

CHAPTER 4 REPORTING REQUIREMENTS

1. Report of Investigation (ROI) - Format

The WRI ROI format includes an executive summary followed by sections on background, scope, statutory authority, findings of fact, analysis, discussion, conclusions, and recommendations, in that order (see Appendices F and G for WRI's 10 U.S.C. 1034 templates for reprisal and restriction, respectively).

a. Executive Summary. The Executive Summary should be a one-page section of the report designed to give the reader the most important information contained in the report in the most concise manner. The main elements of the Executive Summary are:

- **Introductory Paragraph.** The introductory paragraph should state that the investigation was conducted in response to allegations that the complainant suffered reprisal for making a protected communication. Start with: "We initiated this investigation in response to an allegation that [RMO name]¹ took withheld or threatened to take or withhold action [replace "took withheld or threatened to take or withhold action" with the specific personnel action, such as, "did not recommend assignment extension," "denied an end-of-tour award"] to [complainant name] in reprisal for making a protected communication."
- **Findings Paragraph.** This paragraph should concisely summarize the factual findings related to the elements of reprisal.
- **Substantiation.** This paragraph should state whether or not the allegation was substantiated. It should include a clear description of the allegation that the RMO(s) did or did not take, withhold, or threaten to take the PA in question in reprisal for Complainant's protected communication(s), in violation of Title 10, United States Code, Section 1034 (10 U.S.C. 1034), "Protected communications; prohibition of retaliatory personnel actions," which is implemented by DoD Directive 7050.06, "Military Whistleblower Protection."

If there are multiple RMOs having different findings, summarize them separately as in the paragraph above; however, if they collectively took the actions, summarize them together.

¹ Brackets are used throughout the examples to indicate the writer should insert information. Do not use the brackets in the ROI unless needed within a quote.

- **Recommendation Paragraph.** In not substantiated cases, state, “We make no recommendations in this matter.” In substantiated cases, DoDD 7050.06 requires the report to specify the relief to make the complainant whole; that is, to return the whistleblower, as nearly as practicable and reasonable, to the position the whistleblower would have held had the reprisal not occurred. So, for example, state, “We recommend that the Secretary of the Military Department concerned:
 - Take appropriate corrective action regarding the [RMO name]; and
 - [Enter the actions that would return the complainant to the status he or she was in before the reprisal—that is, that would undo each of the substantiated PAs.]

b. Background. This section should provide the reader information about the organizations, command relationships, and Complainant and management officials involved in the matter under investigation. Give a brief overview of events that led to the protected communication and personnel action. It may also be used to provide a very brief chronology or synopsis of key events leading up to the matters under investigation but generally not the matters directly under investigation. Do not include detailed narratives of the facts of the case that are presented in the Findings of Fact section of the report.

c. Scope. This section should describe the scope of the investigation in summary terms, leading with a statement of the timeframe addressed by the investigation, followed by key witnesses interviewed and crucial documents reviewed. Do not list every witness and every type of document. Include subject matter experts if their testimony was crucial to the outcome of the investigation.

d. Statutory Authority. The following statutory language should be cited:

“The [name the investigating organization] conducted this whistleblower reprisal investigation pursuant to Title 10, United States Code, Section 1034 (10 U.S.C. 1034), “Protected communications; prohibition of retaliatory personnel actions,” which is implemented by DoD Directive 7050.06, “Military Whistleblower Protection.”

e. Findings of Fact. This section is a chronological telling of only the facts relevant to the case. State who, what, when, and where—without the use of terms such as protected communications, personnel actions, RMO knowledge, stated reason, RMO motive, animus, or disparate treatment. These terms are for analyzing what happened in relation to the elements of reprisal and should be reserved for the analysis section. Do not, for example, find that a visit to the IG is a protected communication or an unfavorable OER is a personnel action, or that an e-mail to an RMO gave them knowledge of a protected communication etc.

Tell what happened, not the testimony about what happened. For facts not in dispute, state, for example, “Complainant told RMO during a meeting on September 11 that she had been sexually harassed by his XO,” instead of “Complainant testified.... RMO testified..., etc.” Refer specifically to testimony or other evidence only where there are factual disputes in the testimony and resolve those discrepancies in this section. When this requires a credibility assessment, it should be done in this section as well.

f. Analysis. The analysis section begins with a standard paragraph describing the way reprisal is proven. This is to facilitate the understanding of the reader of the report. The paragraph states:

The elements of reprisal are protected communication, knowledge of the protected communication on the part of the responsible management official; a personnel action taken, threatened, or withheld; and a causal connection between the protected communication and the personnel action. The causal connection is resolved by answering the question in paragraph D, below. If the evidence does not establish that the personnel action would have been taken, threatened, or withheld even absent the protected communication, then the complaint is substantiated. Conversely, if the evidence establishes that it would have been taken, threatened, or withheld absent the protected communication, then the complaint is not substantiated. Below, we analyze each of the elements.

This paragraph is followed by a subsection for each of the 4 elements to be analyzed—the headings are in the form of questions. The four-part analysis is a conjunctive standard; therefore, if one of the elements cannot be met (for example, if investigation reveals there was in fact no PC made or no RMO knowledge of the PC), it will ordinarily be unnecessary to address the subsequent elements. In those circumstances, following the last question analyzed, simply write, for example, “Because the RMO lacked knowledge of the PCs, reprisal could not have occurred.”

The four questions to be addressed are as follows:

A. Did Complainant make or prepare to make a protected communication, or was Complainant perceived as having made or prepared to make a protected communication?

Summarize the findings in the first sentence: “We determined that the Complainant made X protected communications and Y communications were not protected....”

Use a short paragraph for each alleged protected communication that synthesizes information already in the Findings of Fact section. Do not introduce new facts. This is merely listing each alleged protected communication and showing your determination that it either is or is not in fact a protected communication and why. These should not begin with “We found,” or “So-and-so stated.” They should end with a statement saying that an alleged protected communication is or is not protected under 10 U.S.C. 1034 and why.

When the investigation covers more than one protected communication, the first paragraph should summarize the different protected communications (not the facts for each protected communication) and serve as a topic paragraph for the section. Then use descriptive sub-headings to introduce a paragraph or more for each protected communication.

Conclude the entire section by stating, “As described above, a preponderance of the evidence established that Complainant”

B. Was an unfavorable personnel action taken or threatened against Complainant, or was a favorable personnel action withheld or threatened to be withheld from Complainant?

Summarize the findings in the first sentence: “We determined that Complainant was/was not the subject of [a personnel action].”

When the investigation covers only one personnel action, this paragraph should synthesize the facts related to the personnel action and determine whether or not it is a personnel action under the statute.

When the investigation covers more than one personnel action, the very first paragraph should summarize the different personnel actions (not the facts for each personnel action) and serve as a topic paragraph for the section. Then use descriptive sub-headings to introduce a paragraph for each personnel action.

Conclude the entire section by stating, “As described above, a preponderance of the evidence established that....”

C. Did the responsible management official(s) know that Complainant made or prepared to make protected communication(s) or perceive Complainant as having made or prepared to make protected communication(s)?

Summarize the findings in the first sentence: “We determined that [RMO name] knew and [second RMO’s name] perceived that Complainant had communicated with ..., and [third RMO’s name] had no knowledge of any protected communications.” Analyze in a separate paragraph or more the findings regarding each RMO.

The follow-on sentences/paragraphs should present the findings of fact—when each RMO first perceived or became aware of the protected communications(s). If knowledge by any RMO is undisputed, simply state the fact and cite the evidence establishing that fact (i.e., witness testimony, documentary evidence). If knowledge by any RMO is disputed, describe the evidence for and against knowledge and explain which is more compelling than the other—for example, the RMO may have stated that she had no knowledge, but a contemporaneous email discussing the protected communication establishes knowledge. Alternatively, you may need to make a credibility assessment of

witnesses when you have competing testimony or weigh the authenticity of documentary evidence.

When the investigation covers more than one RMO or more than one PC, it may be appropriate to use descriptive sub-headings to organize this section to clearly present the relevant facts; you may choose to organize by RMO or by PC or some other approach, depending on the specifics of the case. In rare instances where the RMO was not interviewed, explain why.

Conclude the entire section by stating, “As described above, a preponderance of the evidence established that [RMO’s name] knew and [second RMO’s name] perceived that Complainant had communicated with [Third RMO’s name] had no knowledge of the protected communications.”

D. Would the same personnel action(s) have been taken, withheld, or threatened absent the protected communication(s)? [Include D only if questions A-C are all answered in the affirmative.]

Summarize the findings in the first sentence: “We determined that [RMO’s name] would/would not have taken the personnel actions against Complainant absent his/her protected communications.”

To determine the answer to this “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:

- the strength of the evidence in support of the stated reason for the personnel action;
- the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and
- any evidence that the similar actions have been taken against employees who are not whistleblowers, but who are otherwise similarly situated.

Do not retell the story already detailed in the findings of fact. Instead, refer to the events by the descriptive name given as the heading for each event, such as “September 1, 2013, Complaint to DoD Hotline” or “January 2013 email from DoD Hotline to [RMO’s Name].”

For each personnel action, analyze the following factors and then weigh them together to determine whether the PA would have been taken absent the PC.

- **Each RMO's stated reason(s) for the personnel action(s)**

Remember, the fact that an action was within management's prerogative does not establish that the action would have been taken absent the PCs. Even if you find that the RMO(s) offered reasonable justification for the personnel action the investigation is not complete. The RMO(s) may offer that the action was taken based on the complainant's performance or conduct. The investigator must explore the possibility that others who did not make a PC but who have engaged in the same misconduct as the complainant were treated less harshly or not disciplined at all.

- **Timing between the protected communication(s) and personnel action(s)**

Dates of key events are usually of critical importance in the analysis of reprisal. This section should identify and analyze how much time elapsed between the PC(s) and PA(s). The closer the temporal proximity between the PC(s) and PA(s), the stronger the inference becomes of a possible causal connection between the events. Note that while an inference of causation is stronger when a PA is taken only a few days after a PC, a timing connection may still be present for lengthier gaps in time. For example, it is possible that the member's next performance evaluation was not due for nearly a year following the PC.

- **Motive on the part of the RMO(s) to reprise**

In this section, analyze the RMO's motive to reprise, including any animosity expressed by the RMO(s) regarding the protected communications. Did the complainant's protected communication allege any wrongdoing by any of the RMOs or otherwise implicate or criticize their performance, integrity, competence, or leadership? Have any of the RMOs exhibited or expressed animosity toward the very idea of, for example, filing an IG complaint or contacting a member of Congress?

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

How did the RMO(s) respond in the past to similarly situated personnel who did not make PCs? Are their actions in the case of the complainant consistent with past actions? If there is no evidence supporting a reason for handling the situation differently than in the past, it raises the inference of reprisal? If there is no evidence of similarly situated individuals, say so here.

Conclude the entire section by stating that, as described above, a preponderance of the evidence established [RMO's name] would or would not have taken, withheld, or threatened the specific personnel action in question absent the protected communication.

g. Discussion. Synthesize the analysis above in one or two paragraphs, explaining how we arrived at our conclusions. For example: “Based on a preponderance of the evidence, we conclude that [RMO name] issued an adverse OPR in reprisal for Complainant’s protected communication to the IG. The evidence shows that Complainant’s protected communication resulted in an investigation that substantiated misconduct by the RMO, who knew Complainant made the protected communication. [RMO name] told his XO and others that he was upset that Complainant went outside of the chain of command. Finally, the evidence shows that Complainant had received glowing OPR’s prior to his protected communication, etc.”

h. Conclusions. This section should provide a conclusion for each alleged PA addressed under the findings and analysis section of the report. The conclusion statement for each allegation should briefly identify the misconduct and the statute violated. For example:

We conclude that General Morrow demoted Complainant in reprisal for contacting her congressional representative in violation of Title 10, United States Code, Section 1034.

i. Recommendations. If the complaint was substantiated, this section will recommend specific remedial actions to return the whistleblower, as nearly as practicable and reasonable, to the position the whistleblower would have held had the reprisal not occurred. Additionally, this section should include the general recommendation that appropriate action be taken against the RMO. For example:

We recommend that the Secretary of (the Service) direct [Service/Agency] officials to:

- A. Remove Complainant’s FITREP for (date) from his permanent record, and
- B. Take appropriate corrective action against [the RMO].

In cases where no corrective action is required, state that we make no recommendations.

2. Restriction Cases

Investigations into allegations of restriction require an answer to the question: “Did the RMO restrict the complainant from communicating with a member of Congress or an Inspector General?” Investigators must consider and analyze all of the evidence relating to the RMO’s restriction (preventing or attempting to prevent a member of the Armed Forces from making or preparing to make a lawful communication to a member of Congress and/or an IG) of the complainant’s access to a member of Congress or an Inspector General. It is not necessary for the RMO’s attempt at restriction to be successful for such an allegation to be substantiated. ROIs on restriction cases follow a different template than that used for reprisal reports. See Appendix G for a restriction ROI template.

3. Reporting When the Case Cannot be Completed within 180 Days

If, in the course of an investigation, it becomes clear that the report cannot be issued within 180 days of the commencement of the investigation, the following must be done.

Not later than 180 days after the commencement of an investigation and every 180 days thereafter until the transmission of the report on the investigation to the complainant, the Inspector General conducting the investigation shall submit a notice on the investigation describing the current progress of the investigation, an estimate of the time remaining until the completion of the investigation and the transmittal of the report to the complainant, the Deputy Under Secretary of Defense for Personnel and Readiness; the Secretary of the military department concerned, and DoD OIG-Whistleblower Reprisal Investigations Directorate;. This can be accomplished by courtesy-copying the last three recipients listed above on the letter to the Complainant (See Appendix H for a sample letter).

4. Reporting Closed Cases

Within 30 days after Whistleblower Reprisal Investigations Directorate approves the ROI or the determination that an investigation is not warranted, the Service IG must send a letter to the complainant informing him or her (1) of the investigative findings, (2) that a copy of the report on the results of the investigation is enclosed, and (3) of the right to appeal to the appropriate BCMR (see Appendix I for a sample letter). The report must contain the maximum disclosure of information that is possible, except for information that may be withheld under the Freedom of Information and Privacy Acts. The letter must be courtesy-copied to the:

- Deputy Under Secretary of Defense for Personnel and Readiness,
- DoD OIG Directorate for Whistleblower Reprisal Investigations,
- relevant Board for Corrections of Military Records, and
- Secretary of the military department concerned.

5. Cases in which a Preliminary Determination of Substantiation Has Been Made and the Personnel Action Will Result in Immediate Hardship. The 2017 NDAA placed an additional responsibility on IGs. If the IG makes a preliminary determination that it is more likely than not that a personnel action prohibited by 10 U.S.C. 1034 has occurred and it will result in an immediate hardship to the complainant, the IG is required to promptly notify the Secretary of the military department concerned of the hardship.