DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-061

[redacted]

DECISION OF THE DEPUTY GENERAL COUNSEL
AS THE OFFICIAL WITH DELEGATED AUTHORITY TO TAKE FINAL ACTION ON BEHALF OF THE SECRETARY OF THE U.S. DEPARTMENT OF HOMELAND SECURITY

In reviewing the record of the proceedings before the Board for Correction of Military Records, I have determined that the Board has committed a procedural error. The procedural error in the proceedings before the Board stands as an unfortunate irony in that the error in Board proceedings resulted in the very same effect – a denial of information to the Applicant – that the Board found as "an injustice that shocks [its] sense of justice."

In the proceeding before the Board, the Board requested information from the Coast Guard pursuant to 33 C.F.R. § 52.43(b). The information provided to the Board by the Coast Guard pursuant to that request contained information that the Coast Guard previously withheld from the Applicant. The withholding of this information by the Coast Guard formed the basis for the Board concluding that the treatment by the Coast Guard "shocks the sense of justice." Had the Coast Guard determined at the time of the Board's request for this information that the information constituted "classified, privileged, or sensitive information," 33 C.F.R. § 52.43(c), the Coast Guard should have also provided the Board with an appropriately redacted version of that information. Id. The Coast Guard did not, however, provide a redacted version to the Board.

Under 33 C.F.R. § 52.43, the Board should have provided a copy to the Applicant of the information it received from the Coast Guard pursuant to the Board's request under § 52.43(b). (The applicable regulatory provision calls for the Board to provide a redacted copy to the Applicant when the Coast Guard provides a redacted version, but that is not relevant here because the Coast Guard did not provide a redacted version.) Despite this requirement, the Board did not provide the information to the Applicant. The Board erred in this regard, denying the Applicant the very information that it determined the Coast Guard should have provided.

The irony of the Board's procedural error, problematic in itself, is further punctuated by its decision to decline the Applicant's request for a hearing. In this case the Board concluded that the Coast Guard did not provide the Applicant with sufficient process; yet the Board denied a request to hold a hearing. In cases in which the Board suspects it may find a procedural problem that shocks its sense of justice, the Board should carefully consider whether to grant requests for procedural mechanisms such as a hearing as provided for by regulation. See 33 C.F.R. § 52.51.

Determining the consequence of the procedural error occurring in the proceedings before the Board poses a difficult problem. Ordinarily, a procedural error of this type would be remedied by vacating the Board's opinion and order and providing an instruction to conduct further proceedings after curing the procedural error. That is not possible in this case, however, because there exists a statutory deadline that demands final agency action not later than ten months after the Board receives a complete application. See 14 U.S.C. § 425; 33 C.F.R. § 52.26.

The Board in this case issued a recommended decision granting partial relief. Upon reviewing the opinion supporting that decision, it is clear that the reasoning of the Board, as it concerns the level of disclosure required by the Coast Guard, contains a number of errors. In short, the Board would hold the Coast Guard to a standard of disclosure above that required by the applicable law and the exercise of appropriate discretion. The level of disclosure to the Applicant, according to the Board, shocks the sense of justice. This conclusion is not an appropriate exercise of discretion in the management of the Coast Guard. The Board should not in future matters rely upon its reasoning in this matter.

Given this circumstance – a circumstance involving faulty reasoning by the Board in its decision coupled with procedural flaws in the Board's proceedings – the statute limiting the time for final agency action leads to allowing the order of the Board to stand in the limited context of my review. It would be preferable to explore the errors in the Board's reasoning through a detailed written opinion and also to remand this matter to the Board to correct the significant procedural error that occurred before it; the time allowed under the applicable statute and the timing of the proceedings that have led to the deadline today, however, prevent this course. In this narrow context, I will not disturb the Order of the Board.

The Board is directed, however, not to rely in future cases upon the reasoning (as it concerns the level of disclosure required by the Coast Guard) in its decision.

Date: 11/5/07

[redacted]
Deputy General Counsel
U.S. Department of Homeland Security

DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

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[redacted]

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on January 12, 2007, upon receipt of the completed application, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 20, 2007, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his record by removing all references to his relief for cause, including an administrative remarks (page7) entry dated January 20, 2006 and a special employee review dated December 23, 2005, as well as a performance evaluation dated January 27, 2006.[1] He further requested to be paid officer-in-charge (OIC) special duty assignment pay (SDAP) from the date of his relief for cause to the present. Last, the applicant requested that his OIC qualification codes, rescinded pursuant to the relief for cause, be reinstated. (Enclosure 1, Tab A)

SUMMARY OF THE RECORD

The applicant enlisted in the regular Coast Guard on September 19, 1995. After various assignments and advancement to chief [redacted] he was assigned as OIC of Station [redacted] on July 28, 2005. (Enclosure 1, Tab A) On September 26, 2005, the Deputy Sector Commander ordered an informal investigation into allegations that the applicant, as OIC, created a hostile work environment by making derogatory comments to members of the crew and that the applicant had transferred personally owned furniture in a government-owned vehicle during work hours for his personal use. Lieutenant S____ was appointed as the investigating officer (IO). (Enclosure 4, Tab A) He submitted his report on the investigation on

[1] The military record provided by the Coast Guard did not contain a January 27, 2006, performance evaluation.

October 6, 2005. (Enclosure 2, Tab B) The IO obtained 24 written statements and attached them to his investigative report. The IO found that the applicant had violated Article 92 (disobeying an order or regulation) by failing to comply with the Commandant's Human Relations Policy (COMDTINST 5350.21A),[2] the Commandant's Workplace Violence policy (COMDTINST 5370.1A),[3] and the Commandant's Acceptance and Accounting for Special Projects and Other Gifts to the Coast Guard from Non-Federal Sources policy (COMDTINST 5760.14). Factually, he found that the following:

> a. On separate occasions, the applicant made comments about the name of seaman (SN) W's newborn daughter, such as: "you really screwed that kid up, she is never going to be able to spell her name."
>
> b. The applicant called DC3 D___ into his office and stated "if you were not housing I would punch you." The applicant never stated what he meant, even though the DC3 asked him what he meant by the comment.
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> c. While standing watch, SN W___ and BM3 S___ received a phone call from MK1 P___. The applicant asked who was calling and SN W___ responded Petty Officer D___. The applicant took the phone and learned that it was in fact MK1 P___, at which point, the applicant stated "Does P___ sound like a big, dumb redneck?"
>
> d. MK1 P___ missed colors. The applicant sought out the MK1 and was quoted as saying: "We missed colors this morning and if we miss it again tomorrow I am going to rip your ears off."
>
> e. On or about September 15, 2005, BM3 MA___ and YN3 Py____ moved a couch from Bay Creek, a local housing community, to Station [redacted] using the Station's government vehicle during normal work hours. The couch was placed in the applicant's station berthing area. The couch was not on the Station's property list.
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> f. The applicant made numerous statements about the Station's government housing, such as "I do not give a s___ about housing."
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> g. On two separate occasions, the applicant is quoted as saying that the Station's canine mascot could eat her own feces as far as he was concerned, when asked about procuring food for the dog.

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[2] In COMDTNOTE 5354, the Commandant mandated that no Coast Guard personnel tolerate negative behavior in the workplace. "Harassment, hazing, sexist behavior, and lack of respect for others have no place in the Coast Guard" The Note further stated that "every commander, [CO], [OIC] and supervisor is to be personally committed to and responsible for fair and equal treatment of all Coast Guard personnel and those with whom we interact." (Enclosure 4, Tab B)

[3] Paragraph 6.b.(3) of the COMDTINST 5370.1A (Workplace Violence and Threatening Behavior) states that threatening behavior is an individual's threat, either overt or implied, to commit an act of physical aggression or harm at the work place. Examples of such behavior included "Unusual, bizarre, or menacing behavior or statements that a *reasonable* person would interpret as carrying the potential for violent acts." [Emphasis added.] (Enclosure 4, Tab C)

h. During an all hands meeting, the applicant was quoted as saying that he wanted the names of all the petty officers who made accusations against him to a master chief.

i. The applicant read a passage from the bible to a FN during a mast proceeding.

j. The applicant stated to YN3 Py___, who was at a firing range attempting to qualify, "why can't you shoot; why would you even join the military if you can't shoot, you're basically worthless to the CG if you can't shoot."

The IO expressed his view that the current hostile environment was directly attributed to the applicant. The IO also opined that the applicant had committed the following violations:

- The applicant failed to adhere to the Commandant's Human Relations policy by not treating all unit members with respect, dignity, and compassion. Therefore, the applicant violated Articles 92 and 134 of the UCMJ.

- The applicant violated the Commandant's Workplace Violence Policy (Articles 92 and 134 of the UCMJ) by making unusual, bizarre, or menacing statements that can be interpreted as carrying the potential for violent acts.

- The applicant accepted personal property not authorized by regulation and therefore violated Articles 92 and 134 of the UCMJ.

The IO recommended that the offenses allegedly committed by the applicant be disposed of at mast and that the applicant be temporarily relieved for cause.

On October 6, 2005, the applicant's CO (Coast Guard Sector [redacted] placed the applicant under a military protective order, which directed the applicant to maintain a minimum distance of 500 yards from Station [redacted] to retreat from any members of the crew of Station [redacted] if they approached within 100 yards of the applicant; and to not have telephone, fax, or email contact with any members of the crew of Station [redacted][4] (Enclosure 1, Tab B)

On October 20, 2005, the applicant's CO recommended to Commander, [redacted] Coast Guard District that the applicant be temporarily relieved for cause because the applicant had created a hostile work environment and because of the applicant's reaction to the investigation and his failure to make drastic improvements to his leadership style despite counseling. (Enclosure 1, Tab C) The CO noted that there were two visits by two different master chiefs to

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[4] The CO does not state the basis for the issuance of the protective order. However, the investigative report contained statements from the applicant's subordinates that the applicant had stated in a meeting that he wanted the names of individuals who had reported him to the command. In particular, BM1 D___ wrote in his third statement to the investigation that on October 5, 2005, the applicant stated in a conversation with BM1 D___ that the applicant knew who was making complaints against him and that that individual had in fact held secret meetings with the crew. BM1 D____ stated that the applicant asked him to get with the crew and find out what was going on. According to BM1 D_____, the same day the applicant had asked DC3 B____ and BM3 H____ to write statements on his behalf, which according to BM1 D____ they did not want to do. BM1 D_____ subsequently informed Master Chief A____ about the applicant's inquiries.

the applicant's unit. According to the CO, it was only after the visit by the second, master chief A___, that the CO apparently decided to order an informal investigation into the command climate of Station [redacted] The CO stated in his letter to the District Commander:

> OSCM [A's] meetings with the crew resulted in a bleak appraisal of the climate at the station and led him to conclude that it would be nearly impossible for the applicant to succeed as OINC. Only after meeting with the Station Executive Petty Officer (XPO) and Engineering Petty Officer (EPO) who had indicated a strong desire to work toward success with [the applicant], did OSCM [A___] believe the problems at the station were salvageable. Unfortunately, his meeting with the applicant that same day did not instill great confidence in the OINC's ability to address the problems at the station. According to OSCM [A___], [the applicant] did not appreciate the impact of his leadership and communication deficiencies, but instead was focused on station problems that he had been trying to resolve.
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> Shortly after OSCM [A__'s] meetings, the Chief of Sector [redacted] Response Department, LCDR [C___], met with [the applicant] and the XPO and EPO. Again XPO and EPO indicated that they would work with and support [the applicant]. Despite lengthy counseling, LCDR [C___] left his meeting with [the applicant] less than convinced that he understood the severity of the current state of his unit. LCDR [C___] believed that it would be impossible for [the applicant] to succeed unless he quickly gained a better understanding of his leadership shortcomings and took significant positive steps to gain the confidence of his crew.

The CO noted that he convened an informal investigation into the command climate and recited most of the findings contained in that investigative report. The CO then stated that he had lost confidence in the applicant and recommended his temporary relief for cause, and he also noted that the applicant had lost the support of the XPO and EPO. The CO wrote that the applicant had spent an inordinate amount of time trying to identify members of the crew who contacted the District Command Master Chief and who had issues with him. "[The applicant's] attempts to rectify any misgivings he has caused and sway the opinion of the crew, although they may have been well intentioned, have been received by the crew as disingenuous," which is an indication of how bad the relationship between the applicant and the crew had become. He also noted that three experienced OICs conducted a review of the relief package and concluded that it would not be appropriate to return the applicant to the station. The CO noted that "a contributing factor to [the applicant's] failure was the fact that the entire station's command cadre (OIC, XPO, EPO) reported during the 2005 transfer season." The CO's memorandum listed the following enclosures: (1) Informal Investigation of Command Climate at Station [redacted] that listed 25 enclosures;[5] (2) Completed interview forms of Station [redacted] crew;[6] (3) October 14,

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[5] While the majority of the statements attached to the investigative report from the crew were not favorable to the applicant, others could have been interpreted as favorable. For instance, PO1 P___ wrote two statements for the investigation. Regarding the alleged comment "Does P___ sound like a big, dumb redneck," PO P___ wrote that the comment was made to him over the phone, and he believed that the applicant was only joking. He further stated that he was not offended by the comment and that he was more offended by his crew mates talking about it and telling him how he should feel about it. (Enclosure 4, Tab D) In another statement, PO1 P___stated that he was the individual to whom the applicant allegedly stated that if he missed colors again, the applicant was going to rip off

his ears. PO1 P___ wrote that he missed colors and the applicant had a right to be upset with him. He further wrote that he believed the applicant was joking and that he took it as an off-the-cuff comment. (Enclosure 4, Tab E) PO P___ wrote about the incident: "The Coast Guard Cutter [redacted] was moored to our station and [the applicant] said BMCM J____ was in his office when colors were missed. I am the duty section leader and I hold myself accountable for colors not getting done properly. So, [the applicant] should have been upset with me. I was upset with the watch stander. I felt bad that colors was late in front of another unit and by [the applicant] saying that I will always think about colors and make sure there is a color detail ready at 0800."

Also, BM1 D____ explained in a statement to the investigation that base housing was not the responsibility of the applicant but that that responsibility belonged to ISC [redacted] (Enclosure 4, Tab F)

[6] Not all of the comments on the crew investigation questionnaires were unfavorable to the applicant. The Board notes that the crew investigation questionnaire completed by DC3 B____, who served as the communications petty officer, the BCM, and the BTM, wrote that the applicant instituted a lot of policy changes, increased uniform standards, and changed the quarter's format. This individual further wrote that the applicant made an effort to increase professional development of the crew and that through the applicant's teachings, his operational knowledge had increased. In comparing the unit with the last one, DC3 B___ wrote that the XPO attempted to fix untimely, trivial issues. (Enclosure 4, Tab G)

Some of the information gleaned from the crew investigation questionnaires could have been interpreted as the crew having resentment against the applicant. For instance, BM1 D____ was the executive petty officer (XPO). In his Command Investigation Questionnaire, he wrote the following answer to the question: Following the change of command, did you make any policy changes?

> Yes; every change is driven based on how things were done on CGC [redacted] (65'); New GMT program was developed by BM1 S____; was told by [the applicant] that it was not good enough and gave him his Cutter [redacted] trng schedule and told him to make the station one similar to it. The trng was a positive change but not handled correctly. Other changes: EPO/XPO stand duty because the "crew is out of control" after hours (conveys no trust in crew); quarters schedule changed (lack of information being passed at quarters); required coxns to carry additional BO (in addition to themselves when conducting LE boardings); increased GMT trng; no dockside safety boardings anymore, increased uniform standards, notification requirements when [vessel] gets [underway]; changed ... logs; implemented GAR prior to getting underway; keep 21' in water instead of trailer (affects VIP response times); 3 POs relieved of duties and given to 1st class Pos (actions interpreted as Pos not doing good job – POs feel like none rates). Result completely chaotic; no one in crew could figure out what was going on. NO reasons were provided for making the changes; recommendations for conducting ops were met with "No ... we are doing it this way." [Enclosure 4, Tab H]

On his crew investigation questionnaire, the EPO, MK1____, wrote in response to the question did you make any changes in policy after the change of command: "New OINC made no written policy changes (with the exception of tasking the XPO with rewriting the SORM – pushed CGC [redacted] SORM – intent on throwing out station manual for cutter manual; XPO took 2 weeks working on new SORM, upon handing it in he told the XPO to do it this way and handed him the [redacted] ORG MANUAL; CPO appeared non receptive to command input; more of verbal changes: "This is the way we are doing business." Changes: boat crews will not remove weapons "If the solders in Iraq do no remove gear neither do we." No non-authorized T-shirts with ODUs. (Enclosure 4, Tab I)

On his crew investigation questionnaire, the head cook, FS1 M___ wrote the following about policy changes: "Yes, all policies changed; mess cook duties changed from 1 [week] to 1 month (also some other contingencies – striking FS had to put name on school list), did not agree with contingency and [the applicant] did not explain why contingency was placed on him. Cutter mentality pervades – stations can not be run like a cutter." (Enclosure 4, Tab J)

2005 statements by PO D____, PO H____, and PO B____; and comments by BMCM M___/BMCM B___[7] and BMCS C___ based upon their review of the relief for cause package.

APPLICANT'S BRIEF AND ALLEGATIONS

Events subsequent to October 20, 2005 are primarily presented as discussed in the applicant's brief, but supplemented from the record as necessary. On November 3, 2005, the applicant was informed by Commander, [redacted] Coast Guard District that he was being temporarily relieved for cause, based on a "loss of confidence . . . in your ability to serve as the [OIC]" (Enclosure 1, Tab D) The memorandum stated in part:

> **Investigations** conducted by sector [redacted] revealed various situations where your actions blatantly disregarded the Commandant's human relations and workplace violence policies. Your behavior violated the unique position of trust you occupied as Officer-in-Charge and significantly affected the good order and discipline at your command. Therefore, I have lost confidence in your ability to serve as the [OIC]. [bold added]

The memorandum informed the applicant that he had the right to make a written statement and the right to consult with and obtain the assistance of a military counsel in preparing any statement. The October 20, 2005, memorandum was attached to the November 3, 2005, memorandum and listed four enclosures: Informal investigation with statements, completed interview forms of Station [redacted] crew, statements from PO D___, PO H___, and PO B____, and statements from BMCMs M___/B____ and BMCS C____. However, none of the enclosures were provided to the applicant or his military counsel despite repeated requests for their production.

LCDR Truax (hereafter referred to as the applicant's military counsel) was detailed to provide legal advice to OICs undergoing the Relief for Cause process. (Enclosure 1, Tab E) On November 8, 2006, the applicant provided the following statement in response to the recommendation that he be permanently relieved for cause:

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[7] Upon reviewing the relief package at the request of the command, Master Chief B____ wrote the following on behalf of himself and Master Chief M____: "I believe there is enough documentation to ask for a permanent relief. But, there is an option in the [Personnel Manual] 4.F.4.b that allows the Sector to request a transfer for the OinC if as a result of a temporary relief it is in the best interest of the Service or the member not to return to the unit. I recommend the latter. The OinC definitely made mistakes and said things that were inappropriate which eroded his crew's trust and confidence. In the OinC's defense I believe he is a young inexperienced chief who needs more seasoning. Even though this is a serious matter, the OinC didn't run the boat aground, have an inappropriate relationship, or steal government property. His leadership style, method of communicating, and not recognizing these flaws and taking corrective action were in the end his down fall. That is why I [re]commend the transfer. This way the Chief gets a fresh start and hopefully reflects on the situation. He is allowed time to get the experience needed to mature and gain the leadership without losing his OinC certification. And finally, have the time to recover to compete for another OinC assignment." (Enclosure 4, Tab K)

Master Chief B____ also wrote "I would have preferred that all the crew questionnaires were completed at one time. This would have kept any of the crew member's from discussing what they had written and would have prevented any appearance that any one crew member was out to get the OinC. However, it is hard to glean that from the statements even though there are a lot of similarities." (Enclosure 4, Tab K)

> Based on the advice of legal counsel I am unable to respond to the substance of the provided relief for cause package. The enclosures from CG Sector [redacted] memo . . . of 20 October 05 have not been provided to my counsel or me upon request. The decision for my temporary relief for cause, as well as my command's decision regarding permanent relief for cause, are based in part on documentation that neither I nor my counsel have seen. I am therefore unable to respond, and indeed, my counsel is unable to advise me whether to respond or what the substance of my response should be, because I do not know what I would be responding to.
>
> In the Service's best interest and in accordance with [Article 4.F.4.b. of the Personnel Manual] I respectfully request to be transferred and terminate the relief for cause process. (Enclosure 1, Tab F)

On November 15, 2005, Commander, CG Sector [redacted] recommended that the applicant be permanently relieved for cause. He did not recommend transferring the applicant rather than relieving him because "I am still not convinced that [the applicant] appreciates his leadership deficiencies and their role in his relief." (Enclosure 1, Tab G) On November 18, 2005, by memorandum, the Commander, [redacted] Coast Guard District informed the applicant that he had elected to request the applicant's permanent relief for cause. (Enclsoure 1, Tab H) He told the applicant the following in regard to the applicant's inability to make a statement:

> Your statement of [8 November 2005] asserts that you are unable to respond because you were not provided sufficient information to complete this task. You base this assertion on the fact that you did not receive the enclosures to CG Sector [redacted] memo . . . of 20 October 2005. I find this claim is without merit. The administrative process of Relief for Cause, as outlined in reference (a) requires that you be notified of the action and the reason for it. My memo of 03 November 2005 addressed to you clearly articulated the Relief for Cause action and basis for my action, loss of confidence. Additionally you were provided amplifying information and the supporting factual basis for this action in the three page enclosure (CG Section [redacted] memo . . . of 20 October 05) to the above memo. You clearly had notice of what action was being taken and the reason for it. Upon receipt of this letter, you have the right to make a written statement via your chain of command within five working days. In accordance with Article 4.F.6.3. of [the Personnel Manual], you have the right to consult with, and obtain the assistance of military counsel in preparing any statement.

On November 26, 2005, the applicant provided the following statement in response to the proposed relief for cause:

> Based on advice of legal counsel I am still unable to respond to the substance of the provided relief for cause package because whatever I say will be considered by you and by COMDT (G-WPM) and CGPC (EMP) in the context of the entire package, and I do not know what the entire package looks like . . . I do however offer this: I was attached to STA [redacted] for only 70 days as OIC before I

> was temporarily relieved. The Command Master Chief's visit with the crew occurred on 16 September 2005, when I had only been at the unit for 50 days. In the remaining 20 days, I took several steps to rectify the deficiencies discussed with both Command Master Chiefs and LCDR C____, but time would be necessary as the main ingredient to any solution. I do not disagree that I should not return to STA [redacted] but I honestly believe I was not given an adequate opportunity to successfully resolve the issue. [Enclosure 1, Tab I)

On November 29, 2005, the applicant's CO wrote that he did not believe that it would be in the best interest of the Coast Guard for the applicant to be transferred rather than relieved for cause. (Enclosure 2, Tab D) On December 8, 2005, the Commander, [redacted] Coast Guard District recommended that the Commandant permanently relieved the applicant as OIC. The Commander noted that the applicant had created a hostile work environment and had failed to make leadership and approach changes despite counseling. The Commander also stated that the applicant had been afforded the opportunity to submit a statement and in fact had done so. (Enclosure 2, Tab E) On December 23, 2005, the applicant was permanently removed for cause as OIC of Station [redacted] (Enclosure 2, Tab F)

On January 20, 2006, a negative administrative remarks page (page 7) was placed in the applicant's military record documenting his relief for cause and stating the basis as a loss of confidence based upon the findings of the informal investigation. (Enclosure 1, Tab J)

On January 20, 2006, the applicant received a special employee review as a result of the relief for cause. He received below average marks of 3 in directing others, working with others, developing subordinates, responsibility, integrity, judgment, and monitoring work. He received marks of 2 in setting an example and respecting others. The applicant was not recommended for advancement. (Enclosure 1, Tab K) The applicant was provided written counseling on the marks of 2 and recommendation against advancement and acknowledged such counseling on January 27, 2006. (Enclosure 1, Tab L)

Applicant's Arguments (Enclosure 1, Tab A)

The applicant alleged that the "Coast Guard deprived [him] of the opportunity to submit a meaningful responsive statement by withholding from him the entire informal investigation on which his Relief for Cause was premised, and otherwise failed to follow the procedure laid out in the [Personnel Manual]." The applicant stated that because the relief for cause is stigmatizing, he is entitled to due process. *Weaver v. United States*, 46 Fed. Cl 69, 77-78 (Fed. Cl. 2000), quoting *Canonica v. United States*, 41 Fed. Cl. 516, 524 (Fed. Cl. 1998). The applicant further argued that under *Weaver* he is entitled to full access to records. *Id.* In addition, the applicant argued that the Coast Guard is bound to follow its own procedural regulations if it chooses to implement them. See *Murphy V. United States*, 993 F.2d 871, 873 (Fed. Cir. 1993).

The applicant argued that it is undisputed that he had the right to make a statement in his behalf with respect to the relief for cause. In this regard, he argued that his statement could have been in the form of a rebuttal to the allegations against him. He might have explained the additional circumstances behind the allegations. He might have pointed to mitigating evidence

within the investigation. He might have corrected factual discrepancies. He might have pointed out that a particular allegation was not factually supported, as required by the Personnel Manual. He might have offered or proposed potential solutions to the problems suggested by the investigation. However, the applicant argued that he could do none of the above because he did not have the investigation and the alleged evidence supporting the Relief for Cause. Without access to this information, his right to make a statement in his behalf before action was taken was absolutely meaningless.

The applicant stated that the November 3, 2005 memorandum informing him of his temporary relief for cause stated that the action was "based solely on the investigations." The applicant stated that the memorandum of October 20, 2005 recommending his temporary relief for cause contained "amplifying information" that did not amplify, describe, or summarize anything of import. For example, it did not describe statements by POs D____, H____, or B____, or comments by BMCMs M___ and B____ and Senior Chief C____. The applicant argued that the Coast Guard's refusal to provide him with the informal investigation and the completed crew interview forms deprived him of knowledge of what he was supposed to respond to. The Coast Guard's refusal, in this regard, also deprived the applicant of an opportunity to highlight any positive aspects that may have existed in these documents or to provide rebuttal statements to whatever was contained within those documents.

The applicant also argued that because he was not privy to the investigation and the resulting insufficiency of his statement, the relieving officer could not have carefully considered the gravity of the "circumstances" and the potential outcome's total implications before initiating the process as required by Chapter 4.F.1.b. Further, the applicant asserted that Chapter 4.F.5. requires that any investigations and police reports accompany the Relief for Cause package, which was breached by the command when it withheld the investigation from the applicant.

The applicant asserted that the "Coast Guard deprived [him] of effective assistance of counsel by withholding the entire investigation from his detailed defense counsel." The applicant submitted a statement from his counsel and provided the following pertinent quotations from her statement:

> I contacted [the] legal advisor to the [redacted] District Commander, and requested copies of the enclosures. I informed [the legal advisor] that it is my responsibility to advise [the applicant] about whether he should make a statement about the relief for cause, and what the statement should include, and that I could not carry out my responsibilities to my client without seeing the enclosures. [The legal advisor] told me that, in his opinion [the applicant] was overly obsessed with discovering who said what about him and flatly refused to provide me with a copy of the enclosures.
>
> I advised [the applicant] that he should not respond to the substance of the temporary relief for cause because, irrespective of the factual basis outlined in paragraph 5 of Sector [redacted] memo, I could not advise him on how to respond because I don't have any idea what he would be responding to . . . For example, I have no idea what is really in this "informal investigation of the

> command climate." I don't know who conducted it, how it was conducted, or when it was conducted. I'm not even sure what "command climate" means. I have no idea who submitted these "interview forms" or what they contained, so I could not advise [the applicant] on whether, or how, to rebut them. The same could be said of the statements from [petty officers] D____, H____, and B____. Finally, I don't know what [the] Master Chiefs and the Senior Chief had to say.

The applicant noted that because of the seriousness and stigmatizing nature of a relief for cause, the Personnel Manual mandates the assignment of a qualified military counsel to assist the OIC in preparing his or her written statement. The applicant's military counsel stated that she could not fulfill her duty to the applicant without seeing the investigation. The applicant argued that his military counsel would have been professionally negligent to have assisted him in preparing his statement by guessing at what the investigations contained. He stated that his counsel could not rely on an incomplete summary and trust in its correctness.

The applicant stated that he anticipates that the Coast Guard will argue that it kept the investigation away from him out of some paternalistic concern that he would retaliate against those making statements unfavorable to him. (The applicant stated there is little in the record to suggest this other than hearsay presumptions repeated by the command.) According to the applicant, such justification for withholding the investigation is without merit. The applicant stated that any "fears" about him seeing the statements should have been alleviated given the Military Protective Order issued on October 6, 2005, which prevented him from contacting any members of the unit's crew. The applicant further argued as follows:

> [T]here is absolutely no reason why the investigation could not be provided at a minimum to [my military counsel] as requested. Surely, there was no danger she would "retaliate" against the [Station] crew. In truth, the only "danger" inherent in showing [my military counsel] the enclosures is that she would have helped [me] by providing . . . competent advice.

Last the applicant argued that deprivation of the Personnel Manual's guaranteed right to make a written statement on his behalf and his right to counsel qualifies as an "injustice", which is defined as "treatment by military authorities that 'shock the sense of justice.'" *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (Cl. Ct. 1989) (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (Ct. Cl. 1976), *cert. denied*, 429 U.S. 854 (1076). The applicant further argued that the Coast Guard's deprivation of his right to make a written statement with the assistance of qualified counsel constituted a denial of his constitutionally protected liberty interest against stigmatization by the relief for cause process.

VIEWS OF THE COAST GUARD

On June 7, 2007, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. (Enclosure 2, Tab, A) In this regard, the JAG stated that there was no violation of due process in this case and the relief for cause and the special performance evaluation were conducted in accordance with the Personnel Manual and all other Coast Guard regulations.

The JAG stated that the question before the Board is whether the applicant had sufficient notice of the reasons for his relief for cause and whether it was error for the Coast Guard to deny the applicant access to the October 6, 2005, informal investigation.[8] With respect to this issue, the JAG offered the following:

> e. The Coast Guard Personnel Manual . . . [Chapter] 4.F. contains procedures for relieving an OIC for cause.
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> f. [Chapter 4.F.4.1.a. of the Personnel Manual] required the Coast Guard to notify a member of the reason that [relief for cause] action has been initiated. On 03 November 2005, the applicant was provided the 20 October 2005 Sector [redacted] memo to CGD[redacted] recommending the relief for cause. The 20 October 2005 memo is three pages and details specific instances of conduct that formed the basis for the recommendation. The Coast Guard clearly satisfied the requirements of the [Personnel Manual] by providing the applicant the 20 October 2005 memo detailing the specific instances of conduct forming the basis for his [relief for cause].
>
> g. There is no requirement in Chapter 4.F. that a member must be given all records used in the relief for cause process. The relief for cause is administrative in nature and not criminal in nature. (See Personnel Manual Chapter 4.F.1.a.: "Relief for Cause . . ., the administrative removal of Commanding Officer (CO) or Officer in Charge . . .").
>
> h. Specifically, in applicant's case, the Coast Guard had a reasonable basis not to provide the applicant with the informal investigation report. The CGD[redacted] Command had reason to believe that the applicant would possibly retaliate against members of his command who had provided statements to the informal investigation. Given that the 20 October 2005 memo provided to the applicant was sufficiently detailed to provide the applicant the required notice under [the Personnel Manual] the determination not to release the investigation was reasonable.
>
> i. For these reasons and as discussed in [the CGPC memorandum attached to the advisory opinion], the Board should find that the applicant has not met his burden. (Enclosure 2, Tab C)

CGPC stated that given the applicant's maltreatment of and threatening behavior toward station personnel and the issuance of a military protective order, a determination was made that to provide the applicant with statements from station personnel would be detrimental to the safety and welfare of those personnel. CGPC attached an email from the legal officer for Commander, [redacted] Coast Guard District, to the applicant's military counsel who had requested the attachments to the relief for cause memorandum. The legal officer wrote, "[The] denial

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[8] The JAG attached a redacted copy of the informal investigation report, with the enclosures completely removed), to the advisory opinion.

revolved around [the applicant's] continual interference with the investigation and statements he made indicating that he was going to find out who ratted him out to the command. Based on these facts, the command had concerns that [the applicant] would retaliate against those members who reluctantly came forward if those names became known to [the applicant]." (Enclosure 2, Tab G)

CGPC stated that the applicant made two statements that were forwarded through the chain of command and considered by Commander, [redacted] Coast Guard District. The applicant has not provided any evidence to substantiate that his case would have resulted in a different outcome had he been provided unbridled access to witness statements. The rationale and support for his relief for cause was articulated in the documents presented to the applicant and the chain of command clearly lost confidence in his abilities to command.

APPLICANT'S REPLY TO THE VIEWS OF THE COAST GUARD

On July 23, 2007, the BCMR received the applicant's response to the views of the Coast Guard. (Enclosure 3, Tab A) The applicant stated that he has met his burden of showing that the Coast Guard committed an injustice because it conceded in the advisory opinion that it deliberately and intentionally withheld two dozen witness statements to the informal investigation, in addition to other statements. The applicant argued that the statements were important enough to be provided to the command responsible for approving the relief for cause, but they were denied him and his military counsel.

The applicant disagreed with the JAG that the only due process required was notice of and the reasons for the relief for cause and the name of a lawyer with whom he could speak. The applicant argued that the JAG had created a reasonable basis test justifying the denial of the witness statements that is not supported by law or regulation. The applicant asserted that the Coast Guard takes the position of form over substance, i.e. he was given a notice, so it does not matter whether the informal investigation and witness statements would have enabled him to provide a substantive response to or input on the reasons for his relief.

The applicant stated that the Coast Guard's description of this matter as a "sufficient notice issue" allows it to avoid the issue of the applicant's right to make a statement and stands in stark contrast to the Personnel Manual, which describes the relief for cause as "one of the most severe administrative measures taken against a member in command." Relief for cause usually has a significant adverse impact on the member's future Coast Guard career, particularly on his or her promotion, advancement, duty and special assignments, and selection for schools. See Chapter 4.F.1.b.1. of the Personnel Manual. The applicant argued that in addition to the notice requirement of the proposed relief and the reason for it, the member is entitled to the "right to submit a statement in writing on his or her behalf." Chapter 4.F.4.1.b. of the Personnel Manual.

The applicant next asserted that even if the Coast Guard was justified in refusing to turn over the statements to the applicant, it should have provided them to his lawyer. The applicant noted that the Coast Guard did not even attempt to find a middle ground with the applicant's military counsel after she informed the command's lawyer that she could not advise the applicant without seeing the statements and enclosures and that she was unclear about what the applicant

would be responding to. The applicant suggested that one option for the Coast Guard was to tell the applicant's military counsel that she could see them but could not show them to the applicant.

The applicant submitted another statement from his military counsel in which she stated that the Coast Guard's actions in this matter would set a dangerous precedent. His military counsel stated that she has advised service members in over two dozen relief for cause cases and the Coast Guard never (until this case) refused to produce the entire investigation relevant to the relief, including all witness statements. (Enclosure 3, Tab B) The applicant argued that in his case, his counsel was not allowed to review even one of the 30 statements.

The applicant stated that the Coast Guard makes a "straw man" argument that relief for cause is administrative in nature and not criminal. He stated that the Coast Guard's argument is disingenuous and boilerplate because he never argued that he was entitled to "criminal-type" due process rights and did not use the word criminal in his application. The applicant asserted that he provided case law to support his position but the Coast Guard did not.

The applicant stated that the Coast Guard vaguely alluded to the fears of station personnel as a reason for not releasing the statements, but the Coast Guard offered no explanation for why the applicant was denied access to the statements of BMCM M____, BMCM B____, and BMCS C____ all of whom were senior to the applicant and not assigned to the station. "If the Coast Guard really wanted to afford [me] due process, it could have done so many things to protect [my] rights and protect members it felt could be harmed by [me]. One option would have been redacting the names of the individuals making the statements, but not the entire statements. It could have released some statements but not others." The applicant further argued:

> The advisory opinion reveals that a protective order was issued to [the applicant on 6 October 2005 – a full month before the enclosures were refused to his counsel on November 10. That order states that [the applicant] is to stay a minimum distance of 500 yards from Station [redacted] (2) that he is to retreat from any members of the crew of Station [redacted] There is no suggestion anywhere in the record that [the applicant] had violated that order after it was given. Given that the order was in place, had been working for over a month, and could have been extended if need existed, [the legal officer's] brusque refusal to provide the enclosures to [the applicant's military counsel] on 10 November due to alleged "command . . . concerns" that [the applicant] would retaliate against those members who reluctantly came forward if those names became known to [the applicant] was without any articulated basis in fact or law. In reality, any concerns [the applicant] posed a threat to his crew had been addressed thoroughly and effectively by the Protective Order, which was being obeyed, and which was serving its purpose. This truth is implicitly conceded by the Coast Guard in its wholesale failure to address the issue in its advisory opinion.
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> Perhaps the most revealing statement from the Coast Guard advisory opinion is this one from CGPC: "the applicant has not provided any information that his case would have resulted in a different outcome had he been provided unbridled access to witness statements. There are so many problems with this statement it is

> difficult to know where to begin. Like everything else the Coast Guard argues, there is no support or citation referenced for the "different outcome" burden alleged. In addition, without knowing the contents of the documents, it is impossible to argue anything about them. The Coast Guard would illogically burden [the applicant] with showing how witness statements he had not ever seen would change anything, while continuing to aver that it should be able to deny him those same statements.
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> * * *
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> [T]he "unbridled access" terminology is particularly revealing because it frames what the actual issues are in this case and how high the stakes are. Can the Coast Guard without a basis in law and without necessity in fact, and without the most minimal attempt at a citation to a higher authority, make the decision to "bridle", that is to "curb or restrain" a member's due process rights? Can this Board endorse the idea that the command has the discretion to withhold completely numerous statements affecting a member's career in an administrative proceeding, as long as he is told why the adverse action is being taken, as well as the idea that his military lawyer does not need to see them either? Can these decisions be made at the O-4 level?
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> The Coast Guard does not fully appreciate what this denial of due process has cost [the applicant]. [He] was not given a "special OER" as the Coast Guard alleges . . . In fact, he was given a disciplinary set of marks. As a result, he lost his good conduct eligibility to compete for servicewide exam[ination]. In responding to that set of marks, he was not allowed to view any of the enclosures . . .

FINDINGS AND CONCLUSIONS
(Analysis)

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

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

3. The applicant was relieved as OIC of a Coast Guard unit for cause before he was scheduled to rotate from that assignment. Chapter 4.F. describes relief for cause as one of the most severe administrative measures taken against a member in command and it usually has a significant adverse impact on the member's future Coast Guard career. After the decision to implement relief for cause proceedings, the applicant was entitled to notification in writing of: a. The relief action being taken and the reason for it; b. His right to submit a written statement within five working days of the temporary relief action; and c. The temporary duty station where the member will be assigned while the relief action is pending. The Personnel Manual directs

the command to provide counsel to the applicant within the meaning of Article 27(b) of the Uniform Code of Military Justice (UCMJ) during the temporary relief for cause process and in preparing the member's statement, if any, with respect to the permanent relief for cause. (Enclosure 4, Tab O)

4. The applicant was notified of his temporary relief for cause in a November 3, 2005 memorandum. This memorandum explained that the basis for the relief was in the attached October 20, 2005 memorandum, without enclosures, recommending the applicant's temporary relief for cause due to a loss of confidence because the applicant allegedly created a hostile work environment and exhibited poor leadership and mentoring skills. The applicant subsequently sought the advice of counsel as authorized by the Personnel Manual. His military counsel[9] then sought the enclosures to the October 20, 2005 memorandum, which according to the applicant's counsel were necessary for her to advise and assist the applicant competently in preparing his written statement. The legal officer for the Commander, [redacted] Coast Guard District refused to provide the enclosures. The applicant's military counsel then advised the applicant to write in a statement that based upon the advice of legal counsel he could not respond to the substance of the relief for cause package because he had not been provided with the enclosures to the October 20, 2005 letter.

5. On November 18, 2005, the Commander, [redacted] Coast Guard District informed the applicant that he was recommending to the Commandant that the applicant be permanently relieved for cause. The Commander advised the applicant that he found his claim that he could not provide a statement without the enclosures to the October 20, 2005 letter to be without merit. He informed the applicant that his letter of November 3, 2005 and the October 20, 2005 memorandum, without the enclosures, clearly articulated the basis for his action. He gave the applicant another five days to submit a response. The applicant again wrote in a statement that based upon the advice of his counsel he could not respond to the substance of the relief for cause package because he did not know what the entire package looked like and he was well aware that whatever he said would be considered in the context of the entire package to which he was not privy. He requested in his statement, however, to be transferred rather than relieved, which is an option provided for in Chapter 4.F. of the Personnel Manual. The applicant further noted that he had been OIC for only 70 days when he was relieved and argued that he had not been afforded sufficient time to resolve the issue successfully. On December 23, 2005, the applicant was permanently relieved for cause as OIC of the station.

6. The question before the Board is whether under the circumstances the Coast Guard committed an injustice against the applicant by not providing him or his military counsel with a copy of the enclosures to the October 20, 2005 letter recommending his temporary relief for cause. The attachments not provided to the applicant were the informal investigation and its 25 enclosures, completed crew interview forms, statements by PO D____, PO H____, and PO B____, and comments by BMCM M___/BMCM B___ and BMCS C___. The applicant argued that because his relief for cause carries a stigma he was entitled to all of the documentation that was provided to the individual responsible for making the decision on his relief for cause. In

[9] The term military counsel used in this decision refers to the Judge Advocate (attorney) certified under Article 27 (b) of the UCMJ who was appointed to advise and assist the applicant in the relief for cause proceedings.

support of his contention, the applicant cited *Weaver v. United States*, 46 Fed. Cl. 69 (Fed. Cl. 2000). However, the facts in *Weaver* are different from those of this case. In *Weaver*, the applicant was discharged due to misconduct with an other than honorable discharge, which carried a stigma and as such entitled Weaver to a hearing, which he had. (Enclosure 4, Tab L) While the applicant argued that his relief for cause is stigmatizing, he offered no authority that equates his adverse personnel action with that of a stigmatizing discharge or a discharge with derogatory connotations. Unlike a discharged member, the applicant still enjoys employment with the United States Coast Guard, although in a different assignment from the command position he once held. The applicant has presented no authority which states that his involuntary removal from a command position within the Coast Guard is stigmatizing in the sense that it mandates any due process except that granted by regulation. See *Wilhelm v. Caldera*, 90 F. Supp 2d. 3 (D.D.C. 2000) (stating that a former service member plaintiff who had been involuntarily removed from a residency program had no due process right to practice medicine in the U.S. Army.) (Enclosure 4, Tab M) Therefore, the applicant has not proven that he was entitled to any due process, except that granted by Chapter 4.F. of the Personnel Manual.

7. The Board finds that the Coast Guard superficially complied with the regulation by providing the applicant with notice of and reason for his relief for cause and informing him that he could make a statement. However, the applicant alleged that the Coast Guard committed an injustice against him by its refusal to grant him access to certain documents that deprived him of the right to make *a meaningful written statement and the right to meaningful military counsel in preparing that statement* in response to the adverse action, as guaranteed by the Personnel Manual. An injustice is defined as "treatment by military authorities that 'shocks the sense of justice.'" *Sawyer v. United states*, 18 Cl. Ct. 860, 869 (Cl. Ct. 1989) (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (Ct. Cl. 1976), *cert. denied*, 429 U.S. 854 (1976)). (Enclosure 4, Tab N) For the reasons discussed below, the Board finds that the Coast Guard's refusal to grant the applicant and/or his military counsel access to the October 20, 2005 memorandum enclosures constituted an error and/or injustice that shocks the Board's sense of justice.

8. Under the Personnel Manual, the only due process afforded to a member facing relief for cause is consultation with military counsel qualified under Article 27(b) of the UCMJ and the right to make a written statement. Article 27(b) of the UCMJ states that trial and defense counsel for a general courts-martial (1) must be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and (2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member. The applicant's military counsel could not provide competent legal advice to the applicant without access to all of the documentary evidence. Moreover, the applicant could not make his statement truly count if he was not privy to all the evidence to the greatest extent possible.

9. The Board realizes that the Personnel Manual mandates only that the command give the applicant notice of the relief for cause and the reasons for it, the opportunity to make a written statement, and the assistance of military counsel. However, if the command has an investigative report and other documents on which it relied to relieve the applicant of command, as was done in this case, it appears to this Board that justice and fairness demands that that

information be made available to the applicant or his counsel, unless the Coast Guard has a compelling reason for withholding it. The Coast Guard argued that it was justified in withholding the information because based on the reports from crew members it thought or believed that the applicant might retaliate against those who gave statements, although the CO made no such charge in his October 20, 2005 memorandum. Possible retaliation may have been a concern prior to October 6, 2005, when the applicant was placed under a protective order. The terms of that order directed the applicant not to come near or talk with any of the station crew. Apparently the applicant had been reassigned away from the unit at that time. There is no evidence that the applicant had any contact with any members of the crew on or after October 6, 2005. Moreover, the memorandum relieving the applicant for cause was dated November 3, 2005, almost a full month after the protective order was granted, so the command had an opportunity to assess whether the applicant was in fact complying with the protective order. In addition, the applicant had been transferred away from the station and was subject to prosecution if he violated the protective order. Therefore, the Board finds that any threat of retaliation the applicant allegedly posed to the crew prior to October 6, 2005 had been greatly reduced, if not eliminated by November 3, 2005, the date on which he was temporarily relieved of command.

10. Further, even if the Coast Guard's concern about retaliation remained justified as of November 3, 2005, it had other options for making some or all of the information available to the applicant for use in preparing his statement. It could have redacted the investigative report and its enclosures, as well as the other attachments listed on the October 20, 2005 memorandum, or it could have allowed the applicant's military counsel to review the information with no note taking and/or divulging of names. The Board would have been satisfied that the applicant had been treated justly if the Coast Guard had shown some willingness to work with the applicant's military counsel in her effort to fulfill her duty to competently assist the applicant in writing the best possible statement in an effort to save his career. Again, it makes no sense to the Board for the Coast Guard to provide Article 27(b) counsel to the applicant and expect that counsel to advise and assist a member based upon a partial set of documents, unless a compelling basis existed for withholding the documents from the military counsel. The Board is not persuaded that such a basis existed in this instance. Moreover, the applicant's counsel stated that she had never been denied an entire relief for cause package until this case. There is no legitimate reason that this applicant should have been treated any differently than others who had full access to the documentary evidence on which their relief was based.

11. Also, the Coast Guard's refusal to provide the enclosures to the applicant or his military counsel denied the applicant access to any information that was or might have been favorable to him and to other information that possibly would have been useful in crafting his statement. For instance, two of the master chiefs that the applicant's command asked to review the relief package offered the recommendation of transferring the applicant rather than relieving him, which had been requested by the applicant. Master Chief B____ wrote the following on behalf of himself and Master Chief M____:

> I believe there is enough documentation to ask for a permanent relief. But, there is an option in the [Personnel Manual] 4.F.4.b that allows the Sector to request a transfer for the OinC if as a result of a temporary relief it is in the best interest of the Service or the member not to return to the unit. I recommend the later. The

> OinC definitely made mistakes and said things that were inappropriate which eroded his crew's trust and confidence. In the OinC's defense I believe he is a young inexperienced chief who needs more seasoning. Even though this is a serious matter, the OinC didn't run the boat aground, have an inappropriate relationship, or steal government property. His leadership style, method of communicating, and not recognizing these flaws and taking corrective action were in the end his down fall. That is why I [re]commend the transfer. This way the Chief gets a fresh start and hopefully reflects on the situation. He is allowed time to get the experience needed to mature and gain the leadership without losing his OinC certification. And finally, have the time to recover to compete for another OinC assignment. (Enclsoure 4, Tab K)

12. Additionally, PO1 P's___ two statements that were enclosures to the informal investigation could have been of assistance to the applicant in writing his statement by suggesting that the applicant's alleged comments and management style, while not preferable, were not "hostile" or "abusive". Regarding the alleged comment "Does P___ sound like a big, dumb redneck" PO P___ wrote that the comment was made to him over the phone and he believed that the applicant was only joking. (Enclousre 4, Tab D) He further stated that he was not offended by the comment and that he was more offended by his crew mates talking about it and telling him how he should feel about it. In another statement, PO1 P___ stated that he was the individual to whom the applicant allegedly stated that if he missed colors again, the applicant was going to rip off P's___ ears. PO1 P___ wrote that he missed colors and the applicant had a right to be upset with him. He further wrote that he believed the applicant was joking around and that he took it as an off-the-cuff comment. PO P___ wrote about the incident: The Coast Guard Cutter [redacted] was moored to our station and [the applicant] said BMCM J____ was in his office when colors were missed. I am the duty section leader and I hold myself accountable for colors not getting done properly. So, [the applicant] should have been upset with me. I was upset with the watch stander. I felt bad that colors was late in front of another unit and by [the applicant] saying that I will always think about colors and make sure there is a color detail ready at 0800." (Enclosure 4, Tab E) These statements are evidence that PO1 P___ was not offended by the applicant's comments nor was he in fear that the applicant would actually rip off his ears. The two statements could have been used by the applicant in his written statement to counter the Investigation officer's view that the applicant created a hostile work environment.

13. There is also a crew investigation questionnaire completed by DC3 B___ that was enclosed with the informal investigation that places the applicant in a favorable light. DC3 B___ served as the _____ petty officer, the ____, and the ____. He wrote that the applicant instituted a lot of policy changes, increased uniform standards, and changed the quarter's format. This individual further wrote that the applicant made an effort to increase professional development of the crew and that through the applicant's teachings, his operational knowledge had increased. In comparing the unit to the previous one, DC3 B____ wrote that the XPO attempted to fix untimely, trivial issues. DC3 B's___ statement is evidence that not everyone at the unit thought the applicant had no positive influence.

14. There is other evidence in the investigation that may have been helpful to the applicant as well. BM1 D____ was the executive petty officer (XPO) and some evidence in the

investigation could be interpreted as supporting a finding that he resented the applicant because of the changes instituted by the applicant that resulted in more responsibility being placed on BM1 D____. In his Command Investigation Questionnaire, BM1 D____ wrote the following answer to the question: Following the change of command, did you make any policy changes?

> Yes; every change is driven based on how things were done on CGC [redacted] (65'); New GMT program was developed by BM1 Slack; was told by [the applicant] that it was not good enough and gave him his Cutter [redacted] trng schedule and told him to make the station one similar to it. The trng was a positive change but not handled correctly. Other changes: EPO/XPO stand duty because the "crew is out of control" after hours (conveys no trust in crew) . . . 3 POs relieved of duties and given to 1st class POs (actions interpreted as POs not doing good job – POs feel like none rates). Result completely chaotic; no one in crew could figure out what was going on. NO reasons were provided for making the changes . . . [Enclosure 4, Tab H]

15. The EPO[10] suggested in his command investigation questionnaire that the applicant caused an increase in the XPO's responsibilities. (Enclosure 4, Tab I) Further the head cook[11] a petty officer first class expressed dismay that the applicant made changes in the mess department when he reported aboard. (Enclosure 4, Tab J) Using these command questionnaire responses, the applicant could have clearly argued in his written statement that some of the senior petty officers of the unit were actually more upset about the fact that the applicant instituted major policy changes that placed significantly more responsibility on them than they were about the applicant's inappropriate language and comments. No where in the investigation is this issue discussed.

16. Additionally, the enclosures to the investigation seem to offer some explanation of why the applicant was not too concerned with housing issues. As BM1 D____ pointed out in a third statement to the investigative report, housing was not the responsibility of the applicant but belonged to a petty officer under the control of ISC [redacted] While this does not completely excuse the applicant's foul language in expressing his views about housing, it does explain why his emphasis was not on housing. Such information could have been useful in drafting a written response to the recommendation for the applicant's relief for cause.

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[10] The EPO wrote in response to the question did you make any changes in policy after the change of command: "New OINC made no written policy changes (with the exception of tasking the XPO with rewriting the SORM – pushed CGC [redacted] SORM – intent on throwing out station manual for cutter manual; XPO took 2 weeks working on new SORM, upon handing it in he told the XPO to do it this way and handed him the [redacted] ORG MANUAL; CPO appeared non receptive to command input; more of verbal changes: 'This is the way we are doing business.' Changes: boat crews will not remove weapons 'If the solders in Iraq do no remove gear neither do we.' No non-authorized T-shirts with ODUs."

[11] In response to the question, following change of command did you make any policy changes, the head cook, FS1 M____ wrote the following: "Yes, all policies changed; mess cook duties changed from 1 [week] to 1 month (also some other contingencies – striking FS had to put name on school list), did not agree with contingency and [the applicant] did not explain why contingency was placed on him. Cutter mentality pervades – stations can not be run like a cutter."

17. Another example of the evidence in the investigation that the applicant could have used was whether the "crew investigation questionnaires" were the result of each member's independent experiences or thoughts or whether they were the product of predetermined group answers. In reaching this observation, the Board points to the email from Master Chief____ on behalf of himself and Master Chief M____. In that email, Master Chief B____ stated the following: "I would have preferred that all the crew questionnaires were completed at one time. This would have kept any of the crew members from discussing what they had written and would have prevented any appearance that any one crew member was out to get the OinC. However, it is hard to glean that from the statements even though there are a lot of similarities." (Enclosure 4, Tab K) This information might have been useful to the applicant in pointing out in a written statement that the crew investigation questionnaires and even some of the statements enclosed with the informal investigation were not independent of community influences and were therefore arguably of questionable credibility and/or reliability.

18. To summarize, while some events in the August 20, 2005 memorandum describing the applicant's behavior and management style are probably true, such as the comments about housing, the mascot, and the name of SN's child, other comments or accusations could be interpreted as exaggerations. While the Board finds, as discussed above, that having the enclosures to the October 20, 2005 memorandum could have been useful to the applicant in his preparation of a substantive written statement in his defense, the Board offers no opinion as to whether raising such issues as to the credibility of the witnesses or offering counter arguments to the allegation that the applicant created a hostile environment would have made a difference to the decision maker. For the Board to do so would amount to conjecture on our part. However, the Board is steadfast in its belief that in light of the severity of the relief for cause action, the applicant was entitled to make his best case against being relieved of command for cause in the one opportunity provided to him: making a written statement. In the view of the Board, he was hampered in his ability to do without access to the enclosures to the August 20, 2005 memorandum. By the Coast Guard withholding the investigation report and the other documents attached to it, the applicant was not privy to any favorable or helpful information that was contained in these documents. The Board is not persuaded that the Coast Guard has provided a compelling reason for refusing to allow the applicant and/or his military counsel access to the October 20, 2005 memorandum enclosures that it apparently relied on to justify the applicant's relief for cause. The threat of any retaliation by the applicant against crew members had passed at the time of his temporary relief for cause, and if the Coast Guard was still concerned about retaliation, it could have made alternative arrangements with the military counsel for her to review the informal investigation and other statements rather than giving them to the applicant. The only due process afforded the applicant in the relief process was to write a statement with the assistance of counsel. The Personnel Manual states a relief for cause is the most severe administrative action that can be taken against an OIC and that the effects of a relief for cause negatively impact the member's assignment, advancements, and school assignments. In light of the severity of a relief for cause and the probable negative impact on the applicant's career, as a matter of equity and fairness, he should have been allowed access to the documents on which the Coast Guard relied to relieve him of command to the greatest extent possible. That was not done in this situation. Accordingly, for the reasons discussed above, the Board finds that the Coast Guard's refusal to allow the applicant and/or his military counsel access to the October 20, 2005

memorandum enclosures and its failure to offer a compelling reason for withholding the documents constituted an injustice that shocks our sense of justice.

19. To cure what the Board has found to be an injustice, it will direct that the applicant's record reflect that he received a permanent change of station transfer from his OIC assignment rather than being permanently relieved for cause, which was the option requested by the applicant in responding to the recommendation that he be relieved for cause. Therefore all documents related to the relief for cause subsequent to the temporary relief for cause should be removed from the applicant's record, including the January 20, 2006 special employee review and counseling form as well as the page 7 documenting the relief for cause. The Board will also restore the applicant's OIC certification because the process by which it was withdrawn was unjust. Since all of the records reflecting applicant's relief for cause must be removed from his record and replaced by a record reflecting his permanent change of station, his record as corrected, would no longer support the termination of his OIC certification. Independent of this fact, however, the Board expresses no opinion on whether the applicant is or is not qualified to hold an OIC certification under other applicable rules and regulations. Further, since the Board is recommending the removal of all documents relating to the permanent relief for cause and the accompanying special employee review, the Board finds no basis for not reinstating the applicant's good conduct award eligibility retroactive to the date of its removal. The Board finds that the applicant is not entitled to any back pay based upon the corrections it will direct because he was temporarily removed for cause from his OIC position and not returned to it.

20. Accordingly, the applicant is entitled to partial relief.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of [redacted] USCG, for correction of his military record is granted in part as follows:

The Coast Guard shall correct his record to show that he received a permanent change of station transfer from his assignment as the OIC of Station [redacted] instead of being relieved for cause. All documents relating to his relief for cause shall be removed from his record, including the administrative remarks (page 7) dated January 20, 2006, and the special employee review dated January 20, 2006, with the related counseling entry.

The Coast Guard shall correct his record to show that his OIC certification was not withdrawn as a result of the relief for cause process.

The Coast Guard shall also correct his record to show that his eligibility for a Good Conduct Award was not terminated.

All other requests for relief are denied.

[redacted]