

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 1999-064

FINAL DECISION

██████████, Deputy Chairman:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14, United States Code. It commenced February 17, 1999, upon the receipt of the applicant's complete application for correction of his military record.

This final decision, dated February 24, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant is a chief ██████████ pay grade E-7) in the Coast Guard. He asked the Board to reinstate his OIC (officer in charge) certification and to correct all associated records. The applicant was permanently relieved of his duties as OIC of a Coast Guard station on ██████████. He alleged that the Coast Guard failed to follow the proper procedures in the relief for cause proceeding.

SUMMARY OF RECORD AND SUBMISSIONS

Background

On ██████████ the applicant's commanding officer (CO) asked the Commander, ██████████ Coast Guard District, to temporarily relieve the applicant of his duties as OIC. The CO stated that the applicant consistently demonstrated substandard performance since assuming command on ██████████. The CO stated that it was not one specific incident that caused his loss of confidence in the applicant but a combination of incidents over time. The combination of incidents "present[ed] a worrisome picture of a Chief Petty Officer floundering in a critical position well above the limits of his ability."

The CO cited three major areas of concern with the applicant's performance. The first was the applicant's inability to discern between serious and inconsequential issues, such as major restrictive deficiencies versus minor cosmetic problems during a failed 44' MLB (Motor Life Boat) Stan (Standard) Team visit.¹ According to the CO, instead of

¹ An MLB Stan Team inspection is a combined engineering and standards inspection team that includes both engineering and boat standards experts, who check every part of the boat for readiness.

focusing on repairing the main problem with the boat, which was found not ready for service during the MLB visit, the applicant focused on several minor deficiencies noted during the visit. The CO further stated that the applicant went home at 1600 on the day of the inspection, rather than remaining at the unit, as the others did, while the problem with the boat was being addressed. Another example of the applicant's inability to distinguish between major and minor issues was his stonewalling when the group commander's staff was trying to determine how a 9mm pistol, which was under the applicant's authority, was damaged.

The CO's second area of concern with the applicant's performance was his unwillingness to become and remain engaged in his station's everyday activities. In this regard, the CO stated that the applicant was often away from the unit or unavailable to his crew. For example, the CO stated that the applicant failed to attend or send a representative to a briefing that the CO held on law enforcement and fisheries issues. Another example offered by the CO was the applicant's failure to return a beeper page from his unit.

The CO's third area of concern with the applicant's performance was his poor communications and leadership skills related to mission accomplishment. In this regard, the CO stated that the applicant did not alert the group when his station's readiness was impacted by the loss of a coxswain. The CO also stated that the applicant failed to report promptly the fact that he struck a deadhead while operating the boat. The incident occurred around 1345 and was not reported until 1640 by a MK2 (machinery technician second class), while the applicant proceeded to go home for the day.

On [REDACTED] the Commander, [REDACTED] Coast Guard District, notified the applicant that he had been temporarily relieved of his duties as the OIC for cause. The Commander stated that he had taken this action against the applicant because he had lost confidence in the applicant's judgment, his ability to positively shape morale, good order and discipline, and his ability to properly affect the operational functions of the Coast Guard station.

The Commander advised the applicant that he had a right to legal counsel and a right to submit a written statement on his behalf, within five working days of receipt of the notification. The Commander further advised the applicant that if he determined that the applicant should be permanently relieved, the Commander would forward that determination to the Commandant for final adjudication.

On [REDACTED] the applicant signed a statement entitled "acknowledgement of receipt to temporary relief for cause letter," in which he elected to consult with an attorney. The letter stated as follows:

I have received the letter advising me that I am being considered for a permanent relief for cause. I do desire . . . to make a written statement. I further understand that I have five working days from this date to submit my statement. If I make such election, the statement I submit in that period of time will be confined to the pertinent facts and not impugn the motives of others or make counter charges.

In his written statement dated, [REDACTED] the applicant acknowledged that he had received a letter effecting his temporary relief for cause. He stated that the written statement was his response to the temporary relief for cause and that it fully satisfied his rights with respect to the matter. The applicant objected to the relief for cause and offered counter arguments to the command's reasons for requesting his relief for cause.

In response to the CO's assertion that he focused on minor discrepancies rather than major ones, the applicant stated that during the Stan Team debrief, he questioned the discrepancies that were not clear to him. He stated that he was confused about some of the discrepancies because, prior to the Stan Team visit, the Group's Ready for Operations Inspection had determined that the unit was in excellent condition. With respect to his leaving the unit while the boat was being repaired, the applicant stated that he believed he had the agreement of the small boat manager to leave and go home. The applicant stated that he responded to several inquiries from the group with respect to the damaged weapon. He stated that he thought the group staff was satisfied with his responses, and he was surprised when he received a request for an additional investigation.

With respect to the CO's allegation that the applicant was unwilling to become and remain engaged in the station's every day business by being absent and unreachable, the applicant stated that he did not arbitrarily take off from work because he was in charge. He stated that prior to [REDACTED] he spent one night a week at the unit. He stated that the executive petty officer (XPO) always knew his whereabouts. Concerning one of the examples used by the CO to demonstrate his absence, the applicant stated that he was away from the unit to check into his house after receipt of his household goods. With respect to the other time the CO alleged that he could not be reached, the applicant stated that it was because he and his family had checked into a hotel due to a power outage caused by an ice storm. The applicant stated that although his beeper was on, its normal operation was affected by the loss of power.

The applicant stated that he did not tell the operations officer that one of his coxswains had been placed on the binnacle (sick) list because he believed the impact on the station was negligible. He stated that he could rely on the XPO and himself as backups for the sick coxswain. He also disagreed with the CO's description of the deadhead striking. The applicant stated that after checking the boat there was no cause for concern. However, the MK2 who was with him on the boat thought he felt a vibration and reported it to the EPO (engineering petty officer), who thought a casualty report should have been made. The applicant stated that if he thought there was a problem with the boat that would have endangered the safety of the public, he certainly would have taken the boat out of service.

The applicant wrote in his response that he agreed that the cosmetic condition of the boat that had failed an earlier inspection was below Coast Guard standards.

The applicant attached several complimentary documents to his statement. One memorandum dated [REDACTED] from the CO, informed the applicant that his unit had done very well on the Ready for Operations Inspection. In another memorandum,

dated [REDACTED] the CO informed the applicant of the excellent results he had obtained on the small arms program inspection.

On [REDACTED] at the request of the Commander, [REDACTED] Coast Guard District, the CO provided additional information in support of his request for the applicant's relief for cause. The CO stated that it was not the unit's failure with respect to the Stan Team Inspection that prompted him to request the applicant's relief for cause. Instead, it was the applicant's frequent statement "I don't have a clue" and his unwillingness to properly support his crew by being present during the difficult and stressful evolution after the Stan Team visit. The CO acknowledged that the excellent rating given to the applicant's unit by the Group's Ready for Operations Inspection Team probably contributed to the applicant's belief that his unit was ready for the Stan Team Inspection visit.

The CO stated that the excellent rating that the applicant's unit received on the small arms inspection was due in large measure to the constant direction provided by the weapons officer to the applicant. The CO further stated that "after the applicant's [REDACTED] marks counseling session, I instructed my staff to do everything we could to help [the applicant] succeed. . . . The significant effort by [the CO's] staff was the driving force and primary reason for the 'excellent' rating on the weapons inspection."

The CO stated that the local pager company confirmed that pager service in the area (as claimed by the applicant) was intermittent during after the ice storm. He stated that it was possible that pager service was inoperative at the time the station was trying to reach the applicant.

The CO stated that the fact that the station was down to two coxswains should have been immediately brought to the group operations officer's attention. The CO stated that having only two coxswains did impact the overall readiness of the applicant's unit, and at a minimum, he should have immediately alerted the operations officer to the fact.

The CO concluded this memorandum by stating that the request for the applicant's relief for cause was intended to describe a pattern of performance that, in spite of the CO's efforts to help the applicant succeed, caused the CO to lose confidence in the applicant's judgment and ability.

On [REDACTED] the Commander, [REDACTED] Coast Guard District, asked the Commandant to permanently relieve the applicant from his duties as OIC because of the Commander's lack of confidence in his judgment and leadership ability. The Commander stated in the letter that the applicant had been notified of the reasons for the decision requesting his relief for cause and of his right to counsel. Attached to the letter requesting the applicant's permanent relief for cause was the statement he submitted in response to the temporary relief for cause. The Commander also attached to the permanent relief for cause the notification given to the applicant informing him of his temporary relief for cause.

On [REDACTED] the Commandant approved the request for the applicant's permanent relief for cause. He also ordered that the applicant's OIC certification codes be removed. He ordered the removal of the applicant's certification codes to remain in effect until the applicant has been recertified by another OIC review board, but not earlier than [REDACTED]

On [REDACTED] the applicant appealed his permanent relief for cause and the removal of his OIC certification. He stated that the Commander, [REDACTED] Coast Guard District, violated the Personnel Manual by not giving him notice of the permanent relief for cause and by not allowing him to make a statement with respect to it. He also restated his disagreement with the CO's reasons for requesting his relief for cause.

With respect to the applicant's complaint that he was not given notice of the permanent relief for cause, the CO stated the following in a letter, dated [REDACTED] to the Commander, [REDACTED] Coast Guard District:

I did not receive or provide [the applicant] a copy of the District Commander's permanent relief for cause request to the Commandant, dated [REDACTED]. [The applicant] did receive the District Commander's notification of temporary relief for cause, addressed to him via [the Group CO], dated [REDACTED]. I also have today received and forwarded to [the applicant the] Commandant's final determination on his permanent relief for cause dated [REDACTED].

In a letter to the Commandant, dated [REDACTED] the Commander of the [REDACTED] Coast Guard District stated that the notice requirements required by the Personnel Manual were satisfied in this case. He stated that the notice given to the applicant informing him of his temporary relief for cause satisfied the notice requirement for a request for permanent relief for cause, because the temporary relief notice stated, in part, that the applicant was being considered for a permanent relief for cause. He further stated that the applicant's statement in response to the temporary relief for cause satisfied the requirement that he be given an opportunity to submit a statement. He also argued that the applicant's appeal raised no new issues.

On [REDACTED] the Commandant denied the applicant's appeal.

Coast Guard Views

On November 24, 1999, the Board received an advisory opinion in this case from the Chief Counsel. He stated that the facts in this case show that the Coast Guard, while committing a harmless procedural error during the relief for cause process, ultimately afforded the applicant the full due process to which he was entitled under Coast Guard regulations. He recommended that the Board deny relief to the applicant.

The Coast Guard stated that the Commander, [REDACTED] Coast Guard District [REDACTED] "was obligated to notify the applicant that: (1) Relief for cause action was being taken, and the reason(s) for it; (2) Applicant had a right to submit a statement in writing on his behalf within five working days of the temporary relief for cause action:

and (3) Applicant would be assigned to an enumerated temporary duty station while relief for cause action pended [sic] . . . [REDACTED] was also required to afford Applicant advice of counsel within the meaning of UCMJ, Article 27(b)(1), during the temporary relief for cause process. . . . [REDACTED] complied [with the Personnel Manual] and properly notified Applicant on [REDACTED]

The Chief Counsel further stated that the applicant acknowledged his temporary relief for cause on [REDACTED] although no such acknowledgement is required for a temporary relief for cause. The Chief Counsel stated that the applicant submitted a timely written statement in opposition to the temporary relief for cause. The Chief Counsel stated that the applicant received the due process to which he was entitled during the temporary relief for cause process.

The Chief Counsel stated that Article 4.F.5 of the Personnel Manual requires that a copy of the member's acknowledgment of the notification for permanent relief for cause be included with the request sent to the Commandant for a permanent relief for cause. The Chief Counsel stated that in addition, the relieving authority is instructed not to send a request for a permanent relief for cause to the Commandant until the member has had the opportunity to make a statement on his or her behalf, unless the right to make a statement is waived.

The Chief Counsel stated that although the [REDACTED] acted substantially in accordance with the Personnel Manual, the relief for cause request that he forwarded to the Commandant did not include a signed "Acknowledgement of Receiving a Copy of the Letter Requesting Permanent Relief for Cause" from the applicant. Instead, [REDACTED] submitted the Applicant's "Acknowledgement of Receipt of Temporary Relief for Cause." The applicant's [REDACTED] written statement, in response to the temporary relief for cause, was included in the permanent relief for cause package. The Chief Counsel argued that therefore, it appeared that the applicant was not provided timely notification of the relieving authority's intent to recommend his permanent relief for cause. The Chief Counsel stated that ultimately, the applicant was provided with notice of the permanent relief for cause during a telephone conversation on [REDACTED]. In response to the telephone notification, the applicant submitted an appeal (discussed above), dated [REDACTED]. The Chief Counsel stated that the Commandant's acceptance and review of the appeal satisfied the intent of the Personnel Manual that a member facing permanent relief for cause be given notification of that proposed action and the opportunity to respond to the recommendation before a final decision is reached.

The Chief Counsel stated that the applicant's CO supplied more than adequate justification for requesting the applicant's relief for cause. The Chief Counsel stated that the applicant's CO had given the applicant an administrative remarks (page 7) entry advising him that he was not recommended for advancement. The Chief Counsel argued that the applicant was aware of this page 7 entry when he stated in his application that the CO did not provide any documentation to him to support the allegations in the letter requesting the applicant's relief for cause.

The Chief Counsel attached a statement from the operations officer for the applicant's unit at the time. The operations officer corroborated the CO's bases for requesting the applicant's relief for cause. She stated that the CO made a number of personal efforts to counsel the applicant during his tenure as OIC.

Applicant's Response

On December 23, 1999, the Board received the applicant's response to the views of the Coast Guard. He stated that the Coast Guard failed to follow its regulations (Article 4.F.6.2., Personnel Manual) by not notifying him of the request for his permanent relief for cause and by not giving him the opportunity to write a statement in response to the permanent relief for cause. The applicant argued that, the absence of such a statement makes it appear as though he waived his right to make a statement. The applicant argued that the statement appealing his permanent relief for cause was submitted after the decision to relieve him had already been made, and therefore, carried very little weight.

The applicant argued that the Coast Guard's failure to properly notify him of the permanent relief for cause was not a minor deviation from its regulations. The applicant stated that Article 4.F.1.b. states that a relief for cause is "[o]ne of the most severe administrative measures taken by a member in command, an RFC [relief for cause] usually has a significant adverse impact on the member's future Coast Guard career, particularly on his or her promotion. . . ." The applicant asserted that "[w]hen a [r]elief for [c]ause is undertaken, the Coast Guard should ensure that everything is completed properly and the accused has the opportunity to present his/her side of the case [by] adhering to the written guidelines that are established."

With respect to the page 7 entry notifying the applicant that he was not recommended for advancement, the applicant stated that he received this page 7 after only 71 days at the command. He asserted that he believed that his actual performance could not be fairly evaluated in this short period of time. The applicant stated that, in response to the page 7, he asked the operations officer for a special evaluation to cover a period of six months, but his request was denied. As further evidence that the Coast Guard did not follow its own regulations, the applicant stated that the Coast Guard failed to complete a performance evaluation within 30 days of his relief for cause. (Article 4.F.6.5., Personnel Manual). The applicant stated that having one page 7 entry 71 days after reporting aboard the unit does not constitute strong support for a relief for cause, particularly in light of the positive documentation that he submitted.

APPLICABLE REGULATIONS

Article 4.F.3.c. of the Personnel Manual states that loss of confidence in a subordinate is a ground for relief for cause. This provision states that "[I]t is imperative his or her immediate superiors have full confidence in a member's judgment and ability to command due to the unique position of trust and responsibility he or she occupies; his or her role in shaping morale, good order, and discipline in the command; and his or her influence on mission requirements and command readiness."

Article 4.F.4. of the Personnel Manual states that after deciding to institute temporary relief for cause proceedings, the relieving authority must notify the member in writing of the relief for cause and the reasons for it, the right to submit a statement in writing within five working days of the temporary relief for cause action, and the temporary duty station where the member will be assigned while the request for relief for cause is pending. In addition, this provision states that when grounds for permanent relief for cause appear substantiated, a recommendation for the member's permanent relief for cause is sent to the Commandant.

Article 4.F.5 of the Personnel Manual states that the following documentation, in pertinent part, shall accompany the permanent relief for cause: a detailed statement describing the facts and circumstance surrounding the request; a copy of member's acknowledgment of receiving the permanent relief for cause request; the identity of the attorney who provided counsel or the member's statement declining counsel; and the original of the member's statement or the member's statement declining to submit a statement.

Article 4.F.6 of the Personnel Manual states that a request for a permanent relief for cause should not be sent to the Commandant until the member has had the opportunity to make a statement on his or her behalf (normally five working days). This provision further states that if the member fails to submit a statement within the allowed time, he or she waives the right to make such a statement. This provision of the Personnel Manual also requires that a member be assigned counsel during the temporary relief for cause process and in preparing any statement the member desires to make about the permanent relief for cause request. This provision also requires that the command complete a performance evaluation on the member within 30 days of the Commandant's final action on the permanent relief for cause request.

FINDINGS AND CONCLUSIONS

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

1. The applicant submitted his request for correction within three years of discovery of the alleged error or injustice, as required by § 1552(b) of title 10, United States Code.
2. The Chairman has recommended disposition of the case without a hearing. 33 CFR § 52.31 (1993). The Board concurs in that recommendation.
3. The applicant asked the BCMR to correct his record by reinstating his OIC certification and by removing all related documents (the relief for cause). The applicant has established that he was not given notice, as required by the Personnel Manual, of the request to the Commandant for his permanent relief for cause. Neither was he notified of the right to make a statement in opposition to the permanent relief for cause. See Articles 4.F.5. and 4.F.6., Personnel Manual.

4. Pursuant to 4.F.4 of the Personnel Manual the applicant was entitled to notice of the temporary relief for cause and the right to make a statement with respect to it. He was also entitled to the same rights with respect to the permanent relief for cause, pursuant to Articles 4.F.5. and 4.F.6 of the Personnel Manual. He was given notice of the temporary relief for cause and the opportunity to make a statement, but that was not done with respect to the permanent relief for cause.

5. The Chief Counsel recognized that the applicant was not given timely notification of the request for permanent relief for cause. The Chief Counsel stated that ultimately the applicant was given notification of the permanent relief for cause and the opportunity to make a statement, through a telephone conversation. In this regard, the Chief Counsel noted that the applicant filed a written statement appealing the permanent relief for cause. The Commandant considered the applicant's statement, although the appeal was denied. According to the Chief Counsel, the act of permitting the applicant to submit a written statement appealing the detachment for cause after the decision had been made, afforded the applicant the due process contemplated under Chapter 4 of the Personnel Manual.

6. However, the Chief Counsel's assertion does not answer the applicant's contentions that he was entitled to notice and an opportunity to make a statement prior to the submission of the detachment for cause to the Commandant and that the statement he submitted after the decision to relieve him had been made carried less of a positive impact than it would have had if it had been submitted before the decision was made.

7. While the applicant has demonstrated that the Coast Guard failed to give him notice of the permanent detachment for cause and to permit him the opportunity to make a statement in the manner prescribed in the Personnel Manual, the Board is persuaded that the outcome would not have been any different. In this regard the Board notes that the reason for the applicant's relief for cause was a loss of confidence in him by the CO and the Commander, [REDACTED] Coast Guard District. The reasons for the relief for cause remained constant throughout the process. The applicant was notified of the reasons when he was notified of the temporary relief for cause and he was given an opportunity to respond to them. The reasons for the relief and the applicant's response to the temporary relief were sent to the Commandant for review. Additionally, the applicant was permitted to file an appeal objecting to the permanent relief for cause. In that document, he did not set forth any new issues for the Commandant's consideration. Without setting forth new issues or introducing substantial new evidence into the process, this Board fails to see how the result would have been any different, if the applicant's statement had been submitted before the Commandant acted on the request for permanent relief for cause. Accordingly, the Board finds that the error committed by the Coast Guard did not deprive the applicant of the opportunity to be heard on the issue of his relief for cause.

8. The applicant also disagreed with the CO that his performance was below the standard for an OIC. The applicant submitted documents showing that his station enjoyed some success. However, the CO stated that it was only through the extra effort of his staff that the station received an excellent rating on the small arms

inspection. The applicant also demonstrated that the CO might have misunderstood the situation with respect to the pager situation, i.e., that the ice storm interfered with the proper operation of the pager, and therefore the applicant could not be reached. However, even with this acknowledgement, the CO remained steadfast in his request that the applicant be relieved for cause. The Board notes that the applicant has not submitted any corroboration, except for the documentation mentioned above, that he was performing at the level expected of an OIC. Without convincing evidence that the CO's assessment of the applicant's performance, as described in the documents accompanying his permanent relief for cause, was substantially inaccurate, the Board will not substitute its judgment for that of the Coast Guard.

9. Accordingly, the applicant's request should be denied.

ORDER

The application of
military record is denied.

USCG, for correction of his

