

IN THE CASE OF: [REDACTED]

BOARD DATE: 21 March 2024

DOCKET NUMBER: AR20230001960

APPLICANT REQUESTS:

- correction of the liability determination associated with a Financial Liability Investigation of Property Loss (FLIPL), initiated 24 September 2020
- reimbursement of all monies previously paid
- a video/telephone appearance before the Board

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149, Application for Correction of Military Record with applicant's statement
- Memorandum for Record (MFR), [REDACTED] Army National Guard ([REDACTED] ARNG), 25 January 2020
- Incident/Investigation Report, 29 March 2020
- DA Form 2823, Sworn Statement, 22 September 2020
- DD Form 220, FLIPL, initiated 24 September 2020
- Memorandum, National Guard Bureau (NGB), 4 January 2021
- MFR, [REDACTED] ARNG, 6 January 2021
- Applicant's Rebuttal of FLIPL, 7 January 2021
- NGB Response to Applicant's Rebuttal of FLIPL, 11 March 2021
- Email correspondence, 4 October 2021
- [REDACTED] ARNG Central Issue Facility (CIF) Records, 23 April 2022

FACTS:

1. The applicant states, in effect, there were many administrative errors made during the processing of the FLIPL. These errors led to the reversal of his chain of command's initial recommendation that he be found NOT negligent for the loss of property.

a. There was no legal review conducted or documented. Furthermore, there is sufficient proof that his actions were not negligent in this matter and that his actions were not the proximate cause of the loss. There is no proof that the FLIPL was provided to the approving authority or actioned through appropriate channels as evidenced by the

incomplete DD Form 200. It is his understanding, and the understanding of his legal advisor, that the correct steps were not taken. The applicant contends he was not properly informed of the approving official's final determination, the legal correctness (proximate cause) was not determined in accordance with regulatory guidance, and the depreciation of charged property was not properly calculated.

b. It is probable that even though the U.S. Property and Fiscal Office (USPFO) FLIPL Project Manager (PM) was given the exact regulatory cite for the proper depreciation of lost property, he ignored the regulation and deducted the amount he wanted. In addition, the USPFO FLIPL PM's decision went against the finding of the investigating officer (IO). The PM's errors and omissions directly prevented him from receiving due process during the FLIPL process resulting in a monetary loss.

c. His actions were not negligent. The loss was the result of theft and the documented misconduct of a third party. Had his car been unlocked or had the items been in plain sight then there could be an argument that he was negligent. However, this loss occurred when the items were stolen from his trunk, and they were locked out of sight. He had the equipment with him because there was a chance that he would have to return from a weekend pass at his residence to his duty location to support a COVID-19 mission. He was not in violation of any policy by having his equipment with him. Further, it was apparent that other cars had been vandalized at the same time that his car was vandalized. The police report stated the vehicle was unlocked but that is inaccurate. Given the circumstances he acted like a reasonably prudent person under the same or similar circumstances, and he cannot be found negligent.

d. The criminal actions of an unknown party were the proximate cause of the loss in this case. They formed an intervening cause which by the requirements of the Army regulation should relieve him of all liability in this matter.

e. Legal requirements which must be met to hold a person financially liable for a loss of property were not met. Specifically, it was a legal error to hold someone liable without a proper finding of negligence and proximate cause of the loss.

2. The applicant is currently serving as a noncommissioned officer in the [REDACTED] ARNG. At the time of the incident under review, the applicant held the rank of staff sergeant (SSG/E-6).

3. His service record was void of information regarding a FLIPL investigation.

4. The applicant provides the following documents:

a. A MFR, [REDACTED] ARNG, 25 January 2020, which outlines the unit's policy for storing organizational clothing and individual equipment (OCIE). This policy permitted

individuals in the rank of SSG and above to retain their equipment in their possession rather than a designated locker.

b. An Incident/Investigation Report, 29 March 2020, which shows that the Elk Grove Police Department responded on 29 March 2020, to find two unlocked vehicles, of which one belonged to the applicant, were broken into and property was removed from both vehicles. The applicant reported missing approximately \$2000 worth of military equipment and other personal items worth approximately \$500.

c. His sworn statement, 22 September 2020, wherein he detailed the theft of his OCIE from his privately owned vehicle and provided a list of the missing equipment. He also provided two photographs of what appear to be scratches on the trunk of his car.

d. A DD Form 220, which shows a FLIPL was initiated on 24 September 2020 for the loss of his OCIE which occurred on 28 March 2020. Item 9, Circumstances under which property was lost, states the applicant had stored his OCIE in his vehicle due to mission requirements and that those items were stolen. The applicant filed a police report listing all the missing items. His commander found the applicant was not negligent and stated the applicant was on Defense Support of Civil Authorities mission and he was not required to store his gear in the unit according to the unit Standard Operating Procedures (SOP). His commander recommended the applicant not be held liable for the incident. This form is void of findings, recommendations, or action taken.

e. A memorandum, NGB, USPFO, 4 January 2021, which notified the applicant that he was being recommended for charges of financial liability to the U.S. Government in the amount of \$2,858.14 for the loss of property. The space for the applicant's acknowledgment is blank.

f. An MFR, [REDACTED] ARNG, [REDACTED], 6 January 2021, which shows the applicant was present for the unit's activation to provide support during the State's COVID-19 response from 20 March 2020 through 16 April 2020 in [REDACTED]

g. His rebuttal to the FLIPL recommendation (see paragraph 4(e) above), 7 January 2021, wherein he asked that the financial liability be dismissed in accordance with Army Regulation (AR) 735-5, Property Accountability-Property Accountability Policies, which requires that "before a person can be held financially liable, the facts must show that he or she, through negligence or willful misconduct, violated a particular duty involving the care of the property." He further stated, in effect, that AR 735-5 states in -

(1) Paragraph 13-28, simple negligence is defined as "the absence of due care, by an act or omission of a person which lacks that degree of care for the property that a

reasonably prudent person would have taken under simple circumstances, to avoid the loss, damage, or destruction of Government property.”

(2) Paragraph 13-28, proximate cause is required before holding a person financially liable for a loss to the Government. Proximate cause is defined as “the person’s acts or omissions were the cause that, in a natural and continuous sequence, unbroken by a new cause, produced the loss, damage, or destruction, and without which the loss, damage, or destruction would not have occurred.

(3) Appendix B-2, the method for calculating the depreciation of property when determining the amount of liability.

h. The NGB, USPFO PM’s response to the applicant’s rebuttal, 11 March 2021, wherein the PM stated, in effect, the applicant’s case centered not on intentional or willful action on the applicant’s part but instead “simple negligence.” The applicant’s actions were unintentional but still amounted to the definition of simple negligence. By regulation OCIE will not be stored in privately owned vehicles (POV) and must be stored in a locked duffel bag and building structure (AR 190-51, Military Police-Security of Unclassified Army Resources (Sensitive and Nonsensitive), 2019). Mobilization or being on orders did not relieve the applicant from his responsibility of properly safeguarding his OCIE. The applicant had the age and experience to use better judgement when securing his equipment. The applicant signed a valid hand receipt and therefore had direct custodial and personal responsibility for the OCIE. The applicant was at home and not in an emergency situation or under any time constraints or any other conditions that would negatively impact the mission or his safety or the safety of others. Whether the POV was locked or unlocked was not relevant. If the OCIE had been inside the home, it would have been considered reasonably secured.

(1) The applicant’s commander recommended “Not liable” based on the policy that the applicant did not have to retain the OCIE at the unit. However, the commander’s policy letter does not address the applicant’s responsibility to safeguard and secure OCIE in his possession. There was insufficient reasoning on the part the commander.

(2) The depreciation error was corrected to 10 percent.

(3) Block 15, Financial Liability Officer, of the DD Form 200 was corrected to add missing information that did not populate during the downloading of the form. The factual determination reads as follows:

(a) The applicant improperly stored and secured his OCIE in his POV which was subsequently stolen from his POV on 28 March 2020 due to simple negligence. Based

on AR 190-31, paragraph 3-14b, the regulation states that OCIE shall not be stored in a Soldier's POV.

(b) The applicant had a valid hand receipt and acknowledged that he had the OCIE in his possession at the time of the theft. He also acknowledged that he left some of the OCIE bags in his POV (sworn statement), illustrating he did not execute due diligence or use good judgement. The fact that other car owners were victims of theft/vandalism had no bearing on the applicant's actions and failure to properly safeguard his OCIE.

(c) The unit commander recommended that the applicant not be held liable because the loss occurred during the DSCA support mission (see DD Form 220). A unit policy letter also stated that Soldier's E6 and above are authorized to maintain OCIE in their possession. The applicant claims both the commander's recommendation, and the unit policy letter relieved him of his responsibility to safeguard and secure his assigned OCIE. However, neither the commander's recommendation nor a unit policy letter in this case can relieve a Soldier of responsibility to safeguard and secure OCIE, since both the recommendation and policy violate both Army regulation and State policy. NOTE: The applicant provided the corrected form.

i. Email correspondence between the applicant and the UPPFO PM wherein the applicant requests to be provided the name of the FLIPL approval authority. The PM responded that the approval authority had not been assigned and that upon completion and review by the Staff Judge Advocate, the applicant would be notified. The PM noted that the applicant had only been notified in regard to the recommendation. The PM's office was in receipt of the applicant's rebuttal and the case was being processed through channels.

j. Numerous pages of the applicant's OCIE transaction records which includes a hand receipt for individual equipment.

5. On 26 December 2023, the Office of the Deputy Chief of Staff, G-4, Acting Director of Supply Policy, provided an advisory opinion for the Board's consideration, which states, in effect:

a. The application for relief of financial liability for the FLIPL initiated against the applicant is returned with a recommendation that the financial liability assessed be reversed and that the Defense Finance Accounting Service (DFAS) terminate the debt, return all funds garnished, and correct his records. In addition, this official recommends a review of AR 735-5 to establish a time limit on when a debt can be collected from a Soldier.

b. After a thorough review, the Office of the Deputy Chief of Staff, G-4, concluded that the unit did not follow Army policy and procedures when conducting the FLIPL

process in accordance with AR 735-5 and the recommendation to hold the applicant liable is not administratively sound.

c. AR 735-5 states in:

(1) Paragraph 13-8b. The ARNG will initiate and present financial liability investigations of property loss to the appointing authority or approving authority as appropriate not later than 75 calendar days after the date of discovering the discrepancy. All ARNG investigations will then be forwarded to the State USPFO who will serve as the final review authority. The Date Loss Discovered annotated on the FLIPL is 28 March 2020 and the Date Initiated annotated on the FLIPL is 24 September 2020. This is 180 days, which is outside the policy stated above.

(2) Paragraph 13-10.

(a) Preparation requirements for DD Form 200 Block 9, Circumstances Under Which Property Was, contains the statement "Continued on continuation sheet" indicating additional information containing a description of events leading to the loss, is provided. However, no continuation sheet for Block 9 is attached to this packet.

(b) In accordance with AR 735-5, Chapter 13, exhibits and statements are lettered alphabetically at the bottom of the statement or certificate, followed with the date, amount, and organization as shown on the face of the DD Form 200. Example: "Exhibit A, DD Form 200, 18 May 2013, \$375.00, Co Z, 906th Signal Battalion." Other exhibits such as an estimated cost of damage (ECOD), military police report, and hand receipt, will also be identified as exhibits as shown above.

(c) As part of the initial FLIPL packet, there are no exhibits attached and labeled in accordance with the policy stated above. The statements/exhibits attached to this packet appear to be those which are part of the applicant's appeal packet.

(3) Paragraph 3-10 (14).

(a) An approving authority, when no appointing authority has been designated, initially makes a decision based upon the available evidence whether to appoint a financial liability investigating officer by choosing the correct block in 13c, Appointing Authority-Financial Liability Officer Appointed, of the DD Form 200. If an IO is required, the approving authority completes a memorandum appointing the financial liability IO or AR 15-6, Boards, Commissions, and Committees-Procedures for Administrative Investigations and Boards of Officers IO.

(b) If the approving authority believes that financial liability is appropriate, they will obtain a legal opinion as to its legal sufficiency prior to determining whether to assess financial liability.

(c) When the approving authority decides to approve charges of financial liability against an individual, the approving authority will enter "Approved to hold (insert name, rank, and SSN) financially liable in the amount entered in block 15d, Financial Liability Officer-Recommended Financial Liability" of the DD Form 200. Also enter the respondent's basic pay at the time of loss or damage.

(d) No written legal opinion as to its legal sufficiency prior to determining whether to assess financial liability is attached to this packet.

(e) Block 13, Block 14, Approving Authority, and Block 15 of the DD Form 200 are not populated/signed. It appears that an appointing authority was not assigned, which means that Block 13 would not need to be populated. In this case Block 14 should be populated/signed.

(4) Paragraph 13-15, Accountable Officer.

(a) Accountable officer will complete Block 17, Accountable Officer, of the DD Form 200 following the completion of Blocks 1 through 12. A document or voucher number will be assigned to any initiated DD Form 200 thereby dropping accountability when received from the initiator.

(b) Block 17 of the DD Form 200 is not populated/signed by the accountable officer and no voucher or document number is annotated on the DD Form 200 in this packet.

(5) Paragraph 13-43 Respondent's actions: When an individual has been notified that financial liability has been approved, the individual will, with the advice of legal counsel, thoroughly review the financial liability investigation packet provided, and then decide whether or not to take one of the actions listed below. Request reconsideration of the approving authority's decision. Submit requests for reconsideration by memorandum through their immediate commander to the approving authority. Submit requests for reconsideration only on the basis of legal error.

(a) When the approving authority does not reverse their original decision to approve financial liability, the request for reconsideration becomes an appeal, which will be forwarded to the appeal authority by the approving authority.

(b) The request for reconsideration will set forth, in detail, any new evidence offered, and provide rationale why financial liability is not appropriate.

(c) A request for reconsideration stops all collection action pending a decision by the approving authority and/or the appeal authority.

(d) Upon submission of the servicemember's request for reconsideration, all collection action should stop, pending the approving authority and/or the appeal authority. The servicemember is requesting monies taken be refunded, indicating the collection action was not stopped.

6. On 8 January 2024, the advisory opinion was provided to the applicant to allow him the opportunity to respond. He did not respond.

7. By regulation, the ARNG will initiate and present financial liability investigations of property loss to the appointing authority or approving authority as appropriate not later than 75 calendar days after the date of discovering the discrepancy.

8. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief is warranted. The Board found the available evidence sufficient to consider this case fully and fairly without a personal appearance by the applicant.

2. The Board considered the conclusions of the advisory official in this case and concurred with those conclusions. For the reasons set forth in the advisory opinion, the Board determined the applicant's record should be corrected to show collection of the debt he incurred as a result of the loss of OCIE on 29 March 2020 was cancelled. As a result of this correction, any monies he has paid toward the debt should be returned to him.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

█	█	█	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army and Army National Guard records of the individual concerned be corrected by showing collection of the debt he incurred as the result of the loss of OCIE on 29 March 2020 was cancelled. As a result of this correction, any monies he has paid toward the debt should be returned to him.

6/27/2024

X █

CHAIRPERSON
█

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. AR 735-5, Property Accountability Policies, provides basic policies and procedures for accounting for U.S. Army property and accounting for lost, damaged, or destroyed U.S. Army property.

a. Paragraph 13-8b states the ARNG will initiate and present financial liability investigations of property loss to the appointing authority or approving authority as appropriate not later than 75 calendar days after the date of discovering the discrepancy. All ARNG investigations will then be forwarded to the State U.S. Property and Fiscal Officer (USPFO) who will serve as the final review authority.

b. Paragraph 13-10, states -

(1) Block 9 will contain a description of the events leading to the loss or damage of Government property, with an explanation of how it happened, when it happened, and who was involved, omitting personal opinions and conjectures. The description will provide enough detail to determine the proximate cause of the loss or damage if possible. Show all persons directly concerned by name and grade. The description of the facts must be detailed enough to enable the appointing authority or the approving authority to make a determination of whether relief from, or assessment of financial liability will be sought without appointment of a financial liability officer, or that an investigation by a financial liability officer is required. The initiator of a DD Form 200 must prepare a thorough document in recognition that an investigation by a financial liability officer represents a significant expenditure of time and effort. It may be necessary for the initiator to obtain statements from individuals who were witnesses or who have knowledge of the incident resulting in the loss.

(2) Block 15a, Findings and recommendations. Enter the findings of the investigating officer along with a recommendation regarding financial liability of the involved parties. Proper conclusions will be drawn from the available facts, not on opinion or suspicions. The investigating officer must sustain or refute the statements made in block 9 and any other statements that are part of the investigation. The investigating officer will state in his or her own words how the loss or damage occurred based upon the evidence obtained through the investigation. Recommendations should state the investigating officer's recommendation, such as financial liability to be assessed or relief from responsibility and accountability. Also state the disposition instructions for any unserviceable equipment.

c. Paragraph 13-29 states a Financial Liability Officer's (FLO) responsibility is to determine the cause and value of the loss, damage or destruction of Government property listed on the FLIPL, and to determine if assessment of financial liability is warranted. That determination must be determined from the facts developed during a thorough and impartial investigation. However, before beginning the investigation the financial liability officer must have an understanding of the terms "responsibility, culpability, proximate cause, and loss."

d. Paragraph 13-34 states the FLO will give any individual, against whom he or she makes a recommendation to assess financial liability, a chance to examine the FLIPL after the findings and recommendations have been recorded on the DD Form 200, and the opportunity to make a rebuttal statement in his or her behalf.

e. Paragraph 13-35, states Individuals have the right to submit a rebuttal statement, or other added evidence, and to have that statement or evidence considered and

attached to the FLIPL for consideration by higher authority. Individuals against whom a charge of financial liability is recommended may obtain legal advice from the servicing legal office, (Office of the Staff Judge Advocate, Post Judge Advocate, Command Counsel or Legal Counsel).

f. Paragraph 13-38, states upon receiving a FLIPL on which the approving authority believes financial liability is appropriate, the approving authority will obtain a legal opinion as to its legal sufficiency prior to determining whether to assess financial liability. A legal advisor will provide a written opinion as to the legal sufficiency of the FLIPL. If, in the legal advisor's opinion, the FLIPL is not legally sufficient, the opinion will state the reasons why and make appropriate recommendations. The opinion will be attached to the FLIPL prior to the approving authority's review and decision. The approving authority should ensure corrective actions are taken before taking final action to assess financial liability.

g. Paragraph 13-41b states liability limits in all other cases, will not exceed the amount equal to one month's basic pay at the time of the loss, or the actual amount of the loss to the Government, whichever is less, may be assessed.

h. The following terms are defined in the Glossary, Section II –

(1) Negligence -The failure to act as a reasonably prudent person would have acted under similar circumstances. An act or omission that a reasonably prudent person would not have committed, or omitted, under similar circumstances and which is the proximate cause of the loss of, damage to, or destruction of Government property. Failure to comply with existing laws, regulations, and/or procedures may be considered as evidence of negligence.

(2) Simple Negligence - The failure to act as a reasonably prudent person would have acted under similar circumstances.

(3) Proximate Cause - The cause, which in a natural and continuous sequence of events unbroken by a new cause produced the loss or damage. Without this cause, the loss or damage would not have occurred. It is further defined as the primary moving cause, or the predominate cause, from which the loss or damage followed as a natural, direct, and immediate consequence.

2. AR 600-4, Remission or Cancellation of Indebtedness, in accordance with the authority of Title 10, United States Code (USC), section 4837, the Secretary of the Army may remit or cancel a Soldier's debt to the U.S. Army if such action is in the best interests of the United States. Indebtedness to the U.S. Army that may not be canceled under Title 10, USC, section 4837 when the debt is incurred while not on active duty or in an active status.

3. AR 15-185, ABCMR, prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR will decide cases on the evidence of record. It is not an investigative body. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires. Additionally, applicants may be represented by counsel at their own expense.

//NOTHING FOLLOWS//