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Mr. Gregory D. Ford
Director
United States Army
Criminal Investigation Division
27130 Telegraph Road
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Via email – Gregory.d.ford26.civ@army.mil

Re: CID's G-RAP Debacle.

Director Ford:

Recent media reports state that you have directed a review of CID cases related to the Guard Recruiting Assistance Program (G-RAP) and Army Reserve Recruiting Assistance program (AR-RAP). As an Attorney who has been helping traumatized Soldiers deal with the G-RAP / AR-RAP[1] debacle since 2015, this is welcome news! As you might guess, there is great skepticism that another review by CID agents, applying the same faulty assumptions will produce anything more than the same flawed conclusions.

The purpose of this letter is to provide you some background to assist you in your evaluation of these cases and to offer some important recommendations. You can save time and resources if you carefully consider the information below. In short, you don't need CID agents to re-investigate, you need a competent criminal law attorney to advise you on the law.

1. THE G-RAP FUNDS AT ISSUE IN THE INVESTIGATIONS WERE NOT GOVERNMENT PROPERTY AND THEREFORE NONE OF THE FORMER RECRUITING ASSISTANTS SHOULD BE TITLED FOR THEFT OF GOVERNMENT FUNDS (OR RELATED OFFENSES).

Recruiting assistant's (RAs) were paid by Docupak, from Docupak bank accounts, with Docupak funds. As a matter of law, there can be no theft of government funds. If there can be no theft

[1] For simplicity, I refer to all cases as G-RAP cases herein.

of government funds, there can be no probable cause to believe government funds were stolen. If there is no probable cause, all of the former RAs should be untitled immediately.

A federal appeals court has reached this exact same conclusion in the *Osborne* case discussed below. Since the government did not appeal this decision, you're obligated to adhere to this decision and follow the law[2].

The 6th Circuit Federal Court of Appeals has carefully evaluated G-RAP and the relationship between the government, the private contractor that administered the program (Docupak), and the Recruiting Assistants. *See*, *U.S. v. Osborne*, 886 F 3d 604 (6th Cir Mar. 29, 2018).[3]

In its decision, the Court considered allegations for Larceny of Government Funds (18 USC § 641) and held that the government failed to retain sufficient supervision and control over the G-RAP funds for the funds to retain their federal character. *Osborne*, 886 F 3d at 617. Simplified, Recruiting Assistants were paid out of Docupak accounts with Docupak money.

All of the Recruiting Assistants participated in G-RAP as independent contractors for Docupak and was not employed by the government when acting in their capacity as an RA.

The Court made clear that an RA's performance under G-RAP was "largely extra-governmental" – reversing a conviction, and vacating a sentence, based on alleged violations of G-RAP rules. *Id.* Finding that no reasonable jury could have determined that the funds were something of value to the government. *Id.*

The court cited Docupak materials which made clear that G-RAP and the National Guard were separate:

> [T]here were no federal regulations governing the G-RAP program. The basis for the government's relationship with Docupak [were] task orders, not statute or regulation. There were no Air Force Instructions[4] or Regulations promulgated regarding any of the 'rules' for the G-RAP program. There were no statutes or regulations providing a punishment for any violations of the 'rules.' *Id.*

An RAs "actions in a G-RAP capacity are independent of [the RA's] role as a member of the [] National Guard and *have no impact* on [their] military status." *Id.* (emphasis added). RAs

[2] Your attorneys will explain that the *Osborne* decision is only binding in the 6th Federal Circuit. However, continuing to ignore *Osborne* or limiting corrective action to former RAs within the 6th Circuit territory can only lead to the reputation of your agency to be further diminished.

[3] We've cited *Osborne* in dozens of un-titling petitions. Only one un-titling petition was granted (after initially being denied) and in that case there was literally no evidence of any misconduct. I point this out to explain that your un-titling process is broken.

[4] While the case considered an RA participating in G-RAP through the Air National Guard, Docupak administered all G-RAP programs including the Army National Guard's program which is at issue here.

did not report to any kind of military chain of command and Docupak was the sole contact for any issues arising from G-RAP. *Id.* The rules on which the alleged violations rest, were not "government mandated rule[s], but instead [] rule[s] imposed by Docupak." *Id.*

"There is little to no evidence suggesting that the agreements between Docupak and the RAs were of a governmental nature." *Id.*

The entire basis of the allegations against RAs set forth by your agency rely upon Docupak generated rules, not rules promulgated by the government. In other words, any violation of the rules would implicate an employer – employee dispute between Docupak and the RA. The Federal Government failed to retain an interest in the program sufficient to be a "victim" as proposed by CID allegations.

It's important to note that the government did not appeal the *Osborne* decision. To continue to title RAs and create criminal histories, knowing a federal appeals court rejected CIDs theories is massive bureaucratic arrogance. Your agency, in effect is saying "we know better than the judges on the 6th Circuit bench", and "we're above the law." This is the exact same arrogance that has led your agency to be held in such low regard.

2. CID DID NOT HAVE JURISDICTION TO INVESTIGATE RAs FOR THE ALLEGED OFFENSES.

Since the *Osborne* court determined the money involved was Docupak's money, and since the RAs were civilians, your agency did not have legal jurisdiction to conduct the investigations in the first place. Your agents violated the law.

RAs worked for Docupak in their off-duty, *civilian status*. In fact, G-RAP guidelines prohibited participants from wearing their uniform or conducting activities during drill. At no time did any Recruiting Assistant's actions fall within the scope of the UCMJ.

Despite this fact, in the majority G-RAP CID offense reports, the alleged offenses listed are actions under the Uniform Code of Military Justice (UCMJ). When not in civilian status, the RAs were in their National Guard, Title 32 status – also not subject to the UCMJ.

Worse yet, the actions of CID in G-RAP cases violated the Posse Comitatus Act. Title 18 USC § 1385, known as the Posse Comitatus Act, prohibits an active component of the military from being used to enforce laws *other than* the UCMJ. Specifically:

> Whoever, except in cases and under circumstances ***expressly*** authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both. (emphasis added).

While this concept has been clarified since its inception, for example, extending to the Navy and Marine Corps and permitting exceptions for the Inspector General (IG) – its premise holds true. *See, e.g.*, 10 USC § 375; DoDI 3025.21. Executing the laws includes search or seizure, arrest, and use of military personnel as investigators or interrogators. DoDI 3025.21.

CID's investigators were operating outside the scope of their authority when they investigated G-RAP violations.[5] At all relevant times, the RAs were civilians, not subject to the UCMJ. CID had no authority to investigate non-UCMJ offenses, and the property at issue was not government property.

3. THE SECRETARY OF THE ARMY HAS ALREADY RULED G-RAP PARTICIPATION SHOULD NOT BE HELD AGAINST FORMER RAs.

In June, 2019, Secretary of the Army Mark Esper (later Secretary of Defense) Mark Esper analyzed G-RAP in the context of a promotion review board. Secretary Esper stated:

> **"[Redacted][6] like many others was involved in G-RAP, a program with unclear guidance that changed several times over the years. The circumstances surrounding G-RAP are too unclear to prove malice and blame on any one participant."**

The fact that former RAs remain titled, indexed, and have criminal histories after this determination by the Secretary of the Army is abhorrent. Your agency is comprised of rogue cowboys who think they know better than the Secretary of the Army.

4. ARMY CID CONTINUES TO VIOLATE THE LAW BY CREATING FALSE NCIC CRIMINAL HISTORY ENTRIES.

Your agents have created NCIC criminal history entries on former RAs who were never arrested, charged, prosecuted, convicted or incarcerated. Your agency may have the authority to create NCIC entries, but you don't have the authority to create false entries or make up facts. Almost none of the G-RAP victims were actually arrested. As you know, if they were arrested there would be a paper trail starting with a probable cause affidavit submitted to a federal judge. And yet, your agents, operating above the law, have created hundreds of NCIC entries stating that the former RA was arrested or received into custody.

[5] I have no illusion that any CID agents will be held accountable for violating PCA.
[6] The Esper memo related to a Promotion Review Board involving one of my clients.

I assume you're aware that 18 U.S.C. Section 1519 makes it a crime to make a false entry in a government record. And yet your ungovernable agents, operating with impunity are violating the law every time they make one of these fraudulent criminal histories. I have no illusion that anyone will ever be held accountable for all the trauma and heartache these deceitful records have created for the G-RAP victims.

I recognize you're relatively new to your position, and that you were appointed to fix a broken, unprofessional organization. You may not have a full grasp of the scale of the G-RAP debacle and CID's flawed investigations. I'm attaching a couple of articles that will provide insight into how CID have ruined the lives of so many former Soldiers.

The examples contained in this letter are just some of the most glaring problems with G-RAP. These examples are all you need to finally end this nightmare for thousands of Soldiers and former Soldiers.

I'm happy to meet with you or your team to discuss this obscene miscarriage of justice in greater detail. However, since this entire nightmare is wrong as a ***matter of law. So, once again I urge you to seek competent legal guidance.***

Thank you for your serious consideration of this very tragic situation.

Respectfully,

Doug O'Connell

cc:
Representative Michael Waltz, US House of Representatives,
Ms. Elizabeth Ullman,
The Honorable Christine Wormuth,
General James McConville,
Mr. Guy Surian,
SA William Stakes,
BG David Mendelson.