

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2008-130**

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**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 on May 20, 2008, upon receipt of the applicant's completed application, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 26, 2009, 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 is a former first class cadet (1/c) at the United States Coast Guard Academy who was disenrolled at the end of his fourth and final year at the Academy without a degree or a commission. He asked the Board to order the Coast Guard to award him a Bachelor's Degree from the Academy and a commission as a regular officer. The applicant alleged the following:

I completed all classes and subjects with passing grades and earned my degree. I was unable to pass the Commissioning Physical Fitness Exam (PFE) due to medical conditions that occurred at the Academy; specifically a pilonidal cyst<sup>1</sup> with surgeries, and an acquired scoliosis with bulging L4 and L5 discs. It is my contention that had I been given appropriate care and physical therapy immediately following my final surgery, I would not have developed my subsequent back problems and I would have successfully completed the PFE and graduated with my class.

Furthermore, if the Board denies him an officer's commission, the applicant asked the Board to correct his record to show that he was discharged as a boatswain's mate second class

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<sup>1</sup> A pilonidal cyst is an abnormal pocket in the skin at the base of the spine, which is caused by ingrown hair or some other debris. Such a cyst may be asymptomatic or it may become infected and form an abscess. The initial treatment is usually incision and drainage with removal of the ingrown hair or other debris, and this treatment is effective for 50 to 60 percent of patients. If this treatment is not effective, a surgeon may perform an excision of the cyst. *See* <<http://www.mayoclinic.com/health/pilonidal-cyst/DS00747>>.

(BM2/E-5) instead of a BM3/E-4. He alleged that section 2-6-03 of the Regulations for the Corps of Cadets states the following:

First and Second Class cadets who accepted an appointment without any prior obligation to the Armed Forces of the U.S. who resign or who are disenrolled or summarily dismissed will be transferred to the "Individual Ready Reserve (RJ)" in the rating of Boatswain's Mate second class or Boatswain's Mate third class respectively (Seaman, if disenrolled for Suitability for Service reasons), for a period of service equal to their service as a cadet.

In support of his allegations, the applicant submitted copies of his medical records, which are included in the summary of the record below.

### **SUMMARY OF THE RECORD**

On June 30, 2003, the applicant reported to the Academy as a fourth class cadet (4/c). He had graduated from high school with a 3.85 grade point average and was ranked 35<sup>th</sup> out of 310 graduating students. His SAT scores were 620 and 610 for the verbal and mathematics tests, respectively.<sup>2</sup> His admissions package indicates that he was 5'5" tall and weighed 135 pounds, but other medical records show his height as 5'3".<sup>3</sup> His application for admission states that he was a member of his high school's wrestling team. As part of the admissions process, the applicant took a PFE<sup>4</sup> and scored a total of 239 points. Pursuant to his enrollment, he signed a "Statement of Acceptance and Obligation," which states the following in pertinent part:

I have taken the five-part CGA Practice Physical Fitness Examination (PFE). If my score was less than 250 points, I understand that I must maintain a score of 250 points or greater while a Cadet at the Academy and that I will be placed on probation if my score is less than 250. I understand that I will take the PFE within two weeks of reporting to the Academy. If I receive fewer than 200 points, I understand that I will be recommended for disenrollment.

If I complete the course of instruction at the Academy and accept an appointment as a commissioned officer, I agree to serve at least five years as an officer in the Coast Guard.

If I am separated from the Academy after commencement of my third academic year, I may be transferred to the United States Coast Guard Reserve in an appropriate enlisted grade or rating in an inactive status.

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<sup>2</sup> According to the Academy's website, this year the mean SAT scores for incoming cadets were 639 for math and 617 for verbal; the average high school grade point average was 3.8; and about 50% of incoming cadets ranked in the top 10% of their high school class.

<sup>3</sup> Under Figure 3-C-3 of the Coast Guard Medical Manual, the minimum height for an officer is 5'.

<sup>4</sup> A score sheet in the applicant's record shows that he took this test on January 17, 2003. The total score was a combined score based upon (a) how many pull-ups the person can do at one time; (b) how many sit-ups the person can do in two minutes; (c) how many inches the person can long jump; (d) how much time the person takes to perform a 300-yard shuttle run; and (e) how much time the person takes to run or walk 1.5 miles. A minimum score of 250 out of 500 possible points was required to be retained as a cadet, and a passing score of 325 was required to be eligible for a commission as an officer. In the fall of 2006, the PFE was modified. The new test consists of cadence push-ups, curl-ups (a type of sit-up), and a 1.5 mile run. The minimum score for retention as a cadet was set at 155 out of 300 possible points, and the passing score to receive a commission is 200.

If I complete the course of instruction at the Academy and I decline to accept an appointment as a commissioned officer, I may be transferred to the Coast Guard Reserve for four years of active duty.

The applicant's cumulative class rank as determined by his military precedence average (MPA), his scores on the military precedence index (MPI), term and cumulative grade point averages,<sup>5</sup> and PFE scores for each school term are recorded in his record as follows:

<b>Term</b>	<b>MPA<sup>6</sup></b>	<b>Term MPI<sup>7</sup></b>	<b>Term GPA</b>	<b>Cum. GPA</b>	<b>PFE Score/Grade</b>
Fall 2003	256/279	61/100	1.99	1.99	290/D
Spring 2004	238/264	63/100	2.12	2.05	301/D
Fall 2004	242/255	64/100	1.95	2.02	248/F
Spring 2005	235/250	71/100	2.29	2.09	295/D
Fall 2005	228/241	70/100	2.75	2.23	none
Spring 2006	226/238	83/100	2.35	2.24	none
Fall 2006	234/238	69/100	2.12	2.23	132/F
Spring 2007	236/237	61/100	2.57	2.27	181/D

Comments on performance evaluations in the applicant's record indicate that he had persistent trouble meeting academic and physical fitness standards but was very involved in several extracurricular activities, including the Windjammers Drum and Bugle Corps and the Regimental Band. The Academy's website indicates that in addition to their academic classes, cadets have a two-hour period for athletic training and two one-hour periods for military training or activities each weekday.

In August 2004, the applicant scored 248 total points on the PFE, which was below the 250 minimum standard for retention of a cadet. Therefore, on September 3, 2004, he was placed in a "suspended disenrollment status" and notified that if he did not meet the minimum standard upon a retest by October 8, 2004, he would be recommended for disenrollment. The applicant was placed on Fitness Probation and enrolled in Level II Remedial Physical Training. The Director of Athletics noted that there were "no extenuating circumstances to explain why he failed to meet minimum standards." In addition, on September 14, 2004, a doctor found that the applicant had no medical conditions that would preclude successful completion of the PFE.

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<sup>5</sup> The Academy's Catalog of Courses indicates that it uses a 4.00 scale on which 1.00 denotes a "barely passing" D grade; 1.70 denotes a "barely satisfactory quality" C- grade; 2.00 denotes a "satisfactory quality" C grade; and 2.30 denotes a "very satisfactory quality" C+ grade.

<sup>6</sup> The Military Precedence Average (MPA) determines a cadet's precedence within the class (class rank) and ultimate position on the active duty promotion list if he receives a commission. In adding up a cadet's MPA, his cumulative GPA counts for 70%, his cumulative MPI (see footnote 7 below) counts for 25%, and his Physical Development Competency (PDC), which is a combination of his PFE and swimming scores, counts for 5%. UNITED STATES COAST GUARD ACADEMY, REGULATIONS FOR THE CORPS OF CADETS, sec. 3-3-03.

<sup>7</sup> The Military Precedence Index (MPI) is a numeric measure of a cadet's military performance. Each cadet may earn up to 100 points each term based on their summer performance evaluations, personal conduct, afloat qualifications, and task list completion. *Id.* at sec. 3-3-04.

On September 29, 2004, the applicant scored 276 points on the PFE and was subsequently removed from suspended disenrollment status. The Head of the Department of Health and Physical Education sent the applicant a memorandum dated October 6, 2004, noting that because the applicant had not yet met the commissioning standard of 325, he would be placed in Level I Remedial Physical Training. He further advised the applicant of the following:

3. You will not be released from Level I Remedial Physical Training until you have met the commissioning standard at an official re-test date. It is your responsibility to fully adhere to the remedial training program and to meet the commissioning standard as soon as possible. Once you have, it is also your responsibility to maintain this level of physical fitness or exceed it.
4. Finally, remember that first class cadets must meet the commissioning standard at the January PFE of their first class year or they will be recommended for disenrollment.

On January 27, 2005, the applicant was placed on academic probation. He was advised that he would remain on probation until he showed “significant and sustained improvement.” Comments in the applicant’s record indicate that his poor grades were attributed to a “hobby of watching movies.” In the summer of 2005, the Academic Review Board recommended his retention because his GPA was slowly rising. The applicant remained on academic probation until February 22, 2006.

On August 8, 2005, the applicant was diagnosed with a pilonidal cyst above the gluteal cleft after he complained of pain, “especially when attempting sit-ups.” However, palpation indicated there was no abscess. The applicant was placed on fit for limited duty (FFLD) status for ten days and prescribed Keflex and Naprosyn.<sup>8</sup> On August 17, 2005, he was found fit for full duty (FFD).

On September 9, 2005, the applicant complained of pain in the area of the pilonidal cyst when doing sit-ups. He was found FFLD and advised not to do sit-ups for 30 days. On October 17, 2005, a physician’s assistant noted that an abscess had formed and continued his FFLD status. The applicant was again prescribed Keflex and Naprosyn. On November 10, 2005, a doctor incised and drained the cyst. On November 28, 2005, the applicant was referred to a surgeon, Dr. A, for a consultation about excising the cyst.

On January 9, 2006, the applicant underwent surgery by Dr. A to excise a recurrent pilonidal cyst. However, the wound did not heal properly, and the applicant underwent another excision on April 3, 2006. The applicant was in FFLD status throughout this period and prescribed painkillers, including Percocet. A medical note dated February 1, 2006, states that his FFLD status meant “no sit-ups, running, or jumping.” Another note, dated March 1, 2006, states that he was FFLD with “no sit-ups, no hard running” for 30 days.

The applicant’s medical record contains Dr. A’s notations of post-surgical follow-up examinations describe the healing of the wound. Dr. A’s final note, dated May 12, 2006, states that the applicant “is feeling well”; that the majority of the wound was completely intact but the

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<sup>8</sup> Keflex is an antibiotic drug. Naprosyn is a nonsteroidal anti-inflammatory drug. See <<http://www.drugs.com>>.

lower 2 to 3 millimeters showed “a slight bit of tracking but otherwise clean at the current time”; and that the applicant would be away for the next three months. A medical note in the record dated June 17, 2006, shows that the applicant was FFD.

On September 1, 2006, the Director of Athletics recommended to the Superintendent of the Academy that the applicant be placed in a suspended disenrollment status because he had scored 132 points on the August 2006 PFE, while the new minimum standard for retention of a cadet was 155 points. The Director of Athletics noted that the applicant did not take the PFE in the fall of 2005 or the spring of 2006 because of medical issues, but that the Head of the Department of Health and Education had found that “no extenuating circumstances to explain why [the applicant] failed to meet minimum standards.” He further noted that the applicant would be placed on in Level II Remedial Physical Training and on Fitness Probation. The Head of the Department of Health and Education noted that the applicant had attributed his performance on the PFE to “a long recovery from his surgeries last year” but that the applicant had been “fit for duty for his summer assignment.”

On September 5, 2006, the Superintendent of the Academy notified the applicant that he had been placed on Fitness Probation in suspended disenrollment status because of his failure to meet the new minimum standard for retention of 155 points on the August 2006 PFE. He advised the applicant that he would be disenrolled if he failed to meet the minimum standard on a retest by October 16, 2006. The Superintendent further informed him that if he did not accept the terms of the suspension, he could submit a letter of resignation or be disenrolled and that if he were disenrolled, he could appeal that action.

On November 3, 2006, the applicant underwent a physical examination pursuant to his eligibility for a commission. On his Report of Medical History, the applicant denied ever having suffered from back pain. The doctor noted that the applicant had undergone an excision of a pilonidal cyst but that there were no sequelae and the condition was not disabling. The applicant was deemed fit for full duty.

On December 4, 2006, the Superintendent informed the applicant that he had been removed from suspended disenrollment status. The applicant had exceeded the minimum retention standard for cadets by scoring 165 on the PFE by October 16, 2006. The Superintendent also reminded the applicant that he needed to meet the commissioning standard of 200 points. The notification indicates that the applicant was to remain on Fitness Probation and in Remedial Fitness Level II Training until he met the commissioning standard.

The applicant failed the PFE for commissioning in January 2007. His total score was 181 out of 300 possible points. The minimum passing score for commissioning is 200. A summary of his prior PFE tests printed from the Academy’s database on January 18, 2007, shows that he usually performed well on the push-ups, scoring more than 70 out of a possible 100 points; that on curl-ups (sit-ups), he usually scored about 50 out of a possible 100 points; and that on the 1.5 mile run, he was usually slow and scored less than 50 points.

On January 19, 2007, the Director of Athletics at the Academy sent a memorandum to the Academy Superintendent recommending the suspension of the applicant’s disenrollment:

1. I am recommending that [the applicant] be placed in a suspended disenrollment status due to his failure to meet the 200 point commissioning requirement on the Jan. 2007 Physical Fitness Exam (PFE). I recommend that he be required to pass this standard prior to March 2, 2007. Further, he should be placed on Fitness Probation for the entire semester and be required to take all re-tests. If his scores regress, he should be disenrolled.

2. [The applicant] scored 181 points. He has not met the commissioning standard before, but he did make progress in the remedial program and over leave in the fall semester. He is currently enrolled in a Level 2 remedial fitness program under the supervision of the Health and Physical Education faculty. If he cannot meet the fitness standard in a timely manner, his ability to perform as an officer in the U.S. Coast Guard is in doubt.

The Director of Athletics attached to this memorandum a report from the Head of the Health and Physical Education Department, which included the following information:

PFE History: [The applicant] scored 181 points on the most recent test. Last semester, he scored 132 points, and was placed in suspended disenrollment status with Fitness Probation/Remedial Level II. He later scored 165 points and was removed from suspended disenrollment status. He also made progress over leave. [His] PFE history is weak. He has never met the commissioning standard. His grades are the equivalent of three D's and four F's. He did not take the test in the fall of 2005 or the spring of 2006 due to a medical condition.

For the Record: [The applicant] did not have any extenuating circumstance to explain his failing performance on the PFE. He did, however, make progress toward the commissioning standard over leave period.

Cadets are expected to develop a lifelong commitment to physical activity and to serve as a role model in their future positions as officers. [The applicant's] failure to maintain minimum fitness standards brings into question his ability to serve as an officer in the U.S. Coast Guard.

On January 30, 2007, the Superintendent of the Academy sent the applicant a Notification of Suspended Disenrollment, which stated the following:

1. Based on a review of your cadet record and a recommendation from the Director of Athletics, I have decided to retain you as a cadet in a suspended disenrollment status.

2. You have failed to meet the minimum standards on the Physical Fitness Examination (PFE). As a result, you have been placed in a remedial fitness program as well as Fitness Probation status. You will be retested no later than 2 March 2007. Failure to meet the 200 point minimum standard by that date will result in your disenrollment. In addition, you will remain in Fitness Probation status until the end of the semester and will take every retest. If your scores regress on any of those tests, you will be subject to disenrollment.

3. If you do not elect to accept the stipulations outlined above, you have five (5) working days from the delivery of this letter to submit a letter of resignation or be disenrolled. If disenrolled, you have the right to appeal this action to Commandant (CG-1) within five (5) working days of being notified. Please be advised that a request for reconsideration can be entertained only if you present compelling evidence of extraordinary circumstances that prohibited you from performing at a satisfactory level. You are strongly encouraged to consult with your Company Officer to discuss your plans and to assist you in this matter.

On March 8, 2007, the Superintendent of the Academy informed the applicant that he was being disenrolled from the Academy:

1. I am disenrolling you from the Coast Guard Academy. I find you unsuitable for service as demonstrated by your failure to pass the commissioning standard on the physical fitness exam (PFE). I have considered your overall Academy performance in my decision to disenroll you. You will be discharged with your character of service listed as honorable. You will receive the following separation code on your DD 214: JHK (Involuntary discharge directed by established directive when a member's performance is below accepted standards). You will be transferred to the Individual Ready Reserve in the boatswain's mate third class rating for the time equal to your time as a cadet.
2. Your failure to achieve the minimum physical fitness standard is far from what is expected within our officer corps and within the Corps of Cadets as outlined in [Regulations for the Corps of Cadets, SUPTINST M5215.2 (series)].
3. You have the right to appeal this action to my superior, Commandant (CG-1), within five (5) working days of the receipt of this letter. ...

On March 20, 2007, the applicant submitted a letter appealing his disenrollment based on "legitimate mitigating and extenuating circumstances as to why I have not passed the Physical Fitness Exam (PFE) as of yet." The applicant wrote the following:

2. I recognize the fact that I have not passed the PFE but feel that it does not define me. I have not abandoned the Core Values of the Coast Guard nor do I act in a way that is unbecoming of a Coast Guard Officer. I have been the Drum Major for the Windjammers Drum and Bugle Corps for the past four seasons, starting in a leadership position as a 4/c cadet. I have also taken the Drum Major position for the Regimental Band and I even was awarded the "Best Overall Drum Major" at the Military School Band Festival where I acted in a professional manner and garnered positive press for the Coast Guard and the Academy. In addition to being Regimental Drum Major during the school year, I was also the Battalion Band Drum Major instructing new cadets during the Swab Summer training period. I was not ordered to do so, but I undertook the responsibilities on my own. This was an extra duty in addition to the responsibilities I had as a Swab Summer squad leader. I have also been able to maintain a C average since switching to the Government major and having overloaded semesters. I received a silver star for being on the Commandant of Cadet's list for the spring of 2006 indicating a high level of military performance. I have also been mentoring 4/c cadets in macro economics class which displays more leadership skills and I helped them achieve higher marks on exams and quizzes. I am also a department head within my company, taking more leadership within the company while having an increased academic schedule.
3. Instead of being disenrolled from the USCGA, I ask for you to consider a few potential alternative options. First, I propose that the deadline for passing the PFE be the final PFE of the semester, on 25 April 2007. If I pass at that time then it would be like I had not been on disenrollment. However, if I fail, I would be considered an extended opportunity cadet. This is an option that has been offered to cadets in years past. Once the PFE was passed, I would receive my commission with the extended cadets and report to my unit, USCGC ACTIVE.

Another option would be to allow me to receive my diploma and commission but remain attached to the USCGA. I will forgo the thirty days of liberty and remain here for the summer as a Summer Ensign. I would continue to train and upon completion of the PFE and the summer program I would then report to my unit.

A third option would be to let me reapply to the U.S. Coast Guard Academy and repeat my current semester, either graduating with the extended opportunity cadets if the semester was repeated in the fall or with the class of 2008 if this semester was repeated in the spring.

A last option would be to let me graduate with my diploma and not a commission. I have earned those academic credits and ask to be able to graduate with them, as it is well past the mid-term mark of my final semester.

4. [Superintendent and Commandant of Cadets], I also respectfully request an audience with you individually before this appeal is sent to the CG-1 level.

5. During 2/c summer [2005], I began to notice intense pain from my tailbone area with visually noticeable open sores. I used conventional first aid type remedies but nothing worked. Finally after the coastal sail training phase of the summer was over, I went to the Academy clinic to find out what the problem was, as it had not been getting better, only worse.

At the clinic, I found out that I had a pilonidal cyst affecting the layers of my skin on my tailbone. It was heavily infected and causing intense pain whenever I would sit or put any kind of pressure on the area. I was given a chit for limited duty, including instructions not to take the PFE. I was being treated with antibiotics to avoid having to go through surgery. For weeks I was responding positively to the drugs but then the conditions worsened. The sores were reappearing worse then ever and the antibiotics became ineffective. This was early November [2005] and I had not yet taken the fall PFE. The sores were so infected I had to be admitted to the Academy clinic for immediate surgery. This surgery was to remove all infected material from the area to prepare for the actual surgery that would sew everything back together. The immediate surgery was a success but I was not able to sit with any ease and I still could not put any pressure on the area. I had not fully recovered at the onset of Winter Break.

As soon as I returned from Winter Break, I was admitted to the hospital for surgery completed by [Dr. A], General Surgeon, [with] whom I had previous appointments charting the condition of the pilonidal cyst. Recovery was slow from that surgery as I had to go to many follow-up appointments to cauterize the sutures and for continued maintenance. Because of the surgery and the continuous appointments, I was still on limited duty, not to take the PFE, and I remained on intense prescription medications for the majority of the semester.

However, the area did not heal right after the surgery and I was forced to go back into the hospital for another surgery. This was in March of 2006. I had to continue routine follow up appointments, and I was unable to take any of the spring semester PFEs because of these medical reasons. I spent the majority of the semester on limited duty and in the issued running suit as opposed to the uniform, as I could not wear the uniform properly over the bandages. I spent most of the time on Percocet and other pain killers to alleviate the pain of sitting or any kind of pressure on the area.

I was only cleared by [Dr. A] to leave for my 1/c summer trip a couple of weeks before my departure. I was told not to exert myself and not to start exercising until I was completely comfortable and could do so without any pain. I reached this point about half way through my 1/c summer when I was on USCGC EAGLE. I was on the USCGC RESOLUTE previously, but during that time I still had pains while exercising and I was not comfortable putting myself in a situation where I would need that degree of medical attention that far away from the Academy and the surgeon who operated on me. I only felt comfortable to begin exercising while aboard the EAGLE. This was in late July/early August of 2006. I worked to get back to my previous level of fitness onboard and while I was home during summer leave. However, this was not enough as I earned a 132 on the fall semester PFE.

Since then I have been on Level II remediation and have improved my scores. Coming back from this past winter leave, I achieved a score of 181 showing much improvement. Scores

since then have been around that with some lower, but I have not given up. I have taken the fitness advice from [the coach] and the other coaches of the HPE staff and completed workouts issued from them and the Cadet Level II division led by [a 1/c cadet]. I have rarely missed the scheduled workouts and the only times I had were for legitimate reasons, such as a class field trip to Washington, D.C. I have been faithful to the given nutritional advice and have lost over ten pounds this semester. I have followed all the workouts and protocols. I have stayed strong in my resolve and I have really made fitness a part of my lifestyle, not just something to maintain during my time at the Academy.

Along with his appeal of the disenrollment, the applicant submitted several letters from faculty members who supported his request for an extension of the deadline to pass the PFE based on the Coast Guard's investment in his education and on his recent efforts, positive attitude, good character, leadership in the band, commitment to the Coast Guard, and his extenuating circumstances of being FFLD for most of his 2/c year and of having to take six courses during the spring 2007 term. (The applicant had to take six classes during his final term in order to graduate because he had failed a class, Macroeconomic Principles, which was a requirement for his major, during the fall 2006 term.) The applicant also submitted a letter from a first class cadet who served as the Level II PFE division officer during the 2006-2007 academic year. This cadet stated that he had seen the applicant "come to morning workouts, fully exhaust himself taking the PFE, cheer others on, and maintain a determined and optimistic attitude." He stated that the applicant "has approached the PFE as a process and continuously strives to improve upon his performance." He described the applicant as a hard-working and friendly cadet with good "personal skills." He further noted, "When I watch cadets like [the applicant] run the PFE during retakes, I am truly inspired because I know the effort they put into preparing for every test because I am there to train with them, and I can feel how much they want to pass – want to be able to have numbers which testify to the work they have done. ... [The applicant's] potential is not diminished by his PFE score, and there is still time for improvement, and for us to continue to support him in his pursuits."

In addition, the applicant submitted statements from medical personnel. Dr. A wrote that the applicant "had a pilonidal cystectomy on January 9, 2006. He failed to heal and had to have a repeat pilonidal cystectomy on April 3, 2006. [He] had slow progress healing and was unable to do aggressive physical activity. His healing progressed and he was not released until May [2006] to return to normal physical activity." A nurse at the clinic wrote about the applicant's positive attitude and commitment to the Coast Guard. A lieutenant who treated the applicant for the better part of a year, until the lieutenant's transfer from the Academy in May 2006, wrote that the applicant

had a pilonidal cyst which affected the area around the buttocks. He had several severe infections which needed to be drained and subsequently needed surgery which I believe was done by [Dr. A] locally and L&M Hospital. He recovered just prior to my departure and was put on fit for full duty status to start working out again. In my experience, this problem can take 8 – 12 months to fully recover from to the point where a person can do sit-ups and run effectively. While I was stationed at the Academy from June 2002 to May 2006, I had several cadets with this problem and it took most of them approximately 1 year to pass the PFE. ... I would recommend that the Academy allow him more time to pass the PFE assuming this is the only issue. I believe he had passed the PFE his first 2 years there and I know he should be able to pass it soon again. I would still consider him fit to do virtually any job that an officer in the Coast Guard is expected to do upon graduation.

The applicant's appeal was forwarded to the Commandant through the Commandant of Cadets and the Superintendent of the Academy, both of whom recommended that the appeal be denied. On April 2, 2007, the Superintendent forwarded the appeal to the Commandant with the following memorandum:

1. Forwarded, recommending denial of [the applicant's] appeal. I have considered his entire cadet record in making this recommendation. Although [he] has made many noteworthy contributions to the Coast Guard Academy during his tenure as a cadet, he is not physically qualified for commissioning.
2. Per [Regulations for the Corps of Cadets], letters of recommendation supporting retention of a cadet will only be accepted from Academy faculty, staff, or coaches. Letters of recommendation from non-Academy civilians and cadets in support of other cadets being involuntarily disenrolled are not normally accepted and were not forwarded with [his] appeal.
3. Despite being given repeated opportunities to do so, in the four years [the applicant] has attended the Academy, he has *never* been able to fulfill the Academy's physical fitness graduation requirement of passing the Physical Fitness Examination (PFE) with a score of 200, or the pre-Fall Semester 2006 standard of 325 points or more. While his appeal and letters of recommendation from others place considerable emphasis on his medical condition during his second class [i.e., third or junior] year, they fail to mention that he never met the commissioning standard before his medical condition occurred, either.
4. The cadet regulations specifically state, "The commissioning/graduation standard for the PFE is 200 points on the January PFE of their first class [i.e., fourth or senior] year. Failure to achieve this standard will result in a recommendation for disenrollment. All cadets should strive for this standard throughout their cadet career." [The applicant's] effort and performance on the PFE have consistently been less than stellar. To date his PFE grades and scores are:

	<u>Grade</u>	<u>Score</u>
Spring 2007	D	181
Fall 2006	F	132 [passing score changed to 200 <sup>9</sup> ]
Spring 2005	D	295 [passing score through this term was 325]
Fall 2004	F	248
Spring 2004	D	301
Fall 2003	D	290
Summer 2003	F	202

Furthermore, [the applicant's] PFE re-test on 20 March 2007 actually put him below the minimum 4/c [freshman] standard of 155 points with a total score of 144 points. On 28 March, he took the test again and received 169 points. While an improvement, this is still below the required passing score of 200 as well as his spring score of 181.

5. Further, [the applicant] states that his medical condition from his second class year prohibited him from successfully completing the PFE during his first class year. [He] states that his final operation occurred in March 2006, and that he began exercising in late July/August of 2006. That was eight months ago. I feel he has had ample time to get himself physically conditioned to complete the PFE at the class standard of 200 points.

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<sup>9</sup> The PFE scoring system changed between the spring 2005 and fall 2006 terms. From the applicant's matriculation in 2003 through spring 2005, the passing grade on the PFE for commissioning was 325 out of 500 possible points. Beginning in fall 2006, the test was changed and the passing grade became 200 out of 300 possible points. See footnote 4 above for further explanations of the different PFEs.

6. [The applicant] offers a number of options by which he should be allowed to graduate and/or granted additional time to pass the PFE requirements. None of these are reasonable considering he has had four years to pass the PFE. The resources by which [he] could overcome any deficiencies cited in his appeal have been available to him at the Academy, but he has never fully utilized them despite numerous substandard PFE scores.

7. Coast Guard officers are required to maintain a high level of physical fitness in order to accomplish a myriad of tasks at their units. As future leaders in our service, I expect cadets who graduate from the Coast Guard Academy to set a positive example for junior personnel when it comes to physical fitness. [The applicant] has failed to uphold this standard.

8. [The applicant] is ranked 234 of 238 cadets in his class. He had a 2.23 cumulative grade point average at the beginning of the spring 2007 academic semester. He is a member of the Windjammers Drum and Bugle Corps.

On April 30, 2007, the applicant went to the Academy clinic and stated that he believed that his pilonidal cyst might be returning because he felt irritation in that area. The doctor noted that the applicant was “preparing for his PFE ... [which] will be tomorrow (a make-up PFE since he has not pass[ed] the [PFE]), not a limitation from the pilonidal scar irritation but his physical conditioning ability.” The doctor noted that the applicant’s “feared medical condition [was] not demonstrated” and released him without limitations. She advised the applicant that he could do sit-ups while sitting on a “doughnut.”

On May 21, 2007, the Commandant deferred the applicant’s disenrollment and sent him the following notification:

1. After careful review of your appeal, the Superintendent’s recommendation, and your entire record of performance, I am deferring my decision to act on your appeal.
2. You will be retained in your current status as a cadet and spend a portion of the summer attached to the Academy. While assigned to the Academy, you will be assigned duties as prescribed by the Commandant of Cadets. However, you will be afforded not less than 2 hours/day to train physically and prepare yourself for passing the Physical Fitness Exam (PFE). It will be your responsibility to focus on the necessary physical fitness shortcomings you need to overcome in order to pass the PFE.
3. You will be required to pass the PFE by 1 Aug. If you pass the PFE by this date, you will graduate and be commissioned with a date of rank coinciding with the date that you pass the PFE. If you do not pass the PFE by 1 Aug., you will be disenrolled. In the latter event, you will not be awarded either a commission or a degree. There will be no subsequent extensions of this date.

Also on May 21, 2007, the applicant began undergoing supervised physical training each day. His record contains the work-out schedule given to him by a physical therapist at the Academy and his daily exercise logs for May 21 through July 31, 2007. These logs show that the applicant took “practice” PFEs on May 31, June 7, June 21, and July 5 and five official PFEs on June 12, June 28, July 12, July 26, and July 31, but his scores on these PFEs are not shown. The logs also show that beginning on June 4, 2007, the applicant complained of lower back pain during his workouts every day.

On July 10, 2007, a doctor noted that the applicant had been referred for an evaluation because of his inability to pass the PFE. The doctor wrote that the applicant reported having

“difficulty with sit-ups” and that a physical therapist had told him he might injure himself “due to excessive lordosis” in his lumbar spine.<sup>10</sup> The doctor noted that the applicant “stands with increased lordosis of L-spine [lumbar spine]” but had a full range of motion in his back and hips, good strength, and no tenderness. The doctor stated that the result of the physical examination was “normal” but recommended that the applicant receive “alternative PFE testing.” The doctor ordered xrays.

A radiology report dated July 10, 2007, states that the applicant had some levoscoliosis<sup>11</sup> but that the “degree of lumbar lordosis is unremarkable. No spondylosis or spondylolisthesis is evident.”<sup>12</sup> Contrarily, however, on July 17, 2007, a doctor wrote in the record that the xray indicated that the applicant had acquired lordosis and “spondylolisthesis at several levels of L-spine.” Therefore, he ordered a CT scan of the applicant’s lumbar spine to investigate the “provisional diagnosis” of “acquired deformity—spondylolisthesis.” However, the CT scan, taken on July 25, 2007, revealed that the applicant had “mild left lumbar scoliosis”; “normal alignment without subluxation”<sup>13</sup>; “slight bulging of the L4 and L5 discs”; and “[n]o evidence of disc herniation or spinal stenosis.”<sup>14</sup>

The applicant’s scores on his PFE retests in June and July 2007 are not in the record before the Board. However, on August 2, 2007, the Superintendent sent the applicant notification of his disenrollment from the Academy based on his failure to pass the PFE by August 1, 2007. The Superintendent noted that the applicant would not be awarded either a commission or a degree and that, instead, he would be transferred to the Individual Ready Reserve as a BM3/E-4 for four years. The applicant was honorably discharged from active duty on August 9, 2007, due to “Unsuitability, Substandard Performance,” with a JHK separation code.

## IEWS OF THE COAST GUARD

On October 21, 2008, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny the applicant’s request.

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<sup>10</sup> “Lordosis” is an abnormal increase in the curvature of the lumbar spine and is sometimes called “sway back” or “saddle back.” DORLAND’S ILLUSTRATED MEDICAL DICTIONARY, 29<sup>TH</sup> ED. (W. B. Saunders Co., 2000), p. 1027.

<sup>11</sup> “Scoliosis” is a “lateral deviation in the normally straight vertical line of the spine.” The prefix “levo-“ means “to the left.” *Id.* at 987, 1612.

<sup>12</sup> “Spondylolisthesis” is the “forward displacement (olisthy) of one vertebra over another, usually of the fifth lumbar over the body of the sacrum, or of the fourth lumbar over the fifth, usually due to a developmental defect in the pars interarticularis,” which is a “part of the lamina between the superior and inferior articular processes of a lumbar vertebra.” *Id.* at 1328, 1684. Spondylolisthesis is normally a congenital condition, but it may be caused by a fracture or bone disease, and it may be asymptomatic or cause back pain. *Id.*; Braunwald, E., *et al.*, eds., HARRISON’S PRINCIPLES OF INTERNAL MEDICINE, 15th ed. (McGraw-Hill, 2001), p. 82.

<sup>13</sup> “Subluxation” means “incomplete or partial dislocation.” DORLAND’S ILLUSTRATED MEDICAL DICTIONARY, 29<sup>TH</sup> ED. (W. B. Saunders Co., 2000), p. 1719.

<sup>14</sup> “Spinal stenosis” is a “narrowing of the vertebral canal, nerve root canals, or intervertebral foramina of the lumbar spine caused by encroachment of bone upon the space.” *Id.* at 1698.

The JAG noted that throughout his years at the Academy, the applicant's performance on the PFE was "marginal to substandard." He argued that "the only question presented here is whether the Superintendent of the CGA [Coast Guard Academy] abused his discretion by finding the applicant unsuitable for service as demonstrated by his failure to pass the commissioning standard on the physical fitness exam (PFE)."

The JAG stated that under section 1-1-02 of the Regulations for the Corps of Cadets, the administration of the Academy "is vested in the Superintendent, who is directly responsible to the Commandant for its operation and the accomplishment of its mission." Section 1-1-03 of the regulations states that the mission of the Academy is "[t]o graduate young men and women with sound bodies, stout hearts, and alert minds ... and strong in resolve to be worthy of the traditions of commissioned officers in the United States Coast Guard in the service of their country and humanity." Under section 1-2-01 of the regulations, the Superintendent is responsible for the education and training of cadets, the accomplishment of the mission of the Academy, and the promulgation of regulations to that end. In addition, under section 2-4-01, the Superintendent has the authority to terminate the appointment of a cadet, and section 2-4-02 states that a cadet may be disenrolled for "unsuitability" if they fail to maintain or meet physical fitness standards. Section 3-2-01.b.1.(g) of the regulations states that a cadet may not receive a degree or graduate without successfully meeting the physical fitness standards.

The JAG argued that "the CGA Superintendent exercised his authority as prescribed by CG policy and regulations to disenroll the applicant ... based on the applicant's inability to successfully complete the PFE. The applicant displayed a continuous pattern of substandard performance with regard to his fitness requirements. The applicant was afforded ample time for recovery and remedial retest and physical rehabilitation [in accordance with] 3-4-02.c." of the Regulations for the Corps of Cadets. Citing *Quinton v. United States*, 64 Fed. Cl. 118, 124 (2005), *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); and *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), the JAG argued that the applicant "has not provided any evidence in support of a showing that the CGA Superintendent abused his discretion or did not carry out his duties 'correctly, lawfully and in good faith.'" In addition, citing *United States v. McCrackin*, 736 F. Supp. 107, 112 (D.S.C. 1990), and *Chappell v. Wallace*, 462 U.S. 296 (1983), the JAG argued that the Coast Guard is entitled to "considerable deference" on such a "uniquely military matter."

The JAG argued that the applicant's "failure to successfully pass the PFE commissioning standards after numerous opportunities precludes him from meeting the CGA standards for commissioning, graduation, and conferral of the CGA Bachelor of Science degree." The JAG stated that the CGA "is not in the business of providing disenrolled cadets (for whatever reason) with a four-year degree without fulfilling all requirements as prescribed by CG & CGA policy. At the time the applicant was given an additional extension to successfully complete his PFE requirement, over a year had passed from his initial medical procedures and he was fit for full duty." The JAG stated that if the Board were to grant the applicant a degree, "he would be awarded a degree free of charge without the obligated commission service as an officer in the CG. That would clearly run contrary to CG policy and would not be in the best interest of the CG in the future. ... Thus, sustaining the applicant's request would result in a precedent contrary to

CGA/CG policy and could present a negative effect/divergence with regard to CGA protocol.” Therefore, the JAG concluded, no change should be made to the applicant’s record.

The JAG also adopted the findings and analysis provided in a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC). CGPC stated that the applicant “was provided remedial assistance with regards to meeting the PFE standards and despite the additional coaching and time, the applicant did not meet this integral graduation/commissioning requirement.” CGPC stated that although the applicant claims that his medical condition precluded him from successfully completing the PFE, he was medically cleared for participation in the PFE. CGPC further noted that the applicant had a “significant history of marginal and sub-standard performance on the PFEs” both before and after the treatment of his pilonidal cyst. CGPC concluded that because the requirements for a degree from the Academy and a commission are clear, “any favorable determination in this case by the BCMR should be subject to DHS General Counsel review as it would represent a significant divergence from standard application of Coast Guard policy with regard to cadets meeting degree requirements.”

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

On November 12, 2008, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

### **APPLICABLE REGULATIONS**

Section 2-4-01 of the Regulations for the Corps of Cadets, which were provided to the Board by CGPC, states that the Superintendent of the Academy may disenroll and discharge a cadet upon the recommendation of various officials, including the Director of Health and Physical Education. Section 2-4-02 states that a cadet may be recommended for disenrollment for failure to maintain standards in academics, medical fitness, physical fitness, swimming ability, or suitability for service. Section 2-4-04 lists specific reasons for disenrollment, including misconduct, poor performance, repeated low MPI scores, obesity, poor physical fitness, inability to swim, etc.

Section 3-4-01.a.1. of the regulations states that “[a]s future officers, cadets must learn to develop habits that contribute to life long fitness and maintain the physical capacity to safely perform a wide variety of physical activities associated with serving in the Coast Guard. In order to assure that the fitness and swimming performance standards are met and retained by all cadets, physical performance evaluations are administered on a regular basis.”

Section 3-4-02.b.1. states that “[t]he commissioning/graduation standard for the PFE is 200 points. First class cadets must achieve this standard on both examinations of their first class year, but all cadets should strive for this standard on each PFE of their cadet career.”

Section 3-4-02.b.2. states that “[f]irst class cadets who fail to meet the 200 point standard on the August or January test of their first class year will be interviewed by the Head, Department of HPE within one week of the notification of the failure. If no extenuating circumstances exist to account for the exam failure, these cadets will receive a letter in their file and be recom-

mended for suspended disenrollment status, Fitness Probation, and enrolled in Level II Remedial Physical Training (RPT). These cadets will be retested no later than the midterm date of the semester in which they failed the test. Cadets who fail the retest will be recommended for disenrollment.” Section 3-4-02.c. states the following:

2. Cadets just released from a medical status will be allowed a specific period of time for physical rehabilitation. The cadet’s physician and the Head Athletic Trainer will determine the specific length of time for rehabilitation.

3. Cadets unable to complete the PFE due to medical reasons for two consecutive semesters will be recommended by the Head, Department of Health and Physical Education for a thorough medical review. The Senior Medical Officer will forward the report of medical examination to the Director of Athletics, retaining a copy for the cadet’s health record, with one of the following recommendations: (1) medical treatment to correct any medical condition, (2) convene a Medical Review Board, or (3) a fit for full duty determination. A medical officer may recommend that cadets who are in long-term medical recovery participate in the examination on a specific limited basis. Approved alternative examinations may be substituted for specific items the cadet is unable to perform during that limited period.

Section 3-4-04.a.2. states that cadets in need of remedial physical training will be referred “for medical examination to determine if a physical or psychological medical condition exists which restricts ability to pass the PFE or swimming examinations.”

Section 2-4-06 contains the procedures by which a cadet may appeal disenrollment. Cadets may submit letters describing any extenuating or mitigating circumstances for their deficiency and may seek letters of recommendation from faculty, staff, coaches, and, if permitted by the Superintendent, fellow cadets. Section 2-4-07 states that the Commandant will take final action on a recommendation for disenrollment.

Section 2-6-03.b.2. states that when a first or second class cadet’s appointment is terminated either voluntarily or involuntarily and the cadet has no prior military obligation, the cadet “will be transferred to the ‘Individual Ready Reserve (RJ)’ in the rating of Boatswain’s Mate third class (Seaman, if disenrolled for Suitability for Service reasons), for a period of service equal to their service as a cadet.”

Section 3-2-01.b. states that the following are requirements for graduating and receiving a bachelor’s degree from the Academy:

1. The following are required for the degree of Bachelor of Science and a commission:
  - (a) Pass or validate every course in the core curriculum.
  - (b) Pass at least 37 courses of 3.00 credits or greater.
  - (c) Complete the academic requirements for one of the majors as specified in the official Catalog of Courses.
  - (d) Attain an average of at least a 2.00 in all required upper division courses in the major, as specified in the official Catalog of Courses. This average includes Fs earned and the grades when courses are retaken. ...
  - (e) Attain a Cumulative Grade Point Average of at least 2.00.
  - (f) Be in residence at the Academy for at least four academic years.
  - (g) Complete successfully all required portions of the physical education program including meeting minimum swimming and physical fitness standards.

- (h) Meet all military performance standards, demonstrating all aspects of personal and professional development necessary to serve as Ensigns in the United States Coast Guard, unless a commission will not be offered due to a medical disqualification.
  - (i) International cadets ...
2. The Superintendent confers the degree of Bachelor of Science on those cadets in good standing who have met these requirements or revisions published since matriculation.

Section 3-6-01.a. states that under 10 U.S.C. § 1217, a cadet who acquires a physical disability may be processed for a medical discharge or retirement in accordance with the rules for active duty members under 10 U.S.C. §§ 1201 *et seq.*, and that former cadets may apply to the Department of Veterans' Affairs for disability benefits. Sections 3-6-01.b. and c. state that cadets who fail to meet the medical standards for commissioning under the Coast Guard Medical Manual shall be processed under the Physical Disability Evaluation System.

Chapter 3.E.2. of the Coast Guard Medical Manual states that the "preappointment physical examination of cadets in the graduating class should be held at least 6 months prior to acceptance of the commission. This physical examination should be conducted to determine physical fitness for commission in the Regular Service (section 3-D and 3-E) with recommendations made accordingly. Cadets should not be summarily disqualified for commissioning merely because they do not meet the standards for appointment as cadets provided that they may reasonably be expected to be physically capable of completing a full and effective Coast Guard career. In general, relatively minor defects that would be disqualifying for original commission direct from civilian life are not disqualifying for commission of a cadet in whom the Government has a considerable investment."

Chapter 3.D.2.a.(2)(f) of the Medical Manual states that the medical standards in Chapter 3.D. apply to "[c]adets at the United States Coast Guard Academy, except for such conditions that have been diagnosed since entrance into the Academy. With respect to such conditions, upon recommendation of the senior medical officer, USCGA, the fitness standards of section 3-F are applicable for retention in the Academy."

Chapter 3.D.33.d.(2) of the Medical Manual states that a candidate for appointment as an officer may not be appointed if they have a pilonidal cyst or if they have had a pilonidal cyst excised within the past six months. Chapter 3.E. of the manual does not mention pilonidal cysts. Chapter 3.D.34.c.(4) states that a candidate may be disqualified for appointment if "[t]here is lumbar scoliosis greater than 20 degrees, thoracic scoliosis over 20 degrees, and kyphosis or lordosis greater than 55 degrees when measured by the Cobb method." Chapter 3.F.13.e. states that a member may be disqualified for retention if they have scoliosis with "[s]evere deformity with over two inches of deviation of tips of spinous processes from the midline." Chapter 3.D.34.i. states that spondylolisthesis may be a disqualifying condition for appointment as an officer. Chapter 3.F.13.e.(2) states that spondylolisthesis is a congenital condition that may be disqualifying for retention if there are "more than mild symptoms resulting in repeated hospitalization or significant assignment limitation."

## 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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application is timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in his record, as required under 10 U.S.C. § 1552(b).

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.<sup>15</sup>

3. The applicant alleged that he was unjustly denied a bachelor's degree and an officer's commission upon his completion of his fourth year at the Academy. The Board begins its analysis in every case 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>16</sup> Absent evidence to the contrary, the Board presumes that Coast Guard officials "have carried out their duties correctly, lawfully, and in good faith."<sup>17</sup>

4. Regarding the applicant's request for an officer's commission, the Board finds that he has failed to prove that the Commandant and the Superintendent of the Academy abused their discretion in refusing to offer him a commission. A high degree of physical fitness is an essential requirement for the receipt of a commission, and under sections 1-2-01 and 2-4-01 of the Regulations for the Corps of Cadets, the Superintendent is responsible for determining the fitness standards for commissioning and for disenrolling cadets who fail to meet those standards. Under section 3-4-02, the Superintendent has made passing the PFE and a swimming test the physical fitness standard for receipt of a commission, and the applicant has not shown that he ever received a passing score on the PFE. Section 3-2-01.b. of the regulations states that meeting the physical fitness standard is an essential requirement for a commission. The Board finds that the applicant has not proved by a preponderance of the evidence that he was erroneously or unfairly denied an officer's commission when he could not pass the PFE.

5. The applicant argued that he should have been awarded a bachelor's degree from the Academy because he successfully completed all requirements for the degree except for passing the PFE. Furthermore, he alleged, he was unable to pass the PFE because of "acquired scoliosis" that he developed because he was not given appropriate care and physical therapy fol-

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<sup>15</sup> See *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

<sup>16</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>17</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).

lowing the excision of his pilonidal cyst. However, under sections 3-2-01.b. and 3-4-02 of the Regulations for the Corps of Cadets, passing the PFE is an essential requirement for receiving a bachelor's degree and graduating from the Academy, and although the content of the PFE changed during the applicant's years at the Academy, sit-ups were always part of the test. The CT scan taken on July 25, 2007, revealed that the applicant's actual diagnosis was "mild left lumbar scoliosis" and "slight bulging of the L4 and L5 discs." Otherwise his spine had normal alignment with no dislocation, disc herniation, or spinal stenosis. There is no basis in the record for concluding that the applicant was not afforded proper medical care and advice following the excision of the pilonidal cyst, as he alleged, or that his mild scoliosis and slightly bulging L4 and L5 discs are attributable to either the cyst or his post-excision aftercare. Moreover, the record shows that the applicant, like all cadets who perform poorly on the PFE, was continually encouraged, warned, and provided remedial fitness training to maximize his physical fitness, but did not do so.

6. The applicant alleged that he should receive his degree because only his back condition prevented him from passing the PFE. The applicant's medical records indicate that he was FFD and able to train for the PFE throughout his first (4/c), second (3/c), and fourth (1/c) years at the Academy. During his third (2/c) year, he was FFLD in that he was unable to do sit-ups or run for most of the time from August 2005 through May 2006. The applicant's PFE scores during his final year were as follows: August 2006: 132; October 2006: 165; January 2007: 181; March 20, 2007: 144; and March 28, 2007: 169. The Commandant gave the applicant an extended opportunity to pass the PFE in the summer of 2007, but his training log indicates that, beginning on June 4, 2007, the applicant complained that he could not do sit-ups without suffering from lower back pain. The applicant did not submit and his cadet records do not contain the results of his PFEs in June and July 2007. However, based on his complaints of back pain and the xray and CT scan showing that he has mild scoliosis and slightly bulging L4 and L5 discs, the applicant asks the Board to find that the Superintendent erred in refusing to award him a degree when he could not pass the PFE.

7. The Board finds that the applicant has submitted insufficient evidence to prove that the Superintendent committed error or injustice or abused his discretion in refusing to award the applicant a degree from the Academy. While the medical records show that the applicant had mild scoliosis and slightly bulging L4 and L5 discs and one doctor suggested alternative PFE testing, the Superintendent had access to all of his records, including presumably his June and July 2007 PFE testing, as well as to the applicant's doctors and coaches when he made the decision to disenroll the applicant without awarding him a bachelor's degree. The Board is not persuaded that the Superintendent erred or committed injustice in finding that the applicant had failed to earn a degree from the Academy. In light of all the records, the applicant's disenrollment cannot be considered "treatment by the military authorities that shocks the sense of justice."<sup>18</sup> The Board notes in this regard that the applicant's education and training at the Academy were provided free of charge, and he can likely transfer many of his academic credits to another institution.

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<sup>18</sup> *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (holding that, 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").

8. The applicant alleged that upon his disenrollment, he should have been released to the IRR as a BM2, rather than a BM3. He included in his application a quotation of section 2-6-03 of the Regulations for the Corps of Cadets which indicates that disenrolled 1/c cadets should receive the BM2 rating, while disenrolled 2/c cadets receive the BM3 rating. The Statement of Acceptance and Obligation that the applicant signed upon his admission to the Academy in 2003 states that if disenrolled as a 1/c or 2/c cadet he would “be transferred to the United States Coast Guard Reserve in an appropriate enlisted grade or rating in an inactive status.” The Coast Guard submitted an undated copy of the Regulations for the Corps of Cadets and in this version, section 2-6-03 states that both 1/c and 2/c cadets are released to the IRR as BM3s when disenrolled from the Academy. Therefore, it appears to the Board that the Superintendent acted in accordance with this latter version of the regulations. In the absence of any evidence that the applicant’s version of the regulations was controlling in 2007, the Board must presume that the Superintendent complied with the regulation actually in effect at the time of the applicant’s disenrollment.<sup>19</sup>

9. Accordingly, the application should be denied.

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

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<sup>19</sup> 33 C.F.R. § 52.24(b); *Arens*, 969 F.2d at 1037; *Sanders*, 594 F.2d at 813.

**ORDER**

The application of former cadet 1/c xxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG Academy, for correction of his military record is denied.

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Randall J. Kaplan

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Dorothy J. Ulmer

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Ryan J. Wedlund