IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 5:24-CV-00176-BO

MICHAEL J. FORBES,
614 Northampton Rd.,
Fayetteville, N.C., 28310, *pro se*.

Plaintiff,

v.

THE UNITED STATES ARMY,
Christine E. Wormuth et al.,
101 Army Pentagon,
Washington, D.C., 20310

Defendant.

REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

This 29th day of July, 2024.

This memorandum is in reply to the Defendant's response to a MOTION FOR PARTIAL SUMMARY JUDGMENT by the Plaintiff, *pro se,* pertaining to a Complaint, which alleged Constitutional and Privacy Act violations. The violations of the Act are of certain provisions, namely: (e)(1), (e)(2), (e)(3), (e)(4), (e)(5), (e)(7), (e)(10), and (m)(1).

Jurisdiction, standing, 'disclosure' and 'MWPA' defenses have been addressed in other filings; this brief will only address new defenses and arguments presented in the Defendant's Response to MOTION FOR PARTIAL SUMMARY JUDGMENT. The Plaintiff argues,

a. the Plaintiff's claims are not "immaterial," "made solely for the purpose of obtaining federal jurisdiction," or "wholly insubstantial and frivolous," [Bell, 327 U.S. at 682-83, 66 S.Ct. 773]

b. the MWPA statute is not necessary to adjudge an agency's 'slanted' investigation under (e)(5), and [Kassel v. US VETERANS'ADMIN., 709F. Supp. 1194 (D.N.H. 1989)]

c. no mention of a disclosure violation is alleged as the Plaintiff prevented the imminent unlawful disclosure by asking for the agency to comply with the Privacy Act (no citation necessary as no disclosure allegation was presented by the Plaintiff); that said, this Privacy act case with its associated administrative separation certainly "presents a federal question within this Court's jurisdiction pursuant to 28 USC § 1331,"[1] and has a basis in federal Privacy Act law.[2]

ARGUMENT

This case is simpler than the Defendant purports; this case began with an unlawful order as referenced in Article 90 ("willfully disobeying a superior commissioned officer") of the Uniform Code of Military Justice, as explained in the Manual for Courts-Martial (emphasis added),

[1] Complaint filed in the case of *Peter P. Strzok v. Attorney General Willliam F. Barr, et. al,* case #1:19-cv-2367 in the United States District Court for the District of Columbia, dated August 6, 2019.

[2] "Former FBI special agent Peter Strzok reached a $1.2 million settlement with the Justice Department over claims that the department violated his privacy and the Privacy Act," "Former FBI official Peter Strzok reaches $1.2 million settlement with Justice Dept over Trump-related texts," *CBS News*, July 26, 2024, https://www.cbsnews.com/news/fbi-official-peter-strzok-trump-texts-1-2-million-settlement-doj/.

(iv) Relationship to Military Duty... The order ***must relate to military duty,....*** *The order may not, without such a valid military purpose, interfere* ***with private rights or personal affairs.***

(v) Relationship to statutory or constitutional rights. ***The order must not conflict with the statutory or constitutional rights of the person receiving the order.***

In fact, had the Defendant, through its Brigade Commander and Command Operational Psychologist, properly planned [(e)(10), (m)(1)] or appropriately reacted to the Plaintiff as he was attempting to get the required form and information that was left out of the Brigade Commander's order, and not followed up with another unlawful action via the slanted investigation into the Plaintiff's remediation efforts, this case would not exist. Moreover, the Inspector General's (IG) and Command Operational Psychologist's failures to properly assist the Plaintiff's remediation efforts are outside the Plaintiff's control as well.

Essentially, the Brigade Commander's order and the Command Operational Psychologist's support of the order are evidentiary and as 'plain as the nose on one's face.' Notably, the IG's failure is also apparent facially and factually. The Commander should have never investigated the Plaintiff for his attempts to remediate their blatant violations of law nor should the IG not acted as intermediary to request the information on both behavioral assessments on behalf of the Plaintiff; because 'assisting' is one of their two main objectives that include "advise and assist."

Furthermore, similarly to the Defendant's 4th Circuit case citation that used a 'fencing' metaphor referencing the Plaintiff of that case (the non-moving party to a dismissal motion) [Def. cited McCray, 741 F.3d at 483] in which the Maryland Department of Transportation's

dismissal ruling was overturned, the Plaintiff (McCray) was not provided the opportunity for discovery due to a District Court's summary judgment stemming from that defendant's Motion to Dismiss. The plaintiff in that case and this one are similar as they are fending off defendant dismissal requests, but the two cases differ in one stark fact; the Plaintiff in this case IS THE MOVANT for Partial Summary Judgment vs. the McCray case, wherein the Court acted *sua sponte* in favor of the Defendant. Herein, the Defendant wishes to have the case dismissed prior to discovery and yet the Defendant simultaneously argues against summary judgment citing they will be 'forced as the non-moving party' "into a fencing match without a sword or mask."

A simple factual analysis of this case can clear up this dichotomy. The Defendant does not lack "material facts necessary to combat a summary judgment motion." [McCray, 741 F.3d at 483]. In fact, the Defendant owns all of the unredacted evidence and material facts. The discovery phase of this case only assists the Plaintiff. Any argument that "summary judgment should only be granted 'after adequate time for discovery'" would be severely diminished as the Defendant has orchestrated or controlled all of the evidence since the violations that spawned this controversy. In fact, the Plaintiff has endured shabby internal investigations and repeated questioning over the course of nearly a year's worth of meetings with Inspector General personnel in their whistleblower investigation. This repetitiveness was so burdensome that any further interrogatories or declarations in the discovery phase of this case would be unnecessarily redundant. What else could the Defendant possibly need from the Plaintiff? The Defendant owns all of the evidence. The Plaintiff is the party who stands to gain from the discovery phase and yet it is the Plaintiff who is moving for Partial Summary Judgment. This is because of the *prima facie* nature of the case; the merit of the evidence provided as it relates to the Plaintiff's claims produces straightforward arguments of the Defendant's culpability. There is no material evidence

solely under the control of the Plaintiff; therefore Rule 56 (d) "When Facts Are Unavailable to the Nonmovant," does not apply. This fact alone renders any harm of a Partial Summary Judgment prior to discovery moot.

This is what makes the indisputable nature of the evidence provided by the Plaintiff in his MOTION FOR PARTIAL SUMMARY JUDGMENT available for adjudication at the Court's earliest convenience. After all, what can the Defendant do: deny an emailed or a falsified order was issued and implemented; deny the wording of a law and/or regulation; deny the conflict of interest; or deny the special defense exists? They do so at their own peril before any Court of law.

To expound on the Defendant's implication of victimhood resulting from an unfair "fencing match" inferred in the Defendant's response to the Plaintiff's request for a future Partial Summary Judgment (at its earliest possible convenience), it can be argued that the Plaintiff has been the bullied party, not the Defendant. The Plaintiff has always been willing to 'fence' in any appropriate and fair internal venue and has repeatedly sought one without success. In fact, the Plaintiff unwaveringly sought outside agencies and even congressmen to assist the Defendant in realizing its violations. Regardless, the Defendant metaphorically 'bound,' 'gagged' and 'stripped him naked.'

To date, the Plaintiff has been: 'bound' by the Defendant's solitary use of an administrative separation without due process or any other venue wherein the Plaintiff could argue the "special defense;" 'gagged' from speaking with any General that could have remediated the violations of law and identified the corrupted causation of the investigation found in this case; and 'stripped naked' of the unredacted information that the Defendant still holds in their metaphorical 'arms room' that the Plaintiff can only access via the 'keys' of discovery

motions filed as part of this case in this Federal Court. As a sampling, during discovery, the Plaintiff fully intends to request items that the Defendant owns and will not share: 1) the unredacted investigations (Military Police assault investigation and the 2nd clandestine investigation by Major Chustek) that the Plaintiff has previously requested; 2) every interrogatory, declaration and any other evidence associated with the Inspector General whistleblower investigation; 3) the requested and denied credentials of the Command Operational Psychologist, and; 4) all statute-required paperwork and other evidence that is required to "establish appropriate …safeguards" of provision [(e)(10)] on file prior to the roll out of the two behavioral assessments. The latter can identify whether the Brigade Commander and Command Operational Psychologist simply 'went rogue' or whether this was a coordinated violation of the law from a higher echelon within the Defendant's unelected bureaucratic hierarchy; either of which could provide evidence of culpability and lead the Court to a determination of the Plaintiff's declaratory relief requested for all Soldiers. The Plaintiff has been prevented from accessing items like those listed, which he intended to use for internal adjudication, but all 'cries and pleas' have thus far fallen on deaf ears. This Court can: 'unbind,' 'ungag,' 'clothe' and 'arm' the Plaintiff in a fair third-party venue by denying the Defendant's MOTION TO DISMISS; prevent the Plaintiff from being thrown in the 'dark room' of an administrative separation by establishing the requested emergency relief, and; become the 'harbinger of the fair duel' to end this controversy via a scheduling order in this Court.

CONCLUSION

It is not lost on the Plaintiff that defendant may, in some form or fashion, attempt to formally deny the Plaintiff's claims in their Answer, which could result in delays in resolution of

the controversy. The Plaintiff has argued the futility of 'denying' the Defendant's own factual evidence earlier when asking "What can the Defendant do?" As time passes, the unargued 'delay' portion is of paramount import to the Plaintiff: he wishes a fair 'fencing' match in a timely manner. Should the case result in delaying adjudication of any part of this case or not having a ruling on the Plaintiff's MOTION FOR EMERGENCY INJUNCTIVE RELIEF, then the Defendant will impart immense damages on the Plaintiff. Regardless of this possibility, the Plaintiff is resolute in his pursuit of justice in this matter. Even after being 'bound,' 'gagged,' and 'stripped naked,' the Plaintiff will continue his attempts to get to the 'fencing' match regardless of the civil venue; this is true even if the Plaintiff gets thrown in the Defendant's intended metaphorical solitary confinement or 'dark room' of an administrative separation (without a retirement), albeit he will need then to find a metaphorical 'duel' under different arguments, using different metaphorical 'weapons.' Alternatively, the 'fencing match' this Court has before it, in which it has jurisdiction and a fair venue for the adjudication of the Defendant's actions alleged by the Plaintiff with the support of the Defendant-controlled indisputable evidence in relation to the Plaintiff's *prima facie* case, is possible now. Therefore, the Plaintiff urges this Court to deny the motion to dismiss, and to urge the Defendant's answer to the Plaintiff's pleading.

The Plaintiff's prays that this case can and will proceed prior to the Defendant's planned and scheduled 'locking of the Plaintiff in the dark room' and 'throwing away the key,' of an administrative separation, which is scheduled for December 1, 2024. The Defendant wishes to fire the Plaintiff, via the administrative separation, because he requested statutory information he had been denied on orders (violations of law) and then held protected communications with oversight and investigatory agencies to remediate the violations. This is occurring in violation of

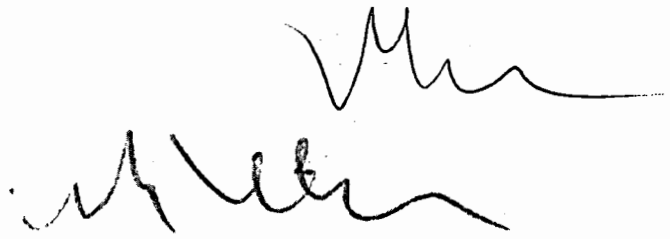
his rights under the First Amendment to the Constitution of the United States. The Plaintiff's posits that the case should be awarded a scheduling order once the Defendant answers the complaint due to the Defendant's deprival of the Plaintiff's property interest in his employment, without due process, which is in violation of his rights under the Privacy Act (e)(5) and the Fifth Amendment to the Constitution.

The Plaintiff also posits the Court has enough *prima facie* evidence to immediately rule that violations of law and executive orders have occurred that violated the Plaintiff's statutory and civil rights/liberties or, at a minimum, provide the emergency relief requested until this case is resolved. In fact, the Supreme Court has stated: "**If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in** politics, nationalism, religion **or other matters of opinion or force citizens to confess by word or act their faith therein** (emphasis added)." Elrod v. Burns, 427 U.S. 347, 356 (1976) (quoting Board of Education v. Barnette, 319 U.S. 624, 642 (1943)). The Plaintiff awaits a ruling, entered order, or requested conference or action, to warrant the issuance of a scheduling order and the opportunity for any and all other relief the Court deems just and proper to make the Plaintiff whole.

CERTIFICATE OF COMPLIANCE

This document complies with the page limit and word count of Local Rule 7.2, in that it is 8 pages long and contains 2086 words.

Dated: July 29, 2024



Michael J. Forbes, *pro se*