

Whistleblower Statutes for DoD: Military vs. Civilian Federal Employee Protections

	Military Service Member	Title 5 Civilian Federal Employee
Governing Law and Policy		
Governing Legislation	<p>Title 10 U.S.C. §1034, Military Whistleblower Act</p>	<p>IG Act of 1978, Amended</p> <p>Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002. (No Fear Act)</p> <p>5 U.S.C. §2301, 2302 Merit system principles, Prohibited personnel practices.</p> <p>5 CFR Part 1209 Merit Systems Protection Board, Whistleblowing Appeals.</p>
DoD Policy	<p>DoDD 7050.06, Military Whistleblower Protection (17 Apr 15)</p> <p>The Guide to Investigating Military Whistleblower Reprisal and Restriction Complaints</p>	<p>DoDD 5106.01, Inspector General of the Department of Defense (IG DOD)(20 Apr 12)</p>
4 Elements		
Elements	<p>For the MWPA, the elements of reprisal are:</p> <ol style="list-style-type: none"> 1. Making a protected communication (PC); 2. Knowledge of the protected communication on the part of the responsible management official (RMO); 3. A personnel action (PA) taken, threatened, or withheld; and 4. A causal connection between the PC and the PA. 	<p>For DoD Civilian Employees, the elements of reprisal are:</p> <ol style="list-style-type: none"> 1. Making a protected communication (PC); 2. Knowledge of the protected communication on the part of the responsible management official (RMO); 3. A PA taken, threatened, or withheld; and 4. Knowledge of the protected disclosure was a contributing factor in the decision to take the personnel action
Burden of Proof		
Burden of Proof	<p>The Guide to Investigating Military Whistleblower Reprisal and Restriction Complaints</p> <p>If the evidence establishes that the PA would have been taken, threatened, or withheld even absent the Protected Communication, then the complaint is not substantiated.</p> <p><i>All four elements of reprisal must be established by a preponderance of the evidence</i> in order for reprisal to be substantiated. Preponderance of the evidence means that the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.</p>	<p>5 CFR § 1209.7 , 1209.2 (a), 78 FR 39548, July 2, 2013:</p> <p>The Board will order appropriate corrective action if the appellant shows by a preponderance of the evidence that the disclosure or other protected activity was a contributing factor in the personnel action that was threatened, proposed, taken, or not taken against the appellant.</p> <p>(b) However, even where the appellant meets the burden stated in paragraph (a) of this section, the Board will not order corrective action if the agency shows by clear and convincing evidence that it would have threatened, proposed, taken, or not taken the same personnel action in the absence of the disclosure or other protected activity.</p>

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ELEMENT 1: Was there a Protected Communication?		
What was communicated?	<p><u>10 U.S.C. §1034(c)(2)</u></p> <p>A protected communication described in this paragraph is a communication in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of, any of the following:</p> <p>(A) A violation of law or regulation, including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct in violation of sections 920 through 920c of this title (articles 120 through 120c of the Uniformed Code of Military Justice), sexual harassment or unlawful discrimination.</p> <p>(B) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.</p> <p>(C) A threat by another member of the armed forces or employee of the Federal Government that indicates a determination or intent to kill or cause serious bodily injury to members of the armed forces or civilians or damage to military, Federal, or civilian property.</p>	<p><u>5 CFR § 1209.4 (b)</u></p> <p>Protected disclosure: a formal or informal communication or transmission, the disclosure reasonably believes that the disclosure evidences any of the following:</p> <p style="margin-left: 40px;">1) a violation of law, rule or regulation;</p> <p style="margin-left: 40px;">2) gross mismanagement;</p> <p style="margin-left: 40px;">3) gross waste of funds;</p> <p style="margin-left: 40px;">4) abuse of authority; or</p> <p style="margin-left: 40px;">5) a substantial and specific danger to public health or safety</p>
To whom was it communicated?	<p><u>10 U.S.C. §1034(c)(2) (summarized on DoD IG website as):</u></p> <p>Lawful communication when made to:</p> <ul style="list-style-type: none"> • a Member of Congress; • an Inspector General; • a member of a Department of Defense audit, inspection, investigation, or law enforcement organization; • any person or organization in the chain of command; or • a court-martial proceeding; or • any other person or organization designated pursuant to regulations or other established administrative procedures for such communications. 	<p><u>5 CFR § 1209.4 (b) (summarized on DoD IG website as):</u></p> <p>Lawful communication when made to:</p> <ul style="list-style-type: none"> • a member of Congress • an IG • the Special Counsel; • a member of a DoD audit, inspection, or law enforcement organization • any person in the chain of command • any other person designated pursuant to regulations or other established administrative procedures to receive such communications, including appeals • any person receiving testimony
ELEMENT 2: Did the responsible management official (RMO) have knowledge of the protected communication OR did the RMO(s) believe a specific individual made a protected communication, even if they did not?		
RMO's Knowledge of PC	<p>The personnel action in question must have been taken (or not taken, such in the case of a promotion), threatened, or influenced by an official who knew of the employee's disclosure;</p>	<p>The personnel action in question must have been taken (or not taken, such in the case of a promotion), threatened, or influenced by an official who knew of the employee's disclosure;</p>

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ELEMENT 3: Was an unfavorable action taken (or, under some statutes, threatened), or was a positive action withheld (or, under some statutes, threatened to be withheld)?

Personnel Action Defined	<p><u>DoDD 7050.06 (e)</u></p> <p>Any action taken on a member of the Armed Forces that affects, or has the potential to affect, that military member's current position or career. Such actions include</p> <ul style="list-style-type: none"> (1) a promotion; (2) a disciplinary or other corrective action; (3) a transfer or reassignment; (4) a performance evaluation; (5) a decision on pay, benefits, awards, or training; (6) referral for mental health evaluations under DoD Directive 6490.1; and (7) any other significant change in duties or responsibilities inconsistent with the member's grade. <p>The list of Personnel actions above is not exhaustive.</p>	<p><u>5 U.S.C. §2302, 5 CFR § 1209.4 (a)</u></p> <ul style="list-style-type: none"> (1) An appointment; (2) a promotion; (3) an action under 5 U.S.C. chapter 75 or other disciplinary or corrective action; (4) a detail, transfer, or reassignment; (5) a reinstatement; (6) a restoration; (7) a reemployment; (8) a decision about pay, benefits, or awards, concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in 5 U.S.C. Section 2302(a)(2); (9) a performance evaluation under 5 U.S.C. chapter 43; (10) a decision to order a psychiatric testing or examination; or (11) any other significant changes in duties, responsibilities, or working conditions. <p>The implementation or enforcement of any nondisclosure policy, form, or agreement)</p>
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ELEMENT 4 : Would the unfavorable action taken or withheld have happened without the Protected Communication?

Causal Connection between Protected Communication and Personnel Action	<p>To determine the answer to the "causation" question, the following factors are analyzed:</p> <ul style="list-style-type: none"> • Reason stated by RMO for taking, withholding, or threatening the Personnel Action (For example, If the RMO stated that he/she took an action based on the complainant's poor duty performance, but a preponderance of evidence indicated that the complainant was a good performer, the RMO's stated reason has not been proven.) • Timing between the protected communications and personnel action • Motive on the part of the RMOs to reprise • Disparate treatment of Complainant as compared to other similarly situated individuals who did not make protected communications <p>See The Guide to Investigating Military Whistleblower Reprisal and Restriction Complaints</p>	<p>(b) However, <u>even where the appellant meets the burden</u> stated in paragraph (a) of this section, the Board <u>will not</u> order corrective action if the <u>agency shows by clear and convincing evidence that it would have threatened, proposed, taken, or not taken the same personnel action in the absence of the disclosure or other protected activity.</u></p> <p>See [78 FR 39548, July 2, 2013]</p>
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FILING A WHISTLEBLOWER COMPLAINT

Where to File	<p>10 U.S.C. 1034 (c)(1): If a member of the armed forces submits to an Inspector General an allegation that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in paragraph (2), the Inspector General shall take the action required under paragraph (4).</p> <p>(DoD IG website) The most efficient means to report and resolve your complaint within the Inspector General (IG) system is by notifying your local or command IG office.</p> <ul style="list-style-type: none"> • They can be located via the following link: http://www.dodig.mil/Hotline/helpful_links.html <p>*All reprisal complaints receive DoD IG oversight regardless of where they are initially submitted.*</p> <p>Secondarily, complaints may be submitted to the DoD Hotline using their on-line complaint form:</p> <ul style="list-style-type: none"> • www.dodig.mil/hotline (Internet) • www.dodig.smil.mil/hotline (SIPRNet) • www.dodig.ic.gov/hotline/index.html (JWICS) • Phone: 1-800-424-9098 	<p>Defense Department civilian employees (appropriated fund) may file reprisal complaints with the DoD IG Directorate for Whistleblower Reprisal Investigations (WRI), via the DoD Hotline. WRI investigates complaints of reprisal generally in accordance with Subchapter II, Chapter 12 of 5 U.S.C. §2302, and §7 of the Inspector General Act of 1978, as implemented by DoD Directive 5106.01.</p> <p>Many whistleblowers in this category file with the Office of Special Counsel (OSC), which is an independent federal investigative and prosecutorial agency. OSC is the primary government agency whose mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing. For more information and to view procedural steps for filing a reprisal complaint with OSC, you may visit their official website at: www.osc.gov.</p> <p>If you are a DoD appropriated fund civilian and you believe you have been discriminated against on the basis of race, color, religion, sex (to include sexual harassment and pregnancy discrimination), national origin, age, mental or physical disability, or genetic information, or if you believe you have been retaliated against for having raised concerns about one of those issues, please contact your Equal Employment Opportunity (EEO) office. There is a 45-day filing deadline, so be sure to consult with your EEO advisor as soon as you believe you experienced an act of discrimination or other management wrongdoing. Matters of this nature DO NOT generally fall under the purview of the Inspector General, as established grievance and EEO channels are available to pursue recourse.</p> <p>Additionally, the U.S. Merit System Protection Board, (MSPB) which interprets the Federal Merit Systems Principles, is empowered to hear and decide complaints for corrective or disciplinary action when an agency is alleged to have committed a prohibited personnel practice. To view eligibility, procedures, and appeal filing procedures, please visit the MSPB e-Appeal site.</p>
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<i>Investigation</i>		
Investigation	<p>10 U.S.C. 1034 (4)(A) An IG receiving an allegation ... shall expeditiously determine,...., whether there is sufficient evidence to warrant an investigation of the allegation.</p> <p>(B) If the IG receiving such an allegation is an IG within a military department, that IG shall promptly notify the DoD IG of the allegation.</p> <p>(C) If an allegation ...is submitted to an IG within a military department and if the determination of that IG ... is that there is not sufficient evidence to warrant an investigation of the allegation, that IG shall forward the matter to the DoD IG for review.</p> <p>(D) Upon determining that an investigation of an allegation... is warranted, the IG making the determination shall expeditiously investigate the allegation. In the case of a determination made by the DoD IG, that IG may delegate responsibility for the investigation to an appropriate IG within a military department.</p> <p>(E) In the case of an investigation under subparagraph (D) within the Department of Defense, the results of the investigation shall be determined by, or approved by, the DoD IG (regardless of whether the investigation itself is conducted by the DoD IG or by an IG within a military department).</p> <p>(5) Neither an initial determination under paragraph (3)(A) nor an investigation under paragraph (3)(D) is required in the case of an allegation made <u>more than one year</u> after the date on which the member becomes aware of the personnel action that is the subject of the allegation.</p> <p>(6) The IG of the Department of Defense ...shall ensure that the IG conducting the investigation of an allegation under this subsection is one or both of the following:</p> <p>(A) Outside the immediate chain of command of both the member submitting the allegation and the individual or individuals alleged to have taken the retaliatory action. (B) At least one organization higher in the chain of command than the organization of the member submitting the allegation and the individual or individuals alleged to have taken the retaliatory action.</p>	<p>Once a federal employee, applicant, or former employee files a complaint with OSC alleging that a prohibited personnel practice (PPP) occurred, OSC assigns the case to an examiner. Because of the high volume of complaints, there may be some delay before a complainant hears from OSC. Currently, 80 percent of complainants hear from the examiner within 60 to 90 days. Complainants who have additional information or questions about their complaint should contact the examiner assigned to their case. Complainants who do not know the name of the examiner assigned to the case can call 1-800-872-9855 or 202-254-3670.</p> <p>When OSC reviews a complaint, we review all the material provided. We look to see whether there is enough evidence to show that a PPP likely has been, or will be, committed. The determination depends on whether the facts of the case appear to satisfy all of the requirements of the law.</p> <p>If the evidence does not suggest that we could prove that a PPP occurred, we send a letter informing the complainant of the reasons for our preliminary determination. In most cases, this decision is not final. If OSC has jurisdiction over the case and made a determination on its merits, the complainant will have an opportunity to respond with additional information or to point out any errors or omissions in the preliminary determination. All determinations, whether preliminary or final, are sent in writing.</p> <p>If OSC determines that the complaint warrants further inquiry, we inform the complainant in writing, and one of two things will happen. The complainant and the agency may be given the option of mediation (further information on OSC's Alternative Dispute Resolution process is available here), or OSC may begin a more in-depth investigation that could lead to prosecution, if appropriate.</p>

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Remedies		
Remedies for Whistleblower	<p>10 U.S.C. 1034 (f) (1) Not later than 30 days after receiving a report from the IG..., the Secretary of the military department concerned, ..., shall determine whether there is sufficient basis to conclude whether a personnel action prohibited by subsection (b) has occurred.</p> <p>(2) If the Secretary concerned determines... that a personnel action prohibited by section (b) has occurred, the Secretary shall—</p> <p>(A) order such action as is necessary to correct the record of a personnel action prohibited by subsection (b); and</p> <p>(B) take any appropriate disciplinary action against the individual who committed such prohibited personnel action.</p> <p>(3) If the Secretary concerned determines ... that an order for corrective or disciplinary action is not appropriate, not later than 30 days after making the determination, such Secretary shall—</p> <p>(A) provide to the Secretary of Defense and the member or former member a notice of the determination and the reasons for not taking action; and</p> <p>(B) when appropriate, refer the report to the appropriate board for the correction of military records for further review....</p>	<p>OSC can seek corrective action (meaning an action that corrects what happened to the employee or applicant), disciplinary action (meaning an action that penalizes the federal official(s) who committed the PPP), or both. Frequently, parties engage in OSC’s Alternative Dispute Resolution (ADR) process and settle the issues with the help of a mediator.</p> <p>Corrective action typically means that OSC seeks to place an employee or applicant in the position he or she would have occupied if no wrongdoing occurred. For example, an employee suspended for prohibited reasons would receive his or her back pay and related benefits, with interest, and a clean record. Corrective action can also include attorneys’ fees, as well as other reasonable and foreseeable costs. The law requires that OSC give the federal agency the opportunity to correct a PPP before filing a complaint with the MSPB.</p> <p>OSC also has the authority to request that the MSPB discipline federal officials who committed PPPs. The law allows the Special Counsel to decide which cases are most appropriate for disciplinary action. Penalties for committing a PPP include removal, reduction in grade (demotion), debarment from federal employment for up to five years, suspension, reprimand, a fine of up to \$1,000, or some combination of these penalties. Federal officials accused of committing a PPP in a disciplinary case have certain rights which can be found at 5 C.F.R. Part 1201, Subpart D.</p> <p>Occasionally, while PPP cases are under investigation, federal agencies may seek to discipline the federal official(s) believed to be responsible for the PPP. If federal officials are under OSC investigation, federal agencies may not discipline them without OSC’s approval. 5 U.S.C. § 1214(f)</p>
Correction Boards/Appeals	<p>10 U.S.C. 1034 (g)(1) A board for the correction of military records...in resolving an application for the correction of records made by a member or former member of the armed forces who has alleged a (prohibited) personnel action, on the request of the member or former member or otherwise, may review the matter.</p> <p>(2) In resolving an application..., a correction board—</p> <p>(A) shall review the report of the IG);</p>	<p>Employees or applicants who allege that they experienced retaliation because of whistleblowing under 5 U.S.C. § 2302(b)(8) may seek corrective action in appeals to the MSPB. Such an appeal is known as an “individual right of action” (or IRA). By law, the employee or applicant must first seek corrective action from OSC before filing an IRA. The IRA may be filed:</p> <ul style="list-style-type: none"> •after OSC closes a matter in which reprisal for whistleblowing has been alleged; or

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	<p>(B) may request the IG to gather further evidence; and</p> <p>(C) may receive oral argument, examine and cross-examine witnesses, take depositions, and, if appropriate, conduct an evidentiary hearing.</p> <p>(3) If the board holds an administrative hearing, the member or former member who filed the application...—</p> <p>(A) may be provided with representation by a judge advocate if—(i) the IG, in the report under..., finds that there is probable cause to believe that a (prohibited) personnel action has been taken (or threatened) against the member with respect to a (protected) communication; (ii) the Judge Advocate General concerned determines that the member or former member would benefit from judge advocate assistance to ensure proper presentation of the legal issues in the case; and (iii) the member is not represented by outside counsel chosen by the member; and</p> <p>(B) may examine witnesses through deposition, serve interrogatories, and request the production of evidence, including evidence contained in the investigatory record of the IG but not included in the report submitted under subsection (e)(1).</p> <p>(4) The Secretary concerned shall issue a final decision with respect to an application ... within <u>180 days</u> after the application is filed. If the Secretary fails to issue such a final decision within that time, the member or former member shall be deemed to have exhausted the member's or former member's administrative remedies....</p> <p>(5) The Secretary concerned shall order such action, consistent with the limitations contained in sections 1552 and 1553 of this title, as is necessary to correct the record of a personnel action prohibited by subsection (b).</p> <p>(6) If the Board determines that a (prohibited) personnel action has occurred, the Board may recommend to the Secretary concerned that the Secretary take appropriate disciplinary action against the individual who committed such personnel action.</p> <p>(h) Upon the completion of all administrative review ..., the member or former member of the armed forces ..., if not satisfied with the disposition of the matter, may submit the matter to the Secretary of Defense. The Secretary shall make a decision to</p>	<ul style="list-style-type: none"> •120 days after a complaint is filed with OSC if OSC has not notified the complainant that it will seek corrective action. <p>The Whistleblower Protection Enhancement Act of 2012 expands the IRA right to include most reprisal claims under 5 U.S.C. § 2302(b)(9), including:</p> <ul style="list-style-type: none"> •retaliation for filing a whistleblower appeal, complaint or grievance; •retaliation for assisting an individual in the exercise of an appeal, complaint or grievance right; •retaliation for cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel; or •retaliation for refusing to obey an order that would require the individual to violate a law. <p>Procedures for filing an IRA are set forth in MSPB regulations at 5 C.F.R. Part 1209. (Note: In considering an IRA, the MSPB may refuse to accept any matters that were not specifically presented to OSC first. Similarly, the MSPB will only consider retaliation allegations in an IRA appeal.)</p> <p>For more information, please see OSC fact sheets “How Complaints are Received and Processed,” “How Complaints are Investigated and Prosecuted,” and “How OSC’s Mediation Program Works.” Other information is also available here.</p>

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	reverse or uphold the decision of the Secretary of the military department concerned in the matter within 90 days after receipt of such a submittal.	

Links to Whistleblower Protection Resources

- [DoD IG](#) – Whistleblower Reprisal Investigations
- U.S. Office of Special Counsel
- Merit Systems Protection Board
- Joint Staff IG
- Air Force IG
- Army IG
- Marine Corps IG
- Navy IG
- U.S. Dept. of Labor/OSHA - Whistleblower Protection Program

NAFI Whistleblower:

- **Title 10 U.S.C. 1587**, Employees of Nonappropriated Fund Instrumentalities

Intelligence Community Whistleblower:

- **PPD 19**, Protecting Whistleblowers With Access to Classified Information, (10 Oct 12)
- **DTM 13-008**, DoD Implementation of Presidential Policy Directive 19, (17 Dec 14)

Defense Contractor Whistleblower:

- **Title 10 U.S.C. 2409**, Contractor Employees: Protection From Reprisal For Disclosure of Certain Information, Dated January 28, 2008 (Applies to contracts signed before July 1, 2013)
- **Title 10 U.S.C. 2409**, Contractor Employees: Protection From Reprisal For Disclosure of Certain Information, Dated January 2, 2013 (Applies to contracts signed or revised on or after July 1, 2013)
- **DFAR Subpart 203.9**, Whistleblower Protections for Contractor Employees