

CHAPTER 1

RESTRICTION AND WHISTLEBLOWER REPRISAL

1. Purpose

This chapter explains restriction, reprisal, and the applicable legal and regulatory terms and their application, under Title 10, United States Code, Section 1034 (10 U.S.C. 1034), “Protected communications; prohibition of retaliatory actions,” and DoD Directive (DoDD) 7050.06, “Military Whistleblower Protection,” (Appendix A).

2. Restriction

Title 10 U.S.C. 1034 prohibits anyone from restricting a member of the Armed Forces from making lawful communications to a member of Congress or an Inspector General (IG).

Proving restriction requires establishing by a preponderance of the evidence that the responsible management official (RMO) prevented or attempted to prevent a member of the Armed Forces from making or preparing to make a lawful communication to a member of Congress or an IG. While as a general matter an RMO may not limit a member’s communications to a member of Congress or an IG, in analyzing a case consider authorized limits on official communications such as those provided in DoDI 5400.04, “Provisions of Information to Congress”; DoD 5400.7-R, “DoD FOIA Program”; DoD 5400.11-R, “DoD Privacy Program.” The determination is always case-specific and must take into consideration the totality of the circumstances in that case.

Restriction can be substantiated even if the RMO’s attempt at preventing a lawful communication failed to actually deter the member of the Armed Forces from subsequently making contact with a member of Congress or an IG. When analyzing such a fact-pattern, your focus should be on whether a reasonable person could believe the RMO’s action was an attempt to deter the member from talking to a member of Congress or an IG.

3. Whistleblower Reprisal

The elements of reprisal are protected communication (PC); the responsible management official knew or perceived that the complainant made or prepared to make a protected communication; a personnel action (PA) taken, withheld, or threatened to be taken or withheld; and a causal connection between the PC and the PA. If the evidence establishes that the PA would have been taken, withheld, or threatened to be taken or withheld even absent the PC, then the complaint is not substantiated. All four elements of reprisal must be established by a preponderance of the evidence in order for reprisal to be substantiated. Each element is discussed in detail below.

a. Element 1, Protected Communication (PC): Did Complainant make or prepare to make a protected communication, or was Complainant perceived as having made or prepared to make a protected communication?

The statute protects members of the Armed Forces who make or prepare to make a PC. Examples of preparing to make a PC include drafting but not sending a complaint and expressing an intention to make a PC. The statute also protects a member who is perceived as making or preparing to make a PC not actually made.

The complainant may have written a letter, sent an e-mail, or spoken to someone who can receive a PC. Determining whether the complainant’s communication or perceived communication was protected relies on two basic questions:

- What was communicated?
- To whom was it communicated?

Table 1.1 lists the content requirements and conditions under which communications are protected.

Table 1.1 - Protected Communications

Type of Communication:	Conditions on Protection:	When made to:
Any communication	Must be a lawful communication	<ul style="list-style-type: none"> • A member of Congress or • An IG
Any communication in which a Service member communicates information that he or she reasonably believes evidences: <ul style="list-style-type: none"> • A violation of law or regulation, including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct in violations of section 920 through 920c of Reference (c) (articles 120 through 120c of the UCMJ), sexual harassment or unlawful discrimination; • Gross mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial and specific danger to public health or safety; or • A threat by another Service member or employee of the Federal Government that indicates a determination or intent to kill or cause serious bodily injury to Service members or civilians or damage to military, federal, or civilian property. • Testimony, or otherwise participating in or assisting in an investigation or proceeding related to a communication as described above; or • Filing, or causing to be filed, participating in, or otherwise assisting in a military whistleblower reprisal action. 	A communication will not lose its protected status because: <ul style="list-style-type: none"> • The communication was made to a person who participated in the activity that the Service member complained of; • The communication revealed information that had been previously disclosed; • Of the Service member’s motive for making the communication; • The communication was not in writing; • The communication was made while the Service member was off duty; or • The communication was made during the normal course of the Service member’s duties. 	<ul style="list-style-type: none"> • A member of Congress; • An IG; • A member of a DoD audit, inspection, investigation, or law enforcement organization; • Any person or organization in the chain of command; • A court-martial proceeding; or • Any other person or organization designated pursuant to regulations or other established administrative procedures to receive such communications

Members of Congress and IGs. “Any lawful communication to a Member of Congress or an IG” is protected under 10 U.S.C. 1034. Communications to Congress and IGs need not disclose wrongdoing to be protected; the only requirement is that the communication be lawful. Examples include routine constituent correspondence, complaints about chain of command, or testifying before Congress. Unlawful communications include disclosures of classified, Privacy Act-protected, and medical quality assurance information to an unauthorized recipient, or threats.

Officials authorized to receive PCs include:

- a member of Congress;
- an Inspector General;
- a member of a DoD audit, inspection, investigation, or law enforcement organization;
- any person or organization in the complainant’s chain of command;
- a court martial proceeding; or
- any other person designated pursuant to regulations or other established administrative procedures to receive such communications.

Many organizations have been designated to receive communication related to their specific areas of responsibility. For example, safety officials are authorized to receive communications concerning violations of safety laws or regulations, the Sexual Assault Response Coordinator is authorized to receive communications concerning sexual assault, and Equal Opportunity advisors are authorized to receive communications regarding equal opportunity, discrimination, or harassment issues.

Communication made to an authorized recipient listed above is a PC only if the member communicates (or is perceived as communicating) information reasonably believed by the complainant to constitute evidence of:

- a violation of law or regulation, including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct in violation of articles 120 through 120c of the Uniform Code of Military Justice, sexual harassment, or unlawful discrimination;
- gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; or
- 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.

A belief is reasonable if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the complainant could reasonably conclude that the disclosed information evidences one of the categories of wrongdoing. So long as his or her belief is reasonable, the complainant need not be right about the underlying allegation.

b. Element 2, Personnel Action (PA): Was an unfavorable personnel action taken or threatened against Complainant, or was a favorable personnel action withheld or threatened to be withheld from Complainant?

The statute prohibits persons from taking or threatening to take unfavorable PAs or withholding or threatening to withhold favorable PAs in reprisal for PC. DoDD 7050.06 defines a personnel action as “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,” which includes promotion, a disciplinary or corrective action; a transfer or reassignment; a performance evaluation; a decision on pay, benefits, awards, or training; referral for a mental health evaluation; or any other significant change in duties or responsibilities inconsistent with the military service member’s grade.

Unfavorable Personnel Actions. Unfavorable PAs may be administrative action that takes away a benefit or results in an entry or document added to the affected member’s personnel records that could be considered negative by boards or supervisors. Each Service has regulations governing PAs.

Examples of actions generally considered unfavorable PAs include:

- counseling that is punitive or that supports separation or adverse evaluation
- letter of reprimand, caution, censure
- adverse evaluation report
- relief for cause
- removal from position
- relief of command
- return to service
- separation from service
- removal from promotion, school, or command list
- entry-level separation
- administrative reduction in rank or pay
- bar to reenlistment
- military occupational specialty reclassification
- referral for mental health evaluation
- failure of a superior to respond to any retaliatory action or harassment (of which the superior had actual knowledge) taken by one or more subordinates against a member
- directing, initiating, or conducting a “retaliatory investigation” for the primary purpose of punishing, harassing, or ostracizing a member of the armed forces for making a protected communication. The investigation is considered proven to be not retaliatory if the RMO provides proof that he or she consulted with a superior

in the chain of command, an inspector general, or a judge advocate general on the disposition of a complaint against a member of the armed forces for an allegation of collateral misconduct or for a matter unrelated to a protected communication.

Examples of favorable PAs that can be withheld or threatened to be withheld include:

- evaluation
- promotion recommendation
- award
- training
- assignment
- attendance at school
- transfer

Examples of threatened PAs taken from actual cases where a reasonable person might infer a threat include statements that:

- a subordinate's career would be "crushed and destroyed" for filing an IG complaint;
- a complainant would suffer a "new set of headaches" come evaluation time if he or she filed an IG complaint; and
- talking to the IG was "not career enhancing."

The list of PAs above is not exhaustive. The directive's broad definition of PA requires investigators to consider each alleged PA on a case-by-case basis to determine whether the action had or may have an effect on the complainant's current position or career.

Investigators should review, on a case-by-case basis, complaints that involve counseling to determine whether they affect, or have the potential to affect, a Service member's current position or career. The same applies for other locally held letters of reprimand, admonishment, instruction, or censure.

In evaluating these complaints, the facts regarding the nature of the action should be adequately developed before deciding on whether to dismiss the complaint or proceed to investigation.

Favorable Personnel Actions. Withholding a favorable PA can affect a member's current position or career as adversely as taking unfavorable action.

An RMO's recommendation for a choice assignment may or may not be a PA. Careers are built on a series of assignments with follow-on assignments building on previous ones. Some programs, schools, and assignments weigh command recommendations, but others do not. Examine what influence the recommendation would have on the decision maker.

Most favorable PAs are included in the member's Official Military Personnel Folder (OMPF). Evaluations, assignments, school attendance, and awards are generally considered PAs because of their long-lasting impact on a career. Promotion and other career boards review and consider the schools attended and awards received. However, not all schools have an impact.

Additional duties are not generally considered PAs. They do not change the inherent nature of a Service member's current position and normally will not impact the complainant's career. The OMPF usually does not record a Service member's additional duties. Certain additional duties may be desirable; however, it is unlikely even in those circumstances that the additional duty would be considered a PA.

Determining whether an action is a PA may require additional fact finding. If you are uncertain of whether the action had the potential to impact the complainant's current position or career, consult with a subject matter expert, such as contacting Human Resources Command for an expert opinion concerning an OER or NCOER to discuss what, if any, impact the RMO's actions could have on the complainant's current position or career.

c. Element 3, Knowledge: Did the responsible management official(s) have knowledge that Complainant made or prepared to make protected communication(s) or perceive Complainant as making or preparing to make protected communication(s)?

Independently analyze each RMO involved in the PA(s) to determine his or her knowledge of the PC. The RMO may assert that he or she was unaware of the PC, for which you need to seek corroborating evidence. If the RMO did not know about or suspect the PC before commencing with the PA, then he or she could not have taken or threatened a PA in reprisal for a PC. However, it is very difficult to prove an absence of knowledge. Compare the RMO's testimony with other evidence, including the testimony of complainant and other witnesses, and assign it appropriate weight and credibility.

Sometimes RMOs take action based on rumor or perception. The rumors or perceptions may not be accurate, but they can still motivate reprisal.

d. Element 4, Causation: Would the same personnel action(s) have been taken, withheld, or threatened absent the protected communication(s)? To determine the answer to the "causation" question, we must analyze what bearing, if any, the protected communication had on the decision to take, threaten, or withhold the personnel action. For each personnel action, we analyze the following factors and then weigh them together to determine whether the PA would have been taken absent the PC.

Reason stated by RMO for taking, withholding, or threatening the PA. Examine the evidence supporting the RMO's stated reason for the PA. If the reason was performance related, what documentation exists regarding performance in support of the PA? Is there supporting testimonial evidence? If the RMO stated that he or 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 communication(s) and personnel action(s). The importance of producing an accurate chronology cannot be overstated. A PA taken shortly after the complainant's PC supports the inference of reprisal. To the contrary, the RMO may have taken the PA months or even years after the complainant's PC. The complainant may have been in a different assignment or command when he or she made the PC. Consider whether the same management officials affected by the underlying investigation or PC were still in a position to take or influence the PA.

The RMO may provide evidence that he or she made the decision prior to the PC. The RMO may also provide evidence that he or she contemplated or discussed taking the action with other individuals prior to the PC. If the RMO consulted with others prior to taking the action, those individuals can provide relevant evidence and should be interviewed to determine whether they corroborate or refute the stated reason for taking the action.

Motive on the part of the RMO(s) to reprise. Did the RMO suffer embarrassment or negative consequences arising from the PC? In addition, have any of the RMOs exhibited or expressed animosity toward the complainant for making the PC, or have they expressed animosity regarding the very idea of, for example, filing an IG complaint or contacting a member of Congress? For instance, you may find evidence that the RMO displayed anger in response to learning of the complainant's PC because he or she believed it had a negative impact on their career, or it was embarrassing to the command. Even when an RMO asserts that the PC was not a factor and something else was the only factor, the investigation is not complete until the investigator tests the assertion against the evidence and considers the totality of the circumstances surrounding the PA.

Disparate treatment of Complainant as compared to other similarly situated individuals who did not make PCs.

If similarly situated personnel who did not make a PC exist, consider whether the RMO's actions were consistent with actions he or she has taken against those personnel. A similarly situated person would be one who engaged in the same conduct or whose performance was at a similar level to the complainant's. If the RMO treated the complainant the same as other similarly situated military members who had not made PCs, then the evidence supports that the RMO did not reprise. If the RMO disciplined the complainant more severely than others who had not made a PC, then the evidence supports reprisal. If the complainant's performance was the stated reason for the PA, how did the RMO treat other poor performers? Were they given more chances to improve before receiving a comparable PA or was poor performance generally overlooked?

4. Standard of Proof

The standard of proof in 10 U.S.C. 1034 cases is a preponderance of the evidence, meaning that 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.