

**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. 2013-047**



**FINAL DECISION**

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receipt of the applicant's completed application on January 9, 2013, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 26, 2013, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST**

The applicant, a [REDACTED], asked the Board to correct his record to show that he has been entitled to Aviation Career Incentive Pay (ACIP) for all active duty and paid Reserve duty, including drills and active duty for training (ADT), since [date redacted]; to pay him the back pay he would be due as a result of this correction; and to order the Coast Guard to continue to pay him ACIP in the future as long as he meets the current and future requirements of 37 U.S.C. § 301a or any other applicable statute.

The applicant explained that he entered active duty in the Regular Coast Guard on [date redacted], and his aviation service date is [date redacted]. He had more 13 years of "operational flying time" on [date redacted], when he was resigned his Regular commission and accepted a commission as a Reserve officer.

The applicant stated that he performed his first paid drill as a Reserve officer in [dated redacted], and when he received his first pay check in [date redacted], he realized that he had not received his ACIP. He asked about it and was told that reservists do not receive ACIP. He has made numerous inquiries, and while the answers he has received have included varying possible theories about why reservists are not paid ACIP, no one has shown him any law or policy that justifies depriving him of his ACIP. The applicant stated that the ACIP statute and applicable Coast Guard regulations support his claim that he should continue to receive ACIP as a reservist.

**APPLICABLE LAW***United States Code*

Title 37 U.S.C. § 301a (the ACIP statute) provides the following in pertinent part:

Subsection (a)(1) states that a member is entitled to ACIP while he

- is entitled to basic pay; and
- frequently and regularly performs flying duty required by orders.

Subsection (a)(2) restricts payment of ACIP to Regular and Reserve officers who

- hold or are in training leading to an aeronautical designator; and
- engage and remain in aviation service on a career basis.

Subsection (a)(3) states that an officer is entitled to “continuous monthly” ACIP if he

- is entitled to basic pay;
- holds an aeronautical designator; and
- is “qualified for aviation service under regulations prescribed by the Secretary concerned.”

Subsection (a)(4) restricts entitlement to “continuous monthly” ACIP to

- the first 25 years of aviation service for officers who perform operational flying duties for 8 of the first 12 *and* 12 of the first 18 years of aviation service; or
- the first 22 years of aviation service for officers who perform operational flying duties for at least 10, but less than 12, of the first 18 years of aviation service.

Subsection (a)(5) ends entitlement to continuous monthly ACIP “[i]f upon the completion of either 12 or 18 years of aviation service it is determined that an officer has failed to perform” the required 8 (out of 12) or 12 (out of 18) years of flying duty.

Subsection (a)(6) defines “aviation service” as “service performed by an officer ... while holding an aeronautical rating or designation or while in training to receive an aeronautical rating or designation.”

Subsection (d) states the following regarding a reservist’s inactive duty (drills):

Under regulations prescribed by the President and to the extent provided for by appropriations, when a member of a reserve component of a uniformed service, or of the National Guard, who is entitled to compensation under section 206 of this title [which authorizes drill pay for inactive duty], performs, under orders, duty described in subsection (a) for members entitled to basic pay, he is entitled to an increase in compensation equal to 1/30 of the monthly incentive pay authorized by subsection (b) for the performance of that duty by a member with corresponding years of aviation service who is entitled to basic pay. Such member is entitled to the increase for as long as he is qualified for it, for each regular period of instruction, or period of appropriate duty, at which he is engaged for at least two hours, including that performed on a Sunday or holiday, or for the performance of such other equivalent training, instruction, duty or appropriate duties, as the Secretary may prescribe under section 206(a) of this title. This subsection does not apply to a member who is entitled to basic pay under section 204 of this title [members on active duty or ADT].

***Executive Order 13294***

Executive Order (EO) 13294, signed on March 28, 2003, states the following:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 301, 301a, and 301c of title 37, United States Code, and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. The Secretary of Defense, the Secretary of Commerce, the Secretary of Health and Human Services, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, with respect to members of the uniformed services under their respective jurisdictions, are hereby designated and empowered to exercise, without approval, ratification, or other action by the President, the authority vested in the President by sections 301, 301a, and 301c of title 37, United States Code. The Secretaries shall consult each other in the exercise of such authority to ensure similar treatment for similarly situated members of the uniformed services unless the needs of their respective uniformed services require differing treatment. [Emphasis added.]

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Sec. 3. This order is not intended to create, nor does it create, any right, benefit, or privilege, substantive or procedural, enforceable at law by a party against the United States, its agencies, officers, employees, or any other person.

***Coast Guard Aviation Incentive Pay Instruction, COMDTINST 7220.39***

Paragraph 1.h. of Enclosure (1) to the instruction states that “[a]viation service begins on the date that a member first reports on competent orders to an aviation facility having aircraft in which the member will receive flight training. ... Aviation service stops accumulating on the date a member loses the aviation designation, including when the member is separated from the uniformed services.”

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

Article 4.A.1.a. states that a “Coast Guard aviator is a commissioned officer of the Coast Guard who has successfully completed an approved military flight training course and has been designated as a Coast Guard aviator by the Commandant.”

Article 4.A.1.g. states that an aviator’s flight status may be suspended temporarily or permanently when the aviator has been referred to an aviator evaluation board, shows an incapacitating fear of flying, voluntarily requests termination of flight status, or is physically disqualified. Any verbal suspension should be confirmed in writing as soon as practicable.

Article 4.A.1.p. states the following regarding termination of “flight status”:

A former Coast Guard aviator will not normally be reinstated in flight status when the removal from flight status was a result of any of the following: ... (3) Voluntary acceptance of a change in status or entry into a program which does not require flight status, e.g., RPA Program. Regardless of the reason for original removal from flight status, an aviator will not normally be considered for reinstatement if flight status was terminated more than 18 months prior to initiation of a request for reinstatement or his/her age, grade, specialty, or previous flight experience indicate that he/she cannot be expected to fill an operational flying billet satisfactorily.”

*Coast Guard Pay Manual, COMDTINST M7220.29B*

Chapter 5.A.4.b. states that an “officer qualified for aviation service who has performed at least eight years of operational duty upon completion of 12 years of aviation service, is entitled to continuous ACIP for the first 18 years of aviation service, subject to the 25 year limitation indicated in 5-A-4.d.”

Chapter 5.A.5.d. states that “an officer who meets the conditions of paragraph 5.A.4.d. is entitled to continuous ACIP for the first 25 years of aviation service.”

Chapter 5.A.4.d. states that an “officer qualified for aviation service who has performed at least 12 years of operational flying duty upon completion of 18 years of aviation service, is entitled to continuous ACIP for the first 25 years of officer service.”

**APPLICANT’S ALLEGATIONS**

The applicant alleged that as a Reserve officer, he is entitled to ACIP for any paid duty because he has held an aeronautical designation<sup>1</sup> since [date redacted]; he has completed more 12 years of operational flying duty and so meets the “12 out of 18” requirement for continuous monthly ACIP under 37 U.S.C. § 301a(a)(4); and is “qualified for aviation service under regulations prescribed by the Secretary concerned” in accordance with COMDTINST 7220.39. Therefore, he should continue receiving ACIP until he has completed 25 years of qualifying service—i.e., through [date redacted]. He noted that § 301a(d) expressly prescribes ACIP for Reserve officers performing inactive duty drills.

The applicant alleged that when he first inquired about his ACIP for Reserve duties, he was told that he was not entitled to it because he was a reservist. Later, he was told that “while the other military services pay ACIP to officers in my situation, the Coast Guard doesn’t have to.” However, the applicant argued, under EO 13294, the Coast Guard’s rules must treat Coast Guard reservists in the same way that the other Armed Forces’ reservists are treated. He alleged that his situation is identical to Reserve officers of other Armed Forces who receive continuous monthly ACIP and so he is legally entitled to ACIP too. He noted that EO 13294 permits varying regulations only if the needs of the Coast Guard require differing treatment and alleged that the Coast Guard has produced no documentation of any process that was used to determine that the needs of the Service require differing treatment.

The applicant noted that under alleged that under section 1.h. of Enclosure (1) to COMDTINST 7220.39, “aviation service” begins on the date that an officer reports for duty at a flight training school and “stops accumulating on the date a member loses the aviation designation.” As a reservist, he retains his aviation designation, and he has not received any written notice of its revocation, as required by section 4 of Enclosure (1). He also noted that none of the reasons for revocation listed in that section apply to him. The applicant noted that Chapter 5.A.5.b. of the Coast Guard Pay Manual, COMDTINST M7220.29.

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<sup>1</sup> The Board notes that the record indicates that the Coast Guard uses the terms “aeronautical designation,” “aviation designation,” and “aviator designation” interchangeably.

The applicant after refuting all of the erroneous reasons he was given for not being paid ACIP, he was told that Coast Guard reservists do not receive ACIP because the Coast Guard has no Reserve billets requiring an aviation designation. He was told that give the lack of any Reserve aviation billets, he was no longer serving as a potential pilot. The applicant argued, however, that no statute or regulation supports this opinion, and Reserve pilots are often called to active duty to serve as pilots on Active Duty for Operational Support (ADOS) orders. In this regard, the applicant noted that a Reserve pilot is no different from an active duty pilot who is not currently serving in an aviation billet. Both are capable of and are called upon to fill an aviation billet even though they are not currently serving in one. The difference is that the active duty pilot receives full ACIP with basic pay, while the Reserve pilot receives pay for drills only, which should be augmented by ACIP.

The applicant noted that in BCMR Docket No. 96-084,<sup>2</sup> the Board held that an officer who had been entitled to continuous monthly ACIP and whose aviation designation the Coast Guard removed simply because the Coast Guard stopped using the type of fixed wing aircraft he flew was still entitled to ACIP. The Board stated, “The fact that no present or prospective missions may exist does not negate the entitlement to ACIP that the applicant has already earned by virtue of performing 12 years of operational flying duty.” The applicant argued that, like the applicant in BCMR Docket No. 96-084, he is being arbitrarily denied ACIP that he has earned by performing more than 12 years of operational flying duty, and the lack of an aviation billet does not negate entitlement to ACIP. Moreover, unlike that applicant, he could still be called to active duty to fly because the Coast Guard still uses the helicopters he is qualified to fly.

The applicant argued that the lack of Reserve aviation billets as a justification for not paying reservists aviation pay would only make sense if the Reserve was a stand-alone service with no aviation function at all. However, the Reserve is a support service and Reserve pilots are often called to active duty to serve as pilots in Coast Guard contingency operations. In this regard, the applicant noted, Reserve pilots are much more likely to fly again than some active duty officers. For example, Coast Guard flag officers continue to receive ACIP even though there is no chance that they will ever again fill an aviation billet because the maximum pay grade

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<sup>2</sup> In Docket No. 96-084, the Coast Guard had revoked the applicant’s aeronautical designator on October 31, 1993, even though the applicant had completed over 12 years of operational flying, because the Coast Guard stopped using the aircraft the officer was qualified to fly. The Board granted the applicant’s request to restore his aeronautical designator based upon the following findings:

4. . . . [T]he applicant performed the requisite amount of operational flying to preserve his entitlement to [continuous] ACIP. Under Section 301a(a)(4), the applicant was not required to perform any more operational flying to preserve that entitlement. By removing the applicant’s aeronautical designator, and thereby terminating the applicant’s aviation service, the Coast Guard has unjustly deprived the applicant of ACIP after the applicant fulfilled all of the statutory requirements that were necessary for him to establish his entitlement to that pay, and to preserve that entitlement until the applicant completes 25 years of service as an officer.

5. The Coast Guard committed an error in canceling the applicant’s aeronautical designator and terminating his receipt of ACIP. . . . The fact that no present or prospective missions may exist does not negate the entitlement to ACIP that the applicant has already earned by virtue of performing 12 years of operational flying duties.

of aviation billets is O-6, and even though policy precludes active duty officers who have not filled a flying billet for eight years from being assigned to a flying billet, such officers continue to receive ACIP though they will never fly for the Coast Guard again. Therefore, the applicant argued, the Coast Guard's policy is inconsistent and unjust.

Finally, the applicant argued, when he began aviation service in [date redacted], ACIP stated that a member would become entitled to continuous ACIP for the first 25 years of "officer service," instead of "aviation service." Therefore, even if the Board thinks he is not entitled to continuous monthly ACIP under the current statute, he should be "grandfathered in" under the old statute.

In support of his allegations, the applicant submitted a series of emails showing the responses he received upon making these arguments to Coast Guard Headquarters. On September 13, 2012, he was advised that Coast Guard aviators lose their aviator designations when they leave active duty and affiliate with the Reserve, though they may continue to wear the insignia. ACIP is "pay intended to encourage/incentivize an officer to pursue an aviation career," and because there is no aviation career path in the Reserve, there "is no point or purpose to ACIP payments to former aviators who can no longer be incentivized to pursue an aviation career as a reservist." However, their aviation designators can be re-conferred if they are recalled to active duty.

In an email dated September 14, 2012, the applicant was advised that when he resigned his active duty commission on [date redacted], he lost his aviation designator, and he did not regain a designator when he took the oath of office to accept a Reserve commission because the Coast Guard Reserve has no aviation program. Therefore, he was told, his situation is not like that of officers who remain on active duty and therefore retain their designators."

In an email dated September 21, 2012, the applicant was advised that in the early 1990s, the Reserve had ended its aviation program in which Reserve pilots were allowed to fly while drilling at Coast Guard air stations. Therefore, his affiliation with the Reserve did not reestablish his aviation career. However, if the applicant performs active duty in an aviation billet, he would be entitled to ACIP pay.

### **VIEWS OF THE COAST GUARD**

On July 26, 2013, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case.

In making this recommendation, the JAG adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC). PSC stated that ACIP incentivizes officer to choose an aviation career, which is challenging and involves hazardous duty, and enables the Service to retain trained pilots. The applicant accrued over 13 years of operational flying time between [date redacted], and [date redacted], the date he resigned his active duty commission. Under Enclosure (1) to COMDTINST 7220.39, PSC stated, "Aviation service stops ... when the member is separated from the uniformed services." Therefore, the applicant's aviation service stopped upon his separation from the Regular Coast Guard. He was

then “rehired” as a Reserve officer but no longer holds an aviation designation because “there is no Reserve aviation program or career path and therefore no need to incentivize a Reservist aviation career path.” PSC stated that the only Reserve officers who receive ACIP are direct commission ensigns and lieutenants who serve on extended active duty contracts until they are integrated into the Regular Coast Guard upon promotion to lieutenant.

In support of these allegations, PSC submitted copies of the regulations and a print-out from the Coast Guard’s Direct Access database showing that the applicant was “TER[minated]” and “D[I]SC[harged]” on [date redacted], and “REH[ired]” into the Reserve that same day. PSC also submitted emails stating that the issue is whether the applicant retained his status as a designated aviator following his resignation of his Regular commission and receipt of a Reserve commission. The Reserve “does not have an aviation career path as there are no mobilization requirements that would necessitate any RC [Reserve Component] aviation assets or a SELRES [Selected Reserve] training program.” PSC claimed that the applicant’s allegation that Reserve aviators are sometimes placed on ADOS under flying orders is incorrect and it would be “contrary to existing CG assignment policies.” Therefore, there is no reason to continue the aviation designation or ACIP of active duty officers who resign and enter the Reserve.

PSC noted that COMDTINST 7220.39 may not clearly address the applicant’s situation because that instruction “is intended to manage aviation incentive pays for the Regular component (where the CG’s aviation mission exists) and was never envisioned to apply to members of the [Reserve] who were formerly designated aviators while a part of the Regular component.” PSC stated that the applicant’s case is not the same as that of the applicant in BCMR Docket No. 96-084 because that applicant did not resign his Regular commission and remained on active duty. The applicant’s “entitlement to ACIP ended along with his designated aviator status upon his resignation as a Regular officer and his former aviator status did not attach to his new commission in the [Reserve].”

The Chief of the Reserve Personnel Management (RPM) Division of PSC stated that the statute requires the officer to “remain in aviation service on a career basis,” but as a Coast Guard reservist, the applicant “is not engaging and remaining in aviation service ‘on a career basis.’” He stated that there are no aviation careers in the Coast Guard Reserve, and the applicant is not and has not performed any flying or other aviation duty as a Reserve officer.

The Chief of RPM stated that Congress’s use of the phrase “career basis” in the ACIP statute signals its intent “to retain critical skills in the service for probable future use. Congressional intent is not to retain aviators who probably will not fly again.” He further argued that even if someone decided, contrary to policy, that the applicant did not lose his aviator designation when he resigned, he should still not receive ACIP because he is not engaging and remaining in aviation service on a career basis, as the ACIP statute requires. The Chief noted that the statute authorizes the Secretary to prescribe regulations for ACIP, but no regulations have been prescribed to authorize ACIP for Coast Guard Reserve personnel.

Based on PSC’s submission, the JAG stated that the applicant had approximately 15 years of aviation service and more than 12 years of operational flying duty when he lost his aviator designation. However, the JAG stated, unlike the applicant in BCMR Docket No. 084-96,

the applicant lost the designation because he did not remain on active duty but resigned his commission.

The JAG stated that the only Reserve officers who receive ACIP are those junior officers accessed through the Direct Commission Aviator program and Officer Candidate School who start their careers on extended active duty contracts and are integrated into the Regular Coast Guard when they are promoted to lieutenant. They are not, like the applicant, “drilling reservists, who have no aviation billets anywhere in the Coast Guard, at any level.”

The JAG stated that the receipt of ACIP by active duty flag officers and those who have not flown for more than eight years “fulfills the very purpose of the statute, to incentivize officers to dedicate the majority of their career to aviation service. Once the 12 of 18 years gate has been passed, an officer is entitled to ACIP for the first 25 years of aviation service.” The JAG stated that if the applicant had remained on active duty, he would have continued to receive ACIP for 25 years whether or not he was assigned to an aviation billet, but “his aviation designation, and consequently his ACIP, ended when he elected to leave active duty.”

The JAG admitted that the Coast Guard differs from the other Armed Forces because the Coast Guard ended its Reserve aviation program in 1992. The other Armed Forces all have Reserve aviation programs. The JAG noted that Executive Order 13294 permits differing treatment based on the needs of the Service, and the “lack of a Coast Guard Reserve aviation program distinguishes us from the other uniformed services.”

The JAG stated that Coast Guard regulations state that aviation service stops when a member is separated and “will not normally be reinstated” if the termination is due to the officer’s voluntary acceptance of a change in status or entry into a program which does not require flight status. The JAG stated that even though the applicant subsequently joined the Reserve, he was separated from the Regular Coast Guard on [date redacted], and so lost his aviation designation on that date. Therefore, the JAG argued, the applicant’s request should be denied.

In support of these allegations, the JAG submitted a copy of a May 12, 2004, legal opinion regarding the request of a reservist for ACIP while he was serving on extended active duty as a Reserve Program Manager. The memorandum states that the flight status of the officer in question “was extinguished (ceased to exist), and you were no longer on an aviation career path within the Coast Guard” when he separated from the Regular Coast Guard. After the individual accepted a Reserve commission, his aviation designation could only be revived “by a Coast Guard decision to update your training, return you to flight status, and thereby, place you in an aviation career path.” “The fact that you held an aeronautical designation as a pilot in the Coast Guard prior to separating from the Coast Guard did not automatically effect your restoration to an aviator career path upon appointment in the Coast Guard Reserve and the entering of an extended active duty agreement (EAD).” The legal opinion also states that the officer’s aeronautical designation had “not terminated, but lapsed” upon his separation from the Regular Coast Guard and that the “mere hold of an aeronautical designation does not result in an entitlement to ACIP” because the officer must also “be in an aviation career path.”

The JAG also submitted copies of two decisions of the Comptroller General regarding



reservists' entitlement to ACIP. The first, dated April 17, 1979, states that an Army officer who voluntarily piloted aircraft while performing unpaid drills and also serving on continuous active duty for training (ADT) at the General Staff College for more than two years was not entitled to ACIP because he was "not performing aviation service on a career basis" even though he had been placed in a flying status to allow him to fly voluntarily. The second, dated January 9, 1989, states that a Coast Guard officer with approximately four years in aviation service lost his aviator status when he was voluntarily assigned to attend law school because the Commandant reasonably determined that as an attorney, the officer was no longer engaging in aviation on a career basis.

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

The applicant alleged that the Coast Guard has not adequately explained why a flag officer or a Regular officer who has not flown in eight years may continue to receive ACIP even though they will not serve in an aviation billet again, while a Reserve officer who could be recalled to extended active duty (EAD) and assigned to an aviation billet again is not. The applicant stated that he personally knows several Coast Guard Reserve lieutenants and lieutenant commanders who have served on EAD in aviation billets, as the emails from PSC indicated that he could in the future, and they have not been required to undergo any retraining.

The applicant pointed out that Reserve pilots need "incentivizing" to remain in the Reserve and available for recall to active duty as pilots just like active duty officer need it to remain on active duty.

The applicant objected to the Coast Guard's claim that he was separated and "rehired." He stated that he transferred from the Regular Coast Guard to the Reserve on the same day with no break in service. He noted that the Coast Guard cites no authority so "support the assertion that a transfer between active and reserve components is a separation for the purposes of loss of aviation designation." He argued that if this were true, such an important issue would be spelled out quite plainly in policy, but it is not. He alleged that members who transfer from the Regular Coast Guard to the Reserve "do not lose any other designations, ratings, or qualifications."

The applicant stated that the JAG's opinion misstates his record and erroneously denies that he met the "12 of 18" gate; fails to acknowledge, as PSC did, that Reserve officers are often recalled to active duty to fill aviation billets and receive ACIP; and includes no evidence or claim that the Coast Guard consulted with the other Service Secretaries before deciding not to pay ACIP to Reserve officers on inactive duty.

The applicant also argued that comparing his situation to that of a Reserve Program Manager is erroneous because a Reserve Program Manager performs continuous active duty in a non-aviation billet, whereas he is a drilling reservist who could be recalled to active duty to fill an aviation billet.

Finally, the applicant repeated his allegation that he never received any written notification of the revocation of his designation, as required by section 4 of Enclosure (1) to COMDT-INST 7220.39.

## 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 was timely filed.

2. The applicant alleged that since he became a drilling reservist, he has been erroneously and unjustly denied the continuous ACIP he received while on active duty by performing more than 12 years of operational flying duty. 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.<sup>3</sup> 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."<sup>4</sup>

3. Under 37 U.S.C. § 301a(d), pursuant to regulations prescribed by the President, an officer of a Reserve component receiving drill pay while on inactive duty is also entitled to receive ACIP for each drill performed calculated at the rate of 1/30<sup>th</sup> of the ACIP an officer receives if he is serving on active duty (i.e., is entitled to basic pay), holds an aeronautical designation, and is "qualified for aviation service under regulations prescribed by the Secretary concerned." Under 37 U.S.C. § 301a(a)(4), entitlement to continuous ACIP extends to 22 or 25 years of "aviation service," respectively, if the officer "perform[s] the prescribed operational flying duties ... for 8 of the first 12, and 12 of the first 18 years of the aviation service of the officer." "Aviation service" is defined by the statute as "service performed by an officer ... while holding an aeronautical rating or designation or while in training to receive an aeronautical rating or designation."<sup>5</sup>

4. Under the ACIP statute, therefore, any service performed while the applicant holds an aeronautical designation is "aviation service." And if he continues to hold his aeronautical designation as a reservist, his inactive service in the Reserve counts as "aviation service" and he should be entitled, under regulations prescribed by the President, to ACIP even for drills since he clearly met the "8 of 12" requirement.<sup>6</sup> Therefore, the critical issue in this case is whether the applicant's aeronautical designation ended when he resigned his Regular commis-

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<sup>3</sup> 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)).

<sup>4</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>5</sup> 37 U.S.C. § 301a(a)(6)(A).

<sup>6</sup> The Board notes that if a drilling Coast Guard reservist cannot hold an aeronautical designation, then the applicant's inactive service is not "aviation service" and it is questionable whether he can meet the "12 of the first 18 years of the aviation service" gate since he did not perform 18 years of aviation service before he resigned his Regular commission.

sion. If it did not, then his inactive service in the Reserve is “aviation service,” and he should be entitled to ACIP.

5. The Coast Guard insists that by policy the applicant’s aeronautical designation ended when he resigned his Regular commission and accepted a commission in the Reserve. As the applicant noted, there apparently is no regulation that expressly addresses this subject, but there are two regulations that refer to it obliquely:

- Paragraph 1.h. of Enclosure (1) to the COMDTINST 7220.39 states that “[a]viation service stops accumulating on the date a member loses the aviation designation, including when the member is separated from the uniformed services.”
- Article 4.A.1.p. of COMDTINST M1000.3 states that once a former Coast Guard aviator’s “flight status” has been terminated, he “will not normally be reinstated in flight status when the removal from flight status was a result of any of the following: ... (3) Voluntary acceptance of a change in status or entry into a program which does not require flight status ...”

6. The Coast Guard’s interpretation of these regulations to mean that when a Coast Guard aviator resigns his Regular commission, his aviation service and his aeronautical designation automatically terminate is entitled to some deference.<sup>7</sup> The Board finds the interpretation to be reasonable even if the officer then accepts a Reserve commission. Although the applicant alleged that he was “transferred” from the Regular Coast Guard to the Reserve on [date redacted], he was in fact separated from a “uniformed service”—the Regular Coast Guard—when he resigned his commission. The fact that he then accepted a Reserve commission does not negate the fact that he was separated from the Coast Guard. Nor has the Board found any regulation stating that a former aviator’s aeronautical designation is automatically renewed or continued if he accepts a commission in the Coast Guard Reserve.

7. The applicant complained that he was never notified in writing that his aeronautical designation had ended. However, the regulations he refers to in Article 4.A.1.g. address the suspension and revocation of an aviator’s designation for cause. The fact that they do not mention that the designation ends when an officer resigns his commission does not persuade the Board that the applicant’s designation must be deemed to have continued past his resignation because he was not notified that his designation had been suspended or revoked.

8. The applicant argued that Coast Guard regulations impermissibly differ from those of the other Armed Forces, whose reservists may receive ACIP. Executive Order 13294

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<sup>7</sup> *Prochazka v. United States*, 104 Fed. Cl. 774, 789 (2012), citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (holding that if a statute is “silent or ambiguous with respect to the specific issue,” an agency’s interpretation must be sustained, if it is “based on a permissible construction of the statute”); *Collins v. United States*, 101 Fed. Cl. 435, 441 (2011) (“the military is entitled to great deference by the judicial branch when conducting its affairs”), citing *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953) (“judges are not given the task of running the Army”); *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.”).

states that, when prescribing ACIP regulations, the “Secretaries shall consult each other in the exercise of such authority to ensure similar treatment for similarly situated members of the uniformed services unless the needs of their respective uniformed services require differing treatment.” The JAG explained that the Coast Guard’s regulations differ because, while the reserve components of the Army, Navy, and Air Force have aviation career paths and aviators who are allowed to fly even while serving on inactive duty, the Coast Guard does not. The Board finds that this significant difference justifies the differing treatment allowed under the Executive Order.

9. The applicant argued that the Coast Guard’s policy is misguided and unjust because pilots serving in the Reserve are sometimes recalled to serve on extended active duty as aviators, and pilots need “incentivizing” to remain in the Reserve so that they will be available for recall, just as much as aviators need it to remain on active duty. The applicant’s arguments appear to be sound, but the Board does not make Coast Guard policy. The Coast Guard’s policy about aeronautical designations and the Reserve is not prohibited by statute or regulation, and its consequences for the applicant are not erroneous and do not shock the Board’s sense of justice.<sup>8</sup>

10. Accordingly, the applicant’s request should be denied because he has not proved by a preponderance of the evidence that the Coast Guard’s refusal to pay him ACIP as a drilling reservist is erroneous or unjust.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

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<sup>8</sup> For the purposes of the BCMRs, “[i]njustice’, when not also ‘error’, is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal.” *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976).

**ORDER**

The application of [REDACTED] USCGR, for correction of his military record is denied.

