

## **OpJAGAF 2018/46, INSPECTOR GENERAL COMPLAINTS, 7 November 2018**

This opinion discusses whether failing to rate a member as “exceeding most, if not all expectations” must always be considered a personnel action (PA).

### **BACKGROUND**

The complainant was a witness and an anonymous complainant in previous IG complaints. Sometime after complainant’s previous communications with the IG, complainant was moved from one flight (P-flight) to another flight (I-flight) within the squadron. Unbeknownst to the complainant, SMSgt O (the first Responsible Management Official (RMO)) and CMSgt G were charged with two duties: (1) reallocating the members of the squadron, including complainant, to various flights based on the relative expertise of each Airman and the needs of the unit; and (2) identifying erroneous duty titles that needed correction. I-flight already had TSgt B in place as the NCOIC and although the complainant technically out-ranked TSgt B, TSgt B had more experience and received excellent reviews from a recent deployment.

Complainant filed an IG complaint claiming SMSgt O and/or Maj C (second RMO) improperly altered complainant’s duty title. Complainant alleged the changes occurred because of the previous protected communications (PC) with the IG. Additionally, complainant claimed her removal as NCOIC of P-flight, her move to I-flight, and the denial of NCOIC position of I-flight as further reprisals. Finally, complainant claimed the rating on her pending EPR was “downgraded” in reprisal for making protected communications.

The third RMO, Capt I, signed complainant’s EPR. Complainant’s EPR did not contain any derogatory comments or any “did not meet standards” ratings. In fact, Capt I marked complainant as “met all expectations” in Sections III, IV, and VI, and marked complainant as “exceeded some, but not all expectations” in Section V. Maj C concurred with Capt I’s ratings and comments and denied influencing Capt I. SMSgt O, Capt I, and Maj C all stated they had no knowledge of any PC’s prior to their respective interviews with the Investigating Officer (IO).

### **Law and Analysis**

When investigating allegations of reprisal, the IO must determine by the preponderance of the evidence that the complainant made a PC, received an unfavorable personnel action (PA), that the RMO knew of the PC, and that the RMO imposed the PA because of the PC.<sup>1</sup>

In this case, the IO found by a preponderance of the evidence that the complainant made PCs and that the PAs occurred, but concluded that none of the RMOs knew of the PCs at the time of the alleged PAs. Accordingly, the IO concluded that the allegation was not substantiated.

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<sup>1</sup> See Inspector General, Department of Defense, “Guide to Investigating Military Whistleblower Reprisal and Restriction Complaints,” dated 29 June 2015.

## **Personnel Actions (PA)**

DoDD 7050.06 defines a PA as any action that affects, or has the potential to affect, the member's position or career.<sup>2</sup> The PAs as alleged could qualify as potential PAs in a vacuum--both changes in duty titles and/or "downgraded" EPRs *could* be unfavorable actions under the right circumstances. However, in this case, before concluding the RMOs lacked knowledge of operative PCs, the IO should have first found the "downgraded" EPR did not qualify as a PA for two reasons.

First, complainant's allegedly "downgraded" EPR was not a referral and contained no derogatory comments nor damaging ratings. The ratings given by Capt I indicate complainant "met all expectations," and even "exceeded some, but not all expectations." Under AFI 36-2406, *Officer and Enlisted Evaluation Systems*, 8 November 2016, a rating of "met all expectations" indicates the rater (and additional rater) believe the ratee "meets established AF standards and expectations".<sup>3</sup> A rating of "exceeds some, but not all expectations," indicates the rater and additional rater believe the ratee "performs beyond most AF established standards and expectations."<sup>4</sup> It would not square with the plain language or intent of 10 U.S.C. § 1034 and the implementing guidance found in DoDD 7050.06 to consider someone who receives a rating "meeting (or exceeding) AF standards" is thereby also receiving an action that "negatively affects or has the potential to affect the member's position or career." This is particularly true in light of complainant's career.

Second, the "downgraded" EPR was not likely to affect the complainant's position or career in this particular case. Complainant was a technical sergeant with a date of rank of April 2009 who was heading into high year tenure (HYT). Complainant mentioned the intention to retire unless complainant was promoted to Master Sergeant. Accordingly, because of this complainant's documented performance history, the preponderance of the evidence shows this EPR was not likely to affect her ability to promote.

## **Conclusion**

In closing, while downgrading a member's performance report can certainly constitute a PA, one must look at the actual markings in the EPR as well as the likely effect the EPR will have on that particular member's career before making this determination. In this case, the ratings the complainant received did not constitute a "downgraded" OPR. In addition, the EPR was unlikely to have an effect on this member's career given her past performance issues.

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<sup>2</sup> See DoDD 7050.06, *Military Whistleblower Protection*, Part II.

<sup>3</sup> See AFI 36-2406, Table 4.2, Item 14.

<sup>4</sup> See AFI 36-2406, Table 4.2, Item 14.