

**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. 2022-049**

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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 May 4, 2022 and assigned the case to a staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision dated September 12, 2024, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT’S REQUEST AND ALLEGATIONS**

The applicant, an active duty First Class Machinery Technician (MK1/E-6), asked the Board to correct his record by removing two Enlisted Evaluation Reports (EER) for the October 1, 2019 through March 27, 2020 rating period and October 1, 2020 through October 26, 2020 rating period, all negative documentation relating to his alleged misconduct, and his Relief for Cause (RFC). The applicant further requested that he be reinstated to E-7.

***Failure to Maintain Cutter***

The applicant explained that throughout a scheduled change of cutters, the Surface Forces Logistics Center (SFLC) found that his cutter was in less than desirable condition. The applicant contested this finding because his cutter had already been inspected by an inspection team several months earlier and found to be ready for sea duty. The applicant claimed that this subsequent inspection failure led to several investigations against him with multiple outcomes that only affected his career and no one else’s. The applicant alleged that the Sector Command and his cutter’s Commanding Officer (CO) used the applicant’s end of enlistment against him, threatening to withhold a recommendation for reenlistment if he did not agree to “voluntarily” submit a request to be reduced in rank.

The applicant stated that he received a negative CG-3307 (“Page 7”) on June 3, 2020

wherein he was counseled for failing to oversee the cutter's maintenance program. The applicant claimed that his CO accused him of neglecting the maintenance of the cutter since he had arrived in 2017, which totaled three years.<sup>1</sup> The applicant contended that if he had neglected the maintenance of the cutter for three years, why did the cutter pass the Cutter Assessment of Readiness and Training and Tailored Ships Training Availability (CART/TSTA) in April 2018. The applicant alleged that when the new CO took over command of the cutter in the summer of 2018 there were no concerns raised regarding the material condition of the cutter.

The applicant claimed that in 2019 his Sector failed to conduct the Annual Ready for Operations Inspection and because the inspection never took place when it should have, there is no way of knowing for certain if the material condition of the cutter deteriorated, improved, or stayed the same. The applicant explained that in November 2019, Surface Forces Logistics Center (SFLC) performed a JVI-Joint Vessel Inspection, which was conducted by SFLC approximately three months late. The applicant claimed that the final report was issued on December 20, 2019 and gave the crew an unrealistic timeframe to repair, order, and complete everything SFLC required. According to the applicant, at no point was it discussed or noted that the cutter was unsafe for the crew to complete its next five thousand mile voyage. The applicant claimed that SFLC stated that the cutter's material condition assessment was to be completed approximately six months prior to the start of the cutter's arrival at its next port. The applicant alleged that on February 23, 2020 the cutter arrived at its new port and was told by the same SFLC staff that the cutter needed to be inspected immediately, at which point the cutter was deemed unsafe and in bad material condition. The applicant questioned why these concerns were not raised four months earlier by the SFLC staff. The applicant alleged that the SFLC knowingly and willingly put his entire crew in danger and set him up for nothing but failure.

The applicant contended that during the investigation into his handling of the cutter's maintenance his command could have sent him to a temporary unit, especially because he was only two months away from permanently transferring to another unit.

The applicant claimed that he received a CG-4910 on May 11, 2020 wherein LCDR P was clearly listed as the Preliminary Investigating Officer (PIO) who was assigned on March 3, 2020. The applicant argued that if any statement or information he provided to LCDR P was used in the investigation than a procedural error occurred because the applicant claimed he never signed an Article 31(b)<sup>2</sup> or a waiver for a remote interview in accordance with the Uniform Code of Military Justice. The applicant alleged that he was never provided with any pictures or reports of the damages found on his cutter. The applicant contested the number of cutter personnel that were interviewed and the number of statements gathered from crewmembers. The applicant also contested the contradiction in alleged damages to the cutter. According to the applicant, the negative Page 7 stated there were over \$494,000 in damages whereas the CG-4910 alleged there were only \$340,000. The applicant claimed that when he signed the CG-4910 charging addendum on May 11, 2020 the charging addendum stated the damages totaled \$340,000 but the addendum was not in the proper format. The applicant explained that when he received his final negative

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<sup>1</sup> The Page 7 did not include any statement of time regarding the applicant's failure to maintain the cutter's maintenance. Specifically, the Page 7 stated, "The findings of investigations into the material condition of the CGC [cutter] and allegations of your misconduct show that you failed to properly oversee the cutter's maintenance program."

<sup>2</sup> Article 31(b) are a service member's Miranda/Tempia rights.

Page 7 on June 3, 2020 the damages he was now accused of allowing were \$494,000, an increase of \$154,000 but he has yet seen, read or heard where those damages are coming from.

The applicant stated that in response to the recommended nonjudicial punishment (NJP), on May 26, 2020 he demanded trial by court-martial in lieu of NJP but the Coast Guard denied him that right and he was never given a reason as to why his court-martial was denied.

The applicant explained that after he demanded trial by court-martial, Captain (CAPT) K approved the applicant's CO's request to permanently relieve the applicant for cause. The applicant claimed that CAPT K's memorandum was forwarded to Coast Guard Personnel Service Center (PSC) on May 8, 2020 but the memorandum reflects a date of May 12, 2020. The applicant argued that in accordance with Article 1.A.8. of the Coast Guard Correspondence Manual, COMDTINST M5216.4D, any correspondence must be typed or stamped with the same date the correspondence is signed. The applicant claimed that this was "another small mistake in an ocean of many." The applicant made the same allegation of error regarding his June 8, 2020 memorandum wherein he was notified that he was being relieved for cause.

### ***Inappropriate Relationship***

The applicant stated that on May 8, 2020 he was given a negative Page 7 for an inappropriate relationship which he claimed was his command's adjudication for his violation of Article 92 of the Uniform Code of Military Justice (UCMJ).<sup>3</sup> However, the applicant stated that on May 11, 2020 he signed his CG-5810A, Acknowledgement of Rights – Acceptance of NJP, which listed violations of Articles 89 and 108 of the UCMJ. The applicant alleged that the statement contained in section B of the CG-5810A stated, "Preliminary inquiry into Facts surrounding alleged misconduct under the UCMJ of MKC [Applicant] and BM2 [Redacted]" dated April 30, 2020 when the investigation was actually completed on April 28, 2020. The applicant claimed that the statement provided in section B of CG-5810A is irrelevant because he was not being charged with that violation in section A. The applicant alleged that this shows that "higher ups" involved in the investigation were not doing their due diligence.

The applicant alleged that he never received a Performance and Discipline Form 12 (PD-12)<sup>4</sup> wherein he would have received formal counseling for his inappropriate relationship. The applicant also contested the wording in the negative Page 7 that reads as if he was at a bigger unit than he actually was. The applicant stated that he was on an 11 person patrol boat. In addition, the applicant stated that the female servicemember he became close to was a department head, regardless of the rank or gender. The applicant claimed that the two had to have a close working relationship and an open line of communication at all times in order to keep the cutter operating. The applicant contended that under policy his relationship with the other crewmember was permitted under policy, but CAPT K stated in the negative Page 7 that the relationship was contrary

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<sup>3</sup> Article 92 – Failure to Obey Order or Regulation states, "Any person subject to this chapter who-

(1) violates or fails to obey any lawful general order or regulation;

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or

(3) is derelict in the performance of his duties;

shall be punished as a court-martial may direct.

<sup>4</sup> The PD-12 is a Page 7 wherein a service member is counseled for inappropriate relationships.

to policy, indicating that they are no longer supposed to follow policy. According to the applicant, the Coast Guard now allows supervisors to read policy and make up something that benefits them.

The applicant claimed that Page 7s are administrative remarks pages that are utilized to document UMCJ infractions and because his was not an infraction, his Page 7 should never have included wording stating that he had committed a serious offense. The applicant argued that serious offenses are automatically taken to court-martial. The applicant stated that he was never taken to court-martial. He explained that he was offered NJP or court-martial but both were denied. The applicant contended that a command should not be able to change the writing in a document to change the eligibility of a service member reenlistment eligibility. The applicant alleged that his command authored the Page 7 to make it sound like he was punished in addition to the Page 7, which was unfair.

The applicant contended:

Has every EPO on board a Cutter that had overages on Dry Docks been relieved? Does everyone with a negative PD-7 been denied Re-Enlistment Eligibility throughout the Coast Guard? Because any UCMJ article is punitive, so any person with a PD-7 that has UCMJ article attached on it should not be eligible to re-enlist. And how many times are we allowed to punish a member for the same thing? (5th Amendment Right has been violated)

Finally, the applicant claimed that he received an RFC, two negative Page 7s and he was forced to voluntarily reduce his rank in order to re-enlist, all for infractions. The applicant stated that two different memorandums have his name wrong, not even misspelled, just completely wrong which he alleged are procedural violations. The applicant argued that this clearly shows the lack of attention to detail and how little attention was paid. For these reasons, the applicant requested relief and requested to be re-instated as an E-7.

### ***Reduction in Rank***

The applicant alleged that in a meeting with CAPT K, Commander (CDR) W, and Master Chief G he was presented with an inappropriate offer. According to the applicant, he was told that if he voluntarily turned in his anchors his Sector would recommend him for reenlistment. The applicant stated that he did not believe that Enlisted Personnel Management (EPM) was aware of the offer made by his command. The applicant questioned the motives of his command and contended that if he was as bad as Sector believed—a member unworthy of his Anchors—why did his command not send him to a CPO reduction board, mast, or any other panel.

The applicant claimed that after he was accused of violating Article 108 of the UCMJ, he was never presented with the opportunity to defend himself against those charges. The applicant alleged that he was never told that he was being investigated for violating Article 108. The applicant claimed that the email he received from the PIO that stated the applicant was not being investigated for anything and that the PIO only wanted to have a conversation with him. The applicant contended that at no point was his Article 31(b) rights given to him. The applicant claimed that he was told that because the damages exceeded \$500 it would be considered a serious offense and if found guilty at NJP he would not be eligible to reenlist. Accordingly, the applicant claimed that he had no choice but to request trial by court-martial so that he could prove his innocence. The applicant alleged that after he requested trial by court-martial he did not hear back

from the Coast Guard until he received his negative Page 7 dispensing of the allegations made against him.

The applicant claimed that his CO's statement in his June 3, 2020 negative Page 7 wherein he stated that the applicant was not entitled to a reenlistment board was erroneous because he had over eight years of service. The applicant argued that his CO's position was wrong and proper procedures were not followed.

The applicant alleged that the CO of his cutter, LT E, was able to finish his tour and move on to advance studies. The applicant claimed that the favorable treatment shown to the CO was unfair and unethical because they were both attached to the cutter, in a command position, and both ultimately responsible for the overall readiness and maintenance of the cutter. The applicant stated that his EER claimed that he was counseled for his inappropriate relationship, but he was never counseled as alleged. According to the applicant, the EER was submitted 30 days after it was signed in violation of Coast Guard policy. The applicant contended that having false statements in his EER can result in future supervisors believing he does not follow guidance or regulations.

The applicant alleged that EPM's memorandum reads as though his anchors were already taken away as punishment, but at the time they had not. The applicant claimed that there is a specific write-up required for voluntary reductions in rank and his command did not utilize it. The applicant alleged that his reduction in rank was not offered voluntarily but was the result of being threatened behind closed doors by two Captains. The applicant claimed that if he had not accepted the reduction in rank he would not have received his CO's recommendation for reenlistment and would have been forced out of the Coast Guard. The applicant contended that his record has been exemplary and he honestly believed that his CO, EPM, and everyone else involved never took that into consideration.

The applicant alleged that EMP looks at a paper file which they review when making their decisions, but the applicant contended that the "paper file" EPM utilizes is not in his Electronic Personnel Data Record (EPDR). The applicant argued that if EPM based their decision off of an investigation, EPM's actions were erroneous because an investigation never happened and ended in two negative Page 7s. The applicant claimed that EPM should have used his EPDR to make their decision, not an investigation that he has been unable to review. According to the applicant, EPM should not be making decisions based on a paper file. The applicant argued that there are procedures that were not followed. He claimed that he has clearly shown that "this entire process from start to finish failed and was never done correctly."

### **SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard on April 26, 2004. He then commissioned as an officer May 6, 2009, where he promoted to Lieutenant Junior Grade before being twice passed over for selection to Lieutenant and was transferred back to the enlisted personnel.

On March 27, 2020, the applicant's Sector Captain, CAPT K, issued a memorandum wherein in he notified the applicant that he was temporarily being relieved for cause of his engineering duties aboard his cutter. CAPT K stated that the applicant's relief was the result of

CAPT K's loss of confidence in the applicant's judgment and ability to serve as the cutter's Engineering Petty Officer (EPO). CAPT K stated that he was ordering the administrative measure based on credible evidence of unsatisfactory conduct and performance. CAPT K stated that on February 24, 2020 the applicant's cutter arrived in port in poor material condition that placed the crew's safety at risk. In addition, CAPT K stated that several discrepancies<sup>5</sup> marked as repaired or corrected when they were not. Finally, CAPT K stated that additional allegations of misconduct included an inappropriate relationship with another crewmember as well as disrespect toward a superior officer. The applicant was informed that he had the right to submit a statement and to consult with counsel.

On March 27, 2020, the applicant signed a memorandum wherein he acknowledged receipt of his temporary RFC and elected to submit a statement and to consult with a military attorney.

On March 30, 2020, the applicant was contacted by a Preliminary Investigating Officer (PIO), LCDR P, assigned to investigate the reason behind the poor material condition of his cutter after it entered drydock. LCDR P stated that he wanted to either conduct a phone interview or have the applicant provide a written statement and it was up to the applicant how he would like to provide his statement. LCDR P informed the applicant that he was not investigating the applicant specifically and could choose not to make a statement if he did not want to. LCDR P told the applicant he just wanted to hear the applicant's side of the story. Specifically, LCDR P wanted to know, "[w]hat was the material condition of CGC [redacted] in your opinion and what were the reasons why it was degraded if you believe so?"

On April 2, 2020, the applicant submitted a statement wherein he objected to his temporary RFC. The applicant argued that his cutter could not be compared to other 87s in the fleet because she came from RDAP Phase 1 the winter of 2016. The applicant claimed at that time the cutter was old and had a multitude of issues that needed to be addressed. He stated that in her transit from her home port her NR1 MDE Shaft Seal failed, her A/C failed, and her intake ventilation failed. In addition, he claimed that he reported that the generators were having major complications—his crew found screws being utilized as fuses, computer fans being used inside A/C cabinets, countless extension cords inside the navigation panel interconnecting everything. Regarding the falsified discrepancies discovered in the investigation, the applicant stated he knew about the many discrepancies that were corrected before Recurring Depot Availability Project that were subsequently reopened, but claimed they were not corrected to hide the condition of the cutter, to lie nor were the corrections made maliciously. The applicant alleged that the discrepancies were corrected because at the time he and his crew inspected and tested the discrepancy, but they could not find the issue at hand or replicate the issue. The applicant compared it to taking your car to the repair shop for a specific problem but the repair shop cannot replicate the problem. The applicant stated that is what he did. He claimed he could not replicate the problem so the discrepancy was listed as corrected. The applicant contended that he would never in his life put his crew at risk. The applicant noted that the cutter was going to be the new home for his own son who was scheduled to take over the cutter's hull so he would never put a crew in danger, especially when his own son would soon be on board.

On April 2, 2020, the Preliminary Investigating Officer (PIO), LCDR P, submitted his

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<sup>5</sup> Cutter discrepancies are maintenance issues on the cutter that can range in severity and priority.

Report on Investigation (ROI) into facts surrounding the unsatisfactory material condition of the applicant's cutter. The relevant portions of the PIO's report are as follows:

**FINDINGS OF FACT:**

1. A Material Condition Assessment (MCA) was conducted during the Joint Vessel Inspection (JVI) on CGC [cutter] on 6 November 2019. This inspection was originally scheduled for September but was delayed due to Hurricane [redacted] avoidance. CGC [cutter's] Recurring Depot Availability Program (RDAP) was scheduled for 23 February 2020 - 29 April 2020, providing approximately four months to correct MCA discrepancies prior to RDAP. (Exhibit 10)

2. CGC [cutter] was required to complete 96 O-Level JVI discrepancies by the unit. A review of their preventative maintenance program against overdue fleet averages was conducted during the MCA. The number of overdue items was deemed within fleet averages and the workload was manageable given the operational schedule. (Exhibit 10)

3. On 24 February, 2020 CGC [cutter] conducted the RDAP acceptance trials. CWO [P] and EMC [W], as Port Engineers, raised concerns about multiple discrepancies that were found during the inspection and sea trial that were not supposed to be present, either because they were cleared or they were never reported.

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4. On Thursday, 27 February, 2020 LT [L] conducted a follow on inspection of the JVI discrepancies. 56 out of the 96 JVI discrepancies were suspiciously cleared, requiring her to further investigate the status onboard and corresponding ALMIS entries. After further assessment, 14 were still unknown/unverifiable, 22 had been repaired, and 20 stated a corrective action or repair taken but was not. This was a conservative assessment where credit was provided to the unit as an unknown/unverifiable entry if ALMIS stated anything like "could not replicate the problem or discrepancy." Only entries that stated corrected but found to be in original inspection state were counted in the 20. Photographic evidence was also provided of the condition during this inspection to compare to the pictures in the original JVI report. (Exhibit 10)

5. The final JVI results for CGC [cutter] were published on 10 March. This report contains meeting notes for all pending discrepancies including parties responsible for repair and projected future availability completion timeframes for depot planned CFDs. The additional discrepancies noted by CWO [P] and EMC [W] are included and are shown to be entered after arrival to CG Yard. (Exhibit 1, 2, 9)

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7. CGC [cutter's] RDAP contract currently has over 50% growth work valued at \$494,000. A typical contract award amount is based off material condition assessments reported by the unit and is expected to have 10-15% growth. The CGC [cutter] has set a record high at the Yard for the 87' program. Also, the contract is currently delayed by 14 days which impacts the entire 87' fleet, not just the current crew onboard. (Enclosure 5)

8. CGC [cutter] had O-level discrepancies in ALMIS that dated over 2 years but were not addressed by the unit, an example being the water bottle being used as a condensate drain in the reefer, requiring the crew to physically empty it. The EPO had back-to-back afloat cutter tours in [redacted] across 5 years and reported to CGC [cutter] as the EPO on 15 June 2017. The EPO was extended a year in his current position. (Exhibit 8, 12)

9. CGC [cutter's] EPO did not personally enter the data on the ALMIS entries, only signed as final clearing authority on non-disabling discrepancies. (Exhibit 4)

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11. The Sector Engineering Branch Chief was not contacted by the EPO on any additional casualties in transit to CG YARD. (Exhibit 8)

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### OPINION

1. The EPO had a duty to correctly document all engineering issues onboard CGC [cutter]. The EPO failed to correctly document these issues, which is a dereliction of duty. (Findings 3, 4, 5, 7, 8, 9, 11, 15, 16, 19, 21)

2. The CO had the duty of ultimate responsibility for maintenance onboard CGC [cutter]. The EPO's dereliction of duty demonstrates the CO's dereliction of duty. (Findings 3, 4, 5, 7, 8, 9, 11, 15, 16, 19, 20)

3. The EPO signed off on cleared discrepancies that were not completed. (Findings 3, 4)

4. The CO/EPO were under pressure to clear discrepancies. (Findings 1, 2, 6)

5. The EPO did not personally enter the status of the discrepancies but did not verify or follow up with questions to crew or inspectors. (Findings 4, 9)

6. The EPO's neglect of action damaged CGC [cutter], USCG property, with repairs estimated at \$494,000. This cost does not include the intangible additional effort the crew continued to perform in work-around solutions to perform the mission without correct repairs or the additional cost to the 87' fleet in delaying the entire CG Dry-dock schedule by 2 weeks. (Findings 4, 7, 8, 9, 11)

7. The EPO had been stationed on cutters in [redacted] for 5 years straight with a historically high overdue maintenance record as a Sector and corrosion issues due to the [redacted] Environment, leading to complacency in discrepancy correction. (Findings 7, 8, 9)

8. The CO lacked knowledge of standard material condition of 87' cutter. (Finding 10)

9. Due to inaccuracies in ALMIS entries, it cannot be proven at this time if the CGC [cutter] was operating without required engineering waivers that would have endangered the safety of the ship and crew. (Finding 3, 4, 11)

### RECOMMENDATIONS

1. I recommend that MKC [Applicant] be charged with Article 92, UCMJ, Failure to Obey a Lawful General Order or Regulation; Dereliction in the performance of duties, and that charge be disposed of at Captain's Mast. The evidence collected satisfies the elements of the charge contained in Finding 12. (Opinion 1)

2. I recommend that MKC [Applicant] be charged with Article 108, UCMJ, Damaging, destroying, or losing military property, and that charge be disposed of at Captain's Mast. The evidence collected satisfies the elements of the charge contained in Finding 14. (Opinion 6)

3. I recommend that MKC [Applicant] not be charged with Article 107, UCMJ, False official statements. The evidence collected does not satisfy all the elements of the charge contained in Finding 13. (Opinion 3, 4, 5)

4. I recommend that MKC [Applicant] be permanently relieved for cause, due to a loss of confidence rooted in his unsatisfactory performance aboard CGC [cutter]. (Opinion 1, 3, 4, 5, 6)

5. I recommend that LT [E] be charged with Article 92, UCMJ, Failure to Obey a Lawful General Order or Regulation; Dereliction in the performance of duties, and that charge be disposed of at Captain's Mast. The evidence collected satisfies the elements of the charge contained in Finding 12. (Opinion 2)



6. I recommend that LT [E] be charged with Article 108, UCMJ, Damaging, destroying, or losing military property, and that charge be disposed of at Captain's Mast. The evidence collected satisfies the elements of the charge contained in Finding 14. (Opinion 6)

7. I recommend that LT [E] be relieved for cause due to a loss of confidence rooted in his unsatisfactory performance aboard CGC [cutter]. (Opinion 2, 6)

8. I recommend that a District 7 EPO board be implemented as in: enclosure 1 from District 1 White Paper to enable better EPO selection and successful tour completion in a very critical billet environment without high desirability. This is especially important when a majority of the critical billets are extended which can accelerate the degradation of the assets and cutter crews if a selectee does not perform. (Opinion 1, 2, 4, 5, 6, 7)

9. I recommend that all 87' cutter CO's either have experience on an 87' cutter or are afforded the opportunity to travel to the CG Yard as part of Pre-arrival Training to gain standard fleet familiarity. (Opinion 8)

On April 8, 2020,<sup>6</sup> the applicant was given his Article 31(b) Miranda/Tempia rights and was told he was being investigated for violating Article 92 – Failure to Obey an Order or Regulation due to an alleged inappropriate relationship with a crewmember of the cutter. The applicant was also told he was being investigated for violating Article 92 Part 3 – Dereliction of Duty, and Article 89 – Disrespect toward a superior commissioned officer, and Article 115 – Communicating a Threat.

On April 30, 2020, the PIO, LT S, issued his ROI into the facts surrounding the applicant's alleged inappropriate relationship with a fellow crewmember. The relevant portions of the PIO's report are as follows:

#### FINDINGS OF FACT:

1. SN [H] and BM2 [M] were roommates onboard the CGC [cutter] and CGC [cutter] from October 2019 until present. (Exhibit 1)

2. The Commanding Officer, LT [E] does not believe SN [H] had a vendetta against BM2 [M] or any reason to try to get her in trouble. (Exhibit 2)

3. BM2 [M] told SN [H] that she had sex with MKC [Applicant] after MKC [Applicant] and BM2 [M] spent an evening together at [redacted] in October 2019. (Exhibit 1)

4. MKC [Applicant] asked excessive questions about a picture in which BM2 [M] was with SN [H's] boyfriend, SN [P]. He asked why he was not invited. He asked SN [P] what occurred the evening the picture was taken. The first time MKC [Applicant] saw SN [P] in person after the picture was taken, he asked him if he had sex with BM2 [M]. (Exhibit 1, 8)

5. At restaurant in [redacted] in late February 2020, SN [H] saw BM2 [M] and MKC [Applicant] touching each other's arms, shoulders, and back. She also saw the two hugging. (Exhibit 1)

6. SN [H] often heard BM2 [M] say "I love you" while on the phone with MKC [Applicant]. One particular time was at the McDonalds in [redacted]. (Exhibit 1)

7. On 23 February, 2020 SN [H] went out with BM2 [M] and MKC [Applicant] to meet MKC [Applicant's]

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<sup>6</sup> The copy of the Article 31(b) presented to the Board was a poor copy of a copy that was difficult to read, however, the Board believes that April 8, 2020 was the date the applicant signed and acknowledged his rights.

children. SN [H] ended up watching MKC [Applicant's] children the majority of the evening while MKC [Applicant] and BM2 [M] spent their time focusing on one another. (Exhibit 1, 5)

8. All persons interviewed with the exception of MKC [Applicant], BM2 [M], and SN [P] stated that the two would often leave and return to the ship at or around the same time. (Exhibits 1-5)

9. MKC [Applicant] was seen walking to work from [redacted] on numerous occasions despite the fact that he lived nowhere close. BM2 [M] lives in [redacted]. (Exhibit 3, 4)

10. MKC [Applicant] and BM2 [M] were frequently observed with each other both on and off the ship. (Exhibit 1-5)

11. BM2 [M] was sitting too close to MKC [Applicant] while the two were working on MKC [Applicant's] Warrant Officer package on the mess deck. They were sitting so close they were touching one another. (Exhibit 1, 3)

12. MKC [Applicant] told BM2 [M], without consulting anyone, she could stand a three hour watch on the bridge despite the fact the watches are always four hours. (Exhibit 5)

13. MKC [Applicant] and BM2 [M's] skype and email conversations were professional in nature and did not contain anything inappropriate. Neither of them were issued a government phone.

14. When the CGC [redacted] CO, LT [E] told MKC [Applicant] that he was not going to recommend him for Warrant Officer due to alleged neglect of required ship's maintenance, MKC [Applicant] said something to the effect of: If I'm going down, you and everyone else on this ship better get their ducks in a row and if you're coming for me, I'm coming for you. (Exhibit 2, 6)

15. LT [E] did not know if what MKC [Applicant] said was an actual threat, but he wanted to get MKC [Applicant] off of the ship due to both the alleged inappropriate relationship and MKC [Applicant's] statement. LT [E] also got a hotel off of the ship that night. He stated he did not know what MKC [Applicant's] intentions were, but he wanted to be smart about the situation by taking preemptive measures to be safe. (Exhibit 2)

16. MKC [Applicant] stated he was not making a physical or career threat. He said he was very upset and frustrated and was "blowing off steam." (Exhibit 6)

### OPINIONS

1. MKC [Applicant] and BM2 [M] were in an inappropriate relationship while stationed together on an afloat unit and violate[d] Article 92(2) of the UCMJ based on the finding of facts. (Findings 1-12)

2. MKC [Applicant] showed disrespect towards a superior commissioned officer. (Finding 14)

3. Based on the lack of evidence combined with the fact that LT [E] was unsure what MKC [Applicant] meant by his statements, I do not believe that MKC [Applicant] communicated threats to anyone at any time. (Finding 15, 16)

### RECOMMENDATIONS

1. MKC [Applicant] and BM2 [M] should both be charged with violating Article 92 (2), UCMJ, Failure to Obey an Order or Regulation by having an inappropriate relationship with one another while serving onboard an afloat unit together. I recommend this matter be disposed of at Captain's Mast. The evidence collected satisfies the elements of the charge contained in Findings 2-12. (Exhibits 1-5, 7); *see also* (Opinion 1)

2. MKC [Applicant] should be charged with violating Article 89, UCMJ, Disrespect Toward a Superior Commissioned Officer. I recommend this matter be disposed of at Captain's Mast. The evidence collected satisfies the elements of the charge contained in Finding 14. (Exhibit 2, 6 ); (Opinion 2)

3. I recommend that MKC [Applicant] not be charged with violating Article 115, UCMJ, Communicating Threat. The evidence collected does not satisfy all the elements of the charge contained in Findings 14, 15, 16. (Exhibit 2, 6); (Opinion 3)

On May 8, 2020, the applicant received a negative Page 7 for his engaging in an unacceptable inappropriate relationship with a second class petty officer. CAPT K stated that an investigation into the applicant's conduct concluded that he spent an excessive amount of time with the petty officer and his focus on the petty officer created a perception of favoritism, to the detriment of other members aboard the cutter. CAPT K admonished the applicant and reminded him that his conduct was unacceptable, contrary to policy, and demoralizing to the other members of the crew. The applicant was directed to avoid even the appearance of impropriety by maintaining only professional, impartial relationships in the workplace, as is expected of a Chief Petty Officer.

On May 11, 2020, the applicant signed his Acknowledgment of Rights wherein he was notified that his CO was considering imposing NJP on the applicant for violations of Article 89 – Disrespect Toward a Commissioned Officer and Article 108 – Military Property of the United States: Loss, Damage, Destruction, or Wrongful Disposition. The applicant signed in acknowledgement and demanded trial by court-martial.

On May 11, 2020, the applicant was presented with NJP Report of Offense and Disposition wherein he was notified that his CO was seeking NJP and wherein he was accused of having violated Article 89 – Disrespect Toward a Commissioned Officer and Article 108 - Military Property of the United States: Loss, Damage, Destruction, or Wrongful Disposition. The applicant signed the Report of Offense and Disposition and refused NJP and requested trial by court-martial.

On May 12, 2020, the applicant's Sector CO, CAPT K, submitted a memorandum wherein he requested that the applicant be permanently relieved for cause. The memorandum is summarized below:

1. In accordance with reference (a),<sup>7</sup> I recommend that you permanently relieve MKC [Applicant's Full Name] for cause, for unsatisfactory conduct and the dereliction in the performance of his duties and responsibilities.
2. This action follows the findings of two administrative investigations that revealed unsatisfactory conduct and dereliction of duty leading to my loss of confidence in MKC [Applicant's First Name] judgement and ability to serve in a position of command.
3. I have reviewed MKC [Applicant's Last Name] statement dated 02 April 2020, and have taken his comments into consideration. However, after thorough review of the investigations and careful consultation with my staff, I recommend that he be permanently relieved for cause.
4. MKC [Applicant's Last Name] was provided legal counsel by CDR [K], CG-[redacted].

On May 12, 2020, the applicant submitted a memorandum wherein he acknowledged receipt of notification of his CO's request for his permanent RFC.

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<sup>7</sup> Military Assignments and Authorized Absences Manual, COMDTINST M1000.8 (series).

On May 18, 2020, the applicant submitted a statement wherein he objected to his permanent RFC, accepted responsibility for losing his temper with his CO, and contested the reasons for his RFC. According to the applicant, the discrepancies that were found on his cutter could be attributed to the high operational tempo of operating an 87' patrol boat in that area, the lack of readily available maintenance assistance and parts for the cutter, and the extended transit from one port to the next. The applicant requested that he be taken to NJP, where he would accept responsibility for his poor conduct, but then be allowed to transfer during the summer as previously scheduled, without the stigma of a RFC. The applicant also contested the wording in his NJP accusing him of neglecting the cutter from June 2017 through March 2020. The applicant recited many of the same arguments and claims in his April 2, 2020 objection and will therefore not be summarized here.

On June 3, 2020 the applicant received a negative Page 7 for his role in the erosion of his cutter's material condition. The applicant's CO, LT E, stated that the applicant failed to properly oversee the cutter's maintenance program, and his dereliction of duty led to \$494,000 in unforeseen maintenance and a two week dry dock delay to the entire 87' fleet. LT E further admonished the applicant for the disrespectful language the applicant directed at him, a commanding officer. LT E stated that the applicant's disrespectful language violated the Coast Guard's Core Values and respect for authority expected from all military members. Finally, LT E stated that credible evidence established, by a preponderance of the evidence, that the applicant violated Articles 89 – Disrespect Toward a Superior Officer and 108 – Military Property of the United States, Loss, Damage, Destruction, or Wrongful Disposition of the UCMJ. LT E informed the applicant that his commission of these serious offenses would result in Direct Access entry of "Not Recommended" for advancement and that he would not receive his CO's recommendation for reenlistment, would be ineligible to reenlist, and was not entitled to a reenlistment board.

On June 4, 2020, CAPT M from EPM issued a memorandum wherein he approved the applicant's CO's request to permanently relieve the applicant for cause. CAPT M stated that the applicant's permanent RFC should be documented on a negative Page 7 and that a permanent relief for cause EER be completed.

On August 21, 2020, the applicant received and signed his RFC EER wherein he received a mark of "Unsatisfactory" conduct for his failure to adequately perform his duties as EPO, disrespectful conduct towards his CO, and engaging in an inappropriate relationship with a junior enlisted member. The applicant also received a two marks of 2 for "Quality of Work" and "Accountability/Responsibility," two marks of 3 for "Respect for Others" and "Chief's Mess Leadership," and one mark of 4 for "Effective Communication." Finally, the applicant received a mark of "Not Recommended" for advancement due to unacceptable performance and conduct as current paygrade. The EER also stated that the applicant was not recommended for reenlistment.

On September 24, 2020, the applicant signed a Separation Page 7 wherein he was notified that on September 21, 2020 a reenlistment interview was conducted and it was determined that pursuant to Article 1.B.4.b. of the Enlistment, Evaluations, and Advancements Manual, COMDTINST M1000.2, the applicant did not meet reenlistment eligibility requirements outlined in Article 1.E.2. of the Military Separations Manual, COMDTINST M1000.4. The applicant also failed to receive his CO's recommendation for reenlistment because the CO found that the

applicant had been derelict in his duties as his cutter's Engineering Petty Officer, he engaged in an inappropriate relationship with a fellow crewmember, and because he directed disrespectful language toward his CO. The applicant was informed that because he did not meet reenlistment eligibility requirements and because he failed to secure his CO's recommendation for reenlistment, the applicant was not entitled to a reenlistment board. Finally, the applicant was informed that a memorandum would be submitted to the Commander of PSC to discharge the applicant upon the expiration of his current enlistment. The applicant elected to submit a statement for consideration to accompany the memorandum to PSC.

On October 1, 2020, the applicant submitted a personal statement wherein he requested the opportunity to reenlist for another four years. The relevant portions of the statement are recorded below:<sup>8</sup>

1. I respectfully request the opportunity to re-enlist in the United States Coast Guard for 4 years. I recognize that my actions have fallen short of what was expected of me. If the Coast Guard will allow me to re-enlist, I would like to voluntarily reduce to E-6 as a means of holding myself accountable, and in recognition of my past failures.

...

4. I made a mistake. I violated article 89, 92, and 108 of the UCMJ as stated on the 3307's and I take full responsibility for my actions. As much as I do not agree with Article 108 and how it got "investigated" and the monetary value has changed twice on the paperwork that I received, I was the Engineering Petty Officer on board, and I am responsible for the safety of my crew. But I am also human, not perfect, and never will be. My mistake does not portray the real me, the real Chief. The Chief that I am since the moment I received those anchors. I made sure that every member was taken care of, their families were taken care of and that everyone felt safe at work. The Chief that has been recommended for advancement year after year. Endorsed for Warrant Officer year after year, and passed every Coast Guard Inspection as an EPO. This was the first mistake in my entire career, one that will never take place again, and I am truly sorry for my actions.

On October 27, 2020, a Commander with EPM, CDR K, approved the applicant's reduction in rank in exchange for the applicant being allowed to reenlist. CDR K encouraged the applicant to take full advantage of this opportunity to continue on with his Coast Guard career. The voluntary reduction from MKC/E-7 to MK1/E-6 was effective the date of CDR K's electronic signature.

### VIEWS OF THE COAST GUARD

On November 30, 2022, a judge advocate (JAG) for the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC recommended that the Board deny relief based on a lack of evidence that an error or injustice occurred. PSC stated that the applicant's Sector conducted two investigations into alleged misconduct and determined that the applicant had committed the offenses alleged. PSC argued that the applicant signed two negative Page 7s acknowledging his misconduct and RFC after having received legal counsel. Furthermore, PSC argued that the Miranda/Tempia rights signed by the

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<sup>8</sup> The applicant included in his statement many of the same arguments as he presented to this Board. Accordingly, for efficiency the applicant's arguments regarding the errors of the investigations and conclusions will not be summarized here.

applicant addressed the elements that the applicant was found in violation of at the time, despite the fact that the original Article 92 violation was later changed to Article 108. PSC noted that the applicant acknowledged these facts when he signed his Acknowledgement of Rights and Report of Disposition on May 11, 2020.

Regarding the delay in finalizing the applicant's RFC EER, PSC explained that policy requires that an RFC EER be submitted within 30 days of the permanent relief authority's final approval of the RFC. In the applicant's case, PSC stated that the permanent relief authority signed memorandum approving the RFC on June 4, 2020, requiring the RFC EER be completed by July 4, 2020. PSC explained that internal records show that the applicant's command first attempted to finalize the RFC EER on July 6, 2020. PSC stated that after the rating chain's submission on July 6, 2020, PSC audited the RFC EER and returned it to the applicant's rating chain due to insufficient comments. PSC explained that while the applicant's EER was signed outside of the prescribed window, it was still required to be completed and entered into the applicant's record as part of the RFC proceedings. PSC further explained that because EPM completes all finalized EERs submitted by rating chains the next business day, EPM can confirm that the applicant's rating chain took corrective action, finalized, and submitted the applicant's EER on August 19, 2020. PSC stated that although the applicant's RFC EER was initially submitted two days late and corrective action was not taken until RFC August 19, 2020, there was no substantive negative impact to the member, and policy required that the EER be submitted.

PSC explained that the applicant was reduced in rank on October 27, 2020 which triggered a Reduction EER to be completed and entered into the applicant's record on October 26, 2020. The comments for "Advancement Potential" on this Reduction EER read, "This unscheduled EER is provided due a change in Rate for SNM. Member voluntary accepted a reduction in Rate which was approved by EPM, as per 1910 Memo, dated 27OCT20. Member is retained in service but was reduced to E-6, Member meets qualification requirements for next higher grade (E7) but is not ready for advancement. Member must continue to develop leadership Capacity in order to regain command recommendation for future advancement eligibility." PSC argued that when comparing the Advancement Potential on the October 26, 2020 Reduction EER with the Advancement Potential on the September 30, 2020 EER reveals that the applicant received a mark of "Not Ready" on his September 30, 2020 EER, with comments that read in part, "...Member satisfactorily performed required duties but is currently filling a role corresponding to the next lower paygrade. Member not ready for carrying out the duties and responsibilities of the next higher grade. Member must continue to develop leadership capacity to be ready for advancement."

PSC contended that the applicant's Approving Official made it clear that the applicant was filling a role of an E-6 and that there was no contradiction between the September 30, 2020 EER and the October 26, 2020 Reduction EER. However, PSC noted that even if there had been a contradiction that would not have been a policy error. PSC explained that the Reduction EER reflected performance from October 1, 2020 through October 26, 2020. According to PSC, the rating chain was basing their assessment of the applicant on new and different information, specifically, that the applicant requested a reduction in paygrade, admitted shortcomings, and a desire to be held accountable for his past failings. PSC argued that it is entirely reasonable to expect that the Approving Official desired to observe the applicant's performance for a greater amount of time to ensure the member had fulfilled the Approving Official's expectations and pathway forward to earn a ready for advancement, specifically, to continue to develop leadership capacity.

Finally, regarding the applicant's request to be reinstated to the rank of E-7, PSC argued that the applicant submitted a statement on October 1, 2020 wherein he voluntarily requested a reduction in paygrade to E-6 "as a means of holding myself accountable, and in recognition of my past failings." PSC noted that the applicant's request was approved by EPM on October 27, 2020.

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

On December 7, 2022, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. The Chair received the applicant's response on January 17, 2023.

The applicant argued that the Coast Guard stipulates to the fact that the RFC EER was turned in two days late and was processed even later due to errors by his rating chain. According to the applicant, when Coast Guard members turn their requests in even one day late, the request is not approved, but when the Coast Guard submits something late it is acceptable.

The applicant contended that the negative Page 7 at issue reads "commission of these serious offenses" which, the applicant claimed, is a contradiction even by PSC's own wording wherein it called the applicant's offenses "infractions." The applicant claimed that this false description of his misconduct negatively affects the way future advancement boards read his record. According to the applicant, an "infraction" and "serious offense" are two different things that should be treated differently.

Regarding his claims of error and injustice regarding his Miranda/Tempia rights signed by him on April 8, 2020, the offenses he was notified of did not include Article 108. The applicant argued that PSC's claim that Article 92 was later changed to 108 was incorrect because during his signing of his rights one can clearly see that there were two investigating officers, LCDR P and LT S. The applicant stated that he only received Miranda/Tempia rights from LT S, not LCDR P. The applicant alleged that LCDR P specifically told him he was not being investigated when he was interviewed by LCDR P despite there being an investigative report. The applicant further alleged that LCDR P's investigation contained errors and misinformation that he could have corrected had he been given his Miranda/Tempia rights and informed that he was being investigated. The applicant claimed that he submitted evidence that his cutter never set a record as stated in the investigative report and he never extended a year on the cutter either. The applicant contended that although the JVI inspection did take place, LCDR P failed to mention that official JVI report was not finalized until December, just two months before the cutter was in dry dock. The applicant claimed that during LCDR P's investigation he does mention Article 108 violations, meaning the investigation from LT S could not have been changed because it did not involve him.

The applicant argued that the Coast Guard completely neglects the fact and does not even try and defend the fact that they signed official memorandums with extensive errors, including using his first name instead of his last name. Instead, the applicant stated that the Coast Guard focused on the one thing they could use, the fact that he did ask for the voluntary reduction. The applicant alleged that although he did ask for the reduction, it was only after he was put in a situation to have his entire Coast Guard career on the line against two Coast Guard Captains, he chose to finalize his career. According to the applicant, in a normal situation where he would not have had to reenlist, he would never have requested the reduction under the circumstances. The

applicant argued that a look at his record proves that he did not request that reduction due to incompetence or for failing to do his job as an E-7.

Finally, the applicant alleged that his Sector command never reviewed his record during that time, as evidenced by a log he pulled of his record. The applicant stated that as a member of the Coast Guard, he just wishes the Coast Guard would take responsibility for their mistakes.

### APPLICABLE LAW AND POLICY

The Manual for Courts Martial, Part IV (Article 92 of the UCMJ), Paragraph 18—Failure to Obey Order or Regulation, provides that:

a. *Text of statute.*

Any person subject to this chapter who—

- (1) violates or fails to obey any lawful general order or regulation;
- (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or
- (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.

b. *Elements.*

...

(2) *Failure to obey other lawful order.*

- (a) That a member of the armed forces issued a certain lawful order;
- (b) That the accused had knowledge of the order;
- (c) That the accused had a duty to obey the order; and
- (d) That the accused failed to obey the order

(3) *Dereliction in the performance of duties.*

- (a) That the accused had certain duties;
- (b) That the accused knew or reasonably should have known of the duties; and
- (c) That the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties.

The Manual for Courts Martial, Part IV (Article 89 of the UCMJ), Paragraph 15—Disrespect Toward Superior Commissioned Officer; Assault of Superior Commissioned Officer, provides that:



a. *Text of statute.*

(a) DISRESPECT.—Any person subject to this chapter who behaves with disrespect toward that person’s superior commissioned officer shall be punished as a court-martial may direct.

...

b. *Elements.*

(1) *Disrespect toward superior commissioned officer.*

- (a) That the accused did or omitted certain acts or used certain language to or concerning a certain commissioned officer;
- (b) That such behavior or language was directed toward that officer;
- (c) That the officer toward whom the acts, omissions, or words were directed was the superior commissioned officer of the accused;
- (d) That the accused then knew that the commissioned officer toward whom the acts, omissions, or words were directed was the accused’s superior commissioned officer; and
- (e) That, under the circumstances, the behavior or language was disrespectful to that commissioned officer.

The Manual for Courts Martial, Part IV (Article 108 of the UCMJ), Paragraph 43—Military Property of United States—Loss, Damage, Destruction, or Wrongful Disposition, provides that:

a. *Text of statute.*

Any person subject to this chapter who, without proper authority—

- (1) sells or otherwise disposes of;
- (2) willfully or through neglect damages, destroys, or loses; or
- (3) willfully or through neglect suffers to be lost, damaged, destroyed, sold, or wrongfully disposed of; any military property of the United States, shall be punished as a court-martial may direct.

b. *Elements.*

...

(2) *Damaging, destroying, or losing military property.*

- (a) That the accused, without proper authority, damaged or destroyed certain property in a certain way, or lost certain property;
- (b) That the property was military property of the United States;
- (c) That the damage, destruction, or loss was willfully caused by the accused or was the result of neglect by the accused; and
- (d) That the property was of a certain value or the damage was of a certain amount.

(3) *Suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of.*

- (a) That certain property (which was a firearm or explosive) was lost, damaged, destroyed, sold, or wrongfully disposed of;
- (b) That the property was military property of the United States;
- (c) That the loss, damage, destruction, sale, or wrongful disposition was suffered by the accused, without proper authority, through a certain omission of duty by the accused;
- (d) That the omission was willful or negligent; and
- (e) That the property was of a certain value or the damage was of a certain amount.

*c. Explanation.*

...

(2) *Suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of.* “To suffer” means to allow or permit. The willful or negligent sufferance specified by this article includes: deliberate violation or intentional disregard of some specific law, regulation, or order; reckless or unwarranted personal use of the property; causing or allowing it to remain exposed to the weather, insecurely housed, or not guarded; permitting it to be consumed, wasted, or injured by other persons; or loaning it to a person, known to be irresponsible, by whom it is damaged.

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

...

**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...

(2) . . . After deciding to institute the temporary RFC process, the temporary relief authority must:

...

(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 M1000.2C, provides the following guidance on unscheduled employee evaluation reports:

Article 4.C.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.

b. Performance Based. The following events require an unscheduled enlisted evaluation report, regardless of the time since the last evaluation report.

4. For Reduction in Rate. . . .

(b) When the reduction is for incompetence or at the member’s request,

[1] Complete a reduction enlisted evaluation report effective the day before the effective reduction date.

[2] Use the competencies for the rate from which reduced.

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 Coast Guard Discipline and Conduct Manual, COMDTINST M1600.2, provides the following relevant guidance on interpersonal relationships within the Coast Guard:

2.A.2.a. Professional Work Environment. Coast Guard policy is to sustain a professional work environment which fosters mutual respect among all personnel, and in which decisions affecting personnel, in appearance and actuality, are based on sound leadership principles. Commanding Officers, officers-in-charge, and supervisors are expected to provide an environment which enhances positive interaction among all personnel through education, human relations training, and adherence to core values.

2.A.2.d. Assessing the Propriety.

(3) The character of the relationship; e.g., personal, romantic, marital.

(b) Romantic relationship: Sexual or amorous relationship. (Does not involve conduct which violates reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended)).

(c) Unacceptable relationship: Inappropriate and not allowed under Service policy. Resolution normally administrative. Relationship must be terminated or otherwise resolved once recognized.

(d) Prohibited relationship: Violates reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended). Resolution may be either administrative, punitive, or both as circumstances warrant.

...

**2.A.2.f. Unacceptable Romantic Relationships.** Romantic relationships between members are unacceptable when:

- (1) Members have a supervisor and subordinate relationship (including periodic supervision of duty section or watch standing personnel), or
- (2) Members are assigned to the same small shore unit (less than 60 members), or
- (3) Members are assigned to the same cutter (see note below), or
- (4) The relationship is between chief petty officers (E-7/8/9) and junior enlisted personnel (E-4 and below), or
- (5) The relationship is manifested in the work environment in a way which disrupts the effective conduct of daily business.

Note: The nature of operations and personnel interactions on cutters and small shore units makes romantic relationships between members assigned to such units the equivalent of relationships in the chain of command and, therefore, unacceptable. This policy applies regardless of rank, grade, or position. This policy applies to Reservists in an active status, whether or not on duty.

Article 1 of the Coast Guard's Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2C, provides the following guidance on reenlistment eligibility:

**1.E. Eligibility for Reenlistment and/or Extension.** The Coast Guard offers reenlistments and/or extensions only to those members who consistently demonstrate the capability and willingness to maintain high professional standards, moral character, and an adherence to the Coast Guard's core values. *To be eligible for reenlistment, or extension of enlistment, a member must receive a positive recommendation from their commanding officer in accordance with Article 1.E.1. of this Manual, and meet the eligibility criteria listed in Article 1.E.2. of this Manual.*...Members who have eight or more years of total active duty and/or reserve military service that meet the eligibility criteria, but are not recommended for reenlistment by their commanding officer, are entitled to a reenlistment board, as outlined in Reference (c), Military Separations, COMDTINST M1000.4 (series). However, *members who do not meet the eligibility criteria are not entitled to a reenlistment board, even if they have eight or more years of total active and/or reserve military service. The procedures in Article 1.E.4. of this Manual must be followed for members who do not meet the eligibility criteria.* (Emphasis added.)

...

**2. Eligibility Criteria.** Each member must meet the basic eligibility requirements listed below during their current period of enlistment/reenlistment, including any extensions, unless an appeal is approved by Commander (CG PSC-EPM) or (CG PSC-RPM):

...

e. Have no documented offense for which the maximum penalty for the offense, or closely related offense under the UCMJ and Manual for Courts-Martial, includes a punitive discharge during the current period of enlistment. Use the following guidance to assist.

- (1) This criteria is aimed at serious offenses, analogous to those warranting the "Commission of a Serious Offense" basis for discharge identified in Reference (c), Military Separations, COMDTINST M1000.4 (series). Commission of a serious offense does not require adjudication by non-judicial or judicial

proceedings. In some circumstances, military justice action is precluded due to state or federal court proceedings, but a commanding officer may remain convinced that credible evidence establishes, by a preponderance of the evidence, that the member has committed a serious offense. In these circumstances, if warranted by the particular facts of the case, Commander (CG PSC-EPM) or (CG PSC-RPM), may determine that a serious offense has been committed, even without a judicial adjudication, and deny the member the opportunity to reenlist.

(2) An acquittal or finding of not guilty at a judicial proceeding or not holding nonjudicial punishment proceeding does not prohibit proceedings under this provision. However, the offense must be established by a preponderance of the evidence. Police reports, Coast Guard Investigative Service reports of investigation, etc., may be used to make the determination that a member committed a serious offense.

...

**4. Members Not Eligible for Reenlistment.**

...

b. Commands must also submit a memorandum to Commander (CG PSC-EPM) or (CG PSC-RPM) to discharge members who do not meet the eligibility criteria and are not recommended for reenlistment/extension by their commanding officer. The memorandum (with enclosures as required) must contain sufficient facts to establish, by a preponderance of the evidence, that the member does not meet the eligibility criteria. The member must be afforded the opportunity to submit a written statement for consideration by Commander (CG PSC-EPM-1) or Commander (CG PSC-RPM- 1).

c. Members who are discharged from the active or reserve component because they do not meet the eligibility criteria will be issued a RE-3 or RE-4 reentry code.

...

**3.A.32. Reduction in Rate.**

a. General Provisions. Reasons for Reduction in Permanent Rate. Reduction in a permanent rate may result from any one of five reasons:

...

(3) Request of the member

...

**d. Reduction in Rate upon Request of the Member.**

(1) Enlisted Member in Pay Grades E-7 through E-9. A request from a chief petty officer, senior chief petty officer or master chief petty officer for voluntary reduction in rate will be submitted to Commander (CG PSC-EPM) or (CG PSC-RPM) for action.

...

h. Personnel Data Record Entries on Reduction in Rate. When a member has been reduced in pay grade by reason of incompetency, own request, or punishment, an Administrative Remarks, Form CG-3307, entry will be made to document the reduction and filed in the member's Personnel Data Record.

...

Article 2.G of the Military Justice Manual, COMDTINST M5810.1G (January 2019), provides the following guidance on Preliminary Inquiries:

2.G.1 Initiating a Command Level Investigation. Upon determination that the alleged misconduct does not require a CGIS investigation, the commanding officer should initiate an investigation. The command may also do so if CGIS has declined to investigate, after being notified of an allegation as required under Coast Guard Investigative Service Roles and Responsibilities, COMDTINST 5520.5 (series). For allegations of sexual misconduct see Subsection 2.F.3. The authority to initiate a command-level investigation may be delegated to the executive officer.

a. This function may also be performed by the executive officer, chief of military personnel, administrative officer, or any officer or petty officer designated by the commanding officer. If designated, a civilian employee in a supervisory position may also perform this ministerial function. If the reviewer determines that an offense may have been committed and the offense is of the type for which NJP is normally imposed, he or she should designate a preliminary inquiry officer (PIO) to conduct a preliminary inquiry and fill in appropriate information on a Report of Offense and Disposition and Record of Non-judicial Punishment, Form CG-4910. See RCM 303, Preliminary inquiry into reported offenses. The commanding officer may also dismiss the matter and take no further action or take nonpunitive measures. See Chapter 1 (discussing nonpunitive measures).

...

2.G.2. Preliminary Inquiry Officer Duties.

...

c. Offense Elements. The PIO must review the description of each of the suspected offenses in Part IV, MCM, and address each of the listed elements during the inquiry.

d. Evidence Collection. The PIO must question any witnesses and collect any documents (log entries, receipts, etc.), statements, and other evidence of the suspected offenses. The PIO should obtain a signed written statement from each witness who has information about the alleged offenses. If a witness refuses to provide a written statement, the PIO should prepare a summary of the interview. It is usually recommended that the PIO not question the suspect until after collecting available evidence and questioning other witnesses. By doing so, the PIO is better prepared to interview the suspect, formulate questions, confront issues in contention and ascertain the suspect's credibility.

e. Discovery of New Offenses. The Details of Offenses block of the Report of Offense and Disposition and Record of Non-judicial Punishment, Form CG-4910 should be updated, if necessary, to reflect the evidence collected by the PIO. For example new offenses discovered by the PIO can be added. Further if the evidence supports a different offense than the one initially listed the details should be updated. See Subsection 2.G.4.

...

g. Conclusion of the Preliminary Inquiry. At the conclusion of the preliminary inquiry, the PIO must complete the Report of Offense and Disposition and Record of Non-judicial Punishment, Form CG-4910 and return the form and any supporting materials obtained during the inquiry to the executive officer. The Details of Offenses block of the Report of Offense and Disposition and Record of Non-judicial Punishment, Form CG-4910 must include the PIO's summarized opinion of what actually occurred. Also, the PIO Recommendation block as to the appropriate disposition of the matter must be completed. Though it is not required, a PIO may wish to follow Chapter 4.F., "Concluding the

Investigation”, of the Administrative Investigations Manual, COMDTINST M5830.1 (series), to report findings, opinions, and recommendations.

...

2.G.6. Rights Warning. Under Article 31(b), UCMJ, a military member suspected of an offense may not be questioned unless he or she is informed of the nature of the offense, advised that he or she does not have to make a statement, and informed that any statement made may be used as evidence. The PIO must advise the person named as the suspect of the investigation of his or her rights under Article 31(b), UCMJ, before asking that person any questions. UCMJ and Miranda/Tempia Rights, Form CG-5810E should be used. The PIO should have a separate witness sign the rights advisement and any written statement given by the suspect. If the PIO suspects that other military members have committed an offense, that person must also be advised of their rights before questioning, even if they are not the subject of the preliminary inquiry.

...

Regarding the effect of demanding court-martial in lieu of NJP, Article 2.H.3 of COMDTINST M5810.1G provides:

A demand for trial by court-martial in lieu of NJP by a member not assigned to or embarked in a vessel *does not require that charges be preferred, transmitted, or forwarded*. The determination to refer a matter to court-martial resides solely with the command and superior commanders, despite a member’s demand. NJP may not be imposed, however, while the demand is in effect. (Emphasis added.)

### 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 his Coast Guard military record. The Board finds that the applicant has exhausted his 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 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).

3. The applicant alleged that the Coast Guard committed an error and injustice when it relieved him for cause, issued him two EERs that had procedural errors, and two negative Page 7s. 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

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<sup>9</sup> 33 C.F.R. § 52.24(b).



“correctly, lawfully, and in good faith.”<sup>10</sup>

4. **Preliminary Inquiries.** The record shows that on March 3, 2020 the applicant’s CO convened a preliminary investigation to look into the poor material condition of the applicant’s cutter. On April 2, 2020, LCDR P submitted his formal Report on Investigation wherein he found that though there were mitigating circumstances that contributed to the poor material condition of the applicant’s cutter, upon arrival at dry dock the poor oversight from the applicant and his CO was a major factor. At the conclusion of LCDR P’s investigation, he recommended that the applicant be charged with Article 92 – Failure to Obey a Lawful General Order or Regulation and Article 108 – UCMJ, Damaging, Destroying, or Losing Military property, and that he be relieved of his duties due to a loss of confidence.

The record further shows that after LCDR P submitted his Report on Investigation, a second PIO was assigned, LT S, to investigate the applicant for an inappropriate relationship, dereliction of duty for his role in the poor material condition of his cutter, and for disrespecting a superior commissioned officer. On April 8, 2020, the applicant was interviewed by LT S and given his Miranda/Tempia rights, also known as his Article 31(b) warnings. These warnings included suspected violations of Article 92(2) – Failure to Obey an Order or Regulation, 92(3) – Dereliction of Duty, 89 – Disrespecting a Superior Commissioned Officer, and Article 115 – Communicating a Threat.

On April 30, 2020, upon the conclusion of the second preliminary inquiry, LT S submitted his formal Report on Investigation and found that the applicant had violated Article 92(2) of the UCMJ, Failure to Obey an Order or Regulation by having an inappropriate relationship with a BM2 who was serving aboard the same cutter as the applicant. LT S further found that the applicant disrespected a superior commissioned officer. LT S recommended that the applicant be charged with violating Article 92(2) and Article 89 and that the violations be disposed of at Captain’s Mast. On May 8, 2020, the applicant was counseled via a negative Page 7 for his inappropriate relationship with the BM2.

On May 11, 2020, the applicant was presented with the Report of Offense and Disposition, and Record of Non-Judicial Punishment (CG-4910) wherein two PIOs were listed, LCDR P and LT S. The applicant was also presented with his Acknowledgement of Rights – Acceptance of NJP wherein he was informed that he was being charged with violating Articles 89 and 108 of the UCMJ and that these charges would be disposed of at Captain’s Mast. The applicant instead demanded trial by court-martial. The following day, May 12, 2020, the Sector Commander, CAPT K, requested that the applicant be permanently relieved of his duties. This request was granted on June 4, 2020. On June 8, 2020, the applicant received a second negative Page 7 for his role in the erosion of his cutter’s material condition.

5. **Unacceptable Romantic Relationship.** The record shows that the applicant engaged in an unacceptable prohibited relationship when he entered into a sexual relationship with a member of the same cutter. The applicant did not dispute this relationship but argued that it was permitted under Coast Guard policy. According to the applicant, his relationship with the BM2

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<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).

was reasonable and necessary because the cutter was only an eleven man crew, the BM2 was a department head, and because the two had to have a close working relationship with an open line of communication at all times in order to keep the cutter operating. The Board is not persuaded by the applicant's arguments.

Article 2.A.1.e. of the Coast Guard Discipline and Conduct Manual, COMDTINST M1600.2, states:

By long standing custom and tradition, commissioned officers, including warrant officers, have leadership responsibilities extending across the Service. Likewise, chief petty officers (E-7 to E9) have a distinct leadership role, particularly within their assigned command. Both provide leadership not just within the direct chain of command, but for a broader spectrum of the Service. Due to these broad leadership responsibilities, relationships involving officers or chief petty officers merit close attention.

Article 2.A.2.d.3.c. of the same manual defines an Inappropriate Unacceptable Relationship as one that is not allowed under Service policy with resolution normally being administrative in nature. This same article states that the relationship, once recognized, must be terminated or otherwise resolved. Finally, Article 2.A.2.f. of COMDTINST M1600.2, states that romantic relationships between members are unacceptable when:

- (1) Members have a supervisor and subordinate relationship (including periodic supervision of duty section or watchstanding personnel), or
- (2) Members are assigned to the same small shore unit (less than 60 members), or
- (3) Members are assigned to the same cutter (see note below), or
- (4) The relationship is between chief petty officers (E-7/8/9) and junior enlisted personnel (E-4 and below), or
- (5) The relationship is manifested in the work environment in a way which disrupts the effective conduct of daily business.

At the time of the inappropriate relationship, the applicant was a Chief while the female member was an E-5 and both were members of the same cutter, which was in violation of Article 2.A.2.f.3. of COMDTINST M1600.2. Upon completion of the administrative investigation, the applicant's CO found that a preponderance of the evidence established that the applicant had engaged in an inappropriate and prohibited relationship. Likewise, Article 2.A.1.e. specifically identifies E-7s as having a distinct leadership role, particularly within their assigned command. The applicant's attempt to justify his misconduct by noting the cutter's small crew size highlights his lack of understanding or appreciation for his leadership role on the cutter. The fact that the applicant's cutter was so small is exactly what made his conduct all the more egregious under Coast Guard policy. The applicant's violation of this policy resulted in him also violating Article 92(2) of the UCMJ because he violated or failed to obey any lawful general order or regulation. Accordingly, the Board finds that the applicant engaged in an inappropriate relationship with a junior member of his crew, in violation of Coast Guard policy and Article 92(2) of the UCMJ.

6. **RFC.** The applicant alleged that his RFC was erroneous and unjust because he was not the reason for his cutter's poor material condition, he was removed from his primary duties while the CO was not, and because there were administrative errors committed by the Coast Guard. For the following reasons, the Board disagrees:

- a. Poor Material Condition. The applicant contended throughout his application that the investigation into the material condition of his cutter was erroneous and unjust because he was not the reason for the cutter's poor material condition. In an attempt to establish that an error or injustice occurred, the applicant posed several questions throughout his application as proof that the investigation and its ultimate findings were erroneous and unjust. However, the questions raised by the applicant to this Board do not prove or establish error or injustice and without more, the Board cannot ignore the findings as presented by the PIOs that led to the applicant's RFC. This Board is not an investigative body and therefore must rely on investigations conducted by individuals vested with the authority and training to investigate. In this case, it was the two PIOs assigned by the applicant's CO. These trained investigators, after conducting multiple interviews and reviewing evidence, concluded that the applicant was a major contributing factor in the poor material condition of the cutter. The Board finds the PIOs Reports on Investigations persuasive and without more is unwilling to ignore the results of the investigation as presented.

Although the applicant has relied heavily on the fact that he was not to blame for the poor material condition of his cutter, the material condition was only one of three reasons for his command's request for his RFC.

- b. CO Was Not Relieved. The applicant further alleged that his RFC was erroneous because while he was removed from the cutter, his CO, who was also named as a contributor of the poor material condition of the cutter, was allowed to remain in command. However, the Board is not here to review the applicant's CO's records for error or injustice, the Board has been convened to review the applicant's. The fact that the CO may or may not have been relieved of his command is not evidence that the applicant was erroneously relieved of his primary duties. Moreover, the record shows that the applicant engaged in multiple acts of misconduct that resulted in his CO losing confidence in the applicant's ability to perform his duties as the cutter's EPO. The applicant's inappropriate relationship alone was enough to support the applicant's RFC, as well as his veiled threat to his CO. Throughout his application, the applicant has completely ignored, almost in its entirety, his inappropriate and prohibited relationship with a member of his crew. Moreover, the record shows that the applicant had much more experience with cutter maintenance than the CO. The applicant's additional UCMJ violations and many years onboard a cutter could have been the reason he was relieved for cause but the CO was not.
- c. The applicant alleged that his RFC was erroneous and unjust because the Coast Guard committed several administrative errors. However, other than his contention with the conflicting date stamps on the Request for RFC and the RFC Approval memorandums, the applicant has failed to point to specific regulations or errors regarding the RFC that rendered the RFC erroneous or unjust. The applicant's reliance on Article 1.A.8. of the Coast Guard's Correspondence Manual, COMDTINST M5216.4D, is unpersuasive and does not show how the contradicting dates stamps prejudiced him or rendered the entirety of the RFC erroneous. First, Article 1.A.8. of COMDTINST M5216.4D does not state the date stamp "must" be the same day as the signature as alleged by the applicant. This Article states, "Type or stamp the date on the same day that correspondence is signed." This

manual is a set of guidelines, not mandates, aimed at unifying Coast Guard correspondences, as evidenced by the manual's introduction. The introduction to this manual specifically acknowledges that correspondence routing may be complex and a chain of command may impose communication preferences for a diversity of mission and mission support ideas. The Correspondence Manual goes on to say, "Not every example of correspondence is provided within, and ultimately good judgment of the writer should be demonstrated."

7. **Mirand/Tempia Rights**. The applicant alleged that he was not read his rights regarding allegations of violating Article 108 of the UCMJ. Article 31(b) rights, Article G.6. of the Military Justice Manual, COMDTINST M5810.1G (January 2019), states:

Under Article 31(b), UCMJ, a military member suspected of an offense may not be questioned unless he or she is informed of the nature of the offense, advised that he or she does not have to make a statement, and informed that any statement made may be used as evidence. The PIO must advise the person named as the suspect of the investigation of his or her rights under Article 31(b), UCMJ, before asking that person any questions. UCMJ and Miranda/Tempia Rights, Form CG-5810E should be used. The PIO should have a separate witness sign the rights advisement and any written statement given by the suspect. If the PIO suspects that other military members have committed an offense, that person must also be advised of their rights before questioning, even if they are not the subject of the preliminary inquiry.

Here, at the time of the first investigation the applicant was not suspected of having violated Article 108 of the UCMJ. There is no evidence that the applicant was suspected of having committed any offense that would have subjected him to criminal proceedings. Furthermore, he was not the subject of the investigation as required by Article G.6. of COMDTINST M5810.1G. The investigation was initiated to uncover the reasons behind the poor material condition of the cutter. It was the cutter, not the applicant, that was the focus of the investigation. The PIO had no way of knowing if the material condition was the result of the applicant's willful neglect or for some other reason outside the control of any one person. The fact that the applicant, in addition to his CO, were ultimately named as the individuals responsible for the cutter's poor material condition, does not entitle the applicant to Article 31(b) rights. It was only after the investigation was completed that the Coast Guard determined that the applicant had violated Article 108 of the UCMJ.

However, the same is not true for the second investigation. Upon the initiation of the second investigation, the applicant was suspected of having violated multiple articles of the UCMJ. Accordingly, prior to questioning the applicant, the second PIO, LT S, formally presented the applicant with his Article 31(b) rights specific to the allegations he was suspected of having violated—Articles 89, 92(2), 92(3), and 115. Accordingly, the Board finds that the applicant was not entitled to Article 31(b) rights issued to him prior to the first investigation.

8. **Reenlistment Board**. The applicant alleged that it was erroneous and unjust for his CO to deny him a reenlistment board because he had more than eight years of service. However, the applicant's contentions are misplaced. The record shows that the applicant engaged in an inappropriate relationship in violation of Article 92(2) of the UCMJ. The record further shows that the applicant was a leading contributor to the poor material condition of his cutter in violation of Article 108 of the UCMJ. Finally, the record shows that the applicant made veiled threats to his CO stating something to the effect, "if you're coming for me, you and everyone else better get

their ducks in a row, because if you're coming for me, I'm coming for you" in violation of Article 89 of the UCMJ. Article 1.E. of the Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2A, states "To be eligible for reenlistment, or extension of enlistment, a member must receive a positive recommendation from their commanding officer in accordance with Article 1.E.1. of this Manual, and meet the eligibility criteria listed in Article 1.E.2. of this Manual." Article 1.E.2.e. of the same manual outlines the reenlistment eligibility criteria, one of which states that in order to be eligible to reenlist, the service member must have no documented offenses for which the maximum penalty for the offense, or closely related offense under the UCMJ or Manual for Courts-Martial, includes a punitive discharge during the current period of enlistment. In this instance, the preponderance of the evidence shows that the applicant's offenses had a maximum punishment of a dishonorable discharge. Accordingly, these incidents rendered the applicant ineligible to reenlist under Article 1.E.2.e of COMDTINST M1000.2A, and ineligible for a reenlistment board, regardless of his more than eight years of service. Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that his CO erroneously and unjustly denied him a reenlistment board.

9. **Failure to Initiate Court-Martial.** The applicant also contended that he had a right to court-martial in order to defend himself and present evidence. He argued that the Coast Guard circumvented his due process rights when it denied him the right to defend himself before a court-martial. However, the applicant's contentions are misplaced. Rule 306(a) of the Rules for Courts-Martial (R.C.M.), states, "Each commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense." Further, COMDTINST M5810.1G, Article 2.H.3. specifically provides that "[a] demand for trial by court-martial in lieu of NJP . . . *does not require that charges be preferred, transmitted, or forwarded.*" (Emphasis added.) The applicant's CO was not required to dispose of the applicant's case through court-martial or NJP. Article 1(d)(2) of Part V of the R.C.M. states, "A commander who is considering a case for disposition under Article 15 will exercise personal discretion in evaluating each case, both as to whether nonjudicial punishment is appropriate, and, if so, as to the nature and amount of punishment appropriate." In accordance with Article 2.H.3 of COMDTINST M5810.1G, "the determination to refer a matter to court-martial resides *solely* with the command and superior commanders, *despite* a member's demand." (Emphasis added.) Again, policy grants the CO discretion when choosing the appropriate disposition for a member. Initiating a court-martial is not mandatory, regardless of the applicant's request for one. The only thing the command could not do following the applicant's demand was impose NJP.<sup>11</sup>

Here, as outlined in the above-referenced policy, and despite the applicant's contentions to the contrary, he was not entitled to a court-martial under Rule 306 of the R.C.M. or Article 1(d)(2) of Part V of the R.C.M. Coast Guard policy gives discretion to COs on how to dispose of offenses within their command, but does not require any specific action be taken. The Coast Guard has many avenues available to it in which to effectively and efficiently dispose of misconduct committed by its service members, including court-martial, Captain's Mast, and administrative remedies. The record shows that the applicant's CO decided that court-martial proceedings were not appropriate and elected instead to pursue administrative measures, such as allowing his enlistment to expire. The applicant has not proven by a preponderance of the evidence that his

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<sup>11</sup> COMDTINST M5810.1G, Art. 2.H.3.

CO's failure to convene a court-martial was erroneous or unjust.

10. **Page 7s.** The applicant alleged that his May 8, 2020 and June 4, 2020 negative Page 7s are erroneous and unjust because the preexisting text contained on the Page 7 states that the Page 7 is for UCMJ "infractions" not for "serious offenses" as described by his CO. The applicant further alleged that serious offenses are automatically taken to court-martial and he never was. The applicant's contentions are a distraction that deflect from the severity of his misconduct and the facts of his case, by placing an unwarranted significance on the term "infractions" vs "serious offense." Black Law's Dictionary defines infraction as "A breach, violation, or infringement; as of a law, a contract, a right or duty." Here, the applicant violated a law and a duty. The fact that the applicant views his misconduct as a minor infraction compared to a serious offense does not make it so and the boiler plate wording of the Page 7 does not render the usage of the administrative remarks page to document his misconduct erroneous or unjust. The fact is, pursuant to the UCMJ and Article 1.B.17.b.3. of the Military Separations Manual, COMDTINST M1000.4, the applicant's misconduct was considered to be the commission of a serious offense because the maximum penalty for the offense under the UCMJ and Manual for Courts-Martial included a punitive discharge. As outlined in Finding 7 above, and pursuant to Rule 306 of the R.C.M. or Article 1(d)(2) of Part V of the R.C.M., Coast Guard commands have broad discretion as to how they dispense of misconduct, and in this instance, the applicant's command chose to document the misconduct in two negative Page 7s, rendering him ineligible to reenlist. Furthermore, as outlined in Finding 7 above, the applicant's misconduct, though considered a serious offense, was not required to be adjudicated by a court-martial as alleged by the applicant.

11. **Reduction in Rate.** The applicant alleged that his reduction in rate was not truly "voluntary" because he was threatened to submit the voluntary reduction. According to the applicant, "By not requesting this reduction I would have never received the CO's endorsement to re-enlist and I would have had to leave the Coast Guard." The Board finds the applicant's claims unpersuasive and unsupported by the facts and policy in this case. The record shows that the applicant was informed on September 24, 2020 that not only had he not met reenlistment eligibility criteria, but he had also failed to secure his CO's recommendation for reenlistment. A week later, on October 1, 2020, after having already learned that he had failed to secure his CO's recommendation for reenlistment, he still submitted a personal statement wherein he requested a reduction in rate in order to "hold himself accountable" for his past mistakes and to secure the chance to reenlist. The applicant's claim that his submission was not voluntary but compulsory in order to secure a recommendation for reenlistment is simply not supported by the record in this case. The record is clear, the applicant submitted his request to be reduced in rank after having already learned he failed to secure a recommendation for reenlistment.

Moreover, pursuant to Article 1.E. of COMDTINST M1000.2C, in order for the applicant to have been eligible for reenlistment he had to receive a positive recommendation from his CO AND meet reenlistment eligibility criteria. It was not one or the other, but both. Even with a positive endorsement from his CO, the applicant was still ineligible to reenlist so the command had no reason to coerce the applicant into submitting a voluntary request to be reduced in rank for the benefit of remaining in the service. Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that his reduction in rate was not voluntary.

12. **EERs.** The applicant alleged that his EERs are erroneous and unjust because they were submitted late and because they contain false statements. For the following reasons, the Board disagrees:

- a. **Delayed EER.** According to the applicant, his RFC EER should be removed from his record because the Coast Guard submitted the EER two days late. However, the applicant has failed to show how this delay prejudiced him. Moreover, the applicant was relieved of his primary duties on June 4, 2020 and Coast Guard policy required that the RFC EER be submitted within 30 days of the RFC, or July 4, 2020, a federal holiday. However, July 4, 2020 fell on a Saturday, meaning the holiday was observed the day before on July 3, 2020. Therefore, the federal government, including many of the Coast Guard administrative staff within PSC, would have been off on that Friday and that Saturday. The record shows that Coast Guard PSC processed the applicant's RFC EER as soon as reasonably practical thereafter on Monday July 6, 2020 following the national holiday. The applicant has failed to point to one Coast Guard policy or regulation, and the Board could find none, that rendered this EER erroneous and unjust on its face due to the two day delay in processing. Accordingly, the applicant has failed to prove, by a preponderance of the evidence, that the EER was erroneous and unjust and should be removed from his record.
- b. **False Statements.** The applicant alleged that his EERs should be removed because they contained comments that were factually untrue. Specifically, the applicant contended that his EER stated that he was counseled for his inappropriate relationship, but he was never counseled as alleged. The applicant contended that having false statements in his EER can result in future supervisors believing he does not follow guidance or regulations. The record shows that the applicant was notified on March 27, 2020 that he was temporarily being relieved of his duties due to his CO's loss of confidence. Although the poor material condition was one of the causative factors that led to the temporary RFC, it was also the applicant's inappropriate relationship with a one of his crewmembers. The applicant alleged that he was not counseled for his inappropriate relationship, but he was counseled and admonished for the inappropriate relationship via his March 27, 2020 temporary RFC. Although the applicant did not receive a negative Page 7 for the inappropriate relationship until May 8, 2020 that does not mean the applicant was not verbally counseled prior to that date. At the very least, the applicant was counseled in his March 27, 2020 temporary RFC.

The applicant's contention that this false statement prejudices him because it can result in future supervisor's believing he does not follow guidance or regulations is unpersuasive because the records show that the applicant failed to follow guidance and regulations. Even without this statement contained in his EER, the applicant's inappropriate relationship as documented in his temporary RFC and negative Page 7 alone are enough to put future supervisor's on notice that the applicant failed to follow Coast Guard guidance and regulations. The one comment in the EER, even if removed would do little to assuage future supervisors that the applicant had not engaged in an inappropriate relationship.

13. The applicant made varied allegations and arguments throughout his application for relief. Those allegations 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.<sup>12</sup>

14. For the reasons outlined above, the applicant has not met his burden, as required by 33 C.F.R. § 52.24(b), to overcome the presumption of regularity afforded the Coast Guard that its administrators acted correctly, lawfully, and in good faith.<sup>13</sup> He has not proven, by a preponderance of the evidence, that the Coast Guard erred when they relived him of his primary duties as the cutter's EPO, issued him two negative Page 7s, and issued a RFC EER and a Reduction in Rate EER in his record after he was found to have committed several serious offenses as outlined in the UCMJ.

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

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<sup>12</sup> 33 C.F.R. § 52.24(b); *see Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that “appear frivolous on their face and could [not] affect the Board's ultimate disposition”).

<sup>13</sup> *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).



**ORDER**

The application of EM1 [REDACTED] [REDACTED] USCG, for correction of his military record is denied.

September 12, 2024

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