

TOPIC

This opinion discusses when IG complaints made by a dual-status technician in their civilian capacity can constitute a PC. In this case, the investigating officer (IO) incorrectly determined a union grievance filed by a dual-status technician while in her civilian employment did not constitute a PC. As a result, he did not analyze whether the personnel action (PA) taken against the Complainant after the PC constituted reprisal. However, based on the unique facts of this case, we believe the union grievance was a PC and the IO should have conducted additional analysis to determine whether the elements for reprisal were met.

BACKGROUND

Complainant is a dual-status technician serving in a Security Forces squadron. As a member of the squadron, Complainant lodged several complaints against her unit leadership and other members of her unit, in both her military and civilian capacity. Among her complaints was a union grievance she filed in her capacity as a civilian employee, alleging "repeated bullying and harassment by ... supervisors" and a failure of management "to protect...employees" stemming from perceived inappropriate actions of lower-level supervision. After Complainant submitted her union grievance, her unit assigned her to gate duty. Complainant believed her new duties were not commensurate with her rank and that she was moved in reprisal for her union grievance. While the IO correctly identified Complainant's communications with the base IG office as a PC, the IO concluded Complainant's union grievance did not constitute a PC. For the reasons discussed below, we disagree.

LAW AND ANALYSIS

Protected Communications (PC)

In investigating an allegation of reprisal, the IO must determine by the preponderance of the evidence that the complainant made a protected communication (PC), received an unfavorable personnel action (PA), that the responsible management official (RMO) knew of the PC, and that the RMO imposed the PA because of the PC.¹

DoDD 7050.06, *Military Whistleblower Protection*, defines a PC as either any communication to a member of Congress or an IG, or any communication where the complainant communicates or prepares to communicate a reasonable belief identifying a violation of law or regulation, gross mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial and specific danger to public health or safety; or a threat by another service member that indicates a determination or intent to kill or cause serious bodily injury to Service members or civilians or damage to military, federal, or civilian property; to a member of a DoD investigatory body, a

¹ See Inspector General, Department of Defense, "*Guide to Investigating Military Whistleblower Reprisal and Restriction Complaints*," dated 18 Apr 17 (hereinafter "*DOD/IG Guide*").

person in the complainant's chain of command, or any person authorized to receive such communications.²

The IO failed to acknowledge Complainant's union grievance as a PC. As a dual-status member, the grievance was properly filed with an agency designated to receive such complaints in accordance with 10 USC §1034(b)(1)(B)(vi). Though law and policy remain unclear regarding whether a complainant in dual-status qualifies as a "member of the armed forces" to trigger the protections of 10 USC §1034, we find the unique circumstances of this case demand 10 USC §1034 protection. First, Complainant's dual-status as a civilian employee and guardsman took place within the exact same military unit. Second, Complainant properly alleged violations of law and/or regulation within Complainant's union grievance. Third, the facts and circumstances alleged in the union grievance were interconnected with other complaints Complainant lodged while in her military capacity. Finally, the alleged reprisal at issue took place while Complainant was in military status. To conclude the union grievance in this case did not amount to a PC would allow Responsible Management Officials (RMOs) to potentially reprise against dual-status members while serving in their military capacity for otherwise protected communications made while serving as a civilian. Such an unfortunate loophole would effectively render the law inapplicable to dual-status members.

CONCLUSION

In closing, under the facts of this case, Complainant's union grievance filed in her civilian capacity as a dual-status technician should have been considered a PC. Moreover, the IO should have analyzed whether any PA taken by Complainant's leadership after she made the PC constituted reprisal.

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² See DoDD 7050.06, Part II and Table.