

OpJAGAF 2018-49, 18 December 2018, INSPECTOR GENERAL COMPLAINTS

Protected Communications (PCs) in Inspector General (IG) Complaints Inquiries

This opinion discusses whether a member's complaint to his or her leadership regarding the unit's leadership style constitutes a PC. In this case, the Complainant spoke with his Superintendent about the unit's leadership style and provided recommendations on ways the unit could improve. The Investigating Officer (IO) identified these conversations as PCs. However, as we discuss below, the IO's determination that these conversations were PCs was incorrect.

BACKGROUND

Complainant was a noncommissioned officer in the Force Support Squadron. Soon after his arrival on base, Complainant met with the Flight Superintendent and expressed his dissatisfaction with leadership and the way the unit was being led. During his meeting with the Superintendent, Complainant also gave his advice on ways the unit could improve its services. Those ideas were ultimately ignored by his unit leadership.

A short time later, Complainant failed to obey an order from his supervisor to return to his duty station. The next day, Complainant filed a formal IG complaint. Later the same day, Complainant received an LOR for failing to obey a lawful order from his supervisor. The Complainant alleged the LOR was in reprisal to his IG complaint and his prior conversation with his Superintendent where he complained about how the unit was led and gave his recommendation on how to make the unit better. In characterizing these communications, Complainant testified to submitting ideas and suggestions to leadership regarding potential adjustments to operations and rescheduling. Complainant also testified to "feeling rejected" when they did not implement Complainant's recommendations.

LAW AND ANALYSIS

Protected Communications (PC)

In investigating allegations 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

The Table in 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; a substantial and specific danger to public health or safety; or a threat by another service member that indicates a determination or

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

intent to kill or seriously harm a service member or civilian or cause damage to military, federal or civilian property.

In this case, the IO found complainant's communications with his Superintendent constituted PCs. Complainant did not provide a basis from which the IO could reasonably find Complainant identified, or reasonably believed Complainant identified, a potential violation of law or regulation in the aforementioned communications. Contrary to the IO's apparent understanding, not *all* communications to one's chain of command constitute PCs. The plain-language of 10 U.S.C. 1034 and the implementing guidance contained in DoDD 7050.06, require the identification of, or reasonable belief of having identified, a possible violation of law or regulation as a condition precedent for a communication to achieve PC status when it is being made to a person in the complainant's chain of command. While we acknowledge an IO has wide latitude in finding a communication is a PC, and the regulation encourages deference to such a finding, in this case, we do not believe such deference results in finding the communications were PCs. Complainant testified to merely complaining about being ignored when presenting recommendations. There is insufficient evidence from which the IO could reasonably conclude the putative communications met any necessary condition precedent. Moreover, we do not find Congress intended 10 U.S.C. § 1034 to be used in this manner.

CONCLUSION

In closing, not all communications to one's chain of command constitute a PC. As stated in DoDD 7050.06, in order to be a PC, the communication must identify a violation of law or regulation. In this case, the mere statement that Complainant did not like his unit's leadership style and his frustration that the unit would not adopt his ideas did not constitute a PC.