

No. 24-1953C
(Judge Hadji)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MICHAEL J. FORBES.,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

**DEFENDANT'S MOTION TO DISMISS AND ALTERNATIVELY
FOR JUDGMENT ON THE ADMINISTRATIVE RECORD**

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**DEFENDANT’S MOTION TO DISMISS AND ALTERNATIVELY
FOR JUDGMENT ON THE ADMINISTRATIVE RECORD**

Pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (RCFC), defendant, United States, respectfully requests that the Court partially dismiss the amended complaint filed by plaintiff, Michael Forbes, for lack of subject-matter jurisdiction over Mr. Forbes’s claims under the Privacy Act and the Military Whistleblower Protection Act. Additionally, pursuant to RCFC 12(b)(6), the United States respectfully requests the Court to dismiss the remaining claims in the complaint for failure to state a claim upon which relief can be granted. Specifically, any challenge to the merits of the Army’s decisions to (1) issue a reprimand and place it in his permanent military personnel record; (2) issue a Relief for Cause evaluation report; and (3) separate him as part of the Qualitative Management Program (QMP), should be dismissed for failure to state a claim.

Alternatively, pursuant to RCFC Rule 52.1, the United States respectfully requests that the Court grant the United States’ motion for judgment upon the administrative record. Mr. Forbes has not shown, and the record does not otherwise reflect, that the decisions of the Army were arbitrary, capricious, or contrary to the law. The United States respectfully requests that the Court enter judgment in its favor.

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction to hear Mr. Forbes's claims under the Privacy Act when the district courts possess exclusive jurisdiction over such claims.
2. Whether this Court has jurisdiction to hear Mr. Forbes's claims under the Military Whistleblower Protection Act when the statute provides no private right of action for money damages.
3. Whether Mr. Forbes has stated a claim upon which this Court may granted relief when he challenges only the substance of the Army's decision to separate him.
4. Whether Mr. Forbes has met his burden of showing that the Army's decision to separate him was arbitrary, capricious, unsupported by substantial evidence, or contrary to law or regulation.

STATEMENT OF THE CASE

I. Statement of Relevant Facts

A. Mr. Forbes's Military Career

Mr. Michael Forbes enlisted in the United States Army as an Intelligence Analyst on October 31, 2006 (AR 1156-1165), and was involuntarily discharged with an "Honorable" characterization of service on November 29, 2024 (AR 1701).

In 2022, while serving as the Brigade Intelligence Non-Commissioned Officer in Charge for the 528th Sustainment Brigade at Fort Liberty¹, North Carolina, Mr. Forbes was investigated for disrespect toward a superior commissioned officer and for engaging in counterproductive leadership. AR 92. The investigation substantiated the allegations (AR 726-727), and Mr. Forbes received a General Officer Memorandum of Reprimand (GOMOR) (AR 91, 833) and

¹ Formerly and currently Fort Bragg, North Carolina.

a Relief for Cause Non-Commissioned Officer Evaluation Report (NCOER) (AR 990-991), both of which were placed in his Army Military Human Resources Record (AMHRR). Based on these derogatory documents, the U.S. Army Human Resources Command (Army HRC) identified Mr. Forbes for potential denial of continued service on active duty under the Qualitative Management Program (QMP). AR 984-986. A QMP board subsequently recommended separation, and Mr. Forbes was separated on November 29, 2024. AR 1701.

B. Command-Directed Investigation into Misconduct and Leadership Deficiencies

On November 22, 2022, Colonel Brunson, commander of the 528th Sustainment Brigade, directed all Soldiers in his command, including Mr. Forbes, to participate in a series of Human Performance and Wellness (HPW) assessments (AR 412), including completing the Strength Deployment Inventory (SDI) 2.0 – an online tool not operated or controlled by the Army.

On November 30, 2022, Mr. Forbes visited the office of the Brigade psychologist, Major Racaza, with questions about the SDI 2.0 program. AR 725. During the conversation, Mr. Forbes became angry and aggressive, demanding to know under what authority Colonel Brunson was ordering Soldiers to participate in an online, third-party assessment. AR 725. He voiced concerns about being forced to share personal information with a private entity and repeatedly interrupted Major Racaza when she attempted to answer his questions. AR 725. After leaving her office, Major Racaza reported the incident to Colonel Brunson.

The following day, December 1, 2022, Mr. Forbes emailed Colonel Brunson to express his objection, citing his concern about “being forced to engage with a third-party corporation and agree to their ‘Terms of Service and Privacy Policy.’” AR 899-900. Colonel Brunson responded the same day, thanking Mr. Forbes for his feedback and excusing him from participation. AR 899.

On December 12, 2022, Colonel Brunson held a “sensing session” (also referred to as a town hall in the AR) for members of Mr. Forbes’s battalion. AR 435. Two anonymous complaints were submitted alleging that Mr. Forbes’s leadership style was toxic and that he frequently yelled at subordinates, creating a hostile environment for junior soldiers and other non-commissioned officers. AR 148.

Based on the incident with Major Racaza and these additional complaints, Colonel Brunson appointed Second Lieutenant (2LT) Miriam Tolston to investigate allegations of disrespect toward a superior officer and counterproductive leadership² by Mr. Forbes. AR 718. During the investigation, 2LT Tolston interviewed numerous witnesses and reviewed sworn statements describing patterns of disrespect, unprofessional conduct, and poor leadership. 2LT Tolston first interviewed Major Racaza and Sergeant Aldeguer – two witnesses to the November 30th incident. AR 735-740. Major Racaza stated that around 1:45 p.m. on November 30th, she noticed Mr. Forbes speaking to Sergeant Aldeguer in an “agitated manner.” AR 735. She offered to help Mr. Forbes, and he followed her to her office where he became angry and aggressive, demanding answers about the regulations or policy providing the Brigade commander to order participation in the staff development program she was overseeing and threatening to call a military attorney. AR 735. When Major Racaza, who is a trained psychologist, attempted to provide answers, Mr. Forbes cut her off continuously and eventually

² Army Reg. 600-100, ¶ 3-3e., defines counterproductive leadership in this way: “Counterproductive leadership entails recurrent or serious negative leadership behaviors that violate one or more of the Army’s core leader competencies or Army Values and have a foreseeable, sustained adverse impact on positive unit climate, the welfare of subordinates, or mission accomplishment. These behaviors are inconsistent with the Army leadership model, undermine good order and discipline, compromise mutual trust, fracture cohesive teamwork, and contribute to an unprofessional organizational climate. Exhibiting counterproductive leadership may lead to investigation and, potentially, relief for cause or other punitive actions.”

stormed out of her office. AR 735. Major Racaza also informed 2LT Tolston that she was aware of numerous instances where Mr. Forbes treated others in the command in demeaning and disrespectful ways. AR 736. Sergeant Aldeguer provided a similarly concerning description of the incident. AR 738. He described Mr. Forbes as “agitated” as he demanded information from Major Racaza and threatened to go to a military attorney. AR 738. He also stated that Mr. Forbes cut off Major Racaza multiple times as she was trying to provide him answers to his questions before he stormed out of her office. AR 739.

First Sergeant (1SG) Larry Morgan, described an incident in 2021 in which Mr. Forbes openly disrespected a commissioned officer in front of other Soldiers and company leadership. AR 741-743. 1SG Morgan summed up Mr. Forbes behavior this way: “I have seen on numerous occasions SFC Forbes be condescending towards Officers, CPT Monsour, CPT Korista, CPT Valdez, CPT Allison Crider, and towards me. SFC Forbes attempts to use an extensive vocabulary and eccentric expressions to mask his toxic behavior, albeit easily spotted, it has generally been accepted within the Brigade.” AR 742. Command Sergeant Major Emekaekwee, the senior enlisted leader in the battalion, confirmed that Mr. Forbes’s counterproductive behavior was well known throughout the command. AR 757.

Several commissioned officers corroborated this pattern. CPT Patrina Lowrie, Mr. Forbes’s supervisor acknowledged Mr. Forbes’s commitment to enforcing standards but noted that his inflexible “my way or no way” approach compromised discipline and degraded the unit’s culture. AR 744. When describing his leadership, CPT Lowrie stated that Mr. Forbes was arrogant, lacked empathy for others, and demanded that things be done his way. AR 745. CPT David Korista, Mr. Forbes’s company commander, described three instances where Mr. Forbes acted in a disrespectful or aggressive manner towards him or other members of the command.

AR 748. He also described an incident from January 18, 2023, where he ordered Mr. Forbes to receive a behavioral health assessment after he exhibited “concerning and alarming behaviors” during an open-door meeting with the Commanding General. AR 748. CPT Korista summed up his statement by expressing two concerns: (1) “SFC Forbes has consistently displayed a pattern of bullying, degradation, disrespect, and unprofessionalism for the entirety of the two years that I have known him, and should never be trusted leading Soldiers ever again, in any form or fashion. He has a total disregard for dignity and respect[;]” and (2) “[SFC Forbes] erratic behaviors and actions, in addition to his counter productive outbursts, not only degrade the Brigade’s morale, but also could pose a threat to the security of all those who work in the Brigade.” AR 748-749.

Enlisted subordinates also described significant harm caused by Mr. Forbes’s leadership. SGT Eric Henkel worked for Mr. Forbes and stated that he was so demeaned by Mr. Forbes that he dreaded coming to work and had to seek behavioral health. AR 751. Another subordinate, Private First Class (PFC) Matthew Scheffing echoed CPT Lowrie’s description of Mr. Forbes leadership style as “his way or no way.” AR 754. He also stated that Mr. Forbes would lose his temper almost every day over minor things and that he did not want to come into work because of Mr. Forbes leadership. AR 754, 761. SFC Meredith, who worked directly for Mr. Forbes, described his behavior as erratic and stated that people intentionally avoided Mr. Forbes, rendering the section unproductive. AR 765-766.

Mr. Forbes provided 2LT Tolston a sworn statement responding to written questions. He denied the allegations of counterproductive leadership and disputed the accounts provided by Major Racaza and Sergeant Aldeguer. AR 733-734.

On February 22, 2023, 2LT Tolston submitted her “Findings and Recommendations” memorandum to Colonel Brunson. She concluded, by a preponderance of the evidence, that

Mr. Forbes disrespected Major Racaza on November 30, 2022, in violation of Army Reg. 600-20. AR 725-726. 2LT Tolston found Major Racaza's version of the events – corroborated by SGT Aldeguer – more credible than Mr. Forbes's and determined that he had acted disrespectfully by raising his voice, cutting her off from speaking, and making her feel unsafe. AR 725-726. She further concluded that Mr. Forbes's conduct reflected a lack of respect for military authority³, undermined military discipline⁴, and demonstrated unprofessionalism. AR 726.

Mr. Forbes leadership was counterproductive as defined by Army Reg. 600-100, which identifies counterproductive leadership behaviors as those that undermine unit cohesion, morale, and mission effectiveness, and are evidenced by lack of self-control, unjust treatment, and disrespectful communication. Army Reg. 600-100, Army Profession and Leadership Policy, ¶ 3-3e. According to 2LT Tolston's findings, Mr. Forbes exhibited a persistent pattern of such behaviors, including condescending and erratic conduct, a "my way or no way" leadership style, and frequent displays of aggression toward both peers and subordinates. AR 726-727. 2LT Tolston concluded that Mr. Forbes leadership was counterproductive as defined by Army Reg. 600-100, citing his tendency to blame others, lack of self-control, unjust and disrespectful treatment of subordinates, condescending tone, and erratic conduct. AR 727; *see* Army Reg. 600-100, ¶ 3-3e(4) (outlining the categories of counterproductive leadership, including abusive,

³ Army Reg. 600-20, ¶ 4-3a ("Respect to seniors will be extended at all times.")

⁴ Army Reg. 600-20, ¶ 4-1a (Military discipline is founded upon self-discipline, respect for properly constituted authority, and the embracing of the professional Army Ethic with its supporting individual values. Military discipline is instilled through positive leadership, reinforcing the regulatory standards for personnel, and the training readiness standards for individual and collective tasks, together, resulting in a mental attitude about proper conduct and obedience to lawful military authority.")

self-serving, and erratic behaviors, and leadership incompetence). In light of these findings, 2LT Tolston recommended that Colonel Brunson consider administrative action, reassignment to a non-leadership position, issuing a Relief for Cause evaluation report, and suspension or revocation of Mr. Forbes's security clearance. AR 727.

C. Mr. Forbes Receives a Reprimand and Relief for Cause Evaluation Report

On May 30, 2023, Brigadier General Lawrence Ferguson, Commanding General of 1st Special Forces Command, issued a written reprimand⁵ to Mr. Forbes. The administrative reprimand stated:

1. You are hereby reprimanded for being disrespectful in language and deportment towards a Field Grade officer and for engaging in counterproductive leadership. On 30 November 2022, you were disrespectful in language and deportment during a conversation with a senior commissioned officer, by raising your voice at her and talking over her. Also, during your time as Brigade S2 NCOIC, you engaged in counterproductive leadership by being quick to anger, erratic, disrespectful, and by failing to take accountability for your mistakes.
2. Your behavior in these matters demonstrates a complete lack of judgment and responsibility. You have discredited yourself, the 1st Special Forces Command (Airborne), and the United States Army. Your conduct constitutes a serious departure from the high standards of integrity and professionalism expected of a Soldier in this command. Your behavior in this matter cannot, and will not, be tolerated, and it forces me to seriously reconsider your suitability for continued service as a Soldier in the United States Army.

⁵ Commanders have the discretion to dispose of substantiated misconduct through a variety of adverse administrative actions short of taking punitive actions (*i.e.*, via court-martial). For example, commanders may issue an officer a GOMOR under Army Reg. 600-37, *Unfavorable Information*, (October 2, 2020), ¶ 3-5.a. A GOMOR may be filed in a Soldier's permanent military personnel file or "locally" in his temporary file. *Id.* at ¶ 3-5.a., b. "Minor behavior infractions or developmental mistakes will not normally be recorded in a Soldier's AMHRR." *Id.* ¶ 3-5.c.(5).

AR 91 (emphasis added). The memorandum also informed Mr. Forbes that the reprimand may be permanently filed in his military record, but that prior to filing, Mr. Forbes could submit any matters in extenuation, mitigation, or rebuttal for Brigadier General Ferguson to consider. AR 91. Mr. Forbes acknowledged receipt of the GOMOR on June 1, 2023, and elected to submit matters to Brigadier General Ferguson's consideration. AR 836.

On June 16, 2023, Mr. Forbes submitted a formal rebuttal through counsel challenging the findings of 2LT Tolston's investigation and the administrative reprimand that followed. AR 35-717. He denied that his interaction with Major Racaza on November 30, 2022 was disrespectful, asserting that he raised legitimate concerns about medical privacy and the use of a third-party behavioral assessment tool. AR 35-37. Mr. Forbes argued that it was Major Racaza who acted unprofessionally during their interaction and, by doing so, forfeited the protections afforded to a superior officer under the Uniform Code of Military Justice. AR 35-37.

Mr. Forbes also rejected the characterization of his leadership as toxic or counterproductive. AR 37-38. He cited his most recent evaluation reports, which reflected strong performance and leadership, and included endorsements for promotion and further professional development. AR 37-38.

Additionally, Mr. Forbes challenged the procedural integrity of the investigation itself. Notably, he does not allege how the investigation failed to comport with Army Reg. 15-6, and instead claimed that the investigation was flawed due to failure to interview key witnesses, reliance on unsworn statements, and the use of hearsay and irrelevant or biased testimony. AR 38-40. Mr. Forbes concluded that the investigation was retaliatory in nature and requested that his reprimand be rescinded, and the investigations proceedings be removed from his record. AR 40.

Prior to Brigadier General Ferguson's GOMOR filing determination, officers and senior non-commissioned officers in his chain of command made filing recommendations. All three officers and two of three senior non-commissioned officers (with one abstaining) recommended filing the reprimand in Mr. Forbes's AMHRR. AR 982-983. After reviewing the recommendations, and Mr. Forbes's rebuttal, Brigadier General Ferguson directed that the GOMOR be filed in Mr. Forbes permanent military record. AR 34, 834.

After being relieved from his duties, Mr. Forbes received a Relief for Cause Non-Commissioned Officer Evaluation Report (NCOER) for the rating period of September 1, 2022, to July 12, 2023. AR 990-991. An Army Relief for Cause NCOER is a formal and adverse performance evaluation triggered when the NCO's "personal or professional characteristics, conduct, behavior or performance of duty warrants removal in the best interests of the Army." Army Reg. 623-3, Evaluation Reporting System, ¶ 3-56. Mr. Forbes's rater, Captain Lowrie, noted on the evaluation that she "directed this RFC because I lost trust and confidence in SFC Forbes to perform as the [Brigade] S2 NCOIC during this rating period based on substantiated allegations of counter productive leadership from an AR 15-6 investigation." AR 991. Mr. Forbes's senior rater had this comment: "SFC Forbes had a pattern of unprofessional behavior and non-compliance with the accepted professional standards consisting of attributes and competencies as part of the leadership requirements model. This pattern of behavior is in conflict with my ability to maintain cohesion amongst the Brigade Staff." AR 991.

D. Mr. Forbes Article 138 Complaints

On March 31, 2023, Mr. Forbes submitted a request for redress under Article 138, Uniform Code of Military Justice⁶, alleging that he and other members of the 528th Sustainment Brigade were wronged when ordered to participate in the HPW program. AR 549. Colonel Brunson denied his request, citing that Mr. Forbes was exempted from participation and that Article 138 requests for redress cannot be brought on behalf of other members of the command. AR 549-550.

On November 24, 2023, Mr. Forbes submitted, through counsel, a request for redress under Article 138, Uniform Code of Military Justice, for alleged wrongs by Brigadier General Ferguson. AR 27. Specifically, Mr. Forbes alleged that his reprimand was improper because it was based on a retaliatory investigation. AR 28. As relief, he requested that his reprimand be removed from his personal file and rescinded, and his Relief for Cause NCOER be rescinded and corrected. AR 28. On November 30, 2023, Brigadier General Ferguson denied the request to remove the GOMOR, stating that Mr. Forbes had not shown, as required, that a later investigation determined that the GOMOR was untrue or unjust in whole or in part. AR 26; *See* Army Reg. 600-37, Unfavorable Information, ¶ 7-2. He then directed Mr. Forbes to use the appeals process outlined in Army Reg. 623-3 for relief related to his Relief for Cause NCOER. AR 26; *See* Army Reg. 27-10, ¶ 19-11(c)(7) (Review pursuant to Article 138 is not appropriate to appeal an NCOER).

⁶ “Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.” 10 U.S.C. § 938.

On November 11, 2024, Mr. Forbes submitted, through counsel, a request for redress under Article 138, Uniform Code of Military Justice, for alleged wrongs committed by Colonel Andrew Lynch (Colonel Brunson's replacement as the 528th commander), and requesting a delay in his discharge. AR 2-25. Specifically, Mr. Forbes alleged that his separation violated Army Reg. 635-8 because he was not provided the proper time to complete the Army's pre-separation program. AR 3. On November 26, 2024, Major General Ferguson responded that he was properly notified of his separation by Army Human Resources Command on May 29, 2024, and that he did not have authority to delay an HRC-directed involuntary separation. AR 1.

E. Mr. Forbes is Separated by a Qualitative Management Board

On December 26, 2023, Mr. Forbes was notified by Army Human Resources Command that documents filed⁷ in his AMHRR made him eligible for Qualitative Management Program⁸ (QMP) board consideration. AR 984. The memorandum informed Mr. Forbes that he could seek removal of an unfavorable document from his record with the Department of the Army Suitability Evaluation Board and the Army Board for Correction of Military Records. AR 984-985. The notification also informed Mr. Forbes of his right to submit matters of mitigation and extenuation for consideration by the board. AR 985.

On March 29, 2024, Mr. Forbes submitted his matters and requested delayed consideration by the board pending adjudication of a lawsuit he filed. AR 1073-1075; 1091. On May 29, 2024, Army Human Resources Command notified Mr. Forbes that the board conducted

⁷ A soldier may be denied continued active service based on "[r]ecent or continuing disciplinary problems, as evidenced by a court-martial, nonjudicial punishment, or administrative reprimand." Army Reg. 635-200, ¶ 16-11a(1)(c). (June 28, 2021).

⁸ Under Army policy, "NCOs (SSG and above) whose performance, conduct, or potential for advancement do not meet Army standards, as determined under the QMP process by approved recommendations of an HQDA NCO evaluation board will be denied continued active service." Army Reg. 635, 200 ¶ 16-11b. (June 28, 2021).

a comprehensive review of his record and recommended that he be denied continued active duty. AR 1070. The notification also informed him that he would be separated no later than December 1, 2024, and directed him to contact his “supporting SFL-TAP to register and receive the mandatory pre-separation briefing.” AR 1071.

II. Mr. Forbes’s Complaint

Mr. Forbes filed a complaint in this Court in late November, 2024. ECF No. 1. On December 9, 2024, Mr. Forbes filed an amended complaint. ECF No. 5. Mr. Forbes alleges violations of both the Privacy Act and the Military Whistleblower Protection Act, as well as wrongful separation. *See generally id.*

SUMMARY OF THE ARGUMENT

The Court should dismiss the amended complaint because the Court does not possess jurisdiction to entertain the majority of the claims in the complaint, and Mr. Forbes has failed to state a claim for the remaining claims.

First, Mr. Forbes alleges violations of the Privacy Act and the Military Whistleblower Protection Act (MWPA), but neither of these acts are money-mandating as to waive the Government’s sovereign immunity. Indeed, because district courts, not the Court of Federal Claims, have jurisdiction over Privacy Act claims, Mr. Forbes claims under the Privacy Act must be dismissed for lack of subject-matter jurisdiction. Likewise, Mr. Forbes claims under the WMPA must be dismissed because Congress did not intend for the WMPA to create a private right of action enforceable outside the established administrative remedy.

Second, this Court should dismiss Mr. Forbes claims for backpay and wrongful separation under the Military Pay Act for failure to state a claim because Mr. Forbes challenges the merits of the decision, not any specific procedures. Because the substance of a military

decision is not justiciable, Mr. Forbes has failed to state a claim upon which relief can be granted.

In the alternative, even if he Mr. Forbes stated a claim challenging his separation, judgment for the United States is warranted. The administrative record provides ample support for Army's decision to separate him from service. Moreover, Mr. Forbes's claim that the Army violated Army Reg. 635-8 fails because the alleged violation is not only harmless error, but at odds with the facts of his separation.

ARGUMENT

I. Standard of Review

A. Motion to Dismiss Under RCFC 12(b)(1)

"A motion to dismiss under RCFC 12(b)(1) will be granted if the plaintiff fails to assert appropriate subject-matter jurisdiction, as subject matter jurisdiction is strictly construed." *Telemaque v. United States*, 82 Fed. Cl. 624, 626 (2008) (citation omitted). When resolving a motion to dismiss pursuant to RCFC 12(b)(1), only uncontroverted factual allegations are accepted as true. *Shoshone Indian Tribe of Wind River Reservation, Wyo. v. United States*, 672 F.3d 1021, 1030 (Fed. Cir. 2012). In resolving disputes over jurisdictional facts, the Court may review evidence extrinsic to the pleadings. *Id.* "[I]t is the plaintiff's burden to establish any challenged jurisdictional facts by a preponderance of the evidence." *IHS Glob. Inc. v. United States*, 106 Fed. Cl. 734, 743 (2012); *see Banks v. United States*, 741 F.3d 1268, 1277 (Fed. Cir. 2014).

B. Motion to Dismiss Under RCFC 12(b)(6)

The granting of a motion to dismiss for failure to state a claim under RCFC 12(b)(6) "is appropriate when the facts asserted by the claimant do not entitle him to a legal remedy."

Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). In ruling upon an RCFC 12(b)(6) motion to dismiss, the Court must accept as true the complaint’s undisputed factual allegations and should construe them in a light most favorable to plaintiff. To survive a motion to dismiss pursuant to RCFC 12(b)(6), the complaint’s “[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that the allegations are true (even if doubtful in fact).” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Moreover, the grounds of entitlement to relief “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* (citations omitted). Courts adopt a two-prong approach of “identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth[,]” then determining whether the remaining well-pleaded factual allegations, if any, “plausibly give rise to an entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

C. Motion for Judgment Upon the Administrative Record

“In this Court judicial review in military pay cases is normally limited to the administrative record developed before the military board.” *Bateson v. United States*, 48 Fed. Cl. 162, 164 (2000). In reviewing a motion for judgment upon the administrative record, the Court makes factual findings from the record evidence as if it were conducting a trial on the record. *Bannum, Inc. v. United States*, 404 F.3d 1346, 1353-54 (Fed. Cir. 2005).

The Court’s review “does not require a reweighing of the evidence, but a determination whether the conclusion being reviewed is supported by substantial evidence.” *Heisig v. United States*, 719 F.2d 1153, 1157 (Fed. Cir. 1983). “Substantial evidence” is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 619-20 (1966) (quotation omitted); *see also Downhole Pipe &*

Equipment, L.P. v. United States, 776 F.3d 1369, 1374 (Fed. Cir. 2015). “[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo*, 383 U.S. at 620; *see also Downhole Pipe*, 776 F.3d at 1374. The Court does not reweigh the evidence. *See, e.g., Downhole Pipe*, 776 F.3d at 1376-77; *Melville v. United States*, 231 Ct. Cl. 776, 779 (1982) (“Plaintiffs’ third point, that there is ample evidence to show that the [decision] was wrong, also is to no avail. The review standard of this court is, in fact, the reverse. The [decision] must be upheld if there is substantial evidence to show that it was right.”).

A plaintiff bears the burden of overcoming the “strong, but rebuttable, presumption that the military discharges its duties correctly, lawfully, and in good faith.” *Bernard v. United States*, 59 Fed. Cl. 497, 501 (2004) (citation omitted). “Because of that presumption of regularity, the agency should not be required to provide an explanation unless that presumption has been rebutted by record evidence suggesting that the agency decision is arbitrary and capricious.” *Impresa Costruzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1338 (Fed. Cir. 2001); *see also Richey v. United States*, 322 F.3d 1317, 1327 (Fed. Cir. 2003).

II. This Court Lacks Jurisdiction Over Mr. Forbes Claims Under the Privacy Act and the Military Whistleblower Protection Act

Mr. Forbes alleges that the Army’s use of a third party’s health and wellness evaluation violated the Privacy Act, 5 U.S.C. § 552. Pl. Comp. at ¶¶ 19 – 24, 33, 36, 29. Specifically, Mr. Forbes argues that because he was ordered to participate in this evaluation, and this evaluation violated the Privacy Act, he suffered harm through the disclosure of his personal information. *Id.* Mr. Forbes additionally argues that the Army violated the Military Whistleblower Protection Act (MWPA), 10 U.S.C. § 1034, by retaliating against Mr. Forbes because Mr. Forbes filed a complaint with the inspector general regarding the alleged Privacy

Act violation. *Id.* at ¶ 9, 20 – 26; 33. Finally, Mr. Forbes makes a number of constitutional claims specific to the Privacy Act and the MWPA. *Id.* at ¶ 22 – 32.⁹ None of these claims are within this Court’s jurisdiction.

First, this Court lacks subject-matter jurisdiction to entertain any of the claims Mr. Forbes brings under the Privacy Act. The Privacy Act, 5 U.S.C. § 552a(g)(1), provides that “the district courts of the United States shall have jurisdiction” over civil actions concerning the relevant statute. *See* 5 U.S.C. § 552a(g)(1). “Although the Privacy Act creates a civil cause of action for monetary damages, the Act expressly vests jurisdiction for such claims in the United States District Courts.” *Parker v. United States*, 77 Fed. Cl. 279, 291 (2007) (citing 5 U.S.C. § 552a(g)(1)), *aff’d*, 280 F. App’x 957, 958 (Fed. Cir.). “The Federal Circuit has clearly held ... that [the Court of Federal Claims] lacks jurisdiction to consider Privacy Act claims.” *Ghaffari v. United States*, 125 Fed. Cl. 665, 667 (2016) (quoting *Bush v. United States*, 627 F. App’x 928, 930 (Fed. Cir. 2016) (citing *Treece v. United States*, 96 Fed. Cl. 226, 232 (2010))); *see also* *Rebish v. United States*, 120 Fed. Cl. 184, 188 (2015) (“To the extent that [plaintiff] intended to allege that the Bureau committed violations of the Privacy Act, jurisdiction over such a claim would lie in district court, not the Court of Federal Claims.”); *Madison v. United States*, 98 Fed. Cl. 393, 395 (2011); *Stephanatos v. United States*, 81 Fed. Cl. 440, 444-45 (2008).

As such, “[a]ny claims that [Mr. Forbes] wishes to pursue under the Privacy Act can only be brought in a District Court, and cannot be brought in this [C]ourt.” *Braun v. United States*, 144 Fed. Cl. 560, 571 (2019). Accordingly, Mr. Forbes’s claims as they relate to the Privacy Act should be dismissed for lack of jurisdiction pursuant to RCFC 12(b)(1).

⁹ To the extent Mr. Forbes argues that the Army violated his First or Fifth Amendment rights generally, *see* Pl. Comp. at 22, this Court lacks jurisdiction over those claims because they are not money-mandating. *See Volk v. United States*, 111 Fed. Cl. 313, 326 (2013).

Likewise, Mr. Forbes retaliation claims relating to the MWPA should also be dismissed for lack of subject-matter jurisdiction. The Federal Circuit has held that this Court does not possess jurisdiction to entertain MWPA claims:

The MWPA provides for a comprehensive administrative review scheme over claims of retaliation—specifically, the correction of military records and disciplinary actions as remedies for prohibited actions—but no private right of action for money damages, which could be enforced in the Court of Federal Claims. Indeed, no judicial review is available under the MWPA because Congress precluded alternative fora by providing a specific form of redress in the statute.

Bias v. United States, 722 F. App’x 1009, 1014 (Fed. Cir. 2018); *see also Klingenschmitt v. United States*, 119 Fed. Cl. 163, 185 (2014) (explaining that the court lacks jurisdiction over whistleblower retaliation claims because the MWPA’s “comprehensive scheme establishes that Congress did not intend to provide plaintiffs with a private cause of action to enforce their rights under the MWPA in court[.]”) (citations omitted), *aff’d*, 623 F. App’x 1013 (Fed. Cir. 2015), *cert. denied*, 137 S. Ct. 93 (2016); *Rana v. United States*, 664 F. App’x 943, 948 (Fed. Cir. 2016) (holding that the MWPA is not money-mandating). Moreover, this Court has previously held that “the [MWPA], 10 U.S.C. § 1034, sets forth an exclusive remedy for alleged retaliation against whistleblowers in the military ... Although [plaintiff] argues that she is not challenging her discharge pursuant to the MWPA, and instead is bringing a claim under the Military Pay Act challenging the Navy’s compliance with its rules and regulations, the [C]ourt reads her allegations as stating a whistleblowing claim, which cannot be reviewed in this court under the guise of a Military Pay Act claim.” *Santana v. United States*, 127 Fed. Cl. 51, 54 (2016).

Servicemembers alleging MWPA violations are not without recourse. Title 10 U.S.C. § 1034, Department of Defense Directive (DODD) 7050.06 establishes this comprehensive scheme. Pursuant to 10 U.S.C. § 1034, when an Inspector General (IG) receives a complaint

alleging reprisal, “the Inspector General of the DOD or an Inspector General of one of the armed forces ‘shall’ determine if there is sufficient evidence to warrant an investigation and, if there is, to conduct an investigation.” *Wilson v. James*, 2015 U.S. Dist. LEXIS 138984, *44 (D.D.C. Oct. 13, 2015) (quoting 10 U.S.C. § 1034(c)-(d)).¹⁰

Within 30 days of the IG completing an investigation, the IG must report the results to the Secretary of Defense, the Secretary of the military department concerned, and the member who made the allegation. *Wilson v. James*, 2015 U.S. Dist. LEXIS at *44-45 (D.D.C. Oct. 13, 2015) (citing 10 U.S.C. § 1034(e)). “Then, after receipt of the report, the Secretary ‘shall’ determine if there is a sufficient basis to conclude whether a prohibited act occurred and, if she determines it has sufficient evidence, shall take the necessary action to correct affected records.” *Id.* at *45 (citing 10 U.S.C. § 1034(f)). If the member who made the allegation disagrees with the Secretary’s determination, he or she can file a petition with the relevant service’s correction board. *See* 10 U.S.C. § 1034(g).

Once received by the correction board, the board must “review the report of any investigation of a whistleblower complaint that was conducted by an Inspector General in accordance with 10 U.S.C. § 1034(c).” *Klingenschmitt*, 119 Fed. Cl. at 189 n.20. When the board’s review is complete, the board makes a recommendation to either concur or non-concur with the IG opinion and recommends record corrections if necessary. After the board makes its recommendation, the petition is forwarded to the Secretary of the military department concerned for a final determination. *See* 10 U.S.C. § 1034(g)(4)-(6). If the petitioner is dissatisfied with the decision of the service secretary, he or she may “seek review by the Secretary of Defense.”

¹⁰ At the time Mr. Forbes separation decision was made, his complaint to the IG remained outstanding. AR 806. Accordingly, the IG investigation was not considered by the Army in its decision to separate Mr. Forbes.

Wilson v. James, 2015 U.S. Dist. LEXIS at *45 (D.D.C. Oct. 13, 2015) (citing 10 U.S.C. § 1034(h)).

In sum, Congress established a comprehensive scheme for administrative review of whistleblower claims in the MWPA and did not intend for courts to exercise the power of judicial review with respect to the merits of alleged MWPA violations. Thus, the merits of the alleged whistleblowing retaliation claims by Mr. Forbes should be dismissed for lack of jurisdiction.

III. The Merits of the Reprimand, the Relief for Cause Evaluation Report, and the QMP's Separation Decision Are Not Justiciable

Mr. Forbes argues that the merits of the Army's decision to separate him and the documents that formed the basis of that decision are erroneous because they were based on a retaliatory investigation. Pl. Comp. at ¶ 14, 20. However, the merits of administrative decisions to reprimand, relieve from a duty or position, and involuntarily separate a service member are not subject to judicial review. *Adkins v. United States*, 68 F. 3d, 1317, 1323 (Fed. Cir. 1995). (The "merits of a decision committed wholly to the discretion of the military are not subject to judicial review, [however] a challenge to the particular *procedure* followed in rendering a military decision may present a justiciable controversy.") "The 'responsibility for determining who is fit or unfit to serve in the armed services is not a judicial province[,] and ... courts cannot substitute their judgment for that of the military departments when reasonable minds could reach differing conclusions on the same evidence.'" *Driscoll v. United States*, 158 Fed. Cl. 399, 407 (2022) (quoting *Heisig v. United States*, 719 F.2d 1153, 1156 (Fed. Cir. 1983) (footnotes omitted)).

Instead of challenging procedural defects, Mr. Forbes challenges the motivation to initiate the investigation, alleging that Colonel Brunson retaliated against him for exposing

statutory and regulatory violations. Pl. Comp. at ¶ 20. These arguments do not challenge any particular procedure but instead go to the merits of discretionary decisions, which are not justiciable. *Martinez v. United States*, No. 23-1982C, 2024 WL 2972892 at *4 (Fed. Cl. June 12, 2024) (citing *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953)).

In general, “[j]usticiability is a particularly apt inquiry when one seeks review of military activities.” *Murphy v. United States*, 993 F.3d 871, 872 (Fed. Cir. 1993). As both the Supreme Court and the Federal Circuit have recognized, the “military constitutes a specialized community governed by a separate discipline from that of the civilian.” *Id.* (quoting *Orloff*, 345 U.S. at 94 (1953)). Accordingly, “[o]rderly government requires that the judiciary be . . . scrupulous not to interfere with legitimate Army matters[.]” *Id.* (quoting *Orloff*, 345 U.S. at 94). “The complex, subtle, and professional decisions as to the *composition*, training, equipping, and *control* of a military force are essentially professional military judgments” *Id.* (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)) (emphasis added).

Entertaining the substantive challenge to the Army’s underlying decision to issue a GOMOR, Relief for Cause NCOER, or involuntarily separate Mr. Forbes would require the Court to re-weigh the evidence, which is not this Court’s role. Out of deference to military authority over personnel matters, “[o]nly if the military binds itself to judicially enforceable procedures can this court become involved.” *King v. United States*, 50 Fed. Cl. 701, 711 (2001). Mr. Forbes has alleged no such justiciable enforceable procedural violation related to his GOMOR, NCOER, or the QMP board’s decision to involuntarily separate him. Thus, Mr. Forbes has failed to state a claim upon which this Court can grant relief because he challenges substantive decisions of the Army, and not any real procedural violation.

Accordingly, his claims regarding backpay and reinstatement should be dismissed for failure to state a claim.

IV. Alternatively, the Government is Entitled to Judgement on the Administrative Record

Even if this Court had jurisdiction over Mr. Forbes claims for back pay and wrongful separation, for the reasons stated below, he has not demonstrated that the Army's decision was unsupported by substantial evidence or contrary to law.

A. The QMP Board's Decision to Separate Mr. Forbes is Supported by Substantial Evidence and is in Accordance With Law

The Army's decision to separate Mr. Forbes under the Qualitative Management Program is supported by substantial evidence in the administrative record and reasonable in light of that evidence. Contrary to Mr. Forbes's contention that he exhibited no disrespectful or counterproductive behavior (Pl. Comp. at ¶ 15), the administrative record shows a pattern of misconduct and poor leadership substantiating the decision to place derogatory information into Mr. Forbes's AMHRR and ultimately separate him involuntarily.

The Army's decision may be overturned only if it is arbitrary, capricious, contrary to law, or unsupported by substantial evidence. *Barnick v. United States*, 591 F.3d 1372, 1377 (Fed. Cir. 2010); *Porter v. United States*, 163 F.3d 1304, 1312 (Fed. Cir. 1998). Courts do not reweigh evidence but ask only whether the decision is supported by such relevant evidence as a reasonable mind might accept. *Heisig v. United States*, 719 F.2d at 1157 (Fed. Cir. 1983). This Court must uphold the Army's decision if the QMP board's conclusion has a rational basis in the record.

Here, the underlying basis for the GOMOR and Relief for Cause NCOER, which ultimately led to Mr. Forbes's separation, is a serious incident of disrespect to a senior officer

and multiple instances of counterproductive leadership, confirmed through a thorough investigation. The QMP selection criteria, found in Army Reg. 600-35, ¶ 19-2, specifically includes disciplinary issues identified by an administrative reprimand. The QMP board's decision to separate, in light of the GOMOR and NCOER and the criteria established in Army Reg. 635-200, ¶ 16, was reasonable and supported by substantial evidence.

Mr. Forbes's claim that he did not engage in disrespectful or counterproductive conduct is directly contradicted by the record. The Army conducted a thorough investigation after credible complaints were made. 2LT Tolston interviewed witnesses, reviewed sworn statements, and found by a preponderance of the evidence that Mr. Forbes disrespected Major Racaza and engaged in a pattern of toxic leadership. AR 725-728. Witnesses consistently described him as aggressive, erratic, and demeaning. AR 735-773.

Mr. Forbes has multiple opportunities to present his side during the investigation, and, indeed, submitted a sworn statement. After receiving the GOMOR, he submitted extensive rebuttal through counsel. AR 733-734. He was later notified of the QMP action and again submitted rebuttal matters for the board's consideration. AR 1073-1104. But his argument that he "expressed no view or behavior that could be reasonably interpreted as disrespectful or counterproductive[.]" Pl. Comp. at ¶ 15, ignores the detailed and corroborated accounts of his conduct. Major Racaza and Sergeant Aldeguer both described Mr. Forbes's disrespectful behavior during the November 30, 2022, incident. AR 735-740. Officers and enlisted personnel provided independent accounts of his counterproductive behaviors. AR 741-766. Brigadier General Ferguson and the QMP board were entitled to credit these accounts, and their reliance on them meets the substantial evidence standard. Mr. Forbes's subjective belief in the propriety of his conduct does not invalidate 2LT Tolston's investigation, or the administrative consequences

of her findings. Courts have repeatedly held that when reasonable minds could differ on the evidence, the military's judgment controls. *Heisig*, 719 F.2d at 1156 & n.11 ("It is equally settled that responsibility for determining who is fit or unfit to serve in the armed services is not a judicial province; and that courts cannot substitute their judgment for that of the military departments when reasonable minds could reach differing conclusions on the same evidence.") (internal citations omitted).¹¹

B. Mr. Forbes was Given Proper Time to Complete His Pre-Separation Program and Nevertheless, the Alleged Procedural Deficiency Constitutes Harmless Error

Mr. Forbes asserts that his involuntary separation under the Army's Qualitative Management Program was procedurally deficient because the Army failed to adhere strictly to the timing requirements governing pre-separation counseling, as prescribed in Army Reg. 635-8, Department of Defense Instruction 1332.35, and 10 U.S.C. § 1142. Pl. Comp. at ¶ 27. Specifically, he contends that he was unlawfully separated without receiving the required time to complete pre-separation services. Pl. Comp. at ¶ 27. This claim fails as a matter of law. The regulations and statutes Mr. Forbes relies upon are procedural in nature and do not confer a substantive right to remain on active duty. Alleged procedural defects unrelated to the legal authority for separation do not render a discharge unlawful and do not entitle a service member to back pay under the Military Pay Act.

Nevertheless, we note that, on May 29, 2024, Army Human Resources Command notified Mr. Forbes that he had been denied continuation on active duty under QMP and would

¹¹ Mr. Forbes also argues that he has been harmed by the Inspector General because it failed to address his assistance request, and this amounts to an alleged violation of Army Reg. 201-1. Pl. Comp. at ¶ 23. But Mr. Forbes has not provided any details on how he was harmed by this alleged violation, and how this alleged violation is at all related to his backpay and separation claims. Accordingly, his claim of harm should be denied by the Court.

be discharged no later than December 1, 2024. AR 1070-1071. That notice explicitly instructed him to contact the Soldier for Life–Transition Assistance Program (SFL-TAP) to register and complete the mandatory pre-separation briefing. AR 1071. Accordingly, he was placed on notice more than 180 days before his effective discharge date. This notification satisfies the purpose of 10 U.S.C. § 1142¹², DoDI 1332.35¹³, and Army Reg. 635-8, which are designed to ensure that separating service members are informed of and have access to transition assistance services prior to separation, not to confer a substantive right to remain on active duty beyond a scheduled separation date.

Any failure to complete the counseling lies with Mr. Forbes, not the Army. While Army Reg. 635-8 suggests that Soldiers be scheduled for pre-separation services at least 120 days prior to separation, nothing in the regulation – or its statutory or DoD counterparts – creates an enforceable right to delay separation due to administrative timing missteps. Courts have consistently held that while military regulations must be followed, not every procedural irregularity entitles a plaintiff to relief. *Wagner v. United States*, 365 F.3d 1358, 1361 (Fed. Cir. 2004). Whether the Army followed its self-imposed procedures is within the scope of this Court’s review. However, in conducting such a review, procedural violations do not justify overturning a decision unless they are “sufficiently significant to change the outcome of a case.” *Dolan v. United States*, 91 Fed. Cl. 111, 122 (2010) (citing *Wagner*, 365 F.3d at 1361); *see also Barnes v. United States*, 473 F.3d 1359, 1362-63 (Fed. Cir. 2007) (reversing judgment for service member because, even if the Navy did not provide sufficient notice of promotion delay

¹² Requires that the Service Secretaries provide pre-separation counseling for members of the armed forces who are scheduled for separation from active duty within certain time periods. 10 U.S.C. § 1142(a).

¹³Department of Defense policy implementing 10 U.S.C. § 1142.

“as soon as practicable,” any “procedural defect . . . was harmless” given that the service member “did not suffer any prejudice,” he received notice three weeks after the promotion was scheduled to become effective, he “promptly submitted his written response,” and the Navy “took no action against him” during the intervening period). Indeed, “strict compliance with procedural requirements is not required where the error is deemed harmless.” *Driscoll v. United States*, 158 Fed. Cl. 399, 408 (2022) (quoting *Wagner*, 365 F.3d at 1362).

As the Court of Federal Court recently explained, a procedural defect in pre-separation counseling, even where the Service member receives no mandatory counseling, is harmless because the alleged defect was not the “catalyst for [the] separation.” *Marshall v. United States*, 164 Fed. Cl. 580 (2023). Mr. Forbes has not alleged, let alone demonstrated, that the alleged error in scheduling his pre-separation services prejudiced his ability to contest the QMP determination or materially affected the outcome of his separation. His claim rests entirely on the proposition that a procedural violation, standing alone, invalidates the separation and entitles him to reinstatement.

CONCLUSION

For these reasons, we respectfully request that the Court dismiss the amended complaint because it presents claims outside this Court’s jurisdiction or claims over which this Court cannot provide relief. In the alternative, the United States requests judgment on the administrative record in its favor.

Respectfully submitted,

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Dated: 4/23/2025

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