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PETER A. MOORE, JR., CLERK
US DISTRICT COURT, EDNC

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,
Secretary of the Army (SoA)
101 Army Pentagon,
Washington, D.C., 20310

Defendant.

PLAINTIFF'S MOTION TO COMPEL
URGENT ABEYANCE

This 18th day of October, 2024.

1. On December 1, 2024 the Defendant will administratively separate the Plaintiff from his contractual, and unblemished, record of service in the United States Army without due process, which prompted this case. This is a federal question and a Privacy Act case (5 USC § 552a) in which the Defendant's supervisory echelon, the Department of Defense, has authorized remediation of Privacy Act rights violations in the form of a lawsuit, per the following quote from their own Privacy Program¹ policy, which states:

¹ See DoD 5400.11-R, (Department of Defense Privacy Program), (May 14, 2007) *online at*: <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/540011r.pdf>.

*[a]n individual may file a civil suit against a DoD Component, if the individual believes his or her rights under the Act have been violated (See Section 552a(g) of Reference (b)).*²

The same policy further defines an individual as follows:

*A living person who is a citizen of the United States or an alien lawfully admitted for permanent residence. The parent of a minor or the legal guardian of any individual may also act on behalf of an individual. Members of the U.S. Armed Forces are "individuals...."*³

Therefore, given the expressed permission to bring a civil suit was granted by the DoD and the Plaintiff has done so, the Plaintiff requests not to be damaged further until this civil controversy brought before this Court is ruled upon or otherwise settled.

2. The Plaintiff, Sergeant First Class Michael J. Forbes, *pro se*, suffered immediate and recurring and long-term damages due to violations of his Constitutional Rights and violations of the lawful requirements of multiple laws, especially the Privacy Act, conducted directly by the Defendant thru its sworn Officers; 'the center of gravity' of participants is the Brigade Commander and his Command Operational Psychologist. The Plaintiff respectfully makes this motion to compel the Defendant to fulfill the Hon. Richard Hudson's (NC-9) request (as characterized by the Defendant in a letter to

² Ibid. para. C10.2. p. 72, "CIVIL ACTIONS."

³ Ibid. para. DL 1.8. p. 8, "DEFINITIONS."

Hudson)⁴ “to delay consideration of his [the Plaintiff’s] separation [on December 1, 2024]...until judicial action is complete” to prevent irreparable and permanent harm to the Plaintiff.

3. The Defendant’s representative (the Senior Enlisted Advisor to the Assistant Secretary of Defense (ASD) for Manpower & Reserve Affairs (M&RA)) refused (on September 12, 2024) both,⁵ to consider the recommendation of the Defendant’s Human Resources Command (HRC) representative (of the Chief of the Operations Management Division),⁶ sent on August 19, 2024 and, its fulfillment,⁷ on August 28, 2024, via a Plaintiff-submitted exception to policy,⁸ this request that was sent to Hon. Ronald Keohane (the ASD (M&RA)) with a copy to Hon. Richard Hudson (Congressman for the 9th District of North Carolina (NC-9)). The Plaintiff learned of this option via an August 19, 2024, HRC letter that was sent to Hon. Hudson’s office then forwarded (by his staff) to the Plaintiff for execution on August 20, 2024;⁹ in fact, the HRC representative recommended specifically what the Plaintiff should accomplish, which follows:

⁴ See Enclosure C01, letter from Department of the Army, US Army Human Resources Command, Chief, Operations Management Division, Jon E. Finke, August 19, 2025.

⁵ See Enclosure C02, p. 2, *email from* Senior Enlisted Advisor of the ASD (M&RA), Sergeant Major Steve Minyard, September 12, 2024.

⁶ Ibid, Enclosure C01.

⁷ See Enclosure C03, *email showing attached Exception to Policy to* ASD (M&RA), Hon. Ronald Keohane, from James M. Branum, Esq., August 28, 2024

⁸ See Enclosure C04, *attached letter to* ASD (M&RA), Hon. Ronald Keohane, *from* James M. Branum, Esq., August 28, 2024.

⁹ See Enclosure C05, *email from Hon. Hudson’s staff member showing attached letter from* HRC, Ms. Kimberly Baldwin, August 20, 2024.

*[r]ecommend SFC Forbes submit an exception to policy [ETP] to the Directorate of Military Personnel Management (DMPM), office of the Deputy Chief of Staff, G-1, United States Army for consideration of his request.*¹⁰

4. A recently added clause (August 1, 2024) under the responsibilities of the Assistant Secretary of Defense for Manpower and Reserve Affairs (ASD (M&RA)), in the published Department of Defense Instruction 1332.14, entitled “Enlisted Administrative Separations,”¹¹ states, “[a]djudicates exceptions to policy requests for enlisted administrative separations.”¹² The Plaintiff learned from this regulation that the appropriate authority for the ETP was recently (August 1, 2024) shifted or added to the ASD (M&RA). Therefore, the Plaintiff engaged his Military Assistance Counsel (MAC) and, within weeks, submitted an ETP for the ASD (M&RA)’s consideration; it was immediately (upon follow-up) denied by the Senior Enlisted Advisor to the ASD (M&RA).¹³ Though my Congressman (via staff) was willing to “get the ball rolling,”¹⁴ with the Defendant to ensure a fair and timely review of their constituent’s recommended administrative abeyance request (which is completely outside the purview of this litigation), the Plaintiff’s and the Congressman’s inquiries for an address to certify its

¹⁰ Ibid, Enclosure C01.

¹¹ See DoDI 1332.14, “Enlisted Administrative Separations,” ”Section 2: Responsibilities,” August 1, 2024, *online at*: <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/133214p.pdf>.

¹² Ibid., para. 2.1, b., pg. 8.

¹³ Ibid., Enclosure C02, p. 2, *email from* Sergeant Major Steve Minyard, September 12, 2024.

¹⁴ Ibid., Enclosure C05.

delivery were ignored.¹⁵ Summarily, this seeming 'shell game,' instigated by the Defendant, was a significant waste of time and money to the Plaintiff.

5. Concurrently, the ASD (M&RA) representative, upon sending his response to the Plaintiff and the Plaintiff's MAC (who sent the ETP to the ASD), sent instructions to the Plaintiff and his MAC, to communicate with the Defendant's Counsel. Given the Plaintiff's MAC is not licensed in NC, let alone a named representative of the Plaintiff in this federal case, the Plaintiff immediately emailed his MAC to 'stand down' and not respond, or engage Defendant Counsel. The Plaintiff immediately crafted an impromptu communication with opposing counsel that informed him of what had occurred and contained specific guidance on communications regarding this litigation and how it differs from administrative matters such as communications with the ASD (M&RA).¹⁶

RECENT EVIDENCE SUPPORTS PLAINTIFF'S ALLEGATIONS

6. Even more evidence in support of the Plaintiff complaint is found in the new United States Army Special Operation Command (USASOC) policy 24-14 (July 17, 2024)¹⁷ that supersedes 24-18 (December 19 2018),¹⁸ which governed this controversy. This updated policy's purpose was for the USASOC Human Research Protection Program (HRPP) to,

¹⁵ See Enclosure C06, *email to SFC Forbes*, Ms. Kimberly Baldwin, August 23, 2024.

¹⁶ See Enclosure C02, p. 1, *email from SFC Forbes to Assistant US Attorney Renfer*, September 12, 2024.

¹⁷ See Enclosure C07, General Staff, Chief of Staff, Colonel John D. Bishop, July 17, 2024.

¹⁸ See Enclosure C08, General Staff, Chief of Staff, Colonel Bradley J. Moses, December 19, 2018.

*establish guidelines to ensure compliance with federal laws and regulations, uphold ethical standards, and protect the rights and welfare of participants, their data, and/or bio[-]specimens involved in Human Subject Research (HSR).*¹⁹

The new policy's subject-matter-expert is the Director of Army Human Research Protection Office (AHRPO), Dr. Brenda Hanson, whom the Plaintiff complained to in February, 2022 about this case.

7. This new August 1, 2024 policy clarified and/or enhanced the old policy under which the Plaintiff endured hardships by implementing the following:

- a. *“Ensure that [Human Subject Research] HSR receive both institutional and regulatory approval prior to commencement.”* (emphasis added)²⁰
- b. *“Ensure that no individual self-determines what constitutes HSR to maintain compliance with regulations.”* (emphasis added)²¹
- c. *[The] “Human [P]rotections [D]irector[,] serve[s] as the exemption determination official for USASOC to determine if an activity meets the regulatory definition of HSR.”* (emphasis added)²²
- d. *“The Staff Judge Advocate must ensure that informed consents and other study related documents (conflict of interest management plans, individual*

¹⁹ Ibid., Enclosure C07, para. 1 “Purpose,” pg. 1,

²⁰ Ibid., Enclosure C07, para. 3. b. , “General”

²¹ Ibid., Enclosure C07, para. 3. c., “General”

²² Ibid., Enclosure C07, para. 4. b. (2), “Responsibilities: Human protections director -”

investigator agreements, informed consents, and payments for participation in research) are in full compliance with lawful principles and ethical standards.

(emphasis added)²³

- e. *“Component subordinate command/subordinate unit – [c]omply with command responsibilities as outlined in DoD Instruction 3216.02 and Department of Army policies.”*²⁴ (emphasis added)

This policy stands as clear evidence that the Commander and the Command Operational Psychologist violated the law and their behavior required ‘checks and balances;’ yet, even the old policy shows the Brigade Commander’s and Command Operational Psychologists culpability in their violations as Commissioned, Field-Grade (Major and above), Officers, as it stated,

Federal law, Department of Defense Directive and Instruction, and Army Regulation require Research, Development, Test and Evaluation (RDT&E) chartered organizations to protect the rights and welfare of personnel participating in research, studies, tests, experiments, and evaluations as human subjects to avoid undue risk or harm to the subject. (emphasis added)²⁵

They swear to uphold these:

²³ Ibid., Enclosure C07, para. 3. b. (1), “Responsibilities: Staff Judge Advocate -”

²⁴ Ibid., Enclosure C07, para. 3. f. (3), “Responsibilities: Component subordinate command/subordinate unit -”

²⁵ Ibid., Enclosure C08, para. 4. b., “GENERAL:”

8. There exists another area of the old policy that provided indisputable proof of the Commander's and Command Operational Psychologist's violation of the Privacy Act. Paragraph 8 clearly states,

a. As applicable, if the Research, Development, Test and Evaluation (RDT&E) proposal is approved for ARSOF Soldier participation or involvement, Soldiers volunteering as human subjects of the research must be: ...

(3) Informed that participation is strictly voluntary, and that they may opt-in or opt-out without coercion whether or not they are offered incentives to participate.²⁶

Informed consent DID NOT occur in this case.

9. That said, had the aforementioned new policy been in force at the time of the Brigade Commander's unlawful orders, they may not have been unlawfully executed by him and equally supported by the Command Operational Psychologist; there would have been better oversight and a complaint or Inspector General inquiry could have been quickly remediated their actions. The enhanced language-specificity found in the described responsibilities of the new policy clearly indicates that the Brigade Commander should not have had the appearance of the faux authority to autonomously "self-determine what constitutes HSR" and to consequently move forward with the personally identifiable data-gathering events without the Judge Advocate General's ensuring that informed consent was properly administered; in contrast with the general comments of the former

²⁶ Ibid., Enclosure C08, 8.,a.,(3).

policy, compliance with standing laws could have been better preserved and moreover maintained with this new policy.

10. Succinctly, the new policy could have provided the Plaintiff the lawful platform that exists, via the Privacy Act and other laws, to formally refuse the unlawful order. He would have had no cause to reach out for help to the Inspector General or to subsequently have to request the “scope and statutory support” for these programs: the Plaintiff would have simply indicated the denial of his consent on his copy of a lawfully presented, and signed, informed consent form. In fact, the Plaintiff would not have endured two investigations, four entrapment attempts, an unjustified emergency Command-Directed Behavioral Health Evaluation, a Relief for Cause Evaluation Report, a General Officer Memorandum of Record, an administrative separation, and ultimately would not have lost his senior staff position, spent thousands of dollars on a military administrative attorney, spent countless hours away from family and friends, and would not now stand to lose his opportunity to fulfill his contract and retire from the United States Army as he still intends. All of these actions and the fabrication of allegations by the Brigade Commander’s subordinates, stem from the Brigade Commander’s decision to violate the Plaintiff’s rights and break the law on November 29, 2022. Moreover, the Command Operational Psychologist’s immediate and unlawful support of his decision, served to accomplish nothing to stop this manner of research. In fact, she moved to do harm to the Plaintiff even though she had a duty to immediately stop this manner of research (or, better still, prevent it from being implemented as it was).

11. The facts that the Plaintiff has evidentiary (*prima facie*) proof of the unlawful order and its causal relationship to all subsequent events leading to the Defendant's decision to unjustly administratively separate the Plaintiff, are what has prompted this lawsuit. This is compounded by the fact that the Plaintiff has provided multiple opportunities for the Defendant to remediate this controversy by providing evidence of the Brigade Commander's, and his Command Operational Psychologist's, unlawful actions, only to be rebuffed at every turn. The capstone event was the blatant and near immediate disregard to a Defendant-"recommended" ETP as a partial remedy to their requested separation abeyance, presented to the Hon. Richard Hudson by Human Resources Command. This requested remedy, once fulfilled by the Plaintiff (after more time and money spent), would have made this filing unnecessary; yet, it was, blatantly and near immediately ignored by the Defendant, regardless of the time and money spent to fulfill the Defendant's recommendation. It is for these reasons the Plaintiff moves this Court to Compel the Defendant to approve the exception to policy that the Plaintiff submitted and "place the separation proceeding or decision [pertaining to the Plaintiff] in abeyance" as requested by his Congressman until the lawsuit and/or affiliated actions are complete. In the alternative, the Court could instead choose to rule on the Plaintiff's Motion for Emergency Injunctive Relief.

CONCLUSION

12. Pursuant the reasons provided herein and both parties awaiting rulings on multiple motions, the Plaintiff petitions for the Court to Compel the Defendant's Urgent Abeyance

from any administrative separation of the Plaintiff, under Fed. R. Civ. P. 65(a), which would serve to limit further damage to the Plaintiff, at least until a ruling or a complete disposition agreement has been agreed upon. Given the expressed permission for a “[m]ember of the U.S. Armed Forces” to bring a civil suit was granted by the DoD in their Privacy Program, coupled with the two-year statute of limitations required to notify the court of, and request relief from, Privacy Act violations, the Plaintiff requests not to be damaged further until this civil controversy, brought before this Court, is ruled upon or otherwise settled. The Plaintiff requests this court to compel the Defendant to grant the Congressman’s indefinite abeyance request (until case ruling or settlement) or decide the emergency injunctive relief motion as soon as possible, or at the least prior to December 1, 2024; at that time, further damages of time and financial expenditures will be borne by the Plaintiff, which could have been solely prevented by the Defendant had the Defendant not done so by refusing to consider the Plaintiff’s request due to this very litigation.