

**JUDICIAL PROCEEDINGS PANEL
REQUEST FOR INFORMATION SET # 3**

76. What are the criteria for substantiating a retaliation case investigated by the command, the SARB, the Service IG, and MCIO? If the standard is different, please explain.

USA	<p>COMMAND: For 15-6 investigations (from AR 15-6, paragraph 3-10): <i>Standard of proof.</i> Unless another directive or an instruction of the appointing authority establishes a different standard, the findings of investigations and boards governed by this regulation must be supported by a greater weight of evidence than supports a contrary conclusion, that is, evidence which, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion. The weight of the evidence is not determined by the number of witnesses or volume of exhibits, but by considering all the evidence and evaluating such factors as the witness’s demeanor, opportunity for knowledge, information possessed, ability to recall and relate events, and other indications of veracity.</p> <p>SARB: The SARB will not substantiate complaints of sexual assault or conduct separate investigations. The SARB will direct that allegations be investigated, monitor investigations until complete, and track and report data on allegations of retaliation.</p> <p>DAIG: DAIG applies a “preponderance of the evidence” standard.</p> <p>MCIO: CID would investigate any retaliation case that was a non-military related criminal offense. Specifically, CID would investigate an Assault, or a Wrongfully Damaging of Private Property, or Communicating a Threat. The criteria for substantiating any criminal offense investigated by CID is a probable cause standard as opined upon by the supporting trial counsel. Generally, the probable cause standard is the set of facts and circumstances which would induce a reasonably intelligent and prudent person to believe that a crime had been committed and that a particular person had committed it.</p>
USAF	<p>Commander-Directed Investigations: If a commander directs a commander-directed investigation (CDI), the standard of proof is a preponderance of the evidence. A preponderance of the evidence for a CDI is defined as “the greater weight and quality of the credible evidence,” meaning the evidence indicates that one position is more probable than the opposing position. After weighing all the evidence, the Investigating Officer (IO) may substantiate a finding when the greater weight or quality of the evidence points to a particular conclusion as more credible and probable than the reverse. Additionally, while the amount of evidence is something to consider, non-credible evidence will not trump a smaller amount of good evidence. Some additional things an IO should consider when weighing the evidence are witness demeanor, opportunity for knowledge, bias, motive, intent, and the ability to recall and relate events. At all times, IOs may use their own common sense, life experiences and knowledge of the ways of the world to assess the credibility of witnesses they interview. A legal advisor assists the commander in framing allegations, provides training to the IO and assists in formulating the proof analysis and interview questions, and advises the IO during the investigation. CDI Guide, para. 3.4.1. Commanders receive a legal review on CDIs from their servicing Staff</p>

**JUDICIAL PROCEEDINGS PANEL
REQUEST FOR INFORMATION SET # 3**

	<p>Judge Advocate (SJA) before reviewing the Report of Investigation and taking action. CDI Guide, para. 3.4.2.</p> <p><u>IG</u>: The standard of proof for IG investigations is a preponderance of the evidence. AFI 90-301, para. 3.48.1. The standard “means that it is more likely than not the wrongdoing has occurred.” The standard is further explained in para. 3.48.2: “IOs must be careful not to apply this standard too mechanically. Quality counts as much as quantity and an IO may choose to believe one witness rather than five others if the one is sufficiently credible and the five are not. In addition, there is no way to measure the weight of a document against the testimony of a witness other than by evaluating credibility as discussed in paragraph 3.49.2.” IGs at all levels receive a legal sufficiency review from their servicing SJA prior to approving the report and its findings. AFI 90-301, para. 3.59.1. The attorney who provides the legal sufficiency review is a different attorney than the individual assigned to advise the IO. AFI 90-301, para. 3.59.2.</p> <p><u>MCIQ</u>: The Air Force Office of Special Investigations (AFOSI) does not substantiate or unsubstantiate allegations that it investigates. Rather, AFOSI investigates each allegation and writes a Report of Investigation (ROI) that includes all evidence collected during the investigation. AFOSI provides the ROI to the commander of the subject of the investigation. The commander receives advice from the servicing SJA taking into account the evidentiary standard of the disciplinary forum under consideration.</p> <p><u>SARB</u>: The AF does not use SARBs.</p> <p><u>References</u>:</p> <ul style="list-style-type: none"> - <i>Commander-Directed Investigation (CDI) Guide</i>, 26 April 2010, http://www.af.mil/Portals/1/documents/ig/cdi-guide.pdf - AFI 90-301, <i>Inspector General Complaints Resolution</i>, 6 June 2012, http://static.e-publishing.af.mil/production/1/saf_ig/publication/afi90-301/afi90-301.pdf - AFI 51-904, <i>Complaints of Wrongs under Article 138, Uniform Code of Military Justice</i>, 30 June 1994, http://static.e-publishing.af.mil/production/1/af_a3_5/publication/afi51-904/afi51-904.pdf
<p>USN</p>	<p>NAVINSGEN typically investigates cases of reprisal or retaliation resulting in unfavorable personnel actions. The standard of review for is “preponderance of evidence.”</p> <p>Pursuant to SECNAVINST 5370.7D, the command typically investigates cases of retaliation in the form of ostracism or maltreatment. A command investigation, pursuant to JAGMAN 0203, uses the same “preponderance of evidence” standard for facts alleged in the allegation. However, a commander may consider the appropriate disposition of the matter and evaluate with advice of a judge advocate whether the facts alleged meet a higher standard of proof in determining how to dispose of the case, i.e. at nonjudicial punishment where a preponderance of the evidence burden</p>

**JUDICIAL PROCEEDINGS PANEL
REQUEST FOR INFORMATION SET # 3**

	<p>must be met, or at a court-martial, where the facts must be proven beyond a reasonable doubt.</p> <p>NCIS, when investigating reprisal or retaliation claims gathers the facts and then forwards the results of the investigation to the command to determine whether the claim is actionable.</p>
USMC	<p>The Service IG or MCIO both have roles in substantiation of retaliation incidents. Because NCIS, a DON agency, is addressed in the USN responses, only the CI and IG process is described below. HQMC SAPR, SARCs, SAPR VA/UVAs, nor CMGs initiate, conduct, or substantiate any investigations, retaliation or otherwise. The Marine Corps SAPR Program has no role in substantiating cases of retaliation.</p> <p>CI. As discussed in Question 74 above, Chapter 2 of the JAGMAN dictates the procedures and standards for CIs. All findings of fact in CIs must be found by a preponderance of the evidence.</p> <p>IG. For professional retaliation (reprisal) the criteria are:</p> <ul style="list-style-type: none"> a. The complainant made (or was preparing to make) a protected communication (PC); b. The complainant was given (or threatened with) an unfavorable personnel action (UPA)/adverse personnel action (PA) or a favorable personnel action was withheld (or threatened to be withheld); c. The Responsible Management Officials (RMO) knew, or suspected, the complainant made or was preparing to make a PC; and d. The personnel actions would not have been taken or withheld absent the PC. <p>The investigation must document: the RMO’s reasons for taking the PA; consistency as compared with similarly situated service members; the motive for taking or withholding the PA; as well as the RMO reaction to the PC. The burden of proof to substantiate professional retaliation (reprisal) is a preponderance of the evidence. Evaluative criteria for social retaliation have not been established beyond the definitions (as required by Section 1709 of NDAA 14) in SECNAVINST 5370.7D. DoDD 7050.06 does not address social retaliation.</p>
USCG	<p>Neither CGIS nor the command “substantiates” a case that it investigates. The command will take action on the case under the same standard that it does for other allegations of misconduct.</p>