In the United States Court of Federal Claims

MICHAEL J. FORBES, *pro se.* *Plaintiff*, v. THE UNITED STATES *Defendant*.	)	No. 1:2024-cv-01953 RESPONSE TO DEFENDANT'S MOTIONS & CROSS MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD (Judge Hadji)

SUMMATION OF CIVIL CONTROVERSY

1. The Army Song has a famous lyric in its chorus that every Soldier knows, "Proud of all we have done, **Fighting till the battle's won**, And the Army Goes Rolling Along."[1] The Plaintiff has a new appreciation for this song, especially after having been on the 'receiving-end' of those self-willed words for over two years now. Simply, this case represents, a singular brick laid in the road of the Army's enduring 250-year history. But it also represents an indelible indicator that the United States Army is still capable of anything; sadly, this particular example includes violating laws, and again, "failing to follow its own regulations" and Executive Orders to achieve a perceived (and misperceived) end state (*Reaves v. United States*, 128 Fed. Cl. 196, 2016).
2. The Defendant demonstrated less than exemplary conduct[2] as it used the 'fruit' (the unsubstantiated and circular findings in an AR 15-6 investigation, ECF 19-1 at 000725-000728) cultivated from a 'poisonous tree' (an over 3-month open investigation) of their own 'planting' (unlawful orders themselves, ECF 5-1 at 5-9 and ECF 19-1 at 000412-000416) to

[1] https://home.army.mil/wood/1715/4022/1084/Army_Song_Lyrics.pdf
[2] 10 USC § 7233.

impugn completed evaluations in an investigation scheme to obfuscate the Plaintiff's commander's original disobedience of an executive order that concurrently violated laws. In fact, the Plaintiff's Senior Rater, his Brigade Commander, wrote and signed comments (October 3, 2022) in the Plaintiff's evaluation just two months prior to his unlawful order (November 30, 2022), that essentially took the Plaintiff from "hero to zero" within two months. This 60 second conversation with a psychologist (who dually represented a corporation while having a "covered relationship" with the Plaintiff in the Army)[3,4] yielded allegations that the Plaintiff disrespected the psychologist. The timeline of events that followed indicate an unlawful scheme in support of personnel actions that were retaliatory; moreover, every step of the separation was linked to the 'disrespect' allegation from November 30, 2022 in the Defendant-submitted Administrative Record (AR). The events of this case coalesced into the basis of the Plaintiff's arguments.

3. It harkens back to one simple fact; 'had the Plaintiff's Brigade Commander and Command Operational Psychologist demonstrated the required dutiful exemplary conduct,[5] prior to, during, and after, the unlawful order on November 29, 2022, we all would not be here. This Court would not be necessary to adjudicate what metastasized into a multi-faceted legal controversy that shows the Defendant's unwavering determination to win at any cost. This was a cost imposed on all who were associated with the battle, not just the Plaintiff; after all, the citizenry of our Country presume leadership at any level may not be immune to accountability with respect to the magnitude and breadth of the lawless decisions contained

[3] A discouraged activity if it "impairs objectivity" in the APA (American Psychological Association) Principle "3. Human Relations, 3.05 Multiple Relationships, ECF 19-1 at 000622)
[4] In violation of *Standards for Ethical Conduct for Employees of the Executive Branch*, 5 USC § 2635.101(a) & (b)(8), (b)(10) & (b)(14); 2635.402(a); 2635.502(a)(1), (a)(2),(b)(1)(i); 2635.801(a), (b)(1), (b)(4), (c) and; 2635.802 (a)(2) & (b)
[5] pursuant to 10 USC § 7233.

herein. Consequently, the Plaintiff's now seeks to prove his separation was retaliatory and wrongful.

STATEMENT OF THE ISSUES

4. To wit, this wrongful separation has the following characteristics; it is:

   a. a separation that occurred after the Plaintiff's 17 year, 9 month and 19 days of unblemished service (see NCO evaluations and awards) and demonstrated steadfast defense of Soldiers well-being that involved standing up for Soldiers to internally remediate issues (ECF 19-1 at 000684 – 000695), if and when, his command steadfastly strayed from procedures designed to protect the physical / mental wellbeing of Soldiers;

   b. a separation alleging the crime of 'disrespect,' (Article 89) which is typically prosecuted via non-judicial punishment having a stated affirmative defense in the Manual for Courts-Martial[6], but instead, was executed as an administrative, instead of a punitive action;

   c. a separation that occurred soon after the Plaintiff identified, disagreed with and reported violations of laws and regulations, (see ECF 19-1 at 001431-001433);

   d. a separation based on an AR (Army Regulation) 15-6 investigation that used two anonymous complaints (ECF 19-1 at 000148) and the Command Operational Psychologist's conflicted (ECF 5-1 at 7-9) verbal complaint on November 30, 2022, to adjudicate previously evaluated and documented service;

   e. a separation based on a five-week investigation that afforded one day of due process (see ECF 19-1 at 000149) with no reply to his clarification question (ECF 19-1 at 000108);

   f. a separation, that was supported by an investigation full of entrapment incidents attempted to garner Plaintiff's admission of guilt, which were unwaveringly opposed by the Plaintiff (ECF 27, Exhibit Y & see empirical timeline at ECF28 Exhibit CM-1);

[6] *See,* "Commentary on UCMJ Article 89." *Manual For Courts-Martial*, p. IV-22.

g. a separation process that merely notified him of the myriad allegations contained in the sworn statements and third party memoranda found in the AR 15-6 investigation the Plaintiff received along with the GOMOR on June 1, 2023;

h. a separation based on an AR 15-6 investigation that libeled the Plaintiff using hearsay, opinion, and falsities;

i. a separation whose 'disrespect allegation' is the central link on every document and in every stage, of the Defendant's administrative separation (the 15-6 investigation, the GOMOR; the QMP Board decision, and post-separation DASEB decision).

j. a separation that ignored the Plaintiff's repeated notification of the causal violations to the commands' actions that spawned the investigation and the Defendant left many of those notifications out of the Administrative Record (*they are in* ECF 27 *exhibits*);

k. a separation that was consistently and professionally opposed by the Plaintiff and rushed while disregarding Army Regulation 635-8 (ECF 27 at Exhibit V);

l. a separation of the Plaintiff whose professional complaints led to a new and improved USASOC Human Research Protection Program (HRPP) policy (ECF 27 at P) written to minimize disobedient and unlawful orders to coerce Soldiers in the future.

5. The humiliation and defamation of the Plaintiff's character and reputation resulting in the loss of his military / retirement pay and benefits only 2 months and 11 days before he would be eligible to file retirement paperwork, when considered with the Plaintiff's service record, is unconscionable. The indefensibility of this QMP separation decision, and the manner in which the overall separation recommendation was conducted, was magnified after the QMP separation decision was finalized by what happened three months later. On July 18, 2024,

USASOC published its HRPP policy to ensure that similar unlawful orders, like the one that spawned this case, may be prevented, going forward (Id.).

6. Interestingly, this case has a similarity with a recent Supreme Court ruling that was stubbornly defended by one of our military branches, *Harrow v. Department of Defense* (SCOTUS 2024, 144 S.Ct. 1178 , 218 L.Ed.2d 502). It provided rare moments of laughter during oral arguments (on March 24, 2024)[7] over one week's worth of pay, a $3,000 claim. In this case, the Army is equally as stubborn; but this case is no laughing matter. This controversy is over more than two years of pay and an earned retirement and benefits, not a mere paycheck. In this case, the indefinite contract of an unblemished and dutiful Senior Non-Commissioned Officer's whose unblemished career, and future, was ***ADMINISTRATIVELY*** destroyed by his Brigade Commander over a 60 second conversation seems facially absurd, if it weren't true. Yet the Plaintiff is forced to bring the following arguments in defense of his career.

ARGUMENTS IN OPPOSITION OF MOTION TO DISMISS

JURISDICTION AND VENUE

7. The Court of Federal Claims (CFC) provides a viable forum for suits seeking military pay and benefits brought by current and former members of military services. Indeed, it is the only judicial avenue available to claimants seeking direct monetary relief in amounts greater than $10,000.[8] The most common ground for relief invoked by successful claimants involves

[7] A recording of the hearing is available at: https://bit.ly/433MiD8
[8] *See* Lettow, Charles "Suits for Military Pay and Disability Payments in the Court of Federal Claims" *Admin. Law Review* (Vol. 65, No. 2, Spring 2023) *online at:* https://administrativelawreview.org/volume-65-issue-2/

a procedural irregularity or failure to comply with applicable military regulations, if the flaw has operated to the prejudice of the claimant.[9]

RCFC 12(b)(1) AND 12(B)(6)

8. The Defendant argues that Plaintiff claims under the Privacy Act and Military Whistleblower Protection Act lack RCFC 12(b)(1) jurisdiction in this Court and that the facts alleged do not entitle RCFC 12(b)(6) legal remedy (ECF-24, at 23-25). In opposition to the Motion to Dismiss chapters of the Defendant's Omnibus Motion (ECF-24), the Plaintiff cites arguments from a successful complaint transferred to this Court by the USDC of the Eastern District of North Carolina in 2013:

> *Rule 12(b)(1) authorizes dismissal of a claim for lack of subject matter jurisdiction. When subject matter jurisdiction is challenged, the plaintiff has the burden of proving jurisdiction to survive the motion. Evans v. B.F. Perkins Co., 166 F.3d 642, 647-50 (4th Cir. 1999). A defendant may challenge subject matter jurisdiction on the basis that the plaintiff has failed to allege jurisdictional facts, or may contest the jurisdictional facts as alleged. Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). When a defendant challenges the jurisdictional facts, "the trial court may go beyond the complaint, conduct evidentiary proceedings, and resolve the disputed jurisdictional facts." Kerns v. United States, 585 F.3d 187, 193 (4th Cir. 2009). If the court does so, "[i]n determining whether jurisdiction exists, the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." Richmond, Fredericksburg & Potomac R.R Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991). The movant's motion to dismiss should be granted only if the material jurisdictional facts are not in dispute and the movant is entitled to prevail as a matter of law. Id.* (quoted from *Reaves v. US,* Court of Federal Claims Case #5:12-cv-00795-FL, DE-35 Webb Memorandum and Recommendation by Judge William A. Webb, 2013)

Pro se Litigant Standard.

> *Plaintiff, as a pro se litigant, is entitled to have his pleadings construed more liberally than those drafted by attorneys. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972). Although there are limits to which the court may legitimately go in construing such*

[9] Ibid. *Also see Fisher v. United States*, 402 F.3d 1167, 1176–77 (Fed. Cir. 2005): *When the question is one of physical or mental fitness for service in the military, courts are loath to interfere with decisions made by the President and his designated agents. . . . This deference to Executive authority does not extend to ignoring basic due process considerations, however. When there is a question of whether reasonable process has been followed, and whether the decision maker has complied with established procedures, courts will intervene, though only to ensure that the decision is made in the proper manner.*

complaints, '[w]here the context, as here, makes clear a litigant's essential grievance, the complainant's additional invocation of general legal principles need not detour the court from resolving that which the litigant himself has shown to be his real concern.' Beaudett v. City of Hampton, 775 F.2d 1274, 1278 (4th Cir. 1985). And although a Plaintiff must affirmatively plead the jurisdiction of the federal court, RCFC 8(e) requires that pleadings 'be construed so as to do justice.' Accordingly, so long as the allegations in Plaintiff's complaint are sufficient to support jurisdiction, this court may sustain federal jurisdiction even if Plaintiff does not expressly invoke the correct statute. Randall v. United States, 95 F.3d 339, 345-46 (4th Cir. 1996). (quoted from *Reaves v. US* (EDNC, 2013), document #DE-35).

The Court of Claims Has Exclusive Jurisdiction Over Plaintiff's Claims.

9. Notwithstanding the direct language of 28 USC § 1491, again, the Plaintiff quotes from

Reaves v. United States (EDNC, 2013, document #DE-35, emphasis added):

*Consistent with the more liberal pleading standard generally applicable to pro se litigants, Haines, 404 U.S. at 520-21, the Court construes Plaintiff's Complaint as making the following jurisdictional arguments. Cf. Lanier-Finn v. Dep't of Army, --- F .Supp. 2d ----, 2013 WL 4535847, at *3 (D. Md. 2013) ("Plaintiff's Complaint does not expressly articulate a basis for finding that Defendant waived its sovereign immunity. However, the Court will construe the Complaint liberally.").*

First, to the extent that Plaintiff seeks back pay, ... retirement, and correction of his military records, the Court will presume that Plaintiff is alleging a claim pursuant to the Tucker Act, 28 U.S.C. § 1346, 1491, which provides the exclusive basis of jurisdiction over non-tort monetary claims against the United States. See Mitchell v. United States, 930 F.2d 893, 895 (Fed. Cir. 1991). ***Second, to the extent Plaintiff requests judicial review of the* [QMP]*'s decision and its purported violation of* [10 U.S.C. §§§ 1142-1143, 1169 and 1552-1553],** ***the Court* [may] *construe*[] *his Complaint as alleging jurisdiction under the* [Military Pay Act, 37 U.S.C. § 204] *and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq.*** *... his claims derive from federal statutory entitlement ... See Schism v. United States, 316 F.3d 1259, 1268 (Fed. Cir. 2002) (claims for military pay and benefits arise from statute); 28 U.S.C. § 1346(b) (granting jurisdiction over tort claims where "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred"). Accordingly, Plaintiff's Complaint is construed be limited to claims and jurisdiction under the Tucker Act and the APA.*

. . . 'It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.' United States v. Mitchell, 463 U.S. 206, 212 (1983); see also Randall, 95 F.3d at 345. This principle—known as sovereign immunity—is implicated not only when the United States itself is sued but also when individual federal agencies are sued. Judkins v. Veterans Administration, 415 F. Supp. 2d 613, 616 (E.D.N.C. 2005). Accordingly, only claims as to which the United States has

waived sovereign immunity may proceed against an agency such as the Defense Department or the Army. "A waiver of the traditional sovereign immunity cannot be implied but must be unequivocally expressed," United States v. Testan, 424 U.S. 392, 399 (1976), and any waiver must be strictly construed. See, e. g., Schillinger v. United States, 155 U.S. 163, 167-169 (1894). Finally, although 28 U.S.C. § 1331 provides that the district courts 'shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States,' this grant of jurisdiction does not abrogate the principle of sovereign immunity. Coggeshall Dev. Corp. v. Diamond, 884 F.2d 1, 4 (1st Cir. 1989) ("[S]ection 1331 'is not a general waiver of sovereign immunity. It merely establishes a subject matter that is within the competence of federal courts to entertain.').

Because the Tucker Act gives the Claims Court jurisdiction over certain types of federal claims against the United States, it 'constitutes a waiver of sovereign immunity with respect to those claims.' Mitchell, 463 U.S. at 212. The APA, on the other hand, sets forward a limited waiver of sovereign immunity as to claims 'seeking relief other than money damages.' 5 U.S.C. § 702. The gravamen of Plaintiff's Complaint is that his unlawful discharge and errors in his military record have wrongfully prevented him from obtaining [Military pay,] *... retirement and other benefits. As such, his claim is properly construed as monetary in nature and outside of § 702's limited waiver of sovereign immunity. See Huff v. United States Dep't of the Army, 508 F. Supp. 2d 459, 464 (D. Md. 2007).*

Moreover, to the extent that Plaintiff does seek equitable relief, see [ECF-5 at 6]*, review under the APA is available only for final agency action for which there is no other adequate remedy in a court. 5 U.S.C. § 704. This limitation has been interpreted to preclude review under the APA where a plaintiff has an adequate remedy by suit under the Tucker Act. Randall, 95 F.3d at 346; Mitchell, 930 F.2d at 896 ('The Claims Court has, in fact, ordered back pay, restoration to military office, placement in correct retirement status, and correction of military records'). As discussed below, Plaintiff has an adequate remedy in the Claims Court based upon his Tucker Act claim.*

Again, quoting *Reaves v. United States* (EDNC, 2013, document #DE-35):

As discussed above, the Tucker Act waives sovereign immunity as to actions "founded either upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491. The Federal Circuit has held that veteran or service member claims for back pay and/or [retirement] *benefits are within the Tucker Act's ambit. See, e.g., Chambers v. United States, 417 F.3d 1218, 1223 (Fed. Cir. 2005); Martinez v. United States, 333 F.3d 1295, 1303 (Fed. Cir. 2003). Where the amount in controversy in such an action does not exceed $10,000, the district courts share original jurisdiction with the Claims Court. 28 U.S.C. § 1346(a)(2). But when a claim exceeds this threshold, the Claims Court has exclusive jurisdiction. See Randall, 95 F.3d at 347; 28 USC § 1491. The damages claimed in Plaintiff's complaint are far in excess of the $10,000 threshold, and neither he*

> *nor Defendants contest that the compensatory damages for either wrongful discharge or backdated* [military pay and] *benefits would exceed $10,000. As such* [the] *exclusive subject matter jurisdiction over Plaintiff's claims is vested in the Claims Court….*

Notably, the DoD Privacy Program provides for explicit sovereign immunity as well.[10]

10. This case began when the Brigade Commander ordered the Plaintiff to become a client (ECF 27, Exhibits H & I) of CoreStrengths (ECF 5-1 at 5) that was "not an 'Army' requirement (ECF 27, Exhibit N). This case demonstrates genuine issues of material fact concerning whether the Agency procedurally adhered to its own policies, regulations, executive orders, and laws governing the safeguards necessary in this case, from its inception through the plaintiff's wrongful separation. (ECF-5):

    a. the collecting and maintaining personal information using a third-party website under Executive Order M-10-23 and the Privacy Act;
    b. investigative launch criteria under the MWPA;
    c. the disregard of the violations of law of all boards and the Plaintiff's Chain of Command;
    d. the required statutory processes for separation of a Soldier, Army Regulation 635-8.

SUPPLEMENTAL JURISDICTION vs. SEVERABILITY & TRANSFERABILITY

Supplemental (sometime referred as 'pendant' or 'ancillary' jurisdiction

11. The Plaintiff was able to find statutory justification for supplemental jurisdiction of Federal District Courts with State Courts (and claims therein) and plenty of case law to support it. However, the Plaintiff's exhaustive efforts to find documented language or case law on the parameters of supplemental jurisdiction between the CFC and Federal District Courts with

[10] *See* DOD 5400.11-R, C10.2, May 14, 2007.

respect to the CFC's Military Pay case exclusive jurisdiction were unsuccessful. At this time, the Plaintiff must (with the resources at hand and time invested) rely on the Court's discretion in its handling of this case in the interest of justice with the following arguments under its consideration.

RCFC Rule 21:

12. This rule permits the severance of any claim.

28 U.S. Code § 1631:

13. Notwithstanding the aforementioned APA and Military Pay Act jurisdictional arguments in support of this case's adjudication in this Court, but, absent supplemental jurisdiction or some other legal justification in response to the Defendant's arguments that challenging the ancillary claims, the Plaintiff requests the Court sever them (pursuant to RCFC 21) and transfer them. "In the Court of Federal Claims, 28 U.S.C. § 1631 allows this court to transfer cases to a district court." (*Kennelly v. United States* (Ct. Cl. , 2023, Case #23-425, Order, unpub.)

The MWPA claims:

14. Regarding the arguments centered on jurisdictional grounds of the MWPA claim, the Court of Appeals for the D.C. Circuit (Rodriguez v. Penrod 857 F.3d 902, (D.C. 2017) stated it:

> *...need not dismiss the petition altogether, however. Under 28 U.S.C. § 1631, we "shall, if it is in the interest of justice, transfer [the] action * * * to any other * * * court in which the action * * * could have been brought at the time it was filed or noticed[.]" Given the resources and time already invested in this matter by both parties, we conclude that transfer is warranted. See generally Five Flags Pipe Line Co. v. Department of Transp., 854 F.2d 1438, 1442 (D.C. Cir. 1988); Professional Managers' Ass'n v. United States, 761 F.2d.740, 745, n.5 (D.C. Cir. 1985) Accordingly, we order the action transferred to the United States District Court for the District of Columbia..*

Moreover, the Defendant cited *Bias v. United States*, 722 F. App'x 1009, 1014 (Fed. Cir. 2018) (ECF-24 at 24),which had a reference to the above case (*Rodriguez v. Penrod,* 2017):

> *But see Rodriguez v. Penrod, 857 F.3d 902, 906 (D.C. Cir. 2017) (observing that because "the entire Whistleblower Act is 'silent' on the question of judicial review," including the provision for seeking relief from "boards for correction of military records," "district courts have routinely reviewed those board decisions in the first instance." (citing inter alia Kidwell v. Dep't of Army, Bd. for Corr. of Military Records, 56 F.3d 279, 283–84 (D.C. Cir. 1995))). (BIAS v. UNITED STATES (2018) United States Court of Appeals, Federal Circuit. Ronald BIAS, Plaintiff-Appellant v. UNITED STATES, Defendant-Appellee 2017-2116 Decided: January 26, 2018)*

The Privacy Act claims:

15. Quoting from *Kassel v. Veterans Administration* (D.N.H. 1989), 709 F. Supp.1194 (emphasis added) to illustrate justiciable Privacy Act claims:

> *Jurisdiction is founded on 5 U.S.C. § 552a(g) and 28 U.S.C. §§ 1331, 1343…. For the reasons stated above, the Court finds and holds as follows: …. **As to Count I (Privacy Act), defendants' motion for summary judgment is granted in part** and denied in part. **The following claims survive**:… plaintiff's claim that **§ 552a(e) (3)** was willfully violated by the Board's failure to apprise those with whom Board members spoke that a principal purpose of their investigation was to assess the need for action against Dr. Kassel; plaintiff's claim that **§ 552a(e) (5)** was willfully violated by the Board of Inquiry's failure to compile a reasonably complete and accurate report; plaintiff's claim that **§ 552a(e) (7)** was willfully violated by the collection, use, and maintenance of documents describing how he exercised rights guaranteed by the First Amendment; … SO ORDERED*

JUSTICIABILITY AND FAILURE TO CLAIM SPECIFIC PROCEDURES

16. The Plaintiff claimed that the Defendant did not follow the DoD Privacy Program. The statutory Privacy Act requirements are found in DODI 5400.11 (DoD Privacy Program).

17. The Plaintiff claimed disobedience of standing Executive Order. Quoting from *Driscoll v. United States* (Ct. Cl., Case #19-1640) (emphasis added):

> *Brought pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), a motion to dismiss a claim as nonjusticiable challenges a court's*

> *competency to decide a controversy. Adkins v. United States, 68 F.3d 1317, 1322 (Fed. Cir. 1995). 'A controversy is justiciable only if it is one which the courts can finally and effectively decide, under tests and standards which they can soundly administer within their special field of competence.' Voge v. United States, 844 F.2d 776, 780 (Fed. Cir. 1988) (quotations omitted). 'Justiciability is a particularly apt inquiry when one seeks review of military activities." Murphy v. United States, 993 F.2d 871, 872 (Fed. Cir. 1993). This is because "judges are not given the task of running the Army.' Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953). 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.' Heisig v. United States, 719 F.2d 1153, 1156 (Fed. Cir. 1983)*
>
> *However, 'although the merits of a decision committed wholly to the discretion of the military are not subject to judicial review, a challenge to the particular procedure followed in rendering a military decision may present a justiciable controversy.' Adkins, 68 F.3d at 1323 (emphasis in original).* ***Even in areas wholly within its discretion, the military 'is nevertheless bound to follow its own procedural regulations if it chooses to implement some.'*** *Murphy, 993 F.2d at 873. Thus, a challenge to a procedural matter is within a court's competence because '[t]he court is not called upon to exercise any discretion reserved for the military, it merely determines whether the procedures were followed by applying the facts to the statutory or regulatory standard.'*

18. If following the myriad procedures of the military is justiciable, then the Court should be well equipped to adjudicate whether the orders issued in this case were in accordance with standing Executive Orders. Commissioned Officers are duty bound to discharge their duties via oath (5 USC § 3331) to follow all lawful orders; in fact, it is a crime to fail to obey any lawful general order or regulation, any lawful order given by one's chain of command, or to be derelict in performing duties (UCMJ Article 92).

19. The Plaintiff requested relief of the Defendant's act of "retaliate[ion] via a complaint and an associated launched and corrupted investigation" (ECF-5 at 3) due to alleged "disrespect of an Officer on November 30, 2022" (ECF-5 at 3) that led to the Plaintiff's separation," (ECF-5 at 5), which the QMP Board relied on. (ECF-24 at 28-29). This was a procedural process that should have included consideration of the Plaintiff's stance.

20. The Plaintiff's claims resulted from a disobeyed executive order by his commander and a lack of demonstrated exemplary conduct as leadership decisions were improperly executed. Examples include: the conflict of interest of the Command Operational psychologist's relationship with the corporate third-party while an employee of the Defendant, the AR 15-6 investigation launched under that same conflicted interest and coupled with two anonymous complaints and, the Psychologist's conflict of interest authorization of the eCDBHE (emergency command-directed behavioral health assessment) after her complaint that were used to launch the AR 15-6 investigation.
21. Many of these same procedural challenges were present in another case previously discussed above, *Kassel v. Veterans Administration* (D.N.H. 1989), 709 F. Supp.1194, including a long pattern of workplace harassment including: "negative performance evaluations, threats of discharge, . . . numerous letters detailing alleged deficiencies in his work, reassignments and an unlawful termination," which later resulted in a flawed investigative procedure in which the majority of the members of the fact-finding board of inquiry should have been removed due to conflicts of interest. In much the same manner, the Plaintiff was subjected to a flawed and compromised investigation, which was used by the Defendant to justify negative personnel actions against the Plaintiff. The formation, composition and the existing pre-textual issues of the case, lead to the court's adjudication of the motivation of the investigation in the *Kassel* case. The Plaintiff is seeking the same treatment.
22. The Plaintiff claimed the specific procedures found in AR 635-8:

> *Even in areas wholly within its discretion, the military 'is nevertheless bound to follow its own procedural regulations if it chooses to implement some.' Murphy, 993 F.2d at 873. Thus, a challenge to a procedural matter is within a court's competence because '[t]he court is not called upon to exercise any discretion reserved for the military, it merely determines whether the procedures were followed by applying the facts to the statutory or regulatory standard.' Id.* Driscoll v. United States (Ct. Cl. , Case #19-1640)

OPPOSITION TO LENGTHY MOTION AND POSSIBLE IMPLIED CONCESSION

23. The Plaintiff wishes not to fall into a trap of "unaddressed arguments." (*Shaw v. Esper* (D.D.C. Case #1:20-cv-02036, 2023)). Therefore, the Plaintiff argued against the validity of the AR 15-6 investigation as retaliatory, and all references to the Defendant's *in minutia* quotes in its filed MJAR (ECF-24) are addressed in detail in the GOMOR rebuttal located in the Administrative Record (ECF-19-1, at 00035-00090) with supporting evidence (that is, if the Defendant added the entire submitted evidentiary record it was given (via a CD with a DA Form 200 signature), at that time, into the Administrative Record.

CONCLUSION

24. For the myriad reasons presented, the Plaintiff respectfully requests the Court DENY the Defendants Motion to Dismiss in its omnibus motion (ECF 24).

OFFICER'S REQUIREMENT OF EXEMPLARY CONDUCT

25. First, it is well established in 10 USC § 7233 "Commanders and others in authority in the Army are required," to respect its own regulations and the laws of the United States, and commits procedural error if it fails to do the same:

> *All commanding officers and others in authority in the Army are required-*
> *(1) to show in themselves a good example of virtue, honor, patriotism, and subordination;*
> *(2) to be vigilant in inspecting the conduct of all persons who are placed under their command;*
> *(3)* ***to guard against and suppress all dissolute and immoral practices,*** *and to correct, according to the laws and regulations of the Army,* ***all persons*** *who are guilty of them, and:*
> *(4)* ***to take all necessary and proper measures, under the laws, regulations, and customs of the Army, to promote and safeguard the morale, the physical well-being, and the general welfare of the*** *officers and* ***enlisted persons under their command or charge****.* (emphasis added)

26. The Defendant demonstrated a lack of exemplary conduct in this case. Similar to the aforementioned $3,000 Supreme Court case (*Harrow*, 2024), the presumptive questions before this Court, could be centered on the definition of two simple words (in that case it was "pursuant to"). The words are located in 10 USC § 7233 above; they are the words "all persons." The questions then become, 'Did the Colonel and the Psychologist have the duty to "correct" *themselves* on behalf of all Soldiers they impacted with these arbitrary and capricious BHE (behavioral health evaluation) orders?' And, '[u]pon the Plaintiff's notification of the order's unlawfulness, "[d]id they not have a duty to belay it until the concerns were properly assessed?'

27. Notwithstanding prior exemplary conduct standards for Commanders and the Psychologist, what about the professional responsibilities of a licensed Psychologist?

> *Operational psychologists strive to take reasonable steps to identify and resolve conflicts that may arise from dual agency, multiple roles and relationships, and conflicts of interest that can occur in settings involving national security, national defense, and public safety*[11] *.... Maintaining some objectivity is necessary in his role as a clinical psychologist.* (*Kassel v. Veterans Administration* (D.N.H. 1989), 709 F. Supp.1194)

28. Regardless of the answers, they assess the unlawful activity (ECF 19-1 at 000549-000550).

THE DISOBEYANCE OF A STANDING EXECUTIVE ORDER - ARTICLE 92

29. Executive Order M-10-23 clearly prohibits the Brigade Commander's order as delivered. Some directly apropos quotes are located under the unreasonably redacted areas of the Administrative Record (ECF 19-1 at 000157)[12].

[11] American Psychological Association, August, 2023, *PROFESSIONAL PRACTICE GUIDELINES for Operational Psychology*, at 11, https://www.apa.org/about/policy/operational-psychology.pdf.
[12] This can be read by using the copy and paste function into another document to read, but is also reprinted in ECF 27)

"HERO" to "ZERO"

30. On October 3, 2022, the Brigade Commander rated this NCO "1" out of "4"[13] and stated "SFC Forbes is a top 15% NCO…" (ECF 19-1 at 001611) . After the Brigade Commander's November 29, 2022 order delivery and the Plaintiff's immediate call (upon reading it) to IG the next morning. The Plaintiff's approximate 60-second conversation with the unit Psychologist, resulted in being ordered to the Commander's office and asked, "[i]s this the hill you want to die on" (ECF 19-1 at 001433). In less than two months he went from one of the best, to unwittingly being investigated twice, issued two negative personnel actions and being administratively separated from service. The Plaintiff lost over two years of pay without the possibility for retirement and benefits, and more.

SPECIAL DEFENSE OF ARTICLE 89

31. The Plaintiff "expected [the Command Operational Psychologist] and the 1SFC Inspector General to fulfill their duties under our Constitution, laws as well as, Army regulations and policies; moreover, he "expected [the Psychologist] to fulfill her duty under both Army regulations and the licensing rules of her jurisdiction (Arizona)" (ECF 19-1 at 000035). She was statutorily mandated and licensed (in Arizona) to provide the information needed for him to be able to make appropriate decisions about his privacy rights under the law (ECF 19-1 at 000035, footnote 3). As stated in the Plaintiff's GOMOR rebuttal to the Major General, the Court Martial Convening Authority in the Plaintiff's GOMOR decision, the Command Operational Psychologist:

> *divested her status as a superior officer and was no longer protected by the provisions of UCMJ article 89…:(When an officer) under all the circumstances departs significantly*

[13] "1" is the best score possible, 4 is the lowest.

> *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."*[14] (ECF 19-1, 000036[15])

ASSAULT

32. The Plaintiff has spent years professionally supporting multiple Commanders and protecting both deployed and garrison facilities from the plethora of information security infractions and violations that arise. The lack of support, or worse, the impromptu violence in opposition to a national security message for something so foundational, as prohibiting phones in our classified facility, is also unconscionable. This is the first time in his career that leadership did not 'have his back;' instead it assaulted him from the back[16]. His Brigade Commander appointed him to do many jobs; Information Security was one of many of them; he had a demonstrated history of excelling at it. After the humiliation of the public assault, none of his fellow Soldiers were going to follow his direction now.

CLANDESTINE AR 15-6 INVESTIGATION LAUNCHED

33. The Defendant MJAR (ECF 24) attempted to substantiate the onus of the Brigade Commander's launched investigation, on January 12, 2023, by stating its underpinnings:

> ***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 leadership by Mr. Forbes."* - (ECF 24 at 10) (emphasis added)

[14] DA PAM 27-9 at 1090.
[15] *See* "Commentary on UCMJ Article 89" *Manual for Courts-Martial , p.* IV-22.
[16] *See, Forbes v. U.S. Army*, (EDNC Case # 5:24-cv-00176, 2024), DE 28, pg. 2.

The investigation was launched by the Brigade Commander and underpinned by a conflicted Psychologist (ECF 5-1 at 7-9) and two anonymous complainants (ECF 19-1 at 000148), both with similar handwriting (ECF 19-1 at 000148). Adding to those facial concerns, the Plaintiff has broken down a list of other issues associated with the investigation in his rebuttal, (ECF 19-1 at 001407 - 001412). To guard against "unaddressed arguments" (ECF 28 at para. 23) of the myriad inculcated hearsay, unsubstantiated opinion and falsities, that libeled the Plaintiff that were lifted from the 15-6 investigation (ECF 24), the Plaintiff relies on his opposition in the exhaustive analysis found in his GOMOR rebuttal (ECF 19-1 at 00035-00090) and the evidentiary CD delivered (ECF 27, Exhibit X) to his commanding General, if needed. Notably, all but two of the allegations found in the Defendant's MJAR (ECF 24) were hidden from the Plaintiff until he received his GOMOR; hence, the GOMOR rebuttal was large.

34. Procedurally, the Brigade Commander's January 12, 2023, AR 15-6 investigation was launched without the Mandatory FLAG,[17] which makes it a clandestine investigation of an unwitting suspect:

> *Mandatory Flag Suspension of favorable personnel actions is mandatory if an investigation is initiated on a Soldier by military or civilian authorities.* ***This is required for all command investigations— commander's inquiry, AR 15-6 preliminary investigation, or AR 15-6 administrative investigation.*** (*Commander's Legal Handbook*[18], emphasis added)

35. Moreover, there is case law that depicts similar slanted investigations have been adjudicated:

> *Given the history of conflict described by Dr. Kassel, the Court finds that a reasonable jury could conclude that the Board's real mission was to create a foundation for taking adverse action. If that is the case, the Board's failure to so inform each of the individuals from whom they gathered information violated § 552a(e)(3)….This subsection of the Privacy Act [(e)(5)] requires federal agencies 'to take reasonable steps to insure the informational quality of the records which it relies upon in making determinations about an individual.' Clarkson v. IRS, 678 F.2d 1368, 1377 (11th Cir. 1982), cert. denied, 481 U.S. 1031, 107 S. Ct. 1961, 95 L. Ed. 2d 533 (1987). Plaintiff asserts that the*

[17] Flag is defined as "suspension of favorable personnel action," *see* AR 600-8-2.
[18] *Commander's Legal Handbook 2019* (The Judge Advocate General's Legal Center & School, Misc. Pub 27-8).

> *investigation was not reasonable because (1) it was founded on the **'false premise'** that he actually made the remarks published on April 26, 1985, and (2) the Board's efforts were 'half hearted' since the Board actually sought to build a case against Dr. Kassel, not to create a balanced record to support a fair review….Plaintiff's second proposition has more merit. A review of the Board's report suggests that Dr. Kassel may be right. **The report included numerous statements of outrage and criticism, but nothing reported in that document provided any other perspective…. Maintaining some objectivity is necessary in his role as a clinical psychologist**.* (*Kassel v. US VETERANS'ADMIN*., 709 F. Supp. 1194 (D.N.H. 1989) (emphasis added)

36. The Defendant's MJAR (ECF 24) is representative of the investigation and emulates the *Kassel* case; the Brigade Commander's investigation contained numerous allegations of racism, homophobia, thievery, bullying, blackmail and more, but nothing reported in that [investigation] **"**provided any other perspective." (Id.) Nor does the Plaintiff's longstanding record of service have the slightest indication of any of those nefarious allegations. Moreover, the investigation covered time periods of evaluations already assessed and absent counter-productivity; in fact, the Plaintiff's evaluations are, arguably, 'exceptional.' Most notably, some of the outlandish allegations spewing from that investigation (ECF 24) were witnessed by our entire formation of Soldiers (ECF 19-1 at 000123, para. "b.") and nothing was done about it; there was no reported incident, no investigation and, consequently, no retraining or punishment. Commanders witnessed such comments and did nothing?!

37. It could be inferred that this is because the allegations are embellished or fabricated. For example, the Investigating Officer stated on behalf of the Battalion CSM (Command Sergeant Major, who had assaulted the Plaintiff on December 12, 2022), "[the Plaintiff's] previous CSM reli[e]ved (sic) him of his position in the unit and his ability to be part of USASOC" (ECF 19-1 at 000138). Yet, there is no sign of any relief for cause[19] in the Defendant's Administrative Record and the Plaintiff's being assigned to 528th (a USASOC unit) upon redeployment from Italy indicates his "ability" to serve USASOC was not barred.

[19] …other than the one at issue in this case,

38. Lastly, the Investigating Officer relied on a circular, self-justifying, reference in her findings:

> *I find that **SFC Forbes engaged in disrespectful behavior** towards MAJ Rhea Racaza. He raised his voice to a superior officer, would not let her speak, and made her feel unsafe in the workplace with his unwelcome behaviors. **This can be supported by MAJ Racazas statement** claiming that SFC Forbes demanded aggressively that she provide him with information and cut her off without letting her explain or answer any questions…. (MAJ Racaza DA 2823) ….* (ECF 000726, emphasis added)

Essentially, this statement indicates the Plaintiff was guilty of 'disrespect' because the Psychologist 'said so.'

39. Even worse, unit leadership used the resultant GOMOR to provide even more hearsay or false allegations directly on the GOMOR TRANSMITTAL FORM (ECF 19-1 at 000982-000983). Notably, the Battalion Command Sergeant Major who "used his hands to return Forbes into formation," (*Forbes v. U.S. Army*, (EDNC Case # 5:24-cv-00176, 2024), DE 28, pg. 2) "abstain[ed] from providing a filing recommendation for this GOMOR" (ECF 19-1 at 001515). But the other comments seemingly stemmed from more anonymous sources; for example, the Brigade Command Sergeant Major made the following statement that is unsubstantiated in the Administrative Record:

> ***It was also documented** that he demonstrated similar behaviors when he was previously assigned to 3rd SFG(A) and 173rd. **His exchanges were not only unprofessional, but bully-like in nature and beyond unacceptable**.*(ECF-19-1 at 001515, emphasis added).

The Plaintiff's Brigade Commander wrote a similar unsubstantiated comment about the Plaintiff's unblemished record of service:

> *SFC Forbes has a demonstrated history of being cancerous to organizations and his current tenure in the 528SB is indicative of that history.* (ECF-19-1 at 001514).

PLAINTIFF AS SUSPECT IN HIS OWN IG COMPLAINT – SECOND INVESTIGATION

40. The Plaintiff's December 13, 2022 assault and counterproductive complaint (ECF 19-1 at 000497) was referred by 1SFC (1st Special Forces Command) IG to ISFC command for

investigation. On February 9, 2023, General Lipson, 1SFC Deputy Commanding General, named the Plaintiff as a possible suspect in an appointment order (another stand-alone MWPA violation, ECF 27 at Exhibit R). The Plaintiff filed a complaint on October 18, 2023 regarding the MWPA violation (ECF 27 at Exhibit W). On November 15, 2023, the Plaintiff received confirmation of its case number assigned by the Secretary of the Army IG (SAIG) was "ZS-23-0084" (ECF 27 Exhibit W).

41. Furthermore, the 1SFC Inspector General Investigating Officer for the separate Reprisal case stated in an email on November 15, 2023, "For clarification, the investigative (sic) conducted by 1st SFC … **was not considered by the CG in rendering your GOMOR**. Are you aware of that?" (ECF 27 Exhibit R, emphasis added). Therefore, the one and only FLAG that occurred on February 7, 2023 (ECF 19-1 at 000517) had nothing to do with the second 1SFC investigation. Therefore, the FLAG that was presented was 26 days late (ECF 19-1 at 000517) of the mandatory notification required for the Brigade Commander's launched AR 15-6 investigation on January 12, 2023 (and it was backdated to that date). Succinctly, the Plaintiff was unwittingly investigated for the AR 15-6 investigation.

42. This second clandestine investigation, however, was also purportedly launched to address the Plaintiff concerns found on his DA Form 1559 (ECF 19-1 at 000497). Little did the Plaintiff know that his complaint was used to instantly name him as a suspect (an unwitting suspect again). As a result, the Plaintiff sat in the only meeting he had with the second Investigating Officer believing he was a witness. The Plaintiff was again found counterproductive in its findings (ECF 28, Exhibit R) and the Command used it as it libeled the Plaintiff's to his Congressman (ECF 28, Exhibit R). From a due process vantage, the investigating officer asked for little evidence and did hardly any follow up questions for the Plaintiff beyond that

initial meeting (there was a question about "posted security reminders," ECF 28, Exhibit R). Therefore, it can be inferred that the investigating officer's findings were based on the first investigation's findings as stated:

> *Additionally, the fact that SFC Forbes[']* behavior had previously been so egregious that the 528th SB initiated a 15-6 investigation...[redacted] all points to my finding that ***...[redacted] is not the one displaying counterproductive/unprofessional behavior, it is SFC Forbes***. (ECF 28, Exhibit R, emphasis added)

That's not all!

FALSE INFORMATION PROVIDED TO CONGRESSMEN

43. On February 21, 2023, the Defendant sent a letter (ECF 19-1 at 000532) categorically stating that "[the Plaintiff] was not assaulted." That is not what it said. The Plaintiff's copy (redacted, unsigned and unfinished) report stated "it the Plaintiff's allegations were unfounded. The veracity of the PMO investigation is unknown from the redacted and unsigned "initial release" report (ECF 27, Exhibit Z) (because there are unanswered questions, e.g., did they ever speak to the suspected assailant or canvass any Soldiers that were in the formation?), "unfounded" likely does not equal "not assaulted." Legal definitions vary on the matter but the definition of "spin" is likely very common.

44. In a separate letter, a worse falsehood occurred, "[the Plaintiff's] allegations… are wildly divergent from the minutia details of what actually took place." To discuss 'divergence of truth,' here is an IG definition of a protected communication, "[p]rotected communication" is "[a]ny communication" that is "lawful communication" "[w]hen made to "[a] member of Congress or [[a]an IG" and "[a]ny communication in which a Service member communicates information that he or she reasonably believes evidences a violation of law or

regulation.…"[20] This letter centers on the MWPA Investigating Officer that found the Plaintiff 'weaponized his complaints' after the 15-6 investigation was launched:

> *...I believe [the Plaintiff's] behavior to be suspicious that* ***all the allegation of violations made by SFC Forbes have been found to be unsubstantiated, he filed official complaints to all these incidents after the 15-6 investigation into his behavior was initiated.*** *As such, I believe that* ***SFC Forbes is deliberately weaponizing*** **[sic]** ***the IG/Congressional complaint process to protect himself from the 15-6 initiated against him*** (ECF, Exhibit R, emphasis added).

45. The indisputable truth in the 'minutia' is that the AR 15-6 investigation was clandestinely initiated on January 12, 2023 (ECF 19-1 at 000092-000094), with formal notification (or FLAG) on February 7, 2023 (ECF 19-1 at 000517) and the Plaintiff had four significant communications with two IG offices prior to being provided a FLAG on February 7, 2023:

    a. the November 30, 2022, initial call-in and emailed Inspector General Assistance Request (IGAR, see ECF 5-1 at 10);
    b. the December 13, 2022 emailed DA Form 1559, retaliation complaint (ECF 19-1 at 000497);
    c. the January 19, 2023 formal in-person intake meeting with USASOC Inspector General to notify them of Reprisal actions;
    d. the February 6, 2023 emailed Form 1559 reprisal complaint (ECF 27, Exhibit Q).

46. Lastly, two different Chiefs from the same Whistleblower Reprisal Division reported conflicting status of the Whistleblower Reprisal Case to a Senator:

    a. On June 13, 2024, the office reported to the Plaintiff's Senator that the "The U.S. Army Special Operations Command Inspector General office completed their investigation." and is under review (ECF 27, Exhibit W).

    b. On August 6, 2024, the same office reported to the same Senator stated regarding the Plaintiff's reprisal case that, "[t]he case, DIH 23-6161, is still under investigation with the United States Army Special Operations Command Inspector's General office (ECF 27, Exhibit W)."

[20] DoDD 7050.06, pg. 15, April 17, 2015.

THE "eCDBHE"[21] 'FISHING' EXPEDITION & CONFLICT OF INTEREST

47. Emergency Command Directed Behavioral Health Evaluations are governed by law and Directive. The governing law, and directive, are predominantly, 10 USC § 1090a, and DoDD 6490.04, respectively:

> *An employer's ability to mandate psychological and other health-related evaluations of applicants and incumbents is both legally constrained (Americans with Disabilities Act [ADA], 1991; ADA Amendments Act of 2008 [ADAAA], 2009; Brownfield v. City of Yakima, 2010; …. "Occupationally mandated psychological evaluations (OMPEs) pose potentially significant legal, financial, and safety consequences for examinees, employers, coworkers, the public, and the psychologists who conduct them."*[22]

48. The Department of Defense has built in "loopholes" to invade Soldier's Medical Records, using DoDI 6490.08 and DoDM 6025.18 by using the words "harm to mission."[23] The Plaintiff's Company Commander used similar words against the Plaintiff "SM exhibits increasing rates of paranoia and erratic behavior, both of which are **negatively impacting the Brigade's mission**" (ECF 19-1 at 000513, emphasis added). The Company Commander can't do this alone as "determination[s are]made by a healthcare provider or medical facility commanding officer at the O-6 or GS-15 level or above."[24] It is no wonder it took 3 months, 5 requests, and direct contact with the Hospital Commander for the Plaintiff to get the full report (the Plaintiff's first request received on January 19, 2023 was missing the last 10 pages, of the unit's eCDBHE referral incident (ECF 19-1 at 000552 - 000565).

49. The Brigade Commander's original December 20, 2022 (ECF 19-1, at 000507) order assigning the Plaintiff to 389th was revoked (Exhibit 19-1 at 000509) and replaced (Exhibit

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[21] eCDBHE = Emergency Command Directed Behavioral Health Evaluation
[22] *See* "Professional practice guidelines for occupationally mandated psychological evaluations". *The American psychologist*, *73*(2), 186–197 (2018).*online at:* https://www.apa.org/pubs/journals/features/amp-amp0000170.pdf
[23] Graham, LTC (Ret) Francesca "Weaponized Diagnosis: The myth of privacy in military healthcare" *WalkTheWalkFoundation (*May 17, 2025), *online at:* https://walkthetalkfoundation.org/wp-content/uploads/2025/05/71_DoDTR_Your-Diagnosis_Their-Ammunition_The-Illusion-of-Privacy-in-Military-Behavioral-Healthcare.pdf.
[24] *Ibid*.

19-1 at 000510) after the Plaintiff was ordered to the Company Commander's Office on January 17, 2023, (ECF 19-1 at 000508). This meeting had a singular purpose the Plaintiff would learn later; on January 17, 2023 the Company Commander realized that he did not have command authority over the Plaintiff, that the Plaintiff later learned was needed to refer the Plaintiff for a behavioral evaluation. New orders were cut (at the Brigade level) and backdated to December 20, 2022 (*Id*., all three orders above, in this paragraph). It can be inferred that the Brigade Commander, through his Company Commander, was going to get his behavioral evaluation of the Plaintiff using Brigade level orders, one way or another; and that he did!

50. In fact, upon realizing his lack of authority, the Company Commander immediately dismissed the Plaintiff without any information as to why he was ordered to arrive. Later that day, after the new orders were cut, he again ordered the Plaintiff to report to the Company Commander's office at 1600 (4 p.m.) on January 18, 2023. This is when the 'false premise' of an behavioral incident was employed regarding:

> *...concerning and alarming behaviors that [the Plaintiff]* ***exhibited in an Open Door meeting with MG Angle****, 1SFC(A) C[ommanding] G[eneral]. I alerted to this* ***incident between [the Plaintiff], MG Angle*** *and MG Angles's staff o'a 1600 on 18 January….* (ECF 19-1 at, at 001661, emphasis added).

51. To this day the Plaintiff has never met General Angle, or any General for that matter (ECF 19-1, at 000661, "para. 7"). It could be inferred that this lie was used to underpin an outside behavioral health review, an emergency Command Directed Behavioral Health Evaluation (eCDBHE), after the clandestine investigation was opened, in an attempt to orchestrate a third-party, the 'on-call' hospital Clinical Social Worker, who might provide fodder for investigation.

52. More troubling than a fictitious General meeting (ECF 19-1 at 001483), is the lack of professionalism demonstrated by the lack of recusal of the Command Operational Psychologist from an authorization requirement that she provided, on January 18, 2023 (ECF 19-1 at 000146), after being the only named complainant in a launched investigation, on January 12, 2023 (ECF at 000092). This conflict of interest is a violation of APA Principle 3.06, "(ECF 19-1 at 000622 under the Defendant's unnecessary redactions) and will be adjudicated by the self-governing Arizona professional licensing board when the Plaintiff has more time (after this case is over). After receiving the Psychologist-authorized results from the Clinical Social Worker (ECF 19-1 at 000555 - 000556) the following day, she immediately filled out her sworn statement for the investigation (ECF 19-1 at 000110).
53. The Plaintiff challenged the Company Commander's sworn statements regarding the fictitious meeting with the Major General (ECF 19-1 at 001483) and the Serious Incident Report (ECF 19-1 at 000146) in the GOMOR rebuttal (ECF 19-1, pgs. 000056, para 7). Two significant topics warrant discussion, the Company Commander's: falsification for, and; intent in; sending the Plaintiff to the eCDBHE.
54. First, his falsification. Contrary to the Company Commander's sworn statement about fictitious meeting with the Major General (ECF 19-1 at 001661 and ECF 24 at 12), under UCMJ Article 107, the Plaintiff has never met with General Angle to date (ECF 19-1 at 001388, para. 7). Nor was the Plaintiff ever been found to be being 'isolative, unhygienic, paranoid, erratic, nervous, aggressive, worrisome, moody, a cheater, a liar, or a **thief'** (ECF 19-1 at 000552-000565, emphasis added) per the Company Commander's DA Form 1462-E (ECF 19-1 at 000513-000514).

55. Second, his intent. Strikingly, the Company Commander made ***his intent clear*** for sending the Plaintiff to the eCDBHE when he finished the open-ended sentence on the DA Form 1462-E, block 10, "Your future plans for dealing with this soldier are:" He finished this sentence with, "**Remove him from USASOC / levels of responsibility"** (ECF 19-1 at 000514, emphasis added). The Defendant violated its own regulations in ordering the Plaintiff to the eCDBHE not only, under false premise of a non-existent open-door meeting with a General, but also, for a nefarious and admitted goal of getting rid of the Plaintiff.

56. Either of the above points when coupled with the Company Commander's use of a conflicted Psychologist authorization (ECF 19-1 at 000146), make his misuse of an eCDBHE a violation of the law governing the referral of service-members to mental health evaluations.[25]

REPEATING SAME MISTAKES OF THE PAST

57. Forty years after the Military Whistleblower Protection Act of 1988 became law, the Plaintiff was treated exactly as Chief Petty Officer[26] Michael J. Tufariello was treated in 1983 & 1984.[27] Tufariello was forced into an emergency Command-Directed Behavioral Health Evaluation at a hospital, as the Plaintiff was. The only difference anyone can infer between the two evaluations is that after his release from the hospital Tuffariello assaulted his Senior Master Chief[28,29] and the Plaintiff did not "fight" back when he was assaulted.

58. CPO Tuffariello's Congressional testimony, among others, prompted the codification of language contained within the MWPA Act of 1986. Sadly, as contained herein, this case may yet be another example of a feckless law, as subjectively questionable referrals, based on lies,

[25] 10 USC § 1090a, *also see* DoDI 6490.04,"Mental Health Evaluations of Members of the Military Services," April 22, 2020.
[26] CPO or E-7 is equivalent rank to Sergeant First Class in the Army.
[27]. "Unsung Hero-Michael Tufariello" *California Register* (video) online at: youtube.com/watch?v=0yb6lr9JdXk&t=3s
[28] Ibid, he admits to assaulting him in the video report, ref video time 12:57.
[29] A Naval Senior Master Chief is the equivalent of a Command Sergeant Major in the Army (E-9)

are implemented as ad hominem attacks on the Soldier that disagrees or complains. The historical self-governing aspect of the law was only exacerbated by Congressional clauses added to it in 2017 [30]. A three month investigation has been reported that most of the 27 cases of alleged mental evaluation reprisal, "[m]ost alleged victims had spotless records until they challenged the system." [31,]

THIEVERY

59. Further exacerbating the aforementioned Company Commander's behavior, he disregarded his unit's investigation into thievery (ECF 19-1 at 000253 - 000286) and his Battalion Commander's subsequent counseling of the Plaintiff (ECF 19-1 at 000290 - 000291) to use an unproven allegation against the Plaintiff. It can be inferred that this falsification, was used to bolster and justify an unlawfully ordered emergency Command Directed Behavioral Health Evaluation (eCDBHE), on a Request for Mental Health Evaluation form (FB Form 1462-E, ECF 19-1 at 000513-000514).

60. Regardless of the facts of a thoroughly-conducted investigation, the Plaintiff's Company Commander stated on an official government form (IAW UCMJ Article 107) that the Plaintiff displays observed concerns of "Thievery" (Id., block 5) after being aware that Plaintiff was absolved of allegation on (October 15, 2021, ECF 19-1, pgs. 000258-000263). On October 19, 2021, the Plaintiff is counseled on thievery investigation (#23-096). This DA Form 4856 corroborates that "[the Plaintiff] conducted no misconduct[,]" (ECF 19-1, at 000290). Yet, on January 18, 2023 (a year and 3 months later), the Company Commander, unlawfully defamed the Plaintiff on the FB Form 1462-E with the same unsubstantiated allegation to hospital personnel (ECF 19-1, at 000513, block 5). Thankfully, that falsification

[30] An affirmative defense clause was added effectively allowing 'open season' investigations on whistleblowers.
[31] Timms, Ed, Steve Mcgongile "The Risks Of Coming Forward -- Be All That You Can Be, Except Military Whistle-Blower," *Dallas Morning News* (March 30, 1992) *online at:*. https://bit.ly/3YSvegQ

and the many others, on that form did not sway the Clinical Social Worker's evaluation. A negative behavioral evaluation could, and likely would, have been added to the clandestine investigation (the Plaintiff was not notified of the open investigation) at that time; is this bias or bad faith or just another example of the Army's determination to win at all costs?

ENTRAPMENTS

61. "Entrapment refers to the actions of a law enforcement official that persuade or encourage a person to engage in an illegal act, which he would otherwise have been unlikely to commit."[32] The Battalion Command Sergeant Major's (CSM) counseling (immediately following his public assault on the Plaintiff, ECF 19-1 at 000142), which included the CSM attempted to nullifying appointment orders of his boss's boss, the Brigade Commander.

62. The attached exhibit (ECF 28. Exhibit CM-1) is a graphic depiction of the empirical timeline surrounding the gauntlet of entrapment events the Plaintiff was presented with to justify coerced counseling sessions; some of them tied to counseling scheme. The stage was set for what was to follow; the Plaintiff was presented with multiple seemingly impromptu information security infractions and taunting assaults (e.g. "piggy-backing" secure facility doors or sneaking in behind someone or propping a door open; prohibited personal phones in secure facilities; and being vigorously slapped on the shoulder twice, ECF 27, Exhibit Y).

63. Once the AR 15-6 investigation was launched, this rash of entrapments consisting of peculiar security infractions and slapping events began and lasted up to and including the day before the GOMOR was issued. When the Plaintiff was confronted with each entrapment, the Plaintiff has a decision to make, uphold the regulations and policies by ceasing the activity, which violates the Battalion Command Sergeant Major's unlawful directive of 'being

[32] "Entrapment" *LegalDictionary, online at:* https://legaldictionary.net/entrapment /

relieved' from confronting the activity, or do nothing and be deemed derelict in his duties, or ignoring observed infractions of USASOC regulation 25-2 and others. It is the equivalent of Star Trek's "Kobayashi Maru," a fictional spacecraft training exercise designed to be a 'no-win scenario.'[33] These entrapments were designed to put the Plaintiff in situations where he cannot succeed regardless of his decision.

64. All of the security infractions were followed by a formal DA Form 4856 counseling session (ECF 27, Exhibit Y, except the slapping events), that consistently stated he was 'unprofessional' and he must then choose to agree with the allegations or disagree. He consistently disagreed.

65. In a cunning final attempt to garner a Plaintiff 'admission of guilt,' on the day before (May 31, 2023) his unwittingly scheduled GOMOR delivery meeting, he was ordered to another meeting and presented with a follow-up statement by the First Sergeant at the bottom of the May 1, 2023 counseling form (ECF 27, Exhibit Y, very last page). The DA Form 4856 had no place to agree or disagree with the statement she wrote, "The CDR is not doing the L[etter] O[f] R[eprimand]. If your behavior continues you could receive an LOR form the Company CDR." Noticing the absolute implication of his behavior… warranting an LOR, and no place to sign or disagree, the Plaintiff wrote in a an impromptu comment, stating his "…behavior was appropriate per USASOC 25-2…." Upon reading this the 1SG ordered the Plaintiff to "Stand fast!" as she brought another Senior NCO in the office to berate him about his professionalism. See the Plaintiff authored powerpoint slide (ECF 28, Exhibit CM-1) for a graphic documentation timeline of similar entrapment attempts.

[33] "Kobayashi Maru" *Wikipedia, online at:* https://en.wikipedia.org/wiki/Kobayashi_Maru

66. USASOC regulation 25-2 is not silent on the requirements of "[r]eporting" infractions or violations, "users" must "cease all activities." once they are observed. USASOC Regulation 25-2-RAR, Table 9-1, and Ch. 9-4, clearly states:

> *Security Infractions: ...* ***Entering with*** *or using* ***unauthorized electronic equipment in USASOC facilities … (USASOC 25-2, Table 9-1).Users who*** *suspect and/or* ***observe*** *an unusual incident will: (1)* ***Cease all activities****. (2)* ***Not leave the device unattended/unsecured****....(USASOC 25-2, Ch. 9-4)*

"INFERENCE OF CAUSATION"

67. The Plaintiff has direct knowledge that IG investigators use slang terminology with complainants; the term 'inference of causation' is deemed "causation" or "causal connection between the protected communication [PC, defined above] and the personnel action[PA][34],,[35] For the Court to draw its own inferences, the Plaintiff supplies the following list of PCs and the Brigade Commander's PAs:

68. On December 19, 2022, the Plaintiff was fired on the day he contacted his Congressman (ECF 27, Exhibit O), one day after receiving a response to his request for the authorizing directives purported on the Brigade Commander's OPORD that was not sent back to him (ECF 27, Exhibit M), but sent to his (First Sergeant) and the Unit Physician's Assistant (heading up HPW for the Brigade Commander). The OPORD stated, "The 528th SB (SO) (A) Soldiers will complete a Human Performance and Wellness (HPW) I[n] O[rder] T[o]to meet USASOC and 1st SFC directive[s]" (ECF 19-1 at 000412), but the Plaintiff's USASOC response was "The USASOC Directive is still in draft….You guys are way ahead of us on this. (ECF 27, Exhibit M)"

[34] *defined as* "Any action taken on a Service member that affects, or has the potential to affect, that member's military pay, benefits, or career."
[35] *Guide to Investigating Military Whistleblower Reprisal and Restriction Complaints*, April 18, 2017.

69. April 20, 2023 at 1020, (10:20 a.m.), was a day after the Plaintiff submitted his Brigade Commander's UCMJ Article 138 redress response to AHRPO on April 19, 2023, as support for his April 4, 2022 complaint to AHRPO (ECF 27, Exhibit P). The Commander authorized the three month long investigation on April 20, 2023 (ECF 19-1 at 000098).
70. On May 11, 2023, the Plaintiff was counseled that "the Brigade Commander has recommended that [the Plaintiff] receive a General Officer Memorandum of Reprimand (GOMOR)." This was one day after a Plaintiff email (May 10, 2023) notifying the Brigade Commander that hospital personnel asked for his contact information (ECF 27, Exhibit S) as he was submitting an in-person request for the Command Operational Psychologists credentialing pursuant the WAMC Bill of Rights (ECF 27, Exhibit B).
71. On May 22, 2023, at 1544, the Brigade Commander modified the 15-6 investigation's finding and added a finding; he "approve[d] the finding of disrespect to a senior commissioned officer" (ECF 19-1, at 000099). This immediately followed an email he received from the Plaintiff to the Brigade Commander, at 1442, depicted his statutorily authorized request for MAJ Racaza's credentials of (ECF 27, Exhibit T). This timeline shows 62 minutes between this notification of the lawful request and the Colonel's adding of 'disrespect' as a founded charge in the AR15-6 investigation.

PLAINTIFF ENGAGED THE ARMY HUMAN RESEARCH PROTECTION OFFICE

72. The exhibit (Exhibit CM-2) is a graphic depiction of the empirical timeline surrounding the chain of events that likely led to the USASOC policy change. On February 3, 2023, the Plaintiff began a dialog with the Director of the Army Human Research Protections Office. (ECF-27, at P). On February 4, 2023, the Director referred the Plaintiff to Ms. Brenda S Hanson, PhD, Human Protections Director, Deputy Chief of Staff, Surgeon, USASOC (ECF

27, Exhibit P); Plaintiff met with two USASOC AHRPO representatives, and sent a recap email to them, cc'ing Ms. Alvarado (ECF-27, Exhibit P).

73. On March 31, 2023, the Plaintiff sent a detailed UCMJ Article 138[36] request for redress to the Brigade Commander (ECF 27, Exhibit A), missing from the AR) for all members of his unit to be exempted (and himself) from the standing order (EC19-1, at 000412 - 000416). The Defendant stated:

> *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.* (ECF 24 at 17)

74. On April 4 & 19, 2023 and in accordance with his Senior Non-Commissioned Officer "roles and responsibilities" (ECF 27, Exhibit P), the Plaintiff re-contacted the AHRPO via email, to file a formal complaint and shared with that office the Plaintiff's Article 138 redress, and the Commander's response to it. (Id.) This was significant because the Commander's calculus in that April 11, 2023 response only justified the release of the Plaintiff from the unlawful standing order as "appropriate and … grant[ed]" (ECF 19-1 at 001442) but "denied" (Id.) the rest of the unit's Soldiers (ECF 19-1 at 001442). This led the Plaintiff's to dutifully have to act again; the February AHRPO meeting spawned the Plaintiff's belief that they had the appropriate oversight authority for this unequal treatment of Soldier's involved in his administration of a research protocol On April 4, 2023, a formal complaint was made with that sub-agency to remediate this violation for the rest of the Soldiers (ECF 27, Exhibit P),

[36] UCMJ Article 138 provides a procedure in which a servicemember can raise a formal complaint against an officer that has wronged them.

the Plaintiff followed the complaint and submitted his Brigade Commander's Article 138 response (ECF 19-1 at 000549 - 000550) to AHRPO on April 19, 2023 (ECF 27, Exhibit P).

75. On July 18, 2024, nearly 15 months after forwarding the Colonel's redress response was sent, the Plaintiff received an email (likely as part of an en masse distribution) from USASOC AHRPO office, entitled "What Is The Human Research Protection Program [HRPP]?" (ECF-27, Exhibit P) with an attachment entitle "POL 24-14 (sic) USASOC HRPP Policy.pdf" (ECF 27, Exhibit P). This policy stated in its purpose:

> *The USASOC HRPP establishes guidelines* ***to ensure compliance with federal laws and regulations, uphold ethical standards, and protect the rights and welfare of participants, their data,*** *and/or biospecimens* ***involved in Human Subject Research….Ensure that H[uman] S[ubject R[esearch] receive both institutional and regulatory approval prior to commencement.*** *The process must be clearly documented and followed* ***to avoid any legal liabilities.***

76. It went on to provide specific guidance to various positions, not found in the prior version:

> *The* ***Staff Judge Advocate must ensure that informed consents*** *and other study related documents (****conflict of interest management plans****, individual investigator agreements,* ***informed consents****, and payments for participation in research)* ***are in full compliance with lawful principles and ethical standards****.* ***This is crucial to protect the rights and welfare of participants.***
>
> *Primary Investigators* [Command Operational Psychologists] - *Conduct HSR activities* ***after receiving institutional and regulatory approvals****.* ***Execute protocol in accordance with approval, laws, and regulations.***
>
> *Component subordinate command/subordinate unit* [Commanders of all subordinate units] - *[c]omply with command responsibilities as outlined in DoD Instruction 3216.02* [Protection of Human Subjects and Adherence to Ethical Standards in DoD-Supported Research] *and Department of Army policies.*

Both Commanders and Primary Investigators must: "Comply with HRPP P[ost]A[pproval] C[compliance M[onitoring] activities." Summarily, this policy has brought lower echelons of USASOC in line to better comply with DOD Instruction 3216.02 that clearly states in the policies first line:

> ***All research involving human subjects that is conducted or supported by the Department of Defense shall comply with*** *part 219 of Reference (c)* [32 CFR, Part 219, **the Common Rule**]*,* ***which incorporates the ethical principles of respect for persons, beneficence, and justice,*** *as codified in page 23192 of the Federal Register (also known as "****The Belmont Report****" (Reference (e)).*

77. Because of the Commanders unlawful order that violated multiple laws, regulations and policies the AHRPO remediated his actions going forward. But this was after:

    a. all the repeated Plaintiff notifications in and out of his Chain of Command;

    b. his demonstrated steadfastness of his character and communications to his Chain of Command, multiple Inspectors General, Congressmen, and other Agencies, that the Commander's order was unlawful;

    c. being investigated twice by multiple echelons of his units:

    d. being forced to endure multiple entrapment attempts to get him to admit he was guilty of allegations he was not guilty of, and finally;

    e. having to consistently defend his character from the documented falsifications that now found their way into this Court;

78. The Plaintiff identified the appropriate oversight authority sub-Agency. But it took over 15 months for the new policy to be published to have any positive lawful impact on the Program. This policy arrived after: two unlawful investigations; a GOMOR: a Relief for Cause Evaluation, and; a QMP Board decision to separate the Plaintiff. The Army Human Research Office apparently agreed with the Plaintiff as it seemingly addressed the Plaintiff's concerns from April 4, and 19, 2023; yet, the Defendant was still separated the Plaintiff.

79. Ultimately, the Plaintiff concerns were addressed via the new USASOC policy. Regardless, the Plaintiff is administratively separated: all while the Plaintiff was correct and his complaint to has a high probability that his complaint had a positive effect on the AHRPO remediating this for all Soldiers. If only the Brigade Commander had offered him an

informed consent form with "agree" and "disagree" boxes to check. The Plaintiff could have disagreed, signed it, copied it, emailed it back and went back to work.

PLAINTIFF NOTIFIED GENERAL OF COMMANDER'S FLAWED DECISIONS

80. On November 24, 2023, the Plaintiff notified the General that issued the GOMOR of the statutory flaws of the Commander and the Command Operational Psychologist; Plaintiff requested the removal and rescission of the GOMOR and Relief for Cause NCOER. The Plaintiff's Pleas were denied stating,

> *AR 600-37 para 7-2 provides, an officer who directed the filing in the AMHRR of the GOMOR may request removal if subsequent evidence or findings establish the GOMOR information is untrue/**unjust in whole or in part**. This decision does not preclude you from submitting an appeal to the DASEB IAW AR 600-37 para 7-2.*(ECF 19-1 at 000026)

This plea was ignored and denied.

DUTY TO DISCLOSE OMMISSIONS AND MISLEADING SUBMISSIONS

81. If "the Court finds that the Army violated an important procedural protection to which [the Plaintiff] was entitled under the Army's regulations by erroneously rejecting documents submitted by Driscoll on his own behalf and failing to ensure that these documents were properly considered by the selection board,…. [t]his error renders [the Plaintiff's] discharge void." *Driscoll v. United States* (Ct. Cl. , Case #19-1640). Similar to the Plaintiff's case, Mr. Driscoll was discharged after 17 years and 5 months of active duty service.

82. The Defendant's Administrative Record is missing items such as the Plaintiff filings with the Boards and various Defendant Agencies as these were used in determining the Agency Action. Also, extra-record evidence is necessary for the Court Record:

> *when agency action is not adequately explained in the record before the court;… when the agency failed to consider factors which are relevant to its final decision; when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; [and/or] in cases where evidence arising after the agency action shows whether the decision was correct or not Esch v. Yuetter* (DC 1988, 876 F2d 976).

83. Here's a list of Plaintiff of some of the questions as to the correctness of the Defendant's evidence: 'Why weren't Plaintiff's Article 138s submissions and board submissions in the AR? Why are redactions that support the Plaintiff's claims on the Executive Order in the AR? Why aren't all letters to Congressman about the Plaintiff in the AR? Why aren't Plaintiff's DASEB (ECF 27, Exhibit C) and ARBA (ECF 27, Exhibit D) submissions in the AR? Why isn't DA Form 2648 in the AR (CDF 27, Exhibit V)? Why can any reader, even on unfamiliar with this case, find, lies such as Thievery in the Administrative Record and, other lies appear when once supplemental evidence is introduced?'

ARBA AND OTHER SUBMISSIONS MISSING

84. The Plaintiff has some insight on the question about the ARBA report. Evidently it exists because, on March 11, 2025, my administrative counsel, who obviously has other administrative clients, contacted ARBA ("ESRB") regarding one of his other clients. After receiving the other clients name and last four of his SSI, the Pentagon ARBA official instead sent information to the attorney about the Plaintiff's ARBA submission (not the other client's) "AR20240011962" and "AR2024001167 ." (ECF 27, Exhibit D). This is concerning on multiple levels, however, it confirms that an ARBA finding "AR2024001167" is available and not in the Administrative Record provided to this Court pursuant RCFC Rule 26.

85. Also, where is the (not an inclusive list, Plaintiff may have missed something):

    a. unredacted Thievery Investigation showing who launched it;
    b. unredacted and signed PMO investigation, for scope and proof of completion;
    c. February 9, 2023 1SFC appointment orders for MWPA referred complaint:
    d. Unredacted findings of the above complaint for scope of inquiry:

e. March 31, 2023, Article 138 submission to the Brigade Commander on;
f. June 28, 2024, Plaintiff's DASEB submission
g. June 28, 2024, Plaintiff's ARBA (ESRB) submission;
h. October 11, 2023 requested and launched Commander's Inquiry on RFC;
i. all of the counseling forms (DA Form 4856) presented to the Plaintiff;
j. the DA Form 2648 showing the date of the mandatory briefing;
k. USASOC MWPA Reprisal investigation;
l. status of SAIG Investigation;

DASEB REQUIRED STANDARDS FOR REMOVING GOMOR

86. The DASEB's "Summary of Relevant Evidence" (ECF 19-1, 001521) states that the Plaintiff did not submit:

a. "a statement from the imposing authority (his chain of command) contending the GOMOR was untrue or unjust nor that new information was discovered or being considered;" (ECF-19-1 at 001521) all Plaintiff attempts were denied;

b. "a new AR 15-6 investigation (resulting from a CI, EO or IG investigation) which concluded that the GOMOR was unjust or untrue, nor that his due process had been violated, or the GOMOR was filed erroneously:" all Plaintiff attempts were delayed due to the seemingly never-ending IG investigation, and now SAIG investigation (ECF 27, Exhibit W) or the requested and confirmed but never communicated Commander's Inquiry of the Relief for Cause NCOER the Plaintiff requested on October 11, 2023 (ECF 27, Exhibit U).

QMP BOARD REQUIREMENTS PREJUDICE THE PLAINTIFF

87. The QMP Board is prejudiced in its procedural restrictions applied to submissions to the board when a Soldier was professional, correct and in need of no rehabilitation. The QMP Board's regulatory requirements for submission state,

*...**the potential for rehabilitation and further useful military service will be considered by the separation authority**; where applicable, the administrative separation board will*

> *also consider these factors. If separation is warranted despite the potential for rehabilitation, consider suspending the separation, if authorized.* (AR 635-200, Ch 1-16., c.), ***[c]orrespondence that criticizes or reflects on the character, conduct, or motives of any other Soldier will not be provided to the board***. (Id. Ch. 16-11., g.(2), emphasis added)

88. DASEB Board states, "[a]ppeals that merely allege an injustice or error without supporting evidence are not acceptable and will not be considered" (ECF 19-1 at 001523). What is likely unusual to the boards in this case is, as the Plaintiff stated in the QMP board's letter (that also went to the DASEB board), "[the Plaintiff] do[es] not have misconduct to address for rehabilitative adjudication." The DASEB findings went on to state, "[t]he appellant addressed his potential for continued service;" The QMP submission, (ECF 19-1 at 001070 - 001105) for more information on the Plaintiff's DASEB's submission and the information that the Plaintiff shared with the board challenging the nature of the investigations held against him and of the lawsuit regarding the violations by the command.

89. Lastly, the DASEB findings stated, "The DASEB will only consider removal of the GOMOR because removal of an evaluation falls under the purview of the ASRB….The appellant has not received any subsequent evaluations ….Since the GOMOR was imposed the appellant has not received any awards or completed any courses." Plaintiff responses to the Defendant are as follows:

    a. it hasn't included the Plaintiff's ARBA submission submitted on June 28, 2024 (ARBA decision not found in AMHRR[37] (ECF 19-1 at 001143 - 001153);
    b. it failed to produce an NCOER for the period from July 12, 2023 thru November 30, 2024 and the DASEB used that in its decision, "the appellant has not received any subsequent evaluations" (ECF-19-1 at 001522);
    c. the Plaintiff needed no rehabilitative courses.

90. The ARBA omission from the Administrative Record, along with the multitude of other omissions, are snafus of the Defendant's making. The lack of an evaluation is not of the

[37] AMHRR = Army Military Human Resources Record

Plaintiff's making, either. Moreover, the Plaintiff was in need of no courses, rehabilitative or otherwise; over the course of his long career, he has demonstrated a growing and significant knowledge base in the duties he was appointed to perform and performed them professionally.

SAIG INVESTIGATION PREVENTING FOIA REQUEST OF IG INVESTIGATION

91. The Army's immortalized concept of 'fighting till the battle is won' is seemingly prevalent against its own service-members. Not only did the Defendant open a second investigation on the Plaintiff to likely attempt to remediate their failure to follow regulation to notify (or FLAG) the Plaintiff, it also used it to double down on the findings of the AR 15-6 investigation. This is not the only time this has occurred; the US Navy did something similar to one of its pilots. The following case is even worse than the Plaintiff's in some material respects:

> *Lieutenant Steven E. Shaw was an F-18 instructor pilot in the Navy until he voluntarily resigned in July 2021….The years leading up to Shaw's resignation were marked by battle, although not the type of battle that Shaw signed up to fight. Shaw fired the first salvo when, in 2017,* ***he helped*** *two Black* ***student pilots*** *file complaints alleging racial discrimination in the fighter pilot training program and,* ***later that year, filed his own whistleblower complaint (and also complained to Senator*** *Warner), alleging that* ***various pilot instructors and student pilots were illicitly*** *betting bottles of liquor based on student performance. In May 2018,* ***Shaw's commanding officer struck back*** *by initiating an investigation of Shaw's* ***own (unrelated) activities****.*
>
> *Shaw, however,* ***regained lost ground*** *when, in June 2019, the* ***Navy Inspector General found that the 2018 investigation was initiated in retaliation for Shaw's protected, whistleblower activities****. Based on that conclusion, in December 2019, the Assistant Secretary of the Navy for Manpower and Reserve Affairs … determined that (1) '[t]he command directed investigation' was 'invalid because it was ordered for a retaliatory purposes* *and* *was conducted in a retaliatory manner****,' and (2) as a result,* ***'any action taken against Lt. Shaw which' was premised on the 2018 investigation, 'in whole or in part,' was also 'invalid.'*** *Consistent with those conclusions, the Assistant Secretary directed that (1)* ***'any adverse or derogatory material that resulted from' the 2018***

> ***investigation be corrected and removed from 'Lt. Shaw's Official Military Personnel File;' (2) the Commander of the U.S. Fleet Forces Command, Admiral Christopher Grady, take steps to address the suspension of 'Shaw's security clearance;' and (3) 'the Chief of Navy Personnel ... determine whether Lt. Shaw's professional or promotion opportunities may have been impacted as a result of reprisal, retaliation and restriction ... and[,] if so, . . . to take remedial action.'*** *At the same time, the Assistant Secretary* ***directed that the two officers responsible for the retaliatory action be subject to retirement grade determinations****. Shaw v. Esper* (D.D.C. Case #1:20-cv-02036, 2023) (emphasis added)

92. Though both legal cases had multiple similarities (e.g. desire to help Service-members, follow-on investigations of plaintiffs regarding "(unrelated) activities," and MWPA complaints), one significant difference of the Plaintiff's case is that his follow-on investigation was another violation of the MWPA. The Plaintiff's aforementioned first MWPA IG complaint was turned against ***him***. Another difference is that the Plaintiff (to date) is unable to get any ***reprisal*** result from his MWPA reprisal investigations and now a follow-on investigation is being cited to prevent its release (ECF 27, Exhibit W).

IMPROPER SEPARATION

93. AR 635-200, Ch. 1-21.,a., states, **"Commanders having separation authority directing separation or REFRAD of a Soldier will comply with AR 635–8."** AR 635-8[38], Ch. 4-3(b)(1), states, "Notify Soldiers of separation **and ensure Soldiers report as required for the Pre-Separation Services Program. Provide transportation if necessary."**

> *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*

[38] AR 635-8, *online at:* https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN38821-AR_635-8-001-WEB-3.pdf.

Human Resources Command on May 29, 2024, and that he did not have authority to delay an HRC-directed involuntary separation. AR 1. (ECF24 at 18)

94. The Major General also stated therein that he "do[es] not have the authority to delay [the Plaintiff's] separation." (ECF 19-1 at 000001); incidentally, the 528ths successive Brigade Commander, on November 13, 2024 stated the exact same statement (ECF-19-1 at 001138). These statements are contrary to the "FY23 Qualitative Management Program (QMP), Frequently Asked Questions about the Secretary of the Army prescribed discharge procedures pursuant to 10 USC § 1169 (ECF-19-1 at 001063):

> ***Q: Can my command seek to defer my QMP separation based on pending legal actions, investigations or administrative separation processing****?*
>
> ***A****: **Yes. The LTC commander may request deferment of involuntary separation under the QMP pending initiation** of a court martial, **civil trial, completion of an ongoing investigation,** or initiation of administrative separation proceedings under AR 635-200**.** The deferment will not exceed a Soldiers prior contractual ETS or retention control point. Commands seeking a deferment beyond that date must seek legal guidance on situations where an involuntary extension is warranted.*

95. The QMP board, the General, and the current Brigade Commander were notified that of the violations of law and regulation as well as the previous pending lawsuit. The Plaintiff sought assistant from his Congressman and received guidance on August 20 2024, to contact HRC (ECF 27, Exhibit V) to stay the separation. On November 24, 2024, the Plaintiff successfully received a response from HRC to submit an Exception to Policy (ETP). It must include, "1. Signed and dated Soldier memo requesting ETP w/ full justification. 2. Signed and dated memo by the SM's first O-6 CDR in his/her Chain of Command, supporting the ETP w/ justification to include proposed separation date" (ECF 19-1 at 000987). The Plaintiff had proactively gotten way ahead out in front of that guidance.

96. In fact, the Plaintiff contacted or employed the following communications to remediate the wrongful separation (see ECF 27, Exhibit V for the below list):

    a. 20240119 - General Ferguson Article 138 response to GOMOR redress was that it was not "unjust in whole or in part;"
    b. 20240410 - Reengaged Hon. Hudson by filling out new privacy statement;
    c. 20240819 - Congressman Hudson received guidance to for an ETP;
    d. 20240820 - Congressman Hudson forwards guidance (dated August 19, 2024) to the Plaintiff and to G1 and Plaintiff to "get the ball rolling;"
    e. 20240828 - Plaintiff's administrative counsel sends letter to Assistant Secretary of Defense (M&RA), ETP authority, following guidance to request an Exception to Policy (ECF 19-1 at 001141);
    f. 20240904 the Chief, Military Personnel Integration Division contacts the Plaintiff's Congressman (ECF 19-1 at 001139)
    g. 20240912 - The Senior Enlisted Advisor to the Assistant Secretary of Defense (M&RA) referred the Plaintiff back to Defendant Counsel in EDNC case;
    h. 20240917 - Congressman "unable to intervene," due to case in litigation;
    i. 20241028 - Plaintiff's administrative counsel sends letter to Army Deputy Chief of Staff of Staff, ETP authority, following guidance to request an Exception to Policy (ECF 19-1 at 001109 - 001111);
    j. 20241113- Brigade Commander stated, "I do not have the authority to delay your separation (in AR);"
    k. 20241127- General stated, "I do not have the authority to delay your separation (in AR)."

97. Multiple efforts to have an authorized meeting with a General (ECF 27, Exhibits K & L) to "submit a statement from the imposing authority" (ECF 19-1 at 001521) were rebuffed. Notably, the DASEB findings were delivered via this case's Administrative Record filing with this Court. The DASEB adjudication occurred and was filed in his AMHRR post Plaintiff Separation. (ECF-19-1 at 001145 and 001525).

98. Prior to that, on November 11, 2025, the Plaintiff sent a third UCMJ Article 138 redress submission to "delay the imposition of [the Plaintiff's] scheduled separation from the US Army..." (ECF 19-1 at 000780) to his current Chain of Command (a different Brigade Commander) (ECF 19-1 at 000780 - 000803). Contrary to HRC's stated procedure, on

November 13, 2024, the current Brigade Commander's reply was, "I do not have the authority to delay your separation" (ECF 19-1 at 001138). On November 26, 2024 , the General that authorized the GOMOR even answered this one and reiterated, verbatim the Brigade Commander's lack of Authority (ECF 19-1 at 000001).

99. The Plaintiff filed an IG complaint, using dates listed on the DD Form 2648 (ECF 28, Exhibit V) as evidence of the Defendants non-compliance with AR 635-8, on November 22, 2024. It was rebuffed and closed (ECF 27, Exhibit V) while addressing the wrong regulation (ECF 27, Exhibit V) and summarily deleting the Plaintiff's clarification of the regulation (ECF 27, Exhibit V). The Plaintiff realized any further pursuit of this request would be stonewalled and hence, futile.

A GOOD OUTCOME FOR SOLDIERS

100. The new requirements in the USASOC Policy 24-14[39] (sic, ECF 27, Exhibit P) remediated the same unit-wide concerns formally brought by the Plaintiff 15 months earlier. This policy purpose was "to ensure compliance with federal laws and regulation" and "to avoid any legal liabilities" (Id.) in conducting Human Subject Research. The remediation of the Plaintiff's concerns are linchpin to the probable cause used in the Command's investigation and subsequent recommendation for the Plaintiff's administrative separation. The Psychologists complaint was 'fruit from the same poisonous tree as she had "depart[ed] substantially from the required standards appropriate to that officer's rank or position" (*see* Special Defense above); regardless, the Plaintiff was found guilty of disrespect in two investigations.

101. Prior to the Plaintiff's formal approach to remediating the issues with these programs, he produced those concerns to have the Inspector General remediate them; concerns that were

[39] USASOC Regulation 24-14, (ECF 27, Exhibit P)

not properly handled[40] by them in accordance with a Call-in Inspector General Assistance request (ECF 5 at 4). As stated, the Plaintiff's concerns were corrected 18 months later, but only after the Defendant 'rolled along' to administratively separate him. That said, the IG's failures denied the Plaintiff's protection from retaliation. In fact, they exposed the Plaintiff to a litany of retaliatory scrutiny. Scrutiny that led to recommendations for an administrative separation for allegations that could have easily been overcome in a military Court.

102. The lack of Senior Leaders, Inspectors General, and Commanders, exemplary conduct throughout the investigations, boards, and subsequent separation, that occurred in this controversy, "is not a problem of Plaintiff's making" (*Reaves v. United States*, 128 Fed. Cl. 196, 2016). As discussed in depth herein, the investigation was slanted. The boards failed to acknowledge legitimate notification of violations of laws. And, the actual separation failed to follow its own regulations in "ensuring Plaintiff a… 120 days prior to separation and in effecting his discharge.

103. Defendant violated Army Regulation 635-8 by discharging Plaintiff before he was ensured to have completed the Army's mandatory Pre-Separation Brief and again in failed to remediate it upon notification. If a soldier was being administratively separated for any reason, the commander was required to ensure this briefing occurred in prior to 120 days stated in the Plaintiff's orders. Note: the Court can see the quality of the rushed medical evaluation for itself (ECF 27, Exhibit V).

[40] *See* pg. I -2 -9 of *The Assistance and Investigations Guide*, Department of the Army Inspector General Agency, July 2021, https://ig.army.mil/Portals/101/TIGS/DIGITAL%20LIBRARY/Investigations%20Training%20Support%20Package/Assistance%20and%20Investigations%20Guide.pdf?ver=c5eWhBkiM5lY6hSnmFxp2A%3D%3D.

CONCLUSION

104. In short, the Army failed to myriad laws, regulations, directives, policies and Executive Orders, throughout this controversy and after notifying the Plaintiff of separation. It capstoned all of this by failing to "ensure [the Plaintiff] report as required for the Pre-Separation Services Program. Provide transportation if necessary[,]" and in effecting his discharge. These are not rudimentary laws; some of them are landmarks in our country's history.

105. The Defendant's disregard for its own Army Regulations, the Privacy Act, the Military Whistleblower Protection Act, the Military Pay Act, the Administrative Procedure Act and countless regulations including the cited AR 635-8 above, to simply win a battle over the Brigade Commander's and Command Operational Psychologists violations, is troubling. First, it investigated him over a request for information that both the Commander and Psychologist had a duty to provide with the order and took offense to his asking for it. Second, anonymous complaints, easily confirmed falsifications, false premises, multiple counseling sessions to garner an admission and significant reliance on hearsay and the word of the Psychologist, who violated a basic privacy requirement, and the myriad broken and misused regulations are troubling. Amidst all of this, the Plaintiff professionally identified the appropriate office to remediate the issues, solving the problem prior to his separation.

106. If the actions in this case, all totaled, were done by an individual person, and not a bureaucratic Agency, they could easily be attributed to a vindictive childlike maturity level embodied in a stubborn child. More realistically, at the unit level the only explanation the Plaintiff can muster is a bad case of misguided Groupthink. Worse yet, these same attributes, which are easily maintained on an individual level, take considerable more effort to maintain en masse. Any reasonable person reading this case can assess and contemplate their own

estimates of the massive amount of man-hours the Defendant spent to defend the Brigade Commander's decisions, not to mention his recommended, and General-Officer authorized, administrative separation of the Plaintiff. When all that was needed to avoid this "Fight" was professionally admitting an error, "Proudly" remediating it, and "Rolling on." Instead, for whatever reason, the Defendant en masse, chose to "Fight till the Battle is won," with full knowledge that not all battles are not winnable. This Court may find similarities between stances in this case and the Government's recently ***lost***, yet steadfastly defended Court of Federal Claims case, *Harrow v. Department of Defense*, an 11year controversy over $3,000, which was recently argued and adjudicated in the Supreme Court.

107. The Defendant has documented many falsities throughout this controversy:

a. it falsified the original complaint misperceived disrespect;
b. it used anonymous complaints from a town hall (ECF 19-1 at 000148) and the Psychologist's verbal complaint (November 30, 2022) to re-adjudicate previously rated evaluation time-periods;
c. it used a preponderance of hearsay, opinion, falsehoods to find the Plaintiff guilty in the 15-6 investigation;
d. it libeled the Plaintiff in a memo by the Investigating Officer that the Plaintiff was relieved of duties and barred from USASOC (ECF 19-1 at 00138);
e. it failed to notify the Plaintiff (the unwitting suspect) by not notifying him of the 15-6 investigation upon its launch (ECF 19-1 at 000092-0000094) and (ECF 19-1 at 000517);
f. it falsified and contradicted itself about whether the eCDBHE was mandatory or voluntary (ECF 19-1 at 001388):
g. it libeled the Plaintiff on Form FB Form 1462-E on multiple topics, e.g., "thievery" (19-1 at 000513), and much more, on its eCDBHE request,
h. it "ordered" the Plaintiff to an eCDBHE (ECF 24 at 12) while concurrently committed a conflict of interest to justify and authorize the eCDBHE (ECF 19-1 at 000146), after the launched 15-6 investigation of the unwitting Plaintiff (ECF 19-1 at 000092-0000094);
i. it used a circular reference fallacy in the findings of the AR 15-6 investigation (ECF 19-1 at 000726);
j. it libeled the Plaintiff about thievery (ECF 19-1 at 000513) to bolster the same eCDBHE;

k. it falsified a non-existent incident in a General's Office on a Sworn Statement (ECF 19-1 at 000748);
l. it falsified the degree of the assault (*Forbes v. U.S. Army*, (EDNC Case # 5:24-cv-00176, 2024), DE 28, pg. 2);
m. it downplayed the assault on the Plaintiff to a Congressman soon after the Plaintiff first contacted USASOC IG (ECF 19-1 at 000532);
n. it falsified to a Senator about the status of the Whistleblower Reprisal Investigation (ECF 27, Exhibit W);
o. it libeled the Plaintiff with unsubstantiated comments in the GOMOR TRANSMITTAL FORM about the Plaintiff's history at two prior units, "3rd SFG (A) and 173d" (ECF 19-1 at 001514-001515)
p. it placed the Plaintiff under a 45 day (renewed once) unsubstantiated Military Protection Order based on February investigation allegations and initiated upon the Plaintiff receiving the GOMOR, June 1, 2023 (ECF 19-1 at 000578 - 000581);
q. it failed to disclose the DD Form 2648, to possibly avoid adjudication of AR 635-8;
r. it stonewalled every effort for an abeyance to the separation;
s. it opened an investigation (SAIG) that prohibits the Plaintiff any information for this case regarding the Whistleblower Reprisal (ECF 28, Exhibit W);
t. it misled the Court by stating SDI 2.0 was part of the HPW program (ECF 24 at 9);
u. it misled this Court with redactions (unnecessary redactions in ECF 27, para. 8) that obfuscates the disobedience to an Executive Order (ECF 19-1 at 000157).

108. Every facet of this administrative separation has been challenged from prior to it becoming such; the documents in support of it are "untrue and unjust." Had any one of the following occurred pursuant existing law, regulation or policy prior to this Brigade Commander's decision to launch his first salvo of what grew into this legal battle on December 19, 2022:

a. had the Command Operational Psychologist performed her duties and appropriately guided the Brigade Commander in all human research programs;
b. had the Brigade Commander provided informed consent forms;
c. had the Command Operational Psychologist provided the informed consent forms:
d. had the Inspector General completed a Call-in IGAR DA Form 1559 forms and intervened, and;
e. had anyone in the Plaintiff's chain of command supported the Plaintiff regarding the Brigade Commanders appointed (never rescinded) Plaintiff's duties (ECF 19-1 at 000243-000248) prior to being sent to 389th (with respect to prohibited phone regulations and policies) on December 19, 2022;
f. had the Plaintiff's chain of command or any Army Board considered the Plaintiff's notifications of the multiple violations of laws and regulations.

then this battle that has now raged for 30 months would likely have been averted.

109. The Commander's Legal Handbook 2019 states:

> ***[s]tatements and other evidence furnished by the recipient will be reviewed and considered by the officer authorized to direct filing in the AMHRR*** *(or local file). The statements and/or material submitted by the recipient will be attached as enclosures to the reprimand along with the recipient's acknowledgment of referral …. A filing authority (the 1SFC General)* ***should only forward a reprimand for inclusion in the AMHRR after considering the circumstances and alternative measures***.

110. As of this submission, this information was considered and ignored repeatedly by the Defendant. Therefore, the Plaintiff has lost complete faith in receiving a fair adjudication of this controversy within the Agency. Given the immense effort expended by the Plaintiff to proactively and intelligently communicate the basis for the violations of laws and regulations, the Defendant has demonstrated its steadfast determination to separate Plaintiff at all cost. The Plaintiff simply feels that fairness is elusive within the Agency on this matter, which nullifies any further internal appeal as futile; hence, he feels the only fair adjudication now can only come only from outside the Agency.

111. The Plaintiff relies on this Court to repair this singular 'broken brick' in the Army's 'storied road of historical feats.' The Plaintiff believes that all of this was done to simply obfuscate the original violations of law and regulations in what became a 'battle of attrition' brought to the Plaintiff. After all, he's been told by so many, "what can one man do?" Well, this man is seeking a fair venue and still fights for his reputation and future. Therefore, the Plaintiff asks this Court to GRANT the Plaintiff's requested relief and turn this horribly arduous battle into another Army win; a winning reminder for all of us, Officer and Enlisted alike, to fight with exemplary conduct amongst ourselves. Moreover, given the autonomous authority provided by the rank structure in the military, this case can serve as a reminder for Commanders to be

open minded so that they win lawfully and win honorably; they should never attempt to risk their exemplary conduct to win at all costs.

112. A battle with a true enemy of the state is the only adversarial conflict that requires any assumption of risk calculations with respect to the adherence to our laws as we fight, fight more, and fight like hell, to win (to survive). This controversy was not a "life, limb or eyesight" case and the Plaintiff was not the enemy of this Agency; he never has been. Ruining the Plaintiff's career over a 60 second conversation is more than any American should ever condone. The requested remediated outcome in this case would benefit the Army as it continues to 'roll along,' as it must always do,… for all of us,… always! Godspeed!

May 21, 2025
Date

Signature of Plaintiff

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TABLE OF AUTHORITIES

CASES **PAGE(S)**

SUPPLEMENTED STATUTES, RULES, REGS, POLICIES, etc. (not found in Defendant's list)

Statutes:

Rules.

Manual for Courts Martial[1]

DoD Directives[2]

DoD Instructions[3]

DoD Manuals[4]

[1] The Manual for Courts-Martial is available online at: https://jsc.defense.gov/Military-Law/Current-Publications-and-Updates/.
[2] DoD Directives are available online at: https://www.esd.whs.mil/DD/.
[3] DoD Instructions are available online at: https://www.esd.whs.mil/DD/.
[4] DoD Manuals are available online at: https://www.esd.whs.mil/DD/.

US Army Regulations.[5]

US Army Special Operations Command Policies.

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Guidance Materials

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Hospital Patient Bill of Rights

[5] Army Regulations are available online at: https://armypubs.army.mil/.

[6] https://tile.loc.gov/storage-services/service/ll/llmlp/Commander's_Legal_Handbook/Commander's_Legal_Handbook.pdf

[7] https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN21189_P27_9_FINAL.pdf

[8] https://www.dodig.mil/Portals/48/Documents/Components/AI/AI%20Manuals/Guide%20to%20Investigating%20Military%20Whistleblower%20Reprisal%20and%20Restriction%20Complaints%20-%2005-09-2024_Final_20240513_508.pdf?ver=EYXJxdntwpw7f7x7jJ02Dg%3d%3d.

[9] https://ig.army.mil/Portals/101/TIGS/DIGITAL%20LIBRARY/Investigations%20Training%20Support%20Package/Assistance%20and%20Investigations%20Guide.pdf?ver=c5eWhBkiM5lY6hSnmFxp2A%3D%3D.

[10] Executive Orders are available online at https://www.federalregister.gov/presidential-documents/executive-orders.