

Personnel Actions (PAs)

This opinion discusses (1) whether a Letter of Counseling (LOC) is *per se* a PA; (2) whether an Enlisted Performance Report (EPR) containing all ratings above “Met all expectations” constitutes a PA; and (3) whether a complaint to supervisors about being scheduled for too many weekend shifts constitutes a Protected Communication (PC). While LOCs can constitute a PA for purposes of IG investigations, not every LOC is *per se* a PA. Instead, investigating officers (IO) must analyze to what extent the LOC has (or could have) an effect on the member’s career. In addition, in a case where a complainant’s EPR contained three “Exceeded some, but not all expectations” and two “exceeded most, if not all expectations” ratings, this is not automatically a PA. Finally, complaints to supervisors regarding working too many weekend shifts are not a PC, absent a showing the scheduling violated a law or regulation or constituted an abuse of authority.

BACKGROUND

Case A

Complainant was an NCO in the Commander’s Support Staff. She had a severely strained relationship with her superintendent. Complainant eventually reported the superintendent’s “toxic leadership” to her squadron leadership. Complainant also drafted a character letter on her own behalf and solicited support from coworkers and peers. She then presented this letter to her unit leadership. Complainant’s leadership was displeased with Complainant’s actions and issued her an LOC. The IO in this case concluded the LOC constituted a PA.

Case B

In this case, Complainant was a Military Training Leader. He felt he was unfairly scheduled to work more weekends than his peers by his assistant flight chief. Complainant elevated his concerns to leadership, who in turn directed the assistant flight chief to reform the schedule. The assistant flight chief also drafted and submitted Complainant’s EPR, which was concurred with, and endorsed by, the squadron commander. The EPR contained three “Exceeded some, but not all expectations” and two “Exceeded most, if not all expectations” ratings. Complainant believed the ratings were “less than favorable.” The IO concurred and determined the complaints about scheduling constituted a PC and the “mark down” on Complainant’s EPR was a PA.

LAW AND ANALYSIS

Protected Communications (PC)

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 of funds, abuse of authority, or a substantial danger and specific danger to public health or safety; or a threat by another service member that indicates a determination to harm or kill to a member of a DoD investigatory body, a person in the complainant's chain of command, or any person authorized to receive such communications.¹

In Case B summarized above, Complainant spoke with his supervisors regarding his displeasure with the superintendent scheduling him to work multiple weekends in a row. However, Complainant did not cite, and the IO did not discover or identify, any law or regulation that was violated by the scheduling decision. Moreover, Complainant did not allege the scheduling was the result of an abuse of authority. Consequently, the IO in that case was incorrect when he determined Complainant's communications to his supervisors were PCs.

Personnel Actions (PA)

DoDD 7050.06 defines a PA as any action that affects or has the potential to affect the member's current position or career.²

In Case A, the IO determined the LOC constituted a PA. As the Inspector General, Department of Defense, "Guide to Investigating Military Whistleblower Reprisal and Restriction Complaints," dated 18 Apr 17, states,

Investigators should review, on a case-by-case basis, complaints that involve **counseling** to determine whether they affect, or have the potential to affect, a Service member's current position or career. The same applies for locally held letters of reprimand, admonishment, instruction, or censure. (emphasis added).

While the LOC included language stripping complainant of supervisory duties, those same duties were returned to Complainant shortly thereafter, with no apparent or implied detriment to the individual's career. Accordingly, it is unclear how the LOC affected or *could* affect Complainant's career. While an LOC *could* be a PA in a given situation, it is erroneous to find all LOCs as PAs. For future cases, we recommend IOs (1) explore whether the LOC precluded Complainant from being submitted for any awards; (2) whether it impacted Complainant's EPR; (3) whether it affected Complainant's ability to earn any awards or decorations; and (4) whether the LOC could have precluded Complainant from promotion or receiving another positive career-enhancing move.

In Case B, the IO found the EPR constituted a PA because not every section was marked as "exceeded most, if not all expectations." According to AFI 36-2406, *Officer and Enlisted Evaluation Systems*, most Airmen should expect to receive "Met all expectations" ratings. Ratings above "Met all expectations" are to be limited to only the best, highest performers. AFI 36-2406 states that members receiving ratings "Exceeded some, but not all expectations" are performing "beyond most AF established standards and expectations."³ Members receiving ratings of

¹ See DoDD 7050.06, Part II and Table.

² See DoDD 7050.06, Part II.

³ See AFI 36-2406, *Officer and Enlisted Evaluation Systems*, dated 8 Nov 16, Table 4.2.

“Exceed most, if not all expectations,” are those performing at an even higher level than their peers, “far exceed[ing] AF standards and expectations, unique performer.”⁴

In this case, Complainant’s EPR contains all positive ratings above “Met all expectations.” While Complainant believed he should have been considered a “unique performer” across all ratings on his EPR, the evidence did not support this belief. Absent evidence that Complainant was, in fact, a unique performer whose performance far exceeded Air Force standards and expectations, the IO should not have found the EPR to be a PA.

CONCLUSION

In closing, a complaint to supervisors about shift scheduling is not a PC, absent evidence the communication was identifying a violation of a law or regulation or was alleging an abuse of authority. Additionally, LOCs should be considered PAs on a case-by-case basis. IOs must closely analyze the effect the LOC has (or could have) on the member’s career or current position before making this determination. Finally, an EPR with all ratings above “Met all expectations” is in fact a positive EPR, and absent evidence showing the Complainant’s performance far exceeds Air Force standards, should not be considered a PA.

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⁴ *Id.*