

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2013-028

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 application upon receipt of the applicant's completed application on November 20, 2012, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated November xx, 2013, 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 that his record be corrected by removing all references to his relief for cause (RFC), by removing the special officer evaluation report (SOER) for the period from February 1, 2011 to June 23, 2011 (disputed SOER), by reinstating his name on the promotion year (PY) 2011 lieutenant selection board list, and by promoting him to LT with a retroactive date of rank and back pay and allowances.

The applicant was the commanding officer (CO) of a Coast Guard cutter. He was temporarily relieved for cause after an investigation into circumstances surrounding the cutter's towing of a sailing vessel during a rescue mission on [REDACTED]. After his temporary RFC (TRFC), the applicant's promotion to LT was delayed and he received the SOER. Subsequently, the TRFC was made permanent. Later, the Secretary of Homeland Security approved a special board's recommendation that the applicant's name be removed from the PY 2011 LT selection board list. The applicant's removal from the PY 2011 selection list was considered his first failure of selection for promotion to LT. He was not selected for promotion LT by the PY 2013 selection board which was considered his second failure of selection. As a result of having two non-selections for promotion, he was scheduled for involuntary discharge from the Coast Guard on June 30, 2013.

The applicant alleged that the basis for his relief for cause (RFC) was flawed and based upon inaccurate information.

BACKGROUND

The applicant was the CO of a Coast Guard cutter. In the afternoon of [REDACTED] the applicant's cutter was ordered to assist a sailing vessel that was taking on water. The CO launched his cutter's small boat and some crew to assist the sailing vessel. The small boat crew was able to shore up the leak and remove the water from the sailing vessel. After the crew completed its work on the sailing vessel, the Coast Guard cutter started the process of recovering the small boat. According to the applicant, the plan was for the cutter to "slowly slacken [its] speed, come "dead in the water (DIW), maneuver [the cutter's] stern perpendicular to the topline, recover the small boat, and regain [the cutter's] down-swell tow with [the sailing vessel]." The plan undertaken by the applicant is described as a dual operation. At some point, the decision had been made by the applicant to relieve his senior enlisted crew of the deck and the conn. During the cutter's attempt to recover its small boat the topline became entangled on the sailing vessel's keel. The topline was removed (detached) from the cutter and retrieved onboard the sailing vessel by the small boat crew. The applicant who had the deck and conn made two unsuccessful attempts to establish a second tow line. On the third attempt, using advice from BMC H (the operations chief petty officer), the applicant successfully accomplished the tow on the third try.

Upon completion of the mission, the applicant's CO, who was the reporting officer for the SOER and the Commander of Sector [REDACTED] arrived on board the applicant's cutter and asked the applicant how things went. The Sector CO was displeased that the applicant had undertaken a dual operation of recovering the small boat while towing a vessel.

Investigation

On February 10, 2011, the reporting officer ordered an investigation into "all the circumstances surrounding the search and rescue case involving [the cutter's] tow of the [sailing vessel] beset by weather . . . which occurred along the coast of [REDACTED]"

After interviewing the cutter's crew including the applicant, interviewing various experts with regard to the dual operation of retrieving a small boat while towing, and obtaining various logs, the investigative officer (IO) reached the following pertinent findings:

- Finding 7 states that the cutter's small boat launched with BM2 N as coxswain, FN P as crew and MK3 B and MK2 C as Rescue and Assistance (R&A) team.
- Finding 8 states that the applicant commences towing evolution . . . , BMC R has conn.
- Finding 9 states the cutter's R&A team and P6 pump transferred safely to the sailing vessel.
- Finding 10 states that the applicant relieved the conn.

- Finding 11 states that the cutter reported that while recovering the small boat their tow line became caught on the sailing vessel's keel and the cutter removed the towline and the R&A team retrieved it onboard the sailing vessel. BMC H and BMC R stated that they both argued adamantly to drop the towline prior to small boat recovery during brief with CO. The final decision by the CO was to keep tow.
- Finding 12 states that BMC H, BMC R, MK2 C, MKC L, and BM2 N stated that the applicant took the deck and conn while attempting to transfer second tow line. The passes were made at unsafe angle and speed, causing safety concerns for the R&A team attempting to retrieve the towline. BMC R requested to conn the ship for the third pass. The CO denied this request and re-established tow on the third pass.
- Finding 14 states that on several occasions, the applicant who was CO of the cutter, gave orders to exceed 10 knots through the North Atlantic Whale South Zone . . . for different reasons to include: returning to homeport in order to re-fuel and maintain B-6 recall status, conducting power trials, performing law enforcement and responding to urgent searches and rescues on a few occasions.
- Finding 15 stated that navigational and systems logs were compared to ships logs, which identified several occasions of speed in excess of 18 knots and on most occasions in excess of 20 knots in the [REDACTED] U.S. Seasonal Management Areas (SMAs) during non-emergent situations.

After making findings of fact, the IO offered the following opinions:

"1. [T]he towline became entangled and several near misses were created by the [applicant] not heeding the advice of the most experienced personnel onboard to remove [the] towline prior to retrieving the small boat . . .

"2. After [the cutter] decided to retrieve the small boat while in tow, there were several items to note that may have caused the towline to become entangled. . . . SPE Risk assessment model . . . was not conducted again specifically for recovery of the small boat while towing . . . During recovery of the small boat, it appears the [cutter] did not adequately slow the [sailing vessel] enabling it to drift over the towline. The R&A team was not utilized to monitor the towline from the [sailing vessel].

"3. The command climate on [the cutter] should be improved in order to increase the confidence and safety of crewmembers onboard. Interviews with members of [the cutter] indicated that the [applicant] should better utilize the experience of his crew. However, they feel that overall they work in a safe environment and the general consensus is that improvements have been made since this incident with exception of possible violations of speed through Right Whale Zones. . . .

"4. On or about [REDACTED] the [cutter] completed a successful tow of a [sailing vessel] in distress with no injuries or damage and received positive media coverage.

“5. [The applicant], the CO of the [cutter] has given direct orders to use excessive speed through the Right Whale Zones contrary to regulations. Per [regulations], U.S. Coast Guard vessels are exempt from the 10 knot speed restriction placed on vessels larger than 65'. Coast Guard policy states that compliance with speed, approach and strike response guidance is crucial to the USCG's commitment to minimize the risk of harming marine protected species and to avoid the costs, administrative burden, operational impacts and other deleterious consequences that can follow adverse interactions with protected resources. Emergency [operations] is defined as those [operations] for which rapid response is required to avoid the possible loss of life and property, urgent LE incidents and matters of national security as defined by operational commanders on a case by case basis. Speed guidance in whale habitats is defined as: to avoid collision with a whale during the course of ops, USCG vessels transiting areas where whales have recently been observed, whale critical habitats, migratory routes and high-use areas shall use extreme caution, be alert, and reduce speeds, as appropriate. Appropriate reduced speeds should be based on the factors identified in rule 6 (safe speed) of the international/inland navigation rules. NOAA fisheries . . . has stated that the most lethal whale strikes involve ships traveling 10 knots or faster. Due to the lack of specific speed restrictions set forth in internal USCG policy, it is difficult to determine what exactly is an appropriate speed . . .”

In the Recommendations portion of the investigation, the IO did not find any criminal activity associated with the cutter's towing of the sailing vessel. The IO recommended that a dereliction of duty charge related to the applicant's use of excessive speed in the whale transit areas be dismissed. The investigation was closed.

Applicant's Investigative Statements

The applicant gave one statement during the investigation and one statement after the investigative report was issued.

On February 27, 2011, the applicant gave a written statement to the investigating officer. He stated that before the evolution he followed the Coast Guard's Seven-step Operational Risk Management (ORM) process in developing an appropriate course of action based on mission requirements and risk mitigation. He stated that he conferred with his senior enlisted personnel, mainly the operations petty officer, BMC H, and the engineering petty officer, MKC L. He stated that after developing the plan, the cutter commenced an all-hands brief and risk assessment. The applicant stated that all hands seemed comfortable with the plan and ready to execute. With regard to recovering the small boat, the applicant stated the following:

Once the situation onboard [the sailing vessel] was under control, [the cutter] needed to recover her small boat and small boat crew in order to manage crew fatigue and exposure to the elements. I had since relieved the deck and Conn and discussed the plan with BMC [H]. While I do not recall the specific conversation regarding all available options, we agreed that the best course of action was to slowly slacken our speed, come “dead in the water” (DIW), maneuver [the cutter's] stern perpendicular to the tow line, recover the small boat, and regain our down-swell tow with [the sailing vessel].

The applicant stated that the dual operation of recovering a small boat while conducting towing operations is standard practice onboard 87 WPB's. He stated that other commanding officers confirmed that this operation to be not only standard practice, but an effective use of the unique platform design to achieve desired mission sets. He found nothing about conducting small boat operations while conducting a tow in any of the regulations and manuals that he consulted.

The applicant stated upon returning to homeport, his reporting officer, who was also the commanding officer of Sector [REDACTED] came aboard the cutter and discussed the mission with the applicant. At this time, the reporting officer learned that the cutter had recovered the small boat while towing the sailing vessel. The reporting officer expressed his concerns that this was an unsafe practice. The applicant stated later on that day he sent the reporting officer an email referencing a draft instruction (apparently about recovering a small boat while towing). After receiving the email, the reporting officer sent the applicant, along with some others, an email stating that there shall be no boat launches/recoveries while towing a vessel. The applicant stated that he felt sure he understood the reporting officer's concerns and that he had learned lessons.

The applicant's second statement is undated but was given after the applicant had an opportunity to review the completed investigative report. He disagreed with several of the findings of fact in the investigation, particularly the one in which the IO found that BMC H and BMC L argued adamantly to drop the towline prior to the small boat recovery. The applicant stated that the BMCs investigative statements indicated that they expressed or voiced strong concern about the operation, which is not the same as "arguing adamantly" about the safety of the operation. He argued that investigative finding that the BMC's "argued adamantly" about the proposed towing evolution incorrectly suggest that they were constantly voicing concerns about the towing evolution and that he was constantly dismissing them, which amounted to speculation. The applicant also disagreed with the finding that BMC R requested the conn on the third attempt to transfer the tow and the applicant denied that request. The applicant stated that his recollection was there were no requests from either BMC to relieve the deck and conn.

Also, in his second statement to the investigation, the applicant stated his position that there is no Commandant policy regarding the joint operation of launch/recovery of an 87' WPB small boat and conducting towing operations.

With regard to the allegation that he used excessive speed in the North Atlantic Right Whale SMAs, the applicant stated that he must have misinterpreted the guidance. He stated that in lieu of any additional guidance, he based his decisions to travel in excess of 10 knots through SMAs on facts normally associated with the unique demands of the Sector [REDACTED] AOR or the cutter's personnel status at the time. The applicant explained his reasons for exceeding 10 knots as follows:

As the "operational commander," I have determined a few times that a speedy return to homeport was emergent since my safe and rapid response is required to avoid the possible loss of life and property. My intent has been to return home as safely and quickly as possible in or to manage crew fatigue (thus contributing to

the safe operation of [the cutter] in the event of recall) and/or return [the cutter] to her full standby posture (fully fueled, fully stocked with provisions, etc.) as soon as possible. My decisions were never questioned from 15 November until 15 March despite the position/course speed check-ins with Sector or our obvious early arrival upon being released from ASR or LE. Instead, my efforts have been constantly praised and I therefore assumed my interpretations of the SMA guidance were within the spirit of the message.

Relief for Cause (RFC)

On [REDACTED] the applicant's reporting officer asked the District [REDACTED] Commander to temporarily relieve the applicant of his duties as CO of the Coast Guard Cutter [REDACTED] because of a loss of confidence in the applicant's leadership and his poor judgment. The reporting officer attached the investigative report that showed that the applicant had exceeded 10 knots while transiting in a critical Northern Right Whale habitat area. The reporting officer stated that the applicant offered non-emergency situations as reasons for exceeding 10 knots. The reporting officer stated that the applicant's reasons for exceeding 10 knots were unpersuasive and violated his written policy and direction: "If you think operating 'by the book' is unreasonable or impractical for a certain situation, let me know and I will make the decision on whether or not to deviate from established policy." The reporting officer stated that rather than consult him, the applicant made the decision to transit through the Right Whale habitat areas with excessive speed solely on his own and despite comments from his crew regarding appropriate speed in such areas.

The reporting officer also pointed out that during the sailing vessel towing operation the applicant did not adequately incorporate his crew's input into his operational planning and risk management of the mission or take their advice during the execution of the mission, in which teamwork was vital, especially with such a small crew. The reporting office stated that the applicant's reluctance to consider the input of senior crewmembers created significant doubt in his mind regarding the applicant's ability to manage risk in a dynamic and challenging environment. The reporting officer further stated the following:

On [REDACTED] I met the cutter and crew at the pier upon their return to homeport. In my discussion with [the applicant], I learned that [the cutter] had entangled the towline around the keel of the sailing vessel as a result of conducting small boat recovery operations while towing. While there is no specific policy provision prohibiting simultaneous operations, I clearly and unambiguously indicated during our conversation on [REDACTED] that recovery of a small boat while towing, with the Coastal Patrol Boat's stern launch and recovery system for the small boat, was a dangerous practice. I followed this conversation with an email to [the applicant], among others, prohibiting boat launches or recoveries while towing a vessel. [The applicant's] statement [to the investigation] that "this type of dual operation is standard practice" and "an effective use of the unique platform design to achieve desired mission sets" and his [second] statement [to the investigation] that the best guidance available is "yet to be developed" signals his belief that his actions were entirely justified—

regardless of the extent to which he endangered both the sailing vessel and his crew. I understand the lack of towing training and expertise possessed by patrol boat commanding officers, yet I am deeply troubled by [the applicant's] unwillingness to embrace counsel and advice, particularly in light of his minimal seagoing experience.

On [REDACTED] the Commander of Coast Guard District Seven (District [REDACTED] Commander) temporarily relieved the applicant of his duties as CO of the cutter involved. The District [REDACTED] Commander stated that he was doing so because he had lost confidence in the applicant's ability to continue to serve in that position, which action was consistent with that requested by the applicant's CO. The District [REDACTED] Commander noted that an investigation into the applicant's cutter's tow of a sailing vessel revealed that the cutter had on at least a half dozen occasions exceeded the speed restriction of 10 knots while in the Northern Atlantic Right Whale habitat area during non-emergent, routine patrols. He informed the applicant that this pattern of conduct was contrary to Atlantic Area guidance for determining safe speed in whale habitat areas, and reflected poor leadership and judgment.

The District [REDACTED] Commander also listed the applicant's failure to adequately incorporate his crew's input into operational planning and risk-management decisions during the towing evolution and its aftermath. He stated that the applicant's reluctance to fully consider the input of his crew, especially during a high-risk small boat recovery while towing another vessel, in conjunction with the judgment he displayed regarding the cutter's speed in whale habitat areas, caused the Commander to sincerely doubt the applicant's ability to continue to lead the cutter. The District [REDACTED] Commander advised the applicant that he had the right to consult with legal counsel.

Also on [REDACTED] Commander, Personnel Service Center (PSC) notified the applicant that based upon the District Commander's [REDACTED] letter, his promotion to LT would be temporarily delayed in accordance with Article 5.A.13 of the Coast Guard Personnel Manual.

On [REDACTED] the applicant submitted a statement in response to his temporary RFC. The applicant expressed his remorse regarding the incidents. He accepted full accountability for his actions and stated that he had learned valuable lessons throughout the process. He commented that he believed that he had a lot to offer the Coast Guard and expressed a desire to continue to serve.

On [REDACTED] the District [REDACTED] Commander asked the Commander, Personnel Service Center (PSC) to permanently relieve the applicant as CO of the cutter because he had lost confidence in the applicant's ability to serve in the position. The Commander listed the same reasons for his loss of confidence as he stated in his temporary RFC. In addition, the Commander stated that according to crew statements, the applicant did not fully consider the input of his crew during a high-risk small boat recovery while towing another vessel. "From [the Commander's] view of the investigation, and my extensive discussion with the Sector Commander, in failing to do so, [the applicant] placed his crew in a position of unacceptable risk." The District [REDACTED] Commander noted the applicant's many talents and his significant

potential for future meritorious, if not exemplary, service as a Coast Guard officer. The District [REDACTED] Commander stated that given that potential, he recommended that the applicant receive the opportunity to demonstrate that he has fully incorporated lessons learned and that he can excel as a servant leader. The District [REDACTED] Commander stated that it was not in the Coast Guard's interest for the applicant to remain on the cutter.

On June 8, 2011, the applicant submitted a statement to the request for his permanent RFC. In that statement, he expressed his remorse for the incidents and stated that he had learned from his mistakes.

PSC directed the applicant's permanent RFC by reason of loss of confidence in an undated letter.

Special Officer Evaluation Report (SOER)

Because the applicant was relieved for cause, Articles 4.F.6.5 and 10.A.3.c.1.e of the Personnel Manual required that a SOER be submitted. A SOER was submitted for the period [REDACTED]. According to 10.A.4.h. of the Personnel Manual, the SOER was derogatory in nature because it documented the applicant's RFC.

The supervisor's portion of the SOER contained a below standard mark of 3 in "adaptability," which was supported by the comment: "Demonstrated difficulty in adapting to command expectations, failed to recognize severity of violating sensitive speed restrictions for North Atlantic Right Whale critical habitat on multiple occasions, violations especially egregious considering recent local media coverage of port closure due to right whale intrusion . . ."

The applicant also received a 3 in "speaking and listening" that was supported by the comment: "Demonstrated inability to listen and grasp severity of Sector Commander's concerns regarding performance, assumed defensive attitude and indicated reluctance to take responsibility for actions." He received a mark of 3 in "teamwork" that was supported by the comment: "Displayed difficulty leading senior enlisted and building crew into cohesive team."

In supplementing or amplifying the supervisor's evaluation of the applicant, the reporting officer wrote in block 7 that the applicant "was relieved for cause after repeatedly disregarding Sector Command guidance for safeguarding critical habitat areas and knowingly ignoring Commandant's policy in front of his crew."

The reporting officer gave the applicant marks of 2 in "judgment" and marks of 3 in "responsibility" and "professional presence." These below standard marks were supported by the comments: "Demonstrated poor judgment in failing to adhere to Coast Guard policy: Conned cutter at excessive speeds through Right Whale protection zones during non-emergent situations violating policy, placed endangered species & CG reputation at risk. When confronted with evidence of excessive speed, placed the blame on other Sector entities rather than accepting responsibility and accountability as CO for cutter movements and adherence to Coast Guard policy."

In describing the applicant's potential for assuming greater leadership roles and responsibilities, the reporting officer wrote the following in section 10 of the SOER:

[The applicant] lost the District Commander's confidence in his ability to command after demonstrating extraordinarily poor judgment when speeding through right whale protection zones in flagrant disregard of one of the service's core missions. While he failed to meet expectations in what is likely the CG's most demanding and challenging O-2 billet, this officer's substantial intellect, superb admin skills and strong desire to serve the country indicate that he can make positive contributions after honing his leadership skills, learning from mistakes & developing more maturity. . . .

The SOER was referred to the applicant for an addendum. He submitted an addendum to the SOER and again stated that he accepted full responsibility for the incident.

Removal from the Selection Board List

On [REDACTED] PSC convened a special board to recommend to the Secretary whether the applicant's name should be removed from the promotion year [REDACTED] selection board list in accordance with Article 3.A.12.F. of the Officer, Accessions, Evaluations, and Promotions regulation. The special board had input from the applicant, as well as the necessary records and documents. The applicant's then-current CO endorsed the applicant's statement by recommending that he be promoted to [REDACTED]

The special board met on [REDACTED] and recommended the removal of the applicant's name from the promotion list for the following reasons:

"c. While serving as [CO] of the cutter, [the applicant] did not meet expectations to execute missions in a professionally competent and proficient manner, failed to recognize the severity of his actions and failed to maintain the accountability required of a CO and Coast Guard officer. Specifically, [the applicant's] special derogatory OER from [the cutter] dated [REDACTED] shows:

"On several occasions, he willfully violated public law and COMDT policy by ignoring the speed restrictions related to the North Atlantic Right Whale critical habitat area;

"Despite early intervention by the Sector Commander concerning his performance and after subordinates pointed out continued non-compliance, [the applicant] showed an inability to take responsibility for his actions as CO;

"His actions and inability to listen proved to be a barrier in leading his senior enlisted and building his crew into a cohesive team.

"d. In considering promoting junior officers, this Board understands that it should discount minor errors. However, it is the opinion of the Board that the circumstances that led to [the applicant's] permanent relief for cause do not constitute a minor error in judgment and were a

failure to act ethically and with accountability. These actions cast doubt on his professional qualifications to serve in the next higher pay grade at this time. Therefore, the Board recommends removing [the applicant] from the promotion year [REDACTED] selection list in accordance with the Officer Accessions, Evaluations, and Promotions Manual, Article 3.A.12.f. “

On [REDACTED] the Secretary approved the special board’s recommendation and removed the applicant’s name from the [REDACTED] selection board list.

APPLICANT’S ALLEGATIONS

The applicant argued that his reporting officer’s request for the applicant’s RFC dismissed the IO’s recommendation that no disciplinary action be taken against him and claimed erroneously that the applicant failed to heed the input of his crew during the cutter’s risk management assessment, that the applicant unilaterally disregarded policy, and that the applicant was unwilling to “embrace [his] counsel” as it related to the cutter’s tow of the sailing vessel. The applicant stated that he conducted a standard risk assessment as per Coast Guard requirements, with input from senior staff, prior to the evolution with the sailing vessel. He stated that after successfully deploying the R&A team, the applicant and BMC H reevaluated the plan of action and mutually agreed to recover the small boat while towing the sailing vessel. The applicant also stated that prior to executing the plan, he personally asked the small boat coxswain over the radio her thoughts on the evolution and she did not express any concerns. The applicant stated the cutter had to break tow and that he welcomed BMC H’s advice in transferring a second towline.

The applicant stated that the IO’s finding of fact that the BMCs “argued adamantly” that the cutter should drop the tow line prior to small boat recovery is not documented in the witnesses statements or any other evidence. The applicant stated that in their investigative statements, BMC R “voiced concerns” with the operation and BMC H “expressed safety concerns and made a strong recommendation” to break tow prior to recovery of the small boat. The applicant argued that there is a significant difference between “voicing concerns” and “adamantly arguing.”

The applicant argued that the investigative report is inaccurate because it states that “BMC [R] requested to conn the cutter on the third pass” and that the applicant should have allowed the more experienced senior enlisted personnel to take the conn. The applicant stated he did not recall anyone asking to take the conn, but he did recall BMC H providing guidance to him on the third attempt. He argued that the finding in the investigation that BMC R requested to conn and the CO denied that request and took a third pass at transferring the tow line is supported by one statement and refuted by three others.

The applicant asserted that the reporting officer’s claim that the applicant unilaterally disregarded policy by conducting a tow and small boat recovery at the same time is misleading. The applicant stated that there is no policy against towing and recovering a small boat at the same time. The applicant stated that such a decision is left to the discretion of the CO based on observed on-scene conditions, training and qualifications, and overall risk assessment, as are many decisions at sea. The applicant stated that other senior officers confirmed this operation to

be an effective use of the ship's unique design to achieve the desired mission. The applicant stated that he heeded his CO's advice and never completed the dual operation again.

With regard to transiting whale habitats in excess of 10 knots, the applicant stated that as permitted by policy he only did so in situations he determined were emergencies, such as to prevent crew fatigue or to fully refuel so that the cutter would be fully ready. The applicant stated:

[I]t was standard practice for patrol boats to check in every four hours with the unit holding their communications "guard," in this case, Sector [REDACTED]. Every four hours, [the cutter] reported her position, course, and speed information back to the Sector . . . Command Center. [The] Sector . . . knew where I was, what I was doing, and how fast I was going every four hours.

Prior to the investigation, my interpretation of [REDACTED] Area policies was never questioned by the Sector despite the numerous position/course/ speed check-ins with Sector. Therefore, to say that I intentionally and flagrantly violated policy is misplaced; in fact, and to the contrary, my efforts were constantly praised and monitored.

VIEWS OF THE COAST GUARD

On May 17, 2013, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief. The JAG stated that the applicant failed to provide sufficient evidence to support his claim that the Coast Guard committed an error when it relieved him for cause. The JAG stated that the District [REDACTED] Commander's loss of confidence in the applicant was based upon an investigation, which found that the applicant did not adequately incorporate his crew's input into operational planning and risk-management decisions, specifically as to their input related to a high-risk small boat recovery while towing another vessel. The investigation also found that the applicant made at least six non-emergent transits at excessive speed through a whale habitat, contrary to Coast Guard Atlantic Area guidance. The JAG stated although the applicant alleges that he exceeded 10 knots on occasions to return for refueling so the cutter could remain in B-6 status and for minimizing crew fatigue, these reasons do not qualify as emergency operations. The JAG stated that emergency operations are "those ops for which rapid response is required to avoid the possible loss of life and property, urgent [law enforcement] incidents and matters of national security." The JAG further stated:

Specifically, the behavior underlying [the District Commander's] loss of confidence was the applicant's disregard for the safe speed provisions of the Coast Guard's speed guidance in whale habitats, and the failure of applicant's adequately incorporating his crew's input regarding the risk assessment of conducting towing operations while recovering a small boat. In sum, the applicant fails to produce sufficient evidence that there were inaccuracies that formed the basis of the relief for cause. Even though the towing of the [sailing vessel] while performing small boat recovery was not an explicit violation of

Coast Guard policy, the results of the investigation regarding applicant's excessive speed in whale habitats and the applicant's disregard of crew's input regarding the safety of towing the [sailing vessel] while conducting small boat recovery operations were sufficient grounds to support the "loss of confidence" basis for relief for cause per Coast Guard policy.

The JAG stated that the applicant's RFC complied with applicable policies at every stage and followed all necessary steps to effectuate a proper RFC. The JAG argued that since the applicant failed to prove that the Coast Guard committed an error or injustice, there is no basis on which to remove the RFC or the SOER from his record. Nor is there a basis for reinstating his promotion to LT.

The Coast Guard submitted statements from the supervisor and reviewer for the SOER. Each stood by his evaluation of the applicant's performance.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 22, 2013, the Board received the applicant's response to the views of the Coast Guard. He stated that the Coast Guard Administrative Investigations Manual required that that an investigation be timely and that "a failure to collect sufficient evidence or to resolve conflicting evidence negatively impacts the value of the investigation." The applicant stated the subject investigation was poorly conducted and commenced two months after the alleged incident occurred. The applicant stated that it is littered with insufficient and conflicting evidence, and does not provide findings of sufficient articulable facts to support a "loss of confidence" RFC.

The applicant stated that BMC R, a member of his crew, had performance issues prior to the towing incident and that he had discussed them with his superiors, including the reporting officer. The applicant stated that he believed that he had their full support in handling this personnel matter. In [REDACTED] the applicant requested that BMC R, who was the executive petty officer, be relieved for cause. The applicant stated that approximately one week later, he was informed that he was under investigation and that his request to relieve BMC R was no longer supported. As a result, the applicant stated that his investigation occurred "under a severely negative tone." The applicant stated that the investigation and related documents accuse him of dismissing advice from the BMC that he was asking be relieved of his executive petty officer duties. The applicant stated that his "command supported [his] approach with BMC [R] until they were challenged, at which point [the applicant] was left out to dry and accused of 'egotistically' dismissing advice."

The applicant restated his position that the investigation surrounding his relief for cause was untimely and littered with conflicting evidence and did not provide sufficient "articulable" facts to support a "loss of confidence" RFC.

APPLICABLE REGULATIONS

Coast Guard Personnel Manual

Relief for Cause (RFC)

Article 4.F.1.a. defines RFC as “the administrative removal of a [CO] or officer in charge (OIC) from his or her current duty assignment before the planned rotation date, normally consisting of a two-step process: (1) The flag officer in the unit’s chain of command orders a temporary RFC; and (2) Commandant orders a permanent RFC after reviewing the case.”

Article 4.F.1.b. states that the need to relieve for cause may arise when a CO’s or OIC’s performance or conduct adversely affects his or her unit’s morale, good order and discipline and/or mission performance.

Article 4.F.2.a. states that district chiefs, area commanders, district commanders, and commanders of maintenance and logistics commands have the authority to temporarily relieve a CO or OIC in their chain of command for cause.

Article 4.F.2.b. states that only Commandant, (G-C), (G-CV), (G-CCS), (CG-1) and (CG-12) can order permanent RFC. (In 2009 Commander, PSC was delegated authority to order permanent RFC.)

Article 4.F.3.c. states that one basis for RFC is loss of confidence. “It is imperative his or her immediate superiors have full confidence in a member’s judgment and ability to command due to the unique position of trust and responsibility he or she occupies; his or her role in shaping morale, good order, and discipline in the command; and his or her influence on mission requirements and command readiness. An articulated, fact-supported loss of confidence is a sufficient basis for RFC.”

Article 4.F.4 details the procedures for properly conducting a RFC: It states as follows:

Office chiefs, area commanders, district commanders, and commanders of maintenance and logistics commands have these responsibilities when initiating RFC action. Before doing so, they must take care to ensure they have not set expectations and standards unreasonably high. When instituting these procedures, they must make every effort to maintain the member’s self-worth. The Coast Guard must do everything possible to ensure that, whether or not the member returns to his or her command, the RFC process does not excessively undermine his or her effectiveness and future contributions to the Service. After deciding to institute the temporary RFC process, the relieving authority must:

1. Notify the member in writing of:
 - a. The RFC action being taken and the reason for it;

- b. His or her right to submit a statement in writing on his or her behalf within five working days of the temporary RFC action;
 - c. The temporary duty station where the relieving authority will assign the member while the RFC action pends.
- 2. Remove the CO or OIC from the unit's rating chain of all members and determine an interim rating chain for those crew members affected by this action.
 - 3. Notify [appropriate superior officers] and Commandant . . . 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.
 - 4. After reviewing the case's circumstances, the relieving authority may take these actions.
 - a. If grounds for permanent RFC are not substantiated, terminate the temporary RFC process, return the CO or OIC to command, and notify [appropriate superior officer] and Commandant . . . of action taken; or
 - b. If grounds for permanent RFC are not substantiated, but as a result of the temporary RFC the CO's or OIC's reinstatement would not be in the Service's and/or his or her best interest, terminate the temporary RFC process but recommend to Commandant . . . the CO's or OIC's PCS transfer, and full document the circumstances surrounding the initiation of the temporary RFC process; or
 - c. Where grounds for permanent RFC appear substantiated, recommend the CO's or OIC's permanent RFC and send appropriate documentation to the Commandant and Commander . . . (CGPC-opm) . . .

Article 4.F.6.5. states that the command should promptly complete an employee review of the member and submit it within 30 days of the Commandant's final action on the permanent RFC request.

Special Officer Evaluation Report (SOER)

Article 10.A.3.c.1. states that the Commandant, COs, higher authority within the chain of command and reporting officers may direct these reports.

Article 10.A.3.c.1.a. states the following;

A special OER may be completed to document performance notably different from the previous reporting period if deferring the report of performance until the next regular report would preclude documentation to support adequate personnel management decisions, such as selection or reassignment . . . Notably changed performance is that which results in marks and comments substantially different

from the previous period and results in a change in the comparison or rating scale. If an individual has been removed from primary duties (other than relief for cause as prescribed by Article 4.F.6. of the Personnel Manual) and early transfer from unit is required, a special OER is required before the reported-on officer receives consideration for reassignment. An OER documenting removal from primary duties is derogatory and must be submitted in accordance with Article 10.A.4.h.

Officer Accessions, Evaluations, and Promotions regulation

Delaying Promotion

Article 3.A.12.F. states that each officer in the chain of command or Commander (CG PSC-OPM) is responsible for delaying a promotion if he or she knows the appointee has disqualified him or herself after being placed on a promotion list. Disqualification means any circumstance which casts doubt on the moral or professional qualifications of the officer concerned, including pending action by a board of officers, courts-martial, or investigative proceedings.

Subsection (2) states that if PSC initiates delaying a promotion, he or she shall advise the officer concerned in writing of the reasons for so doing and require acknowledgment of receipt.

Subsection (3) states that the Commandant shall refer the case to a board of officers to recommend to the President whether to remove the selectee from the promotion list. The officer concerned will be afforded 10 calendar days' notice of the proceedings, and may communicate by memorandum to the board via PSC

Subsection (4) states that the President of the Board will forward a report of the proceedings of the Board containing a recommendation to the Commandant as to whether the officer should be promoted, along with the reasons for the recommendation. If the Commandant finds removal from the promotion list appropriate, he or she will forward the report with endorsements to the Secretary of Homeland Security (acting as the alter ego of the President), who is the final reviewing authority. If the Commandant determines that removal is inappropriate, the case is closed, and the delay of promotion is cancelled.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 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 Board begins its analysis by presuming that the disputed record in the applicant's military record is correct and the applicant bears the burden of proving by a preponderance of the evidence that the record is erroneous or unjust. 33 C.F.R. § 52.24(b).

4. The applicant argued that his RFC was flawed because it resulted from a mischaracterization of actual events, because it was not appropriate given the severe consequences of a RFC, and because the RFC was not "fact supported." He further argued that his RFC and subsequent personnel actions were "completely opposite the [IO's] own recommendations that no disciplinary action be taken against him. The applicant further argued that the reporting officer's claims that the applicant failed to heed the input of his crew during operational planning and risk management assessment for the mission, that the applicant unilaterally disregarded policy, and that the applicant was unwilling to embrace the reporting officer's counsel as it related to the cutter's tow of the sailing vessel, were misrepresentations of the facts and therefore were not legitimate bases for an RFC.

5. The question before the Board is whether the Coast Guard followed its regulation in relieving the applicant for cause as CO of the cutter to which he was then-assigned. For the reasons discussed below, the applicant has failed to prove by a preponderance of the evidence that the RFC and other related personnel actions are in error or unjust.

6. Article 4.F.3.c of the Personnel Manual then in effect states that an "articulated, fact-supported loss of confidence is a sufficient basis for RFC." Nothing in the regulation requires that a RFC due to a loss of confidence be supported by an investigation. However, it is clear from the reporting officer's [REDACTED] letter requesting the applicant's TRFC and the District [REDACTED] Commander's approval of the TRFC, that it was based, at least in part, on the investigation into the applicant's towing of a vessel while recovering a small boat on [REDACTED]. The reporting officer apparently relied on the following pertinent investigative findings of fact about how the applicant interacted with his crew in planning and executing the mission related to the applicant's cutter's towing of the sailing vessel:

- The cutter reported that while recovering the small boat their towline became caught on the sailing vessel's keel and the cutter removed the towline and the R&A team retrieved it onboard the sailing vessel. BMC H and BMC R stated that they both argued adamantly to drop the towline prior to small boat recovery during brief with CO. The final decision by the CO was to keep tow.
- BMC H, BMC R, MK2 C, MKC L, and BM2 N stated that the applicant took deck and conn while attempting to transfer second towline. The passes were made at unsafe angle and speed, causing safety concerns for the R&A team attempting to retrieve the towline. BCMR R requested to conn the ship for the third pass. The CO denied this request and re-established tow on the third pass.

7. The applicant disagreed with the findings and argued that he included his crew's input into the planning and execution of the mission. He stated that while the BMCs indicated they had some safety concerns with towing while recovering the small boat, they did not "argue adamantly" that the cutter should drop the tow before recovering the small boat, as suggested by

the finding of facts. The Board notes the applicant's argument that the finding of fact which states that the BMCs "argued adamantly" to drop the towline prior to recovering the small vessel is inaccurate because the BMCs investigative statements do not use the phrase "argued adamantly." The Board is not persuaded by this argument. In this regard, the applicant does not deny that the BMCs voiced or expressed concern about the safety of recovering a small boat while towing. The fact that two senior BMCs on the applicant's cutter expressed their concerns about the safety of the operation is evidence that the applicant did not heed their advice. The BMCs safety concern and sea experience should have been sufficient warning to the applicant that towing a vessel while recovering a small boat was potentially dangerous. The fact that it took the applicant three attempts to transfer the second towline and in the process of the first two attempts he did so at an unsafe angle and speed supports the CO's conclusion in the RFC that the operation executed by the applicant endangered the sailing vessel and the crew. The Board finds that the reporting officer's conclusion that the applicant failed to heed the advice of his senior crew is supported by the investigation.

8. The applicant argued that there was no Coast Guard policy on simultaneously recovering a small boat while towing. In his RFC for cause request, the reporting officer agreed with the applicant that there is no written Commandant policy regarding the joint operation of launch/recovery of an 87' WPB small boat and conducting towing operations. The Board finds that in the absence of such written policy, a CO is still required to exercise good leadership and sound judgment in decision-making. The reporting officer explained to the applicant at the completion of the mission on [REDACTED] that small boat recovery and towing was an unsafe operation and subsequently sent out an email to the applicant and others prohibiting the practice. The reporting officer's loss of confidence in the applicant was due in part to the applicant's continuing defense of his actions, as demonstrated by his two statements to the investigator, after being counseled and advised by his CO on [REDACTED] that simultaneous towing while recovery a small boat was a dangerous practice. In this regard, the CO stated the following in his [REDACTED] request for the applicant's RFC:

On [REDACTED] I met the cutter and crew at the pier upon their return to homeport. In my discussion with [the applicant], I learned that [the cutter] had entangled the towline around the keel of the sailing vessel as a result of conducting small boat recovery operations while towing. While there is no specific policy provision prohibiting simultaneous operations, I clearly and unambiguously indicated during our conversation on [REDACTED] that recovery of a small boat while towing, with the Coastal Patrol Boat's stern launch and recovery system for the small boat, was a dangerous practice. I followed this conversation with an email to [the applicant], among others, prohibiting boat launches or recoveries while towing a vessel. [The applicant's] statement [to the investigation] that "this type of dual operation is standard practice" and "an effective use of the unique platform design to achieve desired mission sets" and his [second] statement [to the investigation] that the best guidance available is "yet to be developed" signals his belief that his actions were entirely justified—regardless of the extent to which he endangered both the sailing vessel and his crew. I understand the lack of towing training and expertise possessed by patrol boat commanding officers, yet I am deeply troubled by [the applicant's]

unwillingness to embrace counsel and advice, particularly in light of his minimal seagoing experience.

As stated, the reporting officer's loss of confidence in the applicant based upon the applicant's continuous defense of a policy in [REDACTED] that the reporting officer had told him was unsafe in [REDACTED] supports the reporting officer's loss of confidence in the applicant and was a sufficient basis for RFC.

8. The IO also found the following as fact: That on several occasions the applicant who was CO of the cutter, gave orders to exceed 10 knots through the north Atlantic Whale South Zone . . . for different reasons to include: returning to homeport in order to re-fuel and maintain B-6 recall status, conducting power trials, performing law enforcement and responding to urgent searches and rescues on a few occasions.

9. With regard to the allegation that he used excessive speed in the North Atlantic Right Whale habitat, the applicant stated that he must have misinterpreted the guidance. He stated that he based his decisions to travel in excess of 10 knots through the whale habitat on the unique demands of the Sector Jacksonville area of operation or the cutter's personnel status at the time, which included crew fatigue or to return to fully ready status by refueling. According to the IO's opinion "[d]ue to the lack of specific speed restrictions set forth in internal USCG policy it is difficult to determine, what exactly is an appropriate speed." However, Coast Guard COMLANTAREA msg [REDACTED] (North Atlantic Right Whale Ship Strike Reduction Rule Enforcement Guidance), in addition to others, warned that most whale strikes occur at speeds of 10 knots or greater and it warned that Coast Guard cutters should reduce their speeds in whale habitats. The message made exceptions for emergency operations, which it defined as operations for which rapid response is required to avoid possible loss of life and property, urgent law enforcements incidents and matters of national security. The reporting officer was not persuaded that the applicant's reasons for excessive speed in whale protected areas met the emergency operations definition. The applicant does not deny that on occasions he exceeded 10 knots in transiting whale protected areas, nor does he state that he was unaware of Coast Guard guidance on the matter. The fact that the applicant considered normal crew fatigue or refueling or replenishing the cutter as emergencies that would allow him to use excessive speed in a whale habitat speaks to the quality of the applicant's judgment and leadership and supports the reporting officer's RFC. In addition, the reporting officer and District stated that crew members mentioned to the applicant that speed in whale habitats should not exceed 10 knots.

11. The applicant's argument that the IO's recommendation that no disciplinary action be taken against him as a basis for removing the RFC is not persuasive. In fact no disciplinary action or court-marital action was taken against the applicant. His RFC, the OER, and the removal from the promotion list were all administrative measures. Moreover, the reporting officer was not bound by the opinions or recommendations of the IO. Under Article 6.B.2. of the Administrative Investigation Manual (AIM) (2007), either the applicant's CO or the [REDACTED] Coast Guard District Commander was the final review authority for the investigation ordered by the applicant's CO. According to Article 6.E.1. final action authority approves or disapproves the findings of fact and may make additional findings of fact as warranted by evidence contained in the investigation. This provision further states that that an IO's opinions and

recommendations need not be addressed except to the extent necessary to properly resolve issues and take actions. Therefore, pursuant to the above pertinent provision of the AIM, the recommendation that no disciplinary or courts-martial action be taken against the applicant did not prevent the final review authority from taking such action based upon his review of the investigation. However, in the applicant's situation no disciplinary court-martial action was taken against the applicant. His RFC, SOER, and removal from the promotion list were all administrative in nature.

12. To conclude: Article 4.F.3.c. states that one basis for RFC is loss of confidence. "It is imperative his or her immediate superiors have full confidence in a member's judgment and ability to command due to the unique position of trust and responsibility he or she occupies; his or her role in shaping morale, good order, and discipline in the command; and his or her influence on mission requirements and command readiness." It is clear from the evidence of record that the applicant's reporting officer and the District [REDACTED] Commander lost confidence in the applicant's ability to serve as CO of the cutter due to his poor judgment of using excessive speed in a whale protected habitats, his failure to heed the advice of his senior enlisted crew on the unsafe practice of towing and recovering a small vessel simultaneously, and his failure to embrace the counsel of the reporting officer that a dual operation of towing and recovery a small vessel was unsafe. The applicant has not produced sufficient evidence to prove that the RFC lacked an articulated factual basis.

13. His argument that the investigation was untimely is without merit as he presented no regulation that required the investigation to be convened within a specific period of time.

14. The applicant was afforded all due process under the regulation for each of the administrative actions taken in his case.

15. In light of the above discussion, the Board finds that the reporting officer provided sufficient facts to support the applicant's RFC. The other adverse personnel actions resulted from the applicant's relief for cause. The applicant has not provided sufficient evidence to prove that the SOER or the removal of his name from the [REDACTED] promotion board list to be in error or unjust.

16. All of the applicant's contentions and submissions have been considered. Those not discussed within the findings and conclusions are considered not to be dispositive in this case.

17. The applicant has failed to prove an error or injustice and his application should be denied.

[ORDER AND SIGNATURES APPEAR]

ORDER

The application of
military record is denied.

[REDACTED] USCG, for correction of his

[REDACTED]