDTINST M1020.8H in that he was not told to contact the regional HPM or schedule an appointment with a medical officer when he was found to be overweight. The applicant also stated that the Coast Guard erred in adding a handwritten note into a Page 7 after the applicant had signed it and before entering the Page 7 in his record. The applicant therefore argued that the two Page 7s that he signed on May 6, 2015, are erroneous and unjust and should be removed from his record. He also alleged that the mark of 3 for "Health and Well-Being" on his April 30, 2015, OER is erroneous and unjust and should be raised to a 4. 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 his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁵ To be entitled to relief, the applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.⁶

3. The applicant complained that he was not instructed to contact the regional HPM or schedule an appointment with a medical officer. He stated that the command decided to pick and choose which parts of COMDTINST M1020.8H it wished to follow. According to Chapter 3.C.3., which governs when a member comes into compliance within 30 days, the member "must still comply with paragraph 3.B.1. of this manual." Chapter 3.B.1. requires that a member sign a Page 7 documenting his or her non-compliance. Chapter 3.C.1. is the section that requires a member to meet with the HPC, HPM, and a medical officer. The manual does not expressly make this provision mandatory for members who come into compliance within 30 days and there is no provision that requires the command to immediately refer an overweight member to the

⁵ 33 C.F.R. § 52.24(b).

⁶ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

HPC, HPM, and a medical officer. The Board believes that had the Coast Guard intended to make Chapter 3.C.1. mandatory when a member comes into compliance within 30 days, the manual would have stated this. It is telling that Chapter 3.C.3. specifically enumerates that Chapter 3.B.1. (regarding signing the Page 7) is included as a paragraph that must still be complied with but no other Chapters are included. The Board also finds that, in this regard, the applicant's command in fact did more than was required. The CWO recommended that the applicant still be required to see the HPC to obtain guidance, despite the fact that this was no longer required by the manual after the applicant came into compliance. The Board therefore finds that the applicant has not proven by a preponderance of the evidence that his command committed an error or injustice by not requiring the applicant to contact the HPM or to make an appointment with a medical officer. Nor has the applicant shown that the command's actions in this regard should invalidate the mandatory Page 7s for any reason.

4. The applicant alleged that the Page 7s were unjust because he was placed on weight probation on the final day of the reporting period for his OER due to the timing of the unit's semiannual weigh-in. The record shows, however, that the applicant was already well above his MAW and MABF on February 12, 2015, long before the end of the reporting period and before he was placed on limited duty pending his surgery. The record also shows that he managed to lose weight and body fat as the semiannual weigh-in approached despite being on limited duty. The Board cannot conclude that the Page 7 documenting the applicant's failure to maintain the Coast Guard's weight standards constitutes an error or injustice just because of its timing at the end of the reporting period for his OER.

5. The Board finds that according to COMDTINST M1020.8H, the Coast Guard committed no error by entering the Page 7s documenting the applicant's non-compliance with weight standards and subsequent compliance. Chapter 3.C.3. clearly states that even if a member comes into compliance within 30 days, the forms documenting non-compliance must still be signed and placed into the member's record unless covered by an abeyance. Chapter 5 lists hypothyroidism, polycystic ovarian syndrome, and prescribed corticosteroids as qualifying medical conditions to justify an abeyance. The applicant did not suffer from any of these conditions. Moreover, under Chapter 3, members who are unable to exercise because of a medical condition, such as a broken bone or heart condition, are still required to meet the weight standards by maintaining a healthy diet. Therefore, the applicant has not proven by a preponderance of the evidence that the Coast Guard should have granted him an abeyance of the weight standards.

6. The applicant complained of the addition of the phrase "on limited duty" to his first Page 7 placing him on weight probation. The Coast Guard has not denied that the phrase was added after the applicant reviewed and signed the document. The Board need only make corrections that it considers necessary, and removing this mitigative phrase hardly seems necessary, but both the applicant and the Coast Guard think it should be removed, so the Board will direct the Coast Guard to remove it.⁷ The Board agrees with the Coast Guard, however, that, if it had any impact at all, the addition of the phrase "on limited duty" was beneficial to the applicant as it mitigated the information on the Page 7 about his failing the weight standards, as did the Reviewer's comments on the applicant's OER. Therefore, while the addition of this

⁷ 10 U.S.C. § 1552(a).

phrase to the Page 7 after the applicant signed it might be considered an error, the Board finds that it was not a prejudicial or material error.

7. According to Article 11.C.5.e. of the Coast Guard Officer Evaluation System Procedures Manual, when an applicant does not comply with the weight and body fat standards of the Coast Guard, he may not receive a mark of 4 or higher for “Health and Well-Being” on his OER. The applicant completed his semiannual weigh-in on April 29 and 30, 2015, and was found to be 41 pounds overweight and to be 1% over his maximum allowable body fat index. Both dates fall within the reporting period for the April 30, 2015, OER. Therefore, the Coast Guard acted properly in giving the applicant a 3 in “Health and Well-Being” on his April 30, 2015, OER.

8. The applicant, however, is also asking for a correction to his military record in the interest of justice. He served nearly 38 years in the Coast Guard and suffered an extenuating medical situation shortly before he retired. Although the Coast Guard did not commit an error under its policies in this case and is certainly entitled to maintain bright-line rules about abeyances and the documentation of failing weight standards, the Board finds that in light of the unique circumstances of this case, including the applicant’s retirement with nearly 38 years of active duty, his medical condition, and the timing involved, it is in the interest of justice to grant the applicant’s request.

9. Accordingly, the applicant’s request for relief should be granted. The Coast Guard should remove the Page 7s dated April 30, 2015, and May 4, 2015, from his record and change the mark of 3 to a 4 in “Health and Well-Being” on the applicant’s April 30, 2015, OER.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of [REDACTED] USCG Retired, for correction of his military record is granted. The Coast Guard shall remove from his record the two Page 7s regarding weight probation dated April 30, 2015, and May 4, 2015, and shall change the mark for "Health and Well-Being" from a 3 to a 4 on his April 30, 2015, OER.

March 3, 2017

