

FILED

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

2023 JUL 10 10:35

NICHOLAS HARRISON, et al.,
Plaintiffs,

v.

LLOYD J. AUSTIN, Secretary of Defense, et al.,
Defendants.

Civil Action No. 1:18-cv-641 (LMB/IDD)

**PLAINTIFF'S REPLY TO DEFENDANTS' MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFF'S PRO SE MOTION TO CLARIFY AND ENFORCE**

COMES NOW, the Plaintiff, Nicholas Harrison, to respectfully submit this Reply to *Defendants' Memorandum of Law in Opposition to Plaintiff's Pro Se Motion to Clarify and Enforce* in the above-captioned action and to allege and state as follows:

INTRODUCTION

This Reply is submitted in response to the *Defendants' Memorandum of Law in Opposition to Plaintiff's Pro Se Motion to Clarify and Enforce*. It is with a profound sense of regret that the Plaintiff notes the lack of goodwill and genuine intent to resolve the matter at hand, evident in the conduct of the Defendants. Instead of approaching the discussions with sincerity and a commitment to justice, the Defendants have chosen to employ delay tactics, diverting the course of resolution. This disappointing approach not only obfuscates the clarity of the case but also undermines the spirit of the Court's Order and impedes the path to justice for the Plaintiff. The Plaintiff submits this Reply, seeking redress and urging the Court to enforce its own Order, thereby ensuring that justice is not delayed or denied.

STANDARD OF REVIEW

The Plaintiff accepts and accedes to the Standard of Review proposed by the Defendants, rooted in established precedent as cited in *Rainbow Sch., Inc. v. Rainbow Early Educ. Holding LLC*, 887 F.3d 610, 617 (4th Cir. 2018). This authoritative Standard of Review necessitates the Plaintiff to demonstrate “by clear and convincing evidence” the following elements:

- (1) The existence of a valid decree of which the alleged contemnor had actual or constructive knowledge;
- (2) That the decree was in the movant’s favor;
- (3) That the alleged contemnor by its conduct violated the terms of the decree, and had knowledge of such violations; and
- (4) That the movant suffered harm as a result.

Contrary to the assertions of the Defendants, these conditions have been undeniably met, as demonstrated by the arguments and evidence delineated below.

ARGUMENT

I. The Defendants are in Clear Violation of the Court’s Order.

In this case, the Defendants' actions clearly contravene the specific instructions set forth by this Court. The Court’s Order unequivocally directed the Secretary of the Army to “rescind her decision denying Harrison’s application in the Judge Advocate General Corps for the District of Columbia National Guard and reevaluate that application in manner consistent with the injunctive relief awarded to the plaintiffs.” (Amended Order, ECF No. 314 at 1-2.) Two established principles guide the interpretation of judicial orders and legal texts: the plain meaning rule and the contextual reading rule. The former asserts that the words of a document are to be understood in their ordinary

sense, while the latter necessitates that each word must be given its due effect in the context of the text as a whole.

The Court, with deliberate intent, opted to use the words "reevaluate that application" instead of merely instructing the Secretary to allow Harrison to reapply. This choice of wording is significant and should be respected. According to the plain meaning rule, the term "reevaluate" implies a reconsideration of the original application submitted by Harrison, not the submission of a new one. Similarly, the contextual reading rule mandates that the word "that," referring specifically to Harrison's original application, be given due weight. While the Defendants and the Plaintiff might debate the Court's intended meaning, it should be underscored that the Court itself is the ultimate authority on its own intent. Extensive briefing on this point would be redundant, as the Court understands its own directives better than either party.

Moreover, the Court's directive to reevaluate the Plaintiff's application retroactively was entirely feasible. The Plaintiff completed a medical examination in 2014 – which would be valid for any retroactive appointment. Given the existence of protocols for posthumous special selection boards in 10 U.S. Code § 628 (e), the lack of a current medical examination cannot reasonably be an impediment to a retroactive appointment or promotion.

II. The Plaintiff is Subjected to Obvious Cognizable Harm.

This Court's attention must also be drawn to the considerable harm suffered by the Plaintiff as a result of the Defendants' failure to act in accordance with the Court's Order. These instances of harm are not merely hypothetical or speculative — they represent clear, actual, and substantial injury suffered by the Plaintiff.

It should be noted that the Plaintiff, had his application been correctly reevaluated in 2014, would have been appointed as a First Lieutenant. Under AR 600-8-29, Para. 2-7, he would have

been eligible for promotion to Captain in 2015, Major in 2019, and Lieutenant Colonel in 2023. As such, he would currently be eligible for retirement as an officer, with a substantial amount of backpay and retirement benefits. The denial of this career progression by the Defendants' refusal to abide by the Court's Order has directly resulted in the loss of this expected remuneration and retirement benefits. This clearly presents a significant, measurable harm.

Further compounding the harm to the Plaintiff, the Defendants assert that the Plaintiff is now obligated to serve another eight years in the military. This imposition extends far beyond the service period that the Plaintiff would have reasonably anticipated had the Defendants properly reevaluated his application as per the Court's Order. The unnecessary extension of his service term is an additional, distinct, and palpable harm that the Plaintiff is forced to endure as a direct result of the Defendants' violation of the Court's Order.

III. The Plaintiff's Requested Relief is Directly Derived from the Court's Order.

It is worth noting that a substantial portion of the Defendants' Memorandum attempts to undermine the specific relief sought by the Plaintiff. According to the Defendants, the relief is unrelated to the case, unwarranted, and beyond the court's purview. Nevertheless, it is essential to highlight that the Plaintiff's formal request for a Special Selection Board was made in direct response to the Defendants' request for him to update his application so that it could be placed in front of an accessions board. Thus, it is entirely pertinent to the Court's injunction.

Contrary to the Defendants' framing, the Plaintiff did not opt to reapply. Rather, there was a Court Order mandating the Secretary to reevaluate his application. The military subsequently requested an update to this application. While the Defendants were vague regarding the mechanisms for presenting the updated application to the accessions board, they implied that a fair assessment of the Plaintiff's application would necessitate a "blind review" alongside other

applications. The requested updates were therefore intended to ensure the Plaintiff's application would not be singled out due to the irregularities associated with its original 2014 submission, thereby avoiding premature dismissal by the accessions board.

In light of this process, the Plaintiff sought to include a formal request for a Special Selection Board while updating his application. This was a protective measure, undertaken to prevent the risk of immediate separation by a Selective Retention Board, due to suddenly holding the same grade for an extended period, following a retroactive appointment as a First Lieutenant. This action was both reasonable and prudent, being directly tied to the Defendants' request for an updated application, which was to be reevaluated in line with the Court's Order.

Ironically, it was only after the Plaintiff's application was selected by the accessions board that the Defendants reframed the procedure as the Plaintiff reapplying under the military's new policy. This reframing can be observed in the context of the *Statement of Interest* that the Plaintiff submitted as part of his updated application. (Attached as Exhibit 1.)

IV. The Relief Requested by the Plaintiff is Legally Permissible and Feasible.

The Defendants' assertions to the contrary are not well-founded, as the governing statute does not restrict the remit of Special Selection Boards exclusively to individuals who are already officers. 10 U.S. Code § 628 (a) only specifies a "person" who should have been considered but was overlooked due to administrative error. Absent the Defendants' unconstitutional and discriminatory HIV policy, the Plaintiff would have appeared before the selection board at the designated times. Given the Court's previous rulings, it is clear that such a policy constitutes an error.

To fulfill the necessary procedures, the Plaintiff presented an official request to the Army's G-1 with his updated application on August 22, 2022. (Attached as Exhibit 2.) When the

Defendants failed to acknowledge or react to the said request, the Plaintiff escalated the issue by writing a letter to the Army's Assistant Secretary for Manpower and Reserve Affairs on January 27, 2023. (Attached as Exhibit 3.) There is no requisite for the Plaintiff to appeal to the Army Board for Correction of Military Records (ABCMR). In fact, it was not even necessary for the Plaintiff to pen a letter to the Assistant Secretary.

Under 10 U.S. Code § 628 (g), the Court has jurisdiction over the matter if the Secretary has not acted upon an official request six months after receiving a complete application. As the DC National Guard's Specialty Branch Recruitment Office acknowledged by e-mail, the required medical waivers were approved, and a complete application was forwarded to the Human Resources Command on November 6, 2022. (Attached as Exhibit 4.) The six-month deadline expired on May 6, 2023. Hence, the requested relief is not just suitable but also well within the jurisdiction of this Court.

CONCLUSION

In conclusion, it is crucial to underscore that the Plaintiff's requests are far from excessive or unreasonable. He seeks only to ensure the implementation of the Court's Order, an enforcement that respects the foundational principles of our justice system and serves as a testament to the rule of law. The Plaintiff is not seeking to subvert the natural course of military progression or exploit a loophole to secure unwarranted benefit. His simple, yet meaningful, request is that his case for a retroactive appointment, and appropriate subsequent time-in-grade promotions, be placed before a board of his peers, allowing them to make an informed and unbiased decision about the relief he is entitled to. Such an act is neither a deviation from established procedures nor an overreach into areas of discretion reserved to the military. It is a fair and reasonable request, firmly grounded in the language and intention of the Court's Order, and the basic principles of justice it represents.

WHEREFORE, the Plaintiff respectfully requests that the Court grant *Plaintiff's Motion to Clarify and Enforce*, and direct the Defendants to adhere to the clear language and intention of the Court's Order by putting the Plaintiff's request for a retroactive appointment and appropriate subsequent time-in-grade promotions before the relevant Special Selection Board. This Court's mandate, coupled with a fair evaluation by the Plaintiff's peers, will ensure justice is served, and reinforce the core principle that no individual or entity is above the law.

Respectfully Submitted,

Nicholas A. Harrison

Nicholas A. Harrison

Plaintiff (DC Bar #1024439)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
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Nicholas Harrison, et al,
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v.

Civil Action Number: 1:18-cv-641
(LMB/100)

Lloyd Austin, et al
Defendant(s).

LOCAL RULE 83.1(M) CERTIFICATION

I declare under penalty of perjury that:

No attorney has prepared, or assisted in the preparation of Plaintiff's Reply.
(Title of Document)

Nicholas Harrison
Name of *Pro Se* Party (Print or Type)

Nicholas Harrison
Signature of *Pro Se* Party

Executed on: 10 July 2023 (Date)

OR

The following attorney(s) prepared or assisted me in preparation of _____
(Title of Document)

(Name of Attorney)

(Address of Attorney)

(Telephone Number of Attorney)
Prepared, or assisted in the preparation of, this document

(Name of *Pro Se* Party (Print or Type)

Signature of *Pro Se* Party

Executed on: _____ (Date)

Exhibit 1

Statement of Personal Interest

I find myself crammed into an old cargo plane with sixty-three other cocky, athletic guys. I have been on Fort Benning for the past six months and I haven't seen my home or my family for some time. Now, I am finally getting to jump out of a perfectly good aircraft. It seems like a pretty stupid thing to do. However, many of us have been looking forward to this event for quite a while and we're laughing and joking while we wait. Yet, as the aircraft approaches the drop zone, the door is roughly yanked open and a tense silence descends upon the group as everyone turns to stare outside. The young, arrogant, easy-going attitude is suddenly gone and I start to wonder if I've made the right decision.

The first set of jumpers is instructed to stand up and hook up and we reluctantly do as we are told— moving like a group of condemned prisoners heading toward the gallows. With a sick feeling in my stomach, I anxiously wait for the signal. Thirty seconds seem to drag out for an eternity. Yet, when the green light finally comes on and we start rushing toward the door, it certainly doesn't seem long enough. I reach the exit, take a deep breath, and force myself to leap out into the void – determined not to be the only guy who refuses to jump. There is a brief moment of weightlessness. Then, I feel myself plummeting toward the ground

That was the introduction I wrote for my personal statement when I first applied to law school back in 2005. In that essay, I talked about the values that you came to respect and cherish when you served in an airborne infantry unit – where people still sacrificed for one another and lived by a code of duty, honor, and country. I recounted how I had served under a lot of good officers and a lot of bad officers in the military and I explained the special role that JAG officers played in taking care of the soldiers when the chain of command failed them.

Over the course of my twenty-two-year enlisted military career, I have repeatedly stepped up to take personal responsibility for the health, safety, and welfare of my fellow soldiers. While deployed overseas, I have regularly served in leadership roles intended for non-commissioned officers several grades higher than me and I have often exercised influence far above and beyond the bounds of authority conveyed merely by rank or command structure.

Yet, sometimes, even that is not enough. When the entire military and political establishment fails in its sacred duty to take care of over 2,000 U.S. servicemembers, the task of changing the system can fall upon an ordinary soldier – someone who, by luck, fate, or chance, finds himself uniquely situated to shoulder a burden that other affected servicemembers cannot bear. That was the situation I found myself in when my application for a direct commission as a JAG Corps officer was initially denied.

After dutifully going through the waiver and exception to policy request processes, I would embark on an eight-year fight to change the military's discriminatory HIV policies. That fight came to a close in April of 2022 when a federal court finally struck down those policies in a landmark decision – ruling that there was no rational basis for the military's restrictions and applying the equal protection clause to people living with HIV for the first time in history.

Normally, in this essay, the applicant explains his or her motivation and desire to serve in the JAG Corps. If

my original packet had been presented to you back in mid-2014, you would have been reading about the look that I remembered seeing in my fellow servicemembers' eyes when they heard that I was becoming a commissioned officer – the hope that they would finally know someone who knew what it was like to come up through the enlisted ranks and who was committed to protecting and looking out for them.

However, that packet was never put in front of the accessions board and, I am told, the military destroyed my original application at some point during the course of litigation. So, instead of writing a more upbeat, forward-looking essay about why I want to be an officer in the JAG Corps, I have the more difficult challenge of explaining why the special selection board should make me whole by recommending a series of retroactive appointments and promotions.

One of the sad truths that I have had to face is the fact that those who shoulder the burden necessary to successfully effect positive change often don't personally enjoy those benefits during the course of their lifetimes. The wheels of justice can be slow – even in the famed Eastern District of Virginia and I mourn the military career that I might have had in the JAG Corps.

However, I also take some comfort knowing the impact that I have had on so many fellow servicemembers. I also know that, in a lot of ways, I have become the embodiment of much of what one hopes the ideal candidate for a commission as a JAG Corps officer aspires to:

- someone from a poor, disadvantaged community in a flyover state that no one cares about who believes that the best way to prove oneself and change things in this country is to go fight for it;
- someone who is never fully accepted for his lifestyle, orientation, or status, but who puts his or her own life on the line to defend the way of life of those back home who still judge him or her;
- someone who diligently works through the chain of command until it fails him or her, who then steps out to publicly share the most personal and intimate information imaginable to the world because it is a story that needs to be told to effect change.

The grueling ordeal that I have endured over the past eight years is not something that I would wish on anyone. If the U.S. military is truly committed to the health, safety, and welfare of its servicemembers, it is a gauntlet that no one at my level should have ever been expected to run. Yet, I have steadfastly maintained faith in the system and I have done everything that anyone could have possibly expected of me.

My case is already slowly making its way into the law school casebooks. It is the first time in history that a court has applied the equal protection clause to people living with HIV. So, within a couple of years, classrooms of students throughout the United States are going to be reading about the military's old policy.

When they finish discussing the case, someone is going to ask what ultimately happened to me. They will talk about the nature of the checks and balances system – about how a federal court cannot specifically order that anyone be given a military commission. Then, they will want to know what the special selection board decided. They will want to know whether anyone ever made things right.

For many of them, the discussion may be their only intellectual exposure to the idea of military justice. Thus, what you decide will have a lasting impact on how the system and the profession are perceived by them. Will they walk out of that classroom with a sense of faith in the process and give a second look to the JAG Corps' on-campus interviews? Or, will they slam their textbooks in disgust and leave the recruiter sitting alone in the conference room?

Exhibit 2



DEPARTMENT OF THE ARMY
DISTRICT OF COLUMBIA NATIONAL GUARD
JOINT FORCE HEADQUARTERS
2001 EAST CAPITOL STREET
WASHINGTON, DC 20003-1719

REPLY TO
ATTENTION OF:

NGDC-HHD-JHQ

22 August 2022

MEMORANDUM THRU Commanding General, DC National Guard, 2001 E Capitol Street SE, Washington, DC 20003-1719,

THRU Chief, National Guard Bureau, Attn: ARNG-HRP-DA, 111 South George Mason Drive, Arlington, VA 22204-1373,

FOR Chief, Office of Promotions (RC), Attn: KNOX-HRC-PDV-PO, 1600 Spearhead Division Avenue, Fort Knox, KY 40122-5001.

SUBJECT: Request to Convene a Special Selection Board for SGT HARRISON, NICHOLAS A. (443-78-2842)

1. REFERENCES:

a. AR 135-100, *Appointment of Commissioned and Warrant Officers of the Army*, 01 September 1994.

b. AR 135-155, *Promotion of Commissioned Officers and Warrant Officers Other Than General Officers*, 13 July 2004.

c. NGR 600-100, *Commissioned Officers Federal Recognition and Related Personnel Actions*, 06 July 2020.

d. *Harrison v. Austin*, No. 18-cv-00641, 2022 WL 1183767 (E.D. Va. Apr. 6, 2022).

e. Secretary of Defense memorandum (*Policy Regarding Human Immunodeficiency Virus-Positive Personnel Within the Armed Forces*), 06 June 2022.

2. PURPOSE. I am requesting the convening of a special selection board in accordance with AR 135-155, Par. 3-19 and NGR 600-100, Par. 8-14 (b).

3. AUTHORITY. AR 135-155, Par. 3-19 and NGR 600-100, Par. 8-14 (b) provide mechanisms for the convening of special selection boards to correct errors and prevent injustices that occur during the selection process.

NGDC-HHD-JHQ

SUBJECT: Request to Convene a Special Selection Board for SGT HARRISON, NICHOLAS A. (443-78-2842)

4. **BACKGROUND.** When I graduated from law school in 2011, I was selected as an alternate to be appointed to the active duty Judge Advocate General (JAG) Corps, and I was guaranteed appointment in the JAG Corps for the U.S. Army Reserves or the National Guard. However, I was precluded from accepting that commission by a deployment to Kuwait/Iraq in May of 2011.

5. After I returned from that deployment in 2012, I passed the bar exam and moved to Washington DC to take a position with the federal government. Shortly after arriving in DC, I was interviewed and selected for a position in the legal services office supporting the Director, Army National Guard, and asked to apply for a commission. Had that commission been granted, I would have started in the position in Summer 2014. However, my application was denied because I am HIV-positive.

6. I exhausted all possible avenues through the military chain of command – submitting requests for a waiver and an exception to policy through the National Guard Bureau (NGB), Headquarters of the Department of the Army (HQDA), the U.S. Department of Defense (DoD), and the Army Board for Correction of Military Records (ABCMR) before I was forced to challenge the military's policy in federal court.

7. In April of 2022, the U.S. District Court for the Eastern District of Virginia struck down the military's HIV policies as a violation of the equal protection clause of the U.S. Constitution. *Harrison v. Austin*, No. 18-cv-00641, 2022 WL 1183767 (E.D. Va. Apr. 6, 2022). The Secretary of Defense subsequently instructed the services to permit enlisted members seeking to commission as officers. Secretary of Defense memorandum (*Policy Regarding Human Immunodeficiency Virus-Positive Personnel Within the Armed Forces*), 06 June 2022.

8. **ANALYSIS.** Since a federal court cannot order the military to grant me a commission, the judge ordered “that the Secretary of the Army rescind her decision denying Harrison’s application to commission in the Judge Advocate General’s Corps for the District of Columbia National Guard and reevaluate **that** application” Order, *Harrison v. Austin*, No. 18-cv-00641 (E.D. Va. Apr. 6, 2022), ECF No. 308. (Emphasis added.) Thus, the task of providing appropriate equitable relief, and of correcting the error or preventing the injustice of the denial of my earlier commission application, falls back to the military’s existing administrative processes.

9. AR 135-155, Par. 3-19 and NGR 600-100, Par. 8-14 (b) provide mechanisms for the convening of special selection boards to correct errors and prevent injustices that occur during the selection process.

NGDC-HHD-JHQ

SUBJECT: Request to Convene a Special Selection Board for SGT HARRISON,
NICHOLAS A. (443-78-2842)

10. The military's policy that prevented me from becoming a commissioned officer in 2014 because of my HIV status was declared unconstitutional, and it thus qualifies as an error/injustice that would justify application of the special selection board regulation. I therefore respectfully request that a special selection board be convened to review my record and to consider and recommend the actions that should be taken to address this injury and to make me whole.

11. Point of contact is the undersigned at nick@harrison-stein.com or at (202) 297-5057.

4 Encls

1. Letter to Army SSB
2. Memorandum Opinion
3. Court Order
4. OSD Memorandum

Nicholas A. Harrison
NICHOLAS A. HARRISON
SGT, DCARNG



DEPARTMENT OF THE ARMY
DISTRICT OF COLUMBIA NATIONAL GUARD
JOINT FORCE HEADQUARTERS
2001 EAST CAPITOL STREET
WASHINGTON, DC 20003-1719

REPLY TO
ATTENTION OF:

NGDC-HHD-JHQ

22 August 2022

MEMORANDUM FOR THE PRESIDENT AND MEMBERS OF THE SPECIAL SELECTION BOARD (SSB)

SUBJECT: Consideration of Appropriate Remedy to Correct Military's Error/Injustice Regarding SGT HARRISON, NICHOLAS A. (443-78-2842)

1. REFERENCES:

a. AR 135-100, *Appointment of Commissioned and Warrant Officers of the Army*, 01 September 1994.

b. AR 135-155, *Promotion of Commissioned Officers and Warrant Officers Other Than General Officers*, 13 July 2004.

c. NGR 600-100, *Commissioned Officers Federal Recognition and Related Personnel Actions*, 06 July 2020.

d. *Harrison v. Austin*, No. 18-cv-00641, 2022 WL 1183767 (E.D. Va. Apr. 6, 2022).

2. PURPOSE. I am writing this memorandum to provide context and background for the members of the special selection board considering the appropriate remedy to correct the error/injustice caused by the 2014 denial of my application for a direct commission as a JAG officer.

3. BACKGROUND. I am a twenty-two-year combat veteran who continues to serve as a non-commissioned officer in the DC National Guard.

4. I enlisted in the U.S. Army as an airborne infantryman in 2000. After completing my initial entry training at Fort Benning, GA, I was assigned to the 1-501st Parachute Infantry Regiment at Fort Richardson, AK. I served on active duty for three years before I was selected for the Green-to-Gold Program and sent back to complete my college degree at the University of Central Oklahoma while serving in the Oklahoma National Guard.

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SUBJECT: Consideration of Appropriate Remedy to Correct Military's Error/Injustice Regarding SGT HARRISON, NICHOLAS A. (443-78-2842)

5. After graduating with a Bachelor of Science in 2005, I started law school in the evening program at Oklahoma City University, working part-time as a legal intern for a prominent local attorney in Midwest City, OK. After my first semester, I was ranked #1 in my class and I had been appointed Chair of the Student Senate.

6. In 2006, I was pulled out of law school midway through my second semester and I was deployed to Afghanistan with the Oklahoma National Guard as SECFOR for one of the Embedded Training Teams working with the Afghan National Army. I served as a Brigade Tactical Operations Center NCOIC, performing the functions usually assigned to someone at least three grades higher in rank. I also conducted regular combat patrols, including a nighttime reconnaissance mission while the base was under rocket and mortar fire and a building-to-building search in a village where a convoy had just taken enemy fire.

7. When I returned from this deployment in 2007, I transferred to the University of Oklahoma and I had to retake my first semester of law school. At the University of Oklahoma, I served on the Graduate Student Senate and on the Student Advisory Board to the Oklahoma State Regents for Higher Education. I also continued working part-time as a legal intern, taking on additional roles during the summer working with digital forensics and statutory codification. I put together several award-winning business plans, being recognized by the Oklahoma Business Roundtable with an award as the graduate student exemplifying the state's entrepreneurial spirit. During my final year, I also wrote 44 news stories and 11 opinion columns as a student journalist for the campus newspaper, receiving awards for my investigative journalism and being recognized by FOI Oklahoma for my commitment to open records and freedom of information.

8. I graduated with a Juris Doctor and a Master of Business Administration in 2011. I interviewed with the U.S. Army JAG Corps and was selected as an alternate for active duty with a guaranteed appointment in the U.S. Army Reserves or the National Guard. However, I was precluded from pursuing that appointment because I was deployed once again with the Oklahoma National Guard in May of 2011.

9. I was deployed to Kuwait/Iraq, where I served as a Headquarters Platoon Sergeant and received a temporary PPG promotion to SSG (E-6). I took charge of the battalion's transition assistance program, helping soldiers put together resumes, find jobs, and apply for college.

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SUBJECT: Consideration of Appropriate Remedy to Correct Military's Error/Injustice Regarding SGT HARRISON, NICHOLAS A. (443-78-2842)

10. When I returned from this deployment, I was selected as Presidential Management Fellow for the U.S. Small Business Program, and I helped launch the Boots to Business Initiative – the entrepreneurial training track of the military's revamped transition assistance program. I served as Associate Program Manager, where I supervised the delivery of classes to over 6,000 participants at 150 military bases nationwide in 2013-2014.

11. I was also interviewed and selected for a position in the legal services office supporting the Director of the Army National Guard. At the time, they were interviewing several candidates. They had two open spots, and they were creating an order of merit list for future succession planning. I was their first choice and was asked to apply for a direct commission to serve as a JAG officer. Had I received that commission, I would have started in the legal services office in mid 2014. However, my application was denied because I was diagnosed with HIV shortly after returning from my last overseas deployment in mid-2012.

12. My primary care provider at the Washington DC VA Medical Center had worked for the Office of National AIDS Policy, and she told me that everyone knew that the military's HIV policy needed to be changed and they were working on it. Armed with this information, I did what a respectful servicemember was supposed to do in that situation: I put together a request for a waiver and exception to policy, so that I could continue normal progression and advancement in my military career while affording the military the opportunity to craft well-considered revisions to the policy.

13. I coordinated with an officer in the G-1 Office who was sitting on the task force that was reviewing AR 600-110, collecting and forwarding comments and suggestions on changes to the military's policy from other HIV+ servicemembers. She helped me build the packet, characterizing it as a "perfectly reasonable request." She also submitted my medical records to a medical physician (contractor) who noted that there was no reason that I shouldn't be able to perform the duties of a JAG officer.

14. A JAG officer from the DC National Guard's Trial Defense Service was also assigned to assist me as my packet made its way up through the chain of command. He spoke to the Commanding General and was assured that, since I was the DC National Guard's first choice, the "slot" was mine – regardless of how long it took to make it through the process.

15. Over the next eight years, I worked as a contractor, serving in a series of progressively more responsible GS-14 and GS-15 equivalent project and program

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SUBJECT: Consideration of Appropriate Remedy to Correct Military's Error/Injustice Regarding SGT HARRISON, NICHOLAS A. (443-78-2842)

management roles. I also founded and maintained a law practice and served on four non-profit boards.

16. At the U.S. Department of Defense, I supported acquisition strategy reviews of major weapons systems like the Army's CH-47 Chinook Helicopter and Distributed Common Ground System, the Navy's P-8A Poseidon Aircraft, Ohio Class Submarine Replacement, and Distributed Common Ground System, and the Air Force's Defense Enterprise Accounting and Management System and Mission Planning System. When one of the office's associate directors left, I was tapped to administer the Mentor-Protégé Program – a \$25 million program spanning eight service components and defense agencies that added 5,000 jobs and \$2.6 billion to the economy over five years.

17. At the Defense Threat Reduction Agency, I developed a comprehensive twelve-month plan to transform the agency's contracting and procurement processes after it received a poor performance management review, and I helped manage a \$2.8 billion portfolio focused on chemical, biological, radiological, nuclear, and explosive threats to identify opportunities for small businesses and non-traditional defense contractors.

18. At the U.S. Navy Bureau of Medicine and Surgery, I served as a strategic portfolio manager supervising four other portfolio managers who were responsible for eighty-one critical efforts that had been designated as key strategic priorities by the Surgeon General of the U.S. Navy.

19. During that time, my law practice also flourished. After passing the Oklahoma State Bar Exam in 2013, I started my own independent practice. The first case that I filed was an action defending a student journalist's rights to public records. It received considerable nationwide press coverage, it was settled successfully in 2014, and I quickly earned a reputation as an attorney who was not afraid to take on challenging legal matters against larger institutions.

20. I had received a high enough score on the Oklahoma State Bar Exam to be admitted to the DC Bar on a motion in 2015 without having to retake the exam. Later that year, I co-founded the Fidelis Law Group, and I started working with some of the nation's top product liability class action litigation firms. Our company has grown dramatically. Over the past three years, we have handled 76 successful case settlements and recovered \$8,250,000 for clients.

21. Earlier this year, I also decided to set up Harrison-Stein, PC, building on my experience serving on non-profit boards and working with small businesses through the

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federal government to create a boutique law firm committed to helping small businesses and non-profit organizations in the Washington DC community.

22. I had originally expected my career in the National Guard to keep pace. The military police company to which I had been assigned initially had me serving as an acting platoon sergeant even though I was only a SGT (E-5) after my PPG promotion had expired. I was even put at the top of the SSG (E-6) promotion list.

23. However, in 2015, the rewrite of AR 600-110 was abruptly shelved. Everyone who submitted comments and suggestions received a short letter from the Army G-1 informing them that their submissions would be kept on file for the next time that the regulation was reviewed. No explanation was given for cancellation of the revision process. A few months later, I would receive similar letters from the Under Secretary of Defense (Personnel & Readiness) and the Army Deputy Chief of Staff (G-1) informing me that my request for an exception to policy had not been favorably considered. Again, no explanation was given.

24. My commanding officer moved me over to a billet as a Contracting NCO, hoping that I might be able to take training as a DoD contractor to qualify for the 51-C MOS. However, my company could not secure that training. So, I was stuck in limbo – unable to receive a commission as a JAG officer or to reclass into a billet in the DC National Guard. Under the military's HIV policy, I was considered "non-deployable," which was a bar to most Army MOS-Q Schools.

25. Nevertheless, I re-enlisted and continued going into the DC Armory every month, performing whatever tasks I was assigned. Because I was by then a forty-something-year-old sergeant engaged in tasks for which I was overqualified, I believe many viewed me as a failure, and I was even targeted for ridicule and poor treatment by officers who were unaware of my circumstances. When leadership contemplate sending me for training to be a truck driver, I finally sought the assistance of the Chaplain to maintain a position more commensurate with my skills, education, and previous training.

26. I didn't initially intend to challenge the military's HIV policy in court. As noted above, I originally crafted a request for a narrow exception to policy just to finish out the remainder of my military career as an officer. However, when the military denied that request, there were no other options.

27. I put together a briefing packet about the military's HIV policy and my JAG application in early 2017. Over the course of the following two months, I met with the

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offices of fifty-four members of the U.S. House and Senate Armed Services Committees, and Congress ultimately voted to include pointed language in the National Defense Authorization Act of 2018 requesting a report from DoD about the military's HIV policies – particularly in regards to the feasibility of commissioning a prior enlisted servicemember with HIV.

28. My efforts also caught the attention of various advocacy groups including the Human Rights Campaign, Lambda Legal, and the Modern Military Association of America (f/k/a OutServe-SLDN). I agreed to serve as a named plaintiff in impact litigation seeking changes to the military's policies, which was filed in May 2018. Over the next few years, I appeared at various events in Chicago, San Francisco, and Washington DC, and I gave press interviews to a variety of media outlets including Bloomberg, Vice, Rolling Stone, and the New York Times.

29. In April of 2022, Judge Leonie Brinkema of the U.S. District Court for the Eastern District of Virginia struck down the military's HIV policies as a violation of the equal protection clause of the Constitution and directed the military to reconsider my JAG application. *Harrison v. Austin*, No. 18-cv-00641, 2022 WL 1183767 (E.D. Va. Apr. 6, 2022). Because a court cannot order the military to grant an appointment or a subsequent promotion as an officer, the task of providing appropriate equitable relief falls back to the military's existing administrative processes.

30. AUTHORITIES. AR 135-155, Par. 3-19 and NGR 600-100, Par. 8-14 (b) provide mechanisms for special selection boards to make retroactive appointments and promotions in order to correct errors or injustices. The military's policy blocking me from becoming a commissioned officer because I was HIV+ was unconstitutionally irrational, and it thus qualifies as such an error and injustice.

31. IMPACT. If I had been commissioned in July of 2014, I would have received three years constructive service credit and I would have commissioned as a 1LT (O-2E). Then, I would have been eligible for promotion to CPT (O-3E) in January of 2015, to MAJ (O-4) in January of 2019, and to LTC (O-5) in January of 2023.

32. Almost all officers are promoted to CPT (O-3), eighty percent (80%) are promoted to MAJ (O-4), and seventy percent (70%) are promoted to LTC (O-5). Statistically, it is more likely than not I would have been promoted to MAJ (O-4) in January 2019 and would be promoted to LTC (O-5) in 2023 if I was at or above the fifty-sixth percentile of all officers. Given my previous military service record, further supported by my

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performance in all other areas of my professional life and career, I respectfully submit that I would have performed at minimum at this level had I commissioned in 2014.

33. REQUESTED ACTION. I am respectfully requesting that the special selection board recommend that:

- a. I be retroactively selected for a direct commission as a JAG officer and be appointed as a 1LT (O-2E) with a date of rank of July 15, 2014;
- b. I be retroactively promoted to CPT (O-3E) with a date of rank of January 1, 2015;
- c. I be retroactively promoted to MAJ (O-4) with a date of rank of January 1, 2019; and
- d. I be selected for promotion to LTC (O-5) with a date of rank of January 1, 2023 – as it will probably be sometime after that date before these actions can be confirmed by Congress and before appointment and promotion orders can be created/published.

34. I am not requesting that anyone be displaced from a current JAG officer billet in the DC National Guard. However, I am respectfully requesting that the special selection board recommend that I be permanently appointed and promoted (as described above) regardless of whether any open billets exist, that I receive full pay, allowances, and benefits for the time I would have served in those positions (including service credit for military retirement and any student loan repayment programs), that I be given special dispensation and priority to enroll in the appropriate military career courses within a reasonable amount of time, and that I be given any other relief that the special selection board deems necessary and proper to correct this error/injustice.

35. DISCUSSION. In her order, Judge Brinkema did not simply say that I could submit another JAG application. She ordered “that the Secretary of the Army rescind her decision denying Harrison’s application to commission in the Judge Advocate General’s Corps for the District of Columbia National Guard and reevaluate that application” Order, *Harrison v. Austin*, No. 18-cv-00641 (E.D. Va. Apr. 6, 2022), ECF No. 308. (Emphasis added.) Therefore, the proposed remedy requesting retroactive appointments and promotions is the only way to give full effect to the order to reevaluate that application.

36. To be able to regularly perform their duties in the National Guard and the Army Reserves, a servicemember’s military career is supposed to keep relative pace with

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their civilian career. The proposed remedy does that – allowing me to complete the appropriate military career courses within a reasonable amount of time without experiencing extreme financial hardship from a dramatic pay cut when I am put on orders.

37. If I were promoted without the benefit of this remedy, I would have to almost immediately go before promotion/separation boards without the benefit of any previous officer evaluation reports, because I would be a junior officer with twenty years of time in service. I should not be thrown into a situation where I am almost immediately being forced out of the military just after a federal court has ruled that I should have been allowed to serve as an officer.

38. My original goal when I submitted a JAG application was to finish out my twenty-year military career and retire as a commissioned officer. My unit updated my NGB Form 23 last year, and I discovered that I had attained enough points to meet the twenty-year service requirement to qualify for a military retirement. Thus, I would respectfully request that the special selection board also take my entire military service career into consideration. The proposed remedy is the only way I am made whole and placed into a position from which I can retire as an officer.

- 2 Encls
1. Memorandum Opinion
2. Court Order

Nicholas A. Harrison
NICHOLAS A. HARRISON
SGT, DCARNG

Exhibit 3

NICK HARRISON, JD, MBA, PMP

601 Pennsylvania Avenue NW
South Building, Suite 900
Washington, DC 20004-3647
Office: (202) 434-8292
Cell: (202) 297-5057
E-Mail: nick@harrison-stein.com

Friday, January 27, 2023

Honorable Dr. Agnes Gereben Schaefer
Assistant Secretary of the Army (Manpower and Reserve Affairs)
111 Army Pentagon (Room 2E460)
Washington, DC 20310-0111

RE: Letter from Servicemember Requesting the Assistance of the Assistant Secretary

Dr. Schaefer:

My name is SGT Nick Harrison. I am a U.S. Army combat veteran. I served three years on active duty as an airborne infantry paratrooper stationed at Fort Richardson, AK and I was deployed twice with the Oklahoma National Guard to Afghanistan in 2006-2007 and Kuwait/Iraq in 2011-2012. I am also HIV+. Last year, I won a lawsuit where the Court struck down the military's outdated and discriminatory HIV policies. *Harrison v. Austin*, No. 18-cv-00641, 2022 WL 1183767 (E.D. Va. Apr. 6, 2022)

I am writing you because I submitted an official request for an Army Special Selection Board over five months ago. (See first enclosure.) However, I still have not received any acknowledgement of or response to that request. Regardless of any individual's personal feelings on the matter, I should still be able to expect personnel in the Army's G-1 to perform their duties in a military manner and to provide a timely written response. Ignoring my official request is not appropriate.

In July of 2022, I had received my twenty-year service letter and I was ready to retire. Over the course of the past decade, it had become obvious to everyone that HIV was now an easily-managed health condition. With access to the records of over 17 million servicemembers and veterans, the military knew long before anyone else did that people who reached "undetectable" HIV levels could not transmit the virus to anyone else. The Court's "rational basis" decision made it clear that reasonable minds could not even disagree on the matter anymore and the military's policies were being driven by nothing but prejudice, stigma, and malice.

However, the Justice Department insisted that I needed to extend my enlistment for another six months in order for them to be able to carry out the Court's order and make things right. So, I begrudgingly signed the required paperwork and waited for the military to implement the changes. Yet, nine months after the decision, I am now on my second enlistment extension and still nothing has changed.

The Army's G-1 continues to act like the policies which were struck down earlier this year remain in full force and effect. HIV+ servicemembers who have reached out to headquarters have been told that "even though the policy has changed, the policy remains the same."

No action officer is being appointed to implement the court order. No plans are being made to update the applicable regulations. No training is being developed to educate and inform the force of the policy changes. No process is being established to adjudicate complaints of discrimination and harassment.

Even though the U.S. Secretary of Defense has told all of the service branches that HIV is no longer a disqualifying medical condition and that servicemembers with that condition should no longer be considered nondeployable, the Army's G-1 is completely disregarding those directives.

HIV+ servicemembers applying for a commission are being instructed to request a medical waiver. The MRC codes categorizing them as "nondeployable" are not being removed from their records. If they wish to deploy with their unit, they are told to prepare a request for an exception to policy and to wait three months for a decision. The branch responsible for implementing the changes has even started kicking HIV+ servicemembers out of mail handler school.

Throughout our nation's history, the military has occasionally found itself on the wrong side of the U.S. Constitution. As times have changed and society has become more diverse and inclusive, the services have been required to make accommodations for race, gender, sexual orientation, and gender identity.

After such a shift, the process of reconciliation begins with a candid after-action review in order to understand where things went wrong and what needs to be done to get back on track – when all sides come together and work for the good of the entire force. I offered to assist with that over four months ago. (See second enclosure.)

Unfortunately, that process has not even started yet because the same person who oversaw the process when the rewrite of AR 600-110 was abruptly shelved, when HQDA medical reviewers changed their initial recommendations, and when my request for an exception to policy was denied now serves as the Deputy Chief of Staff (G-1).

[In July of 2016, I spoke to COL Stitt briefly on the phone and I had to ultimately go over his head because he refused to forward my packet to the Defense Undersecretary (Personnel and Readiness) for a decision – noting that my packet had gone as far as it could go and that it was now being sent back to my unit.]

When the U.S. Secretary of Defense finally ordered the military to implement the Court's orders in June of 2022, the 2,000 American servicemembers living with HIV should have been able to rely upon the military's service branch personnel chiefs to perform their duties in a military manner. However, that has not happened.

Therefore, I am reaching out to your office to request that, if the Army's G-1 is unable or unwilling to implement the necessary changes, you please designate someone else to step up and take charge of doing so.

Very Respectfully,



NICK HARRISON, JD, MBA, PMP

Enclosures: (1) Request for Army SSB and Letter to Army SSB
(2) Inclusion of Waiver Request Memorandum
(3) Letter to Senate Armed Services Committee
(4) U.S. Secretary of Defense Memorandum
(5) U.S. District Court Opinion and Order
(6) *Metro Weekly* Feature Issue (August 2018)
(7) Statement of Personal Interest

Exhibit 4

RE: Medical Waivers

Booty, Jason D SFC USARMY NG DCARNG (USA) <jason.d.booty.mil@army.mil>

Sun 11/6/2022 10:25 AM

To: Nick Harrison <nick@harrison-stein.com>; Nicholas Harrison <alaskaairborne@yahoo.com>

Cc: Johnson, Annette R CW3 USARMY NG DCARNG (USA) <annette.r.johnson.mil@army.mil>

SGT Harrison,

Your waivers were approved and your packet has been sent to HRC. The board will convene sometime this month.

From: Nick Harrison <nick@harrison-stein.com>

Sent: Sunday, November 6, 2022 9:57 AM

To: Booty, Jason D SFC USARMY NG DCARNG (USA) <jason.d.booty.mil@army.mil>; Nicholas Harrison <alaskaairborne@yahoo.com>

Cc: Johnson, Annette R CW3 USARMY NG DCARNG (USA) <annette.r.johnson.mil@army.mil>

Subject: [URL Verdict: Unknown][Non-DoD Source] Re: Medical Waivers

All active links contained in this email were disabled. Please verify the identity of the sender, and confirm the authenticity of all links contained within the message prior to copying and pasting the address to a Web browser.

Have you heard anything further? Is the G-1 convening a special selection board? Will my packet go to that regardless of what happens with these waivers?

Very Respectfully,

NICK HARRISON, JD, MBA, PMP

Managing Partner (DC Bar #1024439)

Harrison-Stein, PC

601 Pennsylvania Avenue NW

South Building, Suite 900

Washington, DC 20005-3647

Office: (202) 434-8292

Cell: (202) 297-5057

From: Booty, Jason D SFC USARMY NG DCARNG (USA)
Sent: Wednesday, October 5, 2022 11:09 AM
To: Nick Harrison; Nicholas Harrison
Cc: Johnson, Annette R CW3 USARMY NG DCARNG (USA)
Subject: Medical Waivers

SGT Harrison,

Just wanted to give you a status on your Medical Waivers. Currently both medical waivers are still being reviewed by OTSG as of today. Also this is all we are waiting for, your packet will be complete once I have the medical waivers.

V/r

Jason D Booty
SFC, DCARNG

District of Columbia Officer/Warrant Strength Manager NCOIC
Officer/Warrant IST Coordinator
Specialty Branch Officer Recruiter
Interim State Security Manager
State AUVS Manager

Recruiting & Retention Battalion

District of Columbia Army National Guard
2001 East Capitol Street SE
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 Office: (202) 685-9930

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Email: Jason.d.booty.mil@army.mil < [Caution-mailto:Jason.d.booty.mil@army.mil](mailto:Jason.d.booty.mil@army.mil) >

Website: [Caution-https://www.dcarmynationalguard.org/officer](https://www.dcarmynationalguard.org/officer)

MS Teams Chat: [Caution-https://teams.microsoft.com/l/chat/0/0?users=jason.d.booty.mil@army.mil](https://teams.microsoft.com/l/chat/0/0?users=jason.d.booty.mil@army.mil)

For general inquires please use the Officer Strength Manager group email:

ng.dc.dcarng.list.ngdc-j1-rrf-rrf-only-osf-pocs@army.mil < [Caution-mailto:ng.dc.dcarng.list.ngdc-j1-rrf-rrf-only-osf-pocs@army.mil](mailto:ng.dc.dcarng.list.ngdc-j1-rrf-rrf-only-osf-pocs@army.mil) >

GKO Specialty Branch:

[Caution-https://gko.portal.ng.mil/arng/G1/D05/AccessionsBranch/SpecialtyBranch/SitePages/Caution-Home.aspx](https://gko.portal.ng.mil/arng/G1/D05/AccessionsBranch/SpecialtyBranch/SitePages/Caution-Home.aspx)

When you join the District of Columbia Army National Guard, you're joining a team with purpose and setting yourself up for a successful future. You'll gain job skills and leadership experience, and get a head start on your civilian career. Explore the many ways Guard service can accelerate your path. **Join Now!** < [Caution-https://dcarmynationalguard.org/landing-page](https://dcarmynationalguard.org/landing-page) >