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Protecting Military Whistleblowers: 10 U.S.C. §1034

Protected Actions

Military whistleblower protection applies to any servicemember who lawfully discloses wrongdoing to designated officials. A military whistleblower is any servicemember who makes or prepares a protected communication or who is perceived as making or preparing to make a protected communication to an inspector general (IG), a member of Congress, or other designated officials.

Prohibited Conduct

Anyone subject to the Uniform Code of Military Justice (UCMJ) who violates military whistleblower protection can be prosecuted by court-martial with a maximum punishment that includes bad conduct discharge, dishonorable discharge, three years confinement, or total forfeiture of pay and allowances. Civilian employee violators are subject to administrative discipline that could include firing the employee.

Restriction and Reprisal

Restriction occurs when a person prevents or attempts to prevent a military whistleblower from communicating or preparing to communicate with an IG or a Member of Congress, unless the communication is unlawful. Reprisal occurs when a person takes or threatens to take an unfavorable personnel action against a military whistleblower or withholds or threatens to withhold a favorable personnel action from a military whistleblower.

In a common scenario, if a commander became aware that a servicemember intends to blow the whistle on him, he cannot stop the servicemember from doing so. And, if a commander becomes aware that a servicemember did blow the whistle on him, he cannot penalize the servicemember for doing so. The first is restriction; the second, reprisal.

Reprisal consists of four elements:

1. *Protected Communication*—disclosure of an abuse of authority, fraud, a gross waste of funds, or a violation of law or regulation, including sexual misconduct and threats to public property or safety.
2. *Personnel Action*—action that affects or potentially affects a servicemember’s career or current position, such as reassignment, return to service, retaliatory investigation, adverse evaluation, or removal from a school, command, or promotion list.
3. *Knowledge*—established by determining if each person involved in a personnel action perceived or was aware of the protected communication. If a person involved in a personnel action asserts that he or she was

unaware of the protected communication, additional evidence is required to corroborate this assertion.

4. *Causation*—established by determining what influence a protected communication had on a person’s decision to take, threaten, withhold, or threaten to withhold a personnel action. To determine causation, four technical elements are examined and must hold true.

Process

A servicemember may submit reprisal or restriction allegations to an IG within one year following the alleged act or within one year following the date the servicemember became aware of the alleged act. The Department of Defense (DOD) IG or a DOD component IG is to investigate DOD servicemember or former servicemember allegations (DOD Directive 7050.06). The Department of Homeland Security (DHS) IG is to investigate U.S. Coast Guard (USCG) servicemember or former servicemember allegations (33 C.F.R. Part 53).

Table 1. DOD IG Military Whistleblower
Fiscal Years 2017–2019

Reprisal Allegations			Restriction Allegations		
closed	sub	rate	closed	sub	rate
3,811	92	2.41%	185	39	21.08%

Table 2. DOD IG and DHS IG Military Whistleblower
Fiscal Years 2017–2019

Reprisal and Restriction Allegations					
DOD			DHS		
closed	sub	rate	closed	sub	rate
3,996	131	3.27%	ND	2	—

Source: Data in Tables 1 and 2 are an estimate derived from CRS analysis of DOD IG and DHS IG Semiannual Reports to Congress for fiscal years 2017 through 2019.

Notes: “closed” denotes allegations closed; “sub” denotes allegations substantiated; “rate” denotes percentage of closed allegations that were substantiated; “ND” denotes no data available for 10 U.S.C. §1034 allegations.

Investigation

Within 30 days, an IG is to either decline or accept a request to investigate a reprisal or restriction allegation, by determining four criteria: is the report timely, was there protected communication, was it known to have happened, and was there adverse action. An IG must complete an

investigation within 180 days or notify the servicemember and Secretary concerned if the investigation is not timely completed. The IG is required to provide a report to the servicemember after completing the investigation and the servicemember may request copies of the investigation's documents, transcripts, or summaries. Documents provided are subject to redaction, consistent with the Freedom of Information Act (FOIA) or Privacy Act (PA).

Substantiated

The Secretary concerned is to make a final decision for a whistleblower investigation that substantiates an allegation, if that Secretary concludes there was a reprisal or restriction prohibition violation. After this final decision, the Secretary must ensure the appropriate officials correct or remediate the servicemember's military record and discipline the person who violated the prohibition.

- If the Secretary concerned determines correction or remediation is appropriate, but cannot take these actions, that Secretary must ensure that the appropriate officials assist the servicemember with an application to the Board for Correction of Military Records (BCMR) for any available correction or remediation.
- If the Secretary concerned concludes that a person violated a prohibition of reprisal or restriction, but determines correction, remediation, or discipline is not appropriate, that Secretary may refer the report of results to the BCMR, if appropriate, and must report this determination to the Secretary of Defense.

Not Substantiated

A servicemember may apply to the appropriate BCMR for review of a whistleblower investigation that does not substantiate a reprisal or restriction allegation. The Secretary concerned must make a final decision on the servicemember's application within 180 days of its filing, or the application is to be deemed denied and the servicemember's administrative remedies are to be considered exhausted.

BCMR Review

A servicemember may request an evidentiary hearing when the BCMR reviews a whistleblower investigation. The appropriate service judge advocate may provide the servicemember representation by a military attorney at the hearing. During the hearing, the servicemember may serve interrogatories, examine witnesses through deposition, and request the production of evidence, including evidence contained in the agency's investigation file and report that was not included in the report of results. The BCMR is to make a recommendation for final decision, if appropriate, to the Secretary concerned after completing its review.

Secretary of Defense Review

After a Secretary of an armed service makes a final decision to not substantiate a reprisal or restriction allegation, or a BCMR application is deemed denied, a servicemember may seek judicial review of the decision or an administrative review of the decision from the Under Secretary of Defense for Personnel and Readiness (USD(P&R)), who acts for the Secretary of Defense.

Judicial Review

After the USD(P&R) or Secretary concerned makes a final decision to not substantiate a reprisal or restriction allegation, or a review request or BCMR application is deemed denied, a servicemember may seek judicial review of the decision in a federal district court (5 U.S.C. §702). If the federal district court's review affirms the final decision made by the USD(P&R) or Secretary concerned to not substantiate a reprisal or restriction allegation, the servicemember may seek further judicial review in a federal appeals court.

Reprisal Investigation

A reprisal investigation must adequately develop all facts before dismissing an allegation. The standard of proof for reprisal is a preponderance of evidence that a reasonable person would find sufficient to show reprisal likely occurred (*more probable than not*). The investigation must answer the first three questions below in the affirmative and the final question in the negative to substantiate reprisal:

1. Did the servicemember make or prepare to make a protected communication—or—was the servicemember perceived as having made or preparing to make one?
2. Was an unfavorable personnel action taken or threatened against the servicemember—or—was a favorable personnel action withheld or threatened to be withheld from him or her?
3. Did a person who was aware of a protected communication by a servicemember, or its preparation, or who perceived one, or perceived its preparation, take, threaten, withhold, or threaten to withhold a personnel action?
4. Would a person have taken, threatened, withheld, or threatened to withhold the same personnel action without knowledge of the protected communication?

Selected DOD Reprisal Substantiation

DOD OIG investigation substantiated a Navy lieutenant's allegation that a Marine Corps lieutenant colonel reprised against the lieutenant for making several protected communications to an IG and a member of Congress by threatening disciplinary action and requesting a command investigation, which resulted in the lieutenant receiving an unfavorable fitness report (2019).

Selected USCG Reprisal Substantiation

DHS OIG investigation substantiated a Coast Guard lieutenant commander's allegation that her Coast Guard academy supervisors reprised against her for making discrimination and harassment complaints against them by giving her an unfavorable officer evaluation report (2018-19).

Alan Ott, Analyst in Defense and Intelligence Personnel Policy

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