

TOPIC

Allegations of Reprisal for Protected Communication which resulted in a Referral Enlisted Performance Report (EPR).

TEXT OF THE DECISION

We have reviewed the above-referenced Inspector General (IG) Report of Investigation (ROI), dated 14 Feb 18, with the AETC/IG addendum, dated 14 Mar 18, and find the ROI with its addendum legally sufficient. The case includes two allegations of reprisal involving two subjects. The IO determined that the allegations are **NOT SUBSTANTIATED** for reprisal.

BACKGROUND

Complainant was a recruiter assigned to a Recruiting Squadron in February 2013. She generally performed well in her first couple of years as a recruiter. Complainant was married to another active duty Air Force member. They planned a family cruise and vacation for November 2016 after Complainant's husband returned from a deployment. In approximately February 2016, Complainant placed her planned November 2016 leave on the unit leave calendar. In approximately June 2016, a chief master sergeant (the subject of the reprisal allegation), was detailed to the failing squadron to assist them in meeting Air Force recruiting goals. The CMSgt met with Complainant's first line supervisor who admitted he could not hold his subordinates properly accountable. Over the course of early 2016, Complainant's performance declined: she was failing to complete required tasks as a recruiter and failing to meet her recruiting goals. In July 2016, Complainant's first line supervisor issued her a letter of direction (LOD), in which he outlined specific objectives Complainant needed to meet each day to assist her in meeting her recruiting goals. On the same day, the CMSgt issued complainant a Letter of Counseling (LOC) for failing to meet her goals and failing to follow recruiting performance and contacts standards. Despite Complainant continually struggling to complete all work required of her, Complainant's first line supervisor removed the LOD at the end of August 2016.

Complainant continued to fail in following through on all job requirements and meeting recruiting goals through September and October 2016. In October, consistent with leave policy, Complainant submitted her formal leave request for her November 2016 family cruise. The vacation was OCONUS and, therefore, needed to route through Complainant's Commander, who is the subject of the second allegation of reprisal. Complainant's Commander denied her leave request because he determined that Complainant's 10 days of leave plus the Thanksgiving holiday would keep her out of the office too long and inhibit her ability and the unit's ability to make November goals. Complainant's husband contacted Complainant's First Sergeant to advocate for his wife's leave and to express the significant financial loss their family would take if they were unable to take the vacation. In his conversation with complainant's First Sergeant, he told him that he would be encouraging Complainant to file an IG complaint. Complainant's First Sergeant notified Complainant's Commander about the potential IG complaint. Complainant's husband then spoke with his own commander, who agreed to speak with Complainant's Commander about the leave.

Over the course of a few days, the two commanders spoke on the phone and via email about Complainant's leave. Eventually, Complainant's Commander had her resubmit her leave and he approved it.

Shortly thereafter, Complainant's Enlisted Performance Report (EPR) was closing. Complainant's first line supervisor wrote an EPR with ratings that indicated Complainant met standards. The CMSgt detailed to the squadron, as the additional rater, non-concurred with the 1 Dec 15-30 Nov 16 EPR rating and instead marked Complainant as "Met some but not all expectations," and wrote negative comments that resulted in a referral EPR. After Complainant responded to the referral report, her Commander, a lieutenant colonel, endorsed the CMSgt's rating, comments, and referral. The CMSgt's rating was based on Complainant's failure to meet performance standards and recruiting goals, despite her training and ability to do so, as well as the LOC issued to Complainant during the rating period.

Complainant believed the Chief's negative comments, inclusion of the LOC, and referral EPR was issued because of the leave situation. Complainant then contacted the Inspector General and filed a formal complaint on 4 Jan 17. Complainant claimed possible reprisal against the CMSgt and her commander in regards to the Protected Communication (PC) on or about 18 Oct 16 concerning the overseas leave. This investigation is a result of that formal complaint.

GUIDANCE

AFI 90-301, Inspector General Complaints Resolution

10 U.S.C. § 1034 prohibits retaliatory personnel actions against service members who make 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]." ¹ The statute specifically defines who can receive PCs, ² mandates IG investigations of allegations of personnel actions taken in reprisal, ³ and provides a list of PCs that IGs "shall not exclude" from protection. ⁴ 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. ⁵ Department of Defense and Air Force Regulations reflect this framework and contain the same limitations. ⁶ The protections prohibit retaliation against individuals who make PCs.

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¹ 10 USC §1034 (b)(1)

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

³ 10 USC § 1034 (c)

⁴ 10 USC § 1034 (c)(3)

⁵ 10 USC § 1034 (b)(1)(c)

⁶ See DoDI 7050.06, para 3(a)-3(c) and AFI 90-301's definition of PCs

overseas leave. This investigation is a result of that formal complaint. The investigation complied with all applicable legal and administrative requirements. The anomalies below do not affect the legal sufficiency of the investigation. We concur with the ROI's findings and conclusions that the allegations are **NOT SUBSTANTIATED**.

DISCUSSION

ROI Anomalies

The PCs made by Complainant's husband would not normally be considered PCs for the complainant; because the RMOs knew that Complainant's husband stated he would encourage his wife, complainant, to file an IG complaint, we agree that the RMOs perceived that Complainant was preparing to make a PC, thus properly continuing the analysis of this case. The IO did not have a duty to read Article 31 rights to the subjects nor advise a civilian witness of his *Weingarten* rights. Additionally, AF/JAA had similar concerns as MAJCOM/IG about the final appointing authority only holding the grade of major (junior in grade to one of the subjects of the complaint); however, AF/JAA analyzed AFI 90-301 in the same way as MAJCOM/IG and concurs that the delegation to the major was proper. Her role as the appointing authority, while not ideal and generally not advisable, does not affect the legal sufficiency of the investigation and report.

Legal Advisor and Legal Reviewer

The IO appointment letter, dated 23 Jun 17, notified the IO of his assigned legal advisor. The legal review was written and signed by the same attorney. Despite the legal review checklist asserting that a different judge advocate acted in the two roles, on paper, it appears the same attorney served as both the appointed legal advisor and the legal reviewer. The case file does not include an explanation as to why the same judge advocate served in both roles. Paragraphs 1.39.4.2 and 3.59.2 of AFI 90-301 state, "a different JA should perform the legal review other than the individual assigned to advise the IO as legal advisor." Although the legal office's use of the same individual for both roles is not the preferred course of action, the oversight does not affect the IO's findings and conclusions or the legal sufficiency of the ROI.

CONCLUSION

The framed allegations have been addressed and allege violations of law, regulation, or policy. 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. We concur with the ROI's findings and conclusions that the allegations are **NOT SUBSTANTIATED** for reprisal. The ROI, with the AETC addendum, is legally sufficient and the case may be closed in accordance with AFI 90-301.

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