

A Judge Advocate's Guide to the Flying Evaluation Board

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I. Introduction

You are a defense counsel proudly and competently manning the U.S. Army Trial Defense Service (TDS) office at Fort Drum, New York, “the Army’s best-kept secret.”¹ Still relishing your latest “not guilty” panel verdict, you are feeling justifiably confident in your ability to “defend those who defend America.”² A new client walking through the door piques your curiosity—a Chief Warrant Officer three (CW3). Thinking he may be lost, you personally greet him. “Hi Chief, how can I help you today?”³

“I need to see an attorney about this paperwork I received,” he replies.

As you look over the stack of papers from the CW3, you suddenly feel your confidence drain away. “What is a flying evaluation board?” you ask yourself.⁴

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¹ *Mission Vision Motto & Values*, FORT DRUM, http://www.drum.army.mil/AboutFortDrum/Pages/MissionVisionMottoValues_lv2.aspx (last visited Dec. 3, 2012).

² The motto of the U.S. Army Trial Defense Service (TDS). See *Trial Defense Services*, TRIAL DEFENSE SERVICES-FORT CAMPBELL, <http://www.campbell.army.mil/campbell/SJA/Pages/TDS.aspx> (last visited Dec. 5, 2012).

³ Although tradition and practice dictates that Aviation Warrant Officers are addressed as “Mister” or “Miss,” and never “chief,” you don’t know this yet. This is one of the many lessons you will shortly learn about Army Aviation!

⁴ Representing a pilot facing a flying evaluation board (FEB) is an optional legal assistance mission and thus may be handled either by a legal assistance attorney or TDS counsel, depending upon the availability. U.S. DEP’T OF ARMY, REG. 27-3, THE LEGAL ASSISTANCE PROGRAM para. 3-6g (21 Feb. 1996) (RAR, 13 Sept. 2011); see, e.g., *Trial Defense Service*, FORT

That evening you consult applicable regulations and learn that when a commander questions a pilot’s performance, justification for continued aviation service and aeronautical ratings are subject to a complete review.⁵ The mechanism for this review is the flying evaluation board (FEB). The FEB is a traumatic event for a pilot. If the FEB terminates his aviation status, his career could end. A judge advocate (JA) typically presents the command’s case; another JA will defend the pilot-respondent.⁶ Most JAs, however, do not know FEBs exist, and even fewer have experience with them.

This primer is for all JAs involved with FEBs. These include the trial counsel (TC) for a combat aviation brigade (CAB), who will typically present the command’s evidence at the FEB, and the legal assistance (LA) or TDS attorney who will represent the pilot at the board. Other JAs must also understand FEBs. The brigade judge advocate (BJA) for a CAB must have a solid understanding of the FEB to advise his commander about whether to convene a FEB in the first place. Any FEB which terminates a pilot’s aviation service will likely cross the desk of the installation’s chief of military justice, who is often the gatekeeper of actions requiring the signature of the general court-martial convening authority (GCMCA). The staff judge advocate (SJA), who typically briefs the GCMCA, must also be familiar with any FEB he presents for action. This article is designed to educate every JA with a need or desire to learn more about FEBs.

To do so, Part II of this article explores the background of aviation procedures and regulations, including who flies Army aircraft and how they achieve this qualification. Part III examines the reasons to convene a FEB and who may be the subject of a FEB. Part IV outlines the procedures governing the FEB. Finally, the primer proposes strategies for the JA presenting each side of the case, and how a pilot may appeal an adverse finding.

CARSON, <http://www.carson.army.mil/LEGAL/TDSWebsite/AboutUs.html> (last visited May 2, 2013)

⁵ U.S. DEP’T OF ARMY, REG. 600-105, AVIATION SERVICE OF RATED ARMY OFFICERS para. 6-1 (22 June 2010) [hereinafter AR 600-105].

⁶ The respondent may decline representation or hire his own attorney. *Id.* para. 6-3.

II. Background

A. Who Flies?

All Army pilots are officers, either commissioned or warrant.⁷ Duties performed by such officers pursuant to applicable regulations constitute “aviation service.”⁸ Army aviators receive their initial entry flight training on helicopters at Fort Rucker, Alabama.⁹ However, piloting an aircraft is not the sole method of aviation service. Flight surgeons engaged in the practice of aviation medicine also perform aviation service.¹⁰ Both pilots and flight surgeons are rated officers, meaning they hold an aeronautical rating.¹¹

A second category of Army aviation personnel includes those who must perform “frequent and regular” aerial flight in performance of their assigned duties.¹² Though they have flight status, these personnel, typically enlisted, are not pilots or flight surgeons, and thus do not hold an aeronautical rating. They are nonrated Army aviation personnel.¹³ These personnel must generally perform at least four hours of flight duty each month.¹⁴ The most common examples are maintenance personnel, physician assistants, aviation platoon sergeants, avionics technicians, aerial photographers, flight engineers, and door gunners.¹⁵

B. Obtaining an Aeronautical Rating

Upon graduation from initial entry flight training, Army aviators receive the initial rating of “Army Aviator.”¹⁶ Upon successful completion of prescribed benchmarks, an Army

aviator will achieve the rating of “Senior Army Aviator,” and finally “Master Army Aviator.”¹⁷

The readiness level (RL) is a measure of the pilot’s flying abilities and qualifications.¹⁸ At graduation, the aviator’s RL is RL 3.¹⁹ Ironically, this means that the pilot is “not qualified in the aircraft.”²⁰ Pilots have time limits during which they must progress to RL 2 and finally to RL 1 in order to be fully qualified in their aircraft.²¹ In addition, pilots undergo annual evaluations to determine their RLs.²² If at any time a pilot is determined to have an RL other than 1, he must undergo refresher training until he re-obtains RL 1.²³

Various major command-level commanders, and certain branch chiefs, may award flight status to nonrated Army aviation personnel, depending on the type of duty to be performed by the nonrated personnel.²⁴ All nonrated personnel must meet certain medical standards in accordance with Army Regulation (AR) 40-501,²⁵ as well as possess the qualifications outlined in AR 600-105, Chapter 2.

C. Focus of this Article

The procedures to remove nonrated aviation personnel from flight status are detailed in AR 600-105, chapter 2. These procedures are quite abbreviated compared to a FEB and will not be covered in this primer, nor will the process for disqualification of flight surgeons. Likewise, this primer will not deal with termination of aviation service for reasons not requiring a FEB.²⁶ The focus of this primer will be FEBs convened to review the performance of Army pilots.

III. Reasons to Convene a FEB

A FEB should convene if an officer “fails to remain professionally qualified,” has “marginal potential for

⁷ *Id.* at 5 tbl.2-5. This primer is concerned only with manned aircraft; the information contained herein does not necessarily apply to remotely piloted unmanned aircraft.

⁸ *Id.* ch. 2.

⁹ U.S. DEP’T OF ARMY, REG. 611-110, SELECTION AND TRAINING OF ARMY AVIATION OFFICERS para. 1-6 (15 June 2005).

¹⁰ U.S. DEP’T OF ARMY, FIELD MANUAL 3-04.300, C2, AIRFIELD AND FLIGHT OPERATIONS PROCEDURES para. 6-27 (10 Dec. 2010).

¹¹ AR 600-105, *supra* note 5, para. 2-5.

¹² U.S. DEP’T OF ARMY, REG. 600-106, FLYING STATUS FOR NONRATED ARMY AVIATION PERSONNEL para. 2-4 (8 Dec. 1998).

¹³ *Id.* para. 2-3.

¹⁴ U.S. DEP’T OF DEF., 7000.14-R, FINANCIAL MANAGEMENT REGULATION vol. 7a, para. 2201 (Oct. 2012) [hereinafter DODFMR].

¹⁵ *Flight Pay Rated and Nonrated*, U.S. ARMY HUMAN RESOURCES COMMAND WEBSITE, <https://www.hrc.army.mil/TAGD/Flight%20Pay%20Rated%20and%20Nonrated> (last visited May 3, 2013).

¹⁶ AR 600-105, *supra* note 5, at 5 tbl.2-5.

¹⁷ *Id.*

¹⁸ U.S. DEP’T OF ARMY, TRAINING CIRCULAR 3-04.11, COMMANDER’S AIRCREW TRAINING PROGRAM FOR INDIVIDUAL, CREW, AND COLLECTIVE TRAINING para. 3-11 (19 Nov. 2009) [hereinafter TC 3-04.11].

¹⁹ *Id.* para. 3-33.

²⁰ *Id.* para. 3-17.

²¹ *Id.* para. 3-37.

²² *Id.* para. 5-24.

²³ U.S. DEP’T OF ARMY, REG. 95-1, FLIGHT REGULATIONS para. 4-10d (12 Nov. 2008) [hereinafter AR 95-1].

²⁴ DODFMR, *supra* note 14, para. 220114.

²⁵ U.S. DEP’T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS (14 Dec. 2007) (RAR, 4 Aug. 2011) [hereinafter, AR 40-501].

²⁶ AR 600-105, *supra* note 5, para. 5-4.

continued aviation service,” or if a currently non-medically disqualified officer seeks requalification.²⁷ This primer explores only the first two reasons, which deal with *disqualification*. While these reasons may seem simple at first blush, as is often the case, the devil is in the details, as there are several ways to establish them. These are generally categorized as “flying-related” and “not flying-related.”

A. Reasons to Convene a FEB, Flying-Related

1. Lack of Proficiency

This is the broadest, most all-encompassing reason to convene a FEB. To proceed under this section, evidence must show that the pilot either “lacked proficiency in flying duties” or “failed to meet ATP [Aircrew Training Program] requirements.”²⁸ The regulation offers no additional guidance as to what constitutes a “lack[] of proficiency in flying duties.”²⁹ It does state that “failure to meet ATP requirements” covers proficiency, substandard performance on the Annual Proficiency and Readiness Test (APART)³⁰ task iterations, Pilot in Command (PIC) requirements,³¹ and flying hours.³² These requirements are outlined broadly in AR 95-1, Chapter 4. The particular technical requirements are set out in great detail in the operator’s manuals for each particular aircraft.³³

2. Flagrant Violation of Flying Regulations

Army flying regulations are laid out in AR 95-1. This regulation is not exhaustive, but incorporates applicable non-Army regulations for operating an Army aircraft.³⁴ Chief among these are federal aviation regulations, which Army aviators must also comply with.

Army Regulation 600-105 defines “flagrant” violation as a violation that “may show a lack of judgment or proficiency that renders the officer unfit or unqualified to perform flying duties” but gives no further guidance as to what constitutes

such violation, leaving this to the FEB to determine.³⁵ A commander is free to use the full range of judicial, non-judicial, or administrative means to correct a violation, either in conjunction with or instead of a FEB.³⁶

3. Insufficient Motivation

Examples include refusing to fly a specific aircraft, a particular mission or in a particular theater of operations, or a having a fear of flying without an underlying psychiatric illness.³⁷ No non-flying examples are given. Importantly, the regulation describes insufficient motivation as being a non-medical “*self-imposed* deficiency.”³⁸

If a commander discovers that a pilot has insufficient motivation, this regulation requires the commander to suspend the officer and order a medical examination in accordance with AR 40-501. If the flight surgeon performing the examination determines that the pilot is medically fit to fly, the commander may take UCMJ or administrative action against the pilot.³⁹

B. Reasons to Convene a FEB, Not Related to Flying⁴⁰

The non flying-related reasons for convening a FEB are familiar to most JAs. They are equally applicable to non-aviators. Therefore, a JA’s experience in UCMJ or adverse administrative actions will directly benefit him in handling such a case.

1. Undesirable Habits or Traits of Character

The regulation enumerates examples of undesirable traits: abuse of alcohol, illegal drug use, civil confinement, emotional instability, or willfully failing to disclose a medical condition which would disqualify the officer from aviation duty.⁴¹ This list, however, is not exhaustive: the provision is also a catch all one for other “inherent undesirable personality traits that may affect the officer’s duties as an aviation officer.”⁴² A JA advising a commander

²⁷ *Id.* para. 6-1.

²⁸ *Id.*

²⁹ *Id.*

³⁰ AR 95-1, *supra* note 23, para. 4-2.

³¹ PIC as used here is an acronym for Pilot in Command; however, the doctrinally correct acronym is “PC.” *Id.* para. 4-19. In the author’s experience, this mistake is not rare. *See, e.g., id.* para. 5-1h(1).

³² AR 600-105, *supra* note 5, para. 6-1(c)(1)(b).

³³ AR 95-1, *supra* note 23, paras. 4-1, 4-3, 4-5.

³⁴ *Id.* para. 5-1.

³⁵ AR 600-105, *supra* note 5, para. 6-1d.

³⁶ *Id.* para. 5-3(a).

³⁷ Valid safety concerns about a particular aircraft, for example, do not constitute insufficient motivation. *Id.* para. 6-1(e)(3).

³⁸ *Id.* (emphasis added).

³⁹ *Id.*

⁴⁰ An additional reason, an officer requesting to appear before a FEB, is outside the scope of this primer and will not be covered. *Id.* para. 6-1(e)(4).

⁴¹ *Id.* para. 6-1e.

⁴² *Id.* (qualifying that the undesirable traits “include, but not limited” to the ones listed).

who wants to remove an officer's flight status, but cannot fit the officer's deficiency into another category, may find it beneficial to consider whether the deficiency fits into this general provision.

a. Urinalysis Testing

This subsection covers any aviation officer who tests positive for illegal substances, as well as anyone who refuses to comply with an order to provide a urine sample for testing.⁴³

b. Unsatisfactory Duty Performance

Unsatisfactory duty performance may be based on an officer's overall performance, including flying duties as well as duties not related to flying.⁴⁴ Conceivably, under this section, a commander could convene a FEB based entirely on an officer's non flying-related performance; however, as there are other more suitable options for dealing with deficiencies unrelated to flying, a FEB would not be the most efficient use of board members' time in such instance.⁴⁵ As a practical matter, FEBs convened under this section should concern an officer's inability to satisfactorily perform aviation duties.

2. Failure to Maintain Medical Certification

All aviation officers, even if not serving in an aviation billet, must remain medically qualified under AR 40-501.⁴⁶ If the officer fails to timely undergo a medical examination, the commander may refer him to a FEB; however, if the officer is examined and found medically unfit, the case is handled in accordance with chapter 4 of AR 600-105 rather than by a FEB.⁴⁷

⁴³ *Id.* para. 6-1e(1).

⁴⁴ *Id.* para. 6-1e(2).

⁴⁵ For example, a commander might initiate UCMJ or adverse administrative action. A court-martial, non-judicial punishment, or "show cause" board does not specifically require the aviation assets that a FEB does.

⁴⁶ AR 40-501, *supra* note 25, ch.4.

⁴⁷ *Id.* This primer will not deal further with medical disqualifications. A JA advising a commander or a pilot concerning aeromedical disqualification should consult AR 40-501, which deals extensively with this subject. Likewise, close consultation with a flight surgeon, the subject matter experts in these cases, is strongly advised.

IV. FEB Procedures

Subject to some modifications made by AR 600-105, the FEB is governed by the rules for formal boards of officers found in AR 15-6, with the pilot being a designated respondent.⁴⁸ A complete understanding of the FEB process requires a careful reading of both AR 15-6 and AR 600-105. Consider the FEB a jigsaw puzzle. Assembling the final product requires pieces from two different puzzles, but not all the pieces of either. The government must take care not to miss any steps, because the result could be unreasonable delay or needless repetition. The defense counsel is wise to pay equal attention to the intricacies of the FEB puzzle—a government misstep may present an opportunity to improve his client's position.

A. Appointing the FEB

A brigade commander may appoint a FEB.⁴⁹ The commander must then suspend the officer from flying duties, pending the outcome of the FEB, and notify the officer as well as the local finance office in writing. Aviation Career Incentive Pay (ACIP) is suspended concurrently with the flying suspension. While suspended, the officer may not be assigned to flying duties, nor perform crew duties in a military aircraft or flight simulator. If the FEB is not completed within 365 days of the date the suspension is imposed, the appointing authority must request an extension from the GCMCA.⁵⁰

The FEB must consist of at least three voting members. The members may be commissioned officers or commissioned warrant officers, but all must hold aeronautical ratings. If the respondent is a warrant officer, at least one voting member must be a warrant officer in the grade of chief warrant officer four (CW4) or higher and senior in grade to the respondent.⁵¹ The FEB may have more than three voting members, so long as the number is uneven.⁵² All members must be senior to the respondent.⁵³

⁴⁸ AR 600-105, *supra* note 5, para. 6-1f. Though neither regulation explicitly states that the pilot is a designated respondent, the plain meaning of paragraph 5-4 of the AR 15-6 provides for no other logical result.

⁴⁹ Commanders of higher headquarters may also appoint a FEB. *Id.* para. 6-1g & at 17 tbl.5-1.

⁵⁰ Note that commanders below the brigade level may suspend the pilot for up to sixty days, and in fact must do so if they initiate a request for a FEB. *Id.* para. 5-3a & at 17 tbl.5-1.

⁵¹ *Id.* para. 6-2.

⁵² *Id.* "National Guard boards may include a rated officer from the U.S. Army Advisory Group to the ARNGUS of a State." *Id.* para. 6-2f (This is the only distinction the regulation draws between Active Army and National Guard FEBs).

⁵³ U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS para. 2-1 (2 Oct 2006) [hereinafter AR 15-6].

Army Regulation 15-6 also provides for the appointment of “members with special technical knowledge” as voting members.⁵⁴ Especially in cases where the respondent’s flying ability is the subject of the FEB, the appointing authority may wish to appoint at least one member who flies the same aircraft as the respondent.

B. Recorder, Legal Advisor, and Respondent’s Counsel

The appointing authority may also appoint a recorder, assistant recorder, and legal advisor as nonvoting members of the board.⁵⁵ In a FEB, as in a separation board or other formal 15-6 investigation, the recorder has duties similar to those of a court-martial prosecutor⁵⁶; however, the recorder need not be a JA. The only requirement is that the recorder be an officer, either commissioned or warrant.⁵⁷

The appointing authority may wish to appoint an experienced pilot, rather than a JA, as a recorder. Prior to doing so, he should consider the advantages and disadvantages of doing so. A JA will be familiar with the administrative duties of the recorder as well as, being a seasoned advocate, adept at presenting the command’s case to the board in a clear, logical, and persuasive fashion. On the other hand, the JA will most likely be unfamiliar with the technical aspects of aviation, the subject matter of the board, thus limiting his ability to present an in-depth case. A pilot will be a subject matter expert on aviation but may not be able to effectively package his knowledge and present it to the board effectively.

The appointing authority may find that the best way forward is to appoint his trial counsel as a recorder and an aviator as an assistant recorder. This gives him the best of both worlds: an effective advocate in the JA and a subject matter expert in the pilot.

Details on appointing a legal advisor and notifying the respondent are found in chapter 5 of AR 15-6. The notification letter must include a Privacy Act statement, with FEB-specific language.⁵⁸ The inclusion of this special language is important, as the *Feres* doctrine does not

preclude military members suing the government under the Privacy Act.⁵⁹

In a significant expansion of the counsel rights afforded under AR 15-6, the respondent at a FEB also has a right to request military counsel of his choosing, and that counsel’s rater will determine whether the counsel is available for the assignment.⁶⁰

C. Board Recommendation

The FEB is conducted similarly to other AR 15-6 formal board proceedings. Thus, the standard of proof is a preponderance of the evidence,⁶¹ and the rules of evidence in paragraph 3-7 of AR 15-6 apply. Modifications effected by AR 600-105 include a prohibition on making recommendations for disciplinary or UCMJ action and the requirement for the board to announce its findings and recommendations in open session prior to adjourning.⁶²

The board’s possible recommendations are tightly limited by AR 600-105: (1) “[o]fficers with proper training and skills [may] be awarded an aeronautical rating”; (2) orders suspending or disqualifying the respondent from flying may be rescinded and the respondent restored to aviation service; (3) when aviation operations or the flying ability of the respondent can be improved, other recommendations, such as additional training or flight time, may be made; (4) the respondent’s aviation service may be terminated, either permanently or not; and (5) his aeronautical ratings (and thus his authorization to wear the Army Aviation Badge) may also be terminated, either permanently or not.⁶³ If a termination is not permanent, the officer may apply for reinstatement “when the original reasons for the disqualification and current circumstances warrant reconsideration.”⁶⁴

⁵⁴ *Id.* para. 5-1e.

⁵⁵ *Id.* para. 5-1c, d.

⁵⁶ *Id.* para. 5-3 (describing duties of recorder, including arranging for support personnel, recording equipment, administering oaths, and conducting the presentation of evidence).

⁵⁷ *Id.* para. 5-1c.

⁵⁸ “The purpose for soliciting this information is to provide the commander a basis for a determination regarding your flying status.” *Id.* para. B-2b(4).

⁵⁹ *Cummings v. Dep’t of the Navy*, 279 F.3d 1051, 1055–58 (D.C. Cir. 2002). This case indirectly arose from a field naval aviator evaluation board, the Navy equivalent of the FEB.

⁶⁰ Under AR 15-6, a respondent who declines appointed counsel does not have a right to a different counsel. It should be noted that the “counsel” appointed under AR 15-6 need not be an attorney; however, the counsel rights of AR 600-105 clearly contemplate an attorney being assigned as counsel. *Compare* AR 15-6, *supra* note 53, para. 5-6 (mentioning “counsel” but not referring to “legal counsel”), *with* AR 600-105, *supra* note 5, para. 6-3a (referring to “legal counsel”).

⁶¹ AR 15-6, *supra* note 53, para. 3-10b; Captain Michael P. Ryan, *Flying Evaluation Boards: A Primer for Judge Advocates*, ARMY LAW., Aug. 1998, at 43, 44.

⁶² AR 600-105, *supra* note 5, paras. 6-1, 6-3.

⁶³ *Id.* para. 6-3c.

⁶⁴ *Id.* para. 6-6.

D. Legal Review

Following adjournment, the file is sent for a legal review by “the servicing legal advisor.”⁶⁵ Determining the content of the legal review and who performs the review requires a reconciliation of the two applicable regulations. Army Regulation 600-105 contains but a single sentence addressing legal review: “The findings will be reviewed for legal sufficiency by the servicing legal advisor before being submitted to the appointing authority”⁶⁶; however, AR 15-6 is more detailed and mandates that the legal review address the following: “(1) [w]hether the proceedings comply with legal requirements”; “(2) [w]hat effects any errors would have”; “(3) [w]hether sufficient evidence supports the findings of the investigation or board or those substituted or added by the appointing authority”; and “(4) [w]hether the recommendations are consistent with the findings.”⁶⁷

There is also an apparent conflict between the legal review requirements of the two regulations. Army Regulation 600-105 requires a legal review *before* the report is submitted to the appointing authority; however, AR 15-6 requires the legal review to encompass findings, if any, substituted or added by the appointing authority.⁶⁸ If the legal review occurs before submission to the appointing authority, then logically, any action taken by him cannot be part of the review. By the explicit terms of both regulations, AR 600-105 controls and the legal review should occur before submission to the appointing authority.⁶⁹

Read too narrowly, this leads to the unacceptable result that significant actions of the appointing authority are not reviewed. The better practice is to review the report before submitting it to the appointing authority, and then, if he makes revisions, perform a supplemental review. Certainly, the drafters of the regulations did not intend a FEB go forward with only a partial legal review. Further, AR 15-6 directs the appointing authority to obtain a legal review of cases “where the findings and recommendations may result in adverse administrative action . . . or will be relied upon in actions by higher headquarters.”⁷⁰ Because AR 600-105 does

not forbid a supplemental legal review, there is no real conflict.

There is also some ambiguity as to who should perform the legal review. Army Regulation 600-105 requires the legal review to be performed by the “servicing legal advisor,” while AR 15-6 names the “servicing JA” as the reviewer.⁷¹ Presumably the “servicing legal advisor” means the legal advisor to the command (i.e., the BJA or SJA) rather than the legal advisor to the board. To have the same attorney who advised the board during the FEB also review its findings is a conflict of interest on its face. Rare is the attorney who can review a proceeding which was guided by his own advice and opine that the process was done incorrectly. The best practice is to forward the file to the SJA and allow him to make arrangements for the legal review.

E. Actions After Legal Review

Strict time limits apply to FEB processing; deviation at any phase must include written justification.⁷² No later than thirty days after the board convenes (note: “convenes,” not “adjourns”), the president must send the report to the appointing authority.⁷³ As a practical matter, this time is shorter because legal review must occur before the report goes to the appointing authority. At the same time the report is transmitted to the appointing authority, a copy should be furnished to the respondent or his counsel.⁷⁴ The respondent has ten days thereafter to submit a brief to the appointing authority.⁷⁵ This is an excellent opportunity for counsel to highlight information favorable to his client and urge a favorable outcome.

The appointing authority is not bound by the findings or recommendations of the board, and has wide discretion in reviewing the case. He may revise, substitute, or add to the findings and recommendations. He may set the entire proceeding aside and start over, regardless of whether the result favors or disfavors the respondent, and he may base

⁶⁵ *Id.* para. 6-3d.

⁶⁶ *Id.*

⁶⁷ AR 15-6, *supra* note 53, para. 2-3b.

⁶⁸ *See supra* text accompanying notes 68–69.

⁶⁹ AR 15-6, *supra* note 53, para. 1-1 (“In the case of a conflict between the provisions of this regulation . . . and the provisions of the specific directive authorizing the investigation or board, the latter will govern”); AR 600-105, *supra* note 5, para. 6-1f (“When AR 15-6 and this regulation conflict, the guidance found in this regulation will prevail.”).

⁷⁰ AR 15-6, *supra* note 53, para. 2-3b. Of course, the termination of flying status is an adverse action. Furthermore, the appointing authority is likely to be a brigade commander, AR 600-105, *supra* note 5, at 17 tbl.5-1 (FEB may be appointed by the commander of a brigade, regiment, or detached battalion), and the approving authority is the general court-martial

convening authority (GCMCA), *id.* para. 6-1h, so action will likely have to be taken by a higher headquarters as well.

⁷¹ Neither term is defined further. AR 600-105, *supra* note 5, para. 6-3d; AR 15-6, *supra* note 53, para. 2-3b.

⁷² AR 600-105, *supra* note 5, para. 6-5.

⁷³ *Id.* para. 6-5b.

⁷⁴ *See* AR 15-6, *supra* note 53, para. 3-19 (requiring the board to provide an additional copy of the report to the appointing authority for each respondent, clearly to be forwarded to the respondent).

⁷⁵ AR 600-105, *supra* note 5, para. 6-5c.

her decision on any relevant information, even information that was not before the board.⁷⁶

If the board's action, either in its initial form or after revision by the appointing authority, restores the appellant to aviation service, the appointing authority may take final action; the action is not forwarded further up the chain of command.⁷⁷ But, if the appointing authority finds that termination of the respondent's aviation service is appropriate, he must forward the report to the approving authority, typically the GCMCA, within fifteen days.⁷⁸ There is not a specified time within which the approving authority must take final action, except that final action must be taken within six months of the date of respondent's initial suspension from aviation service.⁷⁹

At any time after final action, but only if new evidence is discovered, or unexpected circumstances arise, a respondent may appeal an action terminating his aviation status. The appellate authority is the commander of the Army command (ACOM), Army service component command (ASCC), or direct reporting unit (DRU) to which appellant is assigned. If the appellant is not assigned to an ACOM, ASCC, or DRU, the appellate authority is the Commander, U.S. Army Human Resources Command (HRC). Appeals should be transmitted to the appellate authority through the same channels as the original FEB, with the commander at each level making recommendations. Once the appellate authority has acted, no further direct appeals are permitted.⁸⁰

In some cases, a respondent may make a collateral attack on unfavorable board results in federal district court. An officer has no entitlement to assignment to aviation duties and, thus, no property interest in aviation status.⁸¹ Nevertheless, if a FEB terminates an officer's aviation

status, and the Army failed to follow any applicable portion of a regulation in the process, federal courts will not hesitate to review the case.⁸² The standard of review is "whether an action of a military agency conforms to law or is instead arbitrary, capricious or contrary to statutes and regulations governing that agency."⁸³

V. Strategies for Presenting the Case to the Board⁸⁴

A FEB is an administrative, not criminal, proceeding. The objective of a FEB is to ensure the presentation of all information relevant to an individual's qualifications to be an aviator, during fair and impartial proceedings.⁸⁵ The intent of this section is not to advocate "putting one over" on the other counsel, but rather exploring options that may assist counsel in presenting the most complete and effective case for their side. Full and fair presentation of all evidence enables the best, most correct decisions. This section focuses primarily on strategies applicable to FEBs wherein one or more underlying reasons for convening is flying-related.

A. Strategies for the Command-Government

When a commander intends to convene a FEB, government counsel should immediately and thoroughly review the facts of the case and determine whether a FEB is appropriate. Do the grounds for convening the FEB fall into one of the categories enumerated in AR 600-105, paragraph 6-1? If not, a FEB is not proper, and the command should explore other adjudication options. Even if the facts fall into an enumerated category, would disposition under another regulation be more appropriate? This scenario is most applicable when a commander seeks to convene a FEB for reasons unrelated to flying. Often, UCMJ or other adverse administrative action (an officer elimination board, for example) are a more efficient way to deal with such transgressions.⁸⁶ If a UCMJ proceeding finds the officer guilty of one or more offenses, the government can use

⁷⁶ AR 15-6, *supra* note 53, para. 2-3a. Note that if making revisions adverse to the respondent and relying on new information, the respondent must be given notice and a chance to respond. *Id.* para. 1-9d.

⁷⁷ AR 600-105, *supra* note 5, para. 6-3f. A copy must, however, be forwarded to Human Resources Command (HRC) to issue orders restoring respondent's aviation service.

⁷⁸ *Id.* para. 6-5d. If there is a commander in the chain between the appointing and approving authorities, he serves as the reviewing authority and may take action within the same parameters as the appointing authority. There need not be, and often is not, a reviewing authority; the approving authority serves the dual purpose. *Id.* para. 6-1i.

⁷⁹ *Id.* para. 6-5f. An extension may be granted by the aviation service termination authority (commander of HRC for active Army). *Id.* para. 6-5f & at 3 tbl.2-3.

⁸⁰ *Id.* para. 6-4. However, within three years from final action in the case, respondent may petition the Army Board for Correction of Military Records (ABCMR) for review of the case. The ABCMR has the power to correct errors in or remove injustices from Army records. *The Army Board for Correction of Military Records*, ARMY REVIEW BOARDS AGENCY, <http://arba.army.pentagon.mil/abcmr-overview.cfm> (last visited May 3, 2013).

⁸¹ *Wilson v. Walker*, 777 F.2d 427, 429 (8th Cir. 1985).

⁸² See *Woodard v. Marsh*, 658 F.2d 989, 992-93 (5th Cir. 1981).

⁸³ *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979).

⁸⁴ The suggested strategies advanced in this section are based on the author's experiences prosecuting and supervising six FEBs while serving as BJA, 10th Combat Aviation Brigade, at Fort Drum, New York, Contingency Operating Base Speicher, Iraq, and Bagram Air Base, Afghanistan, from 2009-2012; reviewing, and processing for GCMCA action, two FEBs while Chief of the Criminal Law Division for 10th Mountain Division (Light Infantry) at Fort Drum, from 2008-2009; and representing respondents at two FEBs in TDS, Fort Wainwright, Alaska from 2006-2008.

⁸⁵ AR 600-105, *supra* note 5, para. 6-3.

⁸⁶ See U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (13 Sept. 2011) [hereinafter AR 600-8-24]. Note that there are numerous similarities and overlap between non-flying related reasons to convene a FEB and reasons supporting involuntary separation of an officer.

evidence of the guilty finding at a FEB, rather than essentially trying the underlying offense in front of the FEB. Likewise, if the officer commits an offense which warrants discharge from the Army, and an elimination board involuntarily separates him, a FEB may be unnecessary.⁸⁷

Once the decision is made to proceed to a FEB, government counsel should immediately seek the advice of a competent and trusted pilot on the brigade staff.⁸⁸ The brigade standardization instructor pilot (SP) is a good prospect. The SP is in charge of the brigade aircrew standardization and training program.⁸⁹ An FEB is necessarily a technical proceeding, and the knowledge and experience of an SP are invaluable to a JA seeking to understand the finer points of a FEB case.

Because the board often delves into intricate and detailed aspects of piloting an aircraft, an area where most JAs are inexperienced, counsel may find it helpful to have the appointing authority appoint an expert as an assistant recorder, to assist with preparing the case and to sit at the counsel table during the FEB to advise on questioning witnesses.

At the outset, such an expert can assist counsel with understanding the nature of the respondent's alleged deficiencies. Flying deficiencies are classified into two broad categories: aircraft-specific and general. Most flying regulations of general applicability are found in AR 95-1 and other publications referenced therein; regulations and procedures specific to particular aircraft models are found primarily in the aircrew training manual (ATM) for the aircraft. In official Army nomenclature, these are Training Circulars 1-211 through 1-272. If the violation(s) alleged are of a general nature, the board members, by virtue of being pilots themselves, will probably not require expert testimony in order to understand the deficiency and its significance; however, it is unlikely that all board members will have a deep familiarity with respondent's aircraft model. If a respondent is alleged to have aircraft-specific deficiencies, counsel, in close coordination with the assistant recorder, must decide whether the testimony of an expert on that airframe would benefit the board in understanding the case.

After determining a plan of action for the case, counsel should then, with the guidance of the advisor, begin interviewing witnesses and reviewing relevant documents.

⁸⁷ There may be occasions where the respondent's transgression is of a nature, or so egregious, that principle warrants the command convening a FEB anyway, in an attempt to prevent the officer from wearing the aviation badge. Such offenses may include incidents of violence (homicide, manslaughter, armed robbery, etc.) or extreme depravity (rape, child molestation, etc.), for example.

⁸⁸ Ryan, *supra* note 61, at 45.

⁸⁹ TC 3-04.11, *supra* note 18, para. 1-34; AR 95-1, *supra* note 23, para. 4-26.

The obvious first choices are the respondent's company and battalion⁹⁰ commanders, to get their overall impression of the respondent as both a Soldier and a pilot. From there, it is often helpful to interview as many pilots as possible who have flown with the respondent. If interviews identify substandard conduct, interview the other pilot(s) present as well as any flight crew. If there were other aircraft on the mission, their pilots may also have relevant information. Flight logs are available from the company. Counsel should also speak with the company and battalion SP. If the respondent flies an OH-58 ("Kiowa") or AH-64 ("Apache"), and any alleged deficiencies relate to gunnery, a visit to the company and battalion Master Gunners might prove beneficial to understanding the issues involved. Appendix C contains suggested interview questions.

After reviewing relevant documents and interviewing witnesses, counsel should get a sense of the respondent's qualities. Asking, "Is this [the respondent] someone I would trust to pilot an aircraft in which I was a passenger?" may help distill the case to its essence; it is not unreasonable to conclude that the board members will be asking themselves the same question, as well as considering whether they would select respondent to be a co-pilot in an aircraft they were piloting. Asking potential witnesses these very questions may elicit useful insights.

While documents and witnesses provide a wealth of information, some of that information may not be relevant or useful. For example, some witnesses may express negative personal opinions of the respondent. Government counsel should not allow the proceeding to deteriorate into a personal attack on the respondent. Remember, winning the case at a FEB does not require the government to portray the respondent as bad, immoral, unethical, or criminal. Many upstanding Soldiers and officers would make lousy pilots, and there is no shame in this fact. The focus of the board is on the respondent's potential for continued aviation service, nothing more, and counsel should keep that purpose foremost in their thought process while preparing and presenting the government case. The closing argument to the board should be concise and highlight the evidence and testimony presented which weighs in favor of termination of aviation service.

⁹⁰ In the air cavalry, the company-size element is referred to as "troop," while the battalion-equivalent is "squadron."

B. Strategies for the Pilot-Respondent

The defense counsel may employ many of the same strategies outlined for the government, albeit with an eye toward securing evidence and witnesses adverse to the government's position and favorable to their own. Therefore, defense counsel's first task should be to obtain the services of a consultant of roughly equal qualifications to those of the government's consultant. With all haste, draft a memorandum to the appointing authority requesting appointment of a qualified consultant to assist the defense. It may be tempting to rely on the advice of the client-respondent, rather than going to the trouble of securing a consultant. Counsel should avoid this temptation; the respondent is a client because he is allegedly unqualified as an aviator. Counsel should be skeptical of any expert advice he renders, and press the request for appointment of a consultant.⁹¹

As soon as possible, arrange a meeting with the appointed consultant to review respondent's file. It may be helpful to explain to the consultant up front that it is not important whether they agree with respondent's position, but rather, that they have been appointed to assist the counsel in understanding the case and presenting relevant evidence and testimony at the hearing.

If the command refuses to grant the consultant, counsel should get expert opinions anyway by talking to experienced pilots⁹² who were *not* involved in the incidents in question, preferably not from the respondent's battalion. Obviously counsel may not reveal confidential facts to such persons, but the "public" facts of the case are likely to be substantial, and such an "outside" opinion can give the defense a more realistic assessment of the client's case than the client's own opinions.

While understanding the issues of the case is imperative, counsel must also know the members comprising the board. Counsel may determine that one or more of the board members have flown with the respondent in the past. If this is the case, the member(s) may be challenged for cause as not impartial.⁹³ Counsel should tread carefully in attempting to determine whether the member may be impartial, and, if so, the member's actual opinion of the respondent's potential for continued aviation service. Consult the client before lodging a challenge; he may have relevant information. The best way to challenge a member is to raise the issue with the appointing authority, rather than waiting until the board

convenes and bringing it there. Therefore, it is important to determine as early as possible whether there may be cause to challenge any members.

When preparing and presenting the case before the board, counsel should pay close attention to the guidance in AR 600-105, paragraph 6-3. Is the basis for convening the board a single incident? Isolated incidents should not normally form the basis for terminating aviation status.⁹⁴ Even if it appears the respondent is a poor aviator, the board must consider not just his current status but also his potential for improvement with additional training and flying experience.⁹⁵ Present evidence and testimony which speaks to these points. Review the respondent's flight records. Has he been given adequate flying time? As with any skill, maintaining aviation proficiency requires periodic and regular practice. If the client's flying opportunities have been sporadic, argue that he has potential for improvement and therefore should be given additional training and flight time.

The government may produce pilot-witnesses who testify they would not fly with respondent. If possible, find pilots who would fly with respondent, call them to testify, and explore the reasons behind this trust. When questioning potential witnesses, the suggestions in the government section, above, are equally applicable, as are the sample questions in Appendix C. The decision whether to call the respondent to testify in his own behalf is crucial. Counsel should carefully weigh any potential for incrimination against the board's likely desire to hear the respondent tell, in his own words, why he should be allowed to continue to fly.

In addition to presenting the substantive case, counsel must pay close attention to procedure. Because a FEB is not a criminal proceeding, and the respondent is not in danger of being deprived of life or liberty, procedural protections are not as strong. Army Regulation 15-6, paragraph 2-3, identifies in detail various errors that may occur during a board proceeding, and how they may be remedied; however, even substantial errors—that is, those having a material, adverse impact on the substantial rights of the respondent—are waived if not objected to at the appropriate time. In a FEB, there are no appellate courts to review the proceedings and grant relief for errors which prejudiced the respondent; the only option available to the defense counsel may be to raise the issue with the appointing authority and attempt to persuade him to grant relief. Thus, the defense should not raise objections just to "preserve the error"—object with an eye to getting relief right there at the board, or do not object at all. An objection missed is likely waived; it is therefore critical to raise any objections on the record.⁹⁶ If defense

⁹¹ Because the services of a knowledgeable consultant are so critical to fully understanding the case at a FEB, a proposed revision to AR 600-105, codifying the requirement for a defense consultant, is attached at Appendix A. When seeking an appointment of a defense consultant, counsel may use Appendix B as a sample memo effecting this appointment.

⁹² Ryan, *supra* note 61, at 45.

⁹³ AR 15-6, *supra* note 53, paras. 3-3, 5-7a.

⁹⁴ AR 600-105, *supra* note 5, para. 6-3d(1).

⁹⁵ *Id.* para. 6-3d(2).

counsel anticipates “objectionable” conduct by the government, he should bring copies of the relevant pages of ARs 15-6 and 600-105 with the relevant rules highlighted, and not rely on the legal advisor’s “on the spot” memory.

Finally, the defense counsel should remember that, although a FEB is not a separation board, it may have the same effective result. If a pilot’s aviation status is terminated, it may be difficult for him to reclassify to a new military occupation specialty (MOS). Warrant Officers, because they are specialists in their field, may well find it impossible. An officer who becomes unqualified in his MOS and cannot obtain a new one is subject to administrative separation on several grounds.⁹⁷ This can be a strong argument for defense counsel to make to the board—it makes them aware that their decision may not just ground the officer, but end his career.

VI. Conclusion

Because most JAs are unfamiliar with the FEB, it is especially important to adequately prepare for this proceeding. Fully understanding the issues presented, the procedures followed, and strategies by which to present their side’s case in its most favorable light is essential to competent and zealous representation, and is not difficult.

Becoming familiar with the applicable sections of AR 600-105 and AR 15-6, obtaining the assistance of a qualified expert, and thoroughly reviewing all evidence will prepare any JA to be a competent advocate at a FEB.

⁹⁶ AR 15-6, *supra* note 53, para. 2-3b(4). A list of potential objections is attached at Appendix D.

⁹⁷ Examples include “[A]ctions that result in the loss of a . . . professional license . . . or certification that is . . . necessary for the performance of one’s military duties”; “Failure of an officer to absorb technical proficiency required for grade and competitive category”; and “[A]ctions by a warrant officer resulting in a loss of special qualifications (such as . . . loss of flying status) that directly or indirectly precludes a warrant officer from performing in MOS and is necessary for the performance of those duties.” AR 600-8-24, *supra* note 86, para. 4-2.

Appendix A

Recommended Revision to AR 600-105

6-3. Procedures

****Insert the text below as new subsection (b), renumber existing subsection (b) as (c), and renumber all following subsections accordingly.****

b. Expert Assistance. Upon request of counsel for respondent, the appointing authority shall designate an officer currently qualified as a standardization instructor pilot (SP) to be a confidential consultant for the respondent and respondent's defense counsel. The consultant shall be designated as a member of the respondent's defense team, cloaked with the attorney-client privilege under the provisions of Military Rule of Evidence (MRE) 502, and instructed that all communications with the respondent, defense counsel, and other members of the defense team must be kept confidential and not disclosed to outside parties or the government. If no qualified SP is available, an instructor pilot (IP), qualified on the same primary aircraft as respondent and holding the rank of CW3 or higher, may be appointed. Assistance rendered by the consultant shall include, but not be limited to, the following:

- (1) Advising the respondent and defense counsel as to the strength of the government case.
- (2) Suggesting questions to be asked of government witnesses.
- (3) Opining as to the evidence to be offered by the defense and arguments to be made.
- (4) Assisting in general understanding of the aviation issues in the case.
- (5) Unless specifically authorized by the appointing authority, the duties of the consultant should not ordinarily include testifying at any session of the board.

Appendix B

Sample Appointment Memo for Consultant



REPLY TO
ATTENTION OF:

DEPARTMENT OF THE ARMY
10TH COMBAT AVIATION BRIGADE
10TH MOUNTAIN DIVISION (LIGHT INFANTRY)
FORT DRUM, NEW YORK 13602-5000

AFDR- BDA

25 January 2013

MEMORANDUM FOR CW4 Charles E. Hughes, Task Force Phoenix, 10th Combat Aviation Brigade, Fort Drum, NY 13602

SUBJECT: Appointment to Defense Team as Expert Consultant In the Flying Evaluation Board of CW2 Abe Fortas

1. You are appointed to assist the defense team in the above-referenced case.
2. Your assistance shall include, but not be limited to, advising the respondent and his counsel as to the strength of the government case, suggesting questions to be asked of government witnesses, opining as to the evidence to be offered by the defense and arguments to be made, and assisting in general understanding of the aviation issues in this case.
3. Unless further directed by separate memorandum, your duties do not include testifying at any session of the board.
4. Defense counsel shall, to the greatest extent practicable, make due consideration for and deference to your normal duties when utilizing your services in conjunction with this case.
5. You are designated as a member of the defense team and are cloaked with the attorney-client privilege under the provisions of Military Rule of Evidence (M.R.E.) 502. Your communications with the accused, defense counsel, and other members of the defense team must be kept confidential and not disclosed to outside parties or the government.
6. POC for the defense team and for this memorandum is CPT John M. Harlan, lead defense counsel, at DSN 555-5555.

ROGER B. TANEY
COL, AV
Commanding

Appendix C

Suggested Questions for Witness Interviews

Note: The following questions are intended primarily to start a dialog and frame conversations with relevant witnesses, not as an exhaustive repository. Counsel should ask follow-up questions as appropriate. Unless there is reason to believe the witness would somehow be stifled by his presence, the appointed consultant should attend witness interviews whenever possible, to assist with appropriate follow-up questions.

Pilots Who Have Flown with Respondent

1. Describe the mission(s) on which you have flown with [Respondent]. (Dates, times, places, etc.)
2. Have you ever witnessed [Respondent] [commit an unsafe act, violate flying regulations, maneuver the aircraft unskillfully, etc.—tailor question to deficiencies alleged] while flying an aircraft?
 - a. Describe the incident(s).
 - b. What should [Respondent] have done in the situation(s)?
 - c. What dangers did the incident pose?
3. What is your opinion of [Respondent]'s flying ability?
 - a. (If poor) Do you believe he has the ability to improve with additional training and/or experience? Why or why not?
 - b. Would you willingly fly with [Respondent] as your co-pilot? Why or why not?
 - c. Would you feel safe as a passenger in an aircraft piloted by [Respondent]? Why or why not?

Standardization Instructor Pilot

1. Describe the nature and significance of [Respondent]'s alleged transgression(s).
2. Are [Respondent]'s acts prohibited by regulation or contrary to recommendations in a TM, FM, TC, etc.? How so? Please show me the applicable provision(s) violated.
3. Based on a review of [Respondent]'s flight records, has he gotten sufficient flying time to develop and maintain his flying skills? (Note: This question is especially important if respondent has failed RL progression.)
4. Did [Respondent]'s acts pose a danger to life or property? How so?
5. Do you believe [Respondent] would benefit from additional training and/or experience?

Company/Troop Commander

1. How many flying hours does [Respondent] have in the last month and year?
2. May I see the log book?
3. How does [Respondent]'s flying hours compare with other pilots in your [Company/Troop]?
4. (If [Respondent] has significantly fewer hours than other pilots) Why does [Respondent] have fewer hours than other pilots in your command?
5. Has [Respondent] been in any trouble or involved in any incidents not recorded? Have you noticed any changes in [Respondent]'s demeanor, attitude, or behavior recently?

Master Gunner (If gunnery deficiency is alleged)

1. Describe the nature and significance of [Respondent]'s alleged transgression(s).
2. In your opinion, would [Respondent] improve to a satisfactory level if given additional gunnery training or practice?
3. (If respondent would not improve with additional gunnery training or practice) In your opinion, does [Respondent] have the potential to succeed as a pilot if he re-trains to fly a utility or cargo helicopter as his primary aircraft?

Appendix D

Potential Defense Objections at a FEB

Note: The following list is not exhaustive. Counsel should be constantly aware of, and raise a timely objection to, any issue which potentially improperly prejudices his client.

1. Government seeks to introduce evidence that is not relevant.
2. Government seeks to introduce evidence which was the subject of a privileged conversation (e.g., attorney-client, husband-wife, or communication with clergy).
3. Government seeks to introduce evidence of the results, taking, or refusal of a polygraph (lie detector) test without consent of the person involved in such test.
4. Board composition does not comply with requirements of AR 15-6 or AR 600-105.
5. Respondent's incriminating statement, obtained by unlawful coercion or inducement likely to affect its truthfulness, is sought to be introduced.
6. Government seeks to introduce evidence which is the fruit of an unlawful search.
7. Respondent has been denied his right to counsel (including a constructive denial, if the defense counsel was not given adequate time to prepare for the hearing).
8. A potential witness (other than an expert) is allowed to sit in on the proceeding in advance of giving testimony.
9. Board seeks to exclude respondent or counsel while receiving advice from the legal advisor.
10. Board seeks to convene without a quorum.
11. Board, after convening, seeks to seat an alternate member without ensuring he is thoroughly familiar with all proceedings up to that point. (*See* AR 15-6, para. 5-2).
12. Failure to grant a reasonable extension of time in order to allow for adequate defense preparation.
13. Challenge to the impartiality of any board member(s).
14. Failure to allow or provide for the testimony of defense witness(es).
15. Exclusion of, or failure to assist in securing, documentary or other evidence.
16. Attempt to exclude respondent from any open session of the board (unless respondent lacks proper security clearance).
17. Recommendations exceed the limits of AR 600-105, para. 6-3.
18. Proceeding violates other procedural requirements of AR 15-6 or AR 600-105.