

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-050

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 September 29, 2017, 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 August 23, 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], asked the Board to correct her record by removing a Page 7¹ removing her from weight probation dated May 13, 2016, to consider her for promotion to [REDACTED] and backdate her promotion to what it would have been had she been selected in 2016 had the Page 7 not been in her record.

The applicant stated that she believes her Command should have requested a temporary weight abeyance for her so that she would not have been placed on weight probation. She stated that she was suffering from a medical issue "affecting [her] ability to lose weight" and making it very difficult for her to exercise. She stated that during her third pregnancy, she gained forty pounds and after the birth of the child in April 2015 she lost thirty-four pounds. She was in compliance with weight standards for her first semi-annual weigh-in following the birth in October 2015 following her one-year abeyance for pregnancy.² She stated that for the first six months following the birth, she did not have a menstrual cycle. When her menstrual cycle did return, she was diagnosed with Dysfunctional Uterine Bleeding (DUB) which caused continuous bleeding daily. She became anemic and had low hemoglobin. She stated that "the passing of large blood

¹ An Administrative Remarks record entry, form CG-3307, better 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 Weight and Body Fat Standards Manual, COMDTINST M1020.8H, Article 5.B.

clots and continuous bleeding made it difficult to move or walk and impossible to exercise.” Her doctor placed her on hormone therapy, which lessened the bleeding slightly. The applicant stated that the hormones caused “a side effect of gaining and retaining weight.” For her next semi-annual weigh-in in April 2016, she was six pounds overweight. She stated that she feared the negative repercussions to her career so she “lost the weight within 13 days to come into compliance as quickly as possible, but not in a method that was healthy or sustainable.” She passed her semi-annual weigh-in in October 2016 as well, “but only barely and hormone therapy had begun to lose its effectiveness around this time.” The applicant stated that around December 2016 she returned to her previous state of DUB despite the hormone therapy. Her doctors determined that she would require uterine ablation surgery to prevent a hysterectomy. The applicant had the surgery in [REDACTED] and it was a success. She stated that she has returned to “the normal, active lifestyle [she] used to enjoy.”

The applicant stated that she has been in the Coast Guard for over thirteen years and has never been non-compliant with the weight standards before the incident at issue here, even with her other two pregnancies. She added that she has run over fifteen half marathons while in the Coast Guard “and countless shorter races.” She spoke of her athletic lifestyle and the many sports and activities she has been a part of [REDACTED] throughout her life. She asserted that if it “had not been for a serious hormonal [REDACTED] action after the birth of [her] third child, [she was] confident [she] would have never been non-compliance with weight stan[REDACTED] and will never be non-compliant again due to the positive result from surgery.”

The applicant stated that she had been non-selected for promotion to [REDACTED]. She consulted with career counseling officers “who stated that [her] record of performance is outstanding and [the disputed Page 7] is responsible for being passed over.” The applicant asserted that promotions in the Coast Guard are highly competitive and “it will be impossible” for her to be selected for promotion with this Page 7 in her record. She stated that she is dedicated to the Coast Guard and is passionate about her career and her specialty. She stated that she is proud of what she does every day and that she valued serving the American public. In support of her application, the applicant provided several documents which are discussed below in the Summary of the Record.

[REDACTED] SUMMARY OF THE RECORD

The applicant [REDACTED] she has no negative entries in her record. On the applicant’s last three Officer Evaluation Reports (OERs) she has received all high marks of six’s and seven’s (on a scale of one to seven), but all three had a mark in the fifth spot on the comparison scale. Her remaining OERs are mostly six’s, with marks of five’s and seven’s.

The applicant was seen by a private medical provider on April 17, 2015. She was prescribed hormones for persistent and severe menorrhagia. Her symptoms included “abdominal pain, bloating, cramps, dizziness, fatigue, headache, nausea, and pelvic pain.”

The applicant was seen by a private medical provider on April 27, 2015. Her uterine bleeding was diagnosed as menorrhagia. It was noted that the onset “three months ago” and that the problem was “new onset.” The applicant was referred to a gynecologist.

The applicant had a semi-annual weigh-in on April 27, 2016. She weighed 171 pounds the maximum allowable weight was 165. Her body fat percentage was 36% and the maximum allowable body fat percentage was 34%. [REDACTED]

On May 13, 2016, the applicant received the disputed Page 7.³ The applicant signed and acknowledged the Page 7 on the same date. It states:

On this date your probationary period has come to an end. You weighed 165 (pounds) or achieved 34% 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).

On February 25, 2017, the applicant had “hysteroscopy, suction curettage, and endometrial ablation” surgery.

VIEWS OF THE COAST GUARD

On June 13, 2018, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief in this case. The JAG stated that upon the applicant’s third pregnancy she was entitled to a twelve month exemption from weight standards. The applicant gave birth to her third child on June 11, 2014, and her exemption therefore ended in June 2015. While the applicant was able to come into compliance for the October weigh-in, she was placed on weight probation after her April weigh-in due to complications from “severe transvaginal bleeding.” The JAG stated that the Promotion Year (PY) 2017 [REDACTED] selection board convened on August 10, 2016, and considered the applicant for promotion with the disputed Page 7 in her file.

The JAG stated that upon “thorough review of the applicant’s record, it appears the applicant should have been granted a weight abeyance for her medical condition, and the Coast Guard accordingly recommends granting relief.” The JAG stated that the medical records provided by the applicant show that she was diagnosed with menorrhagia and prescribed hormone therapy on April 17, 2015, and that this problem persisted during her non-compliant weigh-in on April 27, 2016. The JAG consulted with CG-PSC-psd, which is “the approving official for all medical abeyance requests,” and it was confirmed that had the applicant’s command requested a weight abeyance, it would have been granted for her due to her condition and her prescribed medications. The JAG argued that her “command erred by not forwarding a request for an abeyance to CG-PSC-pd once the applicant had been diagnosed with a medical condition that affected her ability to maintain compliance with weight standards.” Had the applicant been covered by an abeyance, she would not have been placed on probation and the Page 7 would not have been entered into her record. The JAG therefore recommended removing the Page 7 from her record in its entirety.

³ There is no Page 7 placing her on weight probation in her record.

The JAG noted that in previous BCMR decisions, this Board has held that “non-compliance with weight standards is generally considered a negative entry in a member’s service record and detrimental to their promotion competitiveness.”⁴ The JAG argued that the applicant has proven by a preponderance of the evidence that her inability to maintain weight standards was through no fault of her own and it would therefore be a material error to penalize her for it. Due to this error, the JAG recommended that the Board convene a Special Selection Board (SSB) to consider the applicant for promotion for PY 2017 to [REDACTED]. If she is chosen for promotion by the SSB, the JAG recommended promoting her and granting her all associated back pay and allowances.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 27, 2018, the Chair sent the applicant a copy of the Coast Guard’s views and invited her to respond within 30 days. The applicant responded on July 10, 2018. She stated that she had no objections to the Coast Guard’s recommendations.

APPLICABLE LAWS & REGULATIONS

Coast Guard Weight and Body Fat Standards Manual, COMDTINST M1020.8H, Article 5.A.2. states that “the intent of authorizing a medical abeyance is to avoid penalizing a member who may be non-compliant due to medical conditions/medications that directly contribute to weight gain.”

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.

Article 5.B.1. states that a member is “exempt from compliance with weight and body fat standards during pregnancy.” Article 5.B.2. states that following the birth of a child, members are required to participate in weigh-ins, but they will be considered to be compliant. Article 5.B.C. states that nursing mother’s exemptions expire twelve months after the date of delivery.

The Coast Guard SSB statute at 14 U.S.C. § 263 was enacted in Public Law 1120213, Title II, § 208(a), on December 20, 2012, and states the following:

(b) Officers considered but not selected; material error.--

(1) In general.--In the case of an officer or former officer who was eligible for promotion, was considered for selection for promotion by a selection board convened under section 251, and was not selected for promotion by that board, the Secretary may convene a special selection board to determine whether the officer or former officer should be recommended for promotion, if the Secretary determines that--

(A) an action of the selection board that considered the officer or former officer--

(i) was contrary to law in a matter material to the decision of the board; or

⁴ See BCMR Docket Nos. 2017-079 and 2015-019.

- (ii) involved material error of fact or material administrative error; or
 - (B) the selection board that considered the officer or former officer did not have before it for consideration material information.
- (2) Effect of failure to recommend for promotion.--If a special selection board convened under paragraph (1) does not recommend for promotion an officer or former officer, whose grade is that of commander or below and whose name was referred to that board for consideration, the officer or former officer shall be considered--
- (A) to have failed of selection for promotion with respect to the board that considered the officer or former officer prior to the consideration of the special selection board; and
 - (B) to incur no additional failure of selection for promotion as a result of the action of the special selection board.

(c) Requirements for special selection boards.--Each special selection board convened under this section shall--

- (1) be composed in accordance with section 252 and the members of the board shall be required to swear the oaths described in section 254;
- (2) consider the record of an applicable officer or former officer as that record, if corrected, would have appeared to the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board and that record shall be compared with a sampling of the records of--
 - (A) those officers of the same grade who were recommended for promotion by such prior selection board; and
 - (B) those [redacted] of the same grade who were not recommended for promotion by such prior selection board; and
- (3) submit to the Secretary a written report in a manner consistent with sections 260 and 261.

(d) Appointment of officers recommended for promotion.--

- (1) In general.--An officer or former officer whose name is placed on a promotion list as a result of the recommendation of a special selection board convened under this section shall be appointed, as soon as practicable, to the next higher grade in accordance with the law and policies that would have been applicable to the officer or former officer had the officer or former officer been recommended for promotion by the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board.
- (2) Effect.--An officer or former officer who is promoted to the next higher grade as a result of the recommendation of a special selection board convened under this section shall have, upon such promotion, the same date of rank, the same effective date for the pay and allowances of that grade, and the same position on the active duty promotion list as the officer or former officer would have had if the officer or former officer had been recommended for promotion to that grade by the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board.
- (3) Record correction.--If an officer or former officer is promoted to the next higher grade as a result of the recommendation of a special selection board convened under this section and the officer or former officer is not eligible for promotion or a former officer whose name was referred to the board for consideration, the Secretary may act under section 1552 of title 10 to correct the military record of the officer or former officer to correct an error or remove an injustice resulting from the officer or former officer not being selected for promotion by the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board.

Article 6.B.13.j. of the Officer Accessions, Evaluations, and Promotions manual, COMDTINST M1000.3 (series), states that an SSB considers the record of an officer as it should have appeared (i.e., after correction) with “a weighted sample of records, reflecting the Opportunity of Selection of the prior board to include an appropriate number of records from officers of the same grade who were recommended for promotion by the prior selection board along with an appropriate number of records from those officers of the same grade who were not

recommended for promotion by the prior selection board.” Article 6.B.13.n. states that an officer who is selected for promotion by an SSB shall have the same date of rank he or she would have had if selected by the regular selection board.

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 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.⁵

3. The applicant alleged that the May 13, 2016, Page 7 in her military record is erroneous and unjust, as is her ensuing non-selection for promotion to [REDACTED]. 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.⁶ 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.”⁷

4. The Board agrees with the JAG that the applicant has proven by a preponderance of the evidence that as a result of her medical condition and hormone medication she qualified for a medical abeyance under Article 5.A. of COMDTINST M1020.8H. The lack of a medical abeyance constitutes both an error and injustice.⁸

5. Because the applicant was not placed on a medical abeyance following her diagnosis and prescription for hormones, she was deemed non-compliant at her April 2016 weigh-in and placed on weight probation. There is no Page 7 placing her on probation, but there is a Page 7, dated May 13, 2016, documenting her removal from probation once she came into compliance.

⁵ *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).

⁶ 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)).

⁷ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁸ *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (finding 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.”; but see 41 Op. Att’y Gen. 94 (1952), 1952 WL 2907 (finding that “[t]he words ‘error’ and ‘injustice’ as used in this section do not have a limited or technical meaning and, to be made the basis for remedial action, the ‘error’ or ‘injustice’ need not have been caused by the service involved.”).

The Boards finds that the Page 7 dated May 13, 2016, should be removed from the applicant's record.

6. The applicant alleged that the documentation regarding her non-compliance with the weight standards may have caused her non-selection for promotion in 2016. The Board agrees with the JAG that it is certainly possible that the erroneous, prejudicial documentation of weight probation in her record caused her non-selection. Title 14 U.S.C. § 263(b)(1) applies to cases in which a Coast Guard officer was, like the applicant, considered but not selected for promotion. It provides that the Secretary may convene an SSB if the Secretary determines that "(A) an action of the selection board that considered the officer or former officer-- ... (ii) involved material [REDACTED] or material administrative error; or (B) the selection board that considered the officer or former officer did not have before it for consideration material information." The Board finds that the applicant is entitled to an SSB under this statute because her record erroneously and unjustly showed that she had been non-compliant with the weight standards, when she should have been granted a medical abeyance. Therefore, the Board should direct the Coast Guard to correct her record as described above and convene an SSB to reconsider her non-selection by the LCDR selection board that convened in August 2016. If she is selected for promotion by that SSB, the applicant should be promoted to [REDACTED] at the earliest opportunity in accordance with the Constitution; her [REDACTED] date of rank should be corrected to what it would have been had she been selected for promotion in 2016 by the PY 2017 [REDACTED] selection board; and she should receive back pay and allowances. If she is not selected by the SSB, her non-selection for promotion in 2016 should remain in her record.

7. Accordingly, the Boards finds that the following relief should be granted:

- a. The Coast Guard should remove from her records the Page 7 dated May 13, 2016, which documents the end of her probationary period.
- b. After making this correction, the Coast Guard should convene a Special Selection Board in accordance with 14 U.S.C. § 263 and Article 6.B.13. of COMDTINST M1000.3A to reconsider the applicant's non-selection by the PY 2017 [REDACTED] selection board in 2016. If she is not selected by that SSB, no further corrections should be made. If she is selected for promotion by the SSB, her non-selection in 2016 by the PY [REDACTED] LCDR selection board should be removed from her record; she should be promoted to [REDACTED] at the earliest opportunity in accordance with the Constitution; her [REDACTED] date of rank should be corrected to what it would have been had she been selected for promotion in 2016; and she should receive back pay and allowances.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

- a. The Coast Guard shall remove from her records the Page 7 dated May 13, 2016, which documents the end of her probationary period.
- b. After making this correction, the Coast Guard shall convene a Special Selection Board in accordance with 14 U.S.C. § 263 and Article 6.B.13. of COMDTINST M1000.3A to reconsider her non-selection by the PY 2017 [REDACTED] selection board in 2016. If she is not selected for promotion by that SSB, no further relief is granted. If she is selected by the SSB, her non-selection in 2016 by the PY 2017 [REDACTED] selection board shall be removed from her record; she shall be promoted to [REDACTED] at the earliest opportunity in accordance with the Constitution; her [REDACTED] date of rank shall be corrected to what it would have been had she been selected for promotion in 2016; and she will receive back pay and allowances.

August 23, 2018

