

TOPIC

Inspector General (IG) Complaints Inquiries

This opinion discusses whether filing a complaint with local law enforcement constitutes a personnel action (PA), as well as what actions an Investigating Officer (IO) should take when a new allegation arises during an inquiry into an IG complaint. This is based on a recent IG case where a complainant alleged a commander's criminal complaint to the local police department was reprisal for complainant making a protected communication. In this case, the IO incorrectly identified the commander's criminal complaint with local law enforcement as a personnel action. Additionally, the IO erred in not further evaluating a new potential allegation that was discovered during the course of the investigation.

BACKGROUND

The complainant and complainant's family began socially interacting with a group commander and the group commander's family. Over time, the relationship became strained and eventually deteriorated after the complainant's daughter accused the commander's daughter of cyber-bullying. The relationship worsened when the spouse of the commander accused the complainant's spouse of making an obscene gesture at the base commissary. Shortly thereafter, the commander received an anonymous text, which prompted the commander to file a complaint with the local civilian police department, alleging the text came from complainant's spouse.

The complainant sought assistance from complainant's immediate chain of command, the wing Staff Judge Advocate (SJA), and eventually, the wing IG. On the day of the complainant's initial IG appointment, the commander, who had been made aware the complainant was likely to initiate an IG investigation, repeatedly called the IG office, asking whether complainant had made a complaint. IG refused to disclose that information. Subsequently, complainant met with IG and formally alleged the commander was reprising against complainant. Later, the commander's spouse alleged the complainant was "stalking" them by standing outside their on-base home. A couple of days later, the commander and commander's spouse filed a police report with the local police department regarding the "stalking" allegation. As a result of this report, the local civilian court issued an arrest warrant for the complainant and the complainant's spouse. The stalking allegation was subsequently dismissed for lack of evidence.

During the investigation, the complainant informed the IO that the commander also attempted to have the complainant and his spouse arrested for violating a civilian restraining order. However, the IO responded, "That's a separate piece to what I'm investigating now." As a result, this potential PA was never investigated.

Law and Analysis:

What constitutes a PA?

DoD Directive (DoDD) 7050.06, *Military Whistleblower Protection*, defines a PA as any action taken on a service member that affects, or has the potential to affect, the member's position or career. In this case, the IO identified the commander's actions in support of his spouse's complaint to the local police department as a "PA." This was incorrect for two reasons.

First, the alleged action did not qualify as a PA as defined by the statute or the interpreting DoDD 7050.06. A PA must have a military nexus; the DoDD lists only *military* personnel actions as examples of possible personnel actions. Allowing a wholly *civilian* action to constitute a PA unreasonably broadens the definition of a PA beyond what Congress intended 10 U.S.C. § 1034 to address (i.e., *military* actions). To that end, the NAF SJA stated they did not believe the commander was in a position to effect the alleged PA. HAF/JAA has previously opined that recommending a potential negative action to an unrelated authority, which also does not come to pass, is insufficient to constitute a PA.¹

Second, the evidence in this case indicates that the arrest itself will not affect the complainant's career. Under the applicable state law, an arrest that does not result in an adverse adjudication can be expunged upon petition of the arrested party. In this instance, the stalking allegation was dismissed by the local court via *nolle prosequi*. Complainant needs only to file a petition for expungement as directed by state law. Any testimony or evidence from the various witnesses about the *potential* effect the arrest *may* have on complainant's security clearance or Air Force career (without questioning the potential of expungement) is purely speculative.

What should an IO do when a new allegation arises during their inquiry?

Under AFI 90-301, *Inspector General Complaints Resolution*, paragraph 3.42.1.1, "the complainant is a key witness who must be interviewed first to clarify allegations and focus the investigation." In this case, the IO dissuaded the complainant from explaining a potential additional PA during their interview. The complainant discussed how the commander and commander's spouse may have been seeking to get complainant arrested again for allegedly violating a restraining order. The IO responded, "That's a separate piece to what I'm investigating now." By advising the complainant that the subsequent action would not be investigated, the IO failed to comply with AFI 90-301. The IO should have further developed the possible allegation, and then, if appropriate, petitioned the Appointing Authority to add it as an additional allegation.

¹ See OpJAGAF 2008/9, 11 Apr 08, at 14

Conclusion:

In closing, as a general matter, filing criminal complaints outside the Air Force is not considered a PA as defined by DoDD 7050.06 and 10 U.S.C. § 1034. Additionally, when a new allegation arises during an IG inquiry, the IO should further develop the possible allegation, and then, if appropriate, petition the Appointing Authority to add it as an additional allegation.

OpJAGAF 2018/45, 7 November 2018