

IN THE CASE OF: [REDACTED]

BOARD DATE: 1 February 2024

DOCKET NUMBER: AR20230008237

APPLICANT REQUESTS: through counsel,

- upgrade of his characterization of service from under other than honorable conditions (UOTHC) to honorable
- his Separation Program Designator (SPD) code and narrative reason for separation be amended to reflect "Secretarial Authority"
- waiver, remission, or mitigation of his debt to the Defense Finance and Accounting Service (DFAS)
- to appear in person at his own expense before the Board

APPLICANT'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Counsel's petition and 25 enclosures (208 pages)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), Section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states, through counsel, the Board should consider his honorable military service as both an enlisted and commissioned Soldier; his candor; the severity of his sentence; his positive and productive post-court-martial conduct; his many intellectual contributions to military ethics and international humanitarian law; his character and reputation; length of time since his court-martial; his age; and his illness. As Enclosure 4, counsel provides a letter from the applicant to the Board, wherein he states:

"I am the U.S. Army counterintelligence officer who was separated from the U.S. Army because of my actions to raise awareness of human rights violations occurring in the proximity of U.S. Forces in Haiti in September 1994. I perceived what appeared to be indifference on the part of my command toward those suffering from

these violations. I inspected and surveyed the National Penitentiary in Port-au-Prince without authority, for which I was court-martialed and dismissed from active service. My court-martial occurred in May 1995, and I was found guilty of conduct unbecoming an officer, not being at my place of duty, and raising my voice to a senior officer. The court-martial convening authority, MG [Major General] [REDACTED] took an unscheduled retirement immediately after the trial and before he took post-trial action and the new court martial convening authority, MG [REDACTED], threw out the charge that was the focus of the weeklong court-martial-conduct unbecoming an officer. My appeal to remain on active duty during the appellate process was denied and I was placed on 'extended unpaid leave' from January 1996 until 2000 after my writ of certiorari, prepared by former Attorney General of the United States: [REDACTED] was not accepted for review by the United States Supreme Court.

My appeals were due to the military judge not instructing the court-martial panel on the defense of justification, which I felt was the only defense of an officer to the charges against me. I was given various awards by the ACLU [American Civil Liberties Union] and other organizations for the very offense that was the subject of my prosecution. I am an internationally recognized expert on the laws of war and military doctrine and have published numerous articles and books on that subject. Besides numerous awards, I received other awards and decorations over the normal course of my military career. I received the 1995 American Civil Liberties Union's Kharas Award, the 1995 Poor Richard's Club's Speak Up For America Award, and the Brooklyn Society For Ethical Culture XIV Annual Peace Site Award for actions in defense of political prisoners in Haiti during Operation Restore Democracy, ending my formal military career.

However, it is not my intention to relitigate my court-martial and appeals, but to ask that my subsequent actions in the interest of the U.S. military be considered in a reclassification of my dismissal to an Honorable Discharge status. I accept the conclusions of the official after-actions review of the 1998 U.S. Army Command and General Staff College, 'Invasion, Intervention, Intervasion: A Concise History of the U.S. Army in Operation Uphold Democracy' and its description of my actions (enclosure).

Subsequent to my separation from active service, I have used my unusual position to advocate the for the historical centrality of American military doctrine in the development of International Humanitarian Law (IHL). I have been engaged as a human rights lecturer by the Departments of the Army and Defense to include the Western Hemisphere Institute for Security Operations/U.S. Army School of the Americas (USARSA), Annual Invited Human Rights Week Lecturer." [He provides a list of activities in which he has participated.]

"I received my Ph.D. in American Diplomatic History in 2005 from [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

I have taught American and intellectual history at numerous public universities and colleges. I am pending publication of books on a metaphysical defense of compassion and another of my spiritual and ethical journey from a soldier to a human rights activist. I have written over twelve articles on military ethics in major journals (to include peer reviewed) and newspapers.

The timing of my request is based on my ill health and desire to receive burial benefits as a veteran. Therefore, I have no interest in obtaining a General Discharge. I am a fourth generation Army officer with my father serving in World War II and the Cold War, my great-grandfathers serving in the Civil War, and my mother, a Korean War era veteran. Both my parents were buried with full military honors at Arlington National Cemetery. I do not foresee being buried at a National Cemetery, but I would like to receive any burial benefits accorded for honorable service for the period of my enlisted, non-commissioned, and commissioned service. On September 7, 1983, I was honorably discharged after six years of enlisted/noncommissioned service. I desire my commissioned officer's service (September 28, 1986 - April 16, 2001) be recharacterized as honorable based on my service to the U.S. military profession after my court-martial conviction and separation from normal active service. As my request pertains to my receiving end of life benefits and my late-term chronic ill-health, a recharacterization to a General Discharge would not be efficacious.

Other post-discharge action corrections requested. The Defense Finance and Accounting Service (DFAS) is collecting tens of thousands of hundreds of dollars for a claim (EFT 2612965971N/TOP Trace # 19183d892) they have yet to adequately document relating to my period of UNPAID leave from 1995 to 2001. I am currently having \$269.96 withdrawn from my monthly SSDI [Social Security Disability Insurance] disability payment, placing my fixed income below a living wage. I have yet to know what is the basis of this claim as it is not related to my court martial sentence and is for a period I received no pay or pay vouchers. I have requested an in-person hearing and I have submitted a request for congressional action to my former congressmen. I have received no relief despite several efforts over several decades. I do not know when I can expect the collections of hundreds of dollars out

of my SSDI disability to end. I request documentation showing how this collection action was initiated and I request all funds collected from me to be returned.

Finally, I assert that I am not and have never been a disaffected officer or soldier. I am presently functioning (substitute Junior Reserve Officer Training Corps (ROTC) instructor) in the tradition of a professional American Soldier, as I have done since November 8, 1977, when I took my first oath to support and defend the US Constitution. Please consider my service to the American Military Profession since leaving active status in consideration of my request to re-characterize my service to honorable standing."

3. Counsel provides a petition and 25 enclosures which are available in their entirety for the Board's consideration. Counsel states, in part:

a. Summary of the petition. The applicant has lived an extraordinary life as an Army veteran, academic, and advocate for humanitarianism, in the conduct of military operations. While deployed to Port-au-Prince, Haiti in 1994 for Operation Uphold Democracy, the applicant felt justified by duty, conscience, and the words of the Commander in Chief to investigate alleged human rights abuses at the Port-au-Prince National Penitentiary. As a counterintelligence officer in the 10th Mountain Division, he used his chain of command to raise concerns about conditions at the prison. When the chain of command failed to act, he did. He left the garrison and went to National Penitentiary by himself. He discovered poor conditions in the prison. For his actions, the applicant was tried and convicted at a general court-martial in 1995 and sentenced to dismissal and total forfeiture of all pay and allowances. The convening authority later mitigated the sentence to forfeiture of \$1,500 per month for 2 months.

b. Background: The Board is empowered to change a court-martial discharge only if clemency is determined to be appropriate. Clemency is an act of mercy, or instance of leniency, to moderate the severity of the punishment imposed. Context informs clemency decisions. What follows, then, is context about the applicant's military service, court-martial, and professional life after he left the Army. The Board will also learn how the government's accounting error imposed a debt that he continues to pay to this day, costing him thousands of dollars through no fault of his own.

(1) The applicant begins his Army career:

(a) The applicant comes from a family of veterans. His mother and father served honorably and were laid to rest with full military honors in Arlington National Cemetery. As a young man, the applicant followed in the footsteps of his parents and grandparents and enlisted in the Army. He served nearly 6 years until September 1983 when he separated at the rank/pay grade of Sergeant/E-5 with an Honorable discharge.

(b) After completing his required service, the applicant could have pursued a civilian career. Instead, he went to school and joined the ROTC. He was not done serving his country. He aspired to earn a commission as an Army officer, and he hit his mark, completing ROTC and commissioning in 1986. The applicant would serve 9 years as an Army intelligence officer until his 1995 general court-martial. Before Haiti and Operation Restore Democracy, he served 6 years in Germany as an operations officer for surface-to-air missiles. In another assignment, he supervised 500 Soldiers stationed in three countries. He spent a year in Central America and the Caribbean. He then served as a Theater Intelligence Officer for Operations Restore Hope (Somalia) and Southern Watch (Iraq).

(2) Operation Uphold Democracy and Court-Martial.

(a) First, the applicant attempted to use his chain of command to investigate human rights abuses at the National Penitentiary of Haiti in Port au Prince.⁸ The end of the story is that he left the garrison on his own accord, and, without authority, inspected the prison based on intelligence reports about deplorable conditions there. In the beginning, though, he tried to use the chain of command and service agencies-his superiors, the legal office, chaplain, and inspector general, but his complaints and concerns about human rights violations at the National Penitentiary spurred no response. Today the Army encourages Soldiers to report suspected human rights abuses, such as human trafficking, to their chain of command, just as the applicant tried to do nearly three decades ago.

(b) Second, the appellate record makes it abundantly clear that the applicant's concerns about the prison's conditions were authentic and sincere. As a matter of law, the courts determined he believed he was right at the time. Under the circumstances, he believed he was doing what the mission demanded. His high degree of conscientiousness showed up while he was in the military and continued in his post-Army career.

(c) Third, the Army's initial assessment of the applicant's conduct was not a court-martial or punitive discharge. As the U.S. Court of Appeals for the Armed Forces (CAAF) opinion points out, his command offered him nonjudicial punishment (NJP) and an opportunity to resign his commission. When the applicant refused to surrender his Army career, his command preferred and referred charges to a general court-martial.

(d) Fourth, the applicant faced multiple charges for his conduct from 30 September to 1 October 1994. After the convening authority took final action on the case, however, the applicant stood convicted of minor military-specific misconduct: failure to go and departing his place of duty; disrespect towards a superior officer; and willful disobedience for not following a superior officer's command to "be at ease" and "stop talking." During post-trial processing, the convening authority dismissed the most

serious charge against the applicant-conduct unbecoming an officer and a gentleman in violation of Article 133 of the Uniform Code of Military Justice (UCMJ). The Article 133 charge was the gravamen of the government's case against him. Despite mitigating the conviction, the convening authority still approved the dismissal but reduced the total forfeiture of pay to \$1,500 pay per month for 2 months.

(e) Finally, multinational forces (MNF) in Haiti eventually investigated conditions at the National Penitentiary. According to one news source, the forces inspected the prison in late November 1994. But, hours after the applicant left the facility, an Army colonel (COL) named MS, who was the military police commander for the MNF, arrived at the prison on other business. As the MNF captured prisoners, they needed someplace to keep them, and COL [REDACTED] job that day was to check the National Penitentiary for space. At the court-martial, he testified that the prison was "filthy" and the conditions inside were "terrible." Although COL [REDACTED] testified that he saw no signs of torture or abuse, he still filed "a report to the Joint Task Force (JTF) commander, Major General (MG) [REDACTED] recommending that "the United Nations or some ... relief organization be directed to visit the prison and provide some relief for the conditions." A later MNF inspection found the prison "not to USA [Army] standards." The applicant's actions were non-violent, principled, and purposeful. They were the actions of someone who cared deeply about people, human rights, and the mission. The Army disagreed with the applicant's actions at the time. Today, though, the Army enshrines the notion that Soldiers stand ready to protect the weak and vulnerable from tyrants, thugs, and bullies.

(3) The applicant exhausted his military appeals. The applicant continued serving in the Army for several months until he was placed in a leave without pay status. After the Army appellate court denied his appeal, he brought his case to the military's highest court, the CAAF. There, too, the court affirmed his conviction and sentence. He petitioned the U.S. Supreme Court for a writ of certiorari, which the Court did not grant.

(4) After the applicant exhausted his clemency and appellate rights, he became an academic, author, advisor, and advocate for human rights. Even after an abrupt end to an otherwise outstanding Army career, he continued to support the mission as a lecturer at the U.S. Army School of the Americas. In 2005, he earned a Ph.D. in American Diplomatic History from [REDACTED]. Two years later, he published a book: [REDACTED]

[REDACTED] He has taught at universities and colleges and written articles on military ethics for journals and newspapers. Even now, he serves as substitute teacher for the Junior ROTC at a local high school. His court-martial conviction never stopped him from living his convictions and elevating the centrality of military ethics and American military doctrine in International Humanitarian Law. His conviction did, however, preclude him from realizing the benefits and entitlements that come with an honorable discharge.

(5) The Government imposed an unjust debt.

(a) On 30 November 1995, the general court-martial convening authority took final action in U.S. v. [the applicant]. The convening authority allowed the dismissal to stand but mitigated the total forfeiture of pay and allowances to forfeiture of \$1,500 pay per month for 2 months. On 5 December 1995, the applicant began unpaid appellate, or excess, leave.

(b) Although the applicant stopped receiving pay and allowances in December 1995, the government continued to post payments to his pay account but withheld disbursement. The Army also paid Federal Income Tax Withholding (FITW) to the Internal Revenue Service. In 2009, DFAS notified the applicant that he owed a debt of \$16,570.58 for pay and allowances he supposedly received while he was in leave without pay status. The applicant contested the debt to the best of his abilities and denied ever receiving pay and allowances while in an unpaid status.

(c) DFAS held a hearing on 19 December 2011 about the debt. The paper-only hearing found the debt valid, and that the government over collected FITW from the applicant's withheld pay. He received pay and allowances for 5-15 December 1995 in the amount of \$1,628.84 and would appear to be a valid debt.

(d) After 15 December, DFAS no longer issued payments to him, but continued posting entitlements to his account. DFAS set aside FITW and paid the Internal Revenue Service (IRS) in 1996 and 1997. The applicant still contends the debt is unjust. The debt was not the result of anything he did or did not do. The debt was the government's fault, an accounting or systems error for which he was held responsible.

c. Discussion.

(1) The applicant's Court-Martial sentence was disproportionate to his offenses.

(a) The applicant departed the Army saddled with a punitive discharge. The Army did not initially assess his actions in Haiti as deserving of a punitive discharge. His command, in fact, offered him a pathway out of the military if he accepted NJP and resigned. The applicant elected not to accept NJP or give up his Army career. His decision to have his case presented to a jury does not mean he deserved a dismissal for his behavior.

(b) Service members have the right to decline an offer of NJP from a superior officer. There are good reasons for turning down NJP. For example, service members may feel they are innocent of the allegations but prefer that a group of members decide rather than a single person. Another reason they may reject an offer of NJP is if they believe they will not get a fair hearing from the chain of command. In fact, the applicant

raised the issue of unlawful command influence on appeal. Although the appellate courts rejected the argument, the argument explains the applicant's concerns about his chain of command at the time. But the fact that the case began as NJP shows that the Army did not intend at the outset to punish the applicant severely or permanently for his actions in Haiti.

(c) The UCMJ gives courts-martial guidelines for fashioning appropriate sentences. Under Article 56, UCMJ, military courts are to impose punishments that are "sufficient, but not greater than necessary. to promote justice and to maintain good order and discipline in the armed forces." To achieve this objective, the UCMJ advises courts to consider several principles of sentencing. These principles are paraphrased as follows:

- Nature and circumstances of the offense
- History and characteristics of an accused service member
- Victim and mission impact
- Need for sentence to reflect the seriousness of the offenses and promote respect for the law
- Punishment
- Deterrence
- Rehabilitation
- Opportunity for retraining and return to duty in the right cases.¹⁷

(d) By the end of his case, the applicant stood convicted of minor offenses. A punitive discharge for these charges was excessive. Regarding the offenses, he was not convicted for what he did at the National Penitentiary because the convening authority dismissed the Article 133, UCMJ, charge and specification. Rather, he was convicted for failing to report for regular duty on 30 September, leaving a hospital after being told to get a mental health evaluation, and raising his voice to a lieutenant colonel (LTC).

(e) Until his court-martial, the applicant had a spotless record in the Army. He was always a dutiful and disciplined enlisted and commissioned Soldier. His actions had minimal mission impact. He did not jeopardize the 10th Mountain Division's role in the MNF. His actions caused no casualties or mishaps or loss of classified information. His actions did invite intervention from the embassy and instigated an investigation and military justice action. But it must be remembered that the applicant tried to use his chain of command to call attention to human rights concerns before he decided to embark on a solo expedition to the National Penitentiary. The MNF would soon follow in the applicant's footsteps and investigate conditions in the prison. In the long run, the applicant's actions had a positive impact on future Soldiers and missions because they modeled action and initiative to stop suspected human rights abuses.

(f) A punitive discharge is a severe punishment. It should only be reserved for the most serious offenses. The applicant's actions did not warrant a lifelong stigma. Given his history and background, he did not need to be deterred from committing further offenses. Nor did he require rehabilitation. In the end, he did what he knew needed to be done in Haiti. He was right to elevate legitimate concern about conditions at the National Penitentiary. His actions in response to inaction from the chain of command may have been extreme at the time. Today, though, a similarly situated Soldier would be applauded and awarded for exposing human rights abuses.

(2) The applicant's military record mitigates his conviction and makes his punitive discharge excessive and unnecessary.

(a) A second reason to upgrade the applicant's discharge is his otherwise good military character. He served 15 honorable and decent years as an enlisted and commissioned Soldier. His court-martial conviction does not outweigh his outstanding service in several countries supporting multiple military operations during the 1990s. His punitive discharge effectively erased his entire commissioned service—a punishment that so far has imposed a lifetime of lost benefits, rights, and status for this Veteran.

(b) Even if the Board thought that the court-martial got it right in 1995, it may still grant clemency now. The Wilkie Memorandum explains how "[i]ncreasing attention is being paid to pardons for criminal convictions and the circumstances under which citizens should be considered for second chances and the restoration of rights forfeited as a result of such convictions." The question the Board must answer is whether the applicant is a person and former Soldier deserving of a second chance. The evidence in the record shows that he is.

(3) The applicant's post-military conduct has been blameless.

(a) The applicant's best case for clemency may be, in the end, his character and rehabilitation after he left the Army. When he could have spiraled into bitterness and despair at the loss of his Army career, the applicant instead went to work teaching, writing, and advocating about International Humanitarian Law. His dismissal did not prevent the Army from seeking his services. The applicant has even lectured at the Army's School of Americas.

(b) The Wilkie memo gives this Board several factors to consider in determining whether to grant relief on clemency grounds. They are:

- An applicant's candor
- Whether the punishment, including any collateral consequences, was too harsh

- The aggravating and mitigating facts related to the record or punishment for which the Veteran or service member wants relief
- Positive or negative post-conviction conduct, including any arrests, criminal charges, or any convictions since the incident at issue
- Severity of misconduct
- Length of time since misconduct
- Acceptance of responsibility, remorse, or atonement for misconduct
- The degree to which the requested relief is necessary for the applicant
- Character and reputation of applicant
- Critical illness or old age
- Meritorious service in government or other endeavors
- Evidence of rehabilitation
- Availability of other remedies
- Job history
- Whether misconduct may have been youthful indiscretion
- Character references
- Letters of recommendation
- Victim support for, or opposition to relief, and any reasons provided

(4) The applicant's actions in Haiti became the blueprint for Soldiers and service members to immediately report human rights abuses:

(a) The applicant stood up against human rights abuses in Haiti, and then stood trial for having the courage of his convictions. His behavior, at the time, may have seemed unusual or insubordinate to his superior officers. Today, though, his initial reports of human rights violations would have been promptly investigated. Two decades of war in Iraq and Afghanistan imprinted on the soul of every Soldier the duty to speak up when they see innocents being mistreated, tortured, and abused.

(b) After the applicant's sojourn to the National Penitentiary, the MNF in Haiti inspected the prison that he visited. The U.S. military took an increased interest in the conditions of the prisons and treatment of detainees. Army commanders learned and were trained to root out intolerable detainee conditions in Haiti and later Iraq. The Army understood, just as the applicant did, that the rule of law must prevail, especially in non-permissive environments. What the applicant did in Haiti came with a heavy consequence. But his actions likewise served as a catalyst for reform within the Army and Department of Defense for reporting and stopping human rights violations wherever American forces are operating.

(5) The Board should waive, remit, or cancel the applicant's DFAS debt and direct DFAS to issue a refund.

(a) The applicant received notice from DFAS in 2009 that he was indebted to the government for overpayment of pay and allowances between December 1995 and December 1998. He disputed the debt but to no avail. The Department of the Treasury now garnishes his Social Security income.

(b) The evidence in the record clearly shows that the debt was the government's fault. It withheld federal taxes and paid them to the IRS on base pay that the applicant was not receiving. This error in the DFAS system should have remained the government's problem rather than become the applicant's years-long burden.

d. Conclusion.

(1) This Board has broad authority to grant clemency to ensure fundamental fairness. The applicant's dismissal was much too harsh for his conduct. Time, hindsight, and two decades of war have softened the severity of the applicant's actions in Haiti. To some extent, time has vindicated the applicant's earnestness in stopping human rights abuses. No one would fault him or ignore him today if he used his chain of command or the inspector general to sound the alarm about inhumane conditions at a facility within an area of operations of U.S. forces. He followed his conscience to the National Penitentiary, and he paid a steep price professionally and financially. The Board should upgrade his dismissal to an Honorable discharge on the grounds of clemency. The Board should also direct DFAS to refund the debt payments the applicant has made since 2009 on grounds of error and injustice.

(2) The applicant is now in poor health. Each passing year makes more urgent his desire to receive full honors and benefits for his enlisted and commissioned service in the Army. He seeks to put as much to rights as he can. Just as he did so long ago in Haiti: he just wanted to make things right. The right and just decision is to grant the applicant's requested relief.

e. Counsel provides the following documents in support of the brief:

- (1) Enclosure 1 – DD Form 149;
- (2) Enclosure 2 – Power of Attorney for Legal Representative;
- (3) Enclosure 3 – Statement of Military Service, dated 4 August 2008;
- (4) Enclosure 4 – Previously discussed letter from the applicant to the Board;
- (5) Enclosure 5 – The applicant's Ph.D, Curriculum Vitae depicting his academic and professional experience and achievements;

(6) Enclosure 6 – U.S. v. [the applicant] 48 MJ 501 (U.S. Army Court of Criminal Appeals (ACCA) 1998);

(7) Enclosure 7 – U.S. v. [the applicant] 52 MJ 98 (CAAF 1999);

(8) Enclosure 8 – Article by [REDACTED]
[REDACTED]
[REDACTED]

(9) Enclosure 9 – Article by [REDACTED]
[REDACTED]
[REDACTED]

(10) Enclosure 10 – [REDACTED]
[REDACTED]
[REDACTED];

(11) Enclosure 11 – [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(12) Enclosure 12 – [REDACTED]
[REDACTED]
[REDACTED]

(13) Enclosure 13 [REDACTED]
[REDACTED] f Command Responsibility," written by the applicant;

(14) Enclosure 14 – Character letter from Dr. [REDACTED] Ph.D who praised the applicant's contribution to the decency and efficacy of institutional resolution;

(15) Enclosure 15 – Character letter from [REDACTED] to the Secretary of the Army requesting clemency for the applicant for his courageous actions [REDACTED]

(16) Enclosure 16 – DFAS debt notification letter, dated 8 May 2009, wherein the applicant was informed he had a debt due to collection of pay and allowances for his leave without pay status from 5 December 1995 to 30 December 1998 in the amount of \$16,570.68. His monthly payments were established as \$481.89;

(17) Enclosure 17 – Congressional Inquiry contesting DFAS debt, dated 3 December 2009;

- (18) Enclosure 18 – Congressional Inquiry regarding DFAS debt, dated 10 January 2012;
 - (19) Enclosure 19 – Letters to DFAS from the applicant and his brother contesting the debt;
 - (20) Enclosure 20 – Department of Treasury statements regarding the applicant's DFAS debt;
 - (21) Enclosure 21 – The applicant's Officer Record Brief (ORB) rendered on 4 January 1995;
 - (22) Enclosure 22 – The applicant's letter to Secretary of Defense [REDACTED] regarding the problematic nature of the Operational Psychological Practice Guidelines under consideration by the American Psychological Association for adoption as official policy for a ten-year period;
 - (23) Enclosure 23 – Federal Bureau of Investigation (FBI) Identity History Summary pertaining to the applicant;
 - (24) Enclosure 24 - Record of a DFAS hearing conducted regarding the applicant's DFAS debt; and
 - (25) Enclosure 25 - DFAS Leave and Earning Statements from 1995 – 1998 which show the applicant was accruing "Held Pay" debt while in an "Excess Leave" status and not receiving pay.
4. On 8 November 1977, the applicant enlisted in the Regular Army for a period of 4 years in the rank/pay grade of private (PV1)/E-1.
 5. On 31 August 1983, he was honorably discharged from the Regular Army and enlisted in the U.S. Army Reserve (USAR) for a period of 3 years.
 6. On 15 August 1984, he entered the Simultaneous Membership Program in order to remain in the USAR as a cadet in the ROTC while attending the University [REDACTED].
 7. Upon graduation from the University of Florida, he was appointed as a second lieutenant/O-1 in the USAR. He was promoted to the rank/grade of first lieutenant/O-2 on 24 March 1998, and to captain (CPT)/O-3 on 1 March 1991. During this period, he served a variety of duties in units located in Germany, Florida, and New York.

8. A DA Form 67-8 (Officer Evaluation Report (OER)) shows the applicant received a Relief for Cause OER for the period from 16 January 1994 through 1 October 1994.

a. His rater indicated that he had shortcomings in the professional competencies of "Displays sound judgement" and "Is adaptable to changing situations." The rater stated, "His professional judgement created a highly embarrassing situation for the U.S. forces in Haiti." He further stated, "[the applicant's] performance as a staff officer in the 10th Mountain Division has suffered a serious setback. While serving as a counterintelligence staff officer for the Combined Joint Task Force in Haiti during Operation Uphold Democracy, [the applicant] demonstrated exceedingly poor professional judgement on 30 SEP 94 by failing to report to duty, leaving the Joint Task Force compound without authorization and going to the Port-au-Prince National Penitentiary and demanding to conduct human rights inspections without the authority of the Commander of the Joint Task Force. Only after being convinced by the Country Team Military Liaison Officer, did [the applicant] relinquish his demands. The following evening [the applicant] departed the military hospital without authorization, entered the JTF headquarters, and proceeded to further exasperate the situation by exhibiting disrespect to a senior officer, the JTF J2. [The applicant] was relieved of his duties, escorted back to his home station, and reassigned to duties outside of the section. Overall, [the applicant's] performance with regards to this incident reflects conduct unbecoming of an officer in the United States military and his poor judgment created a highly embarrassing situation for the Commander of U.S. forces in Haiti." The rater indicated the applicant met requirements but should not be promoted.

b. His senior rater indicated the applicant's overall potential was below center mass. The senior rater stated, "I agree with all of the comments as they relate to the circumstances of [the applicant's] performance as a member of the G2 section, 10th Mountain Division assigned to the Combined Joint Task Force in Haiti. The seriousness of [the applicant's] poor judgement required he be relieved of his duties and reassigned to duties outside the sensitive operations of the G2 intelligence section. Do not promote. The rated officer has been notified of the reason for the relief."

9. General Court-Martial Order (GCMO) Number 13, dated 30 November 1995, shows the applicant was convicted by a general court-martial adjudged on 14 May 1995, of the following charges:

a. Charge I: Article 86: Specification 1: Failure to go to his appointed place of duty. Specification 2: Go from his appointed place of duty.

b. Charge II: Article 89 - Specification: Disrespect a superior commissioned officer.

c. Charge III: Article 90 - Specification: Willfully disobey a superior commissioned officer.

d. Charge V: Article 133 – Specification: Conduct unbecoming an Officer and a Gentleman.

e. The court sentenced the applicant to forfeiture of all pay and allowances and to be dismissed from the service.

f. The convening authority disapproved the finding of guilty of the Specification of Charge V and dismissed Charge V. Only so much of the sentence as provided for forfeiture of \$1500.00 pay per month for 2 months and dismissal were approved, and except for the part of the sentence extending to the dismissal, ordered to be executed.

10. On 13 February 1996, the Chief, Appeals and Corrections Branch, U.S. Total Army Personnel Command, Alexandria, VA informed the applicant that his OER appeal was denied by the Officer Special Review Board.

11. GCMO Number 5, dated 28 March 2001, shows the ACCA affirmed the findings of guilty and the sentence on 9 February 1998. The CAAF affirmed the decision of the ACCA on 30 September 1999. The conviction became final on 22 February 2000 when the Supreme Court denied the applicant's petition for certiorari. The Assistant Secretary of the Army (Manpower and Reserve Affairs) approved this action and ordered the sentence to be executed. The applicant ceased to be an officer of the U.S. Army at midnight on 16 April 2001.

12. Orders and the applicant's DD Form 214 (Certificate of Release or Discharge from Active Duty) confirm he was dismissed from the USAR on 16 April 2001 under the authority of Army Regulation 600-8-24 (Officer Transfers and Discharges), paragraph 5-17, by reason of court-martial, with SPD code JJD. His service was characterized as UOTHC. He was credited with completion of 14 years, 6 months, and 23 days of total active service this period. He had completed his first full term of service and had no lost time.

13. In the processing of this case an Army Review Boards Agency (ARBA) staff member requested the status of the applicant's debt to DFAS. An email from a DFAS staff member indicates the applicant owed \$1,935.03 as of 2 August 2023.

14. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather, it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

15. By regulation, an applicant is not entitled to a hearing before the Board.

16. In reaching its determination, the Board can consider the applicant's petition, arguments and assertions, and service record in accordance with the published equity, injustice, or clemency guidance.

BOARD DISCUSSION:

1. The Board carefully considered the applicant's request, supporting documents, evidence in the records, and published Department of Defense guidance for consideration of discharge upgrade requests. The Board considered the statements provided by the applicant and his counsel, the applicant's record of service, the frequency and nature of his misconduct, the reason for his separation, and whether to apply clemency.

2. A majority of the Board noted the applicant's otherwise excellent service prior to his misconduct while deployed to Haiti and also noted his accomplished post-service career as a basis for clemency in this case. Based on a preponderance of the evidence, a majority of the Board determined the applicant's record should be corrected to show he was honorably discharged by reason of Secretarial authority.

3. A majority of the Board found the debt established against him based on pay he did not receive to be unjust. The majority determined the record should be corrected to show collection of the debt was cancelled and the amount that has been recouped should be returned to him.

4. The member in the minority determined relief is not warranted in this case.

a. The member in the minority found insufficient evidence of in-service mitigating factors and found the applicant's post-service accomplishments insufficient as a basis for clemency in light of the serious nature of the misconduct he committed while deployed and serving as a commissioned officer.

b. The member in the minority also found insufficient evidence to overcome the presumption of regularity regarding the debt established against him, noting that, although the applicant and his counsel provide their explanation of the basis for the debt, the record does not include independent evidence that clearly establishes the basis for the debt.

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 records of the individual concerned be corrected by:

- Reissuing his DD Form 214 to show the following entries –
 - Block 23 – Discharge
 - Block 24 – Honorable
 - Block 25 – AR 600-8-24
 - Block 26 – JFF
 - Block 28 – Secretarial authority
- Showing collection of any debt related to pay transactions that occurred during his period of excess leave was cancelled with remittance to him of all amounts that were recouped

5/6/2024

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. Title 10, USC, Section 1552(b), provides that applications for correction of military records must be filed within three years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the three-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Title 10, USC, Section 1556, provides the Secretary of the Army shall ensure that an applicant seeking corrective action by ARBA is provided a copy of all correspondence and communications, including summaries of verbal communications, with any agencies or persons external to agency or board, or a member of the staff of the agency or Board, that directly pertains to or has material effect on the applicant's case, except as authorized by statute.

3. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The regulation provides that the ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. 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.

4. Army Regulation 600-8-24 prescribes policies and procedures governing transfer and discharge of Army officer personnel.

a. Paragraph 5-17 states an officer convicted and sentenced to dismissal as a result of general court-martial proceedings will be processed pending appellate review. A Reserve Component officer may be released from active duty pending completion of the appellate review or placed on excess leave in lieu of release from active duty.

b. Paragraph 1-22a provides that an officer will normally receive an honorable characterization of service when the quality of the officer's service has met the standards of acceptable conduct and performance of duty.

c. Paragraph 1-22b provides that an officer will normally receive an under honorable conditions characterization of service when the officer's military record is satisfactory but not sufficiently meritorious to warrant an honorable discharge.

5. Court-martial convictions stand as adjudged or modified by appeal through the judicial process. In accordance with Title 10, USC, Section 1552, the authority under which this Board acts, the ABCMR is not empowered to set aside a conviction. Rather,

it is only empowered to change the severity of the sentence imposed in the court-martial process and then only if clemency is determined to be appropriate. Clemency is an act of mercy or instance of leniency to moderate the severity of the punishment imposed.

6. Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) implements the specific authorities and reasons for separating Soldiers from active duty. It also prescribes when to enter SPD codes on the DD Form 214.

a. Paragraph 2-1 provides that SPD codes are three-character alphabetic combinations that identify reasons for, and types of, separation from active duty. The primary purpose of SPD codes is to provide statistical accounting of reasons for separation. They are intended exclusively for the internal use of Department of Defense and the Military Services to assist in the collection and analysis of separation data. This analysis may, in turn, influence changes in separation policy. SPD codes are not intended to stigmatize an individual in any manner.

b. Paragraph 2-6 provides the SPDs and narrative reasons for separation that are applicable to officer personnel. It shows, in part, SPD “JJD” is the appropriate code to assign to an officer who is separated as a result of Court-Martial (Other). KFF is the appropriate SPD to assign to officers who are voluntarily discharged under Secretarial authority.

7. The Under Secretary of Defense for Personnel and Readiness issued guidance to Service Discharge Review Boards (DRB) and Service Boards for Correction of Military/Naval Records (BCM/NR) on 25 July 2018 [Wilkie Memorandum], regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the court-martial forum. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to any other corrections, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, Boards shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses

or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

//NOTHING FOLLOWS//