

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2016-121**

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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. The Chair docketed the case after receiving the completed application on May 6, 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 7, 2018, 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, an [REDACTED] was honorably discharged on August 25, 2014, due to "weight control failure" with an RE-3 reenlistment code, which means that he is eligible to reenlist except for a disqualifying factor (exceeding weight standards). Upon his discharge, he had completed 19 years, 5 months, and 20 days of active duty.

The applicant asked the Board either to vacate his discharge and reinstate him on active duty or to award him constructive credit for active duty from August 25, 2014, through March 5, 2015—the date he would have been able to retire with 20 years of active duty—and to award him all back pay, allowances and retirement pay.

The applicant, via counsel, stated that he enlisted in the Coast Guard directly out of high school on March 6, 1995. He stated that he was consistently rated as above average or superior until he began to experience difficulties with his weight after medical injuries beginning in 2011.<sup>1</sup> The applicant stated that over the years he had struggled with his weight, but he had always been able to lose excess weight when required to do so on weight probation. He stated that he underwent knee surgery in 2012 for a tear in his meniscus, tests revealed a degenerative disc disease of his lumbar spine, and he suffered from chronic shoulder pain.

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<sup>1</sup> The applicant provided medical documents confirming his injuries and treatment.

On March 14, 2014, the applicant was placed on probation for weighing 227 pounds with 26% body fat, which was 25 pounds overweight and 2% over his authorized body fat percentage. The applicant was 38 years old and 72 inches tall. He had a maximum allowable weight (MAW) of 202 pounds and a maximum allowable body fat of 24%. He was given until September 5, 2014, to come into compliance with the weight standards. The applicant stated that he continued to experience pain during this period. He provided a medical record that contained a doctor's note that stated the applicant could run a mile, but could not do push-ups or squats.

The applicant stated that, despite having never done so previously, his command weighed him monthly during his weight probation. He stated that he had the following weigh-ins while on probation:

- April 8, 2014: 219 pounds, 25% body fat; 17 pounds overweight, 1% over body fat
- May 19, 2014: 216 pounds, 25% body fat; 14 pounds overweight, 1% over body fat
- June 16, 2014: 219 pounds, 25% body fat; 17 pounds overweight, 1% over body fat

The applicant stated that because he gained three pounds between his May and June weigh-ins, he was honorably discharged for weight control failure after over 19 years of active duty service. The applicant claimed that his command failed to follow proper Coast Guard protocol in so doing. He argued that his weigh-ins were not witnessed by a member within the command cadre as required by policy.<sup>2</sup> According to the Coast Guard Weight and Body Fat Standards Program Manual, COMDTINST M1020.8H, a "member within the command cadre ... shall witness measurements of the member." The applicant therefore argued that any weigh-in that was not witnessed by his command cannot be used as a basis for his separation.

The applicant further argued that he did not receive the proper medical evaluation prior to being placed on probation. The applicant argued that that a Primary Care Manager must "evaluate command/unit referred members through completion of a form CG-6050, within 30 days of initiation of medical referral." Members must also be referred to a regional health promotion manager (HPM) for "guidance in developing a successful weight management program." Lastly, the member must be evaluated "for physiological medical conditions or prescribed medication that may cause the member's non-compliance."<sup>3</sup> The applicant claimed that his command failed to determine if his medical conditions or medication were effecting his weight gain. He argued that the failure to follow these policies led his command to "erroneously conclude that he was not making reasonable and consistent progress on his weight loss." The applicant argued that given his medical injuries, his weight loss was reasonable and consistent.

The applicant stated that his probation period was scheduled to end September 5, 2014, which would put his halfway point at May 25, 2014. He argued that the standard to determine whether to separate a member on weight probation is "reasonable and consistent progress."<sup>4</sup> One example is members who are not halfway towards compliance at the midpoint of their probationary period. The applicant argued that given the time left on his probationary period, his command erroneously ended his probation. He stated that he was initially only 2% over his allowable body

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<sup>2</sup> COMDTINST M1020.8H., Article 1.B.3.e.

<sup>3</sup> COMDTINST M1020.8H., Article 1.B.5.c.

<sup>4</sup> COMDTINST M1020.8H., Article 3.D.5.b.(1).



fat, and he was only 1% over during his last measurement in June 2014. He claimed that although he weighed 219 pounds and was 17 pounds over his MAW in June 2014, he could have reached his body fat goal of 24% by losing just 6 more pounds, and he was therefore very likely to lose the remaining body fat prior to the end of his probationary period.

The applicant alleged that in separating him, the Commander, PSC was unaware that the applicant had not completed his full probationary period. The applicant stated that a letter from his commanding officer (CO) to the Commander, PSC stated that the applicant “was afforded the proper probationary time period in order to come into compliance yet he was unable to comply with policy.” The applicant argued that this letter proves that the Commander was unaware that the applicant had not been provided the entire probationary period in order to come into compliance.

Lastly, the applicant argued that separating him with 19 years, 5 months, and 20 days of service is unjust. He claimed that separating him prior to the end of his probationary period under his circumstances was an abuse of discretion. The applicant argued that members have a property interest in their service and retirement. Separating the applicant prior to the end of his probationary period just six months early was unjust given that he very likely would have met either his goal weight or body fat prior to September 5, 2014. The applicant pointed out that he had always been able to lose the weight during previous probationary periods. He argued that his command separated him in order to keep him from reaching retirement. The applicant stated that he was due to start terminal leave in January 2015, but he was discharged just four months earlier. He claimed that separating him just months short of retirement has led him to not receive military retirement benefits and has materially affected his livelihood, creating a financial hardship. Therefore, the applicant requested that the Board vacate his discharge and either reinstate him on active duty or award him constructive credit so that he can retire with 20 years of service.

### SUMMARY OF THE RECORD

On March 6, 1995, the applicant enlisted in the Coast Guard. He earned the [REDACTED] rating and advanced to [REDACTED] E-4 in 1998. He took the Servicewide Examination for advancement and advanced to [REDACTED] E-5 in 2000, but he remained in that pay grade until his discharge in 2014. Records show that he was placed on weight probation for exceeding his maximum allowable weight (MAW) in 1996, 2001, 2006, 2011, 2013, and 2014. Each time, he was counseled about the applicable policies and warned about the possibility of being discharged if he did not meet Coast Guard weight standards within the probationary period. And each time, except in 2014, he came into compliance with the standards through a diet and exercise program. Below is a summary of the applicant’s military records concerning his weight probationary periods.<sup>5</sup>

- **January 30, 1996:** The applicant was found to be 4 pounds overweight at 215 pounds, with 26% body fat. He was placed on probation until April 30, 1996, in order to lose

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<sup>5</sup> The Coast Guard mentioned a 2008 and 2010 probationary period, but there was no documentation in the applicant’s military record.

4 pounds or drop to 24% body fat.<sup>6</sup> On March 23, 1996, the applicant's probationary period came to an end. He weighed 210 pounds, which was under his MAW under the policy then in effect; no body fat measurement was included.

- **December 6, 1999:** The applicant successfully met his maximum weight requirement, and his probationary period came to an end. No measurements were included.
- **July 16, 2001:** The applicant was found to be 11 pounds overweight, with 28% body fat. The applicant was told he must lose 11 pounds or drop below 23% body fat.<sup>7</sup> The documentation of the end of this probationary period is not in the record.
- **April 17, 2006:** The applicant was found to be in compliance with the standards based on having 25% body fat, although he weighed 236 pounds.<sup>8</sup>
- **July 21, 2011:** At 237 pounds, the applicant was found to be 35 pounds overweight and have 30% body fat. At that time, he complained of hip, shoulder, and foot pains, which he stated made it difficult to exercise. The doctor noted that the applicant had no metabolic identifiable conditions and no injuries other than chronic shoulder discomfort and joint pain. The doctor stated that the applicant was able to swim, to use an elliptical machine, and to follow a diet. The applicant was placed on probation until April 11, 2012, in order to lose 35 pounds or drop to 24% body fat.

The applicant had lost 12 pounds by October 21, 2011, but by November 21, 2011, he had gained back 7 pounds and his body fat was still 30%. On November 22, 2011, the applicant received a Notification of Intent to Discharge based on his failure to make reasonable and consistent progress in complying with weight and body fat standards. He was informed that he had the right to submit a statement on his behalf within five working days from receiving the notice. The applicant acknowledged receipt of this notice and indicated that he objected to the discharge and was submitting a statement on his behalf. While being processed for discharge, however, the applicant began losing weight again. By January 9, 2012, he had lost 16 pounds and had 25% body fat, and on February 22, 2012, he came into compliance with 24% body fat, although he weighed 210 pounds. Therefore, he was not discharged.

- **August 31, 2012:** The applicant was found to be 30 pounds overweight at 232 pounds, with 30% body fat. He was placed on probation until April 14, 2013, in order to lose 30 pounds or drop to 24% body fat. By October 5, 2012, the applicant had lost 7 pounds and had 29% body fat. On April 1, 2013, his probationary period came to an end. He had 24% body fat; no weight measurement was included.

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<sup>6</sup> Coast Guard members can comply with the standards based on either weighing no more than the maximum allowed weight (MAW) or having no more body fat than the maximum allowed percentage. COMDTINST M1020.8H, Chap. 2.H.

<sup>7</sup> The Coast Guard's weight and body fat standards vary according to the member's gender, height, and age, and they have changed slightly based on these factors over time. COMDTINST M1020.8 (series).

<sup>8</sup> The Coast Guard's MAW varied with members' age, gender, and height, and the maximum allowable body fat percentages varied with members' age and gender. COMDTINST M1020.8F, Chap. 2.3.3.

- **September 19, 2013:** The applicant was found to be 20 pounds overweight at 222 pounds, with 25% body fat, and he was placed on probation until February 19, 2013.<sup>9</sup> On October 8, 2013, the applicant's probationary period came to an end, as he reached 24% body fat. No other measurements were included.
- **March 14, 2014:** The applicant was found to be 25 pounds overweight at 227 pounds, with 26% body fat. He was placed on probation until September 5, 2014, in order to lose 25 pounds or drop to 24% body fat.<sup>10</sup> A Command Weight Referral signed by the CO and by the applicant's doctor on March 18, 2014, shows that the doctor provided the following information to the command:
  - Are there any medical diagnoses or medications that could be contributing to the member's excess weight? No
  - Are there any medical or physical conditions that can limit participation in physical activity? Yes, Right shoulder – pain and limited [range of motion], right knee – meniscus tear
  - Please list the activities the member cannot safely participate in: Push-ups only as tolerate, run – as tolerate.
  - Has the member been referred to a dietician for nutrition counseling? Yes.
  - Please indicate which components of the fitness test it is safe for the member to participate in: a) 1.5 mile run: yes – as tolerate; b) push-ups: yes – as tolerate; c) curl-ups: yes.

The doctor also stated that the applicant could run as tolerated, could not do squats, and could only do push-ups as tolerated. The notes sections includes a statement that says “[follow-up] on a few medical issues... Pending all previous referrals do to workload and making his best effort to loose [sic] weight.” The doctor “recommended run [as] tolerate for knee pain and no push-ups or only as tolerate pending xrays, pmr, ortho evaluations.”

On April 8, 2014, the applicant had lost 8 pounds and 1% body fat, with a total weight of 219 and body fat of 25%. He was again told that he had until September 5, 2014, to come into compliance.

On May 19, 2014, the applicant had lost 3 more pounds and his body fat was still at 25%. He was again told that he had until September 5, 2014, to come into compliance.

On June 16, 2014, the applicant had gained back 3 pounds and his body fat was 25%. The weigh-in record shows his weight and body fat and is signed by the applicant, a member of the applicant's command cadre, and an additional witness. A Page 7 states, “In accordance with chapter 4.A.2. Failure to Progress During Probation, Coast Guard Weight and Body Fat Standards Program Manual ... you are hereby notified that you will be recommended for separation.”

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<sup>9</sup> Presumably this was a typo in the Page 7, as they probably intended 2014 as opposed to 2013.

<sup>10</sup> Weight probationary periods are calculated as the greater of the time the member would take to come into compliance by losing either 1 pound per week or 1% body fat per month. COMDTINST M1020.8H, Article 1.D.4.

### *Discharge Proceedings*

On June 16, 2014, the applicant received a Notification of Intent to Discharge stating that his command had initiated his discharge based on his failure to comply with the weight and body fat standards under COMDTINST M1020.8. The notice states that the applicant was found to weigh 219 pounds, which was 17 pounds over his MAW, and had 25% body fat, which was 1% over his maximum allowable body fat of 24%. The notice also states that his measurements had been verified by his command cadre. The applicant was informed that he had the right to submit a statement on his behalf within five working days from receiving the notice. An attachment to the notice contains an endorsement of the intent to discharge. It states that the applicant acknowledged receipt of the notice, that he was including a statement on his behalf, and that he objected to the discharge.

In his statement objecting to the proposed discharge, the applicant wrote that he had an action plan to meet the applicable weight and body fat requirements. He stated that he believed he had taken a proactive approach to maintaining physical fitness requirement but that he had also encountered difficulties. The statement includes the following:

I would like to recommend this personal plan of corrective action to make a positive shift in my physical fitness to be compliant with all regulatory requirements. I will locate and obtain a physical trainer and dietary expert to create an effective plan that will allow me to meet USCG's physical fitness requirements and formulate a dietary plan to refine any lifestyle changes that will improve overall health through the education and selection of nourishment that will enhance my ability to establish healthy eating goals. Through the implementation of an exercise and dietary plan, I will be able to meet USCG's physical fitness regulations. I respectfully request to have assistance from my Commanding Officer and medical staff to provide guidance and encouragement throughout this process. I have invested 19 years of my life to dedicated and professional service in the United States Coast Guard and fully intend to continue to serve my country with honor and distinction. My conduct, dedication to duty, and my exemplary service, have been impeccable during my tenure as a valuable serviceman. I seek advisement from my Commanding Officer and medical staff to help me in any way possible so that I can achieve these personal and professional goals.

Also on June 16, 2014, the applicant's command prepared a Recommendation for Discharge of the applicant. The recommendation states that pursuant to the Separations Manual and COMDTINST M1020.8 (the weight and body fat manual), the applicant was recommended for an Honorable discharge for failing to comply with maximum allowable weight and body fat standards. The recommendation lists the following enclosures: the letter of notification of intent to discharge to the applicant; the applicant's acknowledgment of discharge notification; the initial Command Medical Referral dated March 14, 2014; the applicant's statement objecting to the discharge (quoted above); and supporting documentation from the applicant's military record. This separation package was forwarded to the Personnel Service Center for decision.

On July 23, 2014, the Personnel Service Center issued separation orders for the applicant with an effective date of August 25, 2014. The authorization states that the applicant would receive an Honorable discharge by reason of convenience to the government for exceeding weight standards, with a reentry code of RE-3.

On August 25, 2014, the applicant was honorably discharged from the Coast Guard for exceeding the weight and body fat standards with an RE-3 reentry code, which meant that he was



eligible to reenlist if he met the standards. His DD 214 shows that he had served 19 years, 5 months, and 20 days on active duty.

### VIEWS OF THE COAST GUARD

On December 1, 2016, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny the requested relief. The JAG argued that the Coast Guard followed the applicable policies in separating the applicant. The JAG stated that in order for a weigh-in to be the basis for separation, it must be witnessed by the command. As evidenced by an email dated June 13, 2016, the applicant's executive petty officer (XPO) witnessed the non-compliant weigh-in on June 16, 2014. The JAG therefore argued that the Coast Guard fulfilled the requirements of the applicable policies, and the Board should therefore deny relief.

The JAG attached to his advisory opinion and adopted a memorandum prepared by the Personnel Service Center (PSC). PSC stated that according to the Coast Guard Weight and Body Fat Standards Program Manual, COMDTINST M1020.8H, a member of the command cadre, to include the XPO, must witness measurements of members subject to separation. According to Article 3.C., a non-compliant member is to schedule an appointment with a Coast Guard medical officer within 30 days of a non-compliant weight screening. The applicant's maximum allowable weight for his age and height was 202 pounds and his maximum body fat percentage was 24% according to the manual.

PSC stated that according to a November 2, 2010, Command Medical Referral form, the applicant was referred for an evaluation after being found overweight. This form stated that it was safe for the applicant to lose the excess weight to come into compliance, and that he had no underlying medical conditions responsible for his excess weight. A Chronological Record of Medical Care note dated November 2, 2010, states that the applicant had "always been in the heavy weight." PSC noted that Page 7s documenting the applicant's non-compliance in 2008 and 2010 were not located in his military record.

A note in the applicant's Chronological Record of Medical Care dated July 22, 2011, states that the applicant had "no previous metabolic identifiable conditions. He has no recent injuries besides chronic shoulder discomfort and joint pain. He is able to swim and do elliptical machines. He can do 1 mile running...He is able to follow diet."

PSC stated that separation packages must contain a memorandum recommending separation, to include the measurements that were witnessed by a member of the command cadre, all Page 7s concerning the non-compliance, applicable health record entries, and form CG-6050 from the most recent probation period.<sup>11</sup> Following the applicant's November 21, 2011, weigh-in noting that he had gained weight while on probation, the applicant's command drafted a memorandum on November 22, 2011, recommending that he be discharged. PSC stated that it has no record of receiving this memorandum and so cannot determine why the applicant was retained at this time.

PSC stated that on March 14, 2014, after being found non-compliant with weight and body fat standards, the applicant was medically screened. It was determined that the applicant had no

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<sup>11</sup> COMDTINST M1020.8H, Article 4.C.2.

medical diagnosis or medication that could have been contributing to his excess weight. A doctor's note in his Chronological Record of Medical Care dated March 18, 2014, states that the applicant was limited to certain physical activities due to his knee injury. The note recommended that the applicant run as tolerated but not do squats or push-ups.

PSC noted that medical abeyance requests are only granted in very limited circumstances, as enumerated in Article 5.A.3. of the manual. The applicant's condition did not qualify for a medical abeyance, and PSC argued that he was therefore required to weigh-in and to be in compliance with the manual.

PSC stated that the applicant gained weight while on probation, as evidenced by his June 16, 2014, Page 7. PSC stated that the measurement was witnessed by two members according to the June 16, 2014, Record of Semi-Annual Weigh-In. PSC argued that members who gain weight during their probation period "have not demonstrated reasonable and consistent progress and may be separated before the probationary period expires" consistent with the manual. Therefore, after the applicant gained weight, his command was authorized to process the applicant for separation prior to the end of his probation, PSC stated.

PSC stated that the applicant was properly notified on June 16, 2014, of the command's intent to discharge him for failure to comply with maximum allowable weight or body fat standards and the applicant provided a statement in objection. PSC noted that upon discharge, the applicant was assigned a reentry code of RE-3, which gave him the opportunity to reenlist, and that he could reenlist at the same rank if he met the weight and body fat standards within two years of discharge.

PSC argued that the applicant did not show that his discharge was erroneous or unjust. PSC stated that his command adhered to the appropriate policies in recommending his discharge. The applicant had argued that a member of the command cadre must witness all weigh-ins, but PSC stated that a member of the command must witness weigh-ins that are to be used as the basis for separation. The applicant's XPO witnessed his June 16, 2014 weigh-in, and it was therefore performed in accordance with policy. PSC submitted an email dated June 13, 2016, from the member who witnessed the applicant's June 16, 2014, weigh-in. The email states that he was present for the non-compliant weigh-in of the applicant on that date; that the recording of the weigh-in was witnessed, entered, and signed by two yeomen; and that he had prepared the Page 7 himself.

PSC also stated that on multiple occasions a medical professional noted that the applicant was able to participate in certain activities and maintain a healthy diet in order to lose weight. PSC further stated that the applicant was properly screened on every occasion he was determined to be non-compliant. PSC stated that the policy authorizes separation of a member prior to the end of a probationary period if reasonable and consistent progress is not being made. Lastly, PSC noted that there is no policy that entitles enlisted members to retire with 20 years of service if they have attained less than 20 years. The applicant did not comply with the weight and body fat standards and was therefore eligible for separation. Therefore, PSC stated that the applicant's command followed all applicable policies, and that the applicant's requests should be denied.



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

On December 6, 2016, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited a response within 30 days. The Chair received the applicant's response, via counsel, on March 31, 2017. The applicant disagreed with the Coast Guard's advisory opinion in full. He argued that the Coast Guard failed to take into consideration all of the applicant's medical documents or the fact that he had been able to come into compliance every time he had previously been on probation. The applicant again provided many medical documents, including treatment records for his hip and shoulder pain.

In addition, the applicant argued that in March 2014, when he was last put on weight probation, he was on Clonazepam and Hydrochlorothiazide. He stated that one of the side effects of Clonazepam is "weight changes," and that one of the side effects of Hydrochlorothiazide is weight gain. He argued that the medical evaluator failed to list these medications on his medical evaluation, or to list the likely side effects. The applicant complains that these medications were not brought to the attention of his command. He argued that the combination of these medications, along with his limited mobility due to his hip and shoulder pain, affected his ability to lose weight and therefore should have been taken into account by his command.

Lastly, the applicant argued that the advisory opinion was incorrect in stating that "there is no current Coast Guard policy that provides enlisted members the ability to retire at 20 years by attaining a certain amount of service." The applicant claimed that this is incorrect, because COMDTINST M1000.4, the Military Separations Manual, Article 2.A.2.b. states that members "who have at least 18 but fewer than 20 years' service when they are found unfit for continued service or who remain on active duty...will remain on active duty until they complete 20 years of service if they meet these criteria: 1) They can perform useful service in an established billet for their grade, specialty, or rating; 2) Their retention will not be detrimental to their health nor a hazard to their associates." The applicant therefore argued that the Coast Guard does recognize that service members have a vested interest in their retirement after they have reached 18 years of active duty service. In conclusion, he claimed that separating him just four months prior to his scheduled terminal leave was unjust and unequitable.

## APPLICABLE LAW AND POLICY

Title 10 U.S.C. § 1169 states, "No regular enlisted member of an armed force may be discharged before his term of service expires, except—(1) as prescribed by the Secretary concerned; ..."

### *Coast Guard Weight and Body Fat Standards Program Manual*

Article 1.A.3. of COMDTINST M1020.8H, the Coast Guard Weight and Body Fat Standards Program Manual in effect in 2014, states that the standards are applicable to all Coast Guard military personnel. Article 1.B.1. states that members are required to "[m]aintain compliance with weight and body fat standards at all times, unless specifically stated otherwise"; complete the mandatory semiannual weight screening; follow the requirements in Article 3 if found to be non-compliant; and be familiar with the requirements of the manual.

Article 1.B.2. states that supervisors must be proactive in ensuring that members maintain compliance with the weight standards; monitor subordinates' adherence to the probationary requirements in Article 3 when they are on probation; and encourage healthy food selections and exercise.

Article 1.B.3. states that the commanding officer is responsible for ensuring the unit's adherence to the policies in the manual; must submit a separation package to PSC within 30 days for any member who meets the conditions for separation provided in the manual; and should ensure that the measurements of members subject to separation are verified and witnessed by a "member within the command cadre, to include CO, executive officer (XO), OIC, executive petty officer (XPO), or command master chief (CMC), or as necessary, a senior member within the command shall witness measurements of the member."

Article 2.C. provides the procedures for measuring weight and body fat. Under Articles 2.C. and 2.D., body fat is calculated in men by measuring their height and the circumference of their neck and waist (the abdomen at the level of the naval) in inches. The circumference of the neck is subtracted from the circumference of the waist to provide a "circumference value," which is compared to a chart showing body fat percentages based on the member's height and circumference value. Before making this calculation, each circumference is measured three times, and the average circumference of the waist is rounded down, while the average circumference of the neck is rounded up, which effectively minimizes the circumference value before that value is compared to the chart to find the member's percentage of body fat.

Article 3.A. provides that a member who is non-compliant may not be advanced or promoted; may not attend significant training courses; and should not be assigned to leadership billets or high-visibility billets.

Article 3.C.1. states that non-compliant members must contact their Unit Health Program Coordinator (UHPC) and their regional Health Program Manager (HPM); follow all of the mandates in the Coast Guard Health Promotion Manual, COMDTINST M6200.1; and schedule an appointment with a Coast Guard "medical officer or civilian medical officer and complete a form CG-6050 within 30 days of a non-compliant weight screening. Failure to complete this requirement in a timely fashion may result in administrative and/or disciplinary action." Article 3.C.2. states that a member's failure to complete these requirements may be considered a failure to demonstrate progress pursuant to Article 3.D.5.b.(1).

Article 3.D. provides the terms for weight probation. Article D.1.3. states that members who are more than 35 pounds overweight and member who are non-compliant at three consecutive weigh-ins are not eligible for probation and must be processed for discharge. Article 1.D.4. states that for members eligible for a probationary period, the period should equal the amount of time it would take the member to lose all the excess weight or body fat at a rate of one pound per week or one percent body fat per month, whichever is greater. However, if the calculated probationary period exceeds eight months, the member must be processed for separation.

Article 3.D.5.a. states that while on probation, the member must weigh-in at least monthly and comply with COMDTINST M6200.1. However, the command may require a random weigh-in at any time with no notice.

Article 3.D.5.b.(1) states that members on weight probation “must demonstrate reasonable and consistent progress throughout their probationary period. Failure to demonstrate reasonable and consistent progress may provide sufficient grounds for separation before the probationary period expires. (For example, *members who gain weight* or are not halfway towards compliance at the midpoint of their probationary period may be recommended for separation.)” (Emphasis added.)

Article 3.D.7. states that non-compliant members must consult their primary care managers and seek guidance on safe exercises and healthy eating habits, and “[i]n most cases, neither illness nor injury will indicate authorization of an abeyance or exemption.”

Article 4.A. states, “[m]embers who meet any one of the following criteria must be recommended for separation.” The list of criteria includes the following:

1. Being more than 35 pounds overweight or having a probationary period that would exceed eight months.
2. “Fail[ing] to demonstrate reasonable and consistent progress during probation (example: a member who is not halfway towards compliance at the midpoint of their probationary period).”
3. Members who fail to comply by the end of their probation.
4. Having a third probationary period in 14 months.
5. Failing three consecutive semiannual weigh-ins.

Article 4.B. states that PSC is the approving authority for such separations, and Article 4.C. states that within 30 days of the member meeting one of the separation criteria in Article 4.A., the command must send a separation package to PSC with a memorandum and all application documentation and health records.

Article 4.C.5. states that a member who is processed for separation but who becomes compliant before being separated is still normally separated, but PSC may “suspend the execution of the discharge based upon service needs, the member’s history of compliance, and the member’s past performance.”

Article 4.G.4. states that members who have been discharged for non-compliance but come into compliance within two years may request to reenlist. PSC will evaluate the request based on service needs, the member’s history of compliance, and the member’s past performance.

Article 5.A. provides the rules for medical abeyances of the weight standards. Article 5.A.2. states that “[t]he 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.”

Article 5.A.3. lists examples of medical conditions and prescription medications that warrant a medical abeyance. They are hypothyroidism, polycystic ovarian syndrome, and prescribed corticosteroids. The manual states that “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.”

### ***Coast Guard Health Promotions Manual***

Chapter 4.C.7. of the Coast Guard Health Promotion Manual, COMDTINST M6200.1, states that members placed on weight probation must meet with their UHPC within 72 hours; complete a new Personal Fitness Plan; start a fitness log to be submitted to the UHPC weekly; log their daily food intake for at least seven days; and perform a physical assessment every month. Chapter 4.C.6. states that for members on weight probation, the UHPC shall—

- Provide them with information on nutrition, weight management, and exercise;
- Ensure that they complete a new fitness plan after consulting their primary care physician;
- Ensure that they start a fitness paper or electronic log and submit it to the UHPC;
- Review the fitness log at least weekly to determine whether the member is losing the required weight progressively at an average of about one pound per week;
- Complete and submit a daily food log for at least the first week; and
- Conduct monthly fitness assessments.

Chapter 5 of COMDTINST M6200.1 advises members to maintain a healthful diet with low fat and cholesterol and to focus on “caloric intake for successful weight management.” Under Article 5.F., members have access to nutritional counseling and education and weight management planning, techniques, and resources.

### ***Military Separations Manual***

Article 1.B.12.a.(10) of COMDTINST M1000.4, the Military Separations Manual in effect in 2014, authorizes the discharge of members for obesity if a medical officer has certified that a proximate cause of the obesity is the member’s “excessive voluntary intake of food or drink” rather than something beyond his or her control.

Article 2.A.1.a. states that this section “prescribes procedures under which certain active duty members ... who are *eligible for retirement or separation because of physical disability* may remain on active duty in a limited assignment status.” (Emphasis added). Article 2.A.2.b. discusses the criteria for keeping such a member on active duty if they have reached 18 years of service, but not yet 20 years.



## 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 filed.<sup>12</sup>

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.<sup>13</sup>

3. The applicant asked the Board to vacate his discharge and reinstate him on active duty or award him constructive credit for active duty from August 25, 2014, through March 5, 2015, and to award him all back pay and allowances and retirement pay. The applicant claimed that his command did not follow proper policy and that it was erroneous and unjust to separate him within seven months of the date he would become eligible to retire. 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.<sup>14</sup> 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."<sup>15</sup>

4. The applicant argued that applicable policy was not followed because a member of his command cadre did not witness all of his weigh-ins while he was on probation. Article 1.B.3. of the Coast Guard Weight and Body Fat Standards Program Manual, COMDTINST M1020.8H, states that a member of the command cadre must witness measurements that are to be used as the basis for separation; it does not state that every monthly weigh-in while on probation must be witnessed by a member of the command cadre. The applicant was processed for separation based on the results of his June 16, 2014, weigh-in, and the record shows that the unit's Executive Petty Officer (XPO)—a member of the command cadre—witnessed that weigh-in. Nor did the applicant deny gaining weight while on probation, claim that the weight and body fat measurements taken in April and May 2014 were false, or submit any evidence casting doubt on those measurements. The record also shows that the command forwarded all required documentation to PSC when recommending the applicant's discharge. The Board therefore finds that the applicant has not proven by a preponderance of the evidence that his command failed to follow proper procedures.

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<sup>12</sup> 10 U.S.C. § 1552(b).

<sup>13</sup> *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

<sup>14</sup> 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

<sup>15</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 argued that he should not have been separated for weight control failure because of his medical conditions. He alleged that the residual effects of knee surgery in 2012 for a torn meniscus, degenerative disc disease of his lumbar spine, and chronic shoulder pain prevented him from exercising to lose weight. Article 5.A. of COMDTINST M1020.8H provides the rules for medical abeyances of the weight standards, and Article 5.A.2. states that “[t]he 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.” Therefore, while the applicant’s knee condition, degenerative disc disease, and chronic shoulder pain interfered with his ability to perform certain exercises, they were not grounds for an abeyance of the weight standards. Article 5.A.3. states that “requests [for abeyances] 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 medical conditions warranting an abeyance that are listed as examples in Article 5.A.3. are conditions that physiologically cause weight gain, such as hypothyroidism, and the applicant has not shown that he had such a condition. Therefore, the applicant has not proven by a preponderance of the evidence that his doctor erred in certifying on the Command Weight Referral form that he did not have a medical diagnosis that was contributing to his weight gain.

6. The applicant alleged that his command was not made aware of medications he was taking and their potential effect on his weight and that his doctor should have submitted a list of his medications to the command. COMDTINST M1020.8H does not require the doctor to attach a list of every medication a member is taking when completing the Command Weight Referral form. Instead, the doctor must certify whether the member is taking a medication that is contributing to his weight gain. Article 5.A.3. of COMDTINST M1020.8H provides corticosteroids as an example of medications that warrant a medical abeyance of the weight standards because they physiologically cause weight gain.<sup>16</sup> The applicant stated that he was taking Clonazepam, which is a benzodiazepine, and Hydrochlorothiazide, which is a thiazide diuretic. Neither of these medications is a corticosteroid, and the applicant has not shown that they physiologically cause weight gain.<sup>17</sup> The Board notes that the applicant had gained weight and failed to comply with the weight standards several times before in his career, when he was presumably not taking those medications. Therefore, the Board finds that the applicant has not shown that the doctor erred by certifying on the Command Weight Referral form that he was not taking any medication that was contributing to his weight gain. The doctor also certified that the applicant had been referred to a dietician and could do certain exercises to lose his excess weight. The doctor’s certification shows that the

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<sup>16</sup> The U.S. National Institutes of Health National Library of Medicine’s databases, MedlinePlus and DailyMed, list changes in body fat, fluid retention, and weight gain as common side-effects of taking a corticosteroid (see, e.g., <https://medlineplus.gov/druginfo/meds/a601102.html#side-effects>; <https://dailymed.nlm.nih.gov/dailymed/drugInfo.cfm?setid=3400d26a-41cb-40e4-99b4-780e1e0ec561>).

<sup>17</sup> See footnote 16. The National Institutes of Health National Library of Medicine’s databases, MedlinePlus and DailyMed, do not list changes in body fat, fluid retention, or weight gain as side-effects of taking Clonazepam (<https://medlineplus.gov/druginfo/meds/a682279.html#side-effects>), but *loss* of appetite is a reported side-effect (<https://dailymed.nlm.nih.gov/dailymed/drugInfo.cfm?setid=ebc11109-e7bf-452d-b675-4b3236d54164>). Similarly, for Hydrochlorothiazide, which is a diuretic, the databases do not list changes in body fat, fluid retention, or weight gain as side-effects (<https://medlineplus.gov/druginfo/meds/a682571.html>), but loss of appetite is a common side effect, and changes in appetite, a sensation of abdominal fullness, vomiting, and anorexia have also been reported (<https://dailymed.nlm.nih.gov/dailymed/drugInfo.cfm?setid=dc7aef5e-9585-45b9-b317-4af570202ef5>). Some commercial websites, however, list both weight gain and weight loss as reported side-effects of these medications.

applicant was not entitled to an abeyance of the weight and body fat standards under Article 5.A. of COMDTINST M1020.8H and was subject to separation for obesity under Article 1.B.12.a.(10) of COMDTINST M1000.4.<sup>18</sup> The preponderance of the evidence shows that the applicant had neither a medical condition nor a prescribed medication that was contributing to his excess weight and was reasonably required to meet the standards through diet and exercise.

7. The applicant argued that his command erroneously recommended him for separation before the end of his probationary period. The record shows that on March 14, 2014, the applicant was 25 pounds over his MAW and, at 26% body fat, 2% over his maximum body fat of 24%. Under Article 1.D.4. of COMDTINST M1020.8H, probationary periods are established as the time the member would take to lose either his excess weight at a rate of 1 pound per week or his excess body fat at a rate of 1% body fat per month, whichever is greater. Because the applicant was 25 pounds over his MAW but only 2% over his maximum percentage body fat, his probationary period was set to end 25 weeks later, on September 5, 2014. Pursuant to Article 3.D.5.b.(1) of COMDTINST M1020.8H, however, members are required to “demonstrate reasonable and consistent progress throughout their probationary period,” and if they do not, they may be separated before the probationary period expires. The requirement for consistent progress encourages the development of consistent, healthy nutrition and exercise habits and prohibits procrastination or backsliding followed by crash dieting, which could be dangerous to both the member and others. Article 3.D.5.b.(1) also states that gaining weight while on probation constitutes failing to “demonstrate reasonable and consistent progress throughout the[] probationary period,” and Article 4.A.2. states that members who fail to demonstrate reasonable and consistent progress throughout their probationary period *must* be recommended for separation by their commands. Therefore, under Articles 3.D.5.b.(1) and 4.A.2. of COMDTINST M1020.8H, a member who gains weight while on probation must be recommended for separation, just as the applicant was in 2011 and 2014.

8. The record shows that during his first month on weight probation in 2014, the applicant lost 8 pounds and 1% body fat. During his second month, he lost 3 pounds while his body fat percentage remained the same. Then at the end of the third month, on June 16, 2014, which was the approximate mid-point of his probationary period, the applicant had regained 3 pounds, while his body fat percentage remained the same. Therefore, in accordance with Articles 3.D.5.b.(1) and 4.A.2. of COMDTINST M1020.8H, the Board finds that the applicant’s command did not err when it initiated his discharge in June 2014 because he had gained weight while on probation. Under Article 3.D.5.b.(1), his weight gain during his third month on probation constituted failure to demonstrate consistent progress throughout the probationary period, and that failure required the command to recommend separation under Article 4.A.2.

9. The applicant argued that he should not have been processed for separation pursuant to Articles 3.D.5.b.(1) and 4.A.2. of COMDTINST M1020.8H because he was halfway to his body fat goal by June 16, 2014. The record shows that he dropped from 26% body fat to 25% body fat during the first month of his probationary period and needed to reduce his body fat percentage to just 24% to comply with the standards. *Not* being halfway to one’s goal at the mid-

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<sup>18</sup> *Chapman v. United States*, 92 Fed. Cl. 570, 583-86 (2010) (finding that the language on the Command Referral form reasonably fulfilled the requirement for a certification that the obesity was caused by “excessive voluntary intake of food or drink” even though the language on that form is not a “precise recitation” of the language in the separation policy).

point is one example of not demonstrating reasonable and consistent progress under Articles 3.D.5.b.(1) and 4.A.2. of COMDTINST M1020.8H. But this fact does not mean that being half-way to one's body fat goal at the midpoint is *per se* proof that the member is "demonstrating reasonable and consistent progress throughout the[] probationary period," as required by Article 3.D.5.b.(1). In the applicant's case, he had dropped from 26% to 25% body fat during the first month of his probation, but his body fat percentage had not fallen further during the next two months, and he had gained weight instead of losing weight during the third month of his weight probation. The Board concludes that the applicant has not proven by a preponderance of the evidence that his command erred in initiating his discharge in June 2014 under Articles 3.D.5.b.(1) and 4.A.2. of COMDTINST M1020.8H even though he had 25% body fat.

10. The applicant argued that his command acted erroneously and unjustly in initiating his separation because he could have met the 24% body fat standard by losing just a few more pounds. The record shows that he had previously complied with the standards during weight probation by reducing his body fat to the maximum allowed percentage rather than reducing his weight to his MAW. In fact in November 2011, the applicant's command notified him of his pending discharge after he gained weight while on weight probation, but then he managed to meet the body fat standard in February 2012 and was not discharged, as permitted under Article 4.C.5. of COMDTINST M1020.8H. There is no evidence that the applicant did the same in 2014, however, and the possible ease with which he could have met the standards in theory does not mean that his command acted erroneously or unjustly in finding that he was not "demonstrat[ing] reasonable and consistent progress throughout [his] probationary period" given that he had gained 3 pounds, instead of losing about 4 pounds (assuming the expected rate of 1 pound per week on average), during the third month of probation and that his body fat percentage had remained the same since the end of the first month. The Board notes that in his statement objecting to the proposed discharge, the applicant claimed that if retained he *would* implement exercise and dietary plans in the future; he did not claim to have strictly adhered to the recommended exercise and dietary plans throughout the first half of his probationary period. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that his command committed error or injustice on June 16, 2014, by finding that he had not demonstrated consistent progress throughout his probationary period even though he could have in theory easily met the 24% body fat standard by the end of the period on September 5, 2014.

11. Finally, the applicant argued that it was erroneous and unjust to discharge him so close to attaining 20 years of active duty service. The applicant had served almost 19.5 years on active duty at the time of his discharge. As PSC noted, however, there are no statutory, regulatory, or policy protections for enlisted members who are close to attaining 20 years of active duty service but fail to maintain the Coast Guard's weight and body fat standards. In response, the applicant argued that Article 2.A.2.b. of the Military Separations Manual shows that members have a vested interest in retirement after reaching 18 years of active duty. That article, however, applies only to members who are being separated due to physical disability; it does not apply to members who fail to comply with the weight and body fat standards in COMDTINST M1020.8H by maintaining a healthy diet and exercising. Nor has the applicant shown that he had a constitutionally protected property interest in his continuing service.<sup>19</sup>

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<sup>19</sup> Enlisted members do not have a constitutionally protected property interest in their military employment because by statute they may be discharged "as prescribed by the Secretary." 10 U.S.C. § 1169; *Flowers v. United States*, 80



12. The policies in COMDTINST M1020.8H provided the applicant with opportunities to remain on or return to active duty if he met the weight or body fat standard even though his command initiated his discharge on June 16, 2014. First, under Article 4.C.5., the applicant could have requested retention if he met either standard before he was discharged on August 25, 2014. There is no evidence that he met the weight or body fat standard by August 25, 2014, or by the originally calculated end of his probationary period, September 5, 2014, even though his primary argument is that his command acted unreasonably because he could have easily met the 24% body fat standard in time just by losing a few pounds. Second, under Articles 4.A.2. and 4.G.4., the Coast Guard's policy when members fail probation by not making reasonable and consistent progress is not to retain them until retirement eligible but to discharge them with an RE-3 reenlistment code so that they will be eligible to reenlist at their prior rank if they meet the standards within two years of discharge. Therefore, had the applicant come into compliance with the standards within two years of his discharge, he presumably would have been able to reenlist in the Coast Guard and retire with 20 years of service. He has not shown that he did so or that the Coast Guard arbitrarily refused to reenlist him. Accordingly, the Board finds that the applicant has not shown that the Coast Guard committed an injustice in discharging him in accordance with the policies applicable to all members in COMDTINST M1020.8H. The Board is not persuaded that the Coast Guard is not entitled to enforce its weight and body fat policies for members with more than 19 but less than 20 years of service, and enforcement of those policies is not "treatment by military authorities that shocks the sense of justice."<sup>20</sup>

13. The Board concludes that the applicant has not proven by a preponderance of the evidence that the Coast Guard acted erroneously or unjustly in discharging him due to his non-compliance with the weight and body fat standards and failure to make consistent progress during his weight probationary period, as required by COMDTINST M1020.8H. The Board denied relief in a very similar case in [REDACTED] and the Board's decision was upheld by the U.S. Court of Federal Claims in 2010.<sup>21</sup> While the applicant's failure to comply with the weight and body fat standards for a few more months so that he could earn a Coast Guard retirement is surprising, the Board finds here, as it did in that case, that the applicant's commanding officer did not commit error or injustice or abuse his discretion by following applicable policy when the applicant gained weight instead of making consistent progress in losing weight and body fat during his probationary period.

14. Accordingly, the applicant's requests should be denied.


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Fed. Cl. 201, 223 (2008) (citing *Canonica v. United States*, 41 Fed. Cl. 516, 524 (1998)). An enlisted member has a constitutionally protected liberty interest in his discharge if the type of discharge awarded is stigmatizing. *Canonica v. United States*, 41 Fed. Cl. 516, 524 (1998). When the type of discharge is stigmatizing, due process is "fulfilled by notice of the government act and an opportunity to respond before or after the act." *Id.*; see *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *Lee v. United States*, 32 Fed. Cl. 530, 546 n. 17 (1995). Notice of a proposed adverse action is adequate when it "appraises the employee of the nature of the charges 'in sufficient detail to allow the employee to make an informed reply.'" *King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996) (quoting *Brook v. Corrado*, 999 F.2d 523, 526 (Fed. Cir. 1993), and *Brewer v. United States Postal Serv.*, 227 Ct. Cl. 276, 647 F.2d 1093, 1097 (1981), *cert. denied*, 454 U.S. 1144 (1982)). Therefore, even if an honorable discharge for weight control failure is considered stigmatizing, the Coast Guard provided due process by notifying the applicant of the reason for his discharge and allowing him to submit a statement objecting to the discharge.

<sup>20</sup> *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (stating that for the purposes of the BCMRs, "injustice" is "treatment by the military authorities that shocks the sense of justice but is not technically illegal").

<sup>21</sup> [REDACTED]

**ORDER**

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

March 7, 2018

