

## Memorandum

**From:** JPP Staff Members: Julie Carson and LTC Kelly McGovern  
**To:** Judicial Proceedings Panel – Article 120 Subcommittee  
**Date:** December 18, 2015  
**Subject:** Follow-up Information from the December 11, 2015, JPP Meeting Regarding The Elements and Burdens of Proof for Whistleblower Acts

### **JPP Question 1: What authority established the standard of proof for Military Whistleblower Protection Act (MWPA) investigations?**

Answer: The DoD IG Guide to Investigating Whistleblower Reprisal and Restriction Complaints, dated November 2014, (the DoD IG Guide) is the only source that defines the preponderance of the evidence standard of proof required for all four elements of MWPA claims.

Background Information: The Military Whistleblower Protection Act of 1988, as amended, 10 U.S.C. 1034(i) requires that the Secretary of Defense shall prescribe regulations to carry out the Act. The statute itself does not address burdens of proof required to warrant an investigation or to substantiate an allegation, therefore it is left to DoD Policy. The MWPA was broadened 1991 and amended again in 2013. The most recent amendment expanded the MWPA, but it did not address the standard of proof.

The DoD policy on Military Whistleblower Reprisal is found in DODD 7050.06 (April 17, 2015) Military Whistleblower Protection. This policy requires that DoD IG “investigates or oversees DoD Component IG investigations of allegations” of whistleblower reprisal. The Directive requires that DoD IG determine if there is sufficient evidence to warrant an investigation, reviews the results of investigations by the Services’ IGs, approves the results, or ensures that deficiencies are corrected. (Encl 2.1(d)) However, the Directive does not address the standard of review to warrant investigations or to substantiate allegations during an investigation.

The DoD IG Guide to Investigating Military Whistleblower Reprisal and Restriction Complaints, is the only source that articulates the standard of MWPA claims. Chapter 1.4 *Standard of Proof*, of the guide states that “[t]he standard of proof in 10 U.S.C. 1034 cases is preponderance of the evidence, meaning 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.” The DoD IG Guide contains explanations of the four elements required for MWPA and provides detailed examples to demonstrate the applicability of the preponderance of evidence standard. For the fourth element of a MWPA, it also contains a list of factors for the investigator to consider when assessing whether a causal connection exists between the protection communication and the adverse personnel action, meets the preponderance of evidence standard.

**JPP Question 2: What authority established the standard of proof for U.S. Government civilian employee whistleblower reprisal investigations?**

Answer: [The Whistleblower Protection Act of 1989 \(WPA\)](#) established the elements and standard of proof for U.S. Government civilian employees.

Background: [The Whistleblower Protection Act of 1989](#) was enacted to amend title 5 U.S.C. to strengthen the protections available to Federal employees against prohibited personnel practices, which were originally passed in the Civil Service Reform Act of 1978. The Whistleblower Protection Act of 1989 established that the primary role of the Office of the Special Counsel is to protect employees, especially whistleblowers, from prohibited personnel practices. The Act details the Merit System Protection Board, Office of Special Counsel's Role, and an Individual's Right of Action.

Specifically, the Act details that the Special Counsel must prove the fourth element of a whistleblower claim by demonstrating (by a preponderance of the evidence) that the whistleblower's disclosure was a contributing factor in the adverse personnel action. If the government agency, however, shows by clear and convincing evidence that the same personnel action would have taken place, regardless of the disclosure, then the Merit Systems Protection Board will not order any corrective action.

**JPP Question 3: Why is there a difference between the fourth element and standard of proof for the Military Whistleblower Protection Act and the U.S. Whistleblower Protection Act?**

Answer: The staff was not able to find any written legislative history that would explain why the standard of proof differs between the MWPA and the civilian WPA. The DoD IG system for Servicemembers and the MSPB for civilians are two distinct personnel investigation systems with similar elements for reprisal claims, but a different burden of proof. The MWPA allows the SecDef to prescribe regulations to carry out the Act. Therefore, any changes to the elements and/or standard of proof would not require legislation.

**JPP Question 4: What other additional information could be helpful in understanding the standard of proof for the MWPA and other agencies' whistleblower policies?**

Answer: The [Government Accountability Project](#), a nonprofit public interest group, publishes information about whistleblower policies. The following excerpts from [INTERNATIONAL BEST PRACTICES FOR WHISTLEBLOWER POLICIES](#) may be helpful to understand the evolution of the standard of proof required in reprisal cases.

**12. Realistic Standards to Prove Violation of Rights.** The U.S. Whistleblower Protection Act of 1989 overhauled antiquated, unreasonable burdens of proof that had made it hopelessly unrealistic for whistleblowers to prevail when defending their rights. The test has been adopted

within international law, within generic professional standards for intergovernmental organizations such as the United Nations.

This emerging global standard is that a whistleblower establishes a *prima facie* case of violation by establishing through a preponderance of the evidence that protected conduct was a “contributing factor” in challenged discrimination. The discrimination does not have to involve retaliation, but only need occur “because of” the whistleblowing. Once a *prima facie* case is made, the burden of proof shifts to the organization to demonstrate by clear and convincing evidence that it would have taken the same action for independent, legitimate reasons in the absence of protected activity.

Since the U.S. government changed the burden of proof in its whistleblower laws, the rate of success on the merits has increased from between 1-5 percent annually to between 25-33 percent, which gives whistleblowers a fighting chance to successfully defend themselves. Many nations that adjudicate whistleblower disputes under labor laws have analogous presumptions and track records. There is no alternative, however, to committing to one of these proven formulas to determine the tests the whistleblower must pass to win a ruling that their rights were violated.

See Tom Devine and Shelley Walden, *International Best Practices for Whistleblower Policies*, Government Accountability Project (April 12, 2013), [http://www.whistleblower.org/sites/default/files/Best\\_Practices\\_Document\\_for\\_website\\_revised\\_April\\_12\\_2013.pdf](http://www.whistleblower.org/sites/default/files/Best_Practices_Document_for_website_revised_April_12_2013.pdf) (last visited December 18, 2015).

## **Legislative & Statutory History of the MWPA**

The statute was introduced by bill to the [United States House of Representatives](#) under the sponsorship of Congresswoman [Barbara Boxer](#) in 1985. In 1986, the substance of the Boxer bill was attached as an amendment to the FY1987 House Defense Authorization Act. The language failed in conference between the House and the [United States Senate](#). The following year, the Inspector General of the U.S. Department of Defense was called to testify before the Defense Acquisition Policy Panel of the [House Armed Services Committee](#). Also testifying were Defense whistleblowers Chief Petty Officer Michael R. Tufariello, U.S.N.R. and Major Peter C. Cole, U.S. Army National Guard, State of Texas.<sup>[8]</sup>

In 1988, the Military Whistleblower Protection Act of 1988 was passed by the United States Congress to protect military members who make lawful disclosures of wrongdoing to Members of Congress or an Inspector General. It required the Office of the Inspector General, U.S. Department of Defense to investigate allegations of whistleblower reprisal. The statute was broadened in 1991 to protect disclosures to auditors, criminal investigators, inspectors and other Department of Defense law enforcement officers. In 1998, the Congress amended the statute to permit lesser Inspectors General to receive allegations and conduct investigations and retained oversight in the Office of Inspector General, U.S. Department of Defense.<sup>[9]</sup>

## The MWPA 2013 Revisions

On December 12, 2013, the [United States House of Representatives](#) approved section 1714 of the [National Defense Authorization Act for Fiscal Year 2014](#) overhauling the Military Whistleblower Protection Act of 1988. The [Government Accountability Project](#), a nonprofit public interest group, praised the legislation as the "first significant advance in military whistleblower rights since they were enacted in 1988" and summarized its provisions as follows:

- Statute of Limitations: This period would expand from 60 days to one year, consistent with general best practice whistleblower protections.
- Protected Audiences: Audiences for protected disclosures would expand to include testimony to congressional and law enforcement staff, courts, grand jury and court martial proceedings.
- Closing Loopholes for Protected Speech: The reform closes the same loopholes that Congress eliminated in the civil service [Whistleblower Protection Enhancement Act](#). Such loopholes include: A whistleblower is not protected if someone previously disclosed the same misconduct; oral disclosures not being covered; whistleblower motives being challenged, and whether the disclosure was made while on or off duty.
- Expansion of Protection against Forms of Harassment: The reforms ban retaliatory removal of duties inconsistent with rank.
- Independent Service [Office of the Inspector General](#) (OIG) investigations: The reforms require service-specific OIG investigations into reprisal to be handled by a higher organizational department than the one where alleged harassment occurred.
- Administrative Due Process Hearings: If not satisfied by OIG action, each member has the right to a Board for Correction of Military Records (BCMR) administrative due process hearing.<sup>[10]</sup>

The bill was signed into law by President [Barack Obama](#) on December 26, 2013.<sup>[11]</sup>

## References

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2. Pixie Alexander, The Military Whistleblower Protection Act at eHow (not linked due to Spam concerns).
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5. Military Reprisal Investigations, History of the Military Whistleblower Protection [Act](#).
6. Defense Hotline, Whistleblower Protection [Information](#).
7. Naval Inspector General, Point Paper on Whistleblower/Reprisal [Guidance](#).
8. Office of the Inspector General, U.S. Department of Defense, History of the Military Whistleblower Protection Act and Statute Prohibiting the Use of Mental Health Evaluations in [\[1\]](#).
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10. *Blaylock, Dylan (December 13, 2013). "GAP Praises House Approval of Military Whistleblower Protection Act Makeover". [Government Accountability Project](#).*
11. *Rucker, Philip (December 26, 2013). "Obama signs defense law, calls it a 'welcome step' toward closing Guantanamo Bay prison". [The Washington Post](#).*