

INSPECTOR GENERAL

Legal Review Concerning Allegations of Reprisal

We have reviewed the above-referenced Inspector General (IG) Report of Investigation (ROI) and find it legally sufficient. The investigation included one reprisal allegation against one responsible management official (RMO). The allegation of reprisal was found to be not substantiated by the investigating officer (IO), and that finding was approved by the appointing authority. In accordance with (IAW) AFI 90-301, *Inspector General Complaints Resolution*, we find the ROI legally sufficient and concur with the IO's findings.

Procedural Background

Complainant was an Air National Guard (ANG) student pilot who attended the Euro-NATO Joint Jet Pilot Training Program (ENJJPT). ENJJPT is located at Base X.

On 6 Jan 10,¹ complainant made an IG complaint alleging a disproportionate number of ANG student pilots were eliminated from ENJJPT during the period of September 2008 to September 2009, due to the unequal treatment they received from instructor pilots (IPs).²

On 12 Apr 11,³ complainant made another IG complaint alleging reprisal against the Guard Advisor to the Numbered Air Force Commander (hereinafter referenced as the Guard Advisor), the Wing Commander, and the Training Squadron Commander.⁴ Complainant specifically alleged that the Guard Advisor negatively influenced a flying evaluation board (FEB) package that went to the National Guard Bureau (NGB) for final approval and that he told the Guard Liaison that he "made a deal" regarding complainant's status.⁵ The IO considered the allegation of a "deal" being made after the FEB. The documents and witness interviews did not provide any evidence of a "deal" between the Guard Advisor and anyone else regarding complainant.⁶ Complainant also alleged reprisal based on his 6 Jan 10 complaint, in which the Guard Advisor was named as the subject. It is undisputed that the Guard Advisor was aware of the IG complaint. The allegations regarding the Guard Advisor were transferred to the ANG Readiness

¹ The ROI "Background" section states the DoD IG Hotline complaint was made on 7 Jan 10. However, paragraph 5 references the same complaint being made on 6 Jan 10. One attachment to DoD HL Form 3 is the complaint dated 7 Jan 10. (Section III, Tab E-4) The attached complaint is not dated but the handwritten note on the complaint indicates it was filled 6 Jan 10. The complaint was also attached to an email from complainant to Hotline, DoD, dated 7 Jan 10. (Sec III, Tab E-8) The date of this complaint will be referenced on 6 Jan 10 throughout this legal review.

² Section III, Tab E-4

³ The ROI "Background" section states the DoD IG Hotline complaint was made on 11 Apr 11. However, a related case has the DoD IG Hotline complaint as an attachment and it was emailed to Hotline, DoD on 12 Apr 11. On 15 Sep 11, a complaint clarification interview was conducted. (Section III, Tab E-40) On 18 Sep 11, complainant filed an AF Form 102 with the same attachment that was emailed to Hotline, DoD on 12 Apr 11. (Section III, Tab E-33) The date of this complaint will be referenced as 12 Apr 11 throughout this legal review.

⁴ Section III, Tab E-33

⁵ Section III, Tab E-33, p. 6

⁶ Section II, Tab C, p. 12

Center on 9 Sep 11, in accordance with AFI 90-301, *Inspector General Complaints Resolution*, 23 Aug 11, Table 3.7, Rule 7.⁷

The allegations against the Wing Commander and Training Squadron Commander were reviewed by the MAJCOM IG. The MAJCOM IG completed a reprisal complaint analysis (RCA) and concluded the Training Squadron Commander's comments regarding complainant's character did not involve an unfavorable personnel action (UPA) and dismissed the allegation against him. The RCA addressing the allegation against the Wing Commander was forwarded to SAF/IGQ with a recommendation to dismiss the reprisal allegation. SAF/IGQ concurred with the recommendation on 23 Sep 11 and forwarded the case to DoD IG. On 6 Oct 11, DoD IG concurred that the Wing Commander did not reprimand against complainant.⁸

On 3 Oct 11, NGB/IG appointed the IO to conduct an IG investigation into all aspects of the facts and circumstances concerning the allegation that the Guard Advisor negatively influenced complainant's FEB package that went to the NGB for final approval and reprimanded against complainant.⁹

The IO completed this ROI on 19 Jan 12. NGB/JA completed a legal review on 10 Feb 12 and found the IO's investigation and corresponding determinations legally sufficient.¹⁰ On 18 Oct 12, SAF/IGQ tasked the IO to provide additional information for this case. The IO provided an addendum to the ROI on 5 Nov 12. On 17 Dec 12, NGB/IG approved the ROI findings. This legal review will address the ROI, with one reprisal allegation against the Guard Advisor.

Factual Background

Complainant was an ANG member on active duty orders to attend ENJJPT, which is conducted at Base X.¹¹ Complainant's home unit was in State Y. At the time of his attendance of ENJJPT, complainant was in training to be an A-10 pilot.¹²

Between 19 Aug 09 and 22 Sep 09, complainant failed five different training mission sorties while enrolled in Introduction to Flyer Fundamentals (IFF). The last sortie failure was on 22 Sep 09, the date of his scheduled graduation. On 26 Oct 09, the Wing Commander sent complainant a letter stating an FEB would be convened, based on his failures.¹³ The FEB convened from 12 to 14 Jan 10 at Base X. On 14 Jan 10, the FEB issued its written findings and recommendations.¹⁴ The FEB found complainant did fail to meet minimum standards for four of the five allegedly insufficient missions and recommended that complainant remain qualified and be reinstated in training. The board determined the remaining sortie was likely below average,

⁷ Section III, Tab E-15

⁸ Section III, Tab E-15

⁹ Section III, Tab D

¹⁰ Section III, Tab E-44, and Section I, Tab B

¹¹ Complainant was at Base X in flying training programs for 21 months immediately prior to filing the 6 Jan 10 complaint.

¹² Section III, Tab E-4, p. 1

¹³ The Wing Commander was also the convening authority. Section III, Tab E-41

¹⁴ The recommendations have been redacted from the 14 Jan 10 Flying and Recommendations Memorandum included in the ROI. Section III, Table E-9

but the instructor for this sortie had engaged in an unprofessional relationship with another trainee. The instructor was renting a room to another student and complainant believed the instructor failed complainant for this sortie so that the student renting the room could take his A-10 replacement training unit slot.¹⁵ Since complainant is in the ANG, he was guaranteed his slot and it could not be given to anyone else. However, the board determined the instructor's unprofessional relationship with another student created a perception of an inability to accurately assess complainant's performance.¹⁶

On 11 Feb 10, complainant's area defense counsel (ADC) filed an objection to the form and substance of the findings and recommendations as signed by the FEB members and requested relief for the severe violation of complainant's rights.¹⁷ The ADC argued the FEB's findings substantially prejudiced her client because the board made findings and recommendations without hearing all the evidence.¹⁸ On 16 Feb 10, civilian defense counsel submitted a request that the findings of the FEB be set aside, and all records of the FEB be either sealed or expunged, so as not to prejudice complainant.¹⁹

There was uncertainty about the FEB's findings because of the legal and procedural questions regarding the way the FEB was conducted. As a result, NGB/A30C "penciled in" complainant for the 21 May 10 IFF class. The purpose of this was to minimize the break in training if the FEB resulted in returning him to the IFF class. Approximately 30 days prior to the IFF class date, complainant was removed from the course because a final decision had not been made regarding the FEB's findings. Due to the length of time that had passed, complainant was not rescheduled for another IFF class because he would be required to re-qualify in the T-38 prior to IFF.²⁰

On 2 Apr 10, after a legal review by the Wing SJA,²¹ the Wing Commander (the convening authority) forwarded the FEB package to the Numbered Air Force Commander, with the recommendation that complainant be allowed to maintain his rating as a pilot but that complainant be re-tracked to a crew-type aircraft.²² On 3 May 10, the Numbered Air Force Commander was made aware of the courses of action available to him regarding the FEB. The courses of action included concurring or non-concurring with the FEB's recommendation and if he chose to non-concur, specifying the reasons; making a determination whether complainant was unsuited for duty in a particular aircraft, role or mission, and making recommendations as to follow-on assignments; or directing the FEB be reconvened or directing a rehearing if the board did not comply with AFI 11-402, *Flying Operations*, or new evidence was discovered. The Numbered Air Force Commander directed a rehearing of the FEB.²³

¹⁵ Section III, Tab D-1, p. 21, lines 21-22

¹⁶ Section III, Table E-31

¹⁷ Section III, Tab E-10, p. 2

¹⁸ Section III, Tab E-10, p. 2

¹⁹ Section III, Tab E-10, p. 5

²⁰ Section III, Tab E-32

²¹ Section III, Tab E-13

²² Section III, Tab E-14, p. 1

²³ Section III, Tab 17 (Memorandum of Record signed by the Numbered Air Force SJA)

On 25 Jun 10, the Numbered Air Force SJA emailed the civilian defense counsel and ADC in response to various objections they raised regarding the FEB. The Numbered Air Force SJA provided an option that would be in lieu of the rehearing. The Numbered Air Force SJA noted complainant was satisfied with the recommendation made by the board, but objected to the findings and believed they were prejudicial to him.²⁴ She asked if complainant would prefer to have the board's recommendations, minus the findings, forwarded through the review process for final decision by the Director, ANG (NGB/CF), instead of the rehearing.²⁵ The Numbered Air Force SJA explained each review authority would have the opportunity to add his/her own recommendations. This would allow complainant to submit new evidence for the reviewing authorities to consider. Selecting this option would require complainant to waive the prejudicial error assertions.²⁶ On 28 Jun 10, complainant submitted a waiver to the Numbered Air Force SJA accepting this proposed course of action and waived any and all errors that occurred during the FEB hearing.²⁷

On 12 Jul 10, per the agreement, complainant, through his counsel, submitted his response to the FEB, with several additional attachments for the Wing Commander to consider.²⁸ On 19 Jul 10, the Wing Commander again concurred with the FEB's recommendation that complainant maintain his rating as a pilot. He again disagreed with the board's recommendation to reinstate complainant into IFF and recommended complainant be re-tracked and afforded the opportunity to meet standards for a crew-type aircraft.²⁹

After the Wing Commander made his recommendation regarding the FEB findings, the package was forwarded to the Numbered Air Force Commander for his review and recommendation. On 23 Jul 10, the Numbered Air Force Legal Office provided a legal review to the Numbered Air Force Director of Operations, the Numbered Air Force Vice Commander and the Numbered Air Force Commander. The legal review included the modified FEB package, along with the Wing Legal Office legal reviews, the Wing Commander's recommendations, and the additional matters submitted by complainant and his counsel. The Numbered Air Force Legal Office determined the case complied with all procedural requirements and recommended the following courses of action for the Numbered Air Force Commander: Concur or non-concur with the FEB's recommendations, and if non-concur, specify the reasons; make a determination whether this officer is unsuited for duty in a particular aircraft, role, or mission and make recommendations as to follow-on assignments; or direct the FEB be reconvened or direct a rehearing if the board did not comply with AFI 11-402, *Flying Operations*, or new evidence is discovered.³⁰

As the ANG Advisor to the Numbered Air Force Commander, the Guard Advisor's position description on the NGB Form 28 states that he is to provide guidance to the Numbered Air Force Commander on ANG issues.³¹ After the Wing Commander made his recommendation but before the Numbered Air Force Commander made his recommendation to the NGB, the

²⁴ Section III, Tab 19

²⁵ This authority was delegated to NGB/A3. Section III, Tab E-6

²⁶ Section III, Tab E-20, p. 1

²⁷ Section III, Tab E-20, p. 4

²⁸ Section III, Tab E-39

²⁹ Section III, Tab E-22

³⁰ Section III, Tab E-23

³¹ Section III, Tab E-34

Numbered Air Force Commander asked the Guard Advisor for his recommendation regarding complainant's FEB package. The Guard Advisor testified that prior to making a recommendation on complainant's FEB package, the Numbered Air Force Commander said to him, ". . . I need you to look at that and I need you to tell me what we're going to do."³² The Numbered Air Force Commander told the Guard Advisor that because he (the Commander) was transferring from the Numbered Air Force Commander position, he would like to make the recommendation regarding complainant's FEB.³³ The Guard Advisor reviewed the information provided and advised the Numbered Air Force Commander that he had concerns and wanted to review additional tapes of complainant flying in IFF. After coordination with legal counsel, complainant provided additional tapes for review.³⁴ The Guard Advisor reviewed the additional tapes and determined complainant could fly fine in a C-130 or a C-17. However, he felt complainant could not fly a pattern and talk on the radio at the same time. He could not fly a pattern and take any kind of input from a flight-lead or instructor-pilot because things immediately became erratic.³⁵ The Guard Advisor agreed with the convening authority that complainant should be eliminated from IFF, but allowed to continue in another airplane.³⁶ The Guard Advisor's advice to the Numbered Air Force Commander "was that the convening authority was correct" and he should concur with the Wing Commander's recommendation.³⁷ On 12 Aug 10, the new Numbered Air Force Commander signed the AF IMT 1768, *Staff Summary Sheet*,³⁸ and recommended NGB/CF³⁹ non-concur with the FEB's recommendation and concur with the convening authority's recommendation.⁴⁰

On 3 Nov 10, the MAJCOM SJA recommended the entire FEB package be returned to the Wing Commander to complete a memorandum to address each allegation and determine if each individual allegation was substantiated or not. In addition, the memorandum needed to include language that the additional information submitted was considered and to what degree the additional information impacted the Wing Commander's findings and recommendations.⁴¹

On 18 Nov 10, the Wing Commander submitted his latest recommendations to the Numbered Air Force Commander IAW the instructions from the MAJCOM SJA. The recommendations from the Wing Commander were consistent with his initial recommendations regarding the FEB.⁴² The ROI does not provide any additional information regarding the Numbered Air Force Commander's involvement during this time. On 7 Dec 10, the MAJCOM SJA found the revised FEB report legally sufficient and recommended to the MAJCOM point of contact (POC) that the entire FEB package be forwarded through appropriate channels for final review and decision.⁴³

³² Section III, Tab D-2, p. 43, lines 16-17

³³ Section III, Tab D-2, p. 43, lines 12-13

³⁴ Section III, Tab D-2, p. 45, lines 15-20

³⁵ Section III, Tab D-2, p. 46, lines 16-22

³⁶ Section III, Tab D-2, p. 47, lines 11-16

³⁷ Section III, Tab D-2, p. 50, lines 19-22, and p. 51 lines 1-7

³⁸ There is no evidence in the ROI to indicate what information the new Numbered Air Force Commander was given regarding the FEB.

³⁹ The Staff Summary Sheet recommended NGB/CF non-concur; however, the authority had been delegated to NGB/A3. Sec III, Tab E-6

⁴⁰ Section III, Tab E-41, AF IMT 1768, 19840901, V5, dated 12 Aug 10

⁴¹ Section III, Tab E-26

⁴² Section III, Tab E-27

⁴³ Section III, Tab E-28

On 14 Dec 10, the MAJCOM POC recommended complainant remain qualified for aviation service and reassigned to a multi-place aircraft.⁴⁴ On 15 Feb 11, NGB/A3⁴⁵ non-concurred with the FEB's recommendation and concurred with the Wing Commander's recommendation that complainant be removed from IFF and remain qualified for aviation as a pilot.⁴⁶ On 5 Mar 11, NGB/A3 again non-concurred with the FEB's recommendation and concurred with the Wing Commander that complainant should not fly fighter aircraft and should pursue a career in a multi-crew aircraft.⁴⁷ On 12 Apr 11, complainant filed an AF Form 102, *Inspector General Personal and Fraud, Waste and Abuse Complaint Registration*, alleging reprisal. In the complaint, he stated complainant was made aware of the FEB results on 14 Feb 11.⁴⁸

Standards

The standard for substantiating allegations investigated by the IG is preponderance of the evidence. The preponderance standard means the IO is satisfied that the greater weight of the credible evidence supports his findings and conclusions. The weight of the evidence supporting a conclusion is not to be determined by the sheer number of witnesses or the volume of evidentiary matter presented, but rather by the evidence which best accords with reason and probability.⁴⁹

Reprisal

Military members who make protected disclosures are sheltered from reprisal by statute (10 U.S.C. § 1034) and regulation (DoDD 7050.06, *Military Whistleblower Protection*, 23 Jul 07, and AFI 90-301, *Inspector General Complaints Resolution*, 15 May 08). Attachment 21 of AFI 90-301 sets out an "acid test" for determining whether reprisal occurred. The four parts of the acid test are:

- (1) Did complainant make or prepare a protected communication (PC)?
- (2) Was an unfavorable personnel action (UPA) taken or threatened; or was a favorable action withheld or threatened to be withheld following a PC?
- (3) Did the official(s) responsible for taking, withholding, or threatening the personnel action know about the PC?
- (4) Does the preponderance of the evidence establish that the personnel action would have been taken, withheld, or threatened if the PC had not been made?

⁴⁴ Section III, Tab E-29

⁴⁵ The Guard Advisor and MAJCOM POC are not related and met for the first time in an elevator in mid-2011. Section III, Tab D-2, p. 64 and pp. 15-16

⁴⁶ Section III

⁴⁷ Section III, Tab E-30; there is no information in the ROI to explain why there are two memos from NGB/A3.

⁴⁸ Section III, Tab-B

⁴⁹ AFI 90-301, *Inspector General Complaints Resolution*, 15 May 08, paragraph 2.48; Attachment 1

Attachment 21 also provides five criteria that *must* be analyzed under question 4. These include reasons for the action, **reasonableness** of the action, **consistency** of the action with past practice, **motive** of the person who took the actions, and the **procedural correctness** of the action.⁵⁰

A PC is defined as any lawful communication to a member of Congress or an IG.⁵¹

A personnel action is defined as:

Any action taken on a member of the armed forces that affects, or has a potential to affect (for example a threat), that military member's current position or career. Such actions include (but are not limited to) a promotion, a demotion, a disciplinary or other corrective action, a transfer or reassignment, a performance evaluation, a decision on pay, benefits, awards, or training, referral for mental health evaluation under DoDD 6490.1, *Mental Health Evaluations of Members of the Armed Forces*, and/or any other significant change in duties or responsibilities inconsistent with the military member's rank.⁵²

An RMO is defined as (1) official(s) who influenced or recommended to the deciding official that he/she take, withhold, or threaten a management action, (2) official(s) who decided to take, withhold, or threaten the management/personnel action, or (3) any other official who approved, reviewed, or indorsed the management/personnel action.⁵³

If the answer to any of the first three questions is no, reprisal cannot be substantiated. If questions 1 through 3 of the acid test are answered in the affirmative and question 4 is answered in the negative—in other words, a preponderance of the evidence supports the conclusion that the RMO took/threatened to take the unfavorable personnel action or withheld/threatened to withhold the favorable personnel action because of the protected communication—then reprisal has occurred and the IO should substantiate the allegation in question.⁵⁴

Abuse of Authority

If an IO determines no reprisal occurred, he must then analyze the allegation under the “abuse of authority” standard.⁵⁵ Abuse of authority is an “arbitrary and capricious exercise of power that adversely affects any person or results in personal gain or advantage to the abuser.”⁵⁶ AFI 90-301, *Inspector General Complaints Resolution*, 15 May 08, Attachment 22, sets forth a separate “acid test” to help analyze this issue. To determine if abuse of authority has occurred, the following questions must be answered: (1) Did the RMO's actions either adversely affect any person OR result in personal gain or advantage to the RMO;⁵⁷ (2) did the RMO act within the

⁵⁰ Id.

⁵¹ DoDD 7050.06, Enclosure 2, paragraph E2.9.1

⁵² AFI 90-301, *Inspector General Complaints Resolution*, 15 May 08, Attachment 1

⁵³ Id.

⁵⁴ AFI 90-301, *Inspector General Complaints Resolution*, 15 May 08, Attachment 21

⁵⁵ AFI 90-301, *Inspector General Complaints Resolution*, 15 May 08, Attachment 21, Notes 1 and 2

⁵⁶ AFI 90-301, *Inspector General Complaints Resolution*, 15 May 08, Attachment 22

⁵⁷ If both of these questions are answered in the negative, then it is not necessary to consider question 2. AFI 90-301, *Inspector General Complaints Resolution*, 15 May 08, Attachment 22

authority granted under applicable regulation, law or policy; and (3) was the action arbitrary and capricious: (1) What were the **reasons** for the RMO's action; (2) what was the **reasonableness** of the action; (3) were the actions taken by the RMO **consistent** with past practices, and (4) what was the **motive** for the RMO's action?

Analysis

Allegation: On or about 14 Feb 11, the Guard Advisor wrongfully influenced personnel actions related to continued IFF training for the complainant in reprisal for making a protected communication, in violation of 10 U.S.C. 1034. **Not substantiated.**

(1) Did the military member make or prepare a communication protected by statute? **Yes.**

Under AFI 90-301, *Inspector General Complaints Resolution*, 15 May 08, Attachment 1, a protected communication includes any lawful communication made to the IG. On 6 Jan 10, complainant made his initial IG complaint alleging a disproportionate number of ANG student pilots were eliminated from ENJJPT during the period from September 2008 to September 2009, due to the unequal treatment they received from IPs.⁵⁸ On 12 Apr 11, complainant made another IG complaint alleging reprisal by the Guard Advisor, Wing Commander and Training Squadron Commander. As both of these complaints were lawful communications made to the IG, they both qualify as protected communications.

(2) Was a UPA taken or threatened; or was a favorable action withheld or threatened to be withheld following the PC? **Yes.**

First, it must be determined whether a UPA was taken/threatened or a favorable action was withheld/threatened to be withheld. Under AFI 90-301, *Inspector General Complaints Resolution*, 15 May 08, Attachment 1, a personnel action is defined as any action taken on a military member that affects or has the potential to affect that military member's position or career. On 12 Aug 10, the MAJCOM Commander recommended that complainant be removed from IFF.⁵⁹ On 15 Feb 11 and 5 Mar 11, the final approval authority on this issue concurred with the recommendations of the Wing Commander and the Numbered Air Force Commander that complainant be removed from IFF.⁶⁰ The practical effect of removal from IFF was that complainant could not be qualified to fly the A-10 aircraft. This inability to qualify on the A-10 had the potential to affect complainant's position and career, because he cannot be assigned as an A-10 pilot within the ANG. Therefore, the removal from IFF was a UPA.

Next, it must be determined if the Guard Advisor is an RMO. Pursuant to AFI 90-301, *Inspector General Complaints Resolution*, 15 May 08, Attachment 1, an RMO is an official who influenced or recommended to the deciding official that he/she take, withhold, or threaten a management action. The Guard Advisor recommended to the Numbered Air Force Commander, sometime before the Numbered Air Force Commander's change of command in 2010, that he

⁵⁸ Section III, Tab E-3

⁵⁹ The AF IMT 1768, V5, dated 12 Aug 10, was from the Numbered Air Force Commander to NGB/CF for approval. Section III, Tab E-41

⁶⁰ Section III, Tab E-25; Section III, Tab E-6

agree with the Wing Commander's recommendation that complainant be removed from IFF and remain qualified for aviation as a pilot.⁶¹ On 12 Aug 10, the Numbered Air Force Commander's successor recommended NGB/CF non-concur with the FEB's recommendation and approve the Wing Commander's recommendation that complainant be removed from IFF, but remain qualified for aviation as a pilot.⁶² On 15 Feb 11 and 5 Mar 11, NGB/A3 non-concurred with the FEB's recommendation and concurred with the recommendations of the Wing Commander and the Numbered Air Force Commander that complainant be removed from IFF and remain qualified for aviation as a pilot.⁶³ NGB/A3 was the final approval authority on this issue.⁶⁴ The Guard Advisor recommended to the Numbered Air Force Commander that complainant be removed from IFF, and the Numbered Air Force Commander further relayed the Guard Advisor's recommendation to NGB/A3, who ultimately made the decision to remove complainant from IFF. These facts support that the Guard Advisor indirectly influenced the decision of NGB/A3 and the deciding official concerning the FEB, to remove complainant from IFF. Consequently, the Guard Advisor was an RMO in the removal from IFF.

Finally, it must be determined if the UPA followed the protected communications addressed in question 1 above. Complainant made the protected communications on 6 Jan 10 and 12 Apr 11. The Guard Advisor made the recommendation to remove complainant from IFF after the FEB made its findings and before the Numbered Air Force Commander's change of command.⁶⁵ The FEB made its findings on 14 Jan 10,⁶⁶ and the Numbered Air Force Commander's change of command was sometime before 12 Aug 10.⁶⁷ The final decision to remove complainant from IFF was made on 5 Mar 11. Therefore, the Guard Advisor's recommendation to remove complainant from IFF and the actual decision to remove him from IFF followed the first protected communication made on 6 Jan 10 and preceded the second protected communication made on 12 Apr 11.

(3) Did the official responsible for taking, withholding, or threatening or influencing the personnel action know about the PC? **Yes.**

The Guard Advisor testified he learned of the 6 Jan 10 IG complaint, the first protected communication, sometime after the FEB.⁶⁸

(4) Does the preponderance of the evidence establish that the personnel action would have been taken, withheld, threatened, or recommended, if the PC had not been made? **Yes.**

⁶¹ Section III, Tab D-2, p. 50, lines 19-22, and p. 51 lines 1-7

⁶² The AF IMT 1768, V5, dated 12 Aug 10, was from the Numbered Air Force Commander to NGB/CF for approval. Section III, Tab E-41

⁶³ Section III, Tab E-25

⁶⁴ Section III, Tab E-6

⁶⁵ It is logical that the Guard Advisor made his recommendation after the FEB made its findings, and the Guard Advisor testified that he made his recommendation to the Numbered Air Force Commander prior to the Numbered Air Force Commander's change of command. Section III, Tab D-2, p. 43, lines 12-13, and p. 51, lines 3-7

⁶⁶ Section III, Tab E-31

⁶⁷ The Numbered Air Force Commander's replacement made his recommendation concerning the FEB on 12 Aug 10. Sec III, Tab E-41

⁶⁸ Section III, Tab D-2, p. 30, lines 5-8, and p. 31, lines 10-14

The IO reasonably concluded that the Guard Advisor did not recommend the personnel action because of complainant's PC.

a. **Reasons** stated by the RMO for taking, withholding, threatening or influencing the action:

At the Numbered Air Force Commander's request, the Guard Advisor reviewed the FEB package on complainant.⁶⁹ The Guard Advisor recommended to the Numbered Air Force Commander that he concur with the Wing Commander's recommendation that complainant be removed from IFF and remain qualified for aviation as a pilot.⁷⁰

The Guard Advisor reviewed the information submitted and advised the Numbered Air Force Commander that he had concerns and wanted to review additional tapes of complainant flying in IFF. The Guard Advisor reviewed the additional tapes and determined complainant could fly fine in a C-130 or a C-17. However, he felt complainant could not fly a pattern and talk on the radio at the same time. He could not fly a pattern and take any kind of input from a flight-lead or instructor pilot because things immediately became erratic.⁷¹ When the Guard Advisor reviewed the additional tapes, he agreed with the Wing Commander's assessment and recommendation that complainant should be eliminated from IFF but allowed to continue in another airplane.⁷² The Guard Advisor's advice to the Numbered Air Force Commander "was that the convening authority was correct" and that he should concur with the Wing Commander's recommendation.⁷³

b. **Reasonableness** of the action taken, withheld, or threatened considering the complainant's performance or conduct:

Complainant is an ANG member and the Guard Advisor's job description required him to provide guidance to the Numbered Air Force Commander regarding ANG matters.⁷⁴ Based on his job description, the Guard Advisor was within the scope of his job duties to provide a recommendation to the Numbered Air Force Commander regarding his recommendation on the FEB. This supports that it was reasonable for the Guard Advisor to provide guidance to the Numbered Air Force Commander regarding complainant's FEB.

The Guard Advisor's recommendation was based on his review of the FEB's report and additional tapes provided by the complainant.⁷⁵ After reviewing the tapes of complainant flying, the Guard Advisor felt it would not be safe to allow complainant to continue flying in IFF. Flying in a fighter requires the ability to multitask and when complainant was instructed to fly in a pattern and take any kind of instruction, things became erratic. The Guard Advisor testified that if things became erratic in a fighter aircraft, you are going to die. However, he felt

⁶⁹ Section III, Tab D-2, p. 43, lines 16-17

⁷⁰ Section III, Tab D-2, p. 50, lines 19-22, and p. 51, lines 1-7

⁷¹ Section III, Tab D-2, p. 46, lines 16-22

⁷² Section III, Tab D-2, p. 47, lines 11-16

⁷³ Section III, Tab D-2, p. 50, lines 19-22, and p. 51, lines 1-7

⁷⁴ Section III, Tab E-37

⁷⁵ Section III, Tab D-2, p. 43, line 19, and p. 46, line 2

complainant could fly and would be fine in a C-130 or C-17.⁷⁶ The evidence supports that the Guard Advisor felt it was not safe to allow complainant to fly in fighters, and he made a recommendation that complainant not be allowed to continue training in IFF. The evidence further supports that the Guard Advisor's recommendation, which was based on the Guard Advisor's assessment of complainant's ability to fly a fighter safely, was reasonable.

c. **Consistency** of the actions of the RMOs with past practices:

The ROI does not include any information regarding the Guard Advisor's advice to the Numbered Air Force Commander on previous FEBs.

d. **Motive** of the RMO for deciding, taking, or withholding the personnel action:

After a complete review of the FEB evidence and additional tapes provided by complainant, the Guard Advisor felt complainant could not fly a pattern and talk on the radio at the same time and when given any kind of input from a flight lead or instructor pilot, things immediately became erratic.⁷⁷ The evidence supports that after a thorough review of available evidence, the Guard Advisor felt it was best for the Air Force and for complainant, if complainant did not fly fighters. The evidence further supports that the Guard Advisor made his recommendation to the Numbered Air Force Commander based on that assessment. Therefore, the Guard Advisor's motive for recommending that the Numbered Air Force Commander non-concur with the FEB's recommendation and concur with the Wing Commander was to ensure complainant was flying an aircraft commensurate with his abilities.

e. **Procedural correctness** of the action:

One of the responsibilities of the Guard Advisor is to provide guidance to the Numbered Air Force Commander on ANG issues.⁷⁸ The Numbered Air Force Commander requested the Guard Advisor make a recommendation regarding the continued training of complainant, a member of the ANG, in IFF.⁷⁹ The Guard Advisor recommended complainant be eliminated from IFF and re-tracked to heavy aircraft.⁸⁰ Since the Numbered Air Force Commander asked the Guard Advisor for his recommendation, providing guidance to the Numbered Air Force Commander was one of the responsibilities of the Guard Advisor, and the Guard Advisor performed a thorough review of the available evidence of complainant's flying abilities, the Guard Advisor's actions were procedurally correct.

Conclusion

The IO concluded that the Guard Advisor did not reprise against complainant. The IO found that the Guard Advisor recommended complainant be re-tracked to a different aircraft because of

⁷⁶ Section III, Tab D-2, p. 46, lines 16-22

⁷⁷ Section III, Tab D-2, p. 46, lines 16-22

⁷⁸ Section III, Tab E-35

⁷⁹ Section III, Tab D-2, p. 43, lines 16-17

⁸⁰ Section III, Tab D-2, p. 46, lines 16-22, and p. 43, lines 16-17

issues he had in IFF, not because of the PC. The preponderance of the evidence supports the IO's findings and conclusion regarding the reprisal allegation.

Abuse of Authority

Since the IO determined the Guard Advisor did not reprise against complainant, the IO is required to apply the abuse of authority acid test to determine if the Guard Advisor abused his authority.⁸¹ The IO determined the Guard Authority did not abuse his authority, but the IO did not apply the abuse of authority acid test in making that determination. This legal review applies the abuse of authority acid test and we agree the Guard Advisor did not abuse his authority.

(1) Did the RMO's actions either adversely affect any person OR result in personal gain or advantage to the RMO? Yes.

As previously discussed, the Guard Advisor is an RMO, because he indirectly influenced the decision of NGB/A3, the final decision maker concerning the FEB. Specifically, the Guard Advisor recommended to the Numbered Air Force Commander that he recommend that complainant be removed from IFF.⁸² On 12 Aug 10, the Numbered Air Force Commander's replacement recommended against the FEB's recommendation and recommended that complainant be removed from IFF.⁸³ On 15 Feb 11 and 5 Mar 11, NGB/A3, non-concurred with the FEB's recommendation and removed complainant from IFF.⁸⁴ After being removed from IFF, complainant could not be qualified to fly the A-10 aircraft. This adversely affected complainant, because he could no longer fly the A-10 and his future assignments within the ANG were limited. There is no evidence to support that the Guard Advisor's actions resulted in his own personal gain or advantage.

(2) Did the RMO act within the authority granted under applicable regulation, law, or policy? Yes.

One of the responsibilities of the Guard Advisor was to provide guidance to the Numbered Air Force Commander on ANG issues.⁸⁵ The Numbered Air Force Commander requested the Guard Advisor make a recommendation regarding the continued training of complainant, an ANG member, in IFF.⁸⁶ The Guard Advisor provided his recommendation after reviewing the FEB report and additional tapes of complainant flying training sorties.⁸⁷ The Guard Advisor acted within the scope of his responsibilities when he made a recommendation to the Numbered Air Force Commander concerning complainant's continuation in IFF. The evidence supports the Guard Advisor did so after a thorough review of the available evidence concerning complainant's flying abilities. There is no evidence to suggest the Guard Advisor acted outside any authority granted under applicable regulation, law, or policy.

⁸¹ AFI 90-301, *Inspector General Complaints Resolution*, 15 May 08, paragraph 5.6.2.4

⁸² Section III, Tab D-2, p. 50, lines 19-22, and p. 51, lines 1-7

⁸³ The AF IMT 1768, V5, dated 12 Aug 10, was from the Numbered Air Force Commander to NGB/CF for approval. Section III, Tab E-41

⁸⁴ Section III, Tab E-25

⁸⁵ Section III, Tab E-35

⁸⁶ Section III, Tab D-2, p. 43, lines 16-17

⁸⁷ Section III, Tab D-2, p. 46, lines 16-22, and p. 43, lines 16-17

(3) Was the action arbitrary and capricious? **No.** Attachment 22 lists four criteria to use in determining if the RMO's action was arbitrary and capricious:

a. What were the **reasons** stated by the RMO for taking, withholding, or threatening the action?

See the discussion of this exact question at paragraph (4)a of the reprisal acid test above.

b. What was the **reasonableness** of the action taken, withheld, or threatened considering the complainant's performance and conduct?

See the discussion of this exact question at paragraph (4)b of the reprisal acid test above.

c. Were the actions taken by the RMO **consistent** with past practice?

See the discussion of this exact question at paragraph (4)c of the reprisal acid test above.

d. What was the **motive** of the RMO for deciding, taking, or withholding the personnel action?

See the discussion of this exact question at paragraph (4)d of the reprisal acid test above.

Conclusion

The Guard Advisor's actions adversely affected complainant, but recommending to the Numbered Air Force Commander that he should recommend complainant be re-tracked to a different aircraft was (1) within his authority as the ANG Advisor to the Numbered Air Force Commander; and (2) not arbitrary and capricious based on the Guard Advisor's job description and the information he had before him. The preponderance of the evidence supports the IO's opinion that the Guard Advisor did not abuse his authority.

Errors and Anomalies

The IO did not apply the abuse of authority acid test before determining the Guard Advisor did not abuse his authority. This legal review does apply the abuse of authority acid test, and we concur with the IO's findings that the Guard Advisor did not abuse his authority. As the application of the acid test resulted in the same conclusion the IO made, this error does not affect the legal sufficiency of the investigation.

Conclusion

The ROI and underlying investigation comply with the requirements of AFI 90-301, *Inspector General Complaints Resolution*, regarding the reprisal allegation. However, the IO failed to apply the acid test for abuse of authority. This legal review applied the acid test for abuse of authority and we agree with the IO's conclusion on that aspect of the case. The framed

allegation has been addressed and alleges a violation of law. The IO reasonably applied the preponderance of the evidence standard in arriving at the findings, and the conclusions are supported by and consistent with the findings. The investigation complied with all applicable legal and administrative requirements, with the exception of the failure of the IO to apply the abuse of authority acid test. That failure did not affect legal sufficiency of the investigation. As such, we concur with the IO's finding that the allegation is **NOT SUBSTANTIATED**. The ROI is legally sufficient and the case may be closed in accordance with AFI 90-301, *Inspector General Complaints Resolution*.

OpJAGAF 2013/1 14 March 2013