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10TH MOUNTAIN DIVISION (LIGHT INFANTRY)
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AFDR-BEA-JA

9 September 2016

MEMORANDUM FOR Commander, 10th Mountain Division Sustainment Brigade, Fort Drum, New York 13602

SUBJECT: Legal Review – Line of Duty Investigation Regarding the Injury to SSG Anastasha Clarke

1. In accordance with AR 600-8-4, paragraph 3-9b, I conducted a legal review of the investigation into the facts and circumstances surrounding the alleged motorcycle accident involving SSG Anastasha Clarke, and resulting in her injury, on or about May 21, 2016.
2. I find the proceedings comply with legal requirements. There are no legal errors that result in a material or adverse effect on any individual's rights. The determination of the investigation is supported by substantial evidence, and lack of contradictory evidence. There do not appear to be any potential claims arising out of this event. The Appointing Authority is neither bound nor limited by the IO's findings and recommendations.
3. AR 600-8-4, Appendix B, para. B-1 states, in part, "Injury, disease, or death directly caused by the individual's misconduct or willful negligence is not in line of duty. It is due to misconduct." Accordingly, conduct that is concluded to be either misconduct or willful negligence is not in the line of duty. The IO found, and the evidence supports that SSG Clarke engaged in misconduct by evading police, riding at an excessive and unlawful speed, and driving recklessly in a fashion that endangered the safety of other drivers.
4. AR 600-8-4, Appendix B, para. B-2 states, in full, "Mere violation of military regulation, orders, or instructions, or of civil or criminal laws, if there is no further sign of misconduct, is no more than simple negligence. Simple negligence is not misconduct. Therefore, a violation under this rule alone is not enough to determine that the injury, disease, or death resulted from misconduct. However, the violation is one circumstance to be examined and weighed with the other circumstances." The IO found, essentially, that while SSG Clarke did violate military rules regarding motorcycle safety, she also operated the vehicle without a license, "evaded police," and exceeded the speed limit.
 - a. AR 600-8-4, Glossary, Section II, defines simple negligence as "The failure to exercise that degree of care which a similarly situated person of ordinary prudence usually takes in the same or similar circumstances, taking into consideration the age, maturity of judgment, experience, education, and training of the soldier. An injury, disease, illness, or death caused solely by simple negligence is in line of duty unless it

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existed prior to entry into the Service or occurred during a period of AWOL (except when the soldier was mentally unsound at the inception of the unauthorized absence)."

b. AR 600-8-4, Glossary, Section II, defines willful negligence as "A conscious and intentional omission of the proper degree of care that a reasonably careful person would exercise under the same or similar circumstances is willful negligence. Willful negligence is a degree of carelessness greater than simple negligence. Willfulness may be expressed by direct evidence of a member's conduct and will be presumed when the member's conduct demonstrates a gross, reckless, wanton, or deliberate disregard for the foreseeable consequences of an act or failure to act. Willful negligence does not necessarily involve committing an offense under the UCMJ or local law." While this section indicates that willful misconduct "will be presumed" when the conduct is "gross" or "reckless," it does not state that "gross" or "reckless" conduct is either necessary or sufficient to reach a finding of willful negligence.

c. AR 600-8-4, Glossary, Section II, defines intentional misconduct as "Any wrongful or improper conduct which is intended or deliberate is intentional misconduct. Intent may be expressed by direct evidence of a member's statements or may be implied by direct or indirect evidence of the member's conduct. Misconduct does not necessarily involve committing an offense under the UCMJ or local law."

d. In the instant case, the IO concluded that not only had SSG Clarke violated civil law (e.g. unlicensed operator, speeding, no insurance, etc.), but that he mindfully and willfully violated the civil law leading up to the accident causing his injury. She knew, or reasonable should have known, that she was required to be licensed in order to operate a motorcycle on public roads. The IO found that SSG Clarke not only *merely* failed to meet the licensure requirement, but *deliberately avoided* it, by failing to pay fines assessed against her license and failing to appear in response to a summons issued by three counties.

e. The IO could have therefore concluded that because SSG Clarke willfully omitted the proper licensure before operating a motorcycle on a public road and reached a conclusion of willful negligence. Such a finding would cause the resulting injury to not be in the line of duty. However, the IO's conclusion that SSG Clarke intentionally engaged in misconduct that was the proximate cause of her injuries (e.g. operating without a license, speeding, driving in a reckless manner), is supported by a preponderance of credible evidence because the specific misconduct that SSG Clarke engaged in was directly tied to her ability to operate the motorcycle in a manner that was safe to herself and others.

5. AR 600-8-4, Appendix B, para. B-5, states, in part, "Injury or death incurred while knowingly resisting a lawful arrest, or while attempting to escape from a guard or other

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lawful custody, is incurred not in line of duty. It is due to misconduct.” The IO found that SSG Clarke evaded the police by speeding at an unlawful rate. The evidence supports that the manner in which SSG Clarke attempted to resist lawful custody was the proximate cause of her injuries.

6. AR 600-8-4, Appendix B, para. B-9, states, in part, “Injury or death because of erratic or reckless conduct, without regard for personal safety or the safety of others, is not in the line of duty. It is due to misconduct. This rule has its chief application in the operation of a vehicle but may be applied with any deliberate conduct that risks the safety of self or others.” The preponderance of credible evidence indicates that that SSG Clarke deliberately operated a vehicle on a public road without regard to her personal safety or the safety of other people who may have also been on that road. Riding at speeds between 70 and 100 MPH in a 35 MPH zone, fleeing from police, and forcing another vehicle into oncoming traffic on a bridge all indicate that SSG Clarke engaged in reckless conduct without regard for her personal safety or the safety of others.

7. For the above states reason, I find that the IO's finding that SSG Clarke's injury occurred “Not in the Line of Duty Due to Own Misconduct” is legally sufficient.

8. The POC for this memorandum is the undersigned at 315-772-6844 or david.c.collver.mil@mail.mil.

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