

August 6, 2018

Via E-mail

Colonel William J. Rice
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United States Army John F. Kennedy Special Warfare Center and School
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Subj: Matters in Defense Submitted on Behalf of Chaplain, Major Jerry Scott Squires, USA

Dear Colonel Rice:

First Liberty Institute continues to represent Chaplain (CH), Major Scott Squires, in this matter. Please direct all correspondence relating to this matter to me at the contact information provided below. We incorporate all legal arguments raised in our letter of 17 April 2018, and offer the matters in defense submitted herein in addition. On behalf of CH Squires, we submit these matters in defense for your consideration in response to Major (MAJ) Ford's most recent Army Regulation (AR) 15-6 findings and recommendations, of 1 August 2018, stemming from a February 6, 2018, Equal Opportunity (EO) complaint against CH Squires and Staff Sergeant (SSG) Kacie Griffin. This correspondence does not address MAJ Ford's findings, conclusions, and recommendations with respect to SSG Griffin.

Summary

MAJ Ford's findings, conclusions, and recommendations are predicated on one false premise: SGT [Name Redacted] was denied the opportunity to attend a Strong Bonds event. The evidence shows that SGT [Name Redacted] and her spouse elected not to attend a Strong Bonds event after CH Squires rescheduled the February 9, 2018, Strong Bonds event his endorsing agency prohibited him from facilitating. The evidence also shows that CH Squires notified and worked with SGT [Name Redacted]' commanding officer and CH Squires' senior chaplain for the sole purpose of ensuring SGT [Name Redacted] and her spouse could attend a Strong Bonds event. Put simply, these facts demonstrate that CH Squires performed his duties with professionalism and honor according to the expectations of his endorsing agency and Department of Defense regulations. Any attempt to characterize his actions otherwise is the result of blatant anti-religious hostility.

MAJ Ford's August 2018 report of investigation concludes that CH Squires should be found guilty of violating Army EO policy, and that he be found guilty of dereliction of duty. Both alleged violations would presumably be charged as violations of Article 92, UCMJ, each subject to court martial with the potential for sentences that include confinement and a punitive discharge. MAJ Ford further recommends that CH Squires be subjected to administrative or non-judicial punishment under Article 15, UCMJ.

Put simply, MAJ Ford's report of investigation constitutes a clear and present danger to the constitutional rights of all chaplains. If Army chaplains are to maintain any trust and confidence in their ability to perform their duties without fear of this kind of threat, you must disapprove MAJ Ford's findings and recommendations. CH Squires has devoted a quarter of a century to serving this nation, first as an enlisted Soldier, then as a chaplain. CH Squires' service record, which includes multiple combat deployments, as well as awards such as the Bronze Star and Meritorious Service Medal (with 4 Oak Leaf Clusters), demonstrates a career dedicated to excellence and service to his fellow Soldiers.

MAJ Ford's report either fails to consider or misstates several important facts and legal authorities. Accordingly, his findings, legal analysis, conclusions, and recommendations are severely deficient. As the approval authority, you have the opportunity to correct these deficiencies by disapproving the legal conclusions and recommendations, and unsubstantiating the Equal Opportunity complaint. Moreover, failure to take these corrective actions would not only result in violations of federal law, Department of Defense (DOD), and Army regulations, but it would impair CH Squires' ability—and that of other chaplains within your command—to carry out his mission, robbing the Soldiers under his care of the vital spiritual support he provides.

Factual Discrepancies in the AR 15-6 Report of Investigation

The following salient facts are missing from or negligently misstated in MAJ Ford's factual findings:

- 1) CH Squires made clear to SGT [Name Redacted] that Strong Bonds events are open to *all* Soldiers. In other words, at no time did CH Squires prevent SGT [Name Redacted] and her spouse from attending a Strong Bonds event;
- 2) Second, CH Squires explained that the only restriction regarding Strong Bonds events applied to him, not to Soldiers who wish to attend;
- 3) The registration deadline for the February 9, 2018, Strong Bonds event was January 26, 2018, fifteen days prior to the event. Thus, when CH Squires spoke with SGT [Name Redacted] on February 1, the registration deadline had already passed;
- 4) Within minutes of concluding his meeting with SGT [Name Redacted] to explain his status as a restricted chaplain, CH Squires notified SGT [Name Redacted]' commanding officer, Colonel (COL) Michael Kornburger, and explained the situation. COL Kornburger simply asked that CH Squires keep him apprised of the situation, and to let him know whether there were any issues that required his attention;

- 5) After notifying, discussing the situation, and receiving guidance from CH Richard Winchester, his senior command chaplain, CH Squires made the decision to reschedule the February 9 Strong Bonds event in order to ensure SGT [Name Redacted]' and her spouse's attendance. The postponement, however, meant that some Soldiers who had timely registered for the February 9 event were unable to attend due to schedule conflicts. In other words, efforts to ensure SGT [Name Redacted] and her spouse could attend the event came at the expense of other Soldiers' attendance;
- 6) Despite the efforts to reschedule a Strong Bonds event for SGT [Name Redacted] and her spouse, and although she registered to attend, SGT [Name Redacted] and her spouse chose not attend the rescheduled event for unknown reasons to CH Squires and reasons MAJ Ford either refused to investigate or failed to make known in his report;
- 7) In accordance with published Army Strong Bonds Guidance ("Guidance"), CH Squires determined, prior to the Strong Bonds event, that a same-sex couple desired to attend the event. In accordance with the Guidance, CH Squires coordinated with another chaplain to conduct the event. CH Squires then went above and beyond his duty and the Guidance by making multiple attempts to personally assure SGT [Name Redacted] that she and her spouse were welcome to attend the Strong Bonds event;
- 8) CH Squires was unable to immediately meet with SGT [Name Redacted] in person due to the following factors:
 - a. On the date on which SGT [Name Redacted] attempted to register for the Strong Bonds event, CH Squires was assigned to his quarters as a result of a medical procedure he underwent that same day;
 - b. CH Squires is not in the same unit as SGT [Name Redacted], which required him to travel to her unit and determine her whereabouts. When CH Squires arrived at SGT [Name Redacted]' work section, it was closed. CH Squires then went to a nearby work section and asked one of the Soldiers present if they knew of SGT [Name Redacted]' whereabouts, but the Soldier did not know SGT [Name Redacted];
 - c. On January 29, 2018, the next working day on which CH Squires was medically and physically able to meet with SGT [Name Redacted], he traveled to her unit in order to meet with her in person, but she was absent;
 - d. On January 30, 2018, CH Squires again traveled to SGT [Name Redacted]' unit in order to meet with her, but she was again absent;
 - e. After numerous attempts to locate and meet with SGT [Name Redacted], CH Squires finally located and met with her on February 1, 2018. Although five calendar days elapsed, the actual duration was only three working days;

- 9) Contrary to MAJ Ford's claim, SGT [Name Redacted] was never "denied the opportunity to attend a Strong Bonds retreat." Rather, CH Squires followed the expectations of his endorsing agency and DOD regulations by rescheduling the Strong Bonds event in order to ensure SGT [Name Redacted] and her spouse could attend. SGT [Name Redacted], for reasons unknown and either unexplained or unexplored by MAJ Ford made the decision not to attend;
- 10) MAJ Ford contradicted himself multiple times throughout the Report of Investigation.
 - a. First, MAJ Ford concluded that CH Squires "unintentionally" discriminated against SGT [Name Redacted].
 - b. However, he then concluded that CH Squires "knowingly" discriminated against her.¹ One cannot unintentionally and knowingly discriminate at the same time.
 - c. In addition, MAJ Ford acknowledged that CH Squires notified his senior chaplain. But he later alleged that CH Squires failed to notify his senior chaplain. Again, both assertions cannot be simultaneously true.

These facts, missing from MAJ Ford's report of investigation, are necessary for a complete understanding of what occurred, and in order to conduct a sufficient legal analysis. Because MAJ Ford either disregarded or failed to consider these facts, his Findings and Recommendations contain several fatal legal defects.

Legal Discrepancies and Deficiencies in the AR 15-6 Findings and Recommendations

The AR 15-6 Findings and Recommendations are defective for numerous reasons. They are unsupported by fact and/or law, and they must be disapproved and unsubstantiated. Any resulting adverse information must be removed from CH Squires' official record.

Chaplain Squires' conduct is protected by law

Although MAJ Ford's first report of investigation concluded that CH Squires unlawfully discriminated against SGT [Name Redacted] when he merely explained to her that he was unable to conduct a Strong Bonds event due to his ecclesiastical restrictions, MAJ Ford appears to have abandoned that conclusion in his second report of investigation. MAJ Ford now concludes that CH Squires unlawfully discriminated against SGT [Name Redacted] "by denying her and her wife the opportunity to attend a Strong Bonds retreat run and paid for by the United States Army." This conclusion is completely unsupported by the facts, as explained herein, and the law. Indeed, CH Squires' actions are protected by

¹ AR 15-6, para 2-8b(1) provides that the approval authority's decision to take further evidence must be "conducted under the provisions of the original appointing memorandum." Thus, both of MAJ Ford's Reports of Investigation must be considered as a single investigation under AR 15-6.

law and thus cannot constitute unlawful discrimination. By definition, when an act is protected by law, it cannot be an unlawful act.

According to CH Squires' ecclesiastical endorsing agency, the North American Mission Board ("NAMB"), "endorsed chaplains will not conduct or attend a wedding ceremony for any same sex couple, bless such a union or perform counseling in support of such a union . . . nor offer any kind of relationship training or retreat, on or off a military installation" Thus, according to NAMB policy, CH Squires is explicitly prohibited by his endorsing agency from conducting Strong Bonds events for same sex couples. And AR 165-1, paras. 1-6(b), 3-1(c), 3-2(b)(4), and 3-2(b)(5), each make clear that chaplains are required to adhere to the religious tenets of their ecclesiastical endorser. Thus, Army regulations and policy actually require that CH Squires not conduct Strong Bonds events that includes same sex couples. Furthermore, under federal law, DOD, and Army regulations, CH Squires' status as a restricted chaplain for purposes of same sex relationships may not be used as a basis for any adverse action.

Section 533(b) of the Fiscal Year (FY) 2013 National Defense Authorization Act (NDAA), Pub. L. No. 112-239,² is entitled "Protection of Chaplain Decisions Relating to Conscience, Moral Principles, or Religious Beliefs." It states "No member of the Armed Forces may:

- (1) Require a chaplain to perform any rite, ritual, or ceremony that is contrary to the conscience, moral principles, or religious beliefs of the chaplain; or
- (2) Discriminate or take any adverse personnel action against a chaplain, including denial of promotion, schooling, training, or assignment, on the basis of the refusal by the chaplain to comply with a requirement prohibited by paragraph (1)."

Department of Defense Instruction (DODI) 1300.17, Paragraph 4d, also states that "a Service member's expression of sincerely held beliefs may not be used as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment." DODI 130.17 incorporates the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, *et seq.* as the applicable legal standard when adverse action under these circumstances is contemplated. RFRA prohibits the government from substantially burdening a person's religious exercise absent a compelling government interest that is furthered by the least restrictive means. And, as stated above, AR 165-1, paras. 1-6(b), 3-1(c), 3-2(b)(4), and 3-2(b)(5), require chaplains to adhere to the religious tenets of their ecclesiastical endorser. Accordingly, CH Squires' actions were both required and protected.

² <https://www.congress.gov/112/plaws/publ239/PLAW-112publ239.pdf>

Remarkably, although MAJ Ford recognized that CH Squires complied with federal law and military regulations, he erroneously concluded that SGT [Name Redacted]' right to attend a Strong Bonds event conducted by CH Squires supersedes federal law and military regulations. MAJ Ford relies on Army Equal Opportunity policy as support for his conclusion. Service-specific policy can *never* supersede federal law such as the NDAA, or superior authority such as DODI 1300.17. Thus, MAJ Ford should have concluded that the restrictions placed on CH Squires, and the aforementioned authorities, dictate one outcome: an unsubstantiated EO complaint on the basis that CH Squires complied with the law and the requirements of his ecclesiastical endorser.

MAJ Ford's finding that CH Squires violated Army EO policy is incorrect

MAJ Ford's finding that CH Squires violated Army EO policy is based on one erroneous conclusion: CH Squires denied SGT [Name Redacted] the opportunity to attend a Strong Bonds event. This finding is both factually and legally incorrect.

As a factual matter, it is beyond dispute that CH Squires afforded SGT [Name Redacted] the opportunity to attend a Strong Bonds event. SGT [Name Redacted], in fact, registered for the Strong Bonds event. For reasons either unexplained or uninvestigated by MAJ Ford, SGT [Name Redacted] voluntarily decided not to attend. And applying the law to these facts, it is also clear that there was no violation of Army EO policy.

AR 600-20, Para 6-2 provides the Army's EO policy: "The U.S. Army will provide EO and fair treatment for military personnel and Family members without regard to race, color, gender, religion, national origin, and provide an environment free of unlawful discrimination and offensive behavior." This language is consistent with the DOD EO policy as provided in DOD Directive 1020.02E, which establishes DOD-wide EO policy. Under DOD Directive 1020.02E, "unlawful discrimination" is defined as disparate treatment "based on a prohibited factor contrary to federal law or regulation."

Importantly, there is neither allegation nor evidence that CH Squires failed to act with respect or professionalism at any time during his communications with SGT [Name Redacted] about his inability to facilitate the Strong Bonds event. CH Squires' actions were the direct result of his restricted status, pursuant to NAMB's tenets and chaplain policy. And, as discussed above, CH Squires' fair and respectful treatment of SGT [Name Redacted] was, even if disparate, not "contrary to federal law or regulation." Quite the opposite. CH Squires' actions under these circumstances are *protected* by federal law and regulation and reflect the dedication to duty that has characterized his entire career. For example, MAJ Ford pointed out that CH Squires treated SGT [Name Redacted] differently than he treated other members of the command when it came to the Strong Bonds event. The different treatment MAJ Ford alleged was the direct result of CH Squires' restrictions as a NAMB-endorsed chaplain. And because CH Squires' adherence to those restrictions is required, his difference in treatment cannot be unlawful under the circumstances.

Therefore, you must disapprove MAJ Ford's findings, conclusions, and recommendations with respect to the allegation that CH Squires violated Army EO policy.

MAJ Ford's finding that CH Squires was derelict in his duties is incorrect

According to MAJ Ford's Report of Investigation, his finding that CH Squires was derelict in his duties has two bases: 1) CH Squires failed to notify the command responsible for the event; and 2) CH Squires failed to notify his technical chain of command regarding a Soldier in need of services he was unable to perform.

But these findings are belied by MAJ Ford's own investigation. In his initial Report of Investigation, MAJ Ford acknowledged that, "after meeting with SGT [Name Redacted], CH Squires had a discussion with CH (LTC) [Richard] Winchester to discuss courses of action if SGT [Name Redacted] did register for the event." And in paragraphs 2v and 2w of his 1 August 2018 Report of Investigation, MAJ Ford again acknowledged that CH Squires met with CH Richard Winchester to "develop[] multiple COAs." Finally, as stated above, CH Squires immediately notified COL Kornburger of his ecclesiastical restriction after discussing the matter with SGT [Name Redacted].

It also appears that MAJ Ford based his dereliction of duty finding on an obscure training vignette derived from the publication "Chaplain Activities in the Post-DOMA Environment." But Under Article 92, UCMJ, in order to be derelict, there must first be an imposed duty. *United States v. Pugh*, 77 M.J. 1 (C.A.A.F. 2017). The cited examples of how such a duty may be imposed include: treaty, statute, regulation, lawful order, standard operating procedure, or service custom. *Id.* A training vignette does not come close to imposing a duty for purposes of Article 92, UCMJ.

Moreover, MAJ Ford conceded that, in the course of his investigation, he determined that the Army Chaplain Corps does not maintain records of whether and how frequently it trains its chaplains, and that there were no known trainings on the treatment of same sex couples in the current fiscal year, resulting in an "absence of formalized training." Such an absence of training thus undermines MAJ Ford's conclusion that CH Squires was derelict in his duties.

It cannot be overstated that it is a legal impossibility for one to be derelict in their duties when they have fully complied with federal law and DOD regulations. Accordingly, MAJ Ford's finding that CH Squires was derelict in his duties is both factually and legally incorrect, and must be disapproved.

Procedural defects and evidence of impermissible bias in the investigation

In addition to the factual and legal errors discussed herein, this entire process has been tainted by the following irreconcilable procedural defects, and MAJ Ford's impermissible anti-religious bias.

First, when MAJ Ford concluded that CH Squires engaged in conduct that violated Article 92, UCMJ—a punitive article—it became his immediate obligation to advise CH Squires of his rights under Article 31b, UCMJ. Yet, there is no evidence in MAJ Ford’s Report of Investigation that he provided any such rights advisement.

Second, during the course of my representation of CH Squires, I was informed on numerous occasions that the Army refused to recognize me as counsel for CH Squires. Despite my assurances that I do, in fact, represent CH Squires, counsel for the Army, a MAJ Justin Nottingham, refused to recognize me as such, and even went so far as to direct detailed military defense counsel to “proceed as if” there were no civilian defense counsel. Such conduct constitutes an interference with the attorney-client relationship, and would typically give rise to a professional responsibility complaint to the offending attorney’s state bar. Much to my shock and surprise, however, when I attempted to notify MAJ Nottingham’s state bar of his unethical conduct, I discovered that he was not a member of the bar in good standing. Thus, the very Army JAG who refused to recognize me as counsel was himself not authorized to practice law under the UCMJ.

Finally, MAJ Ford’s Report of Investigation exhibits impermissible bias in the form of anti-religious hostility. His dubious claim that CH Squires is using the “‘shield’ as a ‘sword’ to cut off the rights of another” appears to be drawn directly from language frequently espoused by outside advocacy groups motivated by a political agenda rather than by mission accomplishment and troop welfare. For example, the People For the American Way (PFAW), who describes itself as a “progressive advocacy organization founded to fight right-wing extremism,” published a 2015 article entitled “Religious Liberty: Shield or Sword.”³ Similarly, in 2016, Kelley Damerow, former interim Executive Director for the Secular Coalition for America, co-authored an article entitled “Religious Liberty is a Shield and Not a Sword.”⁴ MAJ Ford’s choice of words to describe CH Squires and the NAMB denominational beliefs draws obvious and disturbing parallels with those used by PFAW and Ms. Damerow. As a result, there is a substantial likelihood that MAJ Ford manifests an impermissible hostility towards religion—conservative Christianity in particular, perhaps—that has no place in the United States Army.

Adverse action is unwarranted and inappropriate

Despite the fact that MAJ Ford recognized there are substantial mitigating factors, coupled with his conclusion that CH Squires’ discrimination was “unintentional,” MAJ Ford nonetheless recommended that CH Squires be subjected to administrative or non-judicial punishment. MAJ Ford then took the outrageous and extraordinary action of opining that CH Squires’ efforts to reach out to SGT [Name Redacted] and explain his limitations were unnecessary and violated Army EO policy. Yet, MAJ Ford appears to

³ <http://www.pfaw.org/report/religious-liberty-shield-or-sword/>

⁴ https://www.huffingtonpost.com/harry-knox/post_9703_b_7702140.html

have intentionally refused to explain how CH Squires' efforts in this regard—efforts to treat SGT [Name Redacted] with professional respect and dignity—violate Army policy.

Any adverse action under these circumstances is unwarranted and unlawful. As explained above, taking adverse action against a chaplain as a result of a refusal to do something contrary to his/her sincerely held religious beliefs violates federal law.

Adverse action is also inappropriate. Despite his erroneous findings and inappropriate recommendations, MAJ Ford recognized that CH Squires had no intent to discriminate. He also recognized that the Army failed to provide clear guidance or training on how to handle these matters. This is reflected in his recommendation that the Army Special Warfare Center and School develop a specific policy to address this situation. Even assuming the law did not protect CH Squires' actions, which it does, it would be a profound miscarriage of justice to punish a Soldier who nevertheless accomplished the mission.

Any adverse action would tarnish the career and reputation of a stellar officer and Soldier. As you are well aware, a reprimand would likely foreclose any opportunity for CH Squires to promote or compete for sought-after assignments.

Apparent conflict between Army Equal Opportunity policy and chaplain guidance

MAJ Ford is correct that the Army provides little guidance to commanders and Soldiers who are confronted with competing rights and interests in a diverse, pluralistic 21st Century Army. But, as explained herein, the Army *does* provide explicit guidance to chaplains when it comes to strict adherence to the tenets of their ecclesiastical endorsers. AR 165-1 makes clear that chaplains are required to adhere to the religious tenets of their ecclesiastical endorser or they risk losing their endorsement.

Army EO policy rightly protects the right of Soldiers to be free from unlawful discrimination. At the same time, the Army protects the religious liberties of its chaplains. But when an Army EO policy is in apparent conflict with rights that are enshrined in our Constitution, federal law, and DOD policy, the Army EO policy must yield to those superior legal authorities.

Finally, there is no actual conflict between law and policy here. Federal law and Army policy both make clear that chaplains must remain faithful to the tenets of their faith. The failure of a chaplain to do so exposes the chaplain to risk of losing their ecclesiastical endorsement, or worse, violates the aforementioned federal law and policy. And, as discussed above, DOD EO policy only prohibits disparate treatment that is contrary to federal law or regulation. Indeed, CH Squires' actions here are fully protected by *both* federal law and regulation.

Conclusion

For the foregoing reasons, we respectfully request you take the following actions:

- 1) Disapprove MAJ Ford's finding of unlawful discrimination against CH Squires;
- 2) Unsubstantiate the EO complaint; and
- 3) Ensure that any adverse or unfavorable information relating to the EO complaint is not included in CH Squires' service record.

We continue to desire to resolve this amicably, and I am willing to discuss this matter in person, if necessary. Should you deny this request, however, we are prepared to take the necessary legal actions to vindicate CH Squires' legal rights. I may be reached via e-mail at mberry@firstliberty.org.

Sincerely,



Michael Berry
Deputy General Counsel