

IN THE CASE OF: ██████████

BOARD DATE: 29 February 2024

DOCKET NUMBER: AR20230012207

APPLICANT REQUESTS: This case comes before the Army Board for Correction of Military Records (ABCMR) on a remand from the United States District Court, ██████████ ██████████. The Court directs the ABCMR to:

a. Reconsider the applicant's request to correct his military records and other requested relief.

b. Reconsider the following claims set forth in the complaint under paragraphs 102 through 117; specifically, applicant alleges the ABCMR failed to address the following:

- Applicant's claim of inadequate notice, with regard to the charges he would be facing at the Brigade Board
- ██████████ failure to advise the applicant of his right to "examine all relevant evidence"
- The Brigade Board's use of documents not previously made available to the applicant, and of which the applicant had no knowledge
- The violation of the applicant's Fifth and Sixth Amendment rights, under the U.S. Constitution

c. Render a new decision, including an explanation for the rationale of that decision with respect to the above-cited claims.

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

Court remand in lieu of DD Form 149 (Application for Correction of Military Record), with the following documents:

- Complaint, with exhibits A (Initial ABCMR application with Nine Attachments); B (ABCMR Record of Proceedings (ROP)); and C (U.S. Corps of Cadets (USCC) Regulation 351-2 (The Cadet Disciplinary System))
- Stipulation and Order of Voluntary Remand

FACTS:

1. The applicant filed his original ABCMR application in April 2019, requesting the deletion of all service record references to the USMA Form 2-3 (Record of Formal Proceedings under Article 10, Cadet Disciplinary Code (CDC)), accepted on 17 February 2016; the removal of "Misconduct Deficiency" from item 28 (Narrative Reason for Separation) on his DD Form 214 (Certificate of Release or Discharge from Active Duty); and the remission of his United States Military Academy (USMA) educational debt.

a. The applicant argued the USMA separated him following an inadequate investigation, a hurried Brigade board proceeding, and the ineffective assistance of counsel; those factors resulted in the deprivation of his constitutional rights, specifically, his Fifth Amendment right to due process and Sixth Amendment right to effective assistance of counsel. In support of his requests, the applicant provided a 13-page self-authored letter to the Board. along with the following nine enclosures:

- Attachment 1 – Extracts from redacted U.S. Army Criminal Investigation Command (CID) Law Enforcement Report
- Attachment 2 – USMA Form 2-3, accepted on 17 February 2016
- Attachment 3 – USMA Superintendent's 13 April 2016 recommendation to the Assistant Secretary of the Army, Manpower and Reserve Affairs (ASA, M&RA) to separate the applicant and require him to serve 3-years' active duty; applicant's placement on a leave of absence without pay
- Attachment 4 – ASA, M&RA 2 June 2016 memorandum directing the applicant's honorable discharge due to misconduct deficiency and requiring him to repay the U.S. government \$280,972 in advanced education assistance
- Attachment 5 – U.S. Department of the Treasury 25 October 2016 letter stating the applicant owed the U.S. government \$360,569.73
- Attachment 6 – Chapter 3 (Investigations and Disciplinary Hearing Procedures) of USCC Regulation 351-2, dated May 2001
- Attachment 7 – Example DA Form 2627 (Record of Proceedings Under Article 15, UCMJ (Uniform Code of Military Justice)), taken from Army Regulation (AR) 27-10 (Military Justice), dated May 2016
- Attachment 8 – Department of Defense Instruction (DODI) 1322.22 (Service Academies), dated September 2015
- Attachment 9 – Applicant's DD Form 214

b. On 19 February 2021, the Board considered the applicant's argument and evidence and determined relief was not warranted.

(1) "The Board found insufficient evidence to support a conclusion that the applicant's Constitutional rights were substantially harmed during the proceedings that led to his separation from USMA for misconduct deficiency. Based on a preponderance of evidence, the Board determined the decision to separate him and the reason for his separation were not in error, unjust, or inequitable."

(2) "Although the Superintendent, USMA, recommended the applicant be transferred to the U.S. Army Reserve (USAR) as an enlisted member and ordered to active duty for 3 years in lieu of repaying the funds expended for his education, the ASA M&RA determined he was unsuited for military service. The Board agreed that the ASA M&RA was not obligated to approve the Superintendent's recommendation, and she acted within her authority in determining that the applicant was unsuited for military service, would be separated from USMA, and would repay the U.S. Government for the cost of his USMA education. The Board further agreed that the available evidence supports the decision made by the ASA M&RA. Based on a preponderance of evidence, the Board determined the decision that the applicant should repay the education assistance expended on his behalf was not in error, unjust, or inequitable."

2. On 12 July 2023, the applicant filed a complaint in a U.S. District Court, under the provisions of the Administrative Procedures Act ("APA") Title 5, United States Code (USC); through counsel, he asked the court to enter a judgment in his favor; declare as unlawful the ABCMR's earlier decision; and remand the case to the ABCMR for reconsideration. Counsel stated:

a. Background.

(1) "The Army has enacted a regulation that 'provides the policy and procedures for the general governance and operation of the United States Military Academy,' including grounds for separation from the Academy." Two additional regulations provided more specific guidance with respect to the conduct and discipline of cadets at West Point: USCC Regulation 351-1 (Procedures for Conduct Investigation under the Cadet Disciplinary System) and USCC Regulation 351-2.

(2) "Disciplinary 'Boards' (sometimes called 'Hearings') at [REDACTED] are non-judicial proceedings conducted by Regular Army officers at various levels of command...and are convened by the commander of the unit to determine whether a cadet has violated a term (terms) – called Articles – of the Cadet Code of Conduct, and, if so, what punishment the commander will impose."

(3) "To comply with due process requirements, [REDACTED] regulations mandate, among other things, that Cadets must be informed of the nature of the alleged offence(s) and rights that cadets have in the proceeding, including their right to 'examine all available evidence' prior to and in preparation for the hearing." The applicant faced a

"Brigade Board" on 17 February 2016, and it is the wrongful conduct of this board that is at the heart of the applicant's ABCMR application.

b. Statement of Facts.

(1) On 27 June 2011, the applicant enrolled at [REDACTED] and majored in French. In Spring 2014, the applicant participated in a study abroad program and resided with a local host family in [REDACTED]. Due to a misunderstanding, the host family asked the applicant to leave; instead of placing the applicant with another host family, the USMA ordered him back to the academy and conducted a misconduct investigation.

(2) At the conclusion of the investigation, the Superintendent of [REDACTED] directed various penalties, to include turning the applicant back one year and imposing a "suspended separation," which was to remain in effect until the applicant's graduation in 2016. The suspended separation included a condition whereby the applicant could not receive an individual award of 35 or more demerits as a result of an Article 10 Brigade Board.

(3) The applicant worked very hard to learn from his mistakes, and he successfully completed the USMA's "Special Leadership Development Program"; his leadership began recommending him for leadership positions within the company, and, in August 2015, they selected him to be his cadet company's commander.

(4) On 22 September 2015, the applicant attended a biannual leadership conference and banquet, which included a whiskey tasting event. The applicant consumed small amounts of whiskey along with water and food; counsel additionally notes that both the applicant's Regular Army company commander and his Tactical (TAC) Officer attended and neither mentioned anything about the applicant being either impaired or intoxicated.

(5) Following the event, the applicant returned to his barracks; after preparing for the next day and making personal phone calls, the applicant decided, in his capacity as company commander, to ensure his first-year cadets, or "Plebes," had properly prepared their "as-for-class" uniforms. The applicant's interactions with the Plebes varied depending on the circumstances, but he walked into several rooms and talked with a number of the new cadets. As he left one room, and after giving uniform preparation guidance to three male cadets, the applicant gave one of the three a "good job" slap on the backside, much as he had witnessed others do on countless occasions at [REDACTED]. Unknown to the applicant, the Plebe later reported him to the chain of command, stating the applicant's actions had made him uncomfortable, and he believed the applicant was acting inappropriately.

(6) As a result of the complaint, the applicant's TAC Officer relieved him from command and assigned him to another company and barracks; the TAC Officer never gave a reason for the applicant's demotion and transfer. Because the applicant had little to no knowledge of how the system worked, he turned to the USMA Trial Defense Service for help, but the attorney was "nonchalant and unhelpful." The defense counsel took no action on the applicant's behalf and offered no assistance or advice; he simply told the applicant to be "patient and let events play themselves out."

(7) The applicant later learned that, in October 2015, his leadership referred the matter to CID, and asked CID to determine whether the applicant had committed a sexual assault. The CID interviewed the applicant in December 2015 but never provided him a copy of that interview so that he could see if it accurately conveyed what the applicant had said. Subsequently, someone verbally told the applicant that "a decision had been made to drop the criminal investigation and any related charges and that a court-martial was not warranted, but that he would be made the subject of an Article 10 Brigade Board."

(8) On 11 February 2016, the applicant's new TAC Officer told him of the date for the pending Article 10 Brigade Board, but the TAC Officer did not identify the specific charge(s), nor did he advise the applicant as to the nature of the evidence against him and the names of witnesses. Furthermore, no one ever gave the applicant a copy of the USMA Form 2-3, used to inform cadets of their rights, the charges against them, and the possible penalties.

(9) On 17 February 2016, the applicant reported, as directed, to the Article 10 Brigade Board; the Brigade TAC Officer briefly questioned the applicant and asked him to leave the room. The Brigade TAC Officer questioned witnesses, but the applicant was not present, and the Brigade TAC Officer failed to provide the applicant the opportunity to rebut anything the witnesses claimed. When told to return to the hearing room, the Brigade TAC Officer informed the applicant that he had been found guilty; the Brigade TAC Officer then placed the USMA Form 2-3 before the applicant and told him to sign it. At that point, the USMA Form 2-3 did not list any punishments, but the applicant later learned the Brigade Board had decided to give him 35 demerits as punishment. "[Applicant] was further advised that this award of 35 demerits would automatically lift his suspended separation imposed in July 2014, and that the Superintendent would recommend to the Assistant Secretary that he be separated from West Point."

(10) In a 13 April 2016 memorandum, the USMA Superintendent recommended the separation and transfer of the applicant to the USAR, and that the ASA, M&RA order the applicant to serve on active duty for 3 years. The ASA, M&RA, however, rejected those recommendations, stating without further explanation that the applicant

was "unsuited for military service"; instead, the ASA, M&RA directed the applicant's discharge and added the requirement to repay the cost of his USMA education.

(11) On 30 April 2019, the applicant applied to the ABCMR for relief; the ABCMR denied the applicant's requests and provided a 12-page document that purported to restate the applicant's memorandum to the Board and summarize the contents of the applicant's attachments. After three paragraphs headed, "Discussion," the document concluded with four pages of references setting forth the various regulations and references, but offering no explanation as to why they were included or how they related to the matter. Additionally, the ABCMR failed to specifically address or analyze the applicant's claims and did not "follow the dictates of State Farm and its progeny which requires that an agency 'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the decision made,' State Farm, 463 U.S. 29 at 43."

c. First Claim: "The ABCMR Failed to Address Key Issues Raised by Plaintiff in its Decision Thereby Mandating that its Decision Be Set Aside and the Matter Remanded Back to the Army." Counsel points out that, "It is settled law that an agency action is deemed 'arbitrary and capricious' under Section 706(2)(A) of the APA if the agency 'entirely failed to consider an important aspect of the problem....' State Farm, 463 U.S. 29 at 43." "If an agency decides not to address [an] argument, 'it must explain why.' *Thalasinov v. Harvey*, 479 F. Supp. 2d 45, 50 (D.D.C. 2007)."

(1) The ABCMR failed to address [Applicant's] claim of inadequate notice.

- Applicant asserted that ██████████ failed to give him adequate notice of the charges he would face before the Brigade Board and, in so doing, denied him his due process
- The Board's failure to properly address the applicant's claim makes its proceedings unjust

(2) The ABCMR failed to address [Applicant's] claim relative to West Point's failure to advise [Applicant] of his right to "examine all relevant evidence."

- "By regulation, ██████████ was required to advise [Applicant] of his right to "examine all relevant evidence" (see Chapter 1, USCC Regulation 351-2, section 104e.2.(b)(2)) (Punishment under the Cadet Disciplinary System – Procedure for Administering Article 10 – Formal Proceedings (TAC Officer Chain of Command))"
- "██████████ did not comply with this regulation relative to the CID reports, and its failure to do so worked to the substantial prejudice of [Applicant]"; that failure rendered the Brigade Board's decision arbitrary and capricious, and it is axiomatic that an agency's arbitrary and capricious actions are unjust

(3) The ABCMR failed to address the issue of the Brigade Board's use of documents not provided to the applicant and of which he was not aware.

- The Brigade Board referred to CID records in reaching its determination; the applicant had no knowledge of these records, and, as such, was denied the applicant a fair hearing
- Based on the board's actions, the hearing was unjust

(4) The ABCMR failed to address the applicant's Fifth and Six Amendment claims.

- "No citation to law is needed to know that the denial of Plaintiff's Fifth and/or Sixth Amendment rights would render the Brigade Board's Hearing and decision "unjust" as that term is used in Title 10 U.S.C. Section 1552(a)(1)"
- "The ABCMR, entirely failed and neglected to explain its denial of Plaintiff's Fifth and Sixth Amendment claims in its decision in any substantive way"
- "The failure and neglect of the ABCMR to address each of Plaintiff's aforesaid claims in any substantive way, or explain why it did not do so, mandates that its decision be set aside and remanded back to the Army"

d. Second Claim: "The ABCMR Failed to Provide an Explanation for its Determination Thereby Mandating that Its Decision Be Set Aside and the Matter Remanded Back to the Army."

(1) Counsel contends, "The ABCMR failed to satisfy the requirements of Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) and its progeny that an agency must 'articulate a satisfactory explanation for its action reveal[ing] a rational connection between the facts found and the choice made.' State Farm, 463 U.S. 29 at 43."

(2) "Notwithstanding conflicting evidence before it, the ABCMR did not find or identify any 'facts' it relied on in making its determination." Additionally, "The ABCMR decision does not contain any factual or legal analysis explaining how it reached its decision denying [Applicant's] claims."

(3) "The ABCMR's conclusory statements do not meet the requirement that an agency provide a reasoned analysis connecting the facts found with the decision made." "In accordance with State Farm and other settled law set forth in paragraphs 30-48 supra, the ABCMR's failure to address Plaintiff's claims, other than with a conclusory statement of denial, mandates that its decision be set aside and vacated, and the matter remanded back to the Army."

3. All documents provided by applicant and counsel in the court filing have already been incorporated by reference and are summarized in the ABCMR's previous consideration of the applicant's case (ABCMR Docket Number AR20190005706, held on 19 February 2021). In addition, the records available in the applicant's online military personnel file are very limited; as such, the Board can rely on documents provided by the applicant.

4. The applicant's available service record contains a USMA Form 5-50 (Cadet Service Agreement), dated 27 June 2011, which reflects the applicant's appointment as a West Point cadet; the applicant acknowledged the following statements:

a. "That if I voluntarily fail, or because of misconduct fail, to complete the period of active duty specified in paragraphs II (Agreement to Service) (subparagraph) b. (accept appointment on active duty for five years), (subparagraph) c. (accept a Reserve appointment if resigned from Regular Army), (subparagraph) d. (serve 8 years from date of USMA graduation), or (subparagraph) e., (serve on active duty upon failing course of instruction, breach of service agreement, or decline appointment)..., I will reimburse the United States in an amount that bears the same ratio to the total cost of advanced education provided me as the unserved portion of active duty bears to the total period of active duty I have agreed to serve."

b. "If I am obligated to reimburse the United States for the cost of my advanced education, any subsequent enlistment in an Armed Service will not relieve me of debt."

c. "Further, that if I am separated from the United States Military Academy for breach of this service agreement, as defined in paragraph 1.g. (4), Statement of Policies on the next page, and the Army decides that I should not be ordered to active duty because such service would not be in the best interests of the Army, I shall be considered to have either voluntarily or because of misconduct failed to complete the period of active duty and may be required to reimburse the United States as described above." (Paragraph 1g (4) states, "'Breach of service agreement' includes separation resulting from resignation, for any of the bases for separation listed in AR 210-26 (USMA), Table 7-1 (Separations Deemed to be a Breach of Service Contract), including all additions to Table 7-1 subsequent to the date of this agreement or from other willful acts or omissions (AR 210-26, paragraph 7-9 (Breach of Service Agreement and Reimbursement of Educational Costs))."

5. The applicant requested, and, on or about 16 June 2018, received extracts from a redacted CID Law Enforcement Report. The report reflects the applicant's status as a cadet company commander.



a. A CID Form 94 (Agent's Investigation Report), dated 28 October 2015, shows the sequence of events during the initial part of CID's investigation; the document includes the following entries:

(1) On 2 October 2015, the Sexual Assault Response Coordinator (SARC), USCC, USMA contacted the CID office and reported that the applicant had slapped the buttocks of a fellow cadet.

(2) Later that same day, CID interviewed the "victim" (Cadet (CDT) [REDACTED]) who stated, in his view, the incident was not sexual in nature but what occurred was unwanted and very inappropriate; (the form indicates CDT [REDACTED] interview was recorded on a disc).

(a) CDT [REDACTED] continued, stating, on the previous Tuesday (22 September 2015), the applicant had entered CDT [REDACTED] room and, in CDT [REDACTED] assessment, the applicant was intoxicated. The applicant told the cadets he was there because he wanted to inspect their shirts; the shirts were supposed to be ironed a certain way, but neither Cadet [REDACTED] nor his roommates knew how to iron them.

(b) The applicant said, "Come on, what are you doing, get it together" and then slapped CDT [REDACTED] on the buttocks, apparently because CDT [REDACTED] was closest to him. The applicant then left the room but, after about five minutes, he came back and began demonstrating how to iron a shirt. At the end of the demonstration, he slapped CDT [REDACTED] on the buttocks again.

(c) According to CDT [REDACTED], the applicant was "definitely intoxicated." Also, the applicant would normally need to be in uniform and knock on the cadets' doors prior to entry; in this instance, the applicant looked unprofessional, did not knock, and acted aggressively, "spouting out demands at the other cadets."

(3) On 16 November 2015, CID conducted a series of "Canvass" interviews of cadets who were in the vicinity at the time of the incident; the Canvass Interview Worksheets and Interview Sheets have all names redacted. The cadets provided the following comments:

- Cadet First Sergeant (1SG) – notified a day after the applicant's odd behavior and was told that the applicant had slapped someone on the butt; the 1SG notified the chain of command
- Cadet – was on charge of quarters duty that night, and the applicant came by the company area to buy some food; he seemed alright
- Cadet Platoon Sergeant (PSG) – attended whiskey tasting; applicant returned, knocked on the door, and entered the room without waiting; he

- wanted to inspect the platoon's uniforms; he was obviously drunk; the PSG later learned the applicant had gone to a number of rooms
- Cadet – the applicant was drunk from the whiskey tasting; the cadet saw the applicant in his underwear in the room across from him; after this, the applicant went to his own room and invited some others to join him; he later saw the applicant sitting in the dayroom talking on the phone in the dark
  - Cadet – the applicant knocked on his door and walked in; the shirts had already been ironed, so the applicant said, "Okay, you're good" and left
  - Cadet – the cadet was in the room across from the applicant; applicant was intoxicated; he called some cadets over to his room to listen to music; none of the cadets were offended by the applicant's behavior; males often walked around in their underwear because it is a male bay
  - Cadet – witnessed the applicant rapidly taking shots at the whiskey tasting and finishing other people's shots; did not see the applicant at the barracks; the applicant was his Soldier, but the applicant reported directly to the TACs; CDT [REDACTED] later reported the applicant had slapped his buttocks twice

(4) On 4 December 2015, CID interviewed the applicant; the applicant waived his rights, and CID reported the results of the interview on a CID Form 94; (the form indicates the applicant's interview was recorded on a disc) .

- Applicant admitted to "tapping someone on the backside and described it as a 'good game,' while he was going around checking on 'as-for-class' uniforms; applicant denied that he was seeking any sexual gratification
- Applicant affirmed he had gone to the whiskey tasting event and drank whiskey, but he did not feel intoxicated; he stated he had consumed about six half-sized shots of different whiskeys and, before that, he had had a cocktail and a beer
- Applicant acknowledged he probably should have stayed in his room after consuming alcohol; he felt a little tipsy and buzzed, but he believed he was capable of inspecting uniforms; his inspections had occurred between 2200 and 2230, after he had returned from the whiskey tasting
- The CID Special Agent asked if "there was a chance [applicant's] level of intoxication was higher than what he thought, to which [applicant] responded, 'there's obviously a chance'"; later in the interview, the applicant stated he was "probably more intoxicated than he thought he was"

6. The applicant provides a copy of a USMA Form 2-3; the form shows the following

a. The form shows that, on 11 February 2015, the applicant's TAC Officer (Major [REDACTED]) notified him that he was considering whether to punish the applicant for the following misconduct:

- Article 1, CDC, Failed to Comply with Regulations, Orders, Instructions
- Article 6, CDC, Unsatisfactory Behavior
- Article 7, CDC, Error in Judgment
- On 22 September 2015, the applicant acted unprofessionally and made unwanted physical contact with a cadet

b. The form advised the applicant that he had several rights under the Article 10 proceeding; those rights included:

- The TAC Officer had not yet made a decision as to whether the applicant would be punished, and he would not impose punishment unless he was convinced by the preponderance of evidence that the applicant had committed the offenses charged
- The applicant could request a person to speak in his behalf and could present witnesses or other evidence to show why he should not be punished or why any punishment given should be very light
- The maximum available punishments were 35 demerits, 100 hours, 90-days' withdrawal of privileges, 60-days' restriction, and/or reduction in rank
- The hearing would proceed on 17 February 2016

c. On 17 February 2016, the applicant accepted the Article 10 proceedings and, by signing the form, he affirmed the following:

- He had been afforded the opportunity to prepare for his hearing
- He elected to have a person speak in his behalf, and he would personally presented matters in defense, mitigation, and/or extenuation

d. The Brigade TAC Officer (Colonel ██████████) conducted the hearing and, after considering all matters, imposed the following punishments:

- 100 extra duty hours (per USCC Regulation 351-2, cadets receive one demerit per extra duty hour, up to a maximum of 35 demerits; the regulation does not require the imposing official to note the demerits on the USMA Form 2-3)
- 60-days' restriction (suspended "20")
- Reduction to private first class
- Withdrawal of all privileges for 90 days (suspended "30")

e. On 17 February 2016, the applicant elected not to file an appeal.

7. On 13 April 2017, the USMA Superintendent issued his action of the applicant's Article 10 proceedings. He wrote:

a. "Based upon my review of the entire case file, [applicant] has violated the terms of his suspended separation by receiving an individual award of 35 demerits as a result of a Brigade-level Article 10, on 17 February 2016. The suspension of his separation is therefore vacated."

b. "The record of proceedings will be forwarded to the ASA, M&RA with a recommendation that [applicant] be separated from the USMA, transferred to the USAR in the grade of E-4 for three years, and ordered to active duty for three years, in accordance with AR 612-205 (Appointment and Separation of Service Academy Attendees), Table 3 (USMA Cadet Separation Policies), Rule 7 (After Commencement of Fourth Academic Year). The recommendation will further state that if [applicant] does not complete three years of active service, he should be held responsible for repaying a proportionate amount of his education costs based on the remaining time not served." "[Applicant] is immediately suspended from the USMA until final action on his case...." "[Applicant's] status will be authorized leave of absence without pay and allowances, pending separation."

8. On 13 April 2017, the USMA Superintendent signed a memorandum addressed to the ASA, M&RA transferring the applicant's complete case file, pursuant to AR 210-26. The USMA Superintendent wrote:

a. "On 24 July 2014, I reviewed the record of the Misconduct Investigation of [applicant]. At that time, I approved the findings of the Investigating Officer that [applicant] wrongfully used medication in a manner contrary to its intended purpose and that he consumed alcohol in conjunction with a medication causing such impairment that required medical attention, on or about 10 February 2014. This was in violation of Articles 92 (Failure to Obey an Order or Regulation) and 133 (Conduct Unbecoming of an Officer), UCMJ, and AR 210-26, (paragraph) 6-14 (Other Major Misconduct Offenses). [Applicant] was placed on suspended separation status until his graduation from USMA in May 2016, contingent upon his future exemplary conduct and adherence to the terms of the suspended separation."

b. "One of the conditions of the suspended separation was that [applicant] must not receive an individual award of 35 demerits as a result of an Article 10 for an act that occurred during his probationary period. On or about 22 September 2015, [applicant], while intoxicated, made unwanted physical contact with a Fourth Class Cadet. On 17 February 2016, [applicant] received an individual award of 35 demerits as a result of a Brigade-level Article 10."

c. "Based upon my review of the entire case file, [applicant] has violated the terms of his suspended separation. I recommend that [applicant] be separated from the USMA, transferred to the USAR in the grade of E-4 for three years, and ordered to active duty for three years...."

9. On 2 June 2016, the ASA, M&RA determined the applicant was "unsuited for military service. Therefore, I direct he be discharged from the U.S. Army with an Honorable Discharge Certificate." In addition, the ASA, M&RA ordered the applicant to "repay the U.S. Government for the cost of the advanced education assistance expended on his behalf, in the amount of \$280,972.00."

10. On 2 June 2016, orders honorably discharged the applicant, per AR 210-26, Table 3, Rule 7, Note 3 (discharge based on unsuitability, unfitness, physical disqualification), and paragraph 6-14. (Table 3 inaccurately attributed to AR 210-26; should be AR 612-205). The applicant's DD Form 214 shows he completed 4 years, 11 months, and 6 days of service at the USMA.

- Item 13 (Decorations, Medals, Badges, Citations, and Campaign Ribbons Awarded or Authorized) – National Defense Service Medal
- Item 28 (Narrative Reason for Separation) – "MISCONDUCT DEFICIENCY"

11. On 5 January 2024, USMA provided an advisory opinion; the advisory summarized the applicant's requests and stated, while "matters of debt collections for educational costs and record correction (were) best addressed by the Secretary of the Army or ABCMR," the USMA maintained the applicant had misstated the basis for his separation.

a. USMA found the applicant had committed misconduct on three separate occasions during his time as a cadet; two of those instances are directly relevant to the applicant's current case.

(1) The first relevant misconduct involved the consumption of alcohol when the applicant was studying abroad in [REDACTED] and resulted in the applicant's placement in a probationary status, with the stipulation that the applicant could be separated if he received 35 or more demerits for any additional misconduct.

(2) The second dealt with an assault of a fellow cadet and included allegations of being under the influence of alcohol; the applicant subsequently received 35 demerits following a brigade-level Article 10 hearing, and because those demerits violated the rules of his probationary status, the USMA initiated separation action.

b. Factual Background. The applicant enrolled at [REDACTED] in June 2011.

(1) On 5 December 2012, the applicant received 35 demerits in an Article 10 Regimental Board after being discovered lying in bed and having physical contact with a female cadet in his room.

(2) On or about 10 February 2014, while the applicant participated in a study program in ██████, he violated Army regulations and Articles of the UCMJ by becoming intoxicated and taking sleep medication; his actions required his host family to call an ambulance and have him transported to a hospital for treatment.

(a) The USMA conducted a misconduct investigation on four allegations, in that the applicant had:

- On or about 10 February 2014, violated a lawful general regulation (i.e., AR 600-85 (The Army Substance Abuse Program (ASAP)) by wrongfully using medication in a manner contrary to its intended use for the purpose of stupefaction of the central nervous system (Article 92, UCMJ)
- On or about 10 February 2014, consumed alcohol in conjunction with taking Zolpidem (used to treat insomnia), and causing impairment requiring medical attention; such conduct was unbecoming of a gentleman
- On or about 10 February 2014, consumed alcohol in conjunction with taking Zolpidem (used to treat insomnia), and causing impairment requiring medical attention; such conduct brought discredit upon the armed forces
- On or about 7 September 2010, knowingly made false representations to procure a USMA appointment by failing to disclose prior treatment for a mental condition/illness, and that his doctor had prescribed Zolpidem

(b) In March 2014, the investigating officer (IO) notified the applicant that a hearing would be held, on 4 April 2014; subsequent to notification, the applicant's attorney requested a delay until 16 April 2014 (this satisfied the notification requirements set forth in USMA Regulation 1-10 (Administrative Procedures for Misconduct Hearings Directed Under the Provisions of AR 210-26)).

(c) During the misconduct hearing (convened under AR 210-26, paragraph 6-15 (Procedures for Processing Major Misconduct Offenses)), the IO considered all of the exhibits presented by the applicant, to include his admissions to three of the four allegations. The IO found the applicant had committed all four offenses and recommended the applicant's placement on a suspended separation.

(d) The Superintendent approved the findings for allegations 1 and 3, but dismissed allegations 3 and 4; additionally, he placed the applicant on a suspended separation and advised the applicant that the suspension could be vacated in the event any of the following occurred; if the applicant:

- violated the Cadet Honor Code
- Failed to complete any requirement under Senior Leader Development Program or the Army Substance Abuse Program

- Found to have committed additional misconduct during a misconduct investigation
- Received 35 demerits based on an Article 10 Brigade Board for an act occurring during the probationary period
- Exceeded the 6-month demerit allowance during the probationary period
- Received a failing grade in Military Development

(3) On 22 September 2015, the applicant patted a male plebe on the buttocks; the results of an investigation led to the applicant's Article 10 Brigade Board.

(a) The board addressed violations of the following Articles of the CDC:

- Article 1 – Failure to comply with Regulations, Orders, Instructions-Failure to comply with oral or written regulations, orders, or instructions through laxness, ignorance, or neglect
- Article 6 – Unsatisfactory behavior, being any behavior that is prejudicial to the good order and discipline within the Corps of Cadets, and behavior that brings discredit upon the Corps, USMA, and the U.S Army
- Article 7 – Error in judgment; cadets are expected to exercise good judgment at all times, to include situations not covered by instructions; a cadet's decisions or actions may have serious consequences and are a reflection of the cadet's maturity, common sense, and ability to learn from past mistakes

(b) On 11 February 2016, MAJ ██████ notified the applicant of the Brigade Board, and during the notification, MAJ ██████ stated the board would determine whether the applicant had violated Article 1, 6, and 7 of the CDC.

(c) On 17 February 2016, the Article 10 Brigade Board conducted a hearing and the applicant acknowledged he had been given adequate time to prepare any matters he wished to present in defense, mitigation and/or extenuation. He offered no evidence nor did he call any witnesses during board. The board concluded the allegations were founded by a preponderance of the evidence and issued the applicant 35 demerit points. The applicant affirmatively declined to appeal the board's factual findings or punishment.

(d) Following the board, the USMA Superintendent vacated the applicant's suspended separation, and, on 2 June 2016, the ASA, M&RA approved the separation for misconduct deficiency, finding the applicant to be unsuited for military service and requiring the applicant to repay the cost of his USMA education. The authority to require reimbursement of educational costs is authorized by law and regulation.

c. The applicant claims in his application that the Army improperly separated him due to administrative errors occurred during his Brigade-Level Article 10 hearing.

However, the actual basis for his separation was the misconduct he committed, on or about 10 February 2014; it was this misconduct that led to an approved but subsequently suspended separation action. When the applicant failed to comply with the Superintendent's conditions, the suspension was vacated.

d. "Due Process Rights Afforded to [Applicant] Throughout the Administrative Process. [Applicant] claims that his due process rights were violated at multiple points during the administrative processes that resulted in his separation. That claim is contradicted by the records enclosed to [applicant's] ABCMR application and USMA records. Collectively, these records show that [applicant's] separation from USMA complied with Army and USMA policy and regulation."

(1) "The case of *Andrews v. Knowlton* established due process requirements for the separation of a cadet at USMA. The requirements are: "[b]efore a cadet can properly be dismissed or separated from his service academy, he must have a hearing, be apprised of the specific charges against him, and be given an adequate opportunity to present his defense both from the point of view of time and the use of witnesses and other evidence. A military proceeding conducted within these bounds of procedural due process would be proper and immune from constitutional infirmity." *Andrews v. Knowlton*, 509 F.2d 898,900."

(2) "AR 210-26, para. 6-15, provides procedures for processing major misconduct offenses by a cadet. The regulation provides: cadets subject to separation or other adverse action under the provisions of this section of this regulation may, at the discretion of the Superintendent, be tried by court-martial if the conduct constitutes a violation of the UCMJ, be referred to a hearing before an investigating officer under the provisions of this paragraph or be considered under procedures set forth in paragraph 6-4c (Punishments that may be Awarded Cadets) of this regulation. Should the Superintendent elect to proceed under the provisions of this paragraph, cadets concerned will be directed to appear as respondents before an investigating officer appointed by the Superintendent. The investigating officer will conduct an investigation of the matter in accordance with procedures approved by the Superintendent. Upon completion of the investigation, the investigating officer will submit the record of the proceedings, including his or her findings and recommendations, to the Superintendent for action pursuant to paragraph 7-3 (Action by Superintendent) of this regulation."

(3) "The process for the investigation and adjudication of [applicant's] misconduct that occurred in [REDACTED], followed all proscribed procedures. [Applicant] was given over three weeks to prepare for his 16 April 2014 misconduct investigation hearing. The notification memorandum described the evidence that the IO intended to consider with specificity, all witnesses that the IO intended to call, and provided [applicant] with a complete copy of the case file. [Applicant] acknowledged receipt of the notification memorandum and case file. After being notified of the hearing



date, he was provided the opportunity to consult with a military defense attorney, who assisted him in preparing for the hearing. His defense attorney requested a delay in the investigation hearing in order for [applicant] to prepare his matters in defense, extenuation and/or mitigation, which was granted by the IO. During the hearing itself, he had the opportunity to present witnesses and evidence, cross-examine witnesses and evidence and make a statement to the IO. He was notified of his opportunity to consult with his military defense counsel at any point during the hearing. During the hearing, [applicant] chose to admit to the first three allegations against him even though the IO had notified him that doing so would mean that [applicant] would give up certain rights, to include the right against self-incrimination. His acknowledgment of this waiver and subsequent admissions are included in enclosure 8, a copy of the proceedings."

(4) "That was the process by which the misconduct that served as the basis for [applicant's] separation from USMA was investigated. The process satisfies the requirements of Army and USMA regulation and the requirements outlined by *Andrews v. Knowlton*. There was a hearing, he was apprised of the specific charges against him, given an adequate time to prepare, provided all evidence that was to be used by the IO, and participated in the investigation hearing. His due process rights were not violated with respect to his separation."

e. "[Applicant's] Sixth Amendment Right to Counsel. [Applicant] did not have a Sixth Amendment right to counsel because the investigations, Article 10 Boards, and separation were all purely administrative proceedings. Moreover, he consulted with counsel prior to the investigation hearing into the separation that formed the basis of his separation from USMA. The assertion that the Article 10 Board resulting from his assault of another cadet violated his Sixth Amendment rights is similarly without merit. There, he states that he initially consulted with counsel after being notified of CID's investigation, but thereafter made the affirmative decision to not meet with his attorney despite being provided multiple opportunities to do so."

(1) "The first four words of the Sixth Amendment to the US Constitution establish that [applicant's] assertion that his right to counsel was violated is meritless. The Sixth Amendment begins with 'in all criminal prosecutions ....' [Applicant] was not subject to a criminal prosecution and was therefore not afforded the right to counsel by the Sixth Amendment."

(2) "However, Army regulation did provide [applicant] with the opportunity to consult with counsel prior to all misconduct investigation hearings and his separation action. AR 210-26 states that cadets shall have the opportunity to consult with counsel, 'prior to submitting a letter of resignation in lieu of conduct, honor, or misconduct proceedings under this regulation, the cadet will be afforded the opportunity to consult with legal counsel. Upon request, the Staff Judge Advocate will appoint military counsel. Civilian counsel may be retained at the cadet's own expense.' (emphasis added by

writer), AR 210-26 para. 7-6(d) (Qualified Resignation – Resignation in Lieu of Court-Martial or Involuntary Separation). As previously mentioned, [applicant] was afforded the opportunity to consult with counsel, did in fact consult with counsel and/or affirmatively chose not to speak with counsel despite given the opportunity to do so. All Army and USMA policies were followed with respect to [applicant's] access to an attorney."

f. "Allegation of Due Process Violation with Respect to Investigation into Assault of Another Cadet."

(1) "[Applicant's] allegations relating to the inadequacy of the investigation into his misconduct are factual disputes and not legal errors. [Applicant] alleges that the CID investigation into his assault of another cadet was inadequate. In his application to the ABCMR, he alleges the investigation was 'cursory, incomplete, and grossly flawed.' He further states that the investigating CID agent did not interview people he believed could best judge his level of intoxication and that the CID agent falsely concluded he was intoxicated. [Applicant] claims he never stated that he was intoxicated."

(2) "Even if [applicant's] assertions were correct – in that the CID agent should have interviewed additional witnesses and [applicant] never stated he was intoxicated – they have no impact on the outcome of the Article 10 Brigade Level Board. Put another way, the Article 10 Brigade Level Board considered evidence, both documentary and testimonial, in coming to the conclusion that [applicant] assaulted another cadet. Whether or not CID could or should have conducted a more thorough investigation has no impact on the conclusions reached at the Article 10 Brigade Level Board."

g. Allegation of Due Process Violation Due to Insufficient Notice and Time to Prepare for Brigade Board into [applicant's] Assault of Another Cadet.

(1) "[Applicant] next alleges that his due process rights with respect to his Brigade Level Board for his assault of another cadet were violated because he was not properly notified of the Article 10 Brigade Board, did not receive a copy of USMA Form 2-3 before the board, he did not have sufficient time to prepare for the hearing. This allegation is directly contradicted by the USMA Form 2-3 that recorded the Article 10 process."

(2) "[Applicant] was notified of the date and time of the hearing on 11 February 2016. This was 6 days before the hearing was scheduled to take place. USCC Regulation 351-2, (paragraph) 104(e)(2)(c) provides that 48 hours is a reasonable time to prepare for a hearing. On the date of the hearing, 17 February 2016, [applicant] signed and dated the portion of the form that states, 'having been afforded the opportunity to prepare for this hearing, my decisions are as follows: A person to speak on my behalf is requested; and matters in defense, mitigation, and/or extenuation will be

presented in person.' [Applicant] affirmatively stated that he had been given an opportunity and was in fact prepared for the hearing. There is no record to indicate [applicant] requested an extension or delay for the date of the hearing."

(3) "[Applicant] states in his own memorandum to the ABCMR that, on 11 February 2016, MAJ [REDACTED] orally notified him that there was a pending Article 10 Brigade board pending. During notification MAJ [REDACTED] stated that the board was for violating article 1, 6, and 7 of the CDC, and that it was alleged that he had made unwanted physical contact with another Cadet. [Applicant] contradicts himself when he states that he was not notified of his charges when just before he states how he was notified of the alleged conduct and the potential violations. [Applicant] also alleges that notice was not proper because he did not receive a copy of the USMA Form 2-3. USCC Regulation 351-2, (paragraph) 104(e)(2)(b) states, "The imposing commander, or a designated officer, NCO, cadet officer, or a cadet NCO in the position of platoon sergeant or above, must inform the accused cadet of certain rights. This allows the accused cadet time to prepare for the formal proceedings. This may be done using the USMA Form 2-3 (Revised)." (emphasis added by writer). The regulation does not require [applicant] be provided a USMA Form 2-3 to be properly notified. In this case [applicant's] company commander gave [applicant] sufficient time and properly advised him of his rights and the allegations against him."

h. Allegation of Due Process Violation Due to Improper Procedure Resulting in the Brigade Board into [applicant's] Assault of Another Cadet.

(1) "[Applicant] next alleges that his Due Process rights were violated by the Brigade Board relating to his assault of another cadet because he did not have an opportunity to question or cross-examine witnesses and was unaware of the maximum punishment available at the Brigade Board. [Applicant's] rights were not violated because proper procedures were followed during the board. Additionally, both the USMA Form 2-3 and USMA regulations, both of which were available to [applicant], clearly establish the maximum punishment authorized at the hearing."

(2) "USCC Regulation 351-2, (paragraph) 308(b) (Procedures for Conduct of Formal Article 10 Proceedings) states, the conduct of proceedings under Article 10 involves a three-step process in the presence of the cadet: (1) notification, (2) hearing, and (3) imposition of punishment (if the findings result in determination of guilt). Enclosure 7."

(3) "USCC Regulation 351-2 includes a script to be used in all stages of the Article 10 process. During notification, the commander provides a copy of the form for the cadet to review and informs him of several rights available, to include the right to submit evidence, have witnesses available, and to have someone speak on the cadet's behalf. The commander is also required to ensure the cadet understands the allegations

against them and of the maximum punishment authorized for the Article 10. During the hearing, the commander asks whether the cadet has any evidence or witnesses to present. The cadet's response is annotated on the USMA Form 2-3, as it was in this case. [Applicant] responded that he requested someone to speak on his behalf and that matters in defense, extenuation and/or mitigation would be presented in person. There is no indication that any witness [applicant] requested was unable to be present or speak at the Brigade Board. The process proscribed by USCC Regulation 351-2 was followed and therefore [applicant's] Due Process rights were not violated."

(4) "[Applicant] states that the Board was improper because he was unaware of the maximum punishment available at the Brigade Level Board. This assertion is directly contradicted by the USMA Form 2-3 [applicant] signed and USMA regulation. The USMA Form 2-3 in this case clearly states the maximum punishment available is "35 demerits." Moreover, USCC Regulation 351-2 (paragraph). 105 (1) (Demerits and Allowances) states cadets are automatically awarded one demerit for each tour of extra duty given as punishment from an Article 10 proceeding. The demerits are awarded when the Article 10 is entered into the Automated Disciplinary System, and therefore are automatically calculated. Here, [applicant] received a punishment that included 100 extra-duty hours, which resulted in him receiving 35 demerit points, the maximum amount available at a Brigade Level Board. Therefore, [applicant] was aware of the maximum punishment available at the Brigade Level Board because it was explicitly annotated on the USMA Form 2-3 and clearly articulated in USCC Regulation 351-2, both of which were available for [applicant's] reference."

12. On 12 January 2024, the Army Review Boards Agency forwarded the applicant a copy of the advisory opinion for review and the opportunity to submit a statement or additional evidence on his own behalf; on 9 February 2024, counsel provided the following response:

a. "The (USMA advisory) spends significant time discussing matters [applicant] did not raise in his complaint and which are not the subject of, or pertain to, the 'issues' the Court Order directs the ABCMR to address (e.g., the 2014 [REDACTED] incident and subsequent proceedings). Its only relevance is that it resulted in [applicant] being placed on "Suspended Separation," a status [applicant] does not dispute. Accordingly, we do not comment on that matter or other matters raised in the (USMA) 'advisory opinion' not relevant to the issues the ABCMR is to address in a substantive way on remand."

b. First Issue in Applicant's First Claim for Relief Inadequate Notice of Charges: (First Due Process Claim).

(1) Applicant asserts in both his petition to the Board and his U.S. District Court complaint that West Point failed to provide him adequate notice of the charges against him before the 17 February 2016 Brigade Board. More specifically, the contention that

the USMA violated the applicant's due process rights is based on the TAC Officer's failure to provide him a copy of the USMA Form 2-3, or otherwise advise him of his rights and the specific charges against him. As evident in the advisory opinion, West Point admits the TAC Officer did not give the applicant received a copy of the USMA 2-3 during the notification process.

(2) While the applicant acknowledges the TAC Officer verbally advised him on 11 February 2016, the TAC Officer failed to give him a copy of the USMA 2-3, neglected to advise the applicant of his rights, and, most critically, the specific charge against him. Counsel cites case law to argue due process requires, at a minimum, notice and an opportunity for a fair hearing, and it is "fundamental" that the person charged be given notice of the proposed action "and the grounds asserted for it." (Emphasis added by counsel). USMA makes two arguments in its advisory:

(a) USCC Regulation 351-2 does not require a cadet to be provided the USMA Form 2-3 to have received proper notice. In response counsel asserts:

- USMA's contention that "using" the Form 2-3 for oral notification was sufficient is unpersuasive; "using" can only mean providing the form, otherwise a dispute could arise as to what was and what was not given to the cadet by way of required notice
- The reason the USMA Form 2-3 is prepared is so it can be "used" to put the cadet on notice; it defies logic that, once prepared, a copy would not be given to the cadet; certainly, "used" does not and cannot mean "withheld"
- ██████████ regulations do not state that the notice required to be given can be provided orally; the form itself requires the cadet to sign, acknowledging notice of rights and charges; given the language of the form, it is nonsense to only make the form available to the cadet after the hearing
- No regulation provides that notice of rights and charges can be satisfied orally in an Article 10 Brigade Board proceeding...None
- USMA does not try to explain what the TAC Officer told the applicant; counsel asks, "Is (USMA) now alleging (sub silencio), that the TAC Officer had the Form 2-3 in hand, but rather than giving [applicant] a copy of the form, he sat down with [applicant] and read the contents of Form 2-3 to him?"
- There is no evidence that the TAC Officer essentially provided applicant with all the information stated in the Form 2-3, including notice of the charges; USMA's apparent position is a mere ipse dixit, that is, that whatever the TAC Officer did was sufficient to satisfy regulatory and due process requirements
- "'Drive by' notifications do not satisfy due process requirements; 'When notice is a person's due, process which is a mere gesture is not due process,' Mullane v. Cent. Hanover Bank & Trust Co. supra 339 U.S. 306, 315"

- "It requires no citation of law to know that providing a copy of the Form 2-3 to the Cadet after the Hearing, as was done here, does not satisfy due process requirements"
- Arguing the applicant cannot contest the lack of due process in the 17 February 2016 hearing simply because he signed the Form 2-3 must be rejected; the stress of having a "full Bird" colonel "ask" you to sign while standing at attention is tantamount to being forced to sign a false confession

(b) The applicant contradicted himself in his ABCMR application when he stated he did not receive the USMA Form 2-3 from MAJ [REDACTED], on 11 February 2016; counsel responds:

- USMA admits MAJ [REDACTED] did not give the applicant a copy of the form
- Counsel maintains the applicant removed any ambiguity when he stated, "Only after the hearing was I shown the Article 10 Form"; further, "I was never informed of the specific charges... MAJ [REDACTED] failed to provide any insight when he orally informed me of the upcoming hearing"
- "The consequence of [REDACTED] failure to comply with the "fundamental" requirement of adequate notice is obvious. Such failure is prejudicial"; per a U.S. Supreme Court case, a respondent must be advised of and know the claims of the opposing party...anything less denies the party of a fair hearing

c. Second Issue in Applicant's first claim for relief; Failure to Advise Applicant of his Right "To Examine All Relevant Evidence" (Second Due Process Claim).

(1) Chapter One of USCC Regulation 351-2, paragraph 104e2 (b) (2) requires cadets be advised of their right to "examine all available evidence." Applicant stated in his application to the Board, and alleges in his Federal complaint, that USMA did not meet this standard, in that no one mentioned the CID documents ultimately used by the Board to reach its determination. In fact, USMA withheld those documents from the applicant, and he only received them after his dismissal from USMA, and then only because he had filed a Freedom of Information (FOIA) request.

(2) "Not advising [applicant] of his right 'to examine all relevant evidence' (USCC 351-2 Section 104e2(b)(2)), and then withholding the documents worked to [applicant's] substantial prejudice. He was denied the opportunity to know, in advance of the Hearing, what possible evidence was in his favor as well as evidence which might be construed against him. This denied him the opportunity to prepare for the Hearing, including, but not limited to determining who he might want to call as witnesses at the Hearing, and/or to be prepared to cross-examine any witnesses who might be called to testify against him."

(3) In its advisory, USMA failed to address this issue, but case law supports that cadets are entitled to a "fair hearing." "See Wasson v. Trowbridge, supra, the only case cited by [USMA] in its 'advisory opinion' and with which we agree: 'The right to a fair hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them.' Morgan v. United States, supra at 18 (emphasis supplied by counsel); Interstate Commerce Com. v. Louisville & N. R. Co., 227 U.S. 88, 93 (1913) ('All parties must be fully apprised of the evidence submitted or to be considered')."

(4) Additionally, it is settled law that, when agency regulations prescribe specific steps to ensure due process, those steps must be substantially followed, and the military is not exempt from this requirement. "It is Black-Letter Law, that the failure of the military to follow its own mandatory regulations to the substantial prejudice of a servicemember is "arbitrary and capricious" within the meaning of Section 706(2)(A) of the APA, and the actions are unlawful and must be set aside Brezler v. Mills, 220 F. Supp 3d 303 (E.D.N.Y. 2016); see also, Seifert v. Winter, 555 F. Supp. 2d 3, 15-16 (D.D.C. 2008)(setting aside BCNR's determination because of regulatory violation); Gastall v. Resor, 334 F. Supp. 271, 273 (D.Mass.1971) (vacating military discharge due to regulatory violation)."

d. Third Issue in Applicant's First Claim for Relief; The Brigade Board's Use of Documents that [applicant] Had Not Been Provided and of Which He Was Unaware: (Third Due Process Claim). The USMA advisory did not address this issue, but instead went on at length about how the applicant's 2014 hearing, dealing with the incident in ██████████, was fair and provided the applicant the requisite due process. "The obvious implication of the (USMA's) statement is that providing a Cadet all evidence to be used against him or her is an essential ingredient of due process. The failure of West Point, however, to provide the documents it had in connection at the February 2016 Brigade Board – as it did in the 2014 proceeding – is fatal to ██████████ position...."

(1) Following his dismissal from USMA, the applicant filed a FOIA request, asking ██████████ to send him "all documents pertaining to the...brigade board, which occurred February 17, 2016, and any documents, memoranda, or coversheets that were presented to the Superintendent at the time he made the decision to separate [applicant]."

(2) "Three cases, including one from the Second Circuit (Learned Hand, no less) and one from the U.S. Supreme Court which cited Judge Hand, are on point. See Gonzales v. United States, 348 U.S. 407 (1955) (Failure to provide petitioner reports relied on by the Board violated 'underlying concepts of procedural regularity and basic fair play. '); U.S. v. Balogh, 157 F.2d 939, 943 (2d Cir. 1946) (Learned Hand) (The use by the Board of evidence of which the Petitioner was unaware and which he had no chance to answer made the hearing unfair) (vacated on other grounds, 329 U.S. 692);

see also *Crotty v. Kelly*, 443 F.2d 214 (1st Cir. 1971) (Failure of the Hearing Board to afford petitioner access and a chance to respond to all reports was a denial of due process)."

(3) "The use by the Brigade Board of documents in his file and of which he was unaware constituted the denial of [applicant's] basic and fundamental due process rights and rendered the hearing unfair. This violation – which is not contested by (USMA) in its advisory opinion – worked to the substantial prejudice of [applicant] and thereby rendered the decision of the Brigade Board 'in error' and /or "unjust" under Title 10 USC, section 1552(a)(1)."

e. Conclusion. "██████████, in violation of its own regulations and [applicant's] due process rights (1) failed to provide [applicant] proper and adequate notice of the charges relative to the February 2016 Brigade Board; (2) failed to advise [applicant] of his right to examine (and then to provide him) all available evidence in advance of the hearing; and (3) the Brigade Board relied on documents which [applicant] had not been provided and of which he was unaware. These violations by ██████████ of its own regulations and failures of due process, each to the substantial prejudice of [applicant], both individually and collectively, rendered the Brigade Board hearing and its outcome in error and/or unjust under (Title) 10 USC, section 1552(a)(1)). Accordingly, the outcome of the Brigade Board must be vacated."

13. Clemency guidance to the Boards for Correction of Military/Navy Records (BCM/NR) does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority to ensure each case will be assessed on its own merits. In determining whether to grant relief BCM/NRs 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. This includes consideration of changes in policy, whereby a service member under the same circumstances today would reasonably be expected to receive a more favorable outcome.

14. Published guidance to the BCM/NRs clearly indicates that the guidance is not intended to interfere or impede on the Board's statutory independence. The Board will determine the relative weight of the action that led to the discharge and whether it supports relief or not. In reaching its determination, the Board shall consider the applicant's petition, available records and/or submitted documents in support of the petition.



BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The Board concluded that there is insufficient evidence to support a finding that the applicant was properly and fully advised of the charges he would face at the board hearing or that he had a right to examine all relevant evidence. The Board further found that the applicant was not provided with a copy of the CID investigation pertaining to his case. The Board therefore found that the applicant was not afforded appropriate due process and that an injustice occurred. The Board found that the applicant was given sufficient opportunity to consult with counsel and that his right to counsel was not violated.
  
2. Based on injustice resulting from the due process violations, the Board determined to grant the requested relief. Accordingly, the applicant’s record shall be amended to reflect that his educational debt for attendance at the USMA is \$0, and his DD Form 214 shall be amended to remove references to the Article 10 and misconduct.

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 showing he was not required to repay the United States Government for the cost of the advanced education assistance expended on his behalf during his attendance at the United States Military Academy and by reissuing his DD Form 214 to show the following entries:

- Item 25 (Separation Authority) – AR 210-26
- Item 26 (Separation Code) – KND
- Item 28 (Narrative Reason for Separation) – Miscellaneous/general reasons

3/4/2024

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 210-26, in effect at the time, provided policies and procedures for the general governance of the USMA. Paragraph 1-10 stated the ASA, M&RA was the authority for separating first and second class cadets when separation and call to active duty was recommended.

a. Chapter 6 (Misconduct, Honor, Disciplinary, and Other Grounds for Separation).

(1) Paragraph 6-4 (Punishments that may be Awarded Cadets) stated the Superintendent could, in lieu of or pending separation, impose the below-listed punishments in such amounts or in such combinations as the Superintendent deemed appropriate after a hearing of misconduct or honor found a cadet had violated one or more of the following paragraphs: 6-6 (Drugs and Narcotics), 6-7 (Alcoholic Beverages), 6-8 (Sexual Misconduct), 6-9 (Conduct Unbecoming a Lady or Gentleman), 6-10 (Combinations among Cadets (i.e., taking joint action to violate or evade regulations), 6-11 (Indebtedness), 6-12 (Criminal Conviction), 6-13 (Hazing), (Other Major Misconduct Offenses), or 6-16 (Violation of the Cadet Honor Code):

- Admonition

- Reprimand
- Restriction to limits
- Deprivation of privileges
- Reduction in or withdrawal of cadet officer or noncommissioned officer rank
- Demerits
- Punishment tours
- Fatigue tours
- Loss of leave
- Turn-back to the next lower class
- Suspension from the Military Academy

(2) Paragraph 6-14 stated a cadet who committed an offense punishable under the UCMJ by confinement for a term of 6 months or more could be separated from the Military Academy and awarded punishments under paragraph 6-4 of this regulation.

(3) Paragraph 6-17 (Cadet Disciplinary System).

(a) Subject to the approval of the Superintendent, the Commandant was to establish, publish, and administer a cadet disciplinary system. The system included a means to monitor each cadet's conduct, punishment for conduct deficiency, and instruction on the standards of conduct expected and required.

(b) The Commandant was to convene conduct investigations under the provisions of the Cadet Disciplinary System. Before separating a cadet for conduct deficiency, the cadet was to be afforded a hearing to determine whether he/she was deficient in conduct. If after such a hearing a cadet had been found deficient in conduct, the Commandant reviewed the report of proceedings. The Commandant could retain the cadet (with or without probation) or recommend to the Superintendent the cadet's separation or suspension from USMA.

(c) In cases of conduct deficiency where a report of proceedings and the recommendations of the Commandant were forwarded for action, the Superintendent could, under the procedures in paragraph 7-3 (Action by the Superintendent), take one or more of the following actions:

- Direct retention (with or without probation)
- Direct transfer to a lower class
- Direct suspension from the Military Academy
- Recommend separation to the Secretary of the Army

(d) In cases where the Superintendent recommended separation, the Superintendent could immediately, or at any time prior to the Secretary's action,

suspend the cadet. The Superintendent could also suspend any of the above actions under such terms as deemed appropriate.

b. Chapter 7 (Separations and Resignations).

(1) Paragraph 7-3 (Action by the Superintendent). The Superintendent was to review the misconduct hearing and the cadet's entire record, and any matters offered prior to taking action on the case. Except in cases where the Superintendent is the separation authority, all documents pertinent to the separation of a cadet from the Academy were to be forwarded to Headquarters, Department of the Army, for final action. The Superintendent was to make recommendations concerning separation from the Academy and discharge from the Service. If discharge is recommended, the type of discharge recommended will be specified.

(2) Paragraph 7-7 (Separation Documents). A cadet who had been separated and discharged under any provision of this regulation was normally issued an honorable or general discharge certificate unless Headquarters, Department of the Army had determined that the facts and circumstances of the case warranted a lower character of service.

2. USCC Regulation 351-2, in effect at the time, provided procedural guidance for the Cadet Disciplinary System for the United States Corps of Cadets. The system was both developmental and correctional in nature. The intent of these procedures was to ensure the good order and discipline, required of members of the Corps, and serve the leader development of the Cadet Chain of Command.

a. Paragraph 103 (Nonpunitive Measures and Administrative Actions). While not appropriate in serious cases, nonpunitive measures are often the most prompt and effective way to dispose of minor disciplinary infractions. In adverse administrative actions, the development level of an offender and his or her state of mind at the time of the misbehavior determine the value of each action. In other words, what might be effective corrective action for one cadet may not be as effective for another. The situation might warrant a combination of the following actions:

- On-the-Spot Corrections
- Counseling
- Admonitions and Reprimands
- Extra Training
- Remedial Skills Training
- Withdrawal of Privileges
- Performance Grade
- Suspension and Relief from Duty
- Removal from Corps Squad, Competitive Club, and Extracurricular Activities

b. Paragraph 104 (Punishment under the Cadet Disciplinary System). Commanders (the tactical chain of command and cadet commanders) may impose punishment on cadets under their command for offenses under the provisions of Article 10, Cadet Disciplinary Code (Chapter 4 (Cadet Disciplinary Code)) subject to a superior commander's withholding. Commanders must maintain a fair and judicious approach to proceedings under Article 10. The commander may not decide whether the cadet is guilty until the cadet has presented all evidence in defense. If the commander concludes that the cadet is guilty by a preponderance of the evidence, he or she should consider the cadet's evidence in extenuation and mitigation, and then decide what punishment is appropriate. The USMA Legal Assistance office does not normally assist cadets facing Article 10 proceedings.

(1) Summarized Article 10. Cadet commanders and Tactical Officers may hold disciplinary hearings and impose punishment under summarized Article 10 proceedings or summarized Article 10 proceeding for minor or recurring offenses as outlined in table 1-1 (Level of Punishment Guideline). If the cadet commander or Tactical Officer determines that the offense would be more appropriately adjudicated under more formal proceedings, he or she should forward the case to the tactical officer chain of command.

(2) Company Grade Article 10. Company and battalion tactical officers may impose punishment as outlined in table 1-1. If the company tactical officer determines that the offense would be more appropriately addressed in a proceeding at battalion level, he or she should forward the case to the battalion tactical officer with a request that he or she exercise battalion-level authority under the provisions of Article 10. A tactical officer may also elect to refer the offense to the regimental tactical officer or above for adjudication under field grade Article 10 proceedings.

(3) Field Grade Article 10. Regimental tactical officers and above in USCC may hold field grade Article 10 proceedings and impose punishment as outlined in table 1-1. If the regimental tactical officer determines that the offense would be more appropriately adjudicated by a higher commander, he or she should forward the case to the Brigade Tactical Officer or Commandant with a request that he or she exercise authority under the provisions of Article 10.

(4) Formal Proceedings.

(a) The imposing commander, or a designated officer, NCO, cadet officer, or a cadet NCO in the position of platoon sergeant or above, must inform the accused cadet of certain rights. This allows the accused cadet time to prepare for the formal proceedings. This may be done using the USMA Form 2-3 (Revised). This is the same form used to record and file formal Article IO proceedings, and it specifies the rights of the accused during the proceedings. In formal proceedings the cadet has the right to:

- Request a spokesperson
- Examine all available evidence
- Present his/ her case to the imposing commander
- Call and question witnesses
- Submit matters in defense, extenuation, and mitigation
- Appeal within the Tactical Officer Chain-of-Command

(b) Cadets under consideration for formal Article 10 proceedings are allowed a reasonable time, normally 48 hours, to prepare for the proceedings. The imposing commander should notify the cadet in a timely manner that facilitates both protection of the cadet's rights and the disposition of the proceedings within the processing guidelines. If someone else conducts the notification proceedings, the imposing commander must still conduct the remainder of the proceedings. The standard for determining guilt or innocence is by a preponderance of the evidence.

c. Paragraph 105 (Demerits and Allowances). Demerits are automatically awarded one demerit for each tour of extra duty given as punishment from an Article 10 proceeding. The demerits are awarded when the Article 10 is entered into the Automated Disciplinary System, and therefore are not annotated on the Article 10 form by the imposing commander.

d. Paragraph 307b (Convening Authority, Composition of Proceedings, and Timely Processing – Formal Proceedings). Formal Article 10 proceedings are used by the Tactical Officer chain of command. Any Tactical Officer or cadet commander who, after a preliminary inquiry, determines that punishment, if it should prove to be appropriate, might exceed punishment available under summarized proceedings, will proceed as set forth below. Also, proceed with formal proceedings if a cadet elects to refuse a summarized proceeding and requests a formal proceeding. All entries will be recorded on USMA Form 2-3 (Revised) (Record of proceedings under Article 10, CDC.)

e. Paragraph 308 (Procedures for Conduct of Formal Article 10 Proceedings).

(1) The conduct of proceedings under Article 10, CDC, involves a three-step process in the presence of the cadet: (1) notification, (2) hearing, and (3) imposition of punishment (if the findings result in determination of guilt).

(2) Notification. The regulation provides a recommended script for commanders to use during notification. Included is the following: "As your commander, I have disciplinary powers under Article 10 of the CDC. I have received a report that you violated the Cadet Disciplinary Code, and I am considering imposing punishment. As a record of these proceedings I will use USMA Form 2-3 (Formal). I now hand you this

form. Read items 1 and 2. Item 1 states the offense(s) you are reported to have committed and item 2 lists the rights you have in these proceedings."

f. Paragraph 312 (Other Sanctions for Misconduct Outside the Cadet Disciplinary System).

(1) Separation. A cadet will be recommended for separation when the retention of a deficient cadet is not considered to be in the best interests of the Corps of Cadets, the Military Academy or the United States Armed Forces. Only the Secretary of the Army, or his or her designee, may direct separation. When the Superintendent recommends a cadet be separated, he or she may also direct that the cadet be immediately suspended from the Military Academy pending the final decision of the Secretary of the Army. The cadet will immediately out process without regard to term-end examinations or military programs unless otherwise directed by the Superintendent.

(2) Suspension. Suspension is an alternative to separation for deficiency in conduct. Its purpose is to permit a deficient cadet with an otherwise extraordinarily good record to examine his or her commitment to the Military Academy and to the Army, and to allow that cadet to mature sufficiently to meet the standards of conduct should the commitment be reaffirmed. The Superintendent may direct suspension in lieu of forwarding a case to Headquarters, Department of the Army with a recommendation for separation, or the Secretary of the Army may direct suspension in lieu of separation. The period of suspension is usually 1 year or less.

(3) UCMJ. The cadets at the USMA are members of the Regular Army on active duty and subject to the Uniform Code of Military Justice, except that a cadet may not be given punishment under Article 15 of the UCMJ. Cadets are subject to trial by courts-martial.

(4) Turn-Back. If a cadet is found to be deficient in conduct, the Superintendent may direct that the cadet be turned back to the next lower class. This action may or may not be taken in conjunction with suspension from the Military Academy and other punishments.

g. The regulation provides a sample copy of the USMA Form 2-3, along with notes/instructions listed on the reverse side of the form. One of the instructions states, "Give the member a copy of this form," but the comment does not specify at what point during the three-step process the member is provided the copy.

3. AR 612-205, in effect at the time, contained policies and procedures for processing and strength accounting of US Army members appointed as cadets at USMA. Table 3 listed rules for the separation of USMA cadets; Rule 7 stated: If separation action was started after commencement of the fourth academic year (senior year), then the cadet was to be transferred to the USAR as an E-4 for 3 years and could be ordered

to active duty for not less than 2 years, or discharged from the Army if transfer to the USAR fell under either note 3 or 4:

- Note 3 – if the separation authority determines that the cadet was being separated from the Academy due to demonstrated unsuitability, unfitness, or physical disqualification from military service, the cadet was to be discharged from the Army
- Note 4 – Each case was reviewed individually; the Superintendent was to recommend to the Secretary of the Army (or designee) that the cadet either be transferred to the USAR with further recommendation regarding order to active duty or discharged from the Army, when such action was appropriate

4. Title 10, USC, section 2005 (Advanced Education Assistance: Active Duty Agreement; Reimbursement Requirements). The Secretary concerned may require, as a condition to the Secretary providing advanced education assistance to any person, that such person enter into a written agreement with the Secretary concerned under the terms of which such person shall agree to the following:

- To complete the educational requirements specified in the agreement and to serve on active duty for a period specified in the agreement;
- That if such person fails to complete the education requirements specified in the agreement, such person will serve on active duty for a period specified in the agreement;
- That if such person does not complete the period of active duty specified in the agreement, or does not fulfill any term or condition, such person shall be subject to repayment provision
- To such other terms and conditions as the Secretary concerned may prescribe to protect the interest of the United States

5. AR 37-104-4 (Military Pay and Allowances Policy), in effect at the time, chapter 31 (Recoupment of Advanced Civilian Education Expenses), provided for the recoupment of educational expenses (e.g., United States Military Academy, Senior Reserve Officer Training Corps, and advanced civilian schooling). Recoupment applied to those individuals who had signed an agreement that contained recoupment provisions.

6. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military DRBs and BCM/NRs 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 type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.



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, BCM/NRs 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//