

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-183



FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on July 30, 2019, and assigned the case to the Staff Attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated May 10, 2023, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, a retired Commander (CDR/O-5) who was honorably discharged on June 30, 2018, for twice failing to promote, asked the Board to correct his record by expunging his July 1, 2015, permanent relief for cause (PRFC) as the commanding officer (CO) of a cutter from his military record. The applicant argued that he should be made whole, as if the RFC had not occurred, by receiving the following relief:

- 1) Expunge his annual Officer Evaluation Report (OER) for the period ending on March 30, 2015;
- 2) Expunge his Derogatory OER for the period ending on July 1, 2015;
- 3) Retract all derogatory press releases and public statements regarding the applicant's performance of duties as the CO of the cutter;
- 4) Expunge his "pass over" for promotion to Captain by the PY 2017 Captain selection board in 2016;
- 5) Expunge his "pass over" for promotion by the PY 2018 Captain selection board in 2017;
- 6) Conduct a Special Selection Board to consider him for promotion backdated to PY 2017;
- 7) Expunge his forced retirement and reinstate him in active duty military service effective immediately;

- 8) Reinstate him as CO of the cutter or be assigned as a CO to a different cutter commensurate with his pay grade upon return to active duty;
- 9) Pay all household goods, transfer expenses, and entitlements for himself and his dependents following his reinstatement to active duty; and
- 10) Reimburse him for all associated attorney's fees expended from 2015 to the present.

The applicant submitted a 105-page memorandum with his application for relief and 191 exhibits, totaling 1,249 pages. These exhibits included numerous photographs, articles, emails, and memoranda. Only the evidence that is considered specifically relevant to the applicant's requests for relief, specifically his RFC and the subsequent actions flowing from the RFC, will be summarized and included within this decision.

SUMMARY OF THE RECORD

The applicant entered the Coast Guard Academy on July 7, 1991. He graduated and was commissioned an Ensign on May 24, 1995. The applicant continued to serve on active duty and was promoted to Commander (O-5) on July 1, 2011.

During the applicant's Coast Guard career, he served on over thirty cutters, including as an Executive Officer (XO) and a CO.

On July 15, 2014, the applicant was assigned as the CO of a cutter with a crew of 72. On July 31, 2014, the applicant emailed Captain M and LCDR O, wherein the applicant provided an outline for his cutter's plan of action moving forward. The relevant portions of this email are recorded below:

BLUF: [applicant's cutter] currently lacks sufficient operational knowledge and proficiency to conduct sustained operations and training without unreasonable increased risk. The primary reason for this issue is simply the schedule; the lack of underway time combined with the immediate entry into CART (Common Assessment and Reporting Tool) after a major dry dock and personnel change outs were simply devastating to the process. Since taking command approximately 3 weeks ago, I am observing a number of gaps in navigation, damage control, boat operations, organization of the WQSB, doctrine, and the on board training teams — all of which CAN and ARE CURRENTLY IN THE PROCESS OF BEING CORRECTED. As discussed with you both privately, we believe CART on 05 AUG 2014 will be an uphill battle with a number of training and underway restrictive items. With that said, we believe proceeding forward is absolutely essential due to competing future operational and main[tenance] demands — center section overhaul, talon grid replacement, and flight deck renewal to name a few.

During relief week I asked the XO and department heads for a more complete assessment of where we stood with regards to CART check lists, documents we will be using in the future to determine our readiness for sea. Enclosed, you will find the completed self-assessment/snapshot of the CART checklist (30 JUL 2014). Some of these items may be cleared in short order now that we have departed dry dock. Regrettably, many items will not be corrected in the allotted time period prior to CART. However, due to the change out of CO, EO, and OPS as well as 35.1% (26 personnel) of the crew since FEB 2014 ([applicant's cutter] last deployment period), I believe it is essential to have an ATG assessment (CART) so that we can point the cutter in the right direction from the start and move forward in a methodical manner with TSTA as scheduled. In my assessment, this is the best method for getting the ship back on track.

FUTURE PLANS: Our discussion with ATG on 29 JUL was extremely productive and we are grateful for the opportunity to develop and execute a way forward. We intend to begin CART on 05 AUG at 0900 as

discussed. During that time, we will outline where we believe issues are and look forward to any additional input from ATG (Afloat Training Group). We plan to run drills as noted in the schedule with the understanding we may need to take training time out to focus on any issues that may arise; in all honesty, running drills during CART may be challenging. We have a number of new personnel as trainers in WQSB positions, so patience and cooperation across the board will be key.

Ultimately our objective is to combine our internal assessment with the input from ATG and begin correcting discrepancies to return [applicant's cutter] to FMC in short order. I am classifying the majority of our next patrol as a training period so that we may right the boat so to speak. The safety of the crew and health of the cutter demand that we move forward in this positive direction. To do otherwise could, in my professional assessment, place our people at unnecessary risk. In short, we need to identify gaps and correct gaps during an uninterrupted underway period.

Attached to this email was a list of approximately 98 discrepancies that the applicant and his crew had found that needed to be addressed.

On August 5, 2014, the Coast Guard Health, Safety and Work-Life Service Center conducted a Safety Mobile Assistance, Response, and Training Team (SMART) visit. The purpose of the visit was to provide safety and environmental health support to the applicant's cutter when implementing its program. SMART provided the applicant with an administrative report wherein the hazards found aboard his cutter were outlined. The applicant was directed to provide corrective actions or control measures by entering them into the Hazardous Conditions Management System within 60 days. The report provides Risk Assessment Codes (RAC) for each hazard found. RAC 1 reflects imminent danger to personnel or property requiring immediate remedial action. An RAC 2 reflects a serious hazard to personnel or property, or serious discrepancies of internal controls requiring remedial action. An RAC 3 reflects a less serious hazard to personnel or property or internal controls requiring remedial action. Finally, RAC 4 reflects best workplace practice. SMART reported 3 RAC 2 hazards and 72 RAC 3 hazards on the applicant's cutter.

On September 4, 2014, the applicant submitted a memorandum to his command regarding lead testing that had been conducted aboard his cutter in March of that year. The applicant stated that he had significant concerns regarding the status of lead dust aboard the cutter and the potential health risks to crewmembers and their families. The applicant requested 100% lead testing of the cutter when they returned to home port in October 2014. He also requested that following testing, the cutter have contract cleaning for lead removal from all areas of concern. After cleaning, the applicant stated, the cutter should then be retested for lead prior to deployment.

On October 21, 2014, CAPT R sent the applicant a memorandum, "Command Concerns," wherein CAPT R reminded the applicant that he was responsible for the safety, efficiency, and well-being of his command. CAPT R stated that the command had been informed of multiple complaints through various avenues, including crewmembers, family members, chaplains, work-life staff, and the Command Master Chief network. CAPT R stated that the wide variety of people voicing these concerns had caused concerns about the morale, welfare, and work-life balance of the cutter's crew. The applicant was directed to take several steps to develop a plan of action to address and improve the morale, welfare, and work-life balance for the cutter's crew. First, the applicant was directed to conduct a Defense Equal Opportunity Management Institute (DEOMI) Command Climate Survey (DEOCS) no later than November 7, 2014. Next, the applicant was instructed to conduct peer group "town hall" meetings with his Command Chief and collect the crew's concerns no later than November 14, 2014. The purpose of these meetings was to solicit

candid feedback resulting in positive changes. The applicant was instructed to review the meeting results with his command leadership to include the Wardroom and CPO Mess. Finally, the applicant was instructed to submit a summary of his meetings and plan of action to his command no later than November 21, 2014. CAPT R concluded by acknowledging that the applicant also had a responsibility to ensure the cutter's operational readiness but directed the applicant to maintain balance with the welfare of the crew.

On January 5, 2015, the DEOMI survey results were published.¹

On January 16, 2015, the Area Commander, VADM R, sent the applicant a memorandum, "Leadership and Command Climate Concerns" wherein VADM R informed the applicant that he had significant concerns regarding the applicant's leadership and the command climate on board the cutter. VADM R stated that he was encouraged by the applicant's actions. However, he told the applicant that he wanted to be clear that his leadership approach still needed continued improvement. VADM R instructed the applicant to focus on three leadership traits. The first trait was humility. He stated that command at sea bears great responsibility and earns many privileges. However, these privileges cannot over-shadow the dedication and hard work of his crew. The applicant was told that there was no place for arrogance when it comes to leading a ship's crew at sea. VADM R stated that humility could be a CO's strongest trait and must be embraced. The second trait was empowerment. He stated that job satisfaction is the product of job completion with supervisors' satisfaction. A common mistake of leadership is doing the job for their subordinates to ensure it is meeting their own expectation, but this does not elicit job satisfaction. VADM R told the applicant that not all jobs are a priority that require immediate results, nor are all jobs black and white with only one answer. He stated that patience and flexibility were critical to creating a workplace climate with high job satisfaction.

The third trait addressed by VADM R was encouragement. VADM R stated that cutter tours were extremely taxing and demanding on crews and families. He stated that crews must receive continual encouragement to stay motivated and mission focused. Highlighting personnel failures in front of others is unacceptable and deflates, demeans, and demoralizes subordinates. VADM R stated that all crews have the innate desire to please their CO. The applicant was instructed to embrace such desire and seek opportunities to recognize his crew for their efforts. VADM R stated that the applicant should not treat all mistakes like failure, rather as an opportunity for mentorship and encouragement. In addition to focusing on the three leadership traits, the applicant was instructed to take several steps, including providing a plan of action and milestones to improve the leadership and command climate of the cutter, submitting a personal reflection of the DEOMI survey results, submitting a summary of his DEOMI survey review board meetings and their recommendations, continuing to meet with his Command Chief and command leadership team to review progress, and continuing to provide weekly emails on the progress of his plan of action. VADM R concluded by stating that he wanted the applicant to succeed. Accordingly, VADM R directed his staff to stay actively engaged and provide the applicant with the necessary mentorship to improve the leadership and climate aboard the cutter.

¹ Neither the applicant nor the Coast Guard provided a copy of the DEOMI Command Climate Survey results from the survey that was taken while the applicant was CO. The applicant only submitted DEOMI survey results from other cutters and from his cutter before his arrival.

In response to VADM R's January 16, 2015, memorandum, the applicant submitted an 18-page, undated statement, wherein he provided his reflections on the December 2014 DEOMI survey. The applicant stated that the DEOMI survey regrettably contained false and inaccurate information that may have unnecessarily exacerbated the current situation. According to the applicant, there was a perfect storm of multiple events that impacted his cutter, and those storms were not created by any one person or single event. However, the applicant stated that the storms had since passed and that his cutter was moving forward. The applicant reiterated that unidentified members who took the DEOMI survey had made false and inaccurate statements, specifically about him. The applicant claimed that the DEOMI survey was a reflection of where his cutter had been, not where it was, and regrettably the survey did not provide an accurate picture of the path leading to its previous condition, nor did it provide insight into the positive direction the cutter was now heading. The applicant compared his first few months in office to those of a former New York Mayor. He stated that the mayor had encountered similar circumstances, including a police force in disarray, crime at an all-time high, and policies and procedures within the city government not being followed. Using the mayor's model of improvement, the applicant explained, he had directed department heads to enforce uniform standards, as well as improve the ship's appearance, cleanliness, and other basic habitability issues. The applicant claimed that he had noted some reluctance from within middle management, so he had led the way and communicated this objective openly on all levels. According to the applicant, members of his crew had communicated their frustrations with his newly implemented policies outside the chain of command.² The applicant provided many explanations and justifications for the actions he took that led to the DEOMI results, but ultimately concluded that much of the information that had filtered through to Area staff, either formally or informally, did not tell the whole truth, was highly sensationalized, or had completely circumvented the chain of command.

DEOMI Focus Group Results

On January 16, 2015, a DEOMI focus group was convened. The group's assignment was to meet and publish actionable recommendations for system improvements aboard the cutter. The group consisted of eleven shipmates. CWO2 M was the Chair. The DEOMI focus group convened for the first time on January 29, 2015.

On February 6, 2015, and the DEOMI focus group issued a memorandum, "DEOMI Focus Group Minutes, First Meeting," wherein the Chair provided an overview of the group's first meeting. The first topic of conversation concerned the use of racist and offensive comments, slurs and jokes in the work area. Several mid-level leadership participants indicated these types of comments were brought to their attention by junior personnel. Further discussion had revealed that the complaint came from a crewmate who had overheard a conversation without knowing the context. It was believed that these events had taken place between June and November of 2014, with no reports during December or January. It was further revealed that some personnel were either discouraged or were uncomfortable seeking help from their supervisors. The discussion revealed that there were three causes for the apprehension: individuals may be inhibited based on prior experiences, some of the non-rates had previously been scolded for not going through the chain of command with their concerns, and the physical environments are intimidating. Although

² The applicant addressed multiple DEOMI survey results and defended his actions in great detail in his 18-page statement. Only the most relevant claims are included in this decision either here or elsewhere.

there had been attempts to alleviate these barriers, they still existed. Regarding the command climate, the focus group provided the following outline:

- a. Exhaustion - Fatigue continues to be a concern. The focus group indicated the majority of [applicant's crew] understands we are now in an operationally demanding climate because of the nature of our patrol and patrol area. This fatigue is much different than that experienced during the June thru October timeframe in that it is not continual, nor is it mentally and emotionally draining. The current level transitions from periods of high-level fatigue due to intense operations and detainee security to periods of routine fatigue due to daily routine and watch schedules. The general consensus of the focus group is the crew recognizes the efforts within the chain of command to seek and provide for opportunities of rest during the periods where a higher level of fatigue is experienced.
- b. Our positive changes are only temporary- Several focus group members indicated discussions onboard reveal a concern our current efforts and condition will not last. These conversations are focused around the ability of the crew to realize [applicant's cutter] is under the scrutiny of [Sector], indicated by the number of senior leadership visits. The fear is expectations and focused efforts will again shift to what the crew experienced during the months of June thru October.
- c. Undue stress - This is related to the expectation of management. Individuals within the middle to senior leadership positions feel they experience undue stress because they fear their decisions...answers to inquisitive questions and efforts will not meet expectations [which] they feel change on a regular basis. Observations of past experiences, i.e. relief of a department head, restructuring of division officers and rescinded qualification of an OOD, have individuals fearful they may lose qualifications and positions that will adversely impact their evaluations, job assignments and ultimately career retention.
- d. Communications - The focus group feels this may be the most concerning topic in [applicant's cutter]. The general consensus is communications have improved. Specifically noted...the Commanding Officer has withdrawn from acting as the primary source of information for the crew...allowing necessary information to be passed down through the Executive Officer, department heads, division officers and CPO Mess. This has alleviated a great deal of mis-communicated expectations and minimized the number of conversations between uninformed middle-level leadership and subordinates. The focus group recommends the continuance of information pass-down through the chain of command...vice directly from the Commanding Officer.
- e. Trust - This area of concern is closely related to communications. Because of miscommunicated or frequently changing expectations, as well as the passing of some invalid information...the crew feels what they have been led to believe is not accurate. Several decisions regarding our schedule, procedures, and policies have been articulated to the crew as a result of direction by higher authorities or interpretation of policy. Research and discussions after-the-fact have revealed-some of these communications were erroneous interpretations or outdated recollections of policies. The focus group discussion revealed the crew also feels upper level leadership hides behind policies and places blame on [Sector] for the decisions made directly within the ship. Two recommendations were provided to help regain trust within the chain of command: First, communicate the true reason behind a decision or direction, even if the truth is simply because this is the way I/we prefer or feel is best. Second, officers need to take credit not only for the good decisions and positive outcome, but also accept the responsibility for bad decisions that have adverse or less than favorable results or desired acceptance, don't pass the blame on to someone else.

Finally, the focus group discussed the status of the current state of the command. Relevant to our applicant, the focus group found that only six out of the ten members believed the applicant cared about what happened to his crew members, compared to the Executive Officer (XO) who received a vote of ten out of ten. It was also revealed that only four members of the focus group felt they could raise concerns about issues affecting their jobs, and six reported that they had experienced an unreasonable amount of stress at work unrelated to normal operations and shipboard life.

On February 16, 2015, the DEOMI focus group met for a second time. The group first discussed survey results that revealed members of the applicant's crew had reported consuming more alcohol at home as a coping mechanism for "unnecessary stresses" they experienced during the workday and uncertainty about what they would encounter the following day. The Personal Health Assessment (PHA) revealed similar results. The focus group then discussed the "Your command is more concerned about public perception over work-life and well-being of the crew" question. Concerns were raised about emails to crew members' spouses. Several individuals expressed concern over a double standard that the CO was allowed to tell spouses where crew members were located, but it was not okay for them to do so. It was also recommended that the command enhance communication and articulate expectations to help alleviate tension and frustrations created by the presentation of new procedures and unpopular decisions.

On February 24, 2015, the CWO2 M wrote a synopsis of the DEOMI focus group. He stated that it was his opinion that the overall climate aboard the cutter had improved since the DEOMI survey was completed. Specifically, low individual and unit morale were no longer on the rise and were no longer considered to have a negative impact on the working environment. CWO2 M attributed the progress to the cooperation and collective efforts of the Wardroom and CPO M by focusing on communication/messaging, role clarity, and expectation management.

Administrative Investigation

On March 18, 2015, the Sector Commander issued a memorandum, "Investigation into Command Climate Onboard CGC [applicant's cutter]," wherein he appointed Captain L to conduct a single-officer standard investigation in accordance with the Administrative Investigations Manual, COMDTINST M5830.1A, into the command climate on board the applicant's cutter. Specifically, Captain L was directed to investigate whether the applicant had created a poor command climate. Captain L was told to consult with counsel prior to conducting the investigation and to complete the investigation by April 16, 2015, or as soon thereafter as practical.

On April 6, 2015, Captain L submitted a memorandum with the findings of his standard administrative investigation into the command climate onboard the applicant's cutter. He explained that his report and findings were based on information provided during peer group meetings with the non-rates, E-4s, E-5s, E-6s, the Chiefs Mess, and the Junior Officers onboard the cutter. Additionally, one-on-one interviews were conducted with five additional witnesses. The most relevant content of the IO's report is below:

PRELIMINARY STATEMENT

...

6. In summary, the preliminary inquiry concludes that CDR [applicant] effectuated a poor command climate while overcoming a difficult schedule onboard a cutter that was not in compliance with numerous Coast Guard standards and policies and suffered from a lack of professional competence. [Applicant] was inflexible in how he implemented changes, did not initially work closely with his Wardroom and Chiefs Mess, alienated his crew, and failed to adapt his leadership style to the crew, particularly the JOs. He also utilized unorthodox methods to train and communicate his desires. My recommendations are included below.

FINDINGS OF FACT

6. [Sector] staff continued to receive E-mails and reports of a poor command climate from various sources including chaplains, command chiefs, work-life, and other commands around [the cutter] resulting in CDR [applicant] being directed to report to [Sector] for a meeting with CAPT [R] and CAPT [M] on 22 Oct to discuss their concerns with the low crew morale on [applicant's cutter]. In preparation for the meeting, CAPT [R] signed a memo on 21 Oct, officially notifying CDR [applicant] of concerns about morale, welfare, and work-life balance for [applicant's cutter's] crew. The memo listed several required actions including town hall style meetings, a DEOMI survey, and regular correspondence with [applicant's Sector]. (Exhibits (6-pp. 2-5; 7 - p. 1))
7. In late Dec and early Jan the [Sector CMC] got underway with [applicant's cutter] and received similar reports from the crew concerning a poor command climate onboard with CDR [applicant] at the center of the complaints. (Exhibit (8-p. 1))
8. CDR [applicant] complied with CAPT [R's] direction, traded E-mail correspondence with CAPT [M], and officially replied via memo on 9 Jan 2015 which included a link and login information for the DEOMI survey completed on 5 Jan. (Exhibit (7-pp. 2-4)).
9. On 16 Jan. VADM [R] signed a memo to CDR [applicant], highlighting his concerns with CDR [applicant's] leadership and the command climate onboard [applicant's cutter]. The memo directed CDR [applicant] to focus on the leadership traits of humility, empowerment, and encouragement. The memo also listed some required correspondence and tasks detailing steps he must take to remedy the situation. The memo was delivered to CDR [applicant] by CAPT [C] ([redacted]) on 19 Jan during [applicant's cutter's] port call in [redacted] . (Exhibit 7-pp. 5-7).
10. In late Jan and throughout Feb, [Sector] continued to receive reports indicating that while the climate onboard was improving due to the efforts of the Chiefs Mess and the Wardroom, CDR [applicant] was still impeding progress. (Exhibits (6-pp. 18-19, 22-24, 26-30; 8-pp. 3-5, 8- 19)).
11. When CDR [applicant] took command of [applicant's cutter] the cutter was out of compliance with several COMDT/[Sector] policies and the crew required significant training to overcome the extended time between patrols due to the dry-dock availability. The cutter did not utilize shore patrol during foreign port calls, more than 96 hours of stand down was granted before and after patrols, the berthing areas were substandard, and the required logs were not maintained to name a few. The navigation team was not capable of safely navigating in Mode III (paper charts, visual bearings, and radar ranges). [Applicant's cutter] needed to recertify all flight deck personnel prior to their JIATFS patrol in Dec. None of which was listed in CDR [applicant's] relief letter. (Exhibits (2, 7-pp. 11-15)).
12. The Jan 2015 DEOMI survey did not indicate that there were any significant discrimination or SAPR issues onboard [applicant's cutter]. The numbers concerning the shipboard command climate indicated the majority of the crew felt the climate was poor. There are also 44 pages of comments that are mostly negative and for the most part directed at the Commanding Officer/Command. (Exhibit (9)).
 - a. Over 71 percent had an unfavorable opinion of how the chain of command promotes a unit climate based on "respect and trust." (Exhibit (9-p. 25)).
 - b. The cutter was significantly below (> .5) the service average in Organizational Commitment, Trust in Leadership, Organizational Performance, Leadership Cohesion, Job Satisfaction, and Exhaustion. (Exhibit (9-pp. 54--55)).
 - c. Over 40 percent responded that they would either probably or definitely leave the service after completion of their current obligation. (Exhibit (9-p. 65)).
 - d. In response to several locally developed questions, the majority the respondents indicated that there were issues with communications, officers caring about service members, unreasonable

amounts of stress, concerns being heard and addressed at the command level, morale, and the command being more concerned about public perception than the crew. (Exhibit (9-pp. 81-83)).

13. The Dec 2008 DEOMI survey was conducted while then, LCDR [applicant], was the XO of [applicant's cutter]. (Exhibits (3, 10)).

a. Leadership Cohesion fell into an area of "High Organization Concern" and a "Somewhat negative rating" in comparison to the Coast Guard average. (Exhibit (10-pp. 31, 35)).

b. In response to several locally developed questions the majority of the respondents indicated that there were issues with communication within the chain of command, the command's commitment to creating an environment of human respect and dignity, teamwork, officers in the command cadre caring about service members, being motivated by their current assignment to continue a career in the military, and communication flow from senior leadership to all levels. (Exhibit (10-pp. 38-40)).

c. There are several comments included in the survey that are specifically directed at CDR [applicant] which, in general, place the blame for poor morale/people wanting to get out of the Coast Guard on him, state that he only cares about himself and how he looks for his next evaluation, doesn't respect the crew because he calls people "guy" and is constantly challenging them and sizing them up. These comments align with the comments from the Jan 2015 DEOMI survey. (Exhibits (9-pp. 84-128; 10-pp. 41-43)).

14. The Dec 2009 DEOMI survey was conducted 4-5 months after, then LCDR [applicant] departed [applicant's cutter] and shows marked improvements in almost all sections, including highly positive comments about the new XO. (Exhibits (3, 11)).

15. During his first address of the crew, CDR [applicant] stated that it was easier for one person to change rather than 74 and that he would let the current policies remain in effect and he would adjust to them. Soon after that statement, CDR [applicant] began to make changes to align the ship with COMDT/[Sector] policies. (Exhibits (16-p.; 17-p. 1; 18-p. 9; 20-p. 1)).

16. Soon after he arrived, CDR [applicant] learned that the non-rates were being called "stupid," "idiot," and names like "maggots" and took steps to correct the behavior. (Exhibits (13-p. 1; 18-p. 1)).

...

23. Several people in the crew believe CDR [applicant] treats the female JOs (LTJG [D] and ENS [S]) differently than he does the male JOs. He denies that he does. There are several examples. (Exhibits (8-pp. 18-19; 14-p. 1; 17-p. 1; 18-p. 1)).

a. He constantly "grills" LTJG [D] and to a lesser extent ENS [S]. He doesn't do the same to the male JOs. (Exhibits (14-p. 1; 23-p. 2)).

b. He had a discussion with LTJG [D] about being a female in the Coast Guard and that she should embrace it. The fact that his wife gets bad cramps during her period came up and he told her it was okay if it happened to her, he would understand. He said female officers shouldn't try to be one of the guys, but they shouldn't be overly feminine either. He told her she was in a good place and if that changed he'd let her know. LTJG [D] stated it felt strange and uncomfortable. CDR [applicant] denies having that conversation but he did confirm that he discussed baking with her to make sure it was to support a hobby and not to fit in with the guys. (Exhibits (17-p. 1; 18-p. 2; 22-p. 2)).

c. He had a discussion with ENS [S] about being a female in the Coast Guard which revolved around what she should and shouldn't do because she's around guys. He told her she shouldn't bake to earn favor with the guys. She stated that it could have been a good discussion, but the "tone" was off and it made her feel uncomfortable. (Exhibits (8-p. 18; 23-p. 3)).

d. During Evening Reports following a charlie fire onboard, LTJG [D] was asking CDR [applicant] for clarification about an E-mail addressing a Ready For Sea waiver and whether it required they use a tug or just that a tug be available. CDR [applicant] leaned forward and waved the E-mail in her face and stated, "It says I have to." LTJG [D] had to lean out of the way to avoid getting hit. This incident was the last straw for her and she almost filed a formal complaint against him. CDR [applicant] does not remember this incident. (Exhibits (8-p. 15,; 16-p. 3; 18-p. 2; 19-p. 4; 21-p. 5; 22-p. 1)).

e. Just before they got underway LTJG [D] was heading out to get coffee for the Wardroom and asked if anyone needed anything while she was out. CDR [applicant] called her enroute and asked her to get Valentine's Day cards for his wife and daughter. After delivering the cards to him and just as Special Sea Detail was about to be set, he told her to mail them, but he didn't have any stamps so he gave her a couple dollars. The XO had some and she was able to mail the cards. (Exhibit (22-p. 2)).

f. While LTJG [D] was OOD and the engine room was conducting BECCes, CDR [applicant] repeatedly asked her rapid fire seamanship related math questions (radian rule, etc.) that had nothing to do with the evolution. This type and intensity of questioning does not occur to everyone else, only her and the other female JO. Sometimes it even happens during meals. (Exhibits (19-p. 2; 20-p. 3; 22-p. 2)).

g. After conversations in the Cabin with LTJG [D] and in the presence of the XO, CDR [applicant] has made comments about keeping the discussion private by jokingly using references to a green tablecloth, people disappearing, and shooting a certain vertebrae to kill someone. Both XO and LTJG [D] believe he's joking and CDR [applicant] claims they laughed, but given CDR [applicant's] background in intel and [redacted] it made the XO pause and made LTJG [D] nervous and a little scared. (Exhibits (18-p. 2; 19-p. 4; 22-p. 1)).

h. CDR [applicant] had ENS [S] execute rubber docking/man overboard approaches without the help from the normal bridge team. After four to six attempts, with very little coaching, help or feedback he took over and demonstrated how to do it properly. There was some training and a debrief: but it had been very stressful and she shut down. After it was over she ran off the Bridge in tears and another JO was so concerned for her safety he followed to make sure she was okay. Later CDR [applicant] called her to the Cabin to ask her if she understood why he had her do that on the Bridge. During the conversation she remembers him saying something like, "My method works, guaranteed." CDR [applicant] explained that he wanted her to feel how the cutter handled, that he worked with her, and after an hour and a half she was doing well. (Exhibits (8-p. 18; 17-p. 1; 18-p. 2; 19-p. 1; 20-p. 4; 23-p. 1; 24-p. 2)).

i. While breaking in on the Bridge, ENS [S] needed to call CDR [applicant] about a weather change and had diagrammed it out with OPS so she could understand how you can forecast weather changes based on barometer and wind changes. When she called CDR [applicant] he asked her if it made sense and she told him yes. He told her she was wrong and later when he came to the Bridge and saw the diagram on a window he told her that's what he was talking about. (Exhibits (18-p.2; 19-p. 1; 20-p. 4; 23-p. 1)).

j. While transiting [redacted], CDR [applicant] had ENS [S] take the helm in order to have her feel how the currents affected the cutter. He said something like, "You've got a fancy college degree, you should be able to drive as good as the helmsman who doesn't have one." OPS indicated that CDR [applicant] said that the helmsman should stand by ENS [S] to ensure she stood a proper watch and then tried to make it sound better by stating that even though she has a four year degree, the helmsman is more experienced. (Exhibits (8-p. 18; 19-p. 2; 20-p. 3-4; 23-p. 1)).

...

l. While setting up for a passenger transfer with a WHEC, ENS [S] was breaking in as the Conning Officer and had developed a plan with the qualified OOD (LTJG [H], [redacted]). While trying to execute the plan, CDR [applicant] came up to the Bridge, assumed there was no plan and told ENS [S] the commands to give. He had the cutter turn 90 degrees away from the WHEC which increased the distance for the WHEC's small boat to cover and was contrary to what had been briefed with the WHEC. OPS isn't sure why CDR [applicant] maneuvered like that. Afterwards CDR [applicant] said ENS [S] wasn't ready to be an OOD and blamed her for how the transfer went. He never blamed anything on the qualified OOD who he holds out as an example for all the other JOs to emulate. (Exhibits (18-p. 1; 20-pp. 5-6; 23-p. 1)).

m. After avoiding a fishing vessel and being offtrack, ENS [S] gave the wrong command to regain track and CDR [applicant] said something like, "Now you just feel really stupid don't you." CDR [applicant] doesn't remember that situation and stated that he would never use the word stupid. (Exhibits (8-p. 18; 18-p. 2; 23-p. 3)).

n. LTJG [D] fears what she's told me during this investigation could negatively impact her career and that she avoids CDR [applicant] because she feels uncomfortable and awkward around him. (Exhibit (22-pp. 1-2)).

o. LTJG [D is] concerned about ENS [S] having a breakdown or shutting down because she's only been onboard for a few months and is very unhappy and having a hard time. She says that CDR [applicant] doesn't see the breakdown coming and doesn't give ENS [S] time to regroup or recover. He just keeps pushing. She stated that he's always manipulating them and playing games, causing her to be on edge all the time. (Exhibit (22-p. 3)).

p. ENS [S] stated she avoids CDR [applicant] whenever she can and just pushes through when she has to call him. She indicated things are better now that the XO and Department Heads are acting as a buffer between CDR [applicant] and the crew. (Exhibit (23-pp. 1-2)).

24. The JOs stated that CDR [applicant] has a way of introducing unnatural stress into training evolutions and that he has a strange training philosophy where he uses "creative" ways to get his point across and test people. The problem they frequently encounter is that, at first, they didn't know they were being tested. OPS also stated that he tests a lot. (Exhibits (17-p. 1; 20-p. 1)).

25. The XO and OPS describe CDR [applicant's] training method as giving the final exam on the first day, letting the JOs fail and then teaching them how to pass the exam. They both disagree with that method and have discussed it with him. He has refused to change, saying things like, "I know we disagree on training methods, but stick with me and you'll see that it works." CDR [applicant] stated that he likes to assess where his subordinates are as far as their skills and experience is concerned so he can adjust their training. During the follow up interview he stated that he has talked to OPS about adjusting his training style and is having OPS develop the training plan for the JOs because he doesn't want to push them out [of the Coast Guard]. (Exhibits (8-pp. 18-19; 18-p. 2; 19-p. 1; 20-p. 4)).

...

33. The Command Chief, JOs, and OPS feel like CDR [applicant] is always analyzing or testing everyone. (Exhibits (17-p. 3; 20-p. 1; 24-p. 2)).

34. CDR [applicant] has frequently indicated to his XO, Department Heads, and Command Chief that he won't go down alone in reference to [Sector's] focus on the [cutter's] command climate. They don't feel like it is directed at them, but they aren't sure who it is directed at, perhaps [the cutter's] old CO (CAPT [A]) and [Sector]. He denies saying anything like that and stated it would be inappropriate. He also has told them that he will no longer tolerate issues getting outside the lifelines (passed to [Sector]) without him having a chance to deal with them first. The EO mentioned to him that he was given a chance to address at least some of the issues before they went to [Sector], but he just ignored it or said he was going to do it his way. CDR [applicant] seemed surprised and couldn't come up with any examples that he hadn't had a chance to deal

with first. He continues to deny being given an opportunity to address issues prior to [Sector] being told about them. (Exhibits (18-p. 9; 19-pp. 4, 8; 21-pp. 2, 4; 22-pp. 1, 4)).

35. CDR [applicant] continues to blame things like the cutter's schedule, a fractured Chiefs Mess, poor communications at the E-6 and JO level, expectation management, and the old command for the command climate issues onboard [applicant's cutter]. He does not deny that he's part of the problem and ultimately responsible. (Exhibits (7-pp 12-29; 18-pp. 14, 16)).

36. At several levels, the crew feels like the command climate has improved because CDR [applicant] is not attending Quarters as often and is making fewer announcements. Additionally, the XO, Wardroom, and Chiefs Mess are acting as a buffer between the crew and him. (Exhibits (12-p. 5; 14-p. 2; 17-p. 1; 19-p. 8; 20-p. 1; 21-p. 1)).

37. There are indicators that some of the crew is consuming more alcohol due to the "unnecessary stresses" they experience during the workday and the uncertainty of what they will encounter the next day at work. (Exhibit (12-pp. 8, 11))

38. In general, the crew of [applicant's cutter] believes CDR [applicant] lies and does not take responsibility for decisions (blames policy, others onboard, or [Applicant's Sector]). (Exhibits (13-pp. 1- 2; 14-p. 1; 15-pp. 1, 3; 16-pp. 1, 3; 19-pp. 2, 4; 20-pp. 6-7; 21-pp. 3-4; 22-p. 3; 24-p. 1)).

...

OPINIONS

1. Some of the initial command climate related complaints from the crew stemmed from the aggressive schedule following dry-dock, trying to correct significant CART and COMDT/[Sector] policy discrepancies in a short period of time, while simultaneously pushing to overcome a lack of fundamental competencies in certain areas. (Findings of Fact (3, 4, 11, 12 e, 15, 17)).

2. Poor communications, misunderstandings, and incomplete information between the Command Cadre, the Chiefs Mess, and the rest of the crew initially exacerbated the poor command climate on [applicant's cutter]. (Findings of Fact (17, 19)).

3. After attempting to intervene on behalf of the crew, the Command Cadre, and particularly the Chiefs Mess did not feel like they could influence CDR [applicant's] decisions which resulted in personnel requesting assistance through other avenues. (Findings of Fact (5, 6, 10, 34)).

4. CDR [applicant's] training and leadership style introduces unnecessary stress and has negatively impacted the crew and particularly the JOs onboard [applicant's cutter]. CDR [applicant] is unwilling to change his training style. (Findings of Fact (21, 23a, f, h, i, j, k, l, m, 24, 25, 26, 27)).

5. CDR [applicant's] behavior and training style haven't changed since he was the XO of [applicant's cutter]. (Findings of Fact (13, 26)).

6. CDR [applicant's] interactions and discussions with the female JOs were inappropriate and created an environment that is uncomfortable for them to work in. (Findings of Fact (23 b, c, d, e, g, I, k, m, o, p)).

7. CDR [applicant] is confused about which female JO he discussed baking with. (Findings of Fact (23b, c)).

8. The command climate improvements that have occurred onboard [applicant's cutter] recently are mainly due to the efforts of the Chiefs Mess and the Wardroom acting as a buffer between CDR [applicant] and the crew. (Findings of Fact (10, 36)).

9. While CDR [applicant] has made some adjustments to his leadership style, he still does not fully accept responsibility for the poor command climate onboard [the cutter] and those adjustments occurred only

because of [Sector's] focus on [the cutter]. Once [Sector's] attention is no longer focused on [the cutter] and key personnel change out during this summer's transfer season, CDR [applicant] will continue the behavior that created the poor command climate on [the cutter]. (Findings of Fact (35, 38, 40)).

10. CDR [applicant's] leadership style has negatively impacted the crew's desire to stay in the Coast Guard and has led some to consume more alcohol at home due to the increased stress. If this trend continues it could have a negative impact on retention and lead to an increase in risk behaviors on the part of the crew. Through his interactions he has alienated the crew to the point where it would be extremely difficult, if not impossible, for him to regain their trust and confidence. (Findings of Fact (5, 6, 12d, e, 37, 38, 39)).

11. CDR [applicant's] commands directly to the helmsman, unvetted/unexpected announcements to the crew, and unplanned/unorthodox training evolutions have created an atmosphere of uncertainty on [the cutter] that could endanger the cutter and crew at a critical moment. (Findings of Fact (19, 21, 22, 23h, l)).

12. CDR [applicant] is lying about not being able to recall certain events that place him in a negative light. (Finding of Fact (42)).

RECOMMENDATIONS

1. That CDR (applicant) be relieved as Commanding Officer of USCGC [cutter]. (WMEC [redacted]). (Opinions (3, 4, 5, 6, 8, 9, 10, 11, 12)).

Temporary Relief for Cause

On April 20, 2015, the applicant received a memorandum from VADM R. The memorandum notified the applicant that he was being temporarily relieved for cause (TRFC) as the CO of the cutter. VADM R stated that he was relieving the applicant for substandard performance of duty, demonstrated over an extended period of time. VADM R further stated that the command had initiated a number of corrective actions to provide the applicant an opportunity to improve his performance. VADM R stated that the investigation had revealed that the applicant had created a poor command climate that disenfranchised his crew, which put the cutter and crew at risk. The applicant was notified that he had the right to submit a statement and receive advice of counsel during the relief for cause process.

That same day, the applicant acknowledged receipt of the notification of his temporary relief for cause. He indicated that he wanted to consult with an attorney and submit a statement.

On April 22, 2015, the Coast Guard issued a News Release, "Commanding Officer of [redacted] Cutter Temporarily Relieved." The News Release stated that Coast Guard had temporarily relieved the applicant due to a loss in confidence in his abilities to command.

Annual OER

On June 16, 2015, the applicant received his annual OER as the Commanding Officer for the period of June 20, 2014, to March 31, 2015. For the section evaluating his performance of duties, on a scale from 1 (worst) to 7 (best), he received one below-standard mark of 3 for "Adaptability," two above-standard marks of 5, and one excellent mark of 6. The comments for this section are as follows:

Superb preps for readiness evaluation; remarkable drills scores & full cert of all Onboard Training Teams placed cutter in excellent position to successfully combat a shipboard emergency. Planning iso D[redacted]/JIATF-S culminated in the interdiction of 725 kgs of cocaine & prosecution of 3 drug smugglers; disrupted Transnational Organized Crime networks iso COMDT's [redacted] Strategy. Admirably executed 2 SAR cases; saved 4 lives. Resourceful; guided ship through \$2.5M DD, \$493K main diesel engine maintenance, \$67K flight deck renewal; ensured full mission readiness, extended service life of 47+ yr old legacy asset. Notable use of \$128K in backlog; replaced moldy mattresses, removed health hazard. Corrected most CART discreps in less than 2 months; overcame challenges associated w/extended DD. Completed JIATF-S CD patrol & D[redacted] North American Martine Security Initiative training exercise despite casualty to #2 SSDG; sound evaluation of risk & recommended COAs. Adapted to flight deck paint project delay which included the project foreman walking off the job; achieved aviation recert & met INCHOP requirements. Slow response to repeated counseling & direction regarding command climate concerns distracted greatly from ops & readiness achievements. Highly skilled. Cared for 14 detainees 24 consec days; preserved prosecution authority. Conducted 48 moorings, 16 boardings, 47 boat evolutions; enhanced seamanship.

For the section evaluating his communication skills, he received one standard mark of 4 and one mark of 6. The comments for this section are as follows:

Articulate speaker. Participated in talks w/MX & CAN Senior Reps; successfully conveyed value of relationship between USCG, MX Navy (SEMAR), & Royal CAN Navy, assisted w/development of CD TTP. Presented Veteran's Day message to 700 personnel at local school & engaged Navy League/VFW in [redacted]; proud CG Rep, lauded for outstanding pref. Counseled on effective crew messaging & responsiveness to direction. Skilled writer; memo to SFLC wrt onboard lead delivered swift correction. Succinct AARs & Safe to Sail waiver request messages.

For the section evaluating his leadership skills, he received one mark of 3, three marks of 4, one mark of 5, and one mark of 6. The comments for this section are as follows:

Approved paternal & emergency leave during inport & underway periods; provided subords opportunity to be at child's birth, address challenging family issues, etc. Approved personal/unit award & myriad positive Page 7s; documented individual accomplishments. Submitted OCS, NDIU, DCIO, & grad school ltr of recs; enhanced competitiveness on boards. Develop'd subords. Developed training plan to address high AY14 personnel turnover; remained FMC, praised by [Sector], JIATF-S high op-tempo counter-narcotic mission. Supported crew efforts in completion of 64 EOCTs, 6 SWEs, & 19 continuing education credit hours. As OSC, expertly directed 8 multiple surface & air assets iso international LE exercise; enhanced rapport w/partner nations. Leadership style, while operationally effective, directly contributory to poor command climate. Counseled by Supervisor 27 Aug, Reporting Officer in person 21 Oct, & by [Sector]-3/Reviewing Officer on 16 Jan incl delivery of memo from VADM regarding observed deficiencies & direction for improvement; slow in effective response, challenges persisted throughout reporting period. All OERs & EERs submitted on time. Thorough OSF, on time, w/supporting doc.

The applicant's Reporting Officer indicated that he concurred with the Supervisor's evaluation. The Reporting Officer's initial comments are as follows:

Assumed command in final weeks of extended DD...achievements thereafter included 24 day D[redacted] patrol, TSTA, MDE, CSO, flight deck renewal, AVSTAN, & 65 day JIATF-S deployment. Upon reporting, quickly id'd challenges, cmd concerns & provided rcmdations to [Sector]. Achvd numerous op accomplishments, however, accolades overshadowed by embattled relationship w/crew resulting in poor cmd climate. Mbr counseled multiple times w/opportunity to improve.

For the section evaluating personal and professional qualities, the Reporting Officer assigned the applicant one mark of 4 and four marks of 5. The comments for this section were as follows:

w/o prompting, coord/completed 5 COMPREL projects, i.e. painted orphanage, repaired home a/c system, & distributed toys during OCONUS port call; enhanced CG rapport w/foreign partners. Read 17 books on leadership; evaluated pros/cons, advice, & recommendations of others. Demo'd sound op judgment; seized 725 kgs of cocaine, detained 3 drug smugglers; & saved 4 lives. Slow response to poor climate indicators & chain cmd direction. Safely executed 16 fueling evol (137K gal), 75 DLQs, Nav Rule scenarios, etc; appropriately gauged risk, int'l law, bi-lat agreements. Resked'd DLQs due to tumultuous officer wx; vigilant steward of gov resources. ADSEP'd subord following drug/alcohol abuse, investigated \$32K BAH overpayment case, expertly handled false SAPR claim. Conducted Halloween Haunted Ship; 1,000+ customers contributed w/donation of 600+ canned good to local shelter. 8+ cutter events released on social media; highlighted achievements. Established unit fit pgm, hosted chaplains; provided crew work life options.

When compared to other officers of the same grade, the Reporting Officer assigned the applicant a mark for "Strong performer, very competent and respected professional" in the third of seven possible marks ranging from "Unsatisfactory" to "Best Officer of this Grade." On the promotional scale, the Reporting Officer assigned the applicant a mark for "Promotion Potential." The comments for this section are as follows:

[The applicant] is a proven operator w/sound strategic acumen. Successfully achieved improved readiness and operational success, but struggled to balance positive climate with those pursuits. Leveraged critical partnerships with partner nations iso Western Hem strategy & initiatives. Possesses excellent potential to advance CG strategic objectives in the CD and intelligence arena; commended for CG-2, CG-MLE, or CG-ODO assignments. Slow response to steep challenges in fostering a positive command climate despite personal counseling and corrective direction at each echelon of command; a notable change in leadership effect must occur to earn promotion recommend.

Permanent Relief for Cause

On July 1, 2015, the applicant's Area Command received a memorandum from RADM T. The memorandum notified the Area Command that the applicant had been permanently relieved for cause as the CO of the cutter by reason of loss of confidence.

Derogatory OER

The applicant received a derogatory OER for the period of April 1, 2015, to July 1, 2015, due to his permanent RFC. The applicant's primary duties were described as follows:

Resp for safe, effective cutter ops, material readiness & tmng for on-time exec of missions incl SAR, LE, LMR, Intel Collection, Military Readiness & Humanitarian Services. Promote personnel programs thru aggressive prof training, comprehensive family/work life support, & equal opp. Lead a crew of 75 & administers \$450K budget. This OER is submitted per COMDINST M1000.3A, Article 5.A.3.e.(1)(b) due to permanent Relief for Cause. Per Article 5.A.7.c., this OER is a derogatory report; relieved of command on 01JUL15. Competencies marked "not observed" were done so because of short period of report and there is insufficient information to provide a mark or render judgment.

For the sections evaluating his performance of duties and communication skills, he received all marks of "not observed." There were no comments for this section. For the section

evaluating his leadership skills, he received two low marks of 3 for “Looking Out for Others” and “Workplace Climate.” He received marks of “not observed” in the remaining performance dimensions. The comments for this section are as follows:

Leadership style created atmosphere of mistrust, miscommunication, and uncertainty. Appeared to manage with positional power and lost trust and respect of crew. Investigation completed 06APR15, reiterated the fact that, despite repeated counsel, [the applicant’s] leadership style introduced unnecessary stress, disenfranchised crew, & resulted in an extremely poor command climate.

The applicant’s Reporting Officer indicated that he concurred with the Supervisor’s evaluation. The Reporting Officer’s initial comments are as follows:

Despite repeated counseling from Supervisors, ROO failed to adjust leadership style. Style, approach & methodology of executing his vision failed to resonate with crew & culminated with assignment of PIO to investigate unit’s command climate. PIO’s opinions & recommendations reinforced the fact that [the applicant’s] leadership style directly contributed cutter’s poor command climate & associated dysfunction.

For the section evaluating personal and professional qualities, the Reporting Officer assigned the applicant two marks of 3 and marks of “not observed” in the remaining performance dimension. The comments for this section were as follows:

[The applicant’s] inability to hold self accountable, refusal to heed the advice and warnings of his Supervisors, and take action to modify or adjust leadership style demonstrated poor judgment and ultimately reflected poorly on the CG when permanently relieved for cause.

When compared to other officers of the same grade, the Reporting Officer assigned the applicant a mark for “Steady performer; limited potential for increased responsibility” in the second of seven possible marks ranging from “Unsatisfactory” to “Best Officer of this Grade.” On the promotional scale, the Reporting Officer assigned the applicant a mark for “Do Not Promote.” The comments for this section are as follows:

[The applicant’s] leadership approached raised concerns that resulted in removal from primary duties as Commanding Officer. Because of ROO’s inability, despite counsel, to turn around toxic environment and associated disenfranchised crew, I lost confidence in his leadership abilities which necessitated Relief for Cause. Despite the RFC, [the applicant] possesses the skills and ability to effectively advance CG strategic objectives in the CD and intel arena; recommended for CG-2, CG-MLE, G-ODO assignments. Failed to effectively manage 70+ crew not rec for promotion.

On August 13, 2015, the applicant submitted an addendum to the disputed OER. He stated that the actions taken to relieve him as CO were inconsistent with Coast Guard Regulations and the UCMJ. The applicant argued that he had received no written redress of grievances from any member aboard the cutter and no Article 138 Complaints had been filed against him. The applicant stated that when he arrived at the cutter, he noticed that the crew had enormous potential. However, the unit was deficient in the principles of military customs and courtesies, chain of command, and good order and discipline. He argued that the crew experienced poor command climate and dysfunction due to a preexisting unsatisfactory workplace climate, gross mismanagement, and safety, scheduling, and proficiency issues. The applicant then addressed the derogatory OER:

- First, he argued that the comments that he failed to hold himself accountable or heed the advice and warnings of supervisors following repeated counseling is inaccurate.

Specifically, he argued that these comments fail to address the totality of the circumstances. He stated that on October 22, 2014, he met with his command regarding complaints they had received about the cutter. The applicant argued that the complaints were based on misrepresentations of actual events. During the meeting, the applicant presented his command with more than 20 examples of preexisting safety, workplace climate, and proficiency issues that were negatively impacting the command climate. The applicant was instructed to provide weekly reports to his command regarding improvements to the unit and adjustments to his leadership style. He stated that he received indications that his chain of command was satisfied with the cutter's progress. The applicant alleged that he did not receive any additional training, counseling, guidance, or significant feedback during this time. Then, on January 19, 2015, the applicant was unexpectedly counseled. He stated that during the counseling, his command dismissed pre-existing conditions and recommended that he ignore certain regulations to "make the crew happy."

- The applicant also argued that the comment that he managed with "positional power" is false. He asserted that decisions were made in a collective and cooperative manner with direct input from the XO, Department Heads, and Command Senior Chief. The applicant cited a specific incident in which he asked to adjust the cutter's schedule in December 2014 to accommodate a mandated flight deck training. The applicant stated that the request was denied by his command, which instead required an early departure for deployment the day after Christmas. The applicant argued that he "literally begged" his command not to require an early departure due to the negative impact on crew morale and command climate.
- The applicant also contested the comment that he failed to take action to modify or adjust his leadership style. The applicant stated that he ordered the development of an action team to study and address command climate and communication issues at all levels. He stated that the program was just starting to become effective before he was relieved.

On August 25, 2015, the applicant's Supervisor, CAPT M, who was Chief of Area Cutter Forces, provided a written statement about the derogatory OER. CAPT M acknowledged the applicant's operational achievements. However, he argued that the applicant's operational success does not excuse a leadership style which contributed to a miserable command climate that negatively impacted the well-being of the cutter's crewmembers and their families. CAPT M stated that the applicant received ample feedback, advice, and recommendations with respect to his leadership style and its associated negative effect on his crew. He provided several instances of counseling.

- On August 27, 2015, CAPT M contacted the applicant and notified him that the Chiefs' Mess had serious concerns about his leadership style. CAPT M spoke with the Chiefs' Mess who stated that the applicant's leadership style was having a negative impact on the crew and the future direction of the cutter. requested to talk.
- On October 21, 2015, CAPT M and his supervisor, CAPT R, who was the applicant's Reporting Officer and Chief of Area Operational Forces, met with the applicant to discuss his leadership style and command climate aboard the cutter. Throughout the

nearly three-hour conversation, the applicant never acknowledged any deficiency or means to improve his leadership style.

- On January 16, 2015, CAPT C, who was the applicant's OER Reviewer, CAPT R's supervisor, and Chief of Area Operations, delivered a memorandum from VADM R to the applicant regarding observed deficiencies and direction for improvement.

CAPT M stated that the command did not destroy crew morale or undermine the applicant's credibility. To support his assertion, CAPT M stated that the command never reached out to the cutter's crewmembers seeking information about the applicant's leadership style or the command climate aboard the cutter. CAPT M also stated that it was solely the applicant's decision to deploy on December 26, 2014. CAPT M stated that the OER is a fair, objective, and accurate assessment of the applicant's performance. He further stated that according to the investigation, the applicant's leadership style introduced unnecessary stress, disenfranchised the crew, and resulted in an extremely poor command climate which plagued the cutter since his arrival.

On August 28, 2015, the applicant's Reporting Officer, CAPT R, provided a written statement about the derogatory OER. CAPT R acknowledged the shipboard challenges faced by the applicant. However, he stated that on October 21, 2014, he specifically told the applicant that his leadership approach was not working. CAPT R informed the applicant that he needed to adjust his approach to address the command climate concerns. He stated that the applicant's failure to adjust his leadership style was subsequently identified in the DEOMI Organizational Survey results released on January 5, 2015, and in the investigation conducted in April 2015. CAPT R concluded that the derogatory OER was a fair, objective, and accurate assessment of the applicant's performance because he repeatedly failed to change his leadership approach after multiple counseling sessions with his chain of command.

On September 4, 2015, the Reviewer of the applicant's derogatory OER, Captain C, submitted a written statement. He stated that the applicant had failed to balance the pursuit of operational readiness with a positive and sustainable climate. CAPT C stated that the applicant failed to heed repeated counseling and direction from every echelon of his chain of command. He stated that the climate aboard the cutter was characterized by mistrust, disenfranchisement, and anxiety. He concluded by stating that the applicant possesses the intellect and talent to continue productive service as a Commander, but not as a Commanding Officer.

Personnel Records Review Board Application

On March 28, 2016, the applicant submitted an application to the Personnel Records review Board (PRRB) to change several marks on his annual OER for the period of reporting ending March 31, 2015. Specifically, the applicant requested that his mark for the performance dimension "Adaptability" be raised from a 3 to a 5; that his mark for the performance dimension "Workplace Climate" be raised from a 3 to a 4; that his mark on the Comparison Scale be raised to "Exceptional performance; give toughest and most visible leadership assignments," in the fifth of seven possible marks; and that his mark on the promotion scale be raised to "Definitely promote." The applicant also requested that several comments be removed from the OER.

The applicant argued that the OER did not accurately reflect his performance relative to the multitude of challenges he faced as the CO of the cutter. He also argued that the OER was unjust because critical information was intentionally suppressed that more accurately articulated actual events during the period. Finally, the applicant argued that this OER was based on second and third party accounts which were factually incorrect, highly sensationalized, or failed to take into account the totality of the circumstances. The applicant attached 74 enclosures with his PRRB application.

The PRRB gathered sworn declarations from the Supervisor, Reporting Officer, and Reviewer who prepared and signed the disputed OERs:

On May 12, 2016, the applicant's Supervisor, CAPT M, provided a declaration under penalty of perjury. CAPT M stated that the disputed OER was an accurate assessment of the applicant's performance and was completed in accordance with Coast Guard policy. He stated that the applicant's unwillingness to adjust his leadership style contributed to the fleet's worst command climate and marks of 3 in the performance dimensions "Adaptability" and "Workplace Climate." CAPT M stated that the applicant's leadership style was detrimental to the climate aboard the cutter and provided the following examples:

- In August 2014, a member of the cutter's Chiefs' Mess, MKC K, requested to speak with CAPT M. MKC K told CAPT M about the poor command climate aboard the cutter. MKC K attributed the poor command climate to the applicant. In response, CAPT M offered some recommendations as to how MKC K could resolve the issues with the applicant. On August 27, 2014, CAPT M informed the applicant about his conversation with MKC K.
- On October 21, 2014, the applicant had a meeting with CAPT M and CAPT R. CAPT M stated that throughout the entire meeting, the applicant never acknowledged any connection between his leadership style and the poor command climate on board the cutter.
- On January 5, 2015, the DEOMI Organizational Survey results were released. CAPT M stated that the crew submitted 44 pages of negative comments, the majority of which were directed as the applicant.
- On January 16, 2015, CAPT B delivered a memorandum from VADM R to the applicant. The memorandum informed the applicant of his leadership deficiencies and direction for improvement.
- CAPT M stated that for over eight months, the applicant's command received consistent information regarding the poor command climate aboard the cutter from both internal sources and external entities. CAPT M stated that this information, combined with the results of the DEOMI survey, led VADM R to issue a Convening Order for CAPT L to formally initiate an investigation into the command climate aboard the cutter.

CAPT M concluded by stating that he was more than fair to the applicant throughout the reporting period and that his evaluation was justified.

On May 16, 2016, the applicant's Reporting Officer, CAPT R, provided a declaration under penalty of perjury. CAPT R stated that the disputed OER is a valid, fair, objective, and accurate

assessment of the applicant's performance and conduct. He also stated that the disputed OER was completed in accordance with Coast Guard policies. CAPT R stated that his evaluation of the applicant was based on nine months of observing the applicant's performance as a CO, a myriad of reports from Coast Guard members, such as the Command Master Chief and Chaplains, and the results of the DEOMI Survey. He explained that while the command notified the applicant about the concerns, the names of individuals who reported the issues were not provided due to fear of reprisal voiced by the reporting sources. CAPT R also stated that his evaluation was based on the applicant's repeated denial that his leadership was a contributing factor to the unit's poor command climate and his unwillingness to adapt after repeated counseling by his chain of command.

On June 28, 2016, the PRRB denied the applicant's requested relief. First, the PRRB found no evidence that the applicant's Rating Chain did not fully perform their OES duties with respect to adequate preparation and submission of the disputed OER. Accordingly, the PRRB disagreed with the applicant that the marks were not based on the performance during the period. Next, the PRRB found no evidence of intentional suppression of any information from the applicant's Rating Chain. Moreover, the PRRB found no evidence that the Rating Chain's marks and comments were based on inappropriate, inaccurate, or unreliable information. Finally, the PRRB acknowledged that the applicant had submitted evidence to show that there were preexisting issues at the unit. However, the PRRB determined that there was not substantive evidence that the Rating Chain erroneously or unfairly attributed unsatisfactory outcomes to the applicant. Instead, the PRRB found that the OER demonstrates that the Rating Chain set their expectations for the applicant based on their knowledge of the pre-existing issues. The PRRB concluded that the OER comments and marks were justified and factual.

Office of Inspector General Investigation

On May 25, 2016, the applicant filed a formal Military Whistleblower Complaint with the Department of Homeland Security's Office of the Inspector General (OIG).

On September 12, 2016, the OIG opened a formal investigation into the applicant's allegations of retaliation.

On March 29, 2019, the Acting Inspector General issued a memorandum regarding the investigation into alleged retaliation against the applicant. The applicant had alleged that he was retaliated against for making protected whistleblower communication in violation of the Military Whistleblower Protect Act. The memorandum concluded that the applicant's claim was not substantiated and provided no recommendations. The memorandum attached the report of investigation, which stated the following:

- Upon taking command as CO in July 2014, the applicant discovered many issues with the cutter and crew's proficiency. On July 31, 2014, the applicant notified his command about the many issues that did not meet Coast Guard standards or policy. Specifically, the applicant notified his command about a lack of equipment to store medications, crewmember deficiencies, and a lack of training and drills. The applicant also reported issues related to the condition of the cutter itself. The following month, in August 2014, two evaluations concluded that there were issues related to the cutter and the crew.

Specifically, one of the evaluations revealed the existence of exposed wires, lead, and mold on the cutter. On August 25, 2014, the applicant informed his command about the lead and mold issues. The applicant's command acknowledged the lead issue and confirmed that the Coast Guard had a widespread problem with lead. Then, on September 4, 2014, the applicant sent a memorandum to his command and informed them about increased lead contamination aboard the cutter. The applicant expressed significant concern that lead levels had increased and that the cutter's crew had transferred lead dust to previously untested parts of the ship.

- In addition to receiving reports regarding safety issues, the applicant's command also received reports about the applicant's leadership. Shortly after the applicant took command of the cutter, the applicant's command began hearing reports of low morale on the ship. Specifically, the applicant's command heard that the applicant had terminated a liberty run practice that allowed Coast Guard members to use Coast Guard vehicles to handle personal matters while in port. Consequently, Coast Guard members had to rent their own vehicles while in port. Additionally, the applicant had cancelled several crewmembers' previously approved leave and made the crew work long days. The applicant's command stated that these changes had upset the crew, their families, and morale.
- On October 14, 2014, the applicant's command had sent a memorandum to the applicant concerning the low morale. The applicant was notified that his leadership approach was not working. The memorandum directed the applicant to take four prescribed steps to address morale, welfare, and work-life balance for the crew: conduct multiple feedback sessions, gather information, make changes where appropriate, and work with his command to implement the changes. The memorandum also required the applicant to participate in follow-on actions, including informing his command of his progress. The applicant's command also stated that they counseled the applicant via telephone in October 2014.
- In January 2015, the applicant's command had continued to receive reports about issues with the applicant. In response to the reports, the Sector CMC had deployed with the cutter. The CMC observed the applicant challenge Junior Officers in front of others and micro-manage the crew. The CMC also met with crewmembers, who reported that they were unhappy with the applicant's leadership. When the CMC met with the XO of the cutter, the XO became emotional and stated his belief that the applicant would ruin his career.
- Also in January 2015, the DEOMI Survey results had been issued. The report contained below average marks and 44 pages of negative comments about the cutter's command, and the applicant in particular. Specifically, members commented that the applicant did not listen and acted as if the coast Guard revolved around him. Other members said that the applicant's leadership led to low morale and a toxic work environment. The results showed that the applicant's cutter had the worst command climate in the fleet. In fact, the applicant's command stated that the DEOMI survey results were the worst leadership marks they had ever seen for a CO. In contrast, the DEOMI survey results both preceding and following the January 2015 survey reflected significantly higher marks for the COs who commanded the cutter immediately before and after the applicant.

- On January 16, 2015, the applicant's command had sent a memorandum to the applicant, stating that they had significant concerns regarding the applicant's leadership and the command climate aboard the cutter. The applicant's command provided leadership traits for the applicant to improve upon. The applicant was notified that his leadership needed to improve and that he should report his progress to his command.
- On July 1, 2015, the applicant had been relieved for cause, and pursuant to Coast Guard instructions, the applicant was issued a derogatory OER.

The OIG report noted that to substantiate the applicant's claim of reprisal under the Military Whistleblower Protect Act, a preponderance of the evidence must prove: (1) one or more protected communications (PCs); (2) knowledge by a responsible management official (RMO) of the PCs; (3) personnel actions (PAs) taken, threatened, or withheld; and (4) a causal connection between the PC and the PA. If the evidence establishes the four elements above by a preponderance of the evidence, the analysis shifts to a determination whether clear and convincing evidence exists showing the Agency would have taken the PAs against the applicant absent the PCs.

The OIG report determined that a preponderance of the evidence established a prima facie case of whistleblower retaliation. The evidence established that the applicant had made four protected communications when he reported alleged safety and operational concerns regarding his cutter to his command. Specifically, the applicant had made protected communications with respect to lead and mold aboard the cutter. The evidence also established that the majority of the applicant's command had actual knowledge of the applicant's protected communications. Next, the evidence established that the applicant's command had taken multiple adverse personnel actions against the applicant after he initially reported his concerns about the condition and operation of the cutter in July 2014. The adverse actions included ordering the command climate investigation on March 18, 2015, giving the applicant lower marks on his on his annual OER, temporarily relieving the applicant of his command on April 20, 2015, issuing him a derogatory OER on July 1, 2015, and permanently relieving the applicant of command for cause on July 2, 2015. The OIG report noted that each action either affected, or had the potential to affect, the applicant's career with the Coast Guard. Finally, the evidence established that the applicant's protected communications were contributing factors in the adverse personnel actions taken by his command. The OIG report noted that the personnel actions had all occurred within one year of the applicant's first protected communication.

Since a prima facie case of whistleblower retaliation was established, the analysis shifted to determine whether clear and convincing evidence existed, demonstrating that the applicant's command would have taken the personnel actions absent the applicant's protected communications. In making such a determination, the first factor that was considered was the command's reason for the personnel actions when the whistleblowing is excluded. The OIG report determined that the record contained compelling evidence showing that, absent the applicant's protected communications, his command would have taken the same personnel actions. Each member of the applicant's command who had knowledge about the applicant's protected communications credibly reported that the actions they took were motivated and justified by the applicant's poor performance as the CO of the cutter. The OIG report stated that the command's claims were corroborated by the volume of the crewmember complaints, the results of the DEOMI survey, and

the findings of the internal investigation. After multiple counseling sessions, the applicant did not adjust his leadership style. According to Coast Guard policy, a CO's substandard performance of duty over an extended period justifies removal from command. The applicant's command took reasonable and proportionate corrective actions by removing the applicant. The OIG report determined that the applicant's command had a sufficient basis for taking the personnel actions against the applicant absent his protected communications. The second factor that was considered was any evidence of similar actions against similarly situated employees and for the non-whistleblowing aspect alone. The OIG report stated that the Coast Guard had provided comparative data for four other COs who had been relieved for cause due to unsatisfactory performance resulting in a negative command climate. None of the four other COs had engaged in whistleblowing activity prior to being relieved for cause. In each of these four cases, the commands ordered an investigation that concluded that the COs' leadership styles had created and perpetuated a negative command climate prior to recommending relief for cause. The OIG report concluded that the fact that the Coast Guard had treated the applicant the same as other similarly situated individuals who had not made protected communications is strong evidence that the decision to relieve the applicant was not due to his whistleblowing activities. The final factor that was considered was the existence and strength of any motive to retaliate for the whistleblowing activity. The OIG report concluded that the evidence indicated that none of the applicant's command had a motive to retaliate against the applicant based upon his whistleblowing. The applicant's protected communications related to safety issues and crew deficiencies onboard the cutter. Many of these issues and deficiencies were already known to the Coast Guard before the applicant took command of the cutter. Further, the applicant did not direct any of his negative reports at his command, nor did he allege improper conduct on the part of his command.

The OIG report concluded that while a preponderance of the evidence established that the applicant's protected communications were a contributing factor in the personnel actions taken against him, clear and convincing evidence indicated that his command would have taken the same personnel actions absent his protected communications. Accordingly, the OIG did not substantiate the applicant's whistleblower retaliation claim.

On April 29, 2019, the OIG issued a secondary memorandum addressing numerous comments the applicant made in response to the OIG's report. The memorandum stated that after receiving these comments, the OIG conducted a careful, thorough review of the applicant's comments and determined that the bulk of the comments had either been previously provided during the course of the investigation and/or were not material to the report's analysis. However, the OIG determined that ambiguous language in one paragraph of the report could potentially mislead the reader. Specifically, the language in the first paragraph of page 5 of the report which could be misread to suggest that the OIG had found that the applicant flew to his Sector's Command Center in December 2014 for a counseling session. Accordingly, the OIG clarified the language by stating, "[w]hile some evidence suggests that the Complainant was asked to travel to [Sector Command Center] for a counseling session during that time period, the evidence indicates that no such counseling session took place."

On May 1, 2019, the applicant responded to the OIG report. He provided a number of comments and disputed some of the factual findings in the report. The applicant alleged that the OIG report had critical omissions. Specifically, the applicant alleged that the OIG report did not

“appropriately articulate” the issues he faced as the cutter’s CO, such as crew members having sex aboard a military unit, crewmembers consuming illicit narcotics in government leased housing, multiple reports of Senior Petty Officers providing alcohol to underaged crewmembers in government housing, and illegal disposal of hazardous materials, to name a few. The applicant also alleged that the OIG report contained factual errors and only “regurgitate[d]” the previous administrative investigation by the Coast Guard, which the applicant alleged had been conducted in an improper manner, with malice, and in violation of his rights as a citizen of the United States and as a commissioned officer. The OIG conducted a careful, thorough review of the applicant’s comments and allegations, but ultimately determined that the bulk of the applicant’s comments had either been previously provided during the investigation or were not material to the report’s analysis.

On June 30, 2018, the applicant was mandatorily separated from active duty. He retired as a Commander with an Honorable discharge after twice failing to be selected for promotion to Captain.

APPLICANT’S ALLEGATIONS

The applicant alleged that VADM R and his rating chain engaged in a “combat-like campaign” when they knowingly and actively engaged in a plethora of injustices against him through abuses of authority, undue command influence, false official statements, omissions of material facts, and legal errors, that have wrongfully tainted his standing in the United States Coast Guard. In short, the applicant alleged that his rating chain failed to carry out their duties correctly, lawfully, and in good faith. The applicant further alleged that his command demonstrated a sustained history of abuses of power, legal authority, discretionary decision-making, omissions of material fact, and undue command influence. He argued that such actions violated federal law, the Uniform Code of Military Justice (UCMJ), and Coast Guard Regulations.

The applicant argued that his RFC was erroneous and unjust because the cutter’s previous CO had routinely violated Coast Guard regulations and failed to disclose known discrepancies aboard the cutter. The applicant argued that the previous CO was legally required to present accurate information to him regarding the cutter’s operational readiness, material condition, and any potential discrepancies. However, the applicant argued that the previous CO falsely indicated that the cutter had no significant discrepancies. The applicant stated that in accordance with Article 4.1.25.a. of (q),³ a CO about to be relieved of command of a unit shall: 1) inspect the unit in company with the relieving officer; 2) demonstrate, in the presence of the relief, the proficiency of the crew at general quarters and general drills...; and 3) point out any defects and peculiarities of the unit to the relief. First, the applicant stated that on July 12, 2014, he had a conversation with the previous CO, who informed him that there were no defects or major issues about the cutter. The applicant argued that this was a false official statement that caused him to assume command with inaccurate and false information.

Next, the applicant stated that his request to observe the crew conduct drills and exercises before he assumed command was denied. As a result, he argued, that he was unaware of deficiencies in crew operational proficiency, which again caused him to assume command with

³ Coast Guard Regulations 1992, COMDTINST M5000.3.

inaccurate and false information. Finally, the applicant argued that the previous CO failed to point out any defects and peculiarities of the unit. Specifically, the previous CO told the applicant that there were “no significant issues.” The applicant stated that during the relief process from July 9, 2014, to July 13, 2014, the unit inspection log was not available. He stated that a unit inspection log was eventually found on July 15. The applicant stated that according to that log, no inspections of the cutter were recorded between May 2008 and July 2014. Further, there were no records of any material or personnel inspections conducted between July 2009 and July 2014. The applicant argued that these records contradicted the previous CO’s reports that the cutter had no defects or deficiencies. The applicant argued that the failure of the previous CO to report deficiencies constituted an error and injustice because he made the decision to assume command of the cutter with inaccurate and false information.

The applicant argued that his RFC is erroneous and unjust because he was retaliated against by his chain of command. The applicant’s chain of command included CAPT M as his Supervisor, CAPT R as his Reporting Officer, CAPT C as the Reviewer, and VADM R as his CO. The applicant argued that shortly after arriving at the cutter, he conducted a more thorough examination of the cutter. He cited violations of Coast Guard rules and regulations, fraud, waste, abuse of authority, gross mismanagement, and potential threats to public safety. He stated that as the CO of his cutter, he had made no less than 20 confirmed protected communications to his chain of command. The applicant claimed that he was subjected to unlawful retaliation for honestly and forthrightly reporting to his chain of command the issues he discovered on board the cutter. He argued that because he was unwilling to sweep these conditions under the rug and “play ball” with his chain of command, who wanted to keep the conditions quiet, he was ultimately relieved for cause. The applicant argued that he was made the scapegoat for the very condition that he was trying so hard to correct. The applicant argued that his RFC was the result of self-preservation on behalf of his command to cover up years of fraud, waste, abuse of authority, gross mismanagement, and threats to public safety.

The applicant argued that his RFC is erroneous and unjust because the decision was arbitrary and capricious. According to the applicant, the decision to relieve him as CO of the cutter was based on ignorance and not on established facts. He argued that his command had a total of approximately 8.5 hours of cumulative time to observe his performance aboard the cutter. The applicant argued that his command’s opinions about his performance were formed without actually observing his performance. For instance, the applicant argued that his command was not on board to observe that he went to the ship’s mess deck every morning to greet personnel, that personnel would thank him for providing them training on various topics, and that he consoled individuals during multiple emotional breakdowns.

The applicant also contested the assertion that his performance of duty was substandard. To support his assertion, the applicant stated that the Coast Guard Special Operations Ribbon was awarded to all of the cutter’s personnel. Further, the applicant stated that the Meritorious Team Commendation Ribbon was awarded to his cutter. He argued that the ribbons were a reflection of the positive impact his leadership had on unit performance and the performance of personnel assigned to the cutter. The applicant also submitted several emails from his supervisor demonstrating that he was satisfied with his performance and the progress that was being made.

In fact, the applicant argued that there are no emails or other communications from his command demonstrating that they were anything but satisfied with his performance.

The applicant also contested the assertion that there was a poor command climate. First, he argued that all allegations of a poor command climate were unsubstantiated and based on anonymous reports. The applicant argued that in violation of Coast Guard policy, he was never notified who was making the alleged complaints to his command or what the complaints were about. Next, he argued that the command climate aboard his cutter was consistent with climate trends in the Coast Guard, but no other RFCs occurred. The applicant further argued that the command climate aboard the cutter was improving. To support his assertion, the applicant cited a memorandum from the cutter's DEOMI Focus Group to his command that showed that the command climate was improving under his leadership. The applicant also cited to things such as social media posts by members' families praising the cutter and photographs of members enjoying themselves at social events. The applicant alleged that the Coast Guard failed to establish measurable and specific standards to differentiate between a good command climate and a poor command climate. He argued that there are no Coast Guard policies, rules, or regulations in place that outline criteria for the measurement and management of command climate.

The applicant argued that the stated reason for his RFC, the loss of confidence, is a subjective standard. According to the applicant, the Coast Guard has not relieved COs for far more heinous acts and substandard performance. The applicant cited several examples in which COs were not relieved for cause following instances aboard cutters, including collisions. The applicant argued that the counseling provided by his rating chain was vague, subjective, and not based on any measurable standards. Nevertheless, the applicant stated that he completed all tasks required by his command. For instance, he noted that a DEOMI Command Climate Survey and peer group "town hall" meetings were conducted. Additionally, the applicant provided weekly reports to his command as requested.

The applicant argued that his RFC is erroneous and unjust because CAPT R and CAPT M continuously and routinely fraternized with members of his cutter. The applicant argued that Captain L's investigation shows that CAPTs R and M maintained secret communications over an extended period that placed enlisted members on terms of military equality with officers. For example, he alleged, CAPT M was a longtime friend of a Chief Machinery Technician (MKC) on board the applicant's cutter. According to the applicant, the MKC notified CAPT M of the low morale. The applicant argued that such fraternization undermined his lawful authority as CO of the cutter and contributed to his RFC due to unspecified loss of confidence.

The applicant also argued that his RFC was erroneous and unjust because of the investigation into the command climate onboard his cutter. The applicant stated that on March 19, 2015, he was notified that his command had opened a command climate investigation regarding his failure to respond to repeated counseling. First, the applicant argued that an investigation should never have been conducted. He argued that his conduct did not merit an administrative investigation. According to the applicant, the investigation was improperly based on unspecified complaints from unidentified persons. Accordingly, he argued that the investigation was based on unsubstantiated rumors and innuendo. He also argued that the investigation was unwarranted because the cutter had made significant progress to address the preexisting issues and command climate. Even if his

conduct had merited an investigation, the applicant argued that the investigation violated Coast Guard policy. In this case, a standard investigation was conducted. However, the applicant argued that a formal investigation should have been conducted since he was named as a party to the investigation.

The applicant argued that his due process rights were violated as a party to the administrative investigation. The applicant listed eleven violations: 1) he was not given notice that he was a party to the investigation; 2) he was not provided the opportunity to be represented by counsel; 3) he was not provided the opportunity to examine and object to the introduction of evidence; 4) he was not provided the opportunity to object to the testimony of witnesses and cross-examine witnesses; 5) he was not provided the opportunity to introduce evidence; 6) he was not read his Miranda/Tempia Rights; 7) he was not allowed the opportunity to make an argument to the investigator and the Convening Authority; 8) he was not properly advised pursuant to the Privacy Act of 1974; 9) he was not provided the opportunity to challenge members of the Court of Inquiry or the Counsel for the Court for cause; 10) he was not provided a transcript of the proceeding of the Court of Inquiry; and 11) he was not allowed to subpoena witnesses or evidence.

Next, the applicant argued that the investigation was erroneous and unjust because it was conducted by CAPT L. The applicant argued that CAPT L was not competent to serve as an investigating officer. Specifically, the applicant stated that CAPT L had no formal or informal training to conduct an investigation. The applicant also argued that CAPT L committed a multitude of administrative and judicial errors. Next, the applicant argued that CAPT L lacked the requisite judicial temperament. Specifically, the applicant argued that CAPT L failed to demonstrate compassion, open-mindedness, courtesy, and patience. Instead, the applicant described CAPT L as hostile, aggressive, and accusatorial. Finally, the applicant argued that CAPT L should not have been the investigating officer since he was a subordinate of the applicant's chain of command. The applicant argued that his chain of command was directly responsible for the historic fraud, waste, abuse of authority, gross mismanagement, and potential threats to public safety aboard the cutter. Accordingly, he argued that his chain of command had undue influence over CAPT L and the investigation.

The applicant argued that his RFC is erroneous and unjust because he has a well-documented and established history of superior performance over an extended period of time. He stated that his record includes two recommendations for "definitely promote," six recommendations for "accelerated promotion," recognition as a "distinguished officer" five times, and an overall rating average of 6.06 on a scale of one to seven.

The applicant stated that on April 22, 2015, and August 8, 2015, his command issued press releases to publicly announce his temporary and permanent RFC, respectively. The applicant argued that the press releases violated his right to due process, constituted further reprisal, unnecessarily tarnished his reputation, and created an injustice by tainting individuals examining his removal and future promotion panels.

The applicant also argued that his OER for the marking period ending on March 30, 2015, was erroneous and unjust. The applicant stated that according to Coast Guard policy, OERs should be submitted to PSC no later than 45 days following the end of the reporting period. In this case,

the applicant argued that his OER should have been submitted by May 15, 2015. However, his OER was not completed until June 16, 2015. The applicant argued that this delay caused an injustice because his chain of command was influenced by false materials collected during CAPT L's investigation. Furthermore, the applicant also argued that his chain of command should have been disqualified as his rating chain. He argued that his rating chain should have been disqualified because they were identified as parties actively retaliating against him as a military whistleblower. He argued that his chain of command's involvement in his OER raises substantial questions with regard to fairness and accuracy.

The applicant alleged that his command failed to provide him with proper counseling about his performance. He argued that the majority of communication he received from his Supervisor demonstrated that he was exceeding performance objectives. However, the applicant acknowledged that his command provided him two memorandums expressing concerns regarding the command climate aboard the cutter. However, the applicant argued that these documents fail to meet even the most basic tenets to be considered counseling. In addition, the applicant argued that the OER is erroneous and unjust because there was a lack of documented complaints about his performance. Specifically, the applicant stated that there were no UCMJ charges filed against him and that no crew member had ever filed an Article 138 Complaint against him. Accordingly, he argued that he was complying with all rules, laws, and regulations consistent with his legal authorities as CO.

The applicant further argued that his OER was erroneous and unjust because he had minimal in-person contact with his Supervisor. According to the applicant, over the course of nine months, his Supervisor had approximately 2.5 hours to directly observe his performance. The applicant argued that instead of relying on first-hand knowledge, his Supervisor relied on vexatious rumors and inaccurate reports to fabricate a narrative about his performance.

The applicant specifically contested two comments in the OER. The first comment supported a mark of three in the performance dimension of Adaptability. The comment states, "Slow response to repeated counseling & direction regarding command climate concerns distracted greatly from ops & readiness achievements." The second comment supported a mark of three in the performance dimension of Workplace Climate. The comment states, "Counseled by Supervisor 27 Aug, Reporting Officer in person 21 Oct, & by [Sector]-3/Reviewing Officer on 16 Jan including delivery of memo from VADM regarding observed deficiencies & direction for improvement; slow effective response, challenges persisted throughout reporting period." The applicant argued that these comments are inaccurate because the command climate was improving under his leadership. In fact, the applicant argued that he had many communications that show that his command was satisfied with his performance and progress aboard the cutter. The applicant also contested his mark on the Promotion Scale and the support comment. He argued that the mark and associated comment are retribution against him as a military whistleblower. To support his assertion, the applicant argued that the mark and comment do not accurately document his performance as evidenced by his communication with his Supervisor.

The applicant also argued that his derogatory OER documenting the RFC was erroneous and unjust. He argued that his rating chain failed to appropriately apply Coast Guard regulations when evaluating his performance as CO. The applicant argued that a CO is not responsible for

either crew morale or command climate. Instead, he argued that such responsibility fell on the Executive Officer. The applicant also argued that Coast Guard policies fail to clearly define good command climate and poor command climate. Next, the applicant argued that the OER violates Coast Guard policy because one of the comments improperly references an administrative investigation. In the section evaluating his leadership skills, the comment states, “Investigation completed 06APR15, reiterated the fact that, despite repeated counsel, [the applicant’s] leadership style introduced unnecessary stress, disenfranchised crew, & resulted in an extremely poor command climate.” The applicant also argued that the derogatory OER violates Coast Guard policy because it was based on information that occurred during the previous marking period. The applicant stated that the new marking period started on April 1, 2015. Then, on April 21, 2015, the applicant was temporarily relieved from his duties. Accordingly, the applicant was only assigned to the cutter as CO for 21 days of the marking period for the derogatory OER. Of the 21 days he was assigned as CO of the cutter, he was on leave for 11 days. Accordingly, the applicant argued that his derogatory OER was based on 10 days of service.

VIEWS OF THE COAST GUARD

On March 3, 2020, a Judge Advocate (JAG) for the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

The JAG argued that the applicant’s broad assertion that he has made over 60 FOIA requests without providing any amplifying information such as case numbers, subject of requests, or proof of submission makes it impossible for the Coast Guard to evaluate the legitimacy of his allegations. Furthermore, the JAG argued that if the applicant still has outstanding, unanswered FOIA requests after two years, there are remedies available to him under FOIA laws. The JAG stated that whether certain documents are released to the applicant under FOIA is outside the purview of the BCMR because it doesn’t involve a “correction of a record.” The JAG further stated that any Coast Guard information that the applicant could have requested via FOIA, whether or not it would have been provided to him, was available to the OIG and the IO during their respective investigations. The JAG recommended that if the applicant later obtains additional documentation that is material to the issues at hand, and chooses to submit them to the Board, that the Board reconsider the applicant’s relevant claims.

Regarding the applicant’s claims that it was erroneous and unjust for his Command to use the DEOMI/DEOCS surveys as justification for his PRFC and low OER marks, the JAG argued that aside from the generally prohibited OER comments and other policies governing the RFC process, there is no Coast Guard policy that prohibits the consideration of these surveys in an OER or as part of an RFC. The JAG explained that the Coast Guard uses these surveys to help maintain good order and discipline within the service. Two mechanisms for the Coast Guard achieving these things are OERs and the RFC process. Furthermore, the JAG argued that convening authorities have broad discretion to convene administrative investigations under the Administrative Investigations Manual, COMDTINST M5830.1A. According to the JAG, allegations of poor leadership, communication, command climate, and other issues found in the survey results are sufficient justification for initiating an investigation under this manual. The JAG stated that the survey results raised a red flag, and those issues were investigated prior to the unit taking relief

action. The JAG argued that consideration of the DEOMI survey results when formulating marks and comments was not a clear violation of a specific objective requirement of a statute or regulation, as required by *Hary*.⁴ The JAG further argued that the command climate comments and marks do not render the applicant's OER defective or erroneous. In addition, the applicant did not allege a specific misstatement of a significant hard fact. The fact that the applicant's career suffered as a result of his documented poor performance is expected, and does not shock the sense of justice.

The JAG argued that the applicant's contentions that his OER and subsequent RFC were erroneous and unjust because he inherited the problems from the previous CO are without merit. According to the JAG, even if the cutter's command climate was poor prior to the applicant taking command, he had ample time to make positive changes before the events in question took place. The JAG explained that the applicant took command on July 15, 2014, and his TRFC was initiated on April 20, 2015. The JAG stated that the applicant had over nine months to establish a positive command climate and confidence in the crew. However, the positive changes that were observed during the applicant's tenure were largely attributable to the Wardroom and Chief's Mess efforts to shield the crew from the applicant. Frankly, the JAG stated that the command climate before the applicant's arrival is irrelevant. The JAG stated that the applicant boldly claimed on page 66 of his complaint that it was the XO's job to foster a positive command climate, not his own, supporting his misguided theory by citing to the Coast Guard Regulations. This, the JAG argued, was the heart of the matter. The JAG argued that by citing to the XO's responsibilities, the applicant failed to address the CO's responsibilities. The JAG claimed that in the applicant's view, everyone, including the past CO and his own XO, were responsible for the poor command climate except himself. The JAG argued that the applicant fails to recognize the inherent contradiction in his argument when he assigns blame to the former CO but absolves himself of that same responsibility. The JAG stated that the fact that the applicant honestly believes and continues to argue that he was not responsible for the command climate aboard his own ship underscores the validity of the Coast Guard's decision to relieve him of his command.

Regarding the untimely submitted OER, the JAG argued that policy requires regular OERs to be routed to CG-OPM within 45-days following the end of the reporting period. The JAG stated that the applicant was correct that the submission of his OER was tardy, but the delay did not prejudice the applicant. According to the JAG, the administrative investigation was initiated on March 15, 2015, before the end of the reporting period, and his chain of command received the results of the completed investigation on or about April 6, 2015, before his OER was due on May 15. Therefore, the JAG argued that the applicant's command had plenty of time to review the investigation, even if they submitted his OER on time. The JAG stated that the applicant implied that his chain of command should not have been permitted to consider the results of the investigation, because it was completed after the end of the rating period. However, the JAG explained that the investigation made findings of facts, opinions, and recommendations regarding events that occurred during the relevant rating period. Accordingly, it was not erroneous or unjust for the applicant's chain of command to include comments in his OER based on the findings and conclusions of the investigation, so long as those comments did not improperly discuss the investigation itself or contain other prohibited comments. The JAG stated that policy provides,

⁴ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

“[t]hese restrictions do not preclude comments on the conduct that is the subject of the proceeding. They only prohibit reference to the proceeding itself.” The JAG argued that the applicant has not established that the minor delay of 30 days was prejudicial because his rating chain had the opportunity to consider the investigation results before the expiration of the period for submission of the OER. Furthermore, the JAG argued that the applicant’s OER was not erroneous or unjust because the conduct occurred during the applicable rating period, and the comments complied with policy.

The JAG further argued that nothing in the Military Whistleblower Protection Act (MWPA) requires reassignment of a member’s chain of command during the receipt of protected communications, as claimed by the applicant. The JAG claimed that automatic removal or disqualification of a rating chain upon receipt of a protected communication alone would create an untenable personnel policy requirement. Instead, the JAG explained that the applicant was provided with a specific procedural option in the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, to address the propriety of his rating chain based upon his perception of a personal interest or conflict that would raise a substantial question as to whether he could receive a fair and accurate evaluation. By policy, the JAG claimed that it was “incumbent” upon the applicant to identify any disqualification concerns to the next senior officer in his chain of command, but the applicant failed to do so. The JAG argued that the applicant has also failed to submit any evidence that his rating chain was biased or incapable of impartial evaluation of his performance. The JAG claimed that the applicant relies solely upon the fact that he made a protected communication to establish disqualification and retaliation. The JAG stated that while there are circumstances when making a protected communication may create a conflict within a rating chain that warrants disqualification, the necessity for disqualification must be evaluated on a case-by-case basis. Furthermore, the JAG argued that the OIG report found that the applicant failed to prove that the applicant’s command would not have taken the adverse personnel actions absent the protected communications.

Regarding the applicant’s claim that his regular and derogatory OERs were erroneous and unjust because CAPT M should have been disqualified due to an “inappropriate relationship” and fraternization with MKC K, the JAG argued that the only actionable conduct complained of by the applicant is attributable to the applicant’s own subordinate, MKC K. The JAG recited the applicant’s account of a phone call MKC K received while in a conversation with the applicant, and argued that, taking the claim at face value, the applicant, as MKC K’s CO, had the authority and duty to hold MKC K accountable for any perceived disrespect or UCMJ violations. According to the JAG, any failure to hold MKC K accountable in this scenario is directly attributable to the applicant’s own inaction. In addition, the JAG stated that the applicant fails to acknowledge that CAPT M was his superior officer, in the chain of command, and as such it was CAPT M’s prerogative to use whatever means necessary to ensure good order and discipline aboard the applicant’s cutter and every other cutter in the Sector. The JAG claimed that CAPT M chose to call people that he knew and trusted, namely MKC K, to keep a pulse on the unit. That JAG argued that this was not an unacceptable relationship, but an efficient use of a superior officer’s resources. The JAG claimed that the applicant wanted to control all of the information flow to his Sector commanders. The JAG further argued that aside from the applicant’s own statements, he failed to establish that there was an inappropriate relationship, fraternization, or disrespect toward a superior officer on the part of CAPT M that would warrant his disqualification from the applicant’s

OER rating chain. The JAG claimed that including CAPT M in the rating chain was not a clear violation of a specific objection requirement of statute or regulation for the reasons discussed above, and his participation did not render the OER defective or erroneous.

The JAG argued that the applicant failed to prove that the observations contained in block 5.e. of his regular OER, specifically that the applicant was slow to respond to counseling and direction regarding poor command climate, were a misstatement of significant hard fact. The JAG explained that the applicant was the CO for over nine months before his TRFC, during which time he was expected to address the unit's command climate. The JAG further explained that the applicant was counseled on August 27, 2014, by his supervisor, on October 21, 2014, in-person by his RO, and on January 16, 2015, by the Sector Reviewing Officer, including a memorandum by VADM R regarding observed deficiencies and direction for improvement. The applicant's OER further states that these challenges persisted throughout the rating period. The JAG stated that the Officer Evaluation System Procedures Manual, expects supervisors to draw on their own observations, those of any secondary supervisors, and other information when entering comments on the OER. Accordingly, the JAG argued that including the contested marks, comments, and subjective opinions about his slow reaction time to counseling was not a clear violation of a specific objective requirement of statute or regulation. Likewise, the JAG argued that it was not erroneous or unjust to discuss the administrative investigation in the OER. The JAG claimed that conduct that occurs outside of a rating period may be included in a derogatory OER/RFC OER because the purpose of a derogatory RFC OER is to document the reasons for relief and to "book-end" the member's service leading up to the relief.

The JAG argued that the applicant's contentions that his RFC was erroneous and unjust because VADM R's claims that he put the crew at risk were false are without merit because even if the applicant did not engage in risky behavior while serving as CO, his inability to effectively lead the crew put them all at risk anytime they were underway or performing dangerous operations or training. The JAG stated that VADM R's comment was a subjective opinion, but such opinions are not prohibited in the context of OER comments. In fact, the JAG explained that policy permits this very form of relief based on the subjective opinion of the relief authority and the chain of command. Although the applicant alleged that the PRFC "loss of confidence" standard is arbitrary and subjective, the JAG argued that permanently removing someone due to an articulated loss of confidence following a thorough investigation and nine months of opportunity to succeed is not arbitrary or unjust. The JAG explained that the RFC process is grounded in fact but based in no small part of the subjective beliefs and collective experiences of one's chain of command. The JAG stated that the applicant lost the trust and confidence of much of his crew and his entire chain of command, including the three-star VADM R (now ADM), who currently serves as Vice Commandant, and has approximately forty years of experience in the Service. The JAG argued that ADM R does not need to explain his loss of confidence in any greater degree than required by policy and law, and the Sector TRFC memorandum and subsequent PRFC memorandum sufficiently met that obligation. Accordingly, the JAG argued that the applicant failed to prove, by a preponderance of the evidence, that his PRFC was unjust based upon the loss of confidence standard by which he was relieved.

Regarding the applicant's claim that his PRFC was erroneous and unjust because the reason for his relief was never specified to him, the JAG stated that the April 20, 2015, TRFC

memorandum and the July 1, 2015, PRFC memorandum, both clearly state the basis for the applicant PRFC was the Coast Guard's loss of confidence in his ability to satisfactorily perform in his position, as permitted by 1.F.1.d. of the Military Assignments and Authorized Absences Manual, COMDTINST M1000.8A.

The JAG argued that the counseling the applicant received prior to his RFC was neither vague nor subjective as alleged by the applicant. Using the same rationale as already summarized above, the JAG explained that the applicant's supervisory chain of command was entitled to their subjective opinions about his performance during counseling sessions. Furthermore, the October 21, 2014, and January 16, 2015, are quite clear as to the reasons for the applicant's counseling. The JAG stated that throughout the applicant's 100-plus application, he repeatedly heckled his chain about issues that needed fixing, but he never seemed to understand that as the CO, it was his job to fix them, regardless of who caused them.

The JAG stated that throughout his request for relief, the applicant felt entitled to know the identity of the individuals who had made complaints against him, and he repeatedly sought the information, going so far as to cite to the Coast Guard Regulations, COMDTINST M5000.3B, which states, "Whenever an accusation is made against an officer, either by report or by endorsement upon a communication, a copy of such report or endorsement shall be furnished to the officer against whom the complaint is made."⁵ However, the JAG explained that here, the bulk of the accusations made against the applicant were in the DEOMI survey, which are anonymous by design. The JAG argued that looking at the language of the regulation, it cannot fairly be said that the DEOMI survey responses or discussions during the applicant's counseling session were "accusations" within the meaning of the regulation. Furthermore, the JAG claimed that the applicant did receive copies of the DEOMI responses and included them as enclosures to his application. The JAG argued that nothing in the above cited regulation entitles the applicant to know the identity of his "accusers." Additionally, the JAG stated that this regulation should be read in the context of all other modern Service policies, laws, and avenues for redress. Therefore, the JAG argued that it was not erroneous to refuse to disclose the names of the DEOMI survey respondents.

The JAG addressed the applicant's claims that his RFC process was unjust because his chain of command did not make every effort to maintain the applicant's self-worth, by stating that the press releases contested by the applicant were required by policy and designed solely to maintain the public's trust and were in no way designed to humiliate or otherwise retaliate against the applicant. The JAG stated that the applicant ignored Coast Guard policy that states the public's right to know, and the Service's need to maintain public trust and confidence require nothing less than full, transparent, forthright, and timely release of information when a commanding officer, officer-in-charge, or flag officer is removed from command.

The JAG argued that the applicant's contentions that his PRFC was based on an erroneous and unjust command climate investigation are based on misinterpretations or overly broad application of the permissive, not mandatory language of the Administrative Investigations Manual (AIM). The JAG explained that the applicant's due process rights were not violated because he was not entitled to legal counsel for a command climate investigation and his Sector

⁵ 8-1-5 "Complaints, Accusations, and Rebuttals," Coast Regulations (1992), COMDTINST M5000.3B.

had broad discretion to determine what procedural elements and formality of investigation it wanted to convene. In fact, the JAG argued that the applicant's Sector was not required to conduct a command climate investigation prior to the TRFC process but chose to pursue this additional process to confirm its concerns and provide an unbiased, outside assessment of the situation. According to the JAG, under the AIM, standard investigations do not afford anyone the rights of parties, but only a Court of Inquiry or Formal Investigation afford those rights, and those forms of investigations or extraordinarily rare in the Coast Guard and were not required under these circumstances.

Regarding the applicant's claims that the administrative IO lacked "judicial temperament" and committed "judicial" error, the JAG stated that the administrative IO was not an attorney, let alone a judge, nor was he required to be one. The JAG argued that only judges are expected to have judicial temperament, and only judges can commit judicial error. Furthermore, the JAG argued that the applicant had no right to insert evidence into the administrative IO's report, as alleged by the applicant. The applicant stated that CAPT L was empowered by the Convening Authority to determine what facts, information, documents, and evidence were relevant to his investigation. The JAG argued that it was proper and within policy for CAPT L to decide against inclusion of the applicant's information into the investigation due to it being irrelevant, especially considering the information largely pertained to the condition of the ship prior to the applicant taking command.

The JAG argued that an administrative investigation was not required prior to the applicant's PRFC, and therefore his allegations that the administrative investigation and subsequent PRFC were unfairly conducted because the plan from the beginning was to fire him are without merit. The JAG stated that CAPT R could have forwarded the applicant's TRFC up the chain of command without ever having conducted an investigation, thus, even if the applicant's allegation regarding CAPT R are true, the applicant was not prejudiced by CAPT R's pre-investigation because CAPT R was not the convening authority, the IO, or the official that ultimately effectuated the applicant's TRFC and PRFC. According to the JAG, CAPT R was simply another member in the chain of command and any opinions CAPT R held concerning the applicant were irrelevant with respect to the investigation.

The JAG further argued that the applicant's claims that the administrative investigation and subsequent PRFC were erroneous and unjust because he was never read his Article 31(b) rights are also without merit because the applicant was never suspected of having violated the UCMJ and was therefore not entitled to have these rights read. The JAG stated that having poor command climate or being a poor leader are not offenses under the UCMJ. The investigation was not criminal but was a standard administrative investigation. The JAG explained that no disciplinary action was taken against the applicant, only adverse administrative actions. Therefore, the JAG argued that the administrative investigation was neither erroneous nor unjust.

The JAG argued that the applicant's PRFC was not erroneous or unjust due to mutiny, sedition, conspiracy, and disrespect as, she claimed, the applicant alleged. According to the JAG, the applicant's XO, FSCS, CMC were members under the applicant's command, and if the applicant believed these individuals engaged in the alleged behavior cited above, he could have pursued his own investigation into their disrespectful conduct or taken other disciplinary action,

such as NJP. The JAG argued that the applicant's failure to hold these individuals accountable and taken disciplinary action only reflects poorly upon him as a leader. Regarding the officers superior to him, who the applicant alleged engaged in the same offenses, the JAG argued that the applicant could have filed an Article 138 complaint,⁶ an OIG complaint sooner than he did, or even forwarded charges up the chain for investigation and disposition. Although the applicant alleged that there was an agreement amongst many individuals up and down his chain of command to fire him, the JAG stated that the applicant has failed to provided evidence to support these claims. The JAG argued that even if there was an agreement between the applicant's superiors, it was not a crime for them to identify the applicant as a substandard CO and scrutinize his performance for a potential RFC. Likewise, the JAG argued that there was no mutiny on the part of those members who were subordinate to him, either in grade or position, as those subordinates had the blessing of the applicant's superiors to communicate with them regarding conditions affecting the cutter.

Finally, the JAG argued that the applicant has failed to provide any evidence to support his claims that CAPT C gave a verbal no-contact order to the applicant and the crew, preventing him from accessing possible witnesses. According to the JAG, the applicant did not make it clear if he ever asked for this order to be revoked or if he still believes it is in effect today. Therefore, the JAG argued that the applicant failed to prove, by a preponderance of the evidence, that there was a no-contact order or that any error or injustice resulted from it.

For the reasons outlined above, the JAG argued that the Board should deny the applicant's requested relief but remain open for reconsideration where noted.

To support her advisory opinion, the JAG submitted the following documents:

- A sworn declaration from CAPT M, wherein he stated that he stands by all of his statements, content, and recommendations associated with the applicant's OERs. CAPT M stated that the applicant's superiors, which included himself, CAPT R, CAPT C and VADM R were all seasoned cuttermen who provided the applicant with every opportunity for success throughout his tenure as the cutter's CO. For instance, CAPT M stated that they fully supported and documented the applicant's and his crew's success with the applicant's OERs. In addition, CAPT M stated that the applicant was provided counseling opportunities on August 27, 2014 (via telephone), October 21, 2014, (at Sector with CAPT R, applicant, and CAPT M), and on January 16, 2015, (hand-delivered letter from VADMR and provided follow-up counseling by CAPT C) to address the applicant's struggles and challenges with fostering a positive command climate aboard his cutter.

CAPT M stated that out of respect for the applicant, he never reached inside the lifelines of the cutter or her crew to seek out a status of his leadership style and/or associated shipboard morale, camaraderie, environment, etc. CAPT M stated that the applicant's

⁶ Article 138, UCMJ – Complaints of Wrongs: Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

inability to hold himself accountable, refusal to heed the advice and warnings of his supervisors and take appropriate action to modify or adjust his leadership style demonstrated poor judgment. CAPT M stated that the opinions and recommendations of the administrative investigations IO reinforced the fact that the applicant's leadership style directly contributed to the cutter's poor command climate and associated dysfunction. According to CAPT M, it was because of the applicant's inability, despite counsel, to turn around a toxic environment and associated disenfranchised crew, VADM R lost confidence in the applicant's leadership abilities, which resulted in his RFC.

CAPT M stated that the RFC was just and unfortunately, absolutely necessary. CAPT M stated that despite the RFC, CAPT M stated that the applicant possesses the skills and abilities to effectively advance the Coast Guard's strategic objectives in a myriad of specialties.

- A sworn declaration from CAPT R wherein he stated that as the Chief Operational Forces for the applicant's Sector, all major cutter COs reported to him in performance of their duties. This meant that CAPT R also received all reports of mission effectiveness, administrative inspections, overall command performance, command climate, and the results of the DEOMI Organizational Survey for all major cutters in the Sector. With regard to the applicant's cutter, CAPT R stated that he acknowledged the challenges faced to improve performance at the unit, as well as the achievements of the units during their tenure. However, these improvements and achievements could not come at the expense of unnecessary stress on the crew, disenfranchising the crew, or result in extremely poor command climate. CAPT R explained that the DEOMI results revealed the lowest command climate survey in the entire Sector, with over 44 pages of negative comments, mostly directed toward the applicant. During the period in question, CAPT R stated that he received complaints about the applicant from crewmembers, family members, chaplains, Work-Life staff, other units in the local area, and the CMC network. According to CAPT R, the applicant's cutter was the only cutter in the entire Sector that received complaints from so many different entities. Throughout this period, the applicant was afforded multiple direct and candid counseling sessions to improve his leadership. CAPT R explained that on October 21, 2014, the applicant spent three hours talking, but never acknowledged that his leadership may have been part of the problem. CAPT R stated that during this counseling session he pointedly told the applicant, "You are failing," and the only reason they were not about an RFC was because they wanted to counsel the applicant and provide him with the opportunity to improve. CAPT R provided the applicant with a signed memorandum informing the applicant of his concerns and provided specific direction on how to improve.

On January 16, 2015, after receiving the results of the DEOMI survey on January 5, 2015, CAPT R flew the Sector's Chief of Operations, CAPT C, to visit the applicant,⁷ to personally hand deliver a memorandum from VADM R, the Sector's Commander, regarding the serious concerns leadership had regarding the applicant's leadership and provided direction for improvement.

⁷ The applicant's cutter was porting in a foreign country.

In April 2015, after receiving continued complaints from multiple entities, the applicant's Sector order an investigation and based on that investigation, found that the applicant failed to change his leadership style, which resulted in an extremely poor command climate. As a result, the Sector lost confidence in the applicant's ability to command, and relieved him as the cutter's CO.

CAPT R stated that the applicant's OERs were a fair, objective, and accurate assessment of the applicant's performance.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 5, 2020, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. The applicant was granted extensions and responded through counsel on January 29, 2021.

The applicant argued that he inherited several issues aboard his cutter and took appropriate measures to correct those issues. The applicant claimed that the advisory opinion fails to acknowledge the applicant's attempts to correct those issues. The applicant stated that the advisory opinion simultaneously refused to recognize that positive change does not happen overnight but is a gradual process with success that is only measurable over an extended period of time. Furthermore, the applicant argued that the JAG's claims that the conditions of the cutter prior to the applicant's arrival are irrelevant is woefully misplaced and demonstrative of the advisory opinion's failure to comprehend basic cause-and-effect relationships. The applicant explained that he took command of a ship that was fraught with health and safety issues and run by crewmembers who showed a blatant disregard for applicable rules and were inadequately prepared for their mission. As the IO pointed out, the applicant explained that when he took command "the cutter was out of compliance with several COMDT/[Sector] policies and the crew required significant training to overcome the extended time period between patrols." The IO further noted that "the cutter didn't utilize shore patrol during foreign port calls, more than 96 hours of stand down was granted before and after patrols, the berthing areas were substandard, and the required logs were not maintained to name a few. The navigation team was not capable of safely navigating in Mode III (paper charts, visual bearings, and radar ranges). [Applicant's cutter] needed to rectify all flight deck personnel prior to their JIATFS patrol."

The applicant argued that it is clear from the IO's own factual findings that the applicant inherited a ship that was fraught with deficiencies. In addition, the applicant claimed that his cutter suffered from lead contamination, mold issues, exposed electrical wiring, lack of or substandard personal protective equipment, multiple fire and safety hazards, in addition to other issues. The applicant also alleged that there were instances of hazing, reports of racial discrimination, underage drinking, illegal drug use in government funded quarters, and pornographic materials openly displayed in berthing areas. The applicant stated that he also uncovered falsified documents, several inappropriate relationships between crewmembers, and an overall climate that was inconsistent with military values and regulations. In an attempt to correct these deficiencies, the applicant explained that he tried to bring his cutter into compliance with Coast Guard policies and began to hold crewmembers accountable for their actions. As a result of his attempts to bring the

cutter into compliance, the applicant stated that his cutter departed TSTA with “zero underway restrictions, zero training restrictive [*sic*], and 64 minor discrepancies.” Given the numerous issues that were present prior to his arrival, the applicant argued that it is unlikely anyone would have been able to correct all of these issues within such a short period of time. The applicant stated that the JAG’s contention that all of the above mentioned issues are “frankly...irrelevant” is completely absurd and woefully misplaced. The applicant argued that to suggest that the litany of issues inherited by him had no bearing on the command climate aboard his cutter is wholly illogical, because it fails to acknowledge the simple cause and effect relationship between the issues inherited by him and the effect those issues had on the crew. In light of these issues, the applicant argued that it is abundantly clear that he was not fully responsible for the climate aboard his cutter, and any issues that were created by him can and should be attributed to the fact that the crew had grown accustomed to not following Coast Guard policies and regulations, which led them to negatively evaluate him.

The applicant argued that the command climate survey was procedurally faulty and the results should not have been given deference. According to the applicant, the command climate survey lacked the necessary safeguards to protect the validity of the results. The failure to implement even the most basic safeguards tainted the results and rendered any administrative decision based off of the survey inherently flawed. The applicant alleged that the command climate survey was accessible using only one username and password, rather than requiring each service member to log in using personally identifiable credentials. To put it another way, the applicant stated that the survey could be completed multiple times by the same individual, thereby greatly exaggerating the results and creating a high likelihood that a few select crewmembers had repeatedly completed the survey while expressing negative opinions about him. This lack of procedural safeguard rendered the survey’s results inherently flawed. Accordingly, any administrative actions based upon this survey are equally flawed due to the high possibility of tainted results and should therefore be disregarded in their entirety. As previously explained, the applicant stated that he took substantial steps to correct numerous issues that were in existence prior to him assuming command of the cutter.

Specifically, the applicant alleged that he put an end to racial discrimination and hazing aboard the cutter, thereby creating a better climate for all service members. This is just one instance in which the applicant took steps to ensure that a positive climate permeated throughout the ship. The applicant explained that given the vast improvements he made, it is substantially more likely than not that a majority of the concerns raised in the command climate survey were made by a select few individuals on more than one occasion. Accordingly, the applicant argued, the results of the survey are wholly unreliable and his subsequent RFC, which was predicated upon the results of the survey, was unwarranted. The applicant argued that the failure to ensure that the survey could not be completed by the same individual more than once, coupled with the potential for using the survey as subterfuge in order to retaliate against him, renders the survey wholly unreliable, and should be completely disregarded, along with any action taken against the applicant predicated on the survey results must be overturned.

The applicant further argued that he was improperly removed for cause despite the absence of a sufficient basis for his removal. The applicant again alleged that his RFC was based on the command climate survey that was initiated as a subterfuge in order to provide an illusory

justification for his removal. The applicant explained that pursuant to the applicable regulations, a commander can only be relieved after a loss of confidence in his judgment and abilities resulted from documented unsatisfactory conduct or performance. None of these bases, according to the applicant, exist to justify his RFC. Therefore, the applicant argued that his RFC was contrary to controlling regulations, thereby constituting a clear error.

The applicant explained that per Article 1.F.1.d. of the Military Assignments and Authorized Absences Manual, COMDTINST M1000.8A, the basis for an RFC must be predicated upon a loss of confidence in the abilities or judgment of a commander. This loss of confidence must flow from unsatisfactory conduct on the part of the commander or unsatisfactory performance resulting from “gross negligence or substantial disregard of duty.” The applicant explained that the regulation further provides that for an RFC based upon substandard performance over an extended period of time, but relief may be taken “only after the command has taken corrective action such as command counseling, guidance, training, and appropriate use of performance evaluations, which have proved unsuccessful.” The applicant argued that none of the requirements outlined in the above-referenced policy were met prior to his RFC. The applicant explained that while he did discuss the conditions aboard his cutter with his senior leaders prior to being issued an RFC OER, his performance was not deficient to a level that would have warranted an RFC. Again, the applicant explained that he inherited a ship that was fraught with deficiencies and manned by a crew that had grown accustomed to conducting themselves in a manner that was inconsistent with Coast Guard policies and regulations. The applicant claimed that upon assuming command, he took the appropriate steps to ensure the crew and the cutter were fully capable of completing any assigned mission.

The applicant argued that the evidence shows his cutter and crew made substantial improvements regarding the condition of the ship and in bringing the crew into compliance with training requirements and Coast Guard policies. The applicant alleged that after he was counseled regarding the command climate of his crew, he took substantial steps to correct those concerns. The applicant stated that Article 1.F.1.d. of the Military Assignments and Authorized Absences Manual, COMDTINST M1000.8A, makes it unequivocally clear insofar as it requires that attempts at counseling and correcting concerns must be “unsuccessful.” Here, the applicant alleged this requirement was not met and renders his PRFC contrary to regulation. The applicant argued that the DEOMI survey results indicated that the command climate aboard the applicant’s cutter had markedly improved, proving that the counseling sessions with the applicant were successful, thereby rendering the RFC unwarranted and inconsistent with policy. Furthermore, the applicant noted that his personnel were awarded the Coast Guard Special Operations Service Ribbon during his tenure as CO. The applicant contended that if the command climate aboard his cutter had been so horrendous as to justify his removal, there would have been formal documentation describing the alleged deficiencies, but his record is entirely void of material showing complaints against him. The applicant stated that it is extremely concerning that he has not been provided with any objective evidence to support his RFC, despite his repeated attempts to obtain such information. Given the documented improvements in the command climate aboard his cutter, in addition to the achievements of the crew, the applicant argued that it is clear that attempts at correcting any perceived issues were successful, rendering the RFC and the RFC OER unwarranted and unjust.

The applicant argued that the OER issued failed to provide a complete picture of his actions, achievements, and obstacles he faced during the rating period in question. According to the applicant, the failure to provide this highly relevant information is a direct violation of the applicable regulation. Accordingly, the applicant argued that the OER must be removed in the interests of justice. The applicant argued that COs are required to ensure that an OER is an “accurate, fair, and objective” assessment of an officer’s performance during the rating period and “comments in an OER must be sufficiently specific to present a complete picture of the reported on officer’s performance and qualities during the period.” The applicant alleged that his superior officers failed to ensure that these requirements were satisfied. Specifically, the applicant stated that the OER failed to mention several key pieces of information which were critical in assessing his performance.

First, the applicant stated that the OER failed to mention the fact that he inherited a ship that was fraught with safety issues and a crew that had failed to live up to the core values of the Coast Guard. The applicant argued that this information was critical in actually assessing his performance during the applicable rating period because it highlights the obstacles he had to overcome immediately upon assuming command. Second, the applicant alleged that the OER fails to mention the positive steps that he took to correct the previously documented deficiencies. The applicant explained that the fact that this information was not included tends to suggest that he took no action to address the deplorable conditions aboard his cutter, which was simply not the case. The applicant stated that to leave this information out was a clear error because it could have been used to correct a misconception. The applicant alleged that the calculated decision to exclude references to the cutter’s condition and climate prior to his arrival renders the OER an egregiously inaccurate and unfair assessment of his performance during the rating period. The applicant explained that these facts are supported by the IO’s administrative investigation. Given that the OER does not provide a “complete picture of the reported on officer’s performance and qualities,” the applicant argued the OER must be removed in the interests of justice.

The applicant argued that the failure of the IO to consider the potential bias and motives of the crew, prior to substantiating allegations of a poor command climate, was clearly erroneous, and distorted the results of the investigation and proximately caused his RFC. The applicant contended that the IO indicated that the cutter’s crew “required significant training to overcome the significant time between patrols due to dry-dock availability.” The applicant further contended that the IO also indicated that the applicant’s predecessor failed to enforce Coast Guard policies, or otherwise hold the crew accountable for their actions. The applicant alleged that upon assuming command, he took the appropriate steps to address these concerns and ensure that the crew was mission capable. The applicant further alleged that it is highly likely that his actions, to include enforcing standards and Coast Guard policies, were met with hostility from a crew that had become accustomed to a lack of enforcement. Furthermore, the applicant alleged that it is likely that this hostility was motivated, in part or in whole, by his actions and that these hostilities manifested themselves in the form of illegitimate command climate complaints. The applicant argued that the IO failed to consider this very possibility, thereby rendering the entire investigation and accompanying survey results inherently flawed. The applicant alleged that had it not been for the impermissible retaliatory actions of certain crew members aboard his cutter, he would not have been relieved for cause.

The applicant alleged that his protected communications were the sole factor in the decision to initiate a command climate survey, and his subsequent RFC. The applicant further alleged that the findings of the Department of Homeland Security's investigation are inherently flawed, and failed to take into consideration the inter-relationship between his protected communications and his command's desire to ensure their own culpability were not brought to the forefront, potentially damaging their careers. The applicant explained that upon assuming command, he made numerous protected communications to his superiors regarding the condition of the cutter and the inability of the crew to carry out its mission. The applicant stated that this was confirmed by DHS's whistleblower investigation. According to the applicant, these communications involved, either explicitly or implicitly, every single officer with his chain of command, as those officers were directly responsible for the condition of the cutter and the morale of its crew prior to his arrival. The applicant acknowledged that these individuals were not primarily responsible for the conditions aboard the cutter, they were the direct supervisors of the previous CO, making them equally accountable for the conditions of the cutter. The applicant alleged that this clearly shows that his chain of command had a motive to ensure these deficiencies were kept in the dark.

The applicant claimed that because he immediately raised concerns upon assuming command of the cutter and was unwilling to allow the status quo aboard the cutter to continue, his chain of command, whether collectively or individually, likely felt compelled to protect their own careers. The applicant alleged these individuals, either collectively or individually, ordered a command climate investigation, knowing full well that it would come back with substantiated adverse findings against him. The applicant further alleged that the investigation into the command climate aboard the cutter was mere subterfuge, designed to ensure that justification would be present that would allow for the applicant to be relieved of his command, under the illusionary auspices that he fostered a toxic command climate. The applicant explained that by removing him from his position, his command was able to present the optic of having held the person primarily responsible for the conditions aboard the cutter responsible, even though his senior leaders were there before he was, and were therefore responsible for the cutter's condition and morale of the crew. In light of these facts, the applicant argued that it is abundantly clear that he was the victim of a command who failed to ensure the crew was aboard his cutter, prior to him assuming command, was mission capable of conducting themselves in a manner consistent with Coast Guard policies and the UCMJ. The applicant alleged that it was only after he took command and began to take actions designed to correct these issues that he became the target of his crew and leadership. The applicant argued that the decision to relieve him of his command can and should be solely attributed to his protected communications. The applicant claimed that it was his command's attempts at self-preservation that required him to take the fall for circumstances that his leadership failed to correct over an extended period of time.

The applicant alleged that the Sector CMC who deployed with the cutter to interview crewmembers made numerous false statements or otherwise egregiously misrepresented facts and circumstances surrounding the command climate, which directly led to adverse actions taken against the applicant. Had it not been for those maliciously false statements, the applicant argued that he would never have been relieved of his command and would still be serving his country as a member of the Coast Guard. Specifically, the applicant alleged that the CMC implied that the applicant misrepresented regulations or policy concerning the consumption of alcohol during port calls, intruded on the duties of the XO, showed up to work late and not in uniform, kept the OPS

and XO in the cabin for hours which limited their ability to get their work done, and that he put his crew at risk. The applicant alleged that these statements are false and that the CMC knowingly and intentionally portrayed the applicant as a micromanager who infringed upon the duties and responsibilities of his subordinates and was above the rules. The applicant alleged that the CMC's motive for these misrepresentations was to portray the applicant in a negative light. The applicant argued that while each false misrepresentation, standing by itself, does not show ill intent on the part of the CMC, when each false statement is viewed in conjunction with every other false statement, it becomes abundantly clear that these facts were intentionally misrepresented in order to portray the applicant as a toxic leader, who showed no concern for the safety of his crew. The applicant alleged that these false statements directly influenced the command climate investigation, from inception to finish, as well as the decision to relieve the applicant of his command. Without these false statements, the applicant argued that he would never have been relieved of his command.

The applicant argued that if his RFC is removed from his record, justice demands that he be promoted to fully correct the injustices that he suffered as a result of his command's misconduct. The applicant alleged that he was twice passed over due to his RFC and the subsequent derogatory OER. The applicant alleged that his RFC was predicated upon his alleged failure to turn around the poor command climate that was created by his predecessor. The applicant once again alleged that his RFC was mere subterfuge, created to provide his command with justification for his RFC. According to the applicant, his cutter's command climate was in whole or in part directly attributable to the issues created by his predecessor. The applicant alleged that these issues were so numerous and required such extensive intervention that his was forced to essentially make two choices — ensuring that his cutter was safe and the crew was able to complete its assigned mission safely and effectively, or let the crew continue without proper training, while simultaneously ignoring the rampant safety concerns that were discovered in the pre-CART assessment. The applicant stated that he chose to do what a reasonable commander would do, he took action to increase the safety of his crew. With this in mind — in addition to the fact that he corrected numerous issues before being improperly and unjustly relieved of command — the applicant argued that it is clear that the OER didn't accurately reflect his conduct and performance during the rating period. The applicant argued that the RFC OER creates a presumption that he alone was responsible for the conditions aboard his cutter and that he took no actions to correct the issues, which is simply untrue. The applicant alleged that convening a special selection board is unlikely to fully correct the injustices he has suffered. Because the applicant has been removed from military service for several years, the only way to fully correct this clear injustice is to remove all information indicating that he was twice passed over for promotion, expeditiously promote him to Captain (O-6) and remove all adverse information from his file that was predicated upon an inherently flawed command climate investigation.

APPLICABLE LAW AND POLICY

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

Article 1.F.1.a. A relief for cause (RFC) is the administrative removal of a commanding officer (CO), officer in charge (OIC), executive petty officer (XPO), engineer petty officer (EPO), or a designated full-time

command master/senior chief (CMC/CSC) from their current duty assignment before the planned rotation date. It normally consists of a two-step process:

- (1) Temporary relief for cause, and
- (2) Permanent relief for cause.

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

...

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

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

...

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

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

(2) Before approving a temporary RFC, the temporary relief authority identified in Article 1.F.1.c.(1) of this Manual must take care to ensure they have not set expectations and standards unreasonably high and make every effort to maintain the member's self-worth. The Coast Guard must ensure that whether or not the member returns to their command, the RFC process does not excessively undermine their effectiveness and future contributions to the service. After deciding to institute the temporary RFC process, the temporary relief authority must:

...

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

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

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

...

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

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

...

1.F.1.g. Miscellaneous

(1) The command must send all permanent RFC requests to the permanent relief authority identified in Article 1.F.1.b.(2) of this Manual.

(2) Do not send a request for permanent RFC to the permanent relief authority until the member has the opportunity to make a statement on their behalf (normally five working days). If the member fails to submit a statement within the allowed time, they waive the right to make such a statement.

...

(5) The command will complete an employee review of the member within 30 days of the permanent relief authority's final action on the permanent RFC request.

Article 5 of the Coast Guard Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, in effect in 2015 provides the necessary guidance on Special Derogatory OERs. In relevant part:

Article 5.A.1.a. Purpose. The OES has been designed to:

(1) Provide information for important personnel management decisions. Especially significant among these decisions are promotions, assignments, career development, and retention,

(2) Set performance and character standards to evaluate each officer,

(3) Prescribe organizational values by which each Coast Guard officer can be described, and

(4) Provide a means of feedback to determine how well an officer is measuring up to the standards.

...

Article 5.A.2.d. The Rating Chain. The rating chain provides the assessment of an officer's performance and value to the Coast Guard through a system of multiple evaluators and reviewers who present independent views and ensure accuracy and timeliness of reporting. It reinforces decentralization by placing responsibilities for development and performance evaluation at the lowest levels within the command structure. The rating chain consists of the reported-on officer, the supervisor, the reporting officer, and the reviewer (if applicable).

Article 5.A.2.e. Rating Chain Exceptions.

1. Designating Substitutes in the Rating Chain. In instances where a supervisor, reporting officer, or reviewer is unavailable or disqualified to carry out their rating chain responsibilities, the commanding officer or the next senior officer in the chain of command shall designate an appropriate substitute suitable for evaluating the reported-on officer. Other members in the rating chain may be adjusted and designated, as appropriate. Commander (CG-PSC-OPM-3) or (CG PSC-RPM-1) shall be advised in writing of the designation(s). The timing of the substitution may preclude full use of the Officer Support Form (OSF), Form CG-5308; however, that fact alone does not invalidate the OER.

2. Definitions. As used within this subparagraph:

(a) “Unavailable” includes illness, injury, death, prolonged absence, transfer, separation from the service, retirement, or any other situation which prevents or substantially hinders the supervisor, reporting officer, or reviewer from properly carrying out their rating chain responsibilities.

(b) “Disqualified” includes relief for cause due to misconduct or unsatisfactory performance, being an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the supervisor, reporting officer, or reviewer raises a substantial question as to whether the reported-on officer will receive a fair, accurate evaluation.

(c) If not already determined by the commanding officer, it is incumbent on the reported-on officer to identify to the next senior officer in the chain-of-command that an exception to the designated rating chain may exist. This issue should be raised by the reported-on officer during the reporting period or within 30 days after the end of the reporting period.

...

Article 5.A.3.e. The Commandant, commanding officers, higher authorities (including convening authorities) within the chain of command, and reporting officers may direct these reports. The circumstances for the special OER must relate to one of the situations described in Article 5.A.3.e.(1) through 5.A.3.e.(5) below.

(1) Subsequent to Substandard Performance or Conduct.

...

(b) A special OER shall be submitted to permanently remove an officer from primary duties as a result of conduct or performance which is substandard or as directed by the permanent relief authority’s final action on a permanent relief for cause request per by Article 1.F. of reference (q), Military Assignments and Authorized Absences, COMDTINST M1000.8 (series)). The OER will be defined as derogatory and shall follow the procedures for derogatory OER submission in accordance with Article 5.A.7.c. of this Manual. This OER will count for continuity.

...

Article 5.A.7.f. Restrictions. Members of the rating chain shall not:

1. Mention the officer’s conduct is the subject of a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings under the Uniform Code of Military Justice, civilian criminal proceedings, Personnel Records Review Board (PRRB), Coast Guard Board for Correction of Military Records (BCMR), or any other investigation (including

discrimination investigations) except as provided in Article 5.A.3.e. of this Manual. Referring to the fact conduct was the subject of a proceeding of a type described above is permissible when necessary to respond to issues regarding that proceeding first raised by an officer in a reply under Article 5.A.4.g. of this Manual. These restrictions do not preclude comments on the conduct that is the subject of the proceeding. They only prohibit reference to the proceeding itself.

...

The Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1A, in effect in 2015 provides the following guidance on Special OERs:

Article 4.A.2. The circumstances for the Special OER must relate to one of the situations described in Article 5.A.3.e.(1) through 5.A.3.e.(5) of Reference (a). The authorizing article must be cited in Section 2 of the OER along with a brief description of the circumstances which prompted the OER's submission. [Example: "This OER is submitted per COMDTINST M1000.3 (series), Article 5.A.3.e.-- due to ..."]. The authorizing articles are then followed by a brief summary of the primary duties and responsibilities.

...

6.A. General. The Reported-on Officer may reply to any OER. Replies provide an opportunity for the Reported-on Officer to express a view of performance which may differ from that of a rating official. Reported-on Officers *are strongly encouraged* to contact CG PSC-OPM-3 or CG PSC-RPM-1 for guidance prior to preparing an OER Reply.

1. Content of Replies. Comments should be performance-oriented, either addressing performance not contained in the OER or amplifying the reported performance. Restrictions outlined in Article 5.A.7.f. of Reference (a) apply. Comments pertaining strictly to interpersonal relations or a personal opinion of the abilities or qualities of a rating chain member are not permitted.

2. Submission of Replies. Reported-on Officer's OER Reply must be submitted to CG PSC-OPM-3 or CG PSC-RPM-1 via the original rating chain. If the whereabouts of the original rating chain members are unknown, submit the OER Reply directly to CG PSC-OPM-3 or CG PSC-RPM-1 who will forward the Reply to the rating chain.

3. Timeline for Submission of Replies to Supervisor. Replies must be submitted to the Supervisor within 21 days from receipt of the original, validated OER from CG PSC-BOPS-C-MR, Military Records Section. Replies based upon receipt of local copies will not be accepted.

FINDINGS AND CONCLUSIONS

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

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

2. The 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.⁸

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

4. The applicant alleged that his annual OER for the rating period of June 20, 2014, through March 31, 2015, his permanent RFC on July 1, 2015, the subsequent derogatory OER, and the press releases announcing his temporary and permanent reliefs for cause are erroneous and unjust and should be removed from his record. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed evaluation in an applicant's military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.⁹ Absent specific evidence to the contrary, the Board presumes that the members of an applicant's rating chain have acted "correctly, lawfully, and in good faith" in preparing their evaluations.¹⁰ To be entitled to correction of an OER, the applicant cannot "merely allege or prove that an [evaluation] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed evaluation was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.¹¹

5. **Alleged Retaliation.** The applicant alleged that the command climate investigation; his annual OER dated March 31, 2015; his RFC; the derogatory OER documenting his RFC; and press releases about his RFC were all retaliatory for reports he made about safety and other deficiencies of his cutter and crew soon after he took command of the cutter. The record shows that on May 25, 2016, about a year after leaving the cutter, the applicant filed a formal Military Whistleblower Complaint with the OIG. On March 29, 2019, the OIG issued its findings and concluded that, while a preponderance of the evidence established that the applicant's protected communications were a factor in the personnel actions taken against him, clear and convincing evidence indicated that the applicant's chain of command had no motivation to retaliate against him because of those protected communications and would have taken the same personnel actions even without the protected communications. The Board finds the OIG's findings and conclusions persuasive. Therefore, for the reasons stated in the OIG report of investigation, the Board finds that the applicant has failed to prove by a preponderance of the evidence that his protected communications about the condition of the cutter and crew caused his command to retaliate against him through the command climate investigation; his annual OER dated March 31, 2015; his RFC; the derogatory OER; or the press releases. The applicant has failed to show that the OIG erred in determining that the evidence of record does not support his claim that his chain of command's disputed actions were retaliatory for or motivated by his protected communications.

⁸ *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

⁹ 33 C.F.R. § 52.24(b).

¹⁰ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

¹¹ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

6. **Rating Chain.** The applicant alleged that his rating officials should have been disqualified from serving on his rating chain and from effecting his RFC because they had almost no opportunity to observe his performance in person, because they fraternized with members of his crew, and because they were implicated in the discrepancies in the condition of the cutter and crew in July 2014 and were the subject of his whistleblower complaint. The Board disagrees for the following reasons:

a. Lack of in-person observation. Because the CO is the highest ranking officer of a unit, many COs—and particularly the COs of cutters—are typically evaluated by superior officers who have had little, if any, opportunity to observe their performance or their interactions with their crews *in person*. Instead, the officers who evaluate cutter COs must evaluate their performance based primarily on their communications with the CO, the operational and administrative performance of the CO's crew and cutter, and reliable reports. The applicant claimed that the command climate was actually good and that the rating chain relied on unreliable complaints in the DEOMI Survey. He stated that the dozens of complaints about him in the DEOMI Survey could have come from only one, two, or a few disgruntled crewmembers. The record shows, however, that his chain of command had received complaints about the applicant and the command climate for months before the DEOMI Survey occurred; that the CMC deployed with the cutter to observe the command climate, met with many crew members, and relayed his observations and complaints about the applicant from numerous crew members to the chain of command; and that CAPT L conducted an administrative investigation that likewise provided the applicant's rating chain with reliable information about his leadership and the command climate aboard his cutter. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that his rating chain, including the Chief of Area Cutter Forces, the Chief of Operational Forces, and the Chief of Area Operations, evaluated his performance as the CO of the cutter and relieved him of his command based on unreliable information or that they should have been disqualified based on their lack of opportunity to observe his performance in person.

b. Alleged fraternization. Although the applicant alleged that members of his rating chain fraternized with members of his crew, he submitted no substantial evidence to support this claim and so has not overcome the presumption of regularity accorded them that they did not violate the UCMJ by fraternizing and, instead, performed their duties lawfully, correctly, and in good faith.¹²

c. Not disqualified. The applicant alleged that his chain of command should have been disqualified from serving on his rating chain for the disputed OERs because they were identified as parties actively retaliating against him. In making this argument, the applicant ignores both the fact that the applicant filed his whistleblower complaint in 2016, many months after he was relieved for cause, and the fact that the OIG found that his claims of retaliation were unsubstantiated. Article 5.A.2.e. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, states that a rating official may be “disqualified” from serving on a rating chain but that, to be disqualified, the rating official

¹² 33 C.F.R. § 52.24(b); *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

must be relieved for cause due to misconduct or unsatisfactory performance, be an interested party to an investigation or court of inquiry, or be involved in any other situation in which the rating official has a personal interest or conflict that “raises a substantial question as to whether the reported-on officer will receive a fair, accurate evaluation.” The Board finds that the applicant has not proven by a preponderance of the evidence that any of the officers who signed the disputed OERs in 2015 were or should have been disqualified from serving on his rating chain pursuant to Article 5.A.2.e. None of the officers on his rating chain had been relieved for cause from their positions, and none of them was a party to an investigation involving the applicant in 2015. In addition, the fact that the applicant, upon assuming command of the cutter in 2014, discovered and reported many discrepancies in the condition of the cutter and the training of the crew after their drydock period does not raise a substantial question as to whether the applicant received a fair, accurate evaluation. The Board notes in this regard that the OIG reported that the rating chain’s preparation of the OERs was not motivated to retaliate by the applicant’s protected communications about the condition of the cutter and crew.

7. **Past Performance and Operational Achievements.** The applicant alleged that his past performance as an XO and CO, other OERs, and medals and awards prove that his RFC and the disputed OERs are erroneous and unjust. However, the fact that an officer has received better OERs and medals and awards before and after the reporting period for a disputed OER is not evidence that the disputed evaluation does not accurately reflect his performance during the reporting period.¹³ He also argued that the awards his cutter earned for operational performance under his leadership prove that the RFC and disputed OERs are erroneous and unjust, but the applicant was relieved of command because of a poor command climate, not because of operational issues, and his operational successes were lauded and reflected in high marks in the associated dimensions on his annual OER dated March 31, 2015.

8. **Administrative Investigation.** The applicant alleged that CAPT L, the IO appointed by the VADM, conducted an inadequate investigation because it was a standard investigation instead of a formal investigation, because the IO was not trained in investigation, because the IO was overly influenced by the rating chain, and because the IO failed to consider that the DEOMI Survey was unreliable and that the crew was biased against the applicant. For the following reasons, the Board disagrees:

a. Standard Investigation v. Formal Investigation. The applicant alleged that the investigation conducted by CAPT L should have been a formal investigation,¹⁴ instead

¹³ *Grieg v. United States*, 226 Ct. Cl. 258, 271 (1981) (“[T]he fact that this fine officer had better ratings before and after the challenged OER is of no legal moment nor of probative value as to the rating period covered by the one OER with which he is dissatisfied.”).

¹⁴ AIM, Chap. 1.D.1.b. (“Formal Investigations are convened to accord the rights of a Party to an individual, or when the Convening Authority otherwise determines that a formal evidentiary hearing process is appropriate. Formal Investigations involve a hearing at which a Party or Parties are accorded their rights to be present and challenge evidence. The Convening Authority, or the Board of Investigation if so authorized, determines who will be designated a Party. A Formal Investigation has no subpoena power, but is designed to be used in lieu of a nonjudicial punishment proceeding or a Pretrial Investigation under Article 32, UCMJ (a prerequisite to General Courts-Martial).”)

of a standard investigation.¹⁵ However, neither the RFC regulations in COMDTINST M1000.3A nor the Administrative Investigations Manual (AIM) requires a formal investigation for a CO to be relieved for cause, and even a standard investigation is optional. Chapter 3.A.1. of the AIM states that “[t]he vast majority of Administrative Investigations in the Coast Guard, even those involving loss of vessels or aircraft and extensive loss of life, are conducted as Standard Investigations.” Although the applicant alleged that he was named a “party” to the investigation, he has not supported this claim, and no parties may be named in standard investigations.¹⁶ The applicant has not provided any grounds for concluding that his command was required to convene a Formal Investigation into the command climate of his cutter before administratively relieving him for cause.

b. Untrained and biased IO. The applicant alleged that CAPT L was not a trained investigator and so conducted an inadequate, biased investigation. Unlike CGIS criminal investigations, standard investigations do not require an IO with specialized training, and the rules of evidence do not apply. Instead, the command designates an appropriate officer—usually a member of the command—to be the IO, and the IO is required to review and follow the pertinent steps in the AIM and may seek legal advice while conducting the standard investigation. The applicant has not shown that CAPT L lacked any required training or violated any part of the AIM in conducting the standard investigation. Nor has he shown that CAPT L was biased against him or unduly influenced by the applicant’s chain of command in conducting the standard investigation and issuing his findings and recommendations.

c. Reliance on DEOMI Survey. The applicant alleged that the IO and his chain of command relied on unreliable evidence gathered through the DEOMI Survey. The applicant alleged that the survey failed to implement the most basic safeguards, such as providing each crewmember with his or her own username and password. Therefore, according to the applicant, the numerous complaints about him gathered during the survey could have been entered by a single individual with ulterior motives. However, even assuming one or just a few members of the crew were responsible for all the complaints in the DEOMI Survey, which is unproven, that would not prove that the IO’s findings were unreliable. As noted above, there were other reliable sources of information about the command climate and the applicant’s leadership: The chain of command had received complaints about the applicant and the command climate from multiple sources for months before the DEOMI Survey occurred; the CMC who deployed with the cutter to observe the command climate and meet with many crew members relayed his own observations and complaints about the applicant from numerous crew members to the chain of command; and CAPT L, the IO, conducted his own peer group meetings and one-on-one interviews with members of the crew before issuing his report. For CAPT L’s investigation, numerous

¹⁵ AIM, Chap. 1.D.1.a. (“Formerly referred to as “Informal Investigations,” Standard Investigations are convened to investigate the vast majority of minor and major incidents requiring an Administrative Investigation. These investigations are normally conducted by a single individual known as the Investigating Officer (I.O.). A Standard Investigation uses informal evidence-gathering procedures, and usually does not conduct hearings. It does not have authority to designate Parties or to subpoena witnesses.”)

¹⁶ AIM, Chap. 4.C.2. (“A Standard Investigation is a non-Party investigation. Parties must not be designated by a Convening Authority or by an Administrative Investigation in an investigation convened under this section.”).

identified crewmembers and officers provided personal accounts of why they found the applicant's leadership style overwhelming and detrimental to the continued mission of the cutter. Therefore, the preponderance of the evidence shows that even without the DEOMI Survey, CAPT L would have issued substantially the same report and recommendations and the applicant's chain of command would still have concluded that the cutter's command climate was poor, that the applicant's leadership style was a significant contributor to the poor command climate, and that the RFC was warranted.

d. Biased Crew. The applicant alleged that the IO's failure to consider the potential bias and motives of his crew before reporting that the allegations of a poor command climate had been substantiated was a clear error that distorted the results of the investigation. The applicant explained that upon assuming command, he took the appropriate steps to enforce previously unenforced Coast Guard policies aboard the cutter. According to the applicant, it was highly likely that his actions were met with hostility from a crew that had become accustomed to a lack of enforcement, and that these hostilities manifested themselves in the form of illegitimate command climate complaints. However, the applicant has failed to provide any evidence whatsoever that proves, by a preponderance of the evidence, that his crew harbored hostility toward him and so provided illegitimate command climate complaints to the IO. The Board notes that those who made negative comments about the applicant in the administrative investigation gave specific instances of the applicant's poor leadership, such as holding inappropriate conversations with female junior officers, having an inappropriate training style, and in contravention to his own standing orders, issuing commands directly to the helmsman several times without assuming control of the ship. The applicant has failed to show how any of these reported instances were illegitimate and based on improper motives. Nor has he shown that the IO failed to consider the possibility of improper motives.

Therefore, the Board finds that the applicant has not proven by a preponderance that CAPT L's report of the standard investigation was inaccurate, unjust, or unreliable as a source of information about the applicant's leadership for his chain of command.

9. **Annual OER**. Aside from the issues addressed above, the applicant alleged that his regular, annual OER for the rating period of June 20, 2014, through March 31, 2015, is also erroneous and unjust because the OER was not timely submitted in accordance with policy, because the OER failed to provide a complete picture of the applicant's performance, and because of two erroneous comments. For the following reasons, the Board finds the applicant's arguments and evidence unpersuasive:

a. Untimeliness. The applicant alleged that his annual OER is erroneous and unjust because his rating chain did not submit it in a timely manner and waited so that they could include false and defamatory information provided in the administrative investigation. Although the applicant's OER was not submitted within the 45 days of the end of the reporting period as required by Article 2.A.2. of the Officer Evaluation Manual, COMDTINST M1611.1A, this untimeliness did not prejudice the applicant. The record shows that the results of the administrative investigation were released on April 6, 2015, only six days after the end of the reporting period. Therefore, the delay in the completion

of the annual OER did not enable the rating chain to review the report of the administrative investigation, as the applicant claimed, and the applicant has not shown how the delay of the OER prejudiced him. Moreover, this Board has long held that delay *per se* is insufficient to justify removal of an otherwise accurate OER.¹⁷ Nor has the applicant proven that the report of the administrative investigation was false or unreliable. Moreover, the administrative investigation dealt with performance that took place squarely within the applicable rating period, and any OER comments based on information in the IO's report were therefore not prohibited under Coast Guard policy.

b. Incomplete picture. The applicant alleged that his annual OER was erroneous and unjust because it did not provide a complete picture of his performance throughout the rating period. According to the applicant, his rating chain failed to include pertinent facts about the state of the cutter and crew prior to his arrival and the positive steps he took to correct the issues. However, the applicant failed to cite a specific policy or instruction, and the Board knows of none, that requires the condition of a cutter prior to a CO's arrival to be included in an OER in order for the OER to be fair, accurate, and objective. Nor are OER comments required or expected to address every achievement of or issue faced by the officer during the reporting period. Instead, the Supervisor assigns a numerical mark for each performance dimension by comparing the officer's performance to the written descriptions for the numerical marks on the OER form, and then, given the very limited space for comments, the Supervisor enters a comment with an example of the officer's performance that supports the assigned numerical mark.¹⁸ The Board notes in this regard that the great majority of the comments within this annual OER highlight the applicant's many successes and acknowledged his many accomplishments throughout the rating period, including his efforts to correct deficiencies and get crew members qualified.

c. Two disputed comments. The applicant claimed that two comments in the annual OER are erroneous and unjust. The first, which supports the low mark of 3 for Adaptability is, "Slow response to repeated counseling & direction regarding command climate concerns distracted greatly from ops & readiness achievements." The second, which supports the low mark of 3 for Workplace Climate is, "Leadership style, while operationally effective, directly contributory to poor command climate. Counseled by Supervisor 27 Aug, Reporting Officer in person 21 Oct, & by [Sector]-3/Reviewing Officer on 16 Jan including delivery of memo from VADM regarding observed deficiencies & direction for improvement; slow effective response, challenges persisted throughout reporting period." The applicant argued that these comments are erroneous and unjust because the record shows that the command climate was improving under his leadership. The Board finds, however, that the disputed comments are supported by the preponderance of the evidence. There is no persuasive evidence that the applicant inherited a poor command climate and improved it. Instead, there is evidence in the DEOMI Survey and a follow-up report to the survey by CWO M that the effect of the applicant's adopted leadership style had had a bad effect on the command climate aboard the cutter and that, after he was counseled for a second time in October 2014, there was some improvement,

¹⁷ See, e.g., CGBCMR Docket Nos. 2005-053; 2003-110; 2002-015; 43-98; 183-95 (Concurring Decision of the Deputy General Counsel Acting Under Delegated Authority); and 475-86.

¹⁸ PSCINST M1611.1A, Article 2.E.4.

but the crew attributed the improvement to remedial actions taken by the Chiefs' Mess and still considered the applicant's leadership to be an impediment to improving the command climate. Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that these disputed comments are erroneous or unjust.

Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that his annual OER for the period June 20, 2014, through March 31, 2015, rating period was adversely affected by a "misstatement of significant hard fact"; a factor, such as retaliation, "which had no business being in the rating process" (see Finding 5, above); or a *prejudicial* violation of a statute or regulation.¹⁹ There are no grounds for removing or amending the annual OER.

10. **Relief for Cause.** In addition to the issues addressed in the findings above, the applicant argued that his RFC was erroneous and unjust because he inherited issues aboard the cutter that were used to justify his RFC; because his chain of command failed to provide him with the required counseling and failed to adequately define command climate for him; and because he was not responsible for ensuring a good command climate—the Executive Officer was. For the reasons explained below, the Board disagrees:

a. Preexisting Issues. The applicant alleged that his RFC was erroneous and unjust because he inherited many problems from his predecessor that were no fault of his own but were really the fault of the prior CO and his chain of command. The Board disagrees. While the cutter and crew had recently gone through a period of drydock and summer transfer season and a lot of hard work and training were required to get underway, none of the issues cited by the applicant's chain of command as grounds for his RFC involved the readiness of the cutter or its crew. The applicant's chain of command acknowledged the applicant's trials and his successes in bringing his cutter back into compliance with Coast Guard policies and regulations but also stated that the applicant was failing to balance the need for operational readiness with crew morale despite counseling. The record shows that it was the cutter's poor command climate, which the crew primarily attributed to the applicant's leadership, that provided the basis for the applicant's RFC, not the inherited deficiencies in the condition of the cutter and the training and discipline of its crew.

b. Counseling. The applicant alleged that his chain of command did not provide him with the most basic counseling required by Coast Guard policy before his RFC. Once again, the Board disagrees. The record shows that on August 27, 2014, CAPT M, who was his Supervisor and Chief of Area Cutter Forces, contacted the applicant and informed him that he had received reports from the cutter's Chiefs' Mess, specifically MKC K, that the Chiefs' Mess had serious concerns with respect to the applicant's leadership style, the negative affect his leadership style had on the crew, and the future direction of the cutter. The record further shows that on October 21, 2014, at CAPT M's request, the applicant visited Sector Command to discuss his leadership style and the command climate aboard the cutter. This meeting included the applicant, CAPT M, and

¹⁹ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

CAPT R. According to CAPT M, throughout the nearly three-hour conversation, the applicant refused to acknowledge any deficiency in his leadership style, nor did he agree to adopt an improved leadership style. As a result, CAPT R issued a memorandum to the applicant wherein he notified the applicant that since his August 27, 2014, conversation with CAPT M, the Sector Command had continued to receive multiple complaints through various avenues, including crewmembers, family members, chaplains, Work-Life Center employees, and the CMC. The applicant was directed to take specific steps to address the command climate of his cutter. Then again on January 16, 2015, VADM R sent CAPT C to the applicant's cutter, which was docked in foreign port, to hand-deliver a memorandum issued by VADM R, wherein he notified the applicant of his "significant concerns" regarding the applicant's leadership style and his cutter's command climate. The applicant, who was following the leadership style of a former mayor of New York, was repeatedly told to instead focus on humility, empowerment, and encouragement. Finally, the record shows that complaints regarding the applicant's leadership style continued, and on March 18, 2015, the VADM R issued a Convening Order to formally initiate an investigation into the command climate aboard the applicant's cutter. The IO, CAPT L, ultimately concluded that the applicant was the causative factor in the poor command climate and should be relieved of his command.

The applicant also complained that what makes a good or bad command climate is poorly defined and so it was unjust to remove him on that basis of contributing to a poor command climate. However, the record shows that the applicant was counseled both verbally and in writing several times that the command climate of his cutter was the primary cause of concern, and there is no evidence that the applicant claimed not to understand what his command meant or wanted. If he did not understand what they wanted or what constitutes a good command climate, the burden was on the applicant to let them know that he did not understand.²⁰ Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that he was not adequately counseled about the need to improve his leadership style and the command climate aboard his cutter before his command relieved him for cause.

c. Not responsible for command climate. The applicant argued that he should not have been held accountable for the poor command climate aboard his cutter because it was the XO's responsibility. The Board disagrees. First, the vast majority of the crew's complaints concerned their in-person treatment by the applicant himself, not by the XO or anyone else. Second, while Chapter 6-2-3-A(12) of Coast Guard Regulations, COMDTINST M5000.3B, states that one duty of the XO is to "[e]ndeavor to maintain high morale within the command," Chapter 4-1-15 states that the CO is responsible for the well-being of the crew. Nor is this responsibility delegable because Chapter 4-1-2-A states that while a CO may delegate his responsibilities to others, such delegation "shall in no way

²⁰ COMDTINST M1000.3A, Article 5.A.1.c.1.d.1. ("Performance feedback occurs whenever a subordinate receives advice or observations related to their performance in any evaluation area. Performance feedback can take place formally (e.g., during a conference) or informally (e.g., through on-the-spot comments). Regardless of the forum, each officer should receive timely counseling and be clear about the feedback received. If feedback is not fully understood, it is the reported-on officer's responsibility to immediately seek clarification and the rating chain's responsibility to provide it.").

relieve the commanding officer of continued responsibility for the safety, efficiency, and well-being of the command.”

Finally, the Board notes that pursuant to Article 1.F.1 of COMDTINST M1000.8A, the applicant’s chain of command was required to first submit a detailed package to PSC-OPM stating their reasons for the RFC, which the PSC-OPM then had to approve. The applicant argued that his RFC was arbitrary and unjust, but the applicant has not shown that the RFC package contained any errors, and absent evidence to the contrary, his chain of command and PSC-OPM are presumed to have carried out their review duties correctly, lawfully and in good faith.²¹ Nor does the fact that he was not charged with a crime under the UCMJ and no member of his crew filed a complaint against him pursuant to Article 138 of the UCMJ persuade the Board that their decision to relieve him for cause was erroneous or unjust. Therefore, the applicant has not proven, by a preponderance of the evidence, that his chain of command had unreliable or insufficient grounds for his permanent RFC or failed to articulate those reasons sufficiently. He has not shown that his RFC was erroneous or unjust.

11. Derogatory OER. When the applicant was relieved for cause, his rating chain was required to prepare a “derogatory” OER documenting the reasons for the RFC.²² In addition to the issues addressed in the findings above, the applicant argued that the OER documenting his RFC violates Coast Guard policy because it discusses performance that occurred outside of the reporting period, which was April 1, 2015, to July 1, 2015, and because it mentions the administrative investigation. Article 5.A.7.f. of COMDTINST M1000.3A, as in effect in 2015, states that the members of an officer’s rating chain may discuss the conduct or performance underlying an investigation but may not mention the investigation itself “except as provided in Article 5.A.3.e. of this Manual.” Article 5.A.3.e. concerns “Special” OERs, including derogatory OERs documenting a relief for cause, disciplinary action, or “significant historical performance” that was unknown when the regular OER covering that period was prepared.

Although it is possible that the exception in Article 5.A.7.f.(1) is intended to apply only to OERs that document “significant historical performance,” nothing in Article 5.A.3.e. states or implies that limitation. Moreover, Coast Guard policy does not allow a command to delay a regular, annual OER because of a pending investigation of misconduct or poor performance, and so officers frequently receive regular OERs while investigations or other proceedings are pending and then receive discipline or are removed from their duties during a subsequent reporting period. If the exception in Article 5.A.7.f.(1) applied only to Special OERs documenting “significant historical performance,” it would be impossible for a rating chain to comply with Article 5.A.7.c. of COMDTINST M1000.3A or Chapter 5.A.2. of PSCINST 1611.1A by documenting disciplinary action or an RFC with a derogatory OER if the due date for the regular OER happened to fall while the investigation was pending. This Board will not adopt such a narrow interpretation of Article 5.A.7.f.(1) with such a contradictory result.

²¹ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

²² COMDTINST M1000.3A, Article 5.A.7.c.; PSCINST 1611.1A, Chap. 5.A.2.

Likewise, and for the same reasons, the Board finds that the derogatory OER does not violate Article 5.A.7.f.(11) of COMDTINST M1000.3A. Requiring commands to document their reasons for an RFC on a derogatory OER but not allowing them to discuss those reasons in the OER if the due date for the officer's regular OER happened to fall during the investigation would present an unworkable contradiction and thwart the purpose of the policies. Moreover, the written comments in the derogatory OER, which appear on pages 15 and 16 above, discuss the applicant's leadership style and its impact on the command climate aboard the cutter generally. The comments do not discuss any particular incident that occurred only before April 1, 2015.

Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that the derogatory OER documenting his RFC was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.²³

12. The applicant made numerous allegations with respect to the actions and attitudes of various officers and submitted a great deal of evidence that is not relevant to his leadership style or the command climate aboard the cutter. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption or regularity and/or are not dispositive of the case.²⁴

13. The applicant has not proven by a preponderance of the evidence that the command climate investigation, his annual OER dated March 31, 2015, the RFC, the OER documenting the RFC, or the news releases about his temporary and permanent RFC were retaliatory or otherwise erroneous or unjust under the applicable policies. Therefore, the Board finds no grounds for amending or removing those documents from his record, for convening a Special Selection Board, for expunging his retirement and returning him to active duty, or for granting his other requests for relief. Accordingly, his requests for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

²³ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

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

