

# ENCLOSURE A12



# THE LAW FIRM OF JAMES M. BRANUM



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16 June 2023

MEMORANDUM FOR Record

SUBJECT: SFC Forbes, Michael J. rebuttal of 2LT Tolston findings and evidence

The following brief is submitted by James M. Branum, legal counsel for SFC Forbes as a rebuttal of the 15-6 investigation findings and evidence submitted by 2LT Tolston, as well as the recommendation of a GOMOR and the contemplation of a relief for cause.

## Introduction

Any objective reader of the findings and evidence submitted by 2LT Tolston would have reason to be concerned, however, the reality is very different than the distorted picture painted by this report of a deeply flawed investigation conducted by a junior officer.<sup>1</sup>

This problematic investigation resulted in many pages of sworn statements and MFR's (see enclosure A for a detailed discussion of these documents by SFC Forbes and enclosure B for a detailed investigation timeline), but this brief will focus its response to the two central justifications made in the recommendation for a GOMOR, as well the significant errors in the investigation itself.

## 1. SFC Forbes did not engage in disrespectful communication with MAJ Racaza

As outlined by SFC Forbes in his statement (see exhibit 1), SFC Forbes spoke in a respectful manner with MAJ Racaza about his bona fide concerns about medical privacy. He treated her as a professional because she was one, and he rightfully expected her to fulfill her duty under both Army regulations<sup>2</sup> and the licensing rules of her jurisdiction (Arizona)<sup>3</sup> to provide the

<sup>1</sup> In my almost 17 years of practicing in the area of military law, I do not recall ever seeing a 2LT being given such a challenging AR 15-6 investigation to complete.

<sup>2</sup> See DoDI 5400.11 part 5.1 (a)(3) (ref. A). *Also see* DOD Patients Bill of Rights at DoDI 6000.14 (ref. C), and *see* 32 CFR 219 § 219.116 (ref. E).

<sup>3</sup> According to the Ariz. Admin. Code § 4-26-301 (online at <https://casetext.com/regulation/arizona-administrative-code/title-4-professions-and-occupations/chapter-26-board-of-psychologist-examiners/article-3-regulation/section-r4-26-301-rules-of-professional-conduct>), the APA's "Ethical Principles of Psychologists and Code of Conduct" are binding on Arizona psychologists. This includes Rule 3.10 (online at <https://www.apa.org/ethics/code>) which provides that "When psychologists conduct research or provide assessment, therapy, counseling, or consulting services in person or via electronic

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information needed for him to be able to make appropriate decisions about his privacy rights under the law. Unfortunately, this is not what happened, and MAJ Racaza chose to engage with SFC Forbes in a disrespectful and unprofessional manner.<sup>4</sup> As such, she effectively divested her status as a superior officer and was no longer protected by the provisions of UCMJ article 89.<sup>5</sup> As explained in the US Army's *Military Judges Benchbook*:

*(When an officer) under all the circumstances departs significantly from the required standards of an officer and a (gentleman)(gentlewoman) appropriate for that officer's rank and position under similar circumstances is considered to have abandoned that rank and position."*<sup>6</sup>

The veracity of SFC Forbes' interaction with MAJ Racaza are also backed by his long history of conducting himself professionally and respectfully, as shown by several of the character reference letters, including that by CW4(R) Dane A. Bergeron,<sup>7</sup> who said:

*SFC Forbes possesses excellent communication skills (both written and verbal), allowing him to effectively interact with all levels of personnel in the Chain of Command.*

This picture of SFC Forbes is also consistent with what is said in this excerpt from his most recent NCOER dated August 31, 2022:<sup>8</sup>

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transmission or other forms of communication, they obtain the informed consent of the individual or individuals using language that is reasonably understandable to that person or persons except when conducting such activities without consent is mandated by law or governmental regulation or as otherwise provided in this Ethics Code. . ."

<sup>4</sup> For SFC Forbes' account of this interaction, see enclosure A.

<sup>5</sup> See generally Milhizer, Major Eurge R. "The Divestiture Defense and United States v. Collier" *The Army Lawyer* (March 1990; DA-PAM 27-50-207), online at: <https://bit.ly/460vuf>.

<sup>6</sup> DA PAM 27-9 at 1090.

<sup>7</sup> See enclosure C.

<sup>8</sup> This NCOER, as well as his previous ones can be found in the exhibits, in the folder entitled "CRL-Character reference letters"

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**From Part IV Section C (Comments):**

*\* fully supported Army SHARP, EO, and MRT programs  
\* model of the Army values; promoted these values with others and exemplified the highest standards of personal conduct both on and off duty*

**2. SFC Forbes did not engage in “counterproductive or toxic leadership behaviors within brigade or battalion S2 sections.”**

The findings of the IO with regard to allegations of counterproductive and toxic leadership are based on weak and conflicting evidence, much of it based on hearsay, repeated rumors, and unsubstantiated opinions.

A different picture than the one painted by the IO, can be found by examining the past NCOER's (see attachments), as well as the testimony of those who have worked with SFC Forbes (see attached character reference letters). Here is one important excerpt, from the letter by CSM Aubrey L. Crenshaw<sup>9</sup>:

*To date, I have known SFC Forbes for the past eleven years through military positions held and through continued mentorship. I can personally attest to his intelligence, fortitude and professionalism. Others and I can confirm his exceptional qualities and potential as a leader, trainer and motivator. I have witnessed firsthand his growth in both military knowledge and experience, and as a person.*

SFC Forbes has a strong record of being a true leader, one who will speak the truth when it needs to be spoken, but also one who sees the potential of junior enlisted troops and helps them to get on track to get promoted and succeed in their MOS.<sup>10</sup>

Also worth noting are these remarks from SFC Forbes' most recent NCOER, dated August 31, 2022:

**From part III, section j (Comments):**

*\* stellar performance, dedication, and commitment to excellence during the rating period; finds most efficient and effective means to remain in regulatory compliance*

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<sup>9</sup> See enclosure C.

<sup>10</sup> For evidence of this, see the NCOER's, as well as exhibit A.

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*\* earned staff's respect with solid guidance, eagerness to learn other sections' functions, and interoperability; steadfast in protection of command team's decision-making process and reducing risk*

**From Part V section b (Senior Rater Comments)<sup>11</sup>:**

*SFC Forbes is a top 15% NCO with tremendous potential to excel. SFC Forbes' ably served as both OIC and NCOIC of the BDE S2 Section and revitalized our physical security programs; his performance validates his exceptional potential at the next level. Send to Master Leaders Course and promote to Master Sergeant ahead of peers.*

### **3. SFC Forbes was subjected to a flawed and deficient investigation.**

There have been several significant issues related to the process that SFC Forbes has been subjected to, including:

- a. The failure of the IO to call all relevant witnesses (and to either provide sworn statements from all she interviewed) resulted in an inaccurate/distorted judgment of SFC Forbes.**

In the sworn statement by 1SG Morgan (exhibit 4), there were several individuals listed by 1SG Morgan as relevant witnesses, however, it does not appear that the IO interviewed these people. The names provided by 1SG Morgan were: COL Brunson (BDE CDR), LTC Sanchez (BDE XO), CSM Vargas (BDE CSM), LTC Hamman, C. (former BDE XO), and MAJ Collins, M. (former BDE XO).

Also, according to the Findings memo by the IO (pages 5-6), the IO interviewed several witnesses for which she provided no sworn statements or summarized testimony by memorandum. These interviewees were: MAJ CH Rivera, 1LT Lyons, and Mrs. Margaret Lindquist. It is not clear why the IO chose to not provide some kind of MFR for these interviews, given her obligation to “

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<sup>11</sup> The senior rater was COL Brunson.

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**b. The reliance of the IO on summarized statements rather than on sworn statements, resulted in an inaccurate/distorted judgment of SFC Forbes.**

The IO in this investigation made frequent use of MFR's to summarize testimony. While this is permitted under the regulations, it is important to note that the stated intent of this permission is to primarily accommodate witnesses who are testifying telephonically.<sup>12</sup>

While the use of sworn statements is not required for an AR 15-6 investigation (unless otherwise required under the appointment orders), the use of MFR's in place of sworn statements (by MAJ Weber<sup>13</sup>, LTC Furlow<sup>14</sup>, and SFC Meredith<sup>15</sup>) does raise serious questions about whether this testimony should be treated with the same level of deference as one would otherwise provide to testimony done by way of an oath.

**c. The decision of the IO to make use of unreliable, irrelevant and immaterial evidence, resulted in an inaccurate/distorted judgment of SFC Forbes.**

In reviewing the totality of the evidence provided in the AR 15-6 investigation, a few themes keep recurring through multiple witness statements, including the use of generalizations and opinions (often by personnel who have not established on the record the factors that substantiate those opinions), the frequent use of hearsay and more generalized gossip, and the use of irrelevant but negative information.

According to the *Investigating Officers Guide*, AR 15-6 investigations are not bound by the MRE (Military Rules of Evidence), but there are still some limitations on appropriate evidence, most notably:

*The information must be relevant and material to the matter or matters under investigation. Information not meeting this standard must not be included in the investigation.*<sup>16</sup>

Unfortunately, the IO in this case made extensive use of information that was irrelevant and immaterial, including remarks by witnesses about SFC Forbes' opinions on topics including race,

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<sup>12</sup> See *Investigating Officers Guide*, (C-3)(c)(1), of App. C of AR 15-6.

<sup>13</sup> See exhibit 12.

<sup>14</sup> See exhibit 14.

<sup>15</sup> See exhibit 15.

<sup>16</sup> AR 15-6, App. C, (C-3)(g)(1).

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ethnicity, sexual orientation, and gender,<sup>17</sup> all topics that were outside the scope of the matters of the investigation.

**d. The failure of the IO to recognize that many of the allegations made against SFC Forbes, are made by personnel who have an obvious conflict of interest.**

The IO failed to note in her report that SFC Forbes has a pending whistleblower reprisal case with IG against multiple RMO's (responsible management officials), as well as the fact that SFC Forbes had previously accused CSM Emekaekwue of a physical assault against him. This failure to recognize a potential conflict of interest of these two witnesses calls into question the objectivity of the investigation.

The IO also failed to note that MAJ Racaza violated the ethical rules of her practice by engaging in a conflict of interest by way of multiple relationships, in that she: (1) wrongfully accused SFC Forbes of disrespectful communication, (2) ordered an involuntary eCDBHE of SFC Forbes, and (3) testified against SFC Forbes in the AR 15-6 investigation.<sup>18</sup>

## **Conclusion**

The evidence provided by SFC Forbes shows clearly that the allegations made against him are without merit. He did not engage in disrespectful or unprofessional communications with MAJ Racaza, and his leadership approach has been positive in nature, and is in no way toxic or counterproductive.

SFC Forbes has, however, been subject to illegal reprisals and retribution, which has unfortunately tainted the AR 15-6 investigation held against him.

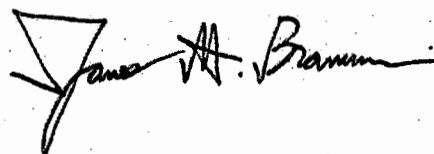
It is for these reasons that you are urged to: (1) withdraw the recommendation of a GOMOR, (2) remove the flawed AR 15-6 proceedings from the record, (3) drop the relief for cause action, and (4) transfer SFC Forbes to another unit where he will not continue to be targeted.

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<sup>17</sup> As discussed in exhibit 1, SFC Forbes did not make these statements.

<sup>18</sup> As discussed above, psychologists licensed by the state of Arizona are bound by the APA's "Ethical Principles of Psychologists and Code of Conduct" (online at <https://www.apa.org/ethics/code>). The relevant provisions are rules 3.05 and 3.06.

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A handwritten signature in black ink that reads "James M. Branum". The signature is written in a cursive style with a large, stylized initial "J".

James M. Branum  
Attorney at Law

**Enclosures:**

- A: Memorandum addressing select portions of the statements and other documents provided by the AR 15-6 investigation.
- B: Timeline of AR 15-6 Investigation
- C: Character Reference Letters

**Exhibits:**

These are all found in the zip file provided electronically but are also available via CD.