

**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. 2020-093**

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MK1

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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. § 2507. The Chair docketed the case after receiving the completed application on March 19, 2020, and assigned the case to the Staff Attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated March 31, 2023, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST**

The applicant, a Machinery Technician First Class (MK1/E-6) on active duty, asked the Board to correct her military record as follows:

- Remove her Relief for Cause (RFC)<sup>1</sup> dated February 28, 2019, and all administrative paperwork referencing her RFC from her position as an Engineering Petty Officer (EPO);
- Remove an Enlisted Evaluation Report (EER) dated April 29, 2019;
- Reinstate her Good Conduct Eligibility to original date prior to the RFC;
- Restore her name to its prior position on the May 2019, Service Wide Advancement List; and
- Upon restoration, if she would have advanced to E-7, retroactively advance her with all back pay and allowances afforded to her.

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<sup>1</sup> Article 1.F.1.d. of the Military Assignments and Authorized Absences Manual, COMDTINST M1000.8A, states that a member may be "relieved for cause" from certain billets, including a commanding officer billet, for "unsatisfactory conduct" or for "unsatisfactory performance," which is described as follows:

One or more significant incidents resulting from gross negligence or substantial disregard of duty may provide the basis for RFC. Substandard performance of duty over an extended period of time may also provide the basis for RFC, but only after the command has taken corrective action such as command counseling, guidance, training and appropriate use of performance evaluations, which have proved unsuccessful.

A full summary of the applicant's allegations are provided below the Summary of the Record.

### SUMMARY OF THE RECORD

The applicant enlisted into the Coast Guard on February 11, 2002, where she trained as a Machinery Technician and continued to promote to MK1.

On May 19, 2017, the applicant was assigned to be the EPO of a small cutter.

On August 8, 2017, the applicant's cutter received the results of its Ready for Operations (RFO) assessment. This assessment revealed major discrepancies within the applicant's engineering department, in addition to other areas of the cutter.

On February 10, 2018, the applicant tore her right ACL while playing in an ice hockey game.

On March 3, 2018, the applicant had surgery to repair her ACL. Her physician gave her an "excellent" prognosis, with a 6 to 8 month recovery time, and she was placed on convalescent leave.

On June 11, 2018, the applicant's Command issued a memorandum, "Temporary Limited Duty," wherein it informed the Coast Guard Health, Safety and Work-Life Service Center (HSWL-SC) that in accordance with the Physical Disability and Evaluation Systems Manual (PDES), COMDTINST M1850.2D, the applicant had been designated for the Temporary Limited Duty (TLD) program. The memorandum stated that the applicant was Fit for Limited Duty (FFLD) and was expected to return to a Fit for Full Duty (FFFD) status within six months and requested that the applicant receive 90 days of Temporary Limited Duty (TLD) status. Her specific limitations were described as "Fit for Limited Duty with restrictions for 90 days, no boat or sea duty, no climbing and no (non-prescribed) PT."

On June 22, 2018, after five months of convalescent leave, the applicant returned to work with TLD status for 90 days.

On August 16, 2018, because her knee was not healing properly, the applicant had another surgery to remove scar tissue that had adhered to her tibia.

On November 20, 2018, the applicant's Sector Command approved an extended TLD status for the applicant, with a new expiration date of February 19, 2019.

On February 27, 2019, the applicant's Officer in Charge (OIC) issued a memorandum, "Request for Administrative Assignment," wherein he requested an Administrative Assignment (ADASSIGN) for the applicant. The OIC stated that the applicant was no longer considered suitable for continued assignment as the EPO and required a no-cost Administrative Assignment to a different unit.

On February 28, 2019, the applicant received a letter of clearance, stating that she was now fit for full duty (FFFD), which was forwarded to the OIC. The applicant's Sector was notified of her new status.

On March 1, 2019, the applicant's OIC acknowledged receipt of the applicant FFFD status and removed her from Temporary Duty (TDY) status.

On March 5, 2019, the applicant received and acknowledged a certification memorandum issued by her OIC wherein deadlines for obtaining required certifications were communicated to the applicant. The applicant was given a March 15, 2019, deadline for completing her Ice Rescue Board certification; a March 18, 2019, deadline for passing a physical fitness test; an April 12, 2019, deadline for completing her 29' RBs Crewmember certification; and a May 17, 2019, deadline for completing her Boarding Team Member certification.

In a March 19, 2019, email, the applicant's OIC recorded verbal counseling and conversations he had had with the applicant regarding her role as EPO following her knee injury as follows:

This email serves to document the verbal discussions we've had regarding your duties here as EPO and your timeline to recertification due to injury. Problems within the Engineering Department here were discovered during an annual RFO visit and documented via memo dated 08 August 2017. During that visit both 25 RBS assets had a total of 5 disabling, 3 restrictive, and 24 major discrepancies. We had a command meeting with myself, XPO (BMC [redacted]) and you to determine corrections needed. During this meeting you stated all discrepancies found were fixed or awaiting parts. In September of 2017 during the STAN visit, similar discrepancies were found on both boats. We again had a command meeting to determine corrective action. I instructed you to complete the Naval Engineering inspection checklist each week prior to an Engineering only reinspection by the Sector RFO team. We also discussed that you needed to be with your department completing the checklist and other items as there was a lack of knowledge with both MK2's and the MK1s.

We also discussed you focusing the majority of your time on this task and that we would work aggressively on your Boat Crew qualifications once this was fixed. On November 1, 2017, Sector RFO completed the Naval Engineering checklist and found minimal discrepancies, a total of 5 majors between both 29 RBS. You put in a great amount of work and effort to achieve this, correcting the discrepancies documented from past RFO/STAN, as well as, improving the learning curve of the MK's and FN in your department. As discussed, you shifted focus to Boat Crew qualification and achieved your initial 29R6S II certification on 07DEC17. Unfortunately, at the beginning of 2018 you tore your ACL while playing ice hockey. The initial prognosis was a 6 month recovery and we identified an MK from Sector to act as EPO during most of your recovery. Upon your return to the unit at the end of June 2018, we talked about your role as EPO while still rehabbing the injury. Duties consisted of the administration and upkeep of unit assets, personnel, and facilities. With your physical therapy schedule still ongoing you were forced to spend a significant amount of time away from the unit putting a greater strain on our small Engineering Department. In August it was determined you would need a second surgery to remove scar tissue and facilitate healing. During our discussion about this, you ensured me time off would be less than a week and it would only help your progress to fit for duty. In late September 2018 we discussed your return to full duty at which point you were hopeful for end of October or November at latest. We also discussed your injury and the policy set forth within Boat Manual Volume 1. This policy states that, medical situations of a temporary nature that preclude you from certifying or maintaining currency, are considered to be no more than one year from the date of injury.

You were concerned with the boats being pulled for ice before recertifying, I told you I would count certifying Ice Rescuer to be within the one year policy. In January of 2019 we discussed your prognosis again and this time there was less certainty of whether you would get cleared for full duty. I told you if we started to exceed the one year mark and with medical initiating a Medical Evaluation Board, that I would need to

Administratively Assign you in order to get a replacement. We discussed this again in February, you said you should be close to getting cleared but still could not provide a clear date. I decided to move forward with the ADASSIGN and routed the request to Sector [redacted] on 27FEB19. On 28FEB19 you provided a note from your surgeon stating you were cleared to return to work with no further limitations. On 05 March you, myself and XPO discussed your expectations now that you were cleared fit and removed from Temporary Limited Duty. These expectations included...moving all remaining Physical Therapy appointments to not interfere with the workday to the greatest extent possible and issuing a timeline to certify in all required positions.

You agreed to the expectations but did have concerns about being able to complete the Physical Fitness Test required to certify. After performing some Ice Rescue drills that same week, you and I met again to discuss how your knee was feeling. You stated "it was sore but fine, just building up strength." I stated that I did not want you to hurt yourself if you didn't feel capable but re-emphasized how important it was to have a full Command Cadre capable of performing all duties. I asked if you had any concerns about certifying on time. You stated you would not likely pass the push-ups for the fitness test and also had concerns about bending your knee in a certain position at the range. I stated as long as you felt comfortable that we should try and see what you were capable of doing, to which you agreed. Myself and the XPO administered the fitness test to you on March 18th, (19 days after receiving your fit for full duty determination). You successfully passed the swim and sit ups but failed to complete the push-ups required. Your first push-up was the only one able to be counted out of a total of 4 push-ups done. You are required to complete 11 push-ups in one minute. You said your knee was giving you some trouble and that you were still building strength from your recovery period. At this point I am unsure if your knee is capable of performing all required tasks or that you just have not properly prepared yourself. You will be required to re-take the fitness test by 15APR19. In the meantime you will be seen by the Medical Officer for an updated fit for duty evaluation. You are also encouraged to seek help in successfully completing the pushups from myself or any other crewmember you feel comfortable with. The length of time that has passed since you have been able to operate to full expectations have been too long. Holding only one certification for approximately one month and missing significant time due to medical appointments, has had a negative effect on the continuity of the unit and Engineering Department. I want to help and see you succeed in your position and I am committed to doing so. However, failure to certify and meet expectations or counseling could result in your relief as EPO.

On April 5, 2019, the OIC issued the applicant a negative CG-3307 ("Page 7") wherein she was counseled for a lack of initiative, motivation, and preparedness. The content of the email is as follows:

Since your return from TLD and having unit boats back in service, you have displayed a lack of initiative in your own certification process. In your certification process I have had to lay out expectations and goals for you that I would expect of a junior member. As a member of this Command Cadre I expect you to hold the standard and model the way for our entire crew. I counseled you on expectations stemming from our annual ICE RFO in February, because you scored a 60 percent on the knowledge test. You were expected to be studying and ready for your certifications immediately upon returning to fit for duty. It was evident that you were not ready to certify upon being deemed fit for duty and I then gave you a certification timeline memo with detailed dates for certification. You were not ready for your Ice Rescue oral board and requested to push the date back a few days. You were also not able to pass the Physical Fitness Test on your first attempt. You have also made nominal efforts in preparing for your Boat Crew Member certification by only getting underway a few times and not seeking help from myself or XPO for the required knowledge. I want to see you take the initiative and attack these certifications. Instead, I feel as if you are doing the bare minimum only because I am making you. This has also affected unit maintenance and operations, in example miscommunication and lack of initiative caused one of the RBS-JI to remain in a restrictive status with no waiver longer than what was needed. This is not acceptable as a member of this command. You are required to maintain the minimum certifications and currencies as described in Boat Manual Volume I. Failure to do this may result in further disciplinary action.

On April 15, 2019, the OIC sent a memorandum to the Sector Commander, who was the applicant's Commanding Officer (CO), wherein he requested that the applicant be temporarily relieved for cause. The OIC cited the following reasons for his request for TRFC:

MK1 [applicant] received numerous verbal counseling, one written email counseling and one CG-3307 regarding her performance and expectations as the unit's EPO. Problems within the engineering department were discovered during an annual Ready for Operations (RFO) visit and documented via memo dated 08AUG17. During that visit both 25 RBS assets had a total of 5 disabling, 3 restrictive, and 24 major discrepancies. During STAN visit the very next month, the report showed almost the same exact discrepancies. This triggered a reinspection for Naval Engineering by Sector RFO team. Because of this, running into the month of November, MK1 [applicant] did not receive initial Boat Crew certification until 07DEC17. This was just barely in policy with Boat Manual Vol. 1 for Command Cadre certification. MK1 was then injured in February 2018, while playing hockey. This injury put her on a TLD status which was extended multiple times, until just over the one year mark (28FEB19). I had multiple discussions with MK1 about her injury and the policy per Boat Manual, Vol 1, in regard to temporary medical situations being not more than one year. Because she had not received a fit for duty status by 10FEB19 I started the process to administrative assign MK1 in order to receive a backfill EPO. I submitted the memo on 27FEB19 through Sector [redacted] and on 28 FEB19, MK1 received a fit for duty recommendation. On 05MAR19 I issued MK1 a timeline for certification memo that outlines the certification process along with dates provided to complete each individual certification. On 18MAR19 MK1 failed the Physical Fitness Test by failing to perform the required amount of pushups in one minute. On 19MAR19 I conducted verbal and written counseling detailing expectations and inquiring into MK1's perceived lack of motivation. This perceived lack of motivation and initiative has been shown in all facets of duty. From repeated attempts by Medical for failing to receive updated doctor notes, to unit maintenance and communication with myself. MK1 failed her Boat Crew recertification board and her second attempt at the push ups on 12APR19. During this time frame MK1 also failed to properly communicate and keep track of parts when one of the unit assets had a restrictive discrepancy. This led to the asset being down longer than expected, missed training opportunities, causing the XPO to track down the required support personnel and part. I have not been able to get MK1 [applicant] out of her "comfort zone" and ask for the help that is needed to succeed as EPO. Her failure to recertify and maintain currencies as required, had had a negative effect on Command presence and unit training. MK1 [applicant] has not reacted appropriately to corrective actions taken to counsel, train, and guidance to success. It is in my opinion that MK1 [applicant] does not possess the judgement and leadership necessary to succeed in a command cadre position.

On April 29, 2019, the applicant's CO issued a memorandum, "Temporary Relief for Cause," wherein he notified the applicant of her Temporary RFC (TRFC), her right to consult with an attorney, and her right to submit a written statement. The applicant's CO provided the following reasons for the applicant's TRFC:

1. In accordance with Section 1.F.1.d of reference (a),<sup>2</sup> you are hereby notified that you are being temporarily relieved for cause as the Engineering Petty Officer (EPO) of U.S. Coast Guard Station [redacted]. I am taking this action because of your inability to recertify as a boat crew member in accordance with reference (b),<sup>3</sup> which has resulted in my loss of confidence in your ability to serve as the EPO.

a. On 10 February 2018, you were injured during an ice hockey game and were put on temporary limited duty. At that time, a temporary EPO from Sector was assigned to the Station. The temporary EPO ensured the engineering department was operating at full capacity and all boats were fully mission capable for the busy summer boating season.

b. You anticipated returning to full duty in October or November 2018, but were unable to return until 28February2019.

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<sup>2</sup> Military Assignments and Authorized Absences Manual, COMDTINST M1000.8.

<sup>3</sup> Boat Operations and Training Manual, Vol. 1, COMDTINST M16114.32.

c. Pursuant to reference (b), as part of the Command Cadre, you were required to complete semi-annual/annual currency maintenance requirements. While on temporary limited duty you were precluded from boat operations for a period of over 12 months; thus, missing the semi-annual/annual maintenance requirements. Upon return to full duty, you were required to recertify within six weeks, on or before 12 April 2019.

d. You returned to a fit for duty status on 28 February 2019. On 05 March 2019, you were issued a certification expectations memo from your Officer in Charge outlining your qualification timeline. You did not meet the outlined requirements when you failed your physical fitness test on 18 March 2019.

e. After receiving verbal counseling on 18 March 2019, your Officer in Charge extended the deadline for your Boat Crew Recertification. On 12 April 2019, you again failed your physical fitness test and also failed your Boat Crew Certification board as required by section 3.C.8.02 of reference (b).

f. Pursuant to 4.D.4 of reference (b), a member of the Command Cadre "unable or unwilling to attain required certification" may be relieved for cause. Due to your Officer in Charge's continued counseling, you were aware of your certification obligations upon returning to full duty.

g. Your inability to maintain minimum certifications and currencies has had an impact on your command presence, unit training, and the readiness of the unit.

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The applicant acknowledged her CO's TRFC memorandum and indicated that she did not wish to consult with an attorney, but was silent as to whether she wished to submit a written statement.

On May 14, 2019, the applicant's CO issued a memorandum, "Request for Permanent Relief for Cause," wherein he requested the applicant be permanently relieved of her duties as EPO. The CO cited the applicant's failure to recertify as a Boat Crewmember as required by the Boat Operations and Training Manual, COMDTINST M16114.32. The CO reiterated the applicant's failure to recertify within six weeks and stated that pursuant to Article 1.F.1.f. of the Military Assignments and Authorized Absences Manual, COMDTINST M1000.8, when a member is "unable or unwilling to attain required certification, that service member may be relieved for cause." The applicant acknowledged her CO's request for PRFC and indicated that she did not wish to submit a written statement or consult with an attorney.

On June 3, 2019, the District Commander endorsed the applicant's PRFC stating the following:

My recommendation is based on a documented inability to recertify as a 29' Response Boat-small Crewmember and Boat Crew Member after returning to full duty in February 2019 following a prolonged temporary limited duty (TLD) period. Her recertification is required to fulfill her duties as EPO, and her inability to certify has directly detracted from her command presence, negatively impacting unit training and readiness.

In evaluating this PRFC, I considered all of the available facts and all input provided by the chain of command. While MK1 [applicant] is now fit for full duty, the unfortunate reality is she has been unable to fully recover in the expected timeframe following her TLD.

On April 29, 2019, the applicant received a disciplinary EER as a result of her PRFC as required by policy.

### APPLICANT'S ALLEGATIONS

The applicant alleged that her May 14, 2019, RFC was unjust and contrary to Coast Guard policy. According to the applicant, her RFC package conclusively demonstrates that her Command intentionally omitted key parts of the Boat Operations and Training Manual, COMDTINST M16114.32C. The applicant alleged that her Command incorrectly ignored her medical status, but instead relied upon her inability to pass a physical fitness test and a tainted Boat Crewmember Certification Board as justification for her RFC. The applicant further alleged that the RFC correspondence created by her Sector proves that her supervisor failed to comply with COMDTINST M16114.32C, following her injury and the necessary recovery period. The applicant claimed that her supervisor grew impatient with her recovery, and his impatience eventually grew into anger and apathy toward her. This anger and apathy, according to the applicant, was manifested in his mischaracterization of her service and his deliberate efforts to set up a series of certification boards aimed at entrapping her.

The applicant explained that while on TLD status, she had physical therapy 3 to 4 days a week for two hours at a time. The applicant stated that while she was gone, all unit maintenance was being completed, and equipment casualties were repaired and addressed. The applicant further stated that she was available by phone 24/7 and always left the engineering department with a list of items to be completed. The applicant alleged that although her OIC stated that he submitted an ADASSIGN request for her, she does not believe he ever submitted one because she never heard anything regarding the request.

The applicant alleged that by August of 2018, her knee was not healing properly, which was caused by the unrealistic expectation that she juggle a serious physical therapy regimen in addition to the rigors of being an EPO in a unit that required lots of trips up and down stairs. The applicant claimed that upon learning that the applicant would require another surgery, her OIC expressed concerns about how long the applicant would need to be out of work. The applicant stated that because she felt threatened by her OIC's response, she regrettably informed him that she was hoping to only need a few days off of work. According to the applicant, her OIC told her that he would submit an ADASSIGN request for her, but she never heard anything back regarding that request.

The applicant explained that pursuant to Physical Disability Evaluation Systems (PDES) Manual, COMDTINST M1850.2D, it is a Command's responsibility to ensure "[T]LD designation of the member is visible and is tracked among actionable administrative entities within the Coast Guard" as "the emphasis of the TLD designation is on recovery and future wellness" of the member, and not on the welfare of the unit. In addition, pursuant to COMDTINST M1850.2D a "determination by a physician that a member is temporarily unable to perform the essential duties of the member's office, grade, rank or rate" should result in the member being placed on Temporary Limited Duty (TLD) for a period of no more than 9 months. The applicant argued that the initial prognosis following her injury should have triggered her placement into a TLD status. However, the applicant alleged her TLD status was not approved until June 21, 2019, which expired on

September 11, 2019, and an extension was never requested. The applicant claimed that her medical personnel were aware of her expired TLD status.

The applicant argued that under the PDES Manual, once a TLD designation is made, “CGPC-EPM or the appropriate servicing ISC (pf) will consider reassigning the member (PSC or administrative assignment) to an appropriate position to allow for continued recovery.” The applicant further argued that under Article 1.A.8.b. of the Boat Operations and Training Manual, she was eligible to be reassigned and her command should have submitted a request based on her physical condition and not knowing the timeline for her recovery. However, the applicant alleged that her command took no action to engage with PSC-EPM or her physician to determine the severity of her injury or the length of time her recovery would take. The applicant claimed that her command instead expected her to be at work every day and was not supportive of her continuing physical therapy appointments.

The applicant argued that under Article 5.b. of the Administrative Assignment and Temporary Duty Guidance, PSCINST 1000.1A., “as a general rule, members assigned to shore units should be: managed by the unit; ADASSIGN to support allowance billet at their own unit or sent ADASSIGN or TDY to the unit’s parent command.” Given the configuration of the station, and the number of stairs that she would have to traverse daily, the applicant argued that being ADASSIGN to her current unit would not have been optimal but leaving and being ADASSIGN to her parent command was a viable option. The applicant further argued that PSCINST 1000.1A states, “members ADASSIGN to any unit, including their permanent duty station will vacate their position” and that members in command cadre positions “shall be ADASSIGN to a support allowance position at the nearest A&T unit that can support that member.” The applicant stated that it is clear that Coast Guard policy takes into a member’s medical situation and has policies in place that are designed to ensure that the member quickly and appropriately recovers from their injuries without detrimental and permanent career impacts. The applicant claimed her command did not follow the required process and only requested ADASSIGN on February 27, 2019.

The applicant further argued that Coast Guard policy is clear regarding medical injuries and the placement of members on a TLD status. The applicant claimed that both her OIC and medical support personnel failed to follow prescribed policies and procedures. The applicant further claimed that policy states that the maximum amount of time from the onset of the illness or injury to recovery normally cannot exceed 12 months, and in such cases a Medical Board should be conducted. According to the applicant, there is no ambiguity in policy and the conduct of her OIC and the Sector medical personnel was clearly inappropriate, placing the welfare of the unit above her own health and well-being.

The applicant alleged that by February 2019, her OIC was trying to get rid of her due to her slow recovery and as such, selectively started following the Medical Manual. The applicant stated that twelve months after her initial surgery, she was informed by her Sector’s medical personnel that she would need to be evaluated for a possible medical board. During this time, the applicant stated that she was preparing for a unit SMART inspection, which the unit passed with praise from the SMART team, this was in addition to passing the ICE RFO assessment.



The applicant explained that on February 28, 2019, she was informed that she was found FFFD, which stopped the ADASSIGN process initiated by her OIC the previous day. The applicant alleged that her OIC argued with Sector medical personnel regarding her FFFD status, stating that her injury rendered her unfit for boat duty and unable to pass her physical fitness test, which would render her unfit to serve as EPO. The applicant alleged that after medical personnel upheld her FFFD status, her OIC began mischaracterizing her service and stacking the deck to ensure he could remove her through the RFC process.

The applicant explained that upon learning of her OIC's certification timelines, she was honest with him, telling him that she did not think she would be able to pass the physical fitness test due to having concentrated her physical fitness to rehabilitating her knee. The applicant stated that on the date of her physical fitness test, she passed the swim and sit-ups portions, but failed the pushup portion because she was unable to straighten her injured knee to meet Coast Guard standards. The applicant argued that her failure to pass her physical fitness test due to her knee injury was proof that she still should have been in a limited duty status. In the following days, the applicant claimed that she continued to experience issues with her injured knee and was told that she had to see her district's medical staff for medical board evaluation. The applicant alleged that during her medical evaluation, the medical officer asked her if she felt comfortable performing the duties of a machinery technician, to which she replied that she did feel comfortable and the medical officer agreed. According to the applicant, the medical officer did not discuss her ability to pass the physical fitness test or whether she was able to complete the duties and responsibilities of an EPO. The applicant claimed that there was also no discussion of a medical board or if she should be returned to a limited duty status.

The applicant alleged that her OIC failed to follow policy with regard to her recertifications. The applicant stated that the deadlines set forth her OIC memorandum on recertification timelines, only gave her 18 days after returning to a FFFD status, to complete her physical fitness test. During that time, the applicant explained that she was still undergoing physical therapy. In addition, she was only given 36 days to recertify as an RBS crewmember, which requires the successful completion of the physical fitness test. The applicant stated that the second physical fitness test was administered again on April 12, 2019, 43 days after being placed on a FFD status. The applicant argued that the Boat Operations Manual, Vol. 1, states that personnel should be afforded, "a reasonable amount of time" to recertify, with "reasonable amount of time" being defined as "the average amount of time for previously uncertified personnel to certify." The applicant argued that six weeks was well short of the qualification timeline expected of an uncertified member of the station, which was six months, to obtain a boat crewmember certification. The applicant claimed that due to the OIC not following the outlined policies, his recertification memorandum placed an undue burden on her to achieve recertification within an unattainable timeline.

The applicant alleged that her OIC knew his pursuit of an RFC was inappropriate and attempted to mischaracterize her service in order to pursue her RFC as the quickest way to obtain a new EPO for the unit. The applicant argued that an objective view of the facts, including the improvements the engineering department made during her tenure, shows that her time as the unit's EPO was above reproach. The applicant further argued that these accomplishments are especially impressive considering that she was juggling the near impossible task of being expected to recover

without the time recommended by her surgeon, a full workload, and a rigorous physical therapy schedule.

Regarding her failed Ice Rescue Oral Board, the applicant alleged that her board was on a Friday, and it was the first day after the ice in the harbor had thawed and the piers were free from ice. The applicant explained that her OIC expressed interest in putting a boat back in the water, since the ice was gone. According to the applicant, in order to do that, she needed to repair the pier to ensure that it had a safe and stable platform for mooring the asset. The applicant claimed that she asked to push her oral board back to later in the day, or even the following Monday, so that she could get the piers in good working order. The applicant alleged that her OIC agreed, without saying anything else except that it was alright. The applicant stated that she spent the day from 0830 to 1800 repairing the piers. The applicant claimed that she passed her Ice Rescue Oral Board the following Monday. The applicant alleged that her OIC's statements that her board had to be rescheduled because she was not prepared was utterly false—a falsehood she allegedly addressed with her OIC when presented with the negative Page 7 documenting her failed Ice Rescue Oral Board.

The applicant claimed that unit maintenance was never affected during her recovery time and that the claims in her RFC paperwork regarding a miscommunication that left a boat in restrictive status longer than necessary are false. According to the applicant, one of the unit's RBS II's had an issue with the GPS signal, which was found to be the antenna. Since it was a restrictive discrepancy, the applicant explained that the part was automatically ordered as a Priority 5, which meant that the part could not be shipped over night and could only be sent as a priority 5, which she explained to her Command. The applicant stated that she had the part sent directly to her, instead of the ESD, where two members were on leave, and the part was installed a few days later. The applicant argued that the boat was not in a restrictive status any longer than it would have been under other circumstances. The applicant alleged that her actions actually shortened the standard timelines and established her above average ability to manage engineering and maintenance issues.

The applicant alleged that her OIC redacted the policy upon which he relied to justify his TRFC and PRFC. The applicant argued that both the TRFC and PRFC memorandums inaccurately convey the language in Article 1.F.3.b.4. The applicant stated that the full text of this article states, "in all cases, except medical situations of a temporary nature, a member of the Command Cadre unable or unwilling to attain required certifications or maintain currency shall normally be relieved for cause." The applicant argued that this article goes even further, defining medical situations of a temporary nature as those that, "preclude a member from boat operations for a period of no more than 12 months." According to the applicant, because the injury to her knee lasted longer than twelve months, the justification used by her Command to remove her for cause was inapplicable.

The applicant explained that on April 29, 2019, 17 days after she failed her second physical fitness test, she was handed her TRFC memorandum and told to gather her things. According to the applicant, after she left the station, she received a text from her OIC telling her that the Sector Command Chief wanted to speak with her. The applicant alleged that this was the first communication she had received from any of her Sector's leadership. When she spoke with the Sector Chief, she asked him why she was being removed for cause instead of being ADASSIGN,

to which the Sector Chief allegedly responded, “it’s either an RFC or a Medical Board.” The applicant alleged that the Sector Chief told her that a medical board would have been detrimental to the applicant’s career, because she would most likely have been medically discharged, instead of medically retired. However, the applicant argued that the Sector Chief is not a medical professional and was not qualified to make a determination about the potential outcome of a medical board, nor was he in a position to decide whether or not she should have gone before a medical board. According to the applicant, this further shows that her Command was making decisions for the betterment of the unit, instead of what was better for her and in accordance with policy.

The applicant alleged that her RFC was detrimental to her career in ways that a medical board would not have been. She claimed that she was removed from the May 2019, Service-Wide Advancement List, where she was ranked 102 on the Chief Machinery Technician list. The applicant stated that she also received an unscheduled disciplinary enlisted evaluation report, wherein she received several disproportionately low marks—a mark of “Not Ready” as well as “Not Recommended for Advancement.” The applicant claimed that as a result of the RFC, she is not eligible for the Service-Wide Examination for 24 months, and will not be eligible to retake the Service-Wide Examination until May of 2023, which is one year past her Professional Growth Point (PGP).<sup>4</sup> The applicant argued that in effect, this unjust RFC has made it impossible for her to ever take the SWE for MKC and will force her to retire as an MK1 in February 2022. However, the applicant argued that if her Command would have followed policy and placed her on TLD status, and ADASSIGN her, she would have been able to fully recover on a prescribed timeline, without the stress and threats from her OIC. The applicant alleged that even though she was not FFFD within a year, a medical board likely would not have separated her from the service, as she was showing steady progress. Based on these facts, the applicant claimed that she would not have been issued an RFC, would not have received negative marks, and would not have been removed from the May 2019, Service-Wife Advancement List.

To support her application, the applicant submitted the following documents:

- Medical documents.<sup>5</sup>
- A November 19, 2018, email from the applicant to a Chief Health Services Technician (HSC) from the applicant’s Medical Department. The content of the email is as follows:

As per our phone conversation today regarding my duty status I have an appointment in 6 weeks with the surgeon. I am walking with only a small limp. My flexion is hovering around the 120-123 degree range, with functional considered 130 degrees. A strength index the first week of Nov showed that my right leg was only 28% as strong as my left leg. On Nov 16th I was at 38% strength, to return to full active duty they say I need to be at least 80%. I am increasing in weight during exercises and they aren't anticipating any issues with strengthening. If my flexion doesn't increase to the 130 range they are considering a manipulation to help

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<sup>4</sup> Article 3.B.2 of the Military Separations manual, COMDTINST M1000.4, defines PGP as “[t]he maximum amount of active military service a member can have for their current pay grade. The PGP of an E-6 is 20 years of active service, meaning that an E-6 who attained his or her 20<sup>th</sup> anniversary on active duty during the year and remains an E-6 on December 31, of that year, is normally retired no later than September 1, of the following year, unless a waiver of the HYT policy is granted. *Id.* at Articles 3.C., 3.D., and 3.G.

<sup>5</sup> The medical documents submitted by the applicant in support of her application were almost all illegible.

break up whatever scar tissue is still adhered. Sorry my knee is being such a pain but hopefully I'm on the final stretch with it and thanks again for all of your help. If you guys have any questions or need anything from me please let me know.

- A November 20, 2018, email wherein the HSC addressed the applicant's concerns with the applicant's medical officer and requested that he request an extension of the applicant's TLD status. The HSC told the applicant's medical officer that even after the second surgery, the applicant was still having issues with her leg. The HSC explained to the medical officer that the applicant was still on TLD, which was set to expire in September, but was unfortunately still not fit for full duty.
- A November 20, 2018, email from the TLD Program Manager, wherein he stated that the applicant was eligible for TLD status until February 19, 2019. He further stated that if the applicant's recovery took longer than the February 19, 2019, deadline, no TLD extension would be authorized.
- A February 27, 2019, email from the applicant's OIC wherein he addressed his concerns regarding the surgeon's recommendations regarding the applicant's FFFD finding. The OIC stated that the applicant still exhibited a limp while walking around the unit and often said her knee was sore from light exercise or even just walking. The OIC further stated that when he asked the applicant when she thought she would be able to pass the physical fitness test, the applicant stated, "probably end of March." The OIC was concerned that if the applicant could not pass the fitness, she would be unable to perform all of her duties as the EPO required by the Boat Operations Manual, Vol. 1. The OIC explained that boat duty is very arduous at times, requiring dynamic movements in response to boat movement, wind, and seas. The OIC worried that if the applicant was still favoring her knee during normal walking, she would be unable to be counted as a boat crew member.
- A February 28, 2019, email wherein an HSC from the applicant's Medical Department forwarded the applicant's OIC's concerns to the applicant's medical officer.
- A personal statement from a Commander who endorsed the applicant's request for relief. The Commander stated that the applicant's previous Command was required to follow the applicable references governing personnel medical injuries, which required the applicant to be ADASSIGN. According to the Commander, the previous Command's failure to follow medical policies slowed the applicant's recovery and created an extremely challenging situation for the applicant to get her required work done. The Commander stated that in the applicant's OIC's own words, the reason the applicant was unable to pass the physical fitness test had nothing to do with will or motivation, but solely due to her knee injury. According to the Commander, the applicant's OIC openly disagreed with the surgeon's assessment of the applicant's FFFD determination.

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

On October 14, 2020, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC). The JAG recommended the Board deny relief in this case.

The JAG argued that the applicant has failed to provide evidence, sufficient to overcome the presumption of regularity, to show that her RFC was erroneous or unjust. According to the JAG, once the applicant's Command determined that RFC was necessary, the applicant received the due process afforded to her in Article 1.F. of the Military Assignments and Authorized Absences Manual, COMDTINST M1000.8A. The JAG argued that the applicant's claims that her Command was impatient with her healing process and because of that impatience used the RFC process to remove her, are a mischaracterization of the events that took place, and rely heavily on hindsight. The JAG claimed that the applicant herself admitted that she misinformed her OIC about her prognosis and that the applicant chooses to give scant attention to the loss of confidence component of her RFC. The JAG stated that narrative described by the March 19, 2019, counseling email, in addition to the April 5, 2019, negative Page 7, shows a command cadre that was aware of the ADASSIGN option, but chose to use a "wait and see" approach the applicant's recovery. The JAG argued that the applicant had a continuing opportunity to resume her duties and her career. However, if she had been ADASSIGN, she would have lost her command cadre tour, in addition to the uncertainty of reassignment and PCS.

The JAG explained that when the applicant was found FFFD and given a timeline to become fully certified and a participating member of the small boat station crew, she performed so poorly on her certification boards that it demonstrated a lack of motivation and initiative, attributes that are not suitable for a busy and operationally intensive small boat station or a member of the command cadre. Whether described as "impatience" or "disappointment," the JAG explained that the applicant's station had been without their EPO from February 10, 2018, to February 28, 2019. The JAG further explained that when the applicant was found FFFD, her Command immediately wanted to see maximum effort, but instead found the applicant displaying a lack of motivation, subject matter acumen, and initiative. Therefore, the JAG argued that while the applicant's Command was willing to work with the physical challenges of the applicant's condition, her lack of effort was a far more degrading influence on the unit. Accordingly, the applicant's Command initiated the RFC procedures outlined in Article 1.F.1.b. the Boat Operations and Training Manual, Vol. 1.<sup>6</sup>

The JAG argued that although delayed, and not as expeditiously as the applicant would have liked, her Command did request ADASSIGN in accordance with Coast Guard policy in February 2019. The JAG argued that Article 4 of the A&T Guidance Instruction states, "Officers-In-Charge of all afloat and ashore units are vested with absolute responsibility to govern the safety, efficiency, and well-being of their command ... . The majority of military personnel issues should be managed within the member's assigned command. [U]nits must carefully consider the member's situation, how to best manage the member, and mission requirements before a decision is made to transfer the member, either temporarily TDY or permanently ADASSIGN, outside their permanent command." In a further nod to the discretion afforded to commands in personnel management, the JAG argued that Article 5.b. of the same manual states, "As a general rule, members assigned to shore units should be managed by the unit; ADASSIGN to a support allowance billet at their own unit; or sent ADASSIGN or TDY to the unit's parent command." Lastly, and in reflection of the importance of command cadre billets, Art. 7.b. provides that long-term TDY should not even be

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<sup>6</sup> Article 1.F.1.b. of the Boat Operations and Training Manual, Vol. 1, states, "The need to relieve for cause may arise when a CO/OIC's, XPO's, EPO's, or CMC/CSC's performance or conduct adversely affects their unit's morale, good order and discipline, and/or mission performance."

considered, “PSC has identified command cadre positions as critical. Members in command cadre positions shall be ADASSIGN to a support allowance position at the nearest A&T unit that can support the member.” Therefore, the JAG argued that based on the discretion afforded the OIC, ADASSIGN of the applicant was always an option based on the Article 4 factors outlined above. The fact that the applicant’s Command delayed the ADASSIGN process was perhaps based on the hope that the applicant would soon recover and return to her full role as the unit’s EPO. Furthermore, the JAG stated that Article 7.b. is silent as to when the ADASSIGN process must begin after a service member’s injury. The JAG explained that by happenstance, the applicant was found FFFD the day after the ADASSIGN process was initiated, thereby removing the necessity to continue the process.

Regarding the applicant’s claims that a medical board should have been initiated, the JAG argued that the applicant’s claims are not supported by policy. The JAG explained that in some cases, a member who becomes available for limited duty due to an incapacitation may eventually recover and become available for fully duty.<sup>7</sup> The JAG argued that the applicant fits squarely into this category because she had an “excellent” prognosis for her torn ACL. The JAG claimed that this is further supported by the fact that the applicant submitted no evidence that she is not currently FFFD, indicating that she has fully recovered, rendering a medical board an inappropriate remedy in 2019.

The JAG argued that the applicant submitted no evidence that she contested her FFFD finding on February 28, 2019, and because of her failure to submit evidence, she has not satisfied her burden. The JAG explained that after the applicant received a clearance letter stating that she was found to be FFFD, she relayed this information to her clinic and her Command. In her email, the JAG claimed that the applicant made no attempt to contest the validity of her FFFD finding. In her email to her Command, the applicant stated, “Attached is my letter for FFFD. All of the updated notes along with a hard copy of this letter will be mailed FedEx this afternoon. As soon as I get the tracking number I will forward it along. If you have any questions or need anything else please let me know.” The JAG argued that at no time did the applicant contest her FFFD finding.

The JAG stated that in the applicant’s own words, she admitted to a medical officer that she felt comfortable performing the duties of a Machinery Technician. Specifically, in her application for relief, the applicant stated, “the Medical officer looked through my notes and asked if I felt comfortable performing the duties of a Machinery Technician. I told him that I felt comfortable and he agreed. No conversation occurred involving my abilities to pass the physical fitness test or if I was able to complete the duties and responsibilities of an EIP at the Station. Also, there was no conversation about a Medical Board or if I should be placed in a limited duty status.”

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<sup>7</sup> Article 2.C.12 of the Physical Disability Evaluation Systems Manual, COMDTINST 1850.2D, states, “Temporary Limited Duty (TLD). General guidelines for using this policy: In some cases, a member who becomes available for limited duty due to an incapacitation may eventually recover and become available for full duty. A member such as this would not be appropriate for the PDES per se, in that there is a reasonable expectation the member will fully recover – in a reasonable time period. The PDES is designed to be a thorough system for all stakeholders, to ensure every member subject to the system is afforded a full and fair hearing to determine fitness for duty. In that members who are expected to recover do not warrant this level of administrative oversight and processing, another mechanism is necessary to provide the Coast Guard with visibility of their condition, while not burdening the organization with undue administrative action...”

The JAG stated that not only did the applicant admit to being comfortable performing the duties of a Machinery Technician, but she also neglected to inform the medical officer of any other concerns she had regarding her ability to perform her fitness tests or her duties as an EPO. The JAG argued that it is incumbent upon the member, especially one in the role of a command cadre, to inform their consulting care manager of their readiness concerns. According to the JAG, the applicant's failure to contest her FFFD finding implies that she wanted to be found FFFD, in addition, it reflects a belief that the applicant did not want or request a medical board. Therefore, the JAG argued that based on the medical evidence available at the time, in addition to the applicant's input, the clinic's decision to find the applicant FFFD was not erroneous or unjust.

Finally, the JAG argued that the applicant had two opportunities during the RFC process to submit written statements and consult with legal counsel, but she declined to do so on both occasions. The JAG further argued that the applicant's failure to exhaust all avenues of timely redress and apply available due process is substantial evidence that when she received her RFC notifications, she accepted the outcomes as valid, even if she did not agree with them. Therefore, the JAG argued that the applicant's request for relief should be denied.

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

On October 16, 2020, the Chair sent the applicant a copy of the Coast Guard's views and invited her to respond within thirty days. As of the date of this decision, no response has been received.

### **APPLICABLE LAW AND POLICY**

Part 4 of Chapter of 4 of the Boat Operations Manual, Vol. 1, COMDTINST M16114.32D, provides the following guidance on Command Cadre certifications:

**D.2. Maintenance Applicability.** Command Cadre (CO/OIC, XO/XPO, EPO) must complete the semiannual/annual currency maintenance requirements in this Manual *Part 4, Chapter 6*, and maintain certification while assigned to the unit.

Except for medical situations of a temporary nature, a Command Cadre member unable or unwilling to attain certification or maintain currency shall normally be relieved for cause. Medical situations of a temporary nature are defined as conditions that preclude a member from boat operations for a period of not more than 12 months.

**D.3. Certification Timeline.** Boat Forces Command Cadre shall certify within a reasonable amount of time (within six months of reporting aboard, unless stated otherwise below).

**D.4. Relief for Cause.** In all cases except medical situations of a temporary nature, a member of the Command Cadre unable or unwilling to attain required certification or maintain currency shall normally be relieved for cause.

Article 1 of the Military Assignments and Authorized Absences Manual, COMDTINST M1000.8A, provides the following guidance on Administrative Assignments and Relief for Cause (RFC):

**1.A.8. Administrative Assignments.**

**1.A.8.a. Purpose.** Administrative assignments provide for personnel management, disciplinary, and accounting procedures that remove a member's records from a unit when the command determines a member is absent under conditions, which mean their return is uncertain. Members not on leave or in some other officially recognized status (e.g., unauthorized absence) should be issued TDY orders in all cases. See Exhibit 1.A.1. for text to include in TDY orders. This type of administrative action normally is after-the-fact and entails no additional costs other than normal entitlements in accordance with the Joint Federal Travel Regulations.

Note: An administrative assignment is not a means to direct a member's physical movement from one command to another, though the two actions may coincide.

**1.A.8.b. Procedures for Transferring and Receiving Commands.** The commanding officer of the transferring command takes these actions.

(1) Requests administrative assignment from Commander (CG PSC-EPM) or (CG PSC-OPM) for members who meet one of the following conditions:

...

(b) The member is temporarily not medically fit for sea duty and requires an ashore assignment until fit for full duty.

...

(5) When the member can return to full or limited duty, the administrative assignment has served its purpose.

**1.F.1.a.** A relief for cause (RFC) is the administrative removal of a commanding officer (CO), officer in charge (OIC), executive petty officer (XPO), engineer petty officer (EPO), or a designated full-time command master/senior chief (CMC/CSC) from their current duty assignment before the planned rotation date. It normally consists of a two-step process:

(1) Temporary relief for cause, and

(2) Permanent relief for cause.

...

**1.F.1.b. Discussion.** (1) The need to relieve for cause may arise when a CO/OIC's, XPO's, EPO's, or CMC/CSC's performance or conduct adversely affects their unit's morale, good order and discipline, and/or mission performance. One of the most severe administrative measures taken against a member in command, an RFC usually has a significant adverse impact on the member's future Coast Guard career, particularly on their promotion, advancement, duty and special assignments, and selection for schools. Therefore, the relieving officer must carefully consider the circumstances' gravity and the potential outcome's total implications before initiating the process.

...

**1.F.1.d. Basis for Relief.** The loss of confidence in the judgment and ability of members serving in the positions identified in Article 1.F.1.a. of this Manual is grounds for a temporary and/or permanent RFC. An articulated, fact-supported package must be prepared based on one of the following root causes of the loss of confidence:



(2) Unsatisfactory Performance. One or more significant incidents resulting from gross negligence or substantial disregard of duty may provide the basis for RFC. Substandard performance of duty over an extended period of time may also provide the basis for RFC, but only after the command has taken corrective action such as command counseling, guidance, training and appropriate use of performance evaluations, which have proved unsuccessful.

...

**1.F.1.e. Procedures to Request a Temporary Relief for Cause (RFC).**

(1) Any member of the chain of command may recommend a temporary RFC if warranted in accordance with Article 1.F.1.d. of this Manual. The temporary RFC package will be addressed to the temporary relief authority listed in Article 1.F.1.c.(1) of this Manual and consist of a Coast Guard memorandum containing a detailed summary of the facts surrounding the incident including any disciplinary actions taken and will include the following information and enclosures as applicable...

(c) Notify the permanent relief authority identified in Article 1.F.1.c.(2) of this Manual of the action taken, the events that caused it, the circumstances of any current or proposed investigation, and the expected completion date of any further action.

...

(3) After reviewing the case’s circumstances, the temporary relief authority will take one of the following actions.

(a) If grounds for permanent RFC are not substantiated, terminate the temporary RFC process, return the CO/OIC, XPO, EPO, or CMC/CSC to command, and notify the permanent relief authority identified in Article 1.F.1.b.(2) of this Manual, as appropriate, of action taken; or

...

(c) Where grounds for permanent RFC appear substantiated, recommend a permanent RFC per Article 1.F.1.f. of this Manual.

**1.F.1.f. Procedures to Request a Permanent Relief for Cause (RFC).** Once the temporary relief authority determines a permanent RFC is warranted, a permanent RFC package will be sent to the permanent relief authority identified in Article 1.F.1.b.(2) of this Manual containing a Coast Guard memorandum detailing any updated information since the submission of the temporary RFC and the following...

Article 4.C. of the Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2B, provides the following guidance on unscheduled employee evaluation reports:

Article 4.C.2. 2. *Unscheduled Enlisted Evaluation Reports.* While the EES focuses on regular evaluation reports, occasionally an unscheduled evaluation report is in order. Use the following to determine whether to complete an unscheduled evaluation report.

a. *General Guidance.* Complete an unscheduled evaluation report if the rating chain completed a regular or unscheduled evaluation report for a period ending more than 92 days for E-6 and below, 184 days for E-7 and above, or 19 active or inactive duty periods for reservists, in accordance with Reference (e), Reserve Policy Manual, COMDTINST M1001.28 (series) before one of the events listed below.

...

9. Relief for Cause. A disciplinary enlisted evaluation report is required for a member who is relieved for cause in accordance with Reference (j), Military Assignments and Authorized Absences, COMDTINST M1000.8 (series). The enlisted evaluation report must be completed within 30 days of the permanent relief authority's final approval action of the permanent relief for cause request. The effective date of the relief for cause EER must be the date the member was temporarily relieved for cause; if a temporary relief for cause was not executed, the effective date of the relief for cause EER must be the same as the permanent relief authority's final action date.

The Administrative Assignments and Temporary Duty Manual, PSCINST 1000.1A, provides the following supplemental guidance and Administrative Assignments:

**4. Discussion.** Sector Commanders, Commanding Officers, and Officers-In-Charge of all afloat and shore units are vested with absolute responsibility to govern the safety, efficiency, and well-being of their command per reference (a). This includes management and administration of their assigned military personnel, per references (b) through (e). The majority of military personnel issues should be managed within the member's assigned command. In accordance with Section 1 .A.8 of reference (b), **units must carefully consider the member's situation, how to best manage the member, and mission requirements before a decision is made to transfer the member, either temporarily TDY or permanently ADASSIGN, outside their permanent command.** Per reference (f), TDY should not exceed 180 days otherwise ADASSIGN should be pursued. (Emphasis Added).

**7.b. Command Cadre.** PSC has identified command cadre positions as critical. Members in command cadre positions shall be ADASSIGN to a support allowance position at the nearest A&T unit that can support the member. Such requests should be submitted via the receiving command to the associated assignment officer or Central Assignment Coordinator for approval.

Article 2 of the Physical Disability Evaluation Systems Manual (PDES), COMDTINST M1850.D, provides the following guidance on permanent and temporary disabilities:

**2.A. Definitions.**

**2.A.6. Available for Full Duty (AFFD).** The final status of a member who is able to perform all of the duties of the member's office, grade, rank or rate. A member placed in this status will have been determined to be fully ready for those duties expected of the member, given their current office, grade, rank, or rating. It pertains to a duty status that may result in an MEB or TLD report.

...

**2.A.16. Fit for Duty (FFD).** The status of a member who is determined by the final approving authority within the PDES to be able to perform the essential duties of the member's office, grade, rank, or rating. This includes the physical ability to perform specialized duty, such as duty involving flying or diving, if the performance of the specialized duty is a requirement of the member's enlisted rating. Only a final approving authority within the PDES can determine a member's fitness for duty. Physicians can determine whether a member is AFFD or AFLD, based upon the physician's assessment of a member's medical condition.

...

**2.A.53. Temporary Limited Duty (TLD).** A determination by a physician that a member is temporarily unable to perform the essential duties of the member's office, grade, rank or rate. A member placed on TLD will have duty limitations specified, such as: no lifting, climbing, swimming, running, prolonged standing, no sea or flying duty, etc. Before placing a member on TLD, the physician must find that an amelioration of the condition for which the member is being

placed on TLD will allow for the member's return to full duty within 9 months. For members of the selected reserve who are temporarily physically disqualified or in an Available for Limited Duty status, see the Reserve Policy Manual, COMDTINST M1001.28 (series).

### FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in her Coast Guard military record. The Board finds that the applicant has exhausted her administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

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>8</sup>

3. The application is timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

4. The applicant alleged that her RFC was erroneous and unjust because her injury prevented her from doing her job and, because of her injury, her Command should have administratively assigned her to another unit. 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 the military record, and the applicant bears the burden of proving, by a preponderance of the evidence, that the disputed information is erroneous or unjust.<sup>9</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>10</sup>

5. **Timeline.** The record shows that on February 10, 2018, the applicant tore her ACL while playing hockey. This injury required that the applicant undergo laparoscopic surgery, which occurred on March 3, 2018. The applicant was given an "excellent" prognosis from her attending physician, with a recovery window of six to eight months, and was placed on convalescent leave as a result. On June 11, 2018, the applicant's Command requested that the applicant be placed on TLD status for a period of 90 days, which was approved on June 21, 2018. The applicant returned to work in a limited capacity beginning on June 22, 2018. On August 16, 2018, she had scar tissue surgically removed, after which her TLD status was extended until February 19, 2019. On February 27, 2019, the applicant's OIC submitted a request for the applicant to be administratively assigned due to her physical injury preventing her from being able to perform the duties of an EPO.

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<sup>8</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>9</sup> 33 C.F.R. § 52.24(b).

<sup>10</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).

On the same date, the OIC sent another email to an HSC from the applicant's assigned medical department, wherein he raised concerns regarding the applicant's continued limp and the pain she experienced from walking. The OIC expressed his worry that the applicant would be unable to pass the physical fitness test and fully contribute to her unit while also being able to handle the rigorous physical demands required of an EPO. The record shows that this information was forwarded to the applicant's medical officer, but despite the OIC's concerns, the medical officer found the applicant FFFD on February 28, 2019. As a result of the FFFD finding, the administrative assignment process was terminated, and the applicant returned to full duty on February 28, 2019.

6. **Failure to Pass Certifications.** After returning to a FFFD status, the applicant was expected to pass the physical fitness test and regain her professional certifications within six weeks. Unfortunately, she twice failed her physical fitness test and failed to regain some of the required professional certifications. The applicant received both verbal and written counseling regarding her failure to obtain the certifications required of a small boat EPO. This included an email and a negative Page 7 issued on April 5, 2018, wherein she was counseled for her failure to obtain the required certifications.

7. **Failure to Pass the Physical Fitness Test.** The reason for the applicant's inability to pass the push-up part of the fitness test in 2019 is unclear in the record. She advised her command that she had not been exercising her arms while convalescing and on limited duty. In addition, as she alleged, a residual issue with her knee could have adversely affected her ability to do push-ups. After returning to a FFFD status and being unable to pass the physical fitness test, the applicant's OIC sent her for another medical evaluation to ensure that the applicant was fully fit for duty. During the second medical evaluation, the applicant expressed optimism and confidence to her medical officer that she could sufficiently perform her duties. This is confirmed by the applicant's own account of her conversation with the medical officer. Given that the applicant did not express any concerns regarding her ability to perform her duties as an EPO and expressed confidence in being able to fulfill her duties, there was no need for the medical officer to initiate a medical board. The applicant alleged that the medical officer should have but did not specifically inquire into whether she was able to pass the physical fitness test and able to fulfill the duties and responsibilities of an EPO. According to the applicant, the medical officer only asked if she felt comfortable performing her duties as a Machinery Technician. The Board finds the applicant's argument unpersuasive. First, her duties as a Machinery Technician at that unit included the duties of the EPO. Second, the applicant was aware that the purpose of her meeting with her medical officer was to reevaluate her fit for duty status due at least in part to her inability to pass the physical fitness tests. While she was aware she had failed the tests, the medical officer may not have been. Even if the medical officer did not inquire into the applicant's ability to pass the physical fitness test, the applicant was aware that she had twice failed her physical fitness test and should have informed the medical officer of these facts. The applicant's silence during this evaluation about her inability to pass the fitness test by doing push-ups indicates either that her knee was not preventing her from doing the push-ups or that she wanted to retain her FFFD status and so intentionally did not mention her inability to do the required push-ups.

8. **RFC vs. Administrative Reassignment.** Article 2.B.16 of the PDES Manual, COMDTINST M1850.2D, defines Fit for Duty as, "The status of a member who is determined by

the final approving authority within the PDES to be able to perform the essential duties of the member's office, grade, rank, or rating." The applicant's FFFD status signaled to her Command that the medical officer had reviewed the applicant's case and found that she was physically able to perform all the duties of her office, grade, rank, or rating, including passing the push-ups part of the fitness test, despite the post-surgical condition of her knee. When the applicant's FFFD status was questioned, and the applicant once again visited with her medical officer for evaluation, she expressed no concerns to the medical officer that would have alerted him that the applicant was in fact not FFFD. This FFFD finding left the applicant's OIC with a reasonable belief that no residuals from her surgeries were preventing the applicant from passing the fitness test and performing all her duties as the EPO. When the applicant failed to do so, it left her Command with a narrow path moving forward.

Article D of Part 4 of Chapter of 4 of the Boat Operations Manual, Vol. 1, COMDTINST M16114.32D, provides the following guidance on command cadre positions:

**D.2. Maintenance Applicability.** Command Cadre (CO/OIC, XO/XPO, EPO) must complete the semiannual/annual currency maintenance requirements in this Manual *Part 4, Chapter 6*, and maintain certification while assigned to the unit.

Except for medical situations of a temporary nature, a Command Cadre member unable or unwilling to attain certification or maintain currency shall normally be relieved for cause. Medical situations of a temporary nature are defined as conditions that preclude a member from boat operations for a period of not more than 12 months.

**D.3. Certification Timeline.** Boat Forces Command Cadre shall certify within a reasonable amount of time (within six months of reporting aboard, unless stated otherwise below).

**D.4. Relief for Cause.** In all cases except medical situations of a temporary nature, a member of the Command Cadre unable or unwilling to attain required certification or maintain currency shall normally be relieved for cause.

As stated above, "In all cases except medical situations of a temporary nature, a member of the Command Cadre unable or unwilling to attain required certification or maintain currency shall normally be relieved for cause." The Board does not believe that the applicant's inability to regain her boat crew certifications was due to an unwillingness, but the preponderance of the evidence does show that she was unable to regain the certifications required by COMDTINST M16114.32D, which was sufficient to expose her to RFC proceedings.

The applicant argued that her Command should have used the less severe action of administratively assigning her, instead of using the RFC process. Article 1.A.8.a. of COMDTINST M1000.8A states, "Administrative assignments provide for personnel management, disciplinary, and accounting procedures that remove a member's records from a unit when the command determines a member is absent under conditions, which mean their return is uncertain..." At no point during the year following her initial surgery did a doctor report that her return was uncertain. Then the applicant was found to be FFFD, which indicated that her return was certain, not uncertain. In addition, Article 1.A.8.b. states that commanding officers may request an administrative assignment from Commander, PSC for members who meet certain conditions. But the applicant did not meet any of the conditions listed in 1.A.8.b. At the time of her RFC, the applicant was FFFD. Article 1.A.8.b.5. of COMDTINST M1000.8A states, "When the member

can return to full or limited duty, the administrative assignment has served its purpose.” Here, there is no evidence that her return was ever considered uncertain, and the record shows that on June 22, 2018, the applicant returned to work and was able to perform her duties in a limited capacity. Under Article 1.A.8.b.5. of COMDTINST M1000.8A, this meant that any administrative assignment would have served its purpose and would not have been the appropriate course of action for the applicant’s Command to take. However, the administrative process that was clearly defined by policy regarding the applicant’s situation was the RFC process outlined in Article 1.F. of COMDTISNT M1000.8A.

In addition, the applicant’s RFC proceedings were thoroughly reviewed by Coast Guard PSC, which found the applicant’s RFC to be supported by policy. Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard erred when it initiated RFC proceedings against her instead of administratively assigning her.

9. **Unscheduled EER.** Article 4.C.2.a.9. of the Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2B, states, “A disciplinary enlisted evaluation report is required for a member who is relieved for cause in accordance with Reference (j), Military Assignments and Authorized Absences, COMDTINST M1000.8 (series).” The EER must be completed within 30 days of the permanent relief authority’s final approval action of the permanent relief for cause request. Accordingly, the applicant’s Command was required by policy to issue the applicant an Unscheduled EER upon the finalization of her RFC. Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that her Command erred when it issued her an Unscheduled EER and her request for relief should be denied.

10. The applicant made varied allegations and arguments. Those not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity and/or are not dispositive of the case.

11. The applicant has not proven by a preponderance of the evidence that her RFC was erroneous or unjust under the applicable policy. Nor has she proven, by a preponderance of the evidence, that the Unscheduled EER documenting her RFC was erroneous or unjust. Accordingly, her request for relief should be denied.

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

ORDER

The application of MK1 [REDACTED] [REDACTED] USCG, for the correction of her military record is denied.

March 31, 2023

[REDACTED] [REDACTED] [REDACTED]  
[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]  
[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]  
[REDACTED] [REDACTED]