

TOPIC

Allegations of Reprisal identify all PCs, RMOs, use AFI in effect at time of alleged misconduct.

TEXT OF THE DECISION

We reviewed the referenced Inspector General (IG) Report of Investigation (ROI) as approved by the Secretary of the Air Force Complaints Resolution Directorate (SAF/IGQ). The case includes four allegations of reprisal against two Responsible Management Officials (RMO). The Investigating Officer (IO) and SAF/IGQ concluded three allegations were **SUBSTANTIATED** and one was **NOT SUBSTANTIATED**.

BACKGROUND

Complainant filed an anonymous IG complaint¹ that alleged a toxic work environment, abuse of leadership, and bullying. This IG complaint resulted in a Commander Directed Investigation (CDI), directed by the group commander. The CDI involved three allegations against squadron leadership. One of the three allegations in the CDI was substantiated against all three named squadron leaders. Additionally, while not a separate allegation, the CDI noted that complainant and two other individuals contributed to a negative environment in the unit. Despite the substantiated finding, the group commander did not take formal action against any person as a result of the CDI; however, he did speak with the squadron commander in an effort to mentor her on issues that surfaced through the CDI.

In September 2015, complainant's commander moved complainant to the another section. Despite requests from complainant and her new leadership, the squadron commander refused to complete a change of rater for complainant to move her rating supervision to complainant's new supervisors. The element leader became complainant's supervisor on or about 1 Oct 14 and remained complainant's rating supervisor through complainant's 2016 rating period.

Complainant believed her squadron commander knew of her anonymous IG complaint and was treating her unfairly; as a result, complainant filed an IG complaint in February 2016. However, she withdrew the complaint in March. In a letter dated 17 Mar 16, a professional association notified complainant that she was selected for the 2016 professional association award.

On 28 Jun 16, complainant's former supervisor signed complainant's 2016 OPR, which covered complainant's performance from 8 Mar 15 to 7 Mar 16. The OPR did not contain a stratification and included a push line with the phrase, "groom for incrsd ldrshp opportunities." The OPR also failed to recommend a leadership position as a next assignment. On 19 Jul 16, complainant's squadron commander signed the OPR without a stratification or recommendation for a leadership job and contained a similarly subdued push line that included, "continue to challenge." While it

¹ While initially filed as anonymous, complainant believed a co-worker was being treated unfairly by leadership due to false assumptions the other individual had filed the complaint, at which point, throughout spring and summer 2015, complainant openly told co-workers that she had filed the complaint that led to the CDI.

is unclear whether squadron leadership reached out to complainant's new leadership to gather OPR information, complainant's new leadership credibly testified that they had included complainant in their OPR stratification and one commander was prepared to provide complainant a "#1/4 CGOs" stratification. Complainant's new supervisory leadership also provided favorable testimony regarding complainant's work performance in contrast to the unfavorable tone of the OPR as written by the subjects.

Complainant filed an IG complaint on 24 Aug 16 alleging reprisal through various actions by squadron leadership for making her IG protected communications.

GUIDANCE

10 U.S.C. § 1034 prohibits retaliatory personnel actions against service members who make Protected Communications (PCs). "No person may take...an unfavorable personnel action...as a reprisal against a member of the armed forces for making or preparing or being perceived as making or preparing [a PC]." ² The statute specifically defines who can receive PCs, ³ mandates that IGs investigate allegations of personnel actions taken in reprisal, ⁴ and provides a list of PCs that IGs "shall not exclude" from protection. ⁵ This list does not include communications not made by the person alleging reprisal. The Military Whistleblower Protection Act does not contemplate protecting anyone other than the person blowing the whistle, with the exception of those who later testify, participate, or assist in investigations, proceedings, or actions brought under the statute. ⁶ Department of Defense and Air Force Regulations reflect this framework and contain the same limitations. ⁷ The protections prohibit retaliation against individuals who make PCs.

DISCUSSION

Allegations not read verbatim to responsible management officials (RMOs)

The IO did not read the allegations verbatim to the subjects. Air Force Instruction 90-301, para. 3.3.2.2, (27 Aug 15, certified current, 8 Jul 16), provides that the IO must read the allegations verbatim to the subject/suspect. ⁸ This requirement is connected to AFI 90-301, para. 3.28, which recognizes that due process is provided in administrative investigations in the Air Force. In some circumstances this oversight may be more problematic; however, the IO provided the subjects with sufficient notice and detail regarding the allegations both at the beginning and throughout the interviews. The transcripts of the interviews are clear about the allegations against them and they provided thorough responses. In addition, regarding the squadron commander, the IO informed her that her interview was based on allegations that she reprised against complainant. The IO gave her Article 31 rights advisement and she was represented by counsel prior to and throughout the interview and investigation; the squadron commander's attorney was present for her to consult

² 10 USC §1034 (b)(1)

³ 10 USC § 1034 (b)(1)(B), broadened in AFI 90-301 under the authority of 10 USC §1034 (b)(1)(B)(vi)

⁴ 10 USC § 1034 (c)

⁵ 10 USC § 1034 (c)(3)

⁶ 10 USC § 1034 (b)(1)(c)

⁷ See DoDI 7050.06, para 3(a)-3(c) and AFI 90-301's definition of PCs

⁸ There are two applicable versions of AFI 90-301 since the dates of the unfavorable personnel actions (UPAs), 4 Aug 15 and 19 Jul 16, cover both versions of the AFI; the other AFI is the version dated 23 Aug 11.

throughout the interview. The IO also had an attorney present to provide legal counsel during the interview and investigation. Regarding the second subject, the IO informed her there was an allegation that she reprised against complainant. In addition, there is only one allegation against the second subject, and it was not substantiated. Therefore, the failure to read the allegations verbatim to the subjects met the basic requirements of due process, ensured a thorough and fair investigation and, therefore, the IO's failure to follow the recommended script for subject interviews and read the allegations verbatim did not affect the legal sufficiency of the investigation or findings and conclusions.

Identities of Complainant and RMOs revealed to witnesses

The IO revealed the identity of complainant and subjects to all of the witnesses, and told the witnesses that complainant was the individual who had filed the IG complaint that previously resulted in a Commander-Directed Investigation. AFI 90-301, para. 3.3 instructs that a "key goal" of the IG Complaints Resolution Program is to facilitate confidence in Air Force leadership through "assurance that an individual's privacy will be safeguarded to the maximum extent practicable" to encourage cooperation and "openness in identifying issues requiring leadership intervention." Furthermore, while IG communications are not privileged or confidential "disclosure of those communications (and the identity of the communicant) should be strictly limited to an official, need-to-know basis." In the instant case, the IO could have conducted a thorough investigation without revealing all the details that he revealed with witnesses who did not have a need-to-know the IG activity of the complainant. In the future, the legal advisor and IG should work to ensure the IO does not reveal more sensitive information about IG complainants than is necessary to conduct a thorough investigation. Although the IO made this error, it does not affect the legal sufficiency of the investigation, findings or conclusions.

Additional RMOs

The IO failed to identify certain individuals as Responsible Management Officials (RMOs) or subjects. Further, the IO made flawed statements regarding why certain individuals were not identified as RMOs. The IO stated, "Although these individuals had influence in the decisions made by the squadron commander, the final authority for the decisions rested with squadron commander." Attachment 1 of AFI 90-301 defines, "RMO" to include "officials who influence or recommend to the deciding official that he/she take, withhold, or threaten to take/withhold a management." The IO identified several individuals that possibly influenced or provided guidance to the squadron commander, including, the current and former group commanders, the current and former deputy group commanders, and the current and former wing commanders. However, as noted by SAF/IGQ in its addendum, the preponderance of the evidence does not support these individuals influenced or took any action in reprisal, and complainant did not allege reprisal against any of those individuals. Complainant only complained about the named two subjects in her complaint clarification interview and on her AF Form 102, *Inspector General Personal and Fraud, Waste & Abuse Complaint Registration*, dated 24 Aug 16. Therefore, while the IO's rationale for not investigating these individuals as subjects was erroneous, his decision not to investigate them as RMOs was warranted.

SAF/IGQ appropriately identified two potential RMOs worthy of further examination due to statements by the complainant. According to the complainant, the acting flight commander informed her that she was moving to the Operations Squadron and that it was going to be a positive move. The acting flight commander was not identified as an RMO, complainant did not allege she took any action or influenced any official based on reprisal, and the preponderance of the evidence supports she did not influence any official; rather, the acting flight commander was merely the individual who communicated to complainant a decision that had already been made by squadron commander. Therefore, acting flight commander is not an RMO.

In addition, the wing commander concurred and signed complainant's 2016 OPR as the Reviewer. The wing commander was not identified as RMO; however, because he signed and concurred on complainant's OPR, he is an RMO. Complainant did not allege wing commander knew about her PCs, nor that he took or influenced any action based on reprisal. The evidence does not suggest that the wing commander took more than an administrative role in complainant's OPR. Therefore, the preponderance of the evidence supports he did not reprise against complainant. The IO's failure to properly identify and analyze these individuals as RMOs did not impact the legal sufficiency of the investigation, findings or conclusions.

2015 OPR as UPA

In its addendum, SAF/IGQ identified that the 2015 OPR in the case file was a personnel action. However, because complainant did not allege this was an unfavorable personnel action based on reprisal in her AF Form 102 or in her complainant clarification interviews, investigation of this UPA was not warranted. Also, MAJCOM/IGQ noted on their Quality Review Checklist that when complainant filed in August 2016 she filed to dispute her 2016 OPR not her 2015 OPR. Therefore, this is not an error and does not affect the legal sufficiency of the investigation, findings or conclusions.

Wrong Version of AFI 36-2406

The IO cited the wrong version of AFI 36-2406, *Officer and Enlisted Evaluation Systems*. The IO cited the version dated 30 November 2015. However, since the UPA was dated 4 August 2015, this version would not have been in effect at that time. The correct version is dated 2 January 2013. However, there were no substantive changes between versions and the information used by the IO was substantially the same in both AFIs; therefore, this error did not affect the legal sufficiency of the investigation, findings or conclusions.

Additional Protected Communications (PCs)

In its addendum, SAF/IGQ notes that the case involved additional PCs that were not identified by the IO. The report and investigation reviewed the PCs for which complainant believed she was reprised and the PCs that impacted the UPAs. The overlooked PCs did not hinder the completion of a thorough investigation into the allegations. Therefore, the IO's oversight of additional PCs was inconsequential to the investigation and did not impact the legal sufficiency of the allegations, investigation, conclusions or findings.

IO Signature on ROI

SAF/IGQ also correctly identified that the IO did not sign the ROI; rather, he signed the appointing authority approval document. AFI 90-301, paragraph 3.51.1.1 states, “The IO must sign the report.” While this is a requirement of the AFI, the next paragraph requires the appointing authority to approve the report in writing. The appointing authority did approve the report in writing. The case file indicates the investigation was thorough and complete, and the ROI provided to SAF/IGQ for oversight is the final version. As such, the technical absence of the IO’s signature on the ROI, itself, does not affect the legal sufficiency of the ROI, investigation, findings, or conclusions.

CONCLUSION

The investigation complied with all applicable legal and administrative requirements. We concur with the ROI’s findings and conclusions that the allegations against the squadron commander are **SUBSTANTIATED** for reprisal and the allegation against complainant’s former supervisor is **NOT SUBSTANTIATED** for reprisal.

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