DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-090

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on February 10, 2017,[1] and assigned it to staff attorney to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated March 16, 2018, 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, who voluntarily retired as a Lieutenant Commander on October 1, 2014, asked the Board to correct his record by taking the following actions:

- Remove any and all records that claim that he was not "aeronautically adaptable," including his annual physical examination report dated May 8, 2012, and all documentation concerning the Aeromedical Consultation Advisory Board (ACAB);
- Add documentation showing that he was aeronautically adaptable, as found by two command-directed mental health evaluations, and that he has remained on continuous flight status since June 12, 2012;
- Remove all Officer Evaluation Reports (OER) from 2012 forward;
- Nullify and void his retirement from the Coast Guard;
- Correct his record so that he has continued on active duty in the Coast Guard; and
- Award him all back pay and allowances, including flight status pay.

The applicant's main contention is that he was "erroneously and unjustly subjected" to the ACAB when he should have gone before an Aviator Evaluation Board (AEB) to determine his aeronautical adaptability. He claimed that convening an ACAB as opposed to an AEB was in

[1] The application was received on June 7, 2016. The case was not docketed until the applicant's medical and military records were received on February 10, 2017.

violation of Coast Guard regulations, as he was denied certain due process rights that he would have had if he had gone before an AEB. The applicant also contended that he was denied a Medical Evaluation Board (MEB) which was also erroneous, unjust, and in violation of Coast Guard regulations.

Applicant's Explanation of Events

With his application, the applicant provided a twenty-four page affidavit outlining his grievances. The affidavit also provides an outline of the applicant's time in the Coast Guard. Regarding the events that led to the ACAB, the applicant stated that in October 2010, he found a tick on his body and was treated for Lyme disease. Due to the medications he was prescribed, he was grounded from flights for three weeks. In January 2011, he injured his back on leave while skiing. He was diagnosed with back spasms and was grounded for three to five days. The applicant stated that on February 6, 2011, he slipped and broke his right ankle. This injury required surgery and he had permanent orthopedic hardware implanted. As a result, the applicant was grounded from February 6, 2011, until about May 25, 2011. He stated that the Air Station's Senior Medical Officer and flight surgeon, Commander P, submitted requests for waivers via an Aeromedical Summary for the applicant's retained orthopedic hardware and for hypertension. The applicant stated that the flight surgeon told him that there should not be any problems in obtaining the waivers so that he could return to his Aircraft Commander (AC) duties.

The applicant stated that he had a meeting on May 17, 2011, with Commander G, the Air Station's Operations Officer. The applicant had wanted to speak with the Operations Officer to discuss the possibility of being selected for a new position at the Air Station. The applicant stated that this is all that he had expected would be discussed at this meeting; however, the Operations Officer "made false statements during this conversation and [the applicant] confronted him about them." The applicant stated that the Operations Officer was "visibly angry" at him and that his "career went downhill after this meeting." The applicant did not provide any other details regarding what was said at this meeting. He stated that he met with the Operations Officer again on May 19, 2011, to discuss "the false statements he had made." The applicant claimed that the Operations Officer "blew up…was yelling, and said he was considering an AEB against" the applicant. The applicant stated that he was very concerned about the possibility of an AEB because this board had "the power to end [his] career" and he could think of "no legitimate reason for an AEB to be convened." He added that he met with the Executive Officer (XO), Captain N, within a week and informed him of that the Operations Officer had made "false statements" during the meeting. The applicant stated that the XO listened to him and stated that the Commanding Officer (CO), Captain T, would want to hear about this incident. The applicant claimed that when he met with the CO, the CO merely said to him, "I expect you to act like a Lieutenant Commander."

The applicant stated that he was returned to flight status as a co-pilot on June 2, 2011. He was returned to flight status even with his command knowing of his "various medical appointments." To return to flight status, he stated, he must have received waivers for hypertension and retained orthopedic hardware, as had been recommended by the flight surgeon. He also claimed that during the period of June 2, 2011, to August 3, 2011, while he was flying in co-pilot status, he accrued over 45 hours of flight time, completed various trainings, and "met aircraft commander standards." He stated that he later learned that his command "elected to rewrite administrative

history" to make it appear that he did not fly up to standards during this period. The applicant argued that this was "not accurate, and [he] was never…counseled concerning any alleged deficiency." The applicant pointed to an email dated June 17, 2011, from a Lieutenant which states:

> I flew with [the applicant] during his recent NVG [Night Vision Goggles] check. He did a good job with all maneuvers and flew them to standard. EPs [Emergency Procedures] were handled correctly with only minor errors. Based on his own concerns regarding "T" proficiency and observing his own discomfort with "T" during checklists and some of the new "memory item" EPs, recommend flying as a First Pilot for a few months to gain proficiency/comfort with the "T" procedures and systems.

The applicant argued that this email proves that he flew to standard as an AC. He also submitted an email from the same person dated July 5, 2011, which the applicant argued proves that "the evaluation was re-written" to show that he had not met standards. He stated that the second email recommended that he fly as a First Pilot[2] for a few months because the applicant was not found to be up to standard. The email states:

> NVG Check 3 June 2011: Noted difficulty with several EPs, mainly the newly established "memory item" EPs. While nothing egregious, based on his own concerns regarding "T" proficiency coupled with my observations of his own comfort level with the "T" during checklists and some of the new "memory item" EPs, recommend having him fly as a First Pilot for a few months to gain proficiency/comfort with the "T" procedures and systems.

The applicant claimed that "history was rewritten" despite the fact that independent evaluations had shown that his judgment and abilities "were without question."[3] He stated that his evaluations during this period, discussed in the Summary of the Record, show that he was performing up to AC standards. He claimed that towards the end of the evaluation period he was "subjected to severe and unwarranted scrutiny, in an apparent effort to discredit [him] and end [his] ability to fly."

The applicant stated that in September 2011, he found a hand-written note in his file. He provided a copy of the note. It states in full:

> 23 Aug 11
> 1. Meets AA unsat definition
> 2. Does he meet spirit of AA unsat?
> 3. Meet w/ Aviation Psychiatrist. Command Directed Referral
>
> Human Factors information to [applicant]
>
> AEB COAS
> Cmd directed Psych Eval → AEB
> AA unsat
>
> Med down chit copy to [the flight surgeon]
> [Applicant]@ ATC …

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[2] A "First Pilot" may be the pilot-in-command of many but not all types of flights and normally has less experience than an "aircraft commander."

[3] The applicant was referring to a Night Water check he performed on June 16, 2011. The instructor noted in the comments section of the evaluation that the applicant's "judgment and pilot skills are not in question." This evaluation is discussed further in the Summary of the Record.

The applicant stated that the apparent plan to convene an AEB based on the results of a psychiatric evaluation was "thrown into disarray by the fact that two different Command Directed Mental Health Evaluations found [him] to have a clean bill of health and be aeronautically adaptable." The applicant argued that the Coast Guard ended up having the local Command Surgeon find him "AA unsat" without his knowledge and switching to an ACAB which does not have a hearing and did not allow the applicant to defend himself. He underwent the first mental health evaluation on October 11 and 12, 2011, at the local Naval Medical unit. The applicant stated that the doctor verbally told him that he could "fathom no reason for a command directed mental health evaluation."

The applicant underwent a second mental health evaluation at a Naval medical base in a different state during the period of February 6 to 10, 2012. He stated that he was examined by four psychiatrists and psychologists during the course of the week. Like the first evaluation, the applicant stated, the second evaluation found "nothing wrong with [him]" and determined that he was physically qualified and aeronautically adaptable. The applicant noted that this evaluation required the command to notify the "next senior commanding officer within two business days" if it did not concur with the recommendations. The applicant stated that his command did not concur with its own command-directed mental health evaluation and did not follow the requirements as specified by DOD Directive 6490.1.[4] He alleged that instead of following proper protocol, his command "skirted this and other directives by ordering [him] to undergo an ACAB process instead of the AEB."

Following the ACAB, the applicant learned on June 18, 2012, that he had lost his flight status because the ACAB had found that he was not aeronautically adaptable. He was told that he "had not maintained physical standards and therefore [he] could no longer fly." He stated that this was the only explanation he received. He did not receive a copy of the ACAB decision until he filed a request for redress many months later. The applicant argued that the ACAB exceeded its lawful authority by making decisions "that are rightfully made by an AEB and by the Coast Guard's physical disability evaluation system."

On June 1, 2012, the applicant received a "devastating" OER. He argued that to "the trained eye, there is a significant difference" between this and his prior OER, as he was rated only as a "Good Performer" versus an "Excellent Performer." He stated that this OER failed to acknowledge his accomplishments during that time period. In October 2012, the applicant was reassigned to an office where he remained until he retired.

On February 15, 2013, the applicant submitted a letter requesting redress under UCMJ Article 138 to Rear Admiral C (discussed in the Summary of the Record). The applicant received a response on February 28, 2012, which granted his request in part by providing him with a copy of the ACAB's final decision, but otherwise denied his requests. The applicant then submitted a Complaint of Wrong on May 29, 2013, to Vice Admiral (VADM) B. This Complaint was denied on June 11, 2013. The denial was forwarded for a legal review, but his claims were again denied. He submitted a Freedom of Information Act request to obtain the documents that were used in the ACAB proceedings, which he stated he never received. The applicant complains to this Board

[4] The Memorandum, discussed in the Summary of the Record, references this DOD Directive.

that these decisions did not take into account that the ACAB was the improper board to use in his case.

The applicant stated that by this point, he came "to the conclusion that no matter what [he did he] would not be treated fairly by the U.S. Coast Guard." He submitted a request to retire on June 18, 2014. He was voluntarily retired on October 1, 2014, with over twenty-two years of active duty service. The applicant argued that although "the retirement paperwork reflects that [his] retirement was voluntary, it was not." He claimed that he was forced out of the Coast Guard because he had no chances of being promoted after being taken out of his field so late in his career. He argued that the Coast Guard's erroneous and unfair actions against him brought about the loss of his flight status and the end of his career.

In addition to his summary of the events, the applicant included in his application the following complaints.

AEB versus ACAB

The applicant stated that he was never brought before an AEB, but instead an ACAB was convened. He argued that the difference between these boards is significant. He stated that the purpose of an ACAB is to provide advice concerning medical waivers and the purpose of an AEB is to determine aeronautical adaptability. He argued that the ACAB's purpose is not to determine aeronautical adaptability, which is what he was told was being considered. The applicant argued that at an AEB, he would have had a right to counsel, to produce witnesses, and to cross-examine witnesses. He stated that he was able provide some documents to the ACAB, but he did so not knowing what documents the board had before them. At an AEB, the applicant stated, he would have known what evidence was before the board and been able to rebut any derogatory information with his own evidence.

The applicant noted that both the notification and the correspondence from the Officer Personnel Management branch (OPM) (see Summary of the Record) "state unequivocally that the reason for the AEB was to determine whether [he] lacked the aeronautical adaptability to fly." In light of the notification that he would appear before an AEB, the applicant stated that he began to obtain legal counsel, gather witnesses, and gather statements on his behalf. He claimed that all of this was known to the CO. The applicant stated that his command changed the procedure from an AEB to an ACAB because they knew that he wished to assert his rights before the AEB.

The applicant alleged that there were several documents in his record that he was unaware of until he received the AEB package on January 3, 2012. He added that, despite his best efforts, he never received the documentation that was evaluated by the ACAB. One of these documents was an email from the Operations Officer. The applicant argued that the email, dated May 19, 2011, is "full of inaccuracies." The email references a Search and Rescue of three women off of nearby islands. The applicant stated that he attempted to obtain a statement from a colleague, but the colleague "was told by a higher authority not to provide a statement." The applicant provided an email chain between himself and the colleague wherein the colleague stated he "was told a statement was not needed." The colleague stated that if he was directed to provide one he would do so, but he felt that providing a statement would be going against orders. The applicant argued

that his command should not have told the colleague not to provide a statement for him, as it exhibits undue "influence over the administrative process and obstruct[s] justice." He also stated that he had tried to obtain statements from other colleagues, but they would not provide statements because they had heard what happened with the first colleague. The applicant claimed that most of the comments in this email "are just made up."

The applicant also took issue with the Summary of Aeronautical Adaptability created by the flight surgeon on November 15, 2011. The flight surgeon had noted that the applicant had previously been treated with Xanax. The applicant stated that he had had to take Xanax one time eighteen years earlier when he was going through a divorce after finding out his wife was having an affair. The Summary also states that the applicant had been treated for mental health. The applicant stated that he had requested stress management assistance when he "was going through such a difficult time in [his] life" in 1995. As to an allegation that the applicant has psoriasis, he noted that he was treated for it one time, it had never reoccurred, and the flight surgeon at the time determined there was no need to pursue the matter further.

The applicant claimed he was also unaware of an annual physical examination form, dated May 8, 2012, which states that he was not aeronautically adaptable. He stated that this form was not shown to him and he did not sign it, despite the fact that there is a place on the form for him to sign. He complained that he had no knowledge of this document going before the ACAB and he did not have a chance to contest it. However, at an AEB he would have had the right to see it beforehand and contest the document at a hearing.

Regarding the applicant's attempts to create a defense against the AEB, he stated that he was called into the XO's office on March 5, 2012. The applicant claimed that the XO told him that he did not need to prepare a defense and that he did not have the right to investigate UCMJ violations. The XO allegedly told the applicant to immediately turn over any and all documentation that he had gathered. The applicant replied that he would have to talk to his Navy JAG. He stated that he was then threatened with UCMJ charges if he did not stop preparing a defense and turn over all documentation immediately.

The applicant stated that he was allowed to present information before the ACAB for thirty minutes, although he was not permitted to ask any questions of the board nor could they ask questions of him. He was informed that the ACAB was not a hearing, so he was only permitted to present for the thirty minutes and then he would be dismissed. He argued that he could not properly prepare to present to the ACAB, as he believed the ACAB was only convened to make recommendations regarding medical waivers, not to make findings on aeronautical adaptability. He ultimately stated that "because the ACAB is not a hearing, [his] career was destroyed and [he] was found to be not aeronautically adaptable without a hearing."

Medical Evaluation Board (MEB)

The applicant noted that the May 8, 2012, annual physical examination form that was placed in his military record without his knowledge notes that he was not qualified for service. He argued that when an aviator is found not physically fit during a physical, then the aviator is required to be referred to an MEB. The applicant stated that he was never brought before an MEB despite

the fact that the annual physical found that he was not physically qualified for service. He argued that this is "irregular, unfair, unjust, and improper."

The applicant also argued that the ACAB exceeded its lawful authorities in finding that his physical condition did not warrant an MEB. He stated that this was erroneous and unjust because by the May 8, 2012, report alone he should have been referred to an MEB. He added that at an MEB, he would have had the right to see the evidence considered and he would have had an opportunity to "defend [him]self."

Aeromedical Summary/Human Factors Analysis

The applicant contended that there are several different versions of the Aeromedical Summary. He claimed that the original version which was submitted into his military record did not have any handwriting on it, and he submitted a copy of this document with no apparent handwriting on it showing a print date of May 26, 2011. He claimed that an unidentified person added a notation in blue ink at some date after May 26, 2011, which makes it appear that on that date a Human Factors meeting was held. The notation in full states "5/26/2011 Follow-up on multiple issues – AMS [Aeromedical Summary] submitted Human Factors meeting, CO, OPS, XO. Plan for IP co-training with member. Up chit given to OPS." The applicant argued that this is erroneous and unjust. He stated that he was never given any notice of a "human factors" meeting nor was he ever told of the results of such a meeting. In addition, the applicant argued that without the handwritten note, the summary is "highly favorable" to him, as it recommends approval of his medical waivers. With the handwritten note, the applicant argued that it could appear that his "performance was the object of concern by the command."

The applicant stated that he learned that "for a considerable period of time and behind [his] back" that the CO and the flight surgeon had "made mention in a memorandum to the file and elsewhere of a Human Factor council or meetings." The applicant reiterated that he was never made aware of these meetings or that they were being used to evaluate his performance. He stated that he only became aware of a human factors analysis when he was notified that he would be required to appear before an AEB. He claimed that Department of Defense (DOD) regulations "make it clear" that human factor analysis is used to investigate "aircraft mishaps."[5] The applicant complained that in this case, a human factor analysis was used behind his back despite the fact he was "never accused of having been part of any aircraft mishap."[6]

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[5] With his application, the applicant provided a copy of the Department of Defense Human Factors Analysis and Classification System; A mishap investigation and data analysis tool. This DOD document is listed as a reference in COMDTINST M6410.3A, Coast Guard Aviation Medicine Manual. It is referenced at Article 5.D.2 f. Specifically, this Article states that Flight Surgeons "are encouraged to participate in unit Flight Safety Board meetings and should be assigned to unit Human Factors Councils where they exist. They are expected to be subject matter experts in Human Factors Analysis ([DOD Document reference])."

[6] In his allegations, the applicant also points to the Navy Regulations pertaining to Human Factors Councils and Boards; specifically COMNAVAIRPAC INSTRUCTION 5420.2B. However, this instruction is not cited as a reference in COMDINST M6410.3A, and the applicant provides no other indication that the Navy Instruction is binding or relevant to Coast Guard operations.

June 1, 2011 Memorandum

The CO placed a memorandum dated June 1, 2011, in the applicant's military file. The applicant pointed out that this memorandum is dated the same date that he returned to flight status; he argued that it would make "no sense" that he would be doing well enough to return to flight status but "behind [his] back the commander would be writing" a document so derogatory. The applicant stated that this memorandum contains unfavorable comments "which are inconsistent with other ratings of [his] duty performance." He added that he was "never counseled concerning any of the alleged concerns mentioned in this memorandum." He argued that certain comments in this memorandum to file, including a comment that his "initiative and leadership have fallen short of that expected of a LCDR," are directly contradicted by other documents in the applicant's military record, including documents signed by the CO himself.

One such document is the applicant's June 10, 2011, OER. The CO stated that the applicant was a "skilled and professional officer with a superb attitude, dedication to duty and willingness to volunteer for any and all difficult assignments." The applicant stated that on June 21, 2011, the CO signed paperwork to allow the applicant to be one of eight people with access to a certain electronic system and equipment. Lastly, on June 24, 2011, the CO endorsed the applicant's medical waiver requests, stating that the applicant had his "highest recommendation for approval of his waivers to continue flight status. This request is also endorsed by the Aeromedical Summary Examination dated 26 April 2011." The applicant claimed that this memorandum was part of the pretext his unit used for requiring him to undergo mental health evaluations.

The memorandum also mentions the applicant's marriage. The applicant claimed that the memorandum used his failed marriage as a basis for concerns about his mental health. The applicant stated, however, that he had been separated from his wife since July 3, 2010, and she had moved away around the same time—almost a year before the date of this memorandum. He stated that it is therefore impossible, as the memorandum claims, that he was undergoing counseling with her at the time the memorandum was written. He claimed that his mental health was never in question until he made complaints around May 25, 2011. In addition, he stated that he did not receive a copy of this memorandum until January 3, 2012, when he received the package that was to be sent to the AEB.

SUMMARY OF THE RECORD

The applicant entered the Coast Guard on July 16, 1991. He attended Officer Candidate School and was commissioned as an officer on May 7, 1999. The applicant was designated as a copilot on May 30, 2002; he was upgraded to First Pilot on May 28, 2004; and became an Aircraft Commander (AC) on April 27, 2005. The applicant was promoted to Lieutenant Commander on June 1, 2008. With his application, he provided copies of the many awards he received while on active duty.

The applicant transferred to the Air Station at issue here in August 2009 as an AC. On the applicant's OERs for 2010 and 2011, he received high marks of 5s, 6s, and 7s out of 7, and a mark in the fifth spot on the comparison scale (out of 7), denoting an "excellent officer." In February 2011, he broke his ankle and was removed from flight duties for an extended period.

On April 26, 2011, the applicant received an Aeromedical Summary Examination. Two disqualifying conditions were noted: hypertension and retained orthopedic hardware. A summary of his "Past Medical History" notes that the applicant had been on antihypertensive medication and had been meeting hypertension management goals. The history noted that he had slipped in February 2011 and broke his right fibula and had a "large plate and 6 screws" implanted that appeared to have healed well based on an x-ray. "Social and Family History" entries state that the applicant was "currently undergoing some issues with marital strife and possible divorce." "Aviation History" states, "Due to recurrent medical conditions and grounding he is working with IP and OPS to establish a return to flight in a methodical" before it ends at the bottom of the page.[7] The pertinent findings from the physical examination were that the applicant was an obese male with normal ability to squat and ambulate his right leg. The discussion noted that the applicant was controlling his hypertension well with minimal medication but needed emphasis on lifestyle modification to improve his weight and fitness. The recommendation was to approve the medical waivers for hypertension and the retained orthopedic hardware.

Another copy of the same document was provided by the applicant that has a handwritten note. The note reads, "5/26/2011 Follow up on multiple issues – AMS submitted Human Factors meeting. CO, OPS, XO. Plan for IP co-training with member. Up chit given to OPS." It appears to bear the name of the flight surgeon above a signature.

On May 19, 2011, the Operations Officer emailed Lieutenant S, a member of the unit's Flight Examining Board (FEB), regarding the applicant's performance. The email outlined various examples of conduct during recent training and search and rescue flights that had caused the Operations Officer to be concerned for the applicant's judgment and ability to return to flight status. The Operations Officer stated that while the applicant was not unsafe, he had made "rookie errors that are not expected from third tour pilots." Specific examples included a search and rescue mission when the applicant had landed on a beach and picked up three women without waiting for the tide, to which the applicant stated "Sector told me to do it"; a search and rescue case where the applicant launched in "marginal weather" and used a hoist which was not required in the Operations Officer's opinion and left the vessel stranded on the rocks; and numerous other instances wherein the applicant stated he could not complete a task because he had not studied or taken the necessary course. The Operations Officer also noted several areas in which the applicant needed to improve. For example, the Operations Officer noted that he had told the applicant that he would need to "get back to flying and do so for at least six months and demonstrate consistent judgment." He stated that the applicant had been "inconsistent at best regarding his availability to stand duty" despite all the time the applicant had been given "to sort out his personal issues." He added that the applicant was "a 'good' guy, with a good heart and a strong desire to succeed" but added that he had confidence, focus, and prioritization problems and failed to see tasks through to completion. The applicant was unable to get things done in an efficient and timely manner. The Operations Officer added that seniority and experience do not automatically guarantee someone flight duties.

On the same date, May 19, 2011, the FEB created a plan for the applicant to return to flight status. The FEB noted that the applicant's most recent flight had occurred on January 14, 2011.

[7] Pages 1 of 3 and 3 of 3 were provided by the applicant, and are marked as Exhibit pages 37 and 38, respectively.

The training plan outlined various actions the applicant was required to take before returning to AC duties. The CO approved this training plan.

On May 27, 2011, the applicant requested a waiver for medically disqualifying factors from PSC. Specifically, he requested a waiver for the retained orthopedic hardware in his right ankle. On June 24, 2011, the CO endorsed the waiver request and stated that the applicant had his "highest recommendation for approval of his waiver to continue in flight status." He added that this request was also endorsed in the Aeromedical Summary Examination dated April 26, 2011. The CO stated that the applicant's "performance has been superb."

On June 1, 2011, the CO prepared a memorandum for the applicant's military file regarding his return to flight duties. The CO stated that he had met with the XO, Flight Surgeon, and Operations Officer on May 27, 2011, to discuss the applicant's "human factors" that needed to be addressed before renewing his AC designation. The memorandum makes note of the applicant's marital and family situation, his medical issues, and his performance and behavior at work, including a tendency to place blame on others.

On June 3, 2011, the applicant was observed in a Night Vision Goggles flight check. All performance dimensions were marked as "S" (presumably for satisfactory). The comments state that it was an overall "good flight." The instructor stated that the applicant had "solid/smooth control" and "all maneuvers flown to standards with only slight errors noted." The instructor recommended that the applicant review various procedures and simulate certain modules. The applicant was observed in an Instrument Warm-up Flight on June 13, 2011. All performance dimensions were marked as "S" except for three which were marked as "DND" (presumably meaning "did not do"). The instructor noted that the applicant had "good control of the aircraft" and "good knowledge of instrument procedures/techniques." On June 13 and 14, 2011, the applicant was observed performing Day Boat Warm-up flights. In the performance dimensions that were marked (some were blank), he received mostly marks of "S" and a few "DND." The comments note that it was a "good warm up flight…Hoisting skills at AC level." The observer stated that the applicant had good control of the aircraft and had "adequate knowledge" of procedures. The applicant was observed in a Night Water flight check on June 16, 2011. All but two of the performance dimensions were marked as "S," and two were marked as "DND," which was explained in the comments as not being conducted due to time constraints and not being required for that particular flight. The instructor noted that the applicant "did an excellent job on this night boat/rescue swimmer flight." The instructor also included in the notes that the applicant was "thoroughly prepared," "conducted excellent aircrew briefs," and "displayed solid aircraft control." The instructor stated that he believed the applicant would "soon [be] ready to return to his duties as an Aircraft Commander as his judgment and pilot skills are not in question." A few issues were noted, however, and the instructor believed the applicant needed to be more comfortable with certain procedures before returning to full duty.

The instructor from the June 3, 2011, flight emailed Lieutenant Commander (LCDR) S on June 17, 2011, in response to a request for input on the applicant's progress. The instructor stated that the applicant did a "good job with all maneuvers and flew them to standard." He noted that the applicant's emergency procedures were also handled correctly but with minor errors. The

instructor recommended, based on a lack of comfort with certain procedures, that the applicant fly as First Pilot "for a few months to gain proficiency/comfort" with those procedures and systems.

On June 22, 2011, the FEB made several recommendations regarding the applicant's return to AC duties. The FEB noted the steps the applicant had taken in order to regain AC status. During this time, members of the FEB noted that the applicant had "displayed strong…skills, as well as good control of the aircraft. However, the FEB members [felt] that his knowledge of the…cockpit is not to the Aircraft Commander level." It was also noted that the applicant had performed just 7.7 hours of flight time since his training plan was created on May 19, 2011. The FEB recommended that once the applicant was able to complete 40 hours of flight time, he should then complete an AC evaluation in order to regain AC duties. The CO approved these recommendations the same day.

The same instructor from the June 3, 2011, flight emailed LCDR S on July 5, 2011, again regarding the applicant's progress. The instructor stated that the applicant had difficulty with several of the emergency procedures. Based on the instructor's observations and the applicant's "own concerns" regarding his proficiency, the instructor again recommended that the applicant fly as First Pilot for a few months.

On August 3, 2011, Commander H[8] emailed members of the applicant's chain of command. He stated that he had had a counseling session with the applicant wherein they discussed the applicant's performance. Commander H came to the conclusion that the applicant did not have the "right mind set for flying right now." He noted that the applicant willingly accepted a temporary suspension of flight duties "until his personal life is in order." Commander H noted that the applicant had divorce proceedings on the following Monday but expressed doubt that this would clear up the applicant's personal issues. He stated that his "desired outcome is to put [the applicant] back in the cockpit and get him up to the AC level again."

Removal from Flight Status

On August 3, 2011, LCDR S signed a "Pilot Critique" regarding the applicant. It discusses the applicant's history and states that the applicant had told LCDR S that he felt he was ready to be an AC again. LCDR S described a flight he took with the applicant to observe and determine whether the applicant was ready to perform AC duties again. LCDR S described the applicant's errors during the flight, including not being able to perform one task to the standard of a copilot. After the flight, LCDR S spoke with the applicant who kept attempting to ask what was next for him to become an AC. It was ultimately decided due to the applicant's personal issues that the applicant should be removed from flight status until further notice.

On August 4, 2011, Commander H created a memorandum to file in the applicant's military record entitled Counseling Sheet. Commander H noted that he and LCDR S had held a joint counseling session with the applicant regarding his pilot performance on his training plan and "also discussed his ability to devote full attention to flight safety and mission completion." Commander H discussed some of the applicant's recent struggles and noted that the applicant "broke down" during a flight. The applicant reportedly "expressed concern over his ability to fly due to personal

[8] Commander H's position is unclear in the record.

anxiety about an impending divorce." The memorandum states that the applicant's divorce date was scheduled for August 8, 2011.

On August 7, 2011, the CO informed the applicant that he was temporarily restricted from flight duties until further notice. The CO noted that the applicant's "recognition of [his] incapacitation for flying duties shows maturity and judgment and [he was commended on his] decision to seek temporary grounding." The applicant was informed that he was expected to "fully recover from [his] condition" within twelve months. He was instructed to review certain portions of the Coast Guard Personnel Manual regarding regaining pilot skills and performance. He was encouraged to work with members of the FEB to identify weaknesses that should be addressed during training.

The applicant's divorce was finalized in court on August 8, 2011.

On August 23, 2011, the flight surgeon signed a Medical Recommendation for Flying Duty. He remarked that the applicant should be assigned to "duties not involving flight." He marked a box "yes" to indicate that the applicant was still allowed to perform simulator duties but marked "no" to indicate that he was not to perform ground run-up duties. There is a section for the applicant's acknowledgement. A box is marked to indicate that the applicant certified that he understood that he "may not" perform aviation duties; however, there is no signature by the applicant on the copy of this document in the record.

Command Referral for Mental Health Evaluation

On October 6, 2011, the CO of the Air Station sent a referral for a mental health evaluation to Dr. F of a nearby Naval base. The CO requested a formal mental health evaluation for the applicant due to his "recurring medical conditions, flight status groundings, prolonged family problems and life stressors in addition to a degradation of…performance." The CO noted that he had informed the applicant of his decision to request an independent mental health evaluation with information regarding his rights. A memorandum with the same date was included as an enclosure from the CO to the applicant in order to notify the applicant of the mental health evaluation referral. The applicant was given notice of his rights, including the right to speak to a civilian attorney, to submit a complaint that the mental health evaluation was in reprisal for a protected communication, and to be evaluated by a mental health care provider of his choosing. The copy of the memorandum provided to this Board was signed by the CO but not the applicant.

On October 14, 2011, the Naval Health Clinic provided the CO with a behavioral health evaluation of the applicant. The memorandum noted that the applicant had received a thorough psychiatric and psychological assessment. The evaluation "did not result in any psychiatric diagnosis including depression, anxiety, psychosis, substance abuse, or somatoform disorder, nor was there sufficient evidence to establish a personality disorder diagnosis." No further medical treatments were recommended from the Naval Health Clinic, although it was noted that the applicant would continue counseling that he had been a part of for the past few months.

Recommendation to PSC for an AEB

On November 4, 2011, the CO notified the applicant that he would be recommending that the OPM convene an AEB to "determine aeronautical adaptability due to recurring medical conditions, flight status groundings, and prolonged family problems." The CO noted that the applicant's performance as a "third tour aviator" had been below that of his peers. Therefore, the CO was requesting an AEB as an independent evaluation in order to determine the applicant's aeronautical adaptability.

On November 15, 2011, the flight surgeon prepared a "Summary of Aeronautical Adaptability Concerns" for the applicant. He noted concerns about the applicant's aeronautical adaptability that had led him to the conclusion that the applicant was not aeronautically adaptable. The flight surgeon discussed various personality traits, examples of performance, and medical concerns he had regarding the applicant. The document included the following:

> In terms of human factors he displays human preconditions of personality style with a cognitive response set that are potentially hazardous in the military aviation environment. In the discussion occurring during the human factors council… there were multiple examples of a personality style that did not allow for insight into his own contribution to a problem. His actions regarding injury, medical direction, social stressors, and command instruction display a limited insight to his role in these issues…and a very "tunnel vision" response set…
>
> Another area of concern is his recurrent social and interpersonal issues that have led to insomnia for recurrent and extended periods of time. An episode is documented in the record during which he was treated with Xanax. Associated with these personal issues he has had anger and impulse related distress for which he had mental health care and treatment… After becoming a pilot he again had interpersonal conflict and was grounded and directed to counseling while being treated for insomnia. Most recently he underwent a divorce and had significant emotional turmoil but was already grounded during that time due to orthopedic surgery on his leg. After recovery from his orthopedic injury he reported the stressors related to his social situation were resolved… Soon thereafter, he was again grounded due to personal strife resulting in distraction and inability to execute an emergency procedure with an instructor pilot…
>
> The review of his medical record shows there are some incomplete areas of the record but from the gathered information he had issues with interpersonal conflict and social stressors from 1992 to present with recurrent bouts of insomnia, two documented psychological interventions, and this is all in the face of multiple medical waivers to allow for flight: 3 progressive waivers for hearing loss, hypertension with medication, and retained hardware. There are also other medical conditions that he has recurrent issues with according to his medical record: obesity, hyperlipidemia, and impaired fasting glucose. Psoriasis, not noted on master problem list and buried in the consultative notes in an earlier volume of his record, was diagnosed by a dermatology clinic and is considered disqualifying for aviation as well and would therefore require an additional request for waiver. The overall impression based on interviews and the medical record review is that of a pilot with cognitive framework / response set and personality style that are not aeronautically adaptable for safe military aviation operations.

On December 15, 2011, the CO sent OPM a package requesting that an AEB be convened for the applicant to evaluate his performance, potential, and motivation for continued service in a flight status. The CO stated that he could not recommend the applicant for flight status as an AC because of recurring medical and personal issues and because of his inability to accept personal responsibility, which could jeopardize mission safety. The package included the "Summary of Aeronautical Adaptability Concerns," the CO's June 1, 2011, memorandum to file, the May 19,

2011, training recommendations to the applicant, and the October 6, 2011, mental health evaluation referral.

On December 19, 2011, the applicant requested via memorandum that an attorney represent him at the upcoming AEB.

On December 21, 2011, the CO informed the applicant that his request to be returned to flight status was denied. The CO noted that he had initiated an AEB at OPM as a result of the flight surgeon's determination that the applicant was not aeronautically adaptable. The CO stated that in accordance with the Officer Accessions, Evaluations, and Promotions Manual, he was authorized to restrict the applicant from flying pending the results of the AEB. The applicant was also informed on this memorandum that in preparation for the AEB, the CO had requested an evaluation by the Naval Aerospace Medical Institute of the applicant's aeronautical adaptability. The applicant signed this document to acknowledge receipt on January 3, 2012.

On February 14, 2012, the CO of a different Naval Medical unit sent the applicant's CO the mental health evaluation. It states that the applicant had been observed over a period of five days at the Psychiatry Division of the Naval Medical base and had been interviewed by two aeromedical psychiatrists, a clinical psychologist, and a resident in aerospace medicine. Pursuant to the evaluation, all of the applicant's available records and collateral history were reviewed. The only diagnosis was "recent divorce; recent medical illness." The recommendations state that the applicant should be returned to his command as he was "psychiatrically Physically Qualified (PQ) and Aeronautically Adaptable (AA) for duty involving flying as a United States Coast Guard aviator. He [was] considered psychiatrically fit and suitable for general, commissioned military service." The final paragraph states "If you do not concur with these recommendations, reference (a) requires that you notify your next senior commanding officer within two business days explaining your decision to act against medical advice regarding administrative management of this Service member." Reference (a) is DOD Directive 6490.1 "Mental Health Evaluations of Members of the Armed Forces."

ACAB Notification and Decision

On April 13, 2012, Commander, PSC, RADM M, notified the applicant that an ACAB would be convened to provide an initial assessment regarding his "fitness to perform aviation duties" and to determine if an AEB was warranted. RADM M noted that ACABs are "established to consider unusual, complicated, or controversial cases that require additional assessment." He noted that an ACAB is an administrative process that operates in an advisory capacity to make a recommendation regarding fitness to perform aviation duties. The applicant's flight status suspension was stated to still be in effect.

From April 26 to May 3, 2012, the applicant exchanged emails with Captain O of PSC. The applicant emailed Captain O initially and made very clear that he did wish to remain in flight status. He stated that he did not understand why he was still going through this process as he had been found to be aeronautically adaptable and to have no personality disorders. The applicant stated that when he met with the flight surgeon, the flight surgeon explained that the difference between the Navy's and Coast Guard's definitions of aeronautically adaptable "is that I can say

that you are not aeronautically adaptable if I do not like the way you tie your boots." The applicant asked various questions about the procedures for the ACAB, which Captain O answered.

On the applicant's April 30, 2012, OER, he received mostly marks of 5s and 6s, with two marks of 4. He received a mark in the fourth spot on the comparison scale, indicating a "good performer."

On a Report of Medical Examination dated May 8, 2012, the flight surgeon listed the applicant's diagnoses as hypertension, hyperlipidemia, herpes simplex, hearing loss, presbyopia, and a history of impaired glucose tolerance (a metabolic syndrome often leading to diabetes mellitus).[9] The applicant weighed 215 pounds. The applicant's blood pressure had recently been raised, but he had not monitored and recorded it as instructed. The presiding doctor found that the applicant was not qualified for service and was "AA Unsat."

On June 6, 2012, the ACAB sent a memorandum to OPM. The memorandum states that the ACAB convened on May 22, 2012, to evaluate the applicant's aeromedical history and his disqualifying diagnoses, which were listed as aeronautical adaptability, hearing loss, hypertension, metabolic syndrome, and retained orthopedic hardware in his right ankle. The applicant had been given the opportunity to present information to the board. The ACAB stated that it had been convened due to conflicting information on the applicant's aeronautical adaptability from a U.S. Navy psychologist, a U.S. Navy aeromedical psychiatrist, a Coast Guard Flight Surgeon, and the applicant's command. After reviewing the information provided to the board and hearing the applicant's presentation, the ACAB found that the applicant was not aeronautically adaptable per Coast Guard standards and recommended that his diagnoses not be given medical waivers. The ACAB recommended that the applicant remain in the Coast Guard in a non-flying billet because none of his diagnoses made him unfit for non-aviation service or warranted evaluation under the Physical Disability Evaluation System (PDES).

On June 18, 2012, the new Commander of PSC, RDML C, sent a memorandum to the applicant notifying him of the results of the ACAB. RDML C concurred with the finding that the applicant was not aeronautically adaptable. The applicant's Aviation Career Incentive Pay and flying assignment were terminated effective as of this date.

Applicant's Article 138 Complaint

On February 15, 2013, the applicant responded to RDML C's June 18, 2012, memorandum. The applicant requested redress and made a complaint under Article 138 of the Uniform Code of Military Justice (UCMJ). The applicant disputed the findings of the ACAB and argued that he should have been given the opportunity to present his case before an AEB as there was nothing unusual, complicated, or controversial about his case. He specifically requested that an AEB be

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[9] "The defects in insulin action lead to impaired suppression of glucose production by the liver and kidney and reduced glucose uptake and metabolism in insulin-sensitive tissues, i.e., muscle and adipose tissue. … Ultimately, this compensatory mechanism fails, usually because of defects in insulin secretion, resulting in progress from [impaired fasting glucose] and/or [impaired glucose tolerance] to [diabetes mellitus]." HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, 18th ed., vol. II (McGraw Hill, 2012), pp.1994-95).

convened "as originally scheduled" so that he could ensure that his case is "fully evaluated and that [he] have a full and fair opportunity to present" his case.

On February 28, 2013, RDML C responded to the applicant's request for redress. RDML C granted his request insofar as providing the applicant with a copy of the ACAB's final decision, as it was clear the applicant had never received a copy of the findings. Regarding the applicant's contention that an AEB should have been convened, instead of an ACAB, RDML C stated that, as the convening authority, he had chosen to convene an ACAB due to the applicant's ongoing medical issues and diagnoses of several medical conditions. He found that the applicant's case was "unusual, complicated, or controversial" as well, based on the different findings between the U.S. Navy and the Coast Guard regarding the applicant's aeronautical adaptability. RDML C noted that an AEB can be an appropriate method of determining aeronautical adaptability, but "an AEB is not an appropriate means of evaluating physical qualification for flight status. Therefore, an ACAB was the appropriate means of evaluating the combination of the medical diagnoses and the questions regarding [the applicant's] aeronautical adaptability." RDML C noted that the applicant was entitled to forward a complaint to the Officer Exercising General Court-Martial Jurisdiction (OEGCMJ) over him, VADM B.

On May 29, 2013, the applicant sent a request for redress and complaint under Article 138 of the UCMJ to VADM B. The applicant again asked that he be afforded the opportunity to present his case to an AEB. He reiterated the same arguments he had made in his February 28, 2013, request for redress.

On July 29, 2013, the Chief of the Office of Military Justice reviewed the applicant's May 29, 2013, request for redress and found that the OEGCMJ's final action on this complaint was legally sufficient and appropriate. The complaint was denied.

On October 1, 2014, the applicant voluntarily retired from the Coast Guard.

VIEWS OF THE COAST GUARD

On August 8, 2017, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he adopted the findings and analysis provided in a memorandum on the case submitted by the Commander, Coast Guard Personnel Service Center (PSC), who recommended that the Board deny relief.

PSC argued that the applicant has not shown that his evaluation by an ACAB vice an AEB was erroneous or unjust. Commander, PSC, reviewed all of the applicable information at the time and decided based on the information to convene an ACAB instead of an AEB. Based on the evidence, PSC argued that the Coast Guard adhered to policy in the Coast Guard Aviation Medicine Manual, which states that an ACAB "considers unusual, complicated, or controversial medical fitness for aviation duty cases." While the applicant's CO initially requested an AEB, upon review of the applicant's conflicting aeronautical adaptability diagnoses, an ACAB was more properly convened. The ACAB looked "strictly at the medical factors of the applicant prior to making their recommendation." Therefore, PSC recommended that the applicant's request for relief be denied.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 16, 2017, the Chair sent the applicant and his attorney a copy of the views of the Coast Guard and invited a response within thirty days. After being granted extensions, the applicant, through his counsel, submitted his response and disagreed with the Coast Guard's advisory opinion.

The response largely reiterates many of the points made in the original application. The applicant claimed that his command retaliated against him after he accused an officer in his chain of command of making false official statements. He stated that this retaliation was "explained in detail" in his application and "is verified in the Exhibits provided." The applicant listed the retaliation that took place as the command telling witnesses not to provide the applicant with statements; creation of "derogatory memoranda behind the applicant's back"; holding a human factors analysis "behind the applicant's back"; convening an ACAB instead of an AEB so that the applicant would have fewer rights; giving him "career-ending and biased OERs"; failing to provide him with results of the May 8, 2012, annual physical examination until after the ACAB had been held; denying him the ability to act as a pilot and AC based upon the results of the ACAB; and constructively forcing him to retire.

The applicant argued that the presumption of administrative regularity does not apply to the Coast Guard in this case. The applicant acknowledged that *Arens v. United States* states that without evidence to the contrary, "the Board presumes that Coast Guard officers…have acted correctly, lawfully, and in good faith performing their duties."[10] He argued that the record "is replete with evidence of irregularity and of abuse of discretion by failing to act lawfully, correctly, or in good faith." The applicant claimed that his command "rewrote administrative history" by rewriting flight evaluations after the fact to state that he had not met standards. The command had also instructed the applicant's colleagues not to provide statements. The applicant argued that both of these actions were irregular and obstructed justice. Not only was he unable to create records that would have been highly beneficial to him, he argued, he was also "kept in the dark" as to significant records and was therefore unable to defend himself against them throughout the process. Most importantly, the applicant complained that he did not receive or review his May 8, 2012, annual physical exam until "many months after the ACAB," which is evidenced by the fact that his signature does not appear anywhere on the document.

The applicant also alleged that there are several "highly suspect" documents in his military record that the Coast Guard's advisory opinion did not even address. One of these is the handwritten note dated August 23, 2011, which, he alleged, appears to be a plan to find the applicant not aeronautically adaptable. There are also the emails regarding the applicant's test flights. The applicant argued that the first one was favorable and the observer later sent another email saying the applicant had not met the standards. The applicant argued that these and other irregularities exist in his record, and the Coast Guard therefore "does not enjoy the presumption of administrative regularity, and the adverse information compiled by the applicant's commanders and others, cannot and should not be credited or relied upon by [this Board.]" He added that it was highly

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[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).

prejudicial that he did not have access to the documents given to the ACAB before he spoke to them, as it made it seem as if the applicant was conceding the derogatory information in his file by not acknowledging it before the board.

The applicant argued that the Coast Guard failed to follow its own regulations by failing to convene an AEB and thereby denying him important procedural protections such as the right to appear with counsel, to question witnesses, to call witnesses, to ask questions of the board, to review and comment upon documents, to submit statements or other documents, and the right to answer questions from the board. He stated that the Coast Guard is required to follow its own procedural regulations and noted that the Court of Federal Claims recently reiterated this point in finding that the Coast Guard had violated its own regulations by failing to grant a petitioner "important procedural protections."[11] He argued that the Coast Guard failed to provide him with the important legal protections due to aviators facing allegations that they are not aeronautically adaptable. The applicant also argued that the Coast Guard conflated policy and regulations by stating that the applicant had alleged "violation of Coast Guard policy" but the applicant had actually asserted regulatory violations.

The applicant asserted that according to Coast Guard regulations, whether or not an aviator is aeronautically adaptable is to be determined by an AEB, not an ACAB. The purpose of an ACAB is to make recommendations regarding medical waivers, but aeronautical adaptability is not waivable. Article 6.A.1.h.1. of the Officer Accessions, Evaluations, and Promotions Manual states that an AEB is convened when an aviator is thought not to be aeronautically adaptable. The applicant argued that the Coast Guard violated their own regulations by not convening an AEB after he was found not to be aeronautically adaptable by a flight surgeon. Although the Coast Guard stated that the applicant's case was complicated which is why an ACAB was appropriate, the applicant argued that "the level of simplicity or complexity" is not a determining factor in whether to refer a case to an ACAB or an AEB. Instead, the more complex a case, the more reason for it to be considered by an AEB, he claimed. He argued that the denial of legal protections was "a gross lack of due process of law, in violation of Coast Guard regulations and the Fifth Amendment to the U.S. Constitution." In addition, the applicant complained that the Coast Guard did not cite any authority for "the proposition that the ACAB in this case was authorized to make determinations of aeronautical adaptability."

The applicant also argued that the ACAB's determination not to recommend granting his medical waivers for hypertension, hearing loss, retained hardware, and metabolic syndrome was "flawed, unfair, and [in] disregard of significant entries in the record." As for metabolic syndrome, the applicant noted that no waiver is required for this condition.[12] In addition, he asserted that he did not have metabolic syndrome. The only entry in his medical record for this condition is in the

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[11] *Rogers v. United States*, 124 Fed. Cl. 757 (2016). The petitioner in this case had been before an Administrative Separation Board (ASB), which recommended that the applicant be retained in the Coast Guard. The court found that the Coast Guard had violated its regulations when the convening authority created an endorsement of the ASB's findings and recommended that the applicant be separated and included information and evidence not before the ASB in his endorsement.

[12] The applicant provided a Coast Guard Aeromedical Policy Document, which states "Metabolic syndrome is disqualifying for initial flight applicants…For rated aircrew, metabolic syndrome constitutes a failure of Level 1 in the Cardiovascular Screening Program… No specific waiver is required for metabolic syndrome. However, the individual components may warrant the need for an AMS [Aeromedical Summary] and waiver request."

May 8, 2012, annual physical examination. He added that his medical records were reviewed by the Veterans Administration after his retirement, and it was not found that he had a metabolic syndrome. As for hearing loss, hypertension, and retained hardware, the applicant already had medical waivers in place. He also complained that the ACAB did not explain its recommendation not to grant the applicant's medical waivers.

APPLICABLE POLICY AND REGULATIONS

Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3

Article 4.A.1.d. of COMDTINST M1000.3 provides for the disposition of aviators who fail to meet the prescribed standards for their aviation service groups. Article 4.A.1.d.(2)(a) states that the CO sends the report of the medical examination to PSC and in the meantime will either ground the officer or restrict the officer's duties based on the advice of a flight surgeon. Article 4.A.1.d.(2)(b) states that upon reviewing the medical report, Commander, PSC will either waive the defect; change the officer's service group (duties); restrict the officer's duties to a "lesser tempo"; terminate the officer's flight status; refer the officer to the Board of Navy Flight Surgeons; or refer the officer to a medical board.

Article 4.A.1.f. states that "grounding" is an informal and temporary restriction of flight duties by the CO and is normally based on a medical condition from which full recovery is expected within a year.

Article 4.A.1.g. discusses suspension from flight status. Article 4.A.1.g.(2) states that a CO may suspend an officer's flight status at the request of the officer or when an officer has been referred to an AEB.

Article 4.A.1.discusses AEBs. Article 4.A.1.h. states that AEBs are convened by the Commander of PSC "when necessary to evaluate performance, potential, and motivation for continued service in flight status of certain Coast Guard aviators." The board is meant to function in an advisory capacity to recommend an action to ensure that aviators who continue in flight status can satisfactorily do so. The AEB is not a disciplinary board "in any respect." Commander of PSC will "normally" convene an AEB within 30 days of advisement by a CO that one of the following requisite conditions exists: faulty judgment, lack of skill, lack of mental abilities, "professionally unfit," or a determination by a flight surgeon that the officer is not aeronautically adaptable.

Article 4.A.1.j. states that an AEB is composed of "three Coast Guard aviators and one military flight surgeon, preferably CG." Article 4.A.1.k. states that AEB proceedings are informal to allow a free exchange of information. The evaluee may present witnesses and cross-examine witnesses, and both the board may question the evaluee and witnesses. An AEB makes one or more of the following recommendations for an active duty aviator: continuation in full flight status; probationary flight status for a period of time; additional training; orders to duty other than flying. Article 4.A.1.l. states that the AEB proceedings and report are forwarded to Commander, PSC for decision. Commander, PSC notifies the evaluee of his decision in a letter. Article 4.A.1.p. states that an officer may request restoration of his flight status.

Coast Guard Aviation Medicine manual, COMDTINST M6410.3A

Article 2.D.1. of the Coast Guard Aviation Medicine manual, COMDTINST M6410.3A, states that the purpose of an ACAB is to "consider unusual, complicated, or controversial medical fitness for aviation duty cases." The ACAB is meant to assist by "making a waiver recommendation." Article 2.D.2. states that the ACAB is composed of flight surgeons assigned to the Commandant and the Commander of PSC-PSD-med or assigned as airframe managers or detailing officers assigned to the Commander for the enlisted and officers who are responsible for the detailing aviation personnel. "Only a fully qualified Coast Guard flight surgeon may be a voting member assigned to an ACAB." A quorum is established when there are three flight surgeons present. Article 2.D.3. states that an ACAB may only be convened by the Commander of PSC for a "complicated case referred from Commander (PSC-PSD-med) directly to the ACAB for recommendation" or for a "waiver request denied by Commander (PSC) and appeal made to the ACAB, through Commander, (PSC), for a case not seen by the ACAB initially." Article 2.D.4. states that Naval Aeromedical Institute (NAMI) specialists may be requested as consultants for waiver disposition without convening an ACAB.

Article 3.A.2. of this manual describes aeronautically adaptable personnel as those who have "demonstrated the ability to utilize long term appropriate defense mechanisms, and display the temperament and personality traits necessary to maintain a compatible mood, suppress anxiety and devote full attention to flight safety and mission completion." Section 3.B.2. states that only a "fully qualified flight surgeon may render a finding of AA Unsatisfactory." An AA Unsatisfactory is mandatory if one of the following conditions is present: adjustment disorders, concealment of disqualifying medical conditions on history forms, disqualifying psychiatric condition, "less than optimal" attitude towards military flight, personality traits that interfere with group functioning, multiple or recurring physical complaints that suggest somatization disorder, history of arrests or illicit drug use, or "significant, prolonged and/or currently unresolved interpersonal or family problems (for example, marital dysfunction)."

Article 4.D.2.d. of this manual states that a recommendation for an aeromedical waiver "in unusual or complicated cases in conflict with written Coast Guard policy…shall be referred for review and recommendation to the Commandant's Aeromedical Consultative Advisory Board."

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application is considered timely because it was filed within three years of his separation from active duty.[13]

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[13] *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

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.[14]

3. The applicant alleged that the Coast Guard committed error and injustice by holding an ACAB as opposed to an AEB and that the related documentation, evaluations, the loss of his flight status and pay, and his subsequent retirement are erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[15] Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."[16]

4. The Coast Guard Aviation Medicine manual describes "aeronautical adaptability" as a medical diagnosis applicable to aviators and related crew personnel. Article 3.B.2. of that manual states that only a "fully qualified flight surgeon may render a finding of AA Unsatisfactory." The record shows that the applicant had previously been found aeronautically adaptable, but on May 8, 2012, a flight surgeon at the applicant's command determined that he was not aeronautically adaptable, and this evaluation was reviewed by the ACAB. The flight surgeon reported that the applicant, who weighed 215 pounds, had a condition that often leads to diabetes mellitus,[17] he had also failed to monitor and report his blood pressure as recently instructed. Although there is no copy of the May 8, 2012, medical evaluation signed by the applicant in the record before the Board, the applicant admitted having met with the flight surgeon, who presumptively would have told the applicant of his diagnosis during that meeting. In addition, Coast Guard members have access to their own medical files,[18] which the applicant knew would be considered by the ACAB, which is a type of medical board convened in accordance with the Coast Guard Aviation Medicine manual, COMDTINST M6410.3A.

5. The fact that two Navy examinations had previously found the applicant aeronautically adaptable does not prove that the Coast Guard flight surgeon's diagnosis on May 8, 2012, was erroneous. Article 3.A.2. of the Coast Guard Aviation Medicine manual, COMDTINST M6410.3A, states that aeronautically adaptable personnel have "the ability to utilize long term appropriate defense mechanisms" and "the temperament and personality traits necessary to maintain a compatible mood, suppress anxiety and devote full attention to flight safety and mission completion." Article 3.B.2. states that an AA Unsatisfactory diagnosis is mandatory if the officer has a "less than optimal" attitude towards military flight or "significant, prolonged and/or currently

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[14] *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).

[15] 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R.§ 52.24(b)).

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

[17] See footnote 8, above.

[18] Coast Guard Medical Manual, Article 2.A.11.a.

unresolved interpersonal or family problems (for example, marital dysfunction)." The Coast Guard flight surgeon's diagnosis on May 8, 2012, is supported by the assessments of the applicant's chain of command regarding his attitude, interpersonal problems, and stresses; by the reports of the other pilots, who noted problems with his performance and confidence in the cockpit in the spring and summer of 2011 before his flight status was suspended in August 2011; and by the other findings on the Report of Medical Examination. The Board finds that the applicant has not overcome the presumption of regularity accorded the flight surgeon's diagnosis of AA Unsatisfactory on May 8, 2012. He has not proven by a preponderance of the evidence that the May 8, 2012, Report of Medical Examination is erroneous or unjust.

6. The applicant argued that his case should have been reviewed by an AEB because it concerned only his aeronautical adaptability, but the Board disagrees. The ACAB considers an officer's fitness for aviation duty, and the record shows that the applicant had received several waivers for medical conditions considered disqualifying for flight status and needed at least one more medical waiver. In addition, aeronautical adaptability is a medical diagnosis that can be made only by flight surgeons and so his aeronautical adaptability was properly evaluated by an ACAB, which is composed of flight surgeons.[19] An AEB is composed of three aviators and one flight surgeon and is not authorized to diagnose an officer. An AEB may only make recommendations regarding an officer's flight status and duties.[20]

7. The record shows that the applicant was initially notified that his CO was recommending that PSC convene an AEB, rather than an ACAB, but whether to convene either board is a prerogative of Commander, PSC, not the CO.[21] PSC *may* convene an AEB once informed that one of the requisite conditions exists.[22] And an ACAB may be convened by PSC to "consider unusual, complicated, or controversial medical fitness for aviation duty cases."[23] No policy authorizes the officer in question to choose an AEB or an ACAB or establishes a right to review by one or the other board under particular circumstances. While the applicant argued that his case was not unusual, complicated, or controversial and claimed that the only issue was whether he was aeronautically adaptable, the Board disagrees. The record shows that the case was both controversial and complicated. In addition to having several medical conditions requiring continuing waivers and needing a new waiver to maintain flight status, the applicant's aeronautical adaptability had been assessed differently by Navy psychiatrists and Coast Guard flight surgeons over the course of the prior year and he was strongly contesting his removal from flight status.

8. The applicant argued that the decision to convene an ACAB, instead of an AEB, was unjust because he was only allowed to present his case for a half-hour to the ACAB and they did not question him, whereas he would have been allowed to answer questions and present and cross-examine witnesses at an AEB hearing. The reasoning behind the two boards' procedural differences is unclear but could be due to the fact that an AEB may be convened due to misconduct and various non-medical reasons, such as faulty judgment, lack of skill, lack of mental abilities,

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[19] Coast Guard Aviation Medicine manual, Article 2.D.2.
[20] Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3, Article 4.A.1.k.
[21] Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3, Article 4.A.1.h. and Coast Guard Aviation Medicine Manual, COMDTINST M6410.3A, Article 2.D.3., respectively.
[22] Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3, Article 4.A.1.h.
[23] Coast Guard Aviation Medicine Manual, COMDTINST M6410.3A, Article 2.D.1.

and being "professionally unfit," in addition to a diagnosis of aeronautical inadaptability. The applicant has not shown that he was entitled to an AEB, however. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that Commander, PSC's decision to convene an ACAB as opposed to an ACAB was erroneous or unjust or an abuse of his discretion.

9. Although the applicant argued that the Coast Guard violated his Fifth Amendment right to due process by convening an ACAB, the Board likewise finds that the applicant has not proven by a preponderance of the evidence that there were prejudicial procedural defects with the ACAB. The applicant was notified on April 13, 2012, that an ACAB would be convened to assess his "fitness to perform aviation duties" and to determine if an AEB was warranted based on his medical diagnoses and contradictory diagnoses regarding his aeronautical adaptability. While the applicant has shown that he did not receive a copy of the final decision of the ACAB until he submitted an appeal, he subsequently received a copy of the decision. The applicant also complained that he did not receive a copy of the package the ACAB received before addressing the board, but he has not pointed to any statute, regulation, or policy that entitled him to a copy of that package, and the Board knows of none. He was also allowed to address the ACAB for thirty minutes before it came to a final decision.

10. Nor has the applicant shown that he had a constitutionally protected property or liberty interest at stake in the ACAB's proceedings. In *Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972), the Supreme Court held that to have a constitutionally protected property interest, a person "must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[24] The applicant has not shown that he was entitled to retain his flight status and continue flying aircraft for the Coast Guard. Nor has he shown that his removal from flying duties and reassignment were stigmatizing,[25] as pilots are often assigned to non-flying duties during their careers. Even if a constitutionally protected liberty or property interest had been at stake, however, the requirements of the Fifth Amendment would have been satisfied by the procedures provided by the Coast Guard: The applicant received notification of the reason for the proposed action and an opportunity to respond.[26] The applicant was notified of the ACAB on April 13, 2012, and was allowed to present his case to the ACAB for thirty minutes. Notice of a proposed adverse action is adequate when it "apprises the employee of the nature of the charges 'in sufficient detail to allow the employee to make an informed reply.'"[27] Although he argued that

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[24] *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 576 (1972)(finding that to have a constitutionally protected property interest in something, a person "must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it); *Ampleman v. Schlesinger*, 534 F.2d 825, 826 (1976) (finding that officer who was honorably discharged after the loss of his flight status had neither a liberty nor a property interest at stake); *Wilson v. Walker*, 600 F. Supp. 555, 558 (1984) ("There is no evidence that the parties entered into a contract, either express or implied, that would allow plaintiff to remain in a flying job unless transferred to a non-flying job following AFR 35–13 procedures. There is no evidence of any statute providing for said procedures; nor does AFR 35–13 create any such entitlement. In fact, AFR 35–13, subsection 3–16 clearly anticipates that persons with flying status will at times be transferred to non-flying jobs. [Citation omitted.] Nowhere in AFR 35–13 can it be said that a property interest was created.")

[25] *Canonica v. United States,* 41 Fed. Cl. 516, 524 (1998).

[26] *Id.* (when a liberty interest exists because a Government action is stigmatizing and prejudicial, due process is "fulfilled by notice of the government act and an opportunity to respond before or after the act").

[27] *King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996) (quoting *Brook v. Corrado,* 999 F.2d 523, 526 (Fed. Cir. 1993), and *Brewer v. United States Postal Serv.,* 227 Ct. Cl. 276, 647 F.2d 1093, 1097 (1981), *cert. denied,* 454 U.S. 1144 (1982)).

he could not properly respond because he was not shown all of the documents considered by the ACAB, the Board finds that he did receive adequate notice of the reasons for the ACAB to inform his response. The record shows that he knew his aeronautical adaptability and other medical conditions were at issue. He had access to his medical records and his performance and flying records. He knew the procedures that he had failed to perform properly in the cockpit and he knew his command was concerned about his behavior and thought that he was distracted by his personal problems, which information might have influenced the ACAB's assessment of his aeronautical adaptability. The Board finds that the applicant was not deprived of due process with regards to the ACAB. The Board finds no grounds for setting aside the results of the ACAB or Commander, PSC's decision to remove the applicant's flight status.

11. The Board notes that the decision of the ACAB was supported by substantial evidence. The applicant had multiple disqualifying diagnoses – hearing loss, hypertension, metabolic syndrome, and retained orthopedic hardware. While he had received medical waivers for three of these previously, one of the main purposes of the ACAB is to assist in "making a waiver recommendation."[28] The board considered the applicant's four disqualifying conditions in addition to his aeronautical adaptability. The ACAB explicitly considered the conflicting findings of the Naval psychiatrists and Coast Guard flight surgeons' evaluations. After considering the evidence and the applicant's presentation, the board ultimately found that the applicant was not aeronautically adaptable and recommended that he not be granted medical waivers. While the ACAB's deliberations and reasoning are not before this Board, it is clear that there was substantial evidence supporting this conclusion. Given the notes from pilots mentioning the applicant's mistakes and their concerns following multiple training flights, the November 15, 2011, Summary of Aeronautical Adaptability Concerns, and the Coast Guard aeronautical adaptability evaluations, the ACAB had substantial evidence to find that the applicant had been unable to demonstrate "ability to utilize long term appropriate defense mechanisms, and display the temperament and personality traits necessary to maintain a compatible mood, suppress anxiety and devote full attention to flight safety and mission completion."[29] Because the applicant was found to be not aeronautically adaptable and needed at least one additional medical waiver, it was likewise reasonable for the ACAB to recommend that the waivers for his medical conditions that were disqualifying for flight duty not be approved.

12. The applicant also complained that his command's actions were retaliatory—done in reprisal for his complaint that the Operations Officer had lied about him. But he submitted no evidence whatsoever that the Operations Officer had lied about him (or even what the Operations Officer said about him), that the applicant had complained about the alleged lies, that his alleged complaints were considered valid, or that the CO would have any reason to retaliate against the applicant for informing the CO about the alleged lies. As the applicant noted, he had received a strong annual OER for the period ending April 30, 2011, before he returned to flight training, and on June 24, 2011, the CO had strongly endorsed his request for a medical waiver for his orthopedic hardware and said his "performance has been superb." Nevertheless, the record shows that the command had concerns about his flying and "human factors," but thought they could be corrected through counseling and more flight training. There is ample evidence in the pilots' notes of the applicant's deficiencies in the cockpit to show that the CO's actions were properly based on valid

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[28] Coast Guard Aviation Medicine Manual, COMDTINST M6410.3A, Article 2.D.3.
[29] Coast Guard Aviation Medicine Manual, COMDTINST M6410.3A, Article 3.A.2.

concerns about the applicant's aeronautical adaptability and were not retaliatory because of an unexplained argument he had with the Operations Officer and reported to the CO as lies. Following several training flights, instructors had expressed concerns that the applicant was not performing to the level of an AC, and he had not performed some duties even to the level of a copilot. Also, the applicant admitted that he was under significant personal stress during the time in question, and on August 3, 2011, he willingly accepted a temporary suspension of flight duties "until his personal life [was] in order." The next day, the applicant "expressed concern over his ability to fly due to personal anxiety about [his] impending divorce" to Commander H, as stated in a memorandum to file. Given this evidence, the Board finds that the applicant has not overcome the presumption of regularity accorded his chain of command, much less proven by a preponderance of the evidence that his command's subsequent actions, such as requesting an AEB and assigning him lower marks on his 2012 OER, were retaliatory.

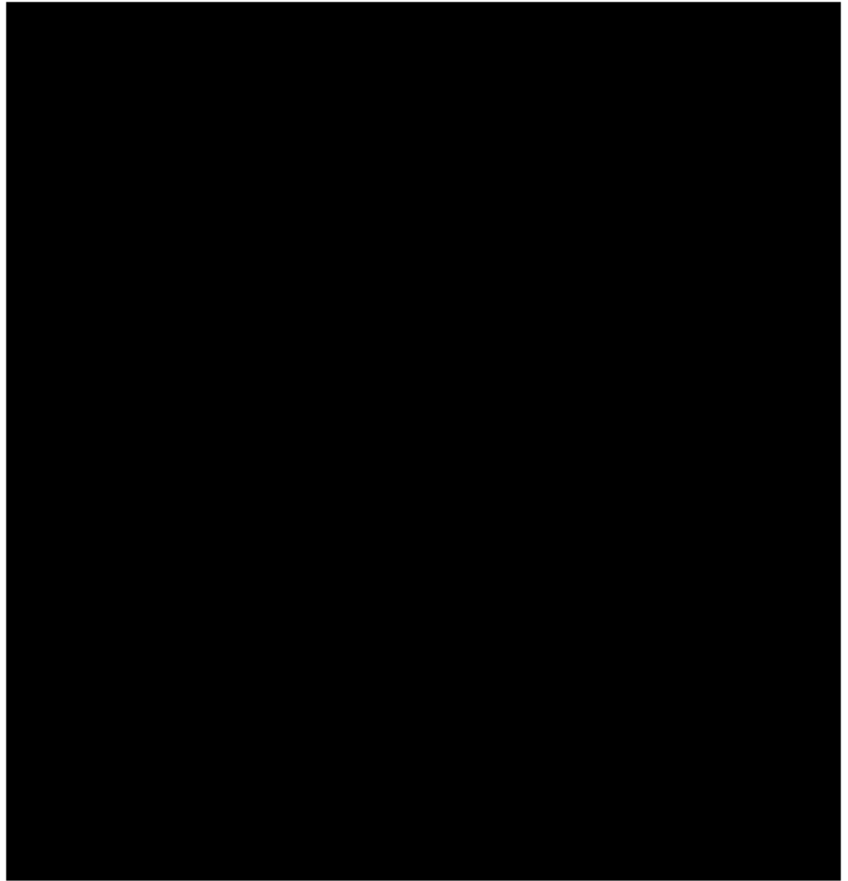
13. The applicant alleged that because he lost his flight status based on his medical conditions, he was entitled to evaluation by a medical board and should have been medically retired. Article 4.A.1.d.(2)(b) of COMDTINST M1000.3 states, however, that upon reviewing the medical report, Commander, PSC will either waive the defect; change the officer's service group (assigned duties); restrict the officer to a "lesser tempo" of duties; terminate the officer's flight status; refer the officer to the Board of Navy Flight Surgeons; or refer the officer to a medical board. The record shows that the applicant's medical conditions had previously received waivers. His hypertension had been controlled by medication, and his orthopedic hardware did not significantly impede his range of motion. Although his conditions were disqualifying for flight status and required waivers, he has not shown that the ACAB or Commander, PSC erred in finding that they did not render him unfit to perform non-flying duties, which would require processing under the Physical Disability Evaluation System for a disability separation. Commander, PSC exercised his discretion under Article 4.A.1.d.(2)(b) by terminating the applicant's flight status and reassigning him to non-flying duties, and the applicant has not proven by a preponderance of the evidence that Commander, PSC's failure to process him for a disability separation was erroneous or unjust.

14. The Board finds that the applicant has not proven by a preponderance of the evidence that his command's actions were retaliatory, that documentation or evaluations in his record are erroneous or unjust and should be removed, that he was denied due process, that his flight status was erroneously or unjustly removed, that he was entitled to a medical board or disability separation, or that his voluntary retirement was in any way involuntary. The Board finds no grounds for granting his requests for relief. Therefore, his requests should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of retired [redacted], USCG, for correction of his military record is denied.



March 16, 2018