

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2020-104**

  
LCDR (O-4)

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**FINAL DECISION**

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on August 6, 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 June 30, 2022, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST AND ALLEGATIONS**

The applicant, a Lieutenant Commander (LCDR/O-4) on active duty, asked the Board to correct his military record by removing the following documents:

- a Special Officer Evaluation Report (OER) documenting his relief for cause as the Commanding Officer of a cutter on December 2, 2016, when he was still a lieutenant (and replacing it with a Continuity OER);
- the applicant's Reply to the contested OER dated May 3, 2017, and any related documents or adverse references related to the contested OER; and
- other documentation of his permanent Relief for Cause (RFC)<sup>1</sup> as Commanding Officer of the cutter, specifically a tugboat. and any replies or references to this relief.

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<sup>1</sup> According to Article 1.F.1.d. of COMDTINST M1000.8A, a member may be "relieved for cause" from certain billets, including a commanding officer billet, for "unsatisfactory conduct" or for "unsatisfactory performance," which is described as follows:

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

The applicant argued that his OER and Permanent RFC are unjust because the incidents that led to his removal were out of his control; he was never given the required counseling or training before his removal as required by policy; and the Coast Guard never provided a clear, proper basis for his removal.

The applicant alleged that on January 6, 2016, eleven months before he was relieved as Commanding Officer of the cutter, his entire leadership team aboard the cutter—except him—was involved in personal misconduct that resulted in the applicant having to relieve his Executive Officer (XO), Engineering Officer (EO), Operations Officer (OPS), and Deck Department Head (1LT). While on liberty, the cutter's XO, EO, OPS, 1LT, and two petty officers were involved in an incident that resulted in the improper use of a government vehicle, consumption of alcohol in violation of Coast Guard policy, and the drunken theft of a valuable painting from a local establishment by the OPS. After learning of the OPS's behavior the following morning, instead of reporting the misconduct, the others attempted to cover up the theft. The theft was discovered several days later when the business owner made a complaint to the District Command after reviewing surveillance video and discovering the perpetrator was a member of the Coast Guard. The applicant claimed that although there were no previous infractions by these individuals, the offenses, coupled with their failures in integrity, resulted in an investigation and the individuals being relieved of their duties.

The applicant argued that the CGIS investigation was unnecessarily prolonged, and the “excruciatingly slow” non-judicial punishment (NJP) process exacerbated the situation so badly that the individual relief of these subordinates was staggered over a four-month period. The applicant claimed that retaining these individuals on the vessel pending their investigations adversely affected not only the mission of his vessel but morale as well. The applicant argued that when he ultimately made the difficult decision to remove his entire leadership team, it was based on the guidance and concurrence of the Sector Commander. According to the applicant, the loss of his entire leadership team had an inevitable impact on the cutter. He was forced to augment the remaining crew with temporary personnel. In the end, the applicant claimed, he just did not have the necessary manpower to conduct the operations of the ship as required, which he claimed he constantly communicated to his commanders.

The applicant claimed that although his sector consistently endorsed the “crawl, walk, run” approach to restoring a ship's readiness, the next level operational commander at the District and his staff would instead frequently ask him when the ship would return to operational readiness and expressed concern over lost operational hours. When these concerns were brought up directly to the applicant's chain of command within the Sector, the applicant claimed, he was assured by his Captain that the Sector would address the matter with the District and told not to worry. He was told that as long as the two remained in good communication, everything should be fine. The applicant argued that although the process was slow and frustrating, his chain of command never gave him any indication that he was at risk of being relieved himself.

The applicant alleged that his chain of command endorsed his approach for his vessel's recovery following the relief of his entire leadership team, but then retracted that endorsement without affording him an opportunity to change course. The applicant also claimed that he sincerely believed he had the support of his command based on the robust verbal and written

communication he was regularly sharing and receiving from his chain of command. The applicant stated that as a junior officer, it was extremely important to him to keep his leadership apprised and to solicit their feedback on how to move forward during that unprecedented time. The applicant argued that had his command staff notified him that his plan was unsatisfactory, he would have taken immediate steps to rectify the situation. Instead, the applicant alleged that the feedback he received was to stay the course and continue to communicate.<sup>2</sup> The applicant stated that he was disappointed to learn that despite the positive support he received at the time, the Sector leadership later stated that they believed the applicant was failing. The applicant further argued that re-characterizing past performance that was previously endorsed is profoundly unjust and that the relief policy is designed to prevent this precise type of action.

The applicant argued that his relief from command violates Coast Guard policies and procedures. According to the applicant, the Coast Guard failed to articulate which basis it used to justify relieving the applicant from his command. The applicant claimed that the articulated reason for recommending his relief was “substantial disregard for duty” which, according to the applicant, is not a legitimate basis. The applicant argued that the events that transpired following the relief of his entire leadership team do not fall under any basis for removal.

The applicant also argued there was no “significant incident” that warranted his relief for cause. According to the applicant, the only possible “incident” was the failed Ready for Sea (RFS) evaluation in July 2016. However, the applicant claimed, units fail RFS evaluations with some regularity, and this rarely results in relief of the commanding officer. The applicant claimed that his vessel’s RFS failure was not particularly egregious, significant, or even unexpected. In fact, according to the applicant, his captain stated that he expected the vessel to fail inspection given the turnover of the leadership team. The applicant argued that in order to warrant a commanding officer’s relief for cause, an “incident” must be part of an extended period of substandard performance about which the member is counseled and provided with an opportunity to remediate, or the incident must actually be “significant” under Coast Guard policy. The applicant claimed none of the justifications provided by his chain of command demonstrate that he disregarded any duty or that there was ever a significant incident.

The applicant further argued that there is no justification for his relief under the second authorized basis, “substandard performance of duty over an extended period of time.” The applicant claimed that while the Sector and District Commanders failed to articulate and justify which basis they were using to recommend his RFC, their language suggested the applicant was relieved under the substandard performance of duty basis. According to the applicant, the language used by his chain of command in their “Recommendation for Temporary Relief for Cause” dated September 1, 2016, such as “permitted readiness...to degrade” the existence of “multiple longstanding degradations,” and the applicant’s “poor judgement, and failure to actively lead” supports his argument that he was relieved due to substandard performance of duty. The applicant also cited the “Temporary Relief for Cause” memorandum dated September 12, 2016, wherein the District Commander characterized the basis for relieving the applicant as a loss of confidence due to “a pattern of neglect, poor judgement, and failure to exercise appropriate oversight...” However, the applicant argued, in order to validly assert this basis, the command must establish a record of

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<sup>2</sup> The applicant claimed that evidence shows his captain’s communications were devoid of any negative indicators, right up to and including the last working day before he was relieved.

significant counseling and notification to him of the alleged substandard performance, followed by an opportunity to remedy and deficiencies. The applicant argued that proceeding on the basis of “loss of confidence” is unjustified because his chain of command never provided him with the requisite counseling required by Coast Guard policy. The applicant argued that his chain of command was fully aware of the issues his vessel faced and fully endorsed his plans to recover. The applicant claimed that at no point did anyone tell him they were unsatisfied with his recovery plan or the leadership the applicant demonstrated while executing his plan.

According to the applicant, his chain of command had several opportunities to provide him with guidance that would have allowed him to recognize he was not meeting their expectations and to improve his performance, but they failed to do so. To support this argument the applicant referenced a positive OER that he received on July 25, 2016,<sup>3</sup> approximately half-way through the five-month period his commanders used to justify his relief from command. The applicant argued that nowhere on this positive OER was he told his commanders were not pleased with how he was managing his command. The applicant stated that the positive OER marks from his captain at the time are significant because they were signed twenty days after the failed RFS evaluation, which the applicant claimed his captain obviously knew about.<sup>4</sup> The applicant stated that had he been counseled, he would have taken a different approach moving forward.

The applicant alleged that after the District Commander sent a letter requesting his permanent RFC to the PSC for approval, he had no ability under policy to directly communicate to PSC his concern that this new memorandum contained new hyperbole, unfair exaggeration, and incorrect statements from the District. In summary, the applicant alleged that a November 2015 Ready for Operations (RFO) inspection report and his actions in response to the report were mischaracterized. The applicant claimed his team was actively working on correcting discrepancies and provided updates to the District Command. The applicant claimed he was wrongly accused of an unacceptably slow response. The applicant stated that if there was a slow response it was not due to any shortcoming on his part, but instead was the result of external factors such as waiting months for the command to schedule the necessary NJP proceedings for his leadership team, that when complete, would have allowed him to request permanent replacements. The applicant argued that had he been afforded permanent placements, instead of temporary, he would have been able to adequately restore mission readiness without the patchwork of temporary crew members in key positions. The applicant stated that he made sure his leadership was aware of the ongoing impact of not having permanent replacements and made efforts to mitigate the impact, but beyond those efforts, the arrival of permanent replacements was out of his control.

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

- Eight letters of recommendations and/or character references from various current and former Coast Guard commanders on behalf of the applicant requesting this Board grant the

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<sup>3</sup> The applicant did not provide this OER so the Board has no way of verifying the statements made here.

<sup>4</sup> The RFS evaluation report was not provided by the applicant. However, in a subsequent administrative investigation which was convened on July 27, 2016, as a result of the failed RFS and RFO, the date shown for the RFS was June 14, 2016.

applicant the relief he seeks.<sup>5</sup> The letters universally lament the difficult circumstances the applicant faced with his leadership team and the subsequent fallout that followed. The endorsers speak of the applicant's leadership, work ethic, professionalism, and dedication to service. These letters also reference the Coast Guard's zero-defect approach to officer promotions.<sup>6</sup>

- Email correspondences between the applicant and his commanders regarding the applicant's progress on bringing his vessel into compliance and remedying the failed inspections.

### SUMMARY OF THE RECORD

On May 23, 2007, the applicant graduated from the Coast Guard Academy and was commissioned as an Ensign. He was assigned to a cutter and promoted to Lieutenant Junior Grade on November 23, 2008. In June 2009, the applicant transferred and became the Executive Officer of another cutter. On May 23, 2011, he was promoted to Lieutenant (O-3).

On June 23, 2014, the applicant reported for duty as the Commanding Officer of the tugboat at issue here. His records show that he received a positive annual OER for this service on May 31, 2015, receiving a total of eight 7s, eight 6s, and two 5s.

In November 2015, the applicant's vessel underwent a Ready for Operations (RFO) inspection and failed. The report noted that there were 14 items that should be added to an already existing "working list." Of the discrepancies indicated, there were 8 "high priority" discrepancies that required immediate attention, 35 "moderate/medium priority" discrepancies, and 15 "low priority" discrepancies.

On December 21, 2015, the applicant submitted a Correction of Discrepancies Memorandum to his commander. Between November 2015 and up to his removal from command, emails show that the applicant remained in constant contact with his captain, providing updates as to the current status of his vessel and updates to the discrepancies being addressed in response to the RFO inspection.

On or about January 22, 2016, the applicant's entire leadership team (Executive Officer, Engineering Officer, and Operations Officer) was removed from the cutter as a result of a serious incident of misconduct that resulted in the leadership team undergoing a CGIS investigation and NJP proceedings. Other officers were detailed to the cutter as replacements.

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<sup>5</sup> The applicant's total application, including his response to the Coast Guard's advisory opinion was approximately 160 pages. For efficiency the letters of reference were not individually summarized here because their content had no bearing on the disposition of this case.

<sup>6</sup> The Coast Guard does not have an official "zero-defect" policy. The term "zero-defect" first appears in the applicant's application here in his letters of recommendation. It is a slang term used when referencing the competitive nature of the officer promotion system.

On March 17, 2016, the applicant submitted an update to his captain showing that his crew had addressed and corrected 16 discrepancies on his working discrepancy list.<sup>7</sup>

On June 14 and 15 of 2016, the applicant's vessel underwent and failed a Ready for Sea (RFS) inspection.

In July 2016, the applicant received his annual OER for the reporting period June 1, 2015, through May 31, 2016. This OER did not include any below-standard marks or comments.

On July 21, 2016, the applicant submitted an Action Plan for Achieving Operational Readiness Memorandum to his Sector Command. This memorandum included the following as attachments: Progressive RFO Completion Matrix which shows a breakdown of the discrepancies and a "goal date" for completion of required repairs; Training and Administration Discrepancy List, which showed 7 total discrepancies (2 High Priority, 2 Moderate Priority, and 3 Low Priority); Deck Department Discrepancy List which provided 6 total discrepancies that were all listed as "Moderate" priorities; Operations Department Discrepancy List which provided 9 total discrepancies (1 High Priority, 5 Moderate Priority, and 3 Low priority); Engineering Department Discrepancy List which provided for 36 discrepancies (5 High Priority, 22 Moderate Priority, and 9 Low Priority), Cutter Planning Calendar, Cutter Qualification Matrix, and the Cutter Personnel Matrix.

On September 9, 2016, the applicant submitted an Updated Action Plan for Achieving Operational Readiness Memorandum to his commanders. The applicant stated that he and his crew would "restore the cutter to full material, operational, and personnel readiness through corrective maintenance, comprehensive training, and the employment of TDY support." The applicant declared that all personnel, including temporary duty, would be responsible for executing his action plan. In addition, the applicant stated that in order for him and his crew to achieve the necessary level of proficiency and material condition, they had employed a Progressive Ready for Operations inspection cycle which included checking, fixing and certifying each program as completed. The applicant also stated that after all RFO programs are successfully certified, he will turn his focus to the completing of required drills and exercises.

On August 25, 2016, an Administrative Command Climate Investigation was completed. The report showed that the crew had additional significant concerns regarding the state of the cutter and crew. The investigator stated, "In summary, the investigation concluded that: 1.) the Commanding Officer (CO) did not effectively command during nearly insurmountable circumstances amidst an abnormally heavy crew transfer cycle; and 2.) the CO exercised too much trust in his Executive Officer (XO) and Department Heads, with very little verification. These factors resulted in severe degradation of deck, engineering, and operations programs, damage

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<sup>7</sup> Because the applicant's vessel already had a "working list" of discrepancies, it was hard to distinguish between discrepancies the applicant was already aware of prior to the RFO inspection, and those that were raised during the RFO inspection. However, a memorandum from the applicant's Rear Admiral (RADM), notes that one of the reasons for the applicant's RFC was because the applicant "allowed discrepancies identified during a November 2015 'Ready for Operations' evaluation to go unattended and permitted the cutter to function in an unsafe state of readiness regardless of known erosion of in mission capability, which ultimately manifested itself in the June 2016 'Ready for Sea' inspection." Given this statement by the RADM, it is a reasonable conclusion that those discrepancies addressed by the applicant comprised those provided in the November 2015 RFO.

control readiness, and material condition of CGC [redacted].” The Command Climate Investigation noted that the initial RFS inspection was terminated due to the “[g]eneral poor condition of the ship, lack of crew readiness, and lack of required qualifications.”

The Investigation also revealed the following:

- Members of the RFS inspection team and TDY personnel found the cutter’s Deck, Engineering, and Operations programs were either expired or in disarray.
- By not inquiring of his Department Heads regarding the status of their respective programs and by not conducting material inspections, the applicant fostered an environment where his XO and Department Heads became complacent.
- In June 2016, the applicant’s supervisor, RFS team, and Engineering Warrant Officer discussed whether or not they should proceed with the inspection given the poor condition of the ship. Despite the concerns raised, the applicant was “firm on his desire to hold the RFS the following week.”

On September 1, 2016, as a result of the Command Climate Investigation, the applicant’s Sector Commander recommended that the applicant receive a Temporary Relief of Command. The Captain stated he had “lost confidence” in the applicant’s ability to “safely and effectively command the cutter and the crew due to a failure to ensure CGC [redacted] was safe to sail, a demonstrated pattern of poor judgement, and a substantial disregard for duty.”

On September 12, 2016, the District Commander, a Rear Admiral (RADM), issued a memorandum agreeing with the proposed Temporary RFC. The RADM stated that although the applicant had “inherited” a difficult work environment and received an Annual Excellence Award in 2015, she had to base her decisions on the findings of fact listed in the Command Climate investigation, which indicated a steady decline in the vessel’s readiness. The RADM argued that as the CO, the applicant had “failed to maintain operational readiness as demonstrated through a failed 2016 ready-for-sea inspection and [was] unable to restore operational capabilities despite extraordinary guidance from senior leaders and tremendous on-site support from subject matter experts. Because of a neglectful and detached leadership style, you were generally unaware of the many discrepancies aboard your cutter, and subsequently operated the cutter despite the unsafe condition of the vessel.”

On September 19, 2016, the applicant responded to the Temporary RFC and requested the relief not become permanent. The applicant “emphatically” disputed his relief because it was based on five months of extremely unusual circumstances following the relief of his entire leadership cadre. The applicant claimed he had worked diligently to repair the damage left in the wake of his leadership team’s relief. The applicant argued that (1) his Sector and District commands erred in removing him because they did not abide by Coast Guard policy when approving his relief; and (2) mitigating circumstances in his case warranted special consideration of options not normally taken following temporary relief for cause, such as return to command.

On October 14, 2016, District Command notified the applicant of their intent to make the RFC permanent. The RADM acknowledged that some progress had been made in restoring the operational readiness of the applicant's vessel but stated that the vast majority of the accomplishments and achievements were the result of the independent and unsupervised actions of temporary duty personnel and external leadership. In addition, the RADM stated, the situation called for more involved leadership on the applicant's part and despite numerous opportunities, the applicant did not demonstrate the level of engaged leadership required to adequately recognize problems. In addition, the RADM claimed that the applicant did not achieve the positive outcomes expected of a commanding officer.

On October 21, 2016, the applicant responded to the District Commander's permanent RFC notification. The applicant argued that his chain of command did not articulate any "significant incident" in which he demonstrated a substantial disregard for duty, which makes his relief arbitrary and capricious. The applicant also argued the only event that could have constituted even a discreet "incident" is the RFS evaluation. Finally, the applicant argued that his chain of command endorsed his plan to recover following the relief of his entire leadership cadre, but now seeks to retract that endorsement.

On October 28, 2016, the applicant applied for redress under Article 138 of the UCMJ with a complaint against his CO, the Sector Commander. On October 31, 2016, the District Commander denied the applicant's request for redress. Here the applicant explained that he does not seek to escape accountability for his actions as CO, and in hindsight there were many things he would have done differently. He argued that he needed to get his vessel back to operational capability and he developed a plan to do that. He claimed that he communicated this plan to his chain of command, but his plan overestimated what could be accomplished with a temporary assigned crew and failed as a result. The applicant alleged that he was transparent about his plan and worked to improve his plan after the failed RFS, and the plan was beginning to work. The applicant further alleged that he was told by his change of command that his plan was "good" and he believed them. The applicant argued that it is unjust that he should suffer such severe career consequences for the failure of a plan that was endorsed and supported by his Sector.

On November 2, 2016, after reviewing the applicant's statement, the District Commander ultimately recommended to Coast Guard Headquarters that the applicant be permanently removed from command. On December 2, 2016, the permanent relief authority at Coast Guard Headquarters authorized the applicant's permanent RFC.

On December 12, 2016, the applicant filed a complaint against the District Commander regarding his denial of the applicant's Article 138 complaint against the Sector Commander. The applicant's request for relief was denied.

On January 31, 2017, the applicant was issued a Special Derogatory OER as required by Coast Guard policy to document his Permanent RFC, which was the result of the failed RFS and Command Climate investigations. This disputed OER covered his performance from June 1, 2016 through December 31, 2016. In the five performance categories, on a scale from 1 (poor) to 7 (superior), the applicant received zero marks of 1, zero marks of 2, three marks of 3, two marks of 4, eight marks of 5, five marks of 6, and zero marks of 7. He also received a mark of "Good



Performer; give tough, challenging assignments” on the officer comparison scale and was highly recommended to remain on the promotion list. The low marks of 3 were supported by the following comments about his performance:

Did not employ proper quality controls to verify compliance w/established CG policies & standards across a range of programs & systems; enables cutter’s material condition, rescue & survival systems, damage control locker & admin to unacceptably degrade; required extensive time and cost to properly correct.

Failed to institute processes, provide the leadership, or develop a culture that ensured compliance w/ CG standards; unaware of significant deterioration in multiple systems incl machinery, rescue & survival systems, small boat & damage control; rendered the cutter not-mission-capable w/ significant lost operational days, required \$45K to correct discrepancies.

Leadership style did not provide effective oversight of Dept Heads & did not meet CG's expectations of a Commanding Officer (CO); led to long-term degradation of vital cutter systems & programs; decision to get u/w during a Ready for Sea Evaluation without properly trained & qualified crew placed the cutter at undue risk in the event of an emergency.

Did not adequately understand complete status of crew's quals or cutter's overall condition, including status of repair lockers, that impacted cutter's readiness & safety; got underway for Ready for Sea eval w/ a crew that was not fully trained or qualified in all watch positions; placed cutter & crew at unnecessary & unacceptable risk.

On February 15, 2017, the applicant submitted his Reply to the derogatory OER for inclusion in his record. In his Reply, the applicant stated that he accepts full responsibility for his performance and of those under his command, but wholeheartedly disputed the underlying rationale and gross departure from Coast Guard policy used to effect it. He argued that he believed the negative comments were unfairly characterized and inconsistent with his past performance, personal character and potential to lead in the future. He claimed that the negative aspects of this OER focus on the flawed preparations and execution of a Ready for Sea evaluation that occurred only two weeks into the period of report. The applicant stated that he regretted the failure to successfully complete RFS at what he believed to be the expected time. He also stated that his vessel was at a higher risk of requiring additional funds for repairs and the costs of necessary maintenance and replacing equipment superseded by policy would likely have been the same had it been completed prior to the rating period.

On April 21, 2017, a Material Condition Assessment and Inspection Results Summary was issued with a comprehensive visual and ultrasonic assessment of the structure, piping, and ventilation systems of the applicant’s vessel. This inspection was conducted August 23 through the 29, 2016. Of the approximately 77 compartments inspected, the report indicated that all but nine compartments were in satisfactory condition. Of those compartments not in compliance, there were three items designated as “re-preservation,” which means that three “structural components exhibited mild to heavy erosion that require mechanical cleaning of the material and proper “re-preservation” to prevent continued material loss that may become a non-conformance.” The report also indicated that six compartments were in “non-conformance,” which means “six structural components exhibit corrosion or structural discrepancies that do not conform to *Naval Ships’ Technical Manual Chapter 100: Hull Structures* that will require structural repair to restore the structural integrity of the component to design specifications.”

In response to the RFC, the Coast Guard convened a Special Board to recommend whether the applicant's name should be removed from the 2017 LCDR promotion list. The Special Board, convened on August 31, 2017, recommended that his name remain on the promotion list, and he was subsequently promoted to LCDR.

### VIEWS OF THE COAST GUARD

On November 3, 2020, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC). The JAG recommended the Board deny relief in this case. The JAG provided the following analysis:

***The applicant's RFC, the underlying basis of the subsequent Special OER, is not an erroneous or unjust application of applicable policy.***

The JAG argued that under Article 1.F. COMDTINST M1000.8A chains of command have significant discretion when making decision on RFC. According to the JAG, although the applicant asserts that he was "arbitrarily relieved contrary to policy," the relieving authority and his supervisor were clear as to the ultimate basis. The JAG argued that as noted in a memo dated December 2, 2016, Coast Guard PSC-OPM stated the applicant would be relieved "by reason of loss of confidence due to substantial disregard of duty." According to the JAG, Article 1.F.1.d.2. describes two bases under the category "Unsatisfactory Performance" one of which may be paraphrased as "One significant incident resulting from substantial disregard of duty." The JAG argued that the various memos issued by the applicant's command, the substantial disregard for duty was not that the cutter failed the RFS evaluation, but that its CO was willing to hazard the vessel and crew by proceeding with the underway portion of the assessment. The JAG argued that Article 1.F. of COMDTINST M1000.8A does not define "loss of confidence," but by its terms, it implies a rational yet subjective standard of trust in the mind of the commander, the loss of which may result in relief for cause so long as it is supported by "[a]n articulated fact-supported package."

The JAG argued that the package was found to be sufficient by Coast Guard PSC-OPM. The JAG also argued that the administrative progression required under RFC regulations found in Article 1.F. were complied with, from Temporary to Permanent relief, including affording the applicant the opportunity to provide a rebuttal and assistance of counsel. As such, the JAG argued that the applicant has not met his burden to show error in the procedure of the RFC.

As to the injustice, the JAG argued given the CO's high level of responsibility, and the high level they are held to, it should not "shock the sense of justice" that the applicant would feel the repercussions of having an essential operational unit out of commission for several weeks/months and then operated unsafely. The Special Board concluded that "the degradation of the material condition and readiness of the ship warranted his relief for cause..." Therefore, the JAG argued, the applicant has failed to overcome the presumption of regularity afforded to the Coast Guard. The JAG argued that a permanent RFC was deemed appropriate by his chain of command and the relieving authority, once authorized, a special OER was required under Article 1.F.1.g. in addition to the Officer Accessions Manual, Article 5.E.7.

***The applicant has failed to provide sufficient evidence to meet the standard for correction of an OER.***

The JAG argued that under *Hary v. United States*<sup>8</sup>, the applicant must do more than merely allege or prove that an OER seems inaccurate, incomplete, or subjective in some sense. He must demonstrate, by competent evidence that: 1. A misstatement of a significant hard fact; 2. Clear violation of a specific objective requirement of statute or regulation; or 3. Factors adversely affecting the rating which had no business being in the rating process.<sup>9</sup>

According to the JAG, the applicant alleged the single misstatement of a significant hard fact in his special OER is the “required 45K to correct discrepancies.” The JAG claimed the applicant provided a Quarterly Funding Detail Report that apparently depicts less than the figure in question. The JAG argued that while the August 25, 2016, administrative investigation report provides a sum of 31K, the applicant’s rating chain may have expanded this figure to include other emergent repairs or, as the applicant himself suggests, to cover TDY expenditures made to augment his crew. Regardless, however, the JAG argued that even if the number is incorrect it is not a material or significant error, as the number itself is only a representation of the emergent costs undertaken to put the cutter in safe condition.

The JAG also argued that the applicant looked to previous OERs as well as extensive statements from colleagues that speak highly of the applicant’s character and work ethic, but for the most part these statements only express regret for challenging situation the applicant faced rather than pointing out any specific injustice committed by Coast Guard D1. In addition, according to the JAG, looking to “follow-on” performance—documented performance following the period of the disputed OER—is contrary to policy. The JAG argued that under OES Procedures Manual, Article 4.B.11., the OER may only document performance for the dates identified in the Period of Report.

The JAG argued that the second prong of the *Hary* test is not implicated here as there is no clear violation of a specific objective requirement of a statute or regulation to establish that the Special OER was unjust. According to the JAG, once the Permanent RFC was authorized, the Officer’s Accession Manual required the Special OER. The applicant was also afforded the opportunity to provide comments and submit a reply.

According to the JAG, the applicant did not call the third prong of the *Hary* test into question, because there are no representations of adverse factors which had no basis being in the rating system. The JAG argued the August 31, 2017, Special Board, spoke to the magnanimity of the applicant’s rating chain by specifically stating, “it speaks volumes that the chain of command that relieved him (the applicant) highly recommended that he be retained on the Promotion List.” As such, the JAG argued that because no prong of *Hary* has been offended, the applicant has failed to overcome the presumption that the Coast Guard administrators discharged their duties, other than correctly, lawfully, and in good faith.

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<sup>8</sup> *Hary v. United States*, 223 Cl. Ct. 10, 18, 618 F.2d. 704, 708 (1981).

<sup>9</sup> *Id.*

The JAG concluded by stating the applicant failed to establish that his RFC and its associated Special OER warrant revision and has not met his burden of establishing via a preponderance of the evidence that the Coast Guard committed an error or injustice. Accordingly, the Board should deny relief.

To support its application the Coast Guard submitted the following documents:

- An October 16, 2017, Report of the Special Board Convened at Coast Guard Headquarters where the facts and documents of the applicant's case were reviewed. The final decision was that the applicant should be allowed to remain on the Commanders Promotion List.
- On July 6, 2020, a Captain for the Coast Guard submitted a Program Input Memorandum recommending the Board grant no relief in the applicant's case.
- The Special OER for the period of June 1, 2016 through December 2, 2016, including statements submitted by the applicant in response to the Special OER, the applicant's supervisor, and the Reporting Officer.
- A May 3, 2017, Reported-On Officer OER Memorandum where the officer requests the memorandum be submitted in conjunction with the Special OER.
- A sworn statement dated June 1, 2020, provided by the applicant's supervisor at the time he was relieved from command of the cutter. The applicant's supervisor stated the applicant's request for correction of his record was misleading at best. According to the supervisor, the applicant was hyper-focused on ancillary details, while still, after four years, not understanding the totality of the situation. The supervisor also stated that the addendum he wrote in conjunction with the applicant's Special OER provided sufficient detail to justify the marks the applicant received, but because the applicant made enough "uninformed statements" in his request for relief that the supervisor believed additional details were warranted. The supervisor claimed that the "local establishment" where the incident happened with applicant's leadership team was as a strip club and the leadership team used a very junior crew member as their driver. According to the supervisor, the chain of command did not hold the applicant accountable for the type of command influence he had on his leadership team, but it was clearly not enough to prevent them from blatantly violating Coast Guard policy, committing illegal acts, then conspiring to cover those acts up.

Regarding the RFS inspection, the supervisor stated the team conducting the RFS had concerns about the readiness of the crew and the vessel shortly after arriving. The investigative team then initiated a conference call with the applicant and the supervisor. The supervisor stated that he specifically remembered giving the applicant the option to delay the at-sea portion if the crew and the applicant were not ready, but the supervisor claimed the applicant wanted to attempt it anyway and needless to say, he was unsuccessful. According to the supervisor, the RFS and the subsequent RFO investigation ultimately found the applicant's vessel got underway with major administrative and operational discrepancies. The supervisor claimed that the applicant was either oblivious

to those discrepancies when deciding to get underway, or he was aware of them and used horrendous judgement to get the cutter underway in this condition, which his request ignores. In addition, the supervisor stated that he believes the applicant was reassured the failed RFS was not totally unexpected, but at the time, the applicant's commander was not fully aware of the extent of the discrepancies. In addition, the supervisor claimed the resulting administrative investigation and the more detailed RFO assessment truly uncovered the extent of the vessel's substandard condition.

The supervisor further stated that the applicant incorrectly takes issue with receiving a positive OER and a strong endorsement from his captain, as if this positive OER supports his arguments, but the supervisor argued it does not. According to the supervisor, the fact that the applicant's captain was willing to give him a positive recommendations, reinforces his impartiality. The supervisor claimed that the applicant's failed RFS was in June, after the end of the marking period for which he was receiving counseling. The supervisor stated the applicant's chain of command would have been justified in giving the applicant negative marks in several performance dimensions given what was known about the leadership incident and its operational and administrative impacts on multiple sectors. However, they made a conscious decision to wait for the results of the investigation to ensure the applicant was not disadvantaged at the promotion board.

The supervisor concluded his statement by addressing the "zero-defect" mindset. The supervisor argued that if the chain of command truly acted as though the Coast Guard was a zero-defect organization, they had ample justification to recommend that the applicant be removed from the promotion list after his relief from cause. Instead, the chain of command decided that based on the applicant's overall performance he should remain on the list, which eventually led to his promotion to LCDR. Finally, the supervisor stated he firmly stands behind the OER and that there is no error or injustice that needs to be corrected.

- A sworn statement dated June 9, 2020, from a retired commander who signed the applicant's Special OER as the reporting officer. The former commander stated he does not believe there was an error or injustice in the issuance of the Special OER. The commander further stated that the applicant did not adequately understand or appreciate the complete status of his crew's qualifications or the cutter's overall condition, and got underway for an RFC with a crew that was not trained or qualified in all watch positions, and with repair lockers that were in poor condition, thereby putting the cutter and his crew at unnecessary and unacceptable risk. According to the commander, the decision to get a crew underway is ultimately the commanding officer's decision, and the applicant's decision to get his cutter underway, despite his crew's and cutter's lack of readiness, showed poor judgment and, in the commander's opinion, was what led to the applicant being relieved of his command.

The commander acknowledged that the circumstances leading up to and following the RFC would have challenged any commanding officer, but maintained that the Special OER documented equitably the applicant's performance during the period in question. The commander stated that both he and the other commander who signed the applicant's Special OER took great care to highlight the applicant's successes, and even revised the

final draft to increase some marks based upon input received from the applicant. In addition, the commander stated that based on the applicant's character experience and performance, he recommended the applicant remain on the active-duty promotion list and that he be considered for future assignments afloat.

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

On November 4, 2020, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. The applicant responded through counsel on March 22, 2021.

Through counsel that applicant argued that the JAG made several mischaracterizations of the applicant's arguments. Specifically, the applicant argued that in the advisory opinion's "Case Summary" section, the JAG mischaracterized the applicant's following argument,

Applicant ... alleges that his receipt of a Special Officer Evaluation Report (OER) for the period of 01 June 2016 to 02 December 2016 from CG Sector [redacted] is erroneous or unjust. He makes this assertion as a means to collaterally attack its basis; namely, his relief for cause (RFC) as Commanding Officer (CO) of USCGC [redacted] that occurred on 02 December 2016.

According to the applicant, this mischaracterization attempts to spin the applicant's position 180 degrees from what he actually argued. The applicant argued that his application is not a petition to remove an OER as a means of collaterally attacking an RFC, but is in fact meant to do the complete opposite. The applicant argued that the RFC was conducted in violation of existing Coast Guard regulations. As a result, the applicant requested that all documentation of this illegal RFC in his military record be removed because he is entitled to a record free from error. According to the applicant, allowing such documentation to remain in his record when the basis for the documentation was carried out in violation of Coast Guard regulations would be an error and an injustice. The applicant stated that the special OER from December 2, 2016, was issued solely to document the RFC conducted on December 2, 2016. According to the applicant, had there not been an RFC there would have been no Special OER. The applicant claimed the content of the Special OER is not what is important in this case and is not the primary purpose of his petition, it is the RFC. The applicant claimed this distinction is important because the Coast Guard is asking this Board to impose a higher burden of proof than would otherwise be allowed under the law. The applicant stated he is aware that when challenging an OER "a claimant must present a 'cogent and clearly convincing evidence,'"<sup>10</sup> which is a much higher burden of proof than required for challenging an RFC. The applicant argued that the issue in front of the Board is whether the RFC was done in error or was unjust under the circumstances. According to the applicant, it was both. As a result, the applicant claimed the burden of proof is merely a preponderance of the evidence.

The applicant argued that although the JAG claimed that the "relieving authority and his supervisor were clear as to the ultimate basis," the evidence does not support that conclusion. The applicant claimed there was no allegation of misconduct made, so basis one under Article 1.F.1.d.

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<sup>10</sup> *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990).

of COMDTINST M1000.8A does not apply, which leaves only the two sub-basis provided under the second basis of Article 1.F.1.d. The applicant argued that the reason given to justify the RFC was because his commander had “lost confidence in your judgement and ability to command,” is not a legal basis for RFC under Coast Guard policy. The applicant argued that the words “significant incident” and “substandard performance” are never used. However, the applicant claimed that the words that are used—“pattern of neglect, poor judgement, and a failure to exercise the appropriate oversight,” “failed to maintain operational readiness as demonstrated by a failed 2016 ready-for-sea inspection,” “neglectful and detached leadership style,” etc.—are highly suggestive of “substandard performance of duty over an extended period of time” not a “significant incident.”<sup>11</sup>

The applicant argued that “substandard performance over an extended period of time,” cannot serve as a basis for his RFC unless the Coast Guard can show “corrective action, such as command counseling, guidance, training and appropriate use of performance evaluations, which have proved unsuccessful,” prior to executing the RFC. According to the applicant, there is zero evidence that the Coast Guard afforded such an opportunity to the applicant because there is none. As a result, the applicant argued the only possible defense to the RFC requires the Coast Guard to take a “revisionist strategy” where most of the reasons given by the Relief Authority are ignored and the basis is reinterpreted long after the fact as “significant incidents.” This is because, according to the applicant, the Coast Guard knows that any other approach would expose the RFC as having been carried out in violation under Article 1.F.1.d. of COMDTINST M1000.8A.

The applicant argued that the Coast Guard completely ignored “substandard performance of duty over an extended period of time” in its analysis. Instead, according to the applicant, the Coast Guard only quotes Article 1.F.1.d. about “One significant incident resulting from substantial disregard for duty.” The applicant claimed the Coast Guard attempted to justify the RFC by arguing the RFS was somehow a significant incident. Specifically, the applicant argued that Coast Guard claimed that the “substantial disregard for duty” is “not that the cutter failed the RFS evaluation” in June of 2016, or for any pattern of poor performance, but rather specifically because the “CO was willing to hazard the vessel and crew by proceeding with the underway portion of the assessment.” According to the applicant, no significant incident is articulated or defined.

The applicant argued that his decision to get the cutter underway for an RFS inspection under less-than-ideal conditions was not a significant incident. He stated that cutters often have to get underway under less-than-ideal conditions, and any career cutterman can tell you harrowing anecdotes. He alleged that he met one who had to get underway for days without a functioning small boat.

The applicant argued that by way of their arguments, the Coast Guard narrowed the source of the problem down to his decision to allow the cutter to get underway for the 1-2 hours needed for the RFS inspection. However, the applicant alleged the Coast Guard has still failed to show that there was a “significant incident” that resulted from his decision to allow the cutter to get

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<sup>11</sup> To augment his argument that substandard performance was the basis for the applicant’s relief of command, he referred back to both the intent to seek Permanent RFC memorandum and the request for Permanent RFC memorandum where similar statements as those referenced here are used, but the arguments were repetitive and were therefore not summarized.

underway. According to the applicant, the Coast Guard ignores this in its advisory opinion as well as all of the RFS paperwork. The applicant further alleged that nothing significant happened during the RFS. Given that the Coast Guard cannot show that a significant incident took place, the applicant alleged, they are left with relying on what could have “hypothetically” been a significant incident, which they use to justify using “*one of the most severe administrative measures* [that can be] taken against a member in command,” which “*usually has a significant adverse impact on the member’s future Coast Guard career.*” According to the applicant, if the Coast Guard is going to expose afloat COs to “career-killing” RFCs based on hypothetical what-ifs, it will in effect make it impossible to be a cutter CO.

The applicant also alleged that if the decision to complete the underway portion of the RFS inspection was truly a significant incident, or a serious risk, then the RFS inspectors had a duty not to encourage it. According to the applicant, the fact that the cutter went underway to complete the assessment means the RFS inspectors supported the decision. The applicant argued that if the cutter were too unsafe, it is fair to expect the inspectors to have refused to be complicit in the inspection itself. The applicant alleged because there is no evidence that inspectors raised concerns, exposes the fact that there was no problem with the cutter at the time of the inspection. The applicant also claimed that the Relief Authority did not think the underway portion of the inspection was significant enough to even mention it in the September Temporary RFC memorandum or the November Permanent RFC memorandum and was only briefly mentioned in the October memorandum. After this, the applicant alleged the argument was all but abandoned only to be “resurrected” in the JAG’s response to his application.

The applicant once again argued that the Command was aware of the failed RFS prior to them issuing the positive OER, in which he received he received the highest possible score of 7 in the performance dimensions of “Judgement, Initiative, and Professional Competence,” and was “highly recommended for continued command afloat.” According to the applicant, this OER was issued after he had taken the cutter underway for the RFS inspection, and his supervisors were all aware of it. The applicant alleged that this shows the “real-time” documents of September, October and November 2016 were revisionist. The applicant claimed the only thing to change between his positive OER and the Temporary RFC was the publication of the Command Climate Investigation on August 25, 2016, which the applicant argued is not a “significant incident” under Article 1.F.1.d. of COMDTINST M1000.8A. The applicant alleged that the timing suggests the motivation for the RFC was political, not based on a “significant incident.”

The applicant further argued that the failure to follow Coast Guard regulations prejudicially impacted his due process rights. Specifically, he alleged he could not exercise his right to respond to the RFC because the basis for it was constantly being changed or redefined, changes that continued throughout the process. The applicant argued without a consistent basis, he was unable to exercise due process. Furthermore, the applicant stated he should not be expected to respond to a moving target. According to the applicant, the RFC was executed in error and the advisory opinion has not rebutted that error. The applicant alleged there has not been a consistently articulated basis for the RFC. The applicant argued that if the basis for the RFC is substandard performance of duty of an extended period of time, then the RFC, and all associated documents in the record must be removed because no warning or opportunity to remediate was offered. If the basis for the RFC is what the Coast Guard states now, then all associated documents in the record



must be removed because there has been no significant incident articulated, because the alleged basis was never actually stated per the instruction, and because the alleged basis changed from memo to memo.

The applicant further argued that context matters and that the Coast Guard is dismissive of “injustice” as a basis for overturning the RFC, arguing that “it should not ‘shock the sense of justice’” that the applicant was relieved for cause because of “a CO’s high level of responsibility, and the high standard they are held to.” The applicant claimed that argument fails to take into account any context, and in doing so, would create a new rule for RFC of COs that would swallow the regulation actually governing RFCs in the Coast Guard. The applicant claimed the context missing here is that his vessel was a high performer for the entirety of his time as CO, until his leadership team committed serious UCMJ violations. The applicant alleged that after these violations, his leadership team was relieved, and he was forced to wait for their replacements that were ultimately not provided. In fact, the applicant further alleged that permanent replacements were not provided until about the time he was removed for cause. The applicant argued that less than a month later, his vessel was scheduled for an RFS inspection. According to the applicant, despite the fact that one-third of his crew was badly distracted by their own legal troubles, he was pushed to complete the RFS and maintain operational hour requirements. The applicant claimed that at the time, he was still a lieutenant and was also facing the summer transfer season, which meant that multiple qualified people would be leaving after June, to be replaced with new crewmembers, which made his chances of passing the RFS inspection worse—facts his command was aware of. Despite all of this, the applicant alleged, he was still pushed by his superiors to get his vessel ready for operations and to participate in the RFS inspection less than one month after having to relieve his one-third of his crew from duty. The applicant stated that prior to this, his vessel had a track record of high performance under his command, and was even nominated for an operational excellence award, facts that were ignored in the RFC paperwork. The applicant claimed that had it not been for the removal of one-third of his crew, there is no reason to think these things would have changed.

The applicant claimed that the incidents described above implicated his entire command, not just himself, yet he was hastily held solely responsible following the negative command climate survey and was subjected to “*one of the most severe administrative measures* [that can be] taken against a member in command,” and which “*usually has a significant impact on the member’s future Coast Guard career.*” The applicant argued that it is because of the significant impact an RFC can have on an officer career, the relieving authority *must carefully consider the circumstance’s gravity and the potential outcome’s total implications before initiating the process.*” However, the applicant claimed the RFC process was initiated approximately two weeks after the command climate survey was completed on August 25, 2016, and just a month after he was praised in an official OER, which was issued one month after the failed RFS inspection. The applicant alleged this creates an appearance that politics, rather than facts, led to the RFC decision. Given this unique context, the applicant argued his RFC does “shock the sense of justice.”

The applicant used six personal statements from “career cutterman” issued on his behalf to defend his position that his RFC was unjust. Together, the applicant alleged these individuals possess over 100 years of active-duty experience in the Coast Guard, most of them on cutters. These letters will be summarized here for efficiency and clarity.

- Captain T, who “served on board 7 Coast Guard cutters for 12 years, 5 of which were in command writes that the RFC “was grossly disproportionate” given the totality of events.
- LCDR F, a fellow cutter CO, claimed that based on the facts given to him by the applicant, the RFC appeared motivated more by internal politics rather than the factual basis argued in the Response and the other basis provided in the RFC memos. LCDR F also notes that he had never heard of a Commanding Officer being relieved of command following correctable material conditions uncovered during a RFS inspection. He also stated that “Normally, when a relief like this takes place, a discussion is had with nearby command officers to uncover lessons learned and avoid similar pitfalls. Despite several requests to discuss the matter, these discussions never took place, and no explanation was provided to the applicant’s peers.<sup>12</sup>
- LCDR TI, a cutter CO at the time of the applicant’s relief stated he was “[s]hocked to hear of the applicant’s relief.” In addition, LCDR TI claimed that the challenging circumstances the applicant’s unit faced with the removal of his entire command cadre were well known throughout the fleet, replacing the four most senior members of a seventeen-person crew is highly detrimental to any unit’s operational readiness. Finally, LCDR TI claimed it was clear this situation was marred by a lack of unity of effort and clear objectives from all stakeholders involved.<sup>13</sup>
- Captain F, an officer with 30 years of active-duty Coast Guard experience who is responsible for 10 cutters writes, “If a majority of the command cadre were removed from the cutter, or any type of unit, I believe the right decision would be to “all stop” and delay the RFS or RFO assessment, and provide the Commanding Officer the opportunity to bring in new permanent personnel, train them, and properly prepare the cutter and its crew for operations.

The applicant argued that his relief was arbitrary, capricious, and avoidable and shocks the sense of justice, especially because no one in his chain of command had any experience on afloat on cutters. The applicant claimed that the leadership that imposed the RFC were all non-cutterman. In addition, the applicant alleged that only cuttermen understand the challenges faced by cutter COs like those faced by him, the applicant, and non-cuttermen do not. The applicant argued that this dynamic played out in his case and, had cuttermen made up the senior chain of his command in 2016, the RFC would not have happened.

- CDR S, who was a cutterman officer with twenty-one years of active-duty Coast Guard experience, twelve of which were “at sea” billets on six different Coast Guard cutters stated, “Due to Coast Guard assignment officer billeting changes implemented in 2020, if [the applicant’s] relief occurred in the USCG today, [the applicant] would likely not have

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<sup>12</sup> LCDR F stated he did not wish to speculate as to why the upper chain of command treated the applicant’s RFC differently.

<sup>13</sup> The applicant alleged that it was clear that the command climate and RFS failure could have been avoided had the upper chain of command wanted to do so. Had they wanted to, they could have postponed the RFS following the relief of one-third of the ship’s crew and the entire command cadre other than the CO.

been relieved.” Specifically, policy has changed to ensure that “OSC now directs the placement of career cuttermen into positions that have direct operational supervision over cutters. Unfortunately, this policy was not in place when [the applicant] was faced with an incredible leadership challenge worsened by oversight without the benefit of appropriate afloat experience.” CDR S also claimed that the applicant’s “entire chain of command (Supervisor, Reporting Officer, and Reviewer) had zero afloat command experience, and cumulatively add up to less at sea experience than [the applicant].” As he said, “It is my opinion that USCG assignment policies and the lack of afloat experience throughout [the applicant’s] entire chain of command failed to provide the environment necessary to supervise [the applicant’s] difficult and unique afloat challenges. *And rather than providing the necessary leadership and supervision to assist [the applicant], his command found it more expedient to simply relieve [the applicant] of his command and destroy his career.*”

- LCDR P, a subject matter expert and ATO director, as well as a cutterman with twenty-one years of active-duty service, including thirteen years of afloat experience and two tours of command of cutters pointed out that in taking the position that the RFS has anything to do with the RFC, which is what the Coast Guard has done, it has failed to acknowledge that the RFS was done in violation of policy. According to LCDR P, under FORCECOMINST 3502.1 only an Afloat Training Organization (“ATO”) can carry out an RFS inspection and certify a ship ready for sea. According to LCDR P, in the Coast Guard’s haste to make the applicant’s vessel sea ready, it failed to follow regulations governing vessel inspections. LCDR alleged the Coast Guard failed to contact the regions ATO office, who was responsible for the applicant’s inspection. LCDR stated, “I find it unconscionable that a sector would replace a XO, EO, OPS, and 1LT and provide no administrative support or guidance, and then go on to attack the administrative ability of a unit and the judgement of a junior Commanding Officer. That speaks volumes to the leadership climate in which [applicant] found himself.” LCDR further stated, “I cannot understand the relief of an officer for policy violations by an organization actively violating policy. Our service deserves better.” LCDR P, along with CDR S and CAPT F, articulated how this situation could have been avoided with better leadership from the applicant’s sector and district.

The applicant argued that it may be convenient for the Coast Guard to conclude that the applicant’s RFC does not shock the sense of justice, but these independent statements from experienced Coast Guard cuttermen with experience in command afloat show that it absolutely does shock the sense of justice, and to any neutral observer it should as well. The applicant further argued that the policy violations, the changing explanations for the RFC, the way the applicant went from a “7” in “Judgement” on his OER to an officer that had to be relieved because of judgement even though nothing new had happened, the way the senior leadership tried to keep everything silent—all of this creates an appearance that the RFC was unfair, arbitrary and capricious.

The applicant concluded by stating there is a factual and legal error in this case, as well as an injustice in this case, which is amply demonstrated by the evidence provided. The applicant alleged this error and injustice prejudiced him just as COMDTINST M1000.8A said it would. The

applicant argued that the BCMR has a duty to correct an error or injustice in a service member's record. The applicant further argued that the only equitable remedy is to order all documents in his official record that reference, or were issued because of, the illegal RFC be removed.

### APPLICABLE LAW AND POLICY

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

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

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

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

...

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

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

...

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

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

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

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

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

...

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

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

...

**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.

Coast Guard Officer Evaluation System Procedures Manual (PSCINST M1611.1A) Article 4, provides the necessary guidance on Special OERs. Specifically, Article 4.A.2. states:

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.

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

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.

## FINDINGS AND CONCLUSIONS

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

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

2. The application is timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b). 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. All Board members concurred in that recommendation.<sup>14</sup>

3. The applicant alleged that his OER documenting his permanent RFC on December 2, 2016, is 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.<sup>15</sup> 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.<sup>16</sup> To be entitled to relief, 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.<sup>17</sup>

4. The applicant argued that his RFC and the OER documenting it are erroneous and unjust because the Coast Guard failed to articulate and inform him of which basis it used to justify relieving him from command and stated only that the decision was based on the applicant's

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<sup>14</sup> *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

<sup>15</sup> 33 C.F.R. § 52.24(b).

<sup>16</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

<sup>17</sup> *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).

“substantial disregard of duty.” He argued that that is not a legitimate basis for removal. The Board disagrees, however, because COMDTINST M1000.8A, Article 1.F.1.d.2., states the following:

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... (Emphasis added.)

Therefore, the Commanding Officer of a cutter may be relieved for cause if the chain of command loses confidence in his or her judgment or ability because “one or more significant incidents result[s] from ... substantial disregard of duty.” For the reasons stated below, the Board finds that the applicant has not proven by a preponderance of the evidence that his relief for cause was erroneous or unjust under this policy.

5. The Command explained their reasons for removing the applicant for what they believed was his “substantial disregard of duty” in their “Recommendation for Temporary Relief for Cause” memorandum dated September 1, 2016. They stated that the applicant had “permitted readiness ... to degrade,” that there were “multiple longstanding degradations,” and that the applicant’s “poor judgement, and failure to actively lead” were the reasons for seeking his RFC. Article 1.F.1.d.2. states that “[t]he loss of confidence in the judgement and ability of members serving in positions identified in Article 1.F.1.a. ... is ground for temporary and/or permanent RFC.” The records show that after two failed inspections and a negative Command Climate investigation, revealing lax oversight and additional readiness issues not disclosed by the RFO and RFS inspections, the applicant’s chain of command lost confidence in his judgment and ability to lead and therefore believed it was necessary to relieve him of his command. Although the applicant submitted statements from several cuttermen criticizing this decision without first-hand knowledge of the events and communications, the Board finds that the applicant has not proven by a preponderance of the evidence that there was anything arbitrary or capricious about his command’s decision to relieve him for cause from his command of the cutter. The record indicates that his chain of command ultimately attributed the failed inspections with dozens of discrepancies to his substantial disregard of duty, as revealed at least in part by the Command Climate investigation, and the applicant has not proven by a preponderance of the evidence that this conclusion was erroneous or unjust.

6. The applicant argued that his Command’s reasoning was faulty because there were no “significant incidents” and he did not disregard his duty. Despite the cuttermen’s statements, the Board is not persuaded that the repeated failed inspections; the applicant’s decision to complete the underway portion of the RFS inspection after being offered the chance to skip it; and the revelations of lax oversight and “multiple longstanding degradations” in the Command Climate investigation cannot constitute one or more “significant incidents” that resulted from a “substantial disregard of duty.”

In addition, 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 PSC-OPM then had to approve before the RFC would go into

effect. 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, PSC-OPM is presumed to have carried out their review duties correctly, lawfully and in good faith.<sup>18</sup> Therefore, the applicant has not proven by a preponderance of the evidence that his chain of command had insufficient grounds for his permanent RFC or failed to articulate those reasons sufficiently.

7. The applicant argued that the RFC was unjust because there is no documentation of performance counseling in his record. However, Article 1.F.1.2.d. of M1000.8A does not require documented counseling before an RFC for “significant incidents resulting from ... substantial disregard of duty.” Instead, it states, “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.” (Emphasis added.) Long-term substandard performance is thus an alternative basis on which an officer may be relieved of command, and it requires “corrective action such as command counseling, guidance, training and appropriate use of performance evaluations, which have proved unsuccessful.” But that was not the basis on which the applicant was relieved of command.

Moreover, the record shows that the applicant received substantial oral counseling through frequent telephone calls with his chain of command. The failed RFO inspection followed by the replacement of his command cadre should have put the applicant on notice that a significant increase in leadership and oversight on his part was needed. He was given nine months to rectify the discrepancies reported in the RFO inspection but apparently did not meet that deadline. And the applicant acknowledged that he received substantial guidance from his commanders following the failed RFO inspection. Therefore, the Board is not persuaded that the applicant’s command failed to provide guidance and counseling following the failed RFO inspection. The Board finds that the applicant has failed to prove by a preponderance of the evidence that the Coast Guard failed to provide him with guidance, counseling, and an opportunity to improve before removing him from command.

8. The applicant argued that RFC was erroneous and unjust because his chain of command endorsed his slow approach for his vessel’s recovery following the relief of his entire leadership cadre but then retracted that endorsement without affording him the opportunity to change course. The Board finds this argument unpersuasive. The record shows that the cutter failed the RFO inspection with dozens of discrepancies in November 2015, long before his command cadre was removed. In addition, the applicant was given nine months to correct the discrepancies, and he was not relieved for cause until September 2016, almost a year later. In the interim, the record shows, he chose to continue the underway portion of the RFS inspection in June 2016—as if he expected to do reasonably well—even though his command offered him a chance to skip it. And according to his chain of command, the results of the RFS inspection, especially the underway portion, were dismal. The record further shows that the failed RFS inspection and the Command Climate investigation revealed that the applicant’s cutter and crew were not making the progress the Command had believed, based on the applicant’s reports, and revealed additional readiness and leadership concerns that the Command could not ignore.

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<sup>18</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).



The record shows that the upon the RFS inspection team's arrival, the RFS was terminated because of "[t]he general poor condition of the ship, lack of crew readiness, and lack of required qualifications." In addition, according to the Command Climate investigation, subsequent to the failed RFS, members of the RFS inspection team and TDY personnel found the cutter's Deck, Engineering, and Operations programs were either expired or in disarray. The Command Climate investigation also revealed that by not inquiring with his Department Heads regarding the status of their respective programs and by not conducting material inspections, the applicant fostered an environment where his XO and Department Heads became complacent. These facts were not known to the applicant's commanders until August 25, 2016, when the Command Climate Investigation report was released, at least a month after he was presented with his annual OER. It was after these revelations that the applicant's Command "retracted their positive endorsement" and decided the appropriate path forward was to relieve the applicant of his command. Finally, the Command Climate Investigation revealed that in early June 2016, the applicant's supervisor arranged a conference call with the applicant, the RFS team and an Engineering Chief Warrant Officer regarding whether they should proceed due to the personnel situation aboard the cutter. Despite the concerns raised, the applicant was "firm on his desire to hold the RFS the following week." The RFS team personnel proceeded to raise concerns to their chain of command regarding the upcoming RFS, but still the applicant was adamant that the RFS take place. These are only a few of the examples provided in the RFS report and Command Climate investigation that show the applicant was not fully grasping or appreciating the severity of his vessel's situation. The decision to remove the applicant was made only after these inspections and investigation revealed that the applicant had allowed a severe erosion of both the vessel and crew readiness to take place under his command.

9. The applicant argued that he was misled because his chain of command was aware of the failed RFS inspection when he received an annual OER in July 2016 and yet assigned him positive marks.<sup>19</sup> This argument fails because a regular, annual OER can only address conduct occurring during the reporting period for the OER. The positive OER that the applicant received in July 2016 was his regular OER for the reporting period June 1, 2015, through June 1, 2016—a period that did not include the failed RFS inspection. Because the RFS inspection took place on June 14 and 15, 2016—two weeks after the reporting period for his annual OER ended—it could not be included or considered in the regular, annual OER that the applicant received in July 2016 for the reporting period that ended on June 1, 2016. Although his superiors were aware of the failed RFS inspection in July when they counseled the applicant on his regular OER, they were prohibited under Coast Guard policy—Office Evaluation Systems Procedure Manual (COMDTINST M1611.1A), Article 2.B.11.—from evaluating or commenting on performance or conduct that had occurred after the end of the rating period.

10. The applicant argued that the incidents described above implicated his entire command, not just himself, yet he was hastily held solely responsible following the negative Command Climate investigation and was subjected to "*one of the most severe administrative measures* [that can be] taken against a member in command," and which "*usually has a significant impact on the member's future Coast Guard career.*" But a Command Climate investigation is an

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<sup>19</sup> Although the applicant ultimately received the OER in July 2016, it was for a rating period that ended in May of 2016.

investigation of the working climate resulting from a unit's command cadre, particularly the Commanding Officer. Therefore, it is primarily designed to investigate the quality and effectiveness of the Commanding Officer's leadership and oversight. In light of the negative Command Climate investigation, the Board cannot conclude that the applicant, as Commanding Officer, was arbitrarily or unjustly held responsible for the results and relieved of command.

11. The applicant presented numerous letters from current and former service members who shared their opinions on the applicant's RFC. Specifically, these letters indicated that the applicant's RFC was unjust, should shock the sense of justice, and would never have happened under their command. However, the members who wrote the letters of reference were not privy to all of the events, the Command Climate investigation, or the applicant's communications with his chain of command. The Board finds these letters unpersuasive and speculative about the facts of this case. The Board finds that the applicant's RFC is supported by the preponderance of the evidence, as explained in the previous findings, and these letters do not persuade the Board that the RFC was erroneous or unjust.

12. The applicant made numerous allegations with respect to the actions and attitudes of various officers, such as his allegation that his commanders wrongfully claimed that his vessel was infused with 45K and that the material condition of his vessel was negatively exaggerated. 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.<sup>20</sup>

13. The applicant has not proven by a preponderance of the evidence that his RFC was erroneous or unjust under the applicable policy. Nor has he proven by a preponderance of the evidence that the 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.<sup>21</sup> Accordingly, his request for relief should be denied.

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

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<sup>20</sup> 33 C.F.R. § 52.24(b); see *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that "appear frivolous on their face and could [not] affect the Board's ultimate disposition").

<sup>21</sup> *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).

**ORDER**

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

June 30, 2022

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