



CCD 121.06
EFFECTIVE DATE: 10 February 2022

By Order of the Secretary of Health and Human Services:

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SUBJECT: Protected Communications

1. PURPOSE: This Directive prescribes the procedures governing the processing of a complaint alleging whistleblower retaliation made by a member of the U.S. Public Health Service (USPHS) Commissioned Corps pursuant to the Military Whistleblower Protection Act (MWPA) codified in 10 U.S.C. § 1034.
2. APPLICABILITY: This Directive applies to:
 - 2-1. All members of the USPHS Commissioned Corps on active duty who have presented allegations of retaliation and/or restriction as codified in 10 U.S.C. § 1034 and subject to the limitations as contained in Section 6-5. of this Directive regarding the timeliness of claims presented.
 - 2-2. All Public Health Service (PHS) officers whether assigned within the Department of Health and Human Services (HHS or Department) or assigned to other Departments via Memorandum of Agreement.
 - 2-3. All HHS civilian personnel who have administrative authority over PHS officers.
3. AUTHORITIES:
 - 3-1. [42 U.S.C. § 202](#), "Administration and supervision of Service"
 - 3-2. [42 U.S.C. § 213a](#), "Rights, benefits, privileges, and immunities for commissioned officers or beneficiaries; exercise of authority by Secretary or designee"
 - 3-3. [42 U.S.C. § 216](#), "Regulations"
 - 3-4. [10 U.S.C. § 1034](#), as amended "Protected communications; prohibition of retaliatory personnel actions"
 - 3-5. [5 U.S.C. Appendix 3](#), "Inspector General Act of 1978" as amended
 - 3-6. [Public Law 112-144](#), FDA Safety and Innovation Act, Section 1129
4. PROPONENT: The proponent of this Directive is the Secretary, HHS.

5. SUMMARY OF REVISIONS AND UPDATES: This Directive replaces Commissioned Corps Directive (CCD) 121.06, "Protected Communications," dated 11 January 2017. This Directive:
 - 5-1. Reflects recent changes to 10 U.S.C. § 1034.
 - 5-2. Specifies that the Inspector General (IG) makes the determination that an officer's allegations are substantiated or unsubstantiated instead of the Deputy Secretary (DS).
 - 5-3. Designates the Surgeon General (SG) as the First Level Reviewing official in place of the Principal Deputy Assistant Secretary for Health (P-DASH).
 - 5-4. Designates the Assistant Secretary for Health (ASH) as the official who makes the Department's final decision in the administrative processing of the complaint in place of the DS.

6. POLICY:

- 6-1. PHS officers are free to make protected communications.
- 6-2. No person may restrict a PHS officer from making lawful communications to a Member of Congress (MC) or an Inspector General (IG).
- 6-3. PHS officers will be free from reprisal for making or preparing to make or being perceived as making or preparing to make a protected communication.
- 6-4. No person may take or threaten to take an unfavorable personnel action or withhold or threaten to withhold a favorable personnel action in reprisal against any PHS officer for making or preparing to make or being perceived as making or preparing to make a protected communication.
- 6-5. No investigation is required when a PHS officer submits a reprisal allegation more than one year after the date that the officer became aware of the personnel action that is the subject of the allegation.
- 6-6. The Standard of Proof in 10 U.S.C. § 1034 reprisal cases is a 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 or untrue.
- 6-7. This Directive only applies to disclosures made on or after 9 July 2012, the effective date of PL112-144.
- 6-8. All future whistleblower complaints or complaints pending review and final decision, as of the date of this Directive may be processed under this Directive.

7. RESPONSIBILITIES:

- 7-1. The Secretary delegates to the ASH, or designee, the authority for making the final Departmental decision in the administrative processing of a whistleblower complaint under 10 U.S.C. § 1034 and this Directive, including whether corrective or disciplinary action should be taken and, if so, for ordering corrective or disciplinary action.
- 7-2. The responsibility for providing supervision of activities relating to the day-to-day operations of the USPHS Commissioned Corps rests with the SG. The SG, or designee, shall be the first-level reviewer of the IG's report of investigation (ROI) and determination, and is responsible for making recommendations to the ASH consistent with 10 U.S.C. § 1034 and this Directive, including whether corrective or disciplinary action should be taken and, if so, the appropriate corrective or disciplinary action to be taken.
- 7-3. The responsibilities of the parties noted in the Section 8. of this Directive are incorporated herein by reference.

8. PROCEDURES: Unless otherwise expressly provided below, the responsibilities in Section 8. may be delegated in writing.

- 8-1. If a PHS officer is detailed to an agency outside of the Department, HHS IG may work with the IG of the Department to which the officer is assigned to investigate the Whistleblower Complaint.

- 8-2. Inspector General (IG). The IG will conduct an investigation and issue a Report of Investigation (ROI) in accordance with 10 U.S.C. § 1034, the Military Whistleblower Protection Act (MWPA).
- 8-3. IG Investigation and Report.
- a. Upon receiving an allegation from an officer that a personnel action prohibited by 10 U.S.C. § 1034, the MWPA, has been taken (or threatened), the IG shall expeditiously determine whether there is sufficient evidence to warrant an investigation of the allegation. However, neither an initial determination nor an investigation is required in the case of an allegation made more than one year after the date on which the officer becomes aware of the personnel action that is the subject of the allegation.
 - b. If the IG makes a preliminary determination in an investigation that, more likely than not, that a prohibited personnel action has occurred and the personnel action will result in an immediate hardship to the PHS officer alleging the personnel action, the IG shall promptly notify the ASH of the hardship, and the ASH shall take such action as the ASH considers appropriate. However, if the ASH is the Responsible Management Official (RMO) named in the whistleblower complaint, then the IG will notify the Secretary, or his/her designee, who shall take such action as the Secretary, or his/her designee, considers appropriate.
 - c. Not later than 180 days after the commencement of the investigation, and every 180 days thereafter until the transmission of the ROI, the IG shall provide to the SG and the officer making the allegation a notice which includes the following:
 - (1) A description of the current progress of the investigation; and
 - (2) An estimate of the time remaining until the completion of the investigation and the transmittal of the ROI.
 - d. The ROI shall contain a thorough review of the facts and circumstances relevant to the allegation and the complaint or disclosure and shall include documents acquired during the course of the investigation, including summaries of the interviews conducted. The ROI may include a recommendation as to the disposition of the complaint.
 - e. After completion of the investigation, the IG shall submit the ROI to the SG and a copy of the ROI to the officer who made the allegation not later than 30 days after the completion of the investigation. The copy of the ROI sent to the SG shall include the documents acquired during the course of the investigation, including summaries of the interviews conducted. In the event the SG is the RMO named in the whistleblower complaint and the complaint is substantiated as to the SG's conduct, then the IG shall submit the ROI to the ASH instead. In the event the ASH is the RMO named in the whistleblower complaint and the complaint is substantiated as to the ASH's conduct, then the IG shall submit the ROI to the Secretary, or his/her designee, instead.
 - f. In the copy of the ROI transmitted to the officer, the IG shall ensure the maximum disclosure of information possible, with the exception of information that is not required to be disclosed under 5 U.S.C. § 522. However, the copy of the ROI need not include summaries of interviews conducted, nor any document acquired, during the course of the investigation. If the officer requests such items, the IG will provide them to the officer either with a copy of the ROI, or after the ROI has been sent to the officer.

- g. The ROI should contain an analysis of the IG's determination that the officer's allegations were substantiated or unsubstantiated, including the following items as appropriate (this is not intended to be exhaustive and not all reports need to include all of these items):
- (1) Whether any protected communications were made, including whether the officer had a reasonable belief that his/her disclosure revealed misconduct protected by 10 U.S.C. § 1034, and, if so, identification of all protected communications;
 - (2) Identification of all unfavorable personnel actions, if any, alleged to be acts of reprisal taken after the protected communications were made;
 - (3) Evidence of knowledge of the protected communications by the responsible management official(s);
 - (4) Evidence of a causal nexus between the protected communication and the alleged retaliatory personnel action (i.e., evidence showing that the unfavorable personnel action would not have been taken if not for the protected communication); and
 - (5) Evidence of retaliatory motive or intent.
- 8-4. The First Level Review and Recommendation. The SG will receive the ROI from the IG. However, if the SG is the RMO in the whistleblower complaint and the complaint is substantiated as to the SG's conduct, then the ASH, or designee, will receive the ROI from the IG and will exercise the responsibilities of the SG outlined in this Section.
- a. Upon receipt of the ROI, the SG, or his/her designee, as the first-level reviewer, will review the ROI within 10 days of receipt from the IG to determine if additional information is needed in order to make a decision regarding corrective or disciplinary action. If extenuating circumstances exist and the 10-day timeframe cannot be met, the SG or the SG's designee will annotate the reasons for the delay on the official file. A review of the ROI will be completed as soon as possible to meet the established deadlines described below.
 - b. If within the 10-day period the SG determines that the ROI does not contain sufficient information to determine whether to order corrective or disciplinary action, what type of corrective or disciplinary action would be appropriate, or which individuals should receive the corrective or disciplinary action, the SG will specify the reasons that additional information is needed for his/her recommendation and submit a written request to the IG for additional information. Once the IG receives the request for additional information, the IG will determine whether to supplement the ROI with the information requested. The IG will provide a response to the SG on its decision to supplement as soon as practicable.
 - c. From the date the SG receives the IG's ROI or the supplemental ROI, whichever is later, the SG or the SG's designee will have 10 days to determine whether corrective or disciplinary action should be taken and to submit a recommendation to the ASH.
 - d. The SG will make a recommendation to the ASH, via a written memorandum, whether to order corrective or disciplinary action and, if so, what corrective or disciplinary action to take.

- 8-5. Final Review and Determination. The ASH will receive the ROI from the SG. However, if the ASH is the RMO in the whistleblower complaint and the complaint is substantiated as to the ASH's conduct, then the Secretary, or designee, will receive the ROI from the SG and will exercise the responsibilities of the ASH outlined in this Section.
- a. Within 30 days of receipt of the ROI, or supplemental ROI, whichever is later, from the IG, the ASH or ASH's designee will make a final determination as to whether to order corrective or disciplinary action.
 - b. The ASH's or ASH's designee's determination is the Department's final decision in the administrative processing of the whistleblower complaint.
 - c. If the ASH or ASH's designee, after reviewing the ROI, determines not to order corrective or disciplinary action, the ASH or ASH's designee will notify the officer and the IG in writing as to the determination and the reasons no corrective or disciplinary action will be taken.
 - d. If ASH or ASH's designee determines that corrective or disciplinary action is warranted, the ASH or ASH's designee shall:
 - (1) Document the determination in writing and provide one copy to the Operating Division/Staff Division (OPDIV/STAFFDIV) or non-HHS organization to which the officer is detailed, and one copy to the officer;
 - (2) To the extent possible, order remedial action as is necessary to amend any Department record to correct or remove personnel actions prohibited by 10 U.S.C. § 1034(b);
 - (3) If appropriate, refer the matter to the Board for Correction of PHS Commissioned Corps Records (BCCCR) for review and correction of the officer's personnel record;
 - (4) Refer the matter to the appropriate official in the OPDIV/STAFFDIV or non-HHS organization to which the officer is detailed for consideration of additional appropriate corrective or disciplinary actions;
 - (5) Order any other corrective or disciplinary action the ASH or ASH's designee deems appropriate; and
 - (6) Submit a report to IG on the corrective or disciplinary actions taken.
- 8-6. PHS Officer Additional Rights. After receiving the ASH or ASH's designee's decision, if the officer believes that an error or injustice remains in his/her records, the officer may make application with the Board for Correction of Commissioned Corps Records (BCCCR). An application to the BCCR must be filed within three years after discovery of the alleged error or injustice.
- 8-7. Pursuant to the Freedom of Information Act (FOIA), the officer may request a copy of the summaries of interviews conducted, and any document acquired during the course of the investigation (which may be redacted to exclude information that is not required to be disclosed under FOIA) by making a FOIA request through the HHS FOIA office.
9. HISTORICAL NOTES: This is the third issuance of this Directive within the Commissioned Corps Issuance System.

- 9-1. CCD 121.06, "Protected Communications," dated 11 January 2017.
- 9-2. CCD 121.06, "Protected Communications," dated 31 October 2013.

Appendix

Definitions

- a. Chain of Command. The succession of commanding officers or senior officials from a superior to a subordinate through which authority/command is exercised. This also includes the succession of civilian personnel through whom administrative control is exercised, including supervision and rating of performance.
- b. Day(s). Calendar days including the days of the week, weekends, and holidays.
- c. Gross Mismanagement. A management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission. The matter must be significant and more than *de minimis* wrongdoing or simple negligence. It does not include management decisions that are merely debatable among reasonable people. It must also include an element of blatancy.
- d. Gross Waste of Funds. An expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government.
- e. Inspector General (IG). An Inspector General appointed under the Inspector General Act of 1978.
- f. Member of Congress (MC). A U.S. Senator or Representative, delegate or resident Commissioner to the U.S. Congress, or a staff member of a Senator, Representative, congressional committee, delegate, or resident Commissioner.
- g. Personnel Action. Any action taken that affects, or has the potential to affect, an officer's current position or career. Such actions include the threat to take any unfavorable action; the withholding, or threat to withhold, any favorable action; the making of, or threat to make, a significant change in the duties or responsibilities of a PHS officer that is not commensurate with the officer's grade; the 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 PHS officer; and the conducting of a retaliatory investigation of an officer (i.e., an investigation requested, directed, initiated, or conducted for the primary purpose of punishing, harassing, or ostracizing a PHS officer for making a protected communication).
 - (1) Examples of such actions include, but are not limited to, failure to promote or reduction in rank; a disciplinary or other corrective action; a transfer or reassignment; a performance evaluation; decisions concerning pay, benefits, awards, and/or training; removal; separation; referral for mental health evaluations; counseling that is punitive; letter of counseling or reprimand; and any other significant change in duties or responsibilities inconsistent with the officer's grade.
 - (2) It also includes personnel actions that can be withheld such as evaluations, recommendations for promotions, awards, training, assignments or transfers.
 - (3) Finally, it includes the threat of personnel actions that a reasonable person might conclude as impacting on the PHS officer's career. For example, a statement made to a PHS officer that his or her career would be "crushed or destroyed" for filing an IG complaint or complaining to a Member of Congress.
 - (4) The aforementioned list is not exhaustive and investigators will be required to consider each alleged personnel action on a case by case basis.

h. Protected Communication.

- (1) To be a protected communication, as used herein, the communication must be lawful and one in which a PHS officer complains of, or discloses information that the PHS officer reasonably believes constitutes evidence of any of the following:
 - (a) A violation of law or regulation, including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct, sexual harassment or unlawful discrimination.
 - (b) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety.
 - (c) A threat by another PHS officer or employee of the Federal Government that indicates a determination or intent to kill or cause serious bodily injury to others , or damage to military, Federal, or civilian property.
- (2) A communication described in Paragraph h.(1) of this Appendix shall not be excluded from these protections because:
 - (a) The communication was made to a person who participated in an activity the PHS officer reasonably believed to be covered by Paragraph h.(1) of this Appendix;
 - (b) The communication revealed information that had been previously disclosed;
 - (c) Of the PHS officer’s motive for making the communication;
 - (d) The communication was not made in writing;
 - (e) The communication was made while the PHS officer was off duty; and
 - (f) The communication was made during the normal course of duties of the PHS officer.
- (3) An unlawful communication is not a protected communication under 10 U.S.C. § 1034 or this Directive. If a communication or disclosure is reasonably suspected of being unlawful, the Office of the General Counsel (OGC) may be consulted.
- (4) In order to be a protected communication, as used herein, the communication must be made (or prepared to be made) to or for:
 - (a) A Member of Congress;
 - (b) An Inspector General;
 - (c) A member of an agency audit, inspection, investigation, or law enforcement organization;
 - (d) Any person or organization in the officer’s chain of command;
 - (e) A USPHS Commissioned Corps disciplinary board or military court martial proceeding;
 - (f) Any other person or organization designated pursuant to regulation or established administrative procedures for such communication; or

- (g) Providing testimony, or otherwise participating in or assisting in an investigation or proceeding related to an allegation brought pursuant to this directive, or filing, causing to be filed, participating in, or otherwise assisting in an action brought pursuant to this directive.
- i. Public Health Service officer. A PHS officer is a member of the USPHS Commissioned Corps.
- j. Reasonable Belief. A belief is reasonable if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the PHS officer could reasonably conclude that the disclosed information evidences one of the categories of wrongdoing set forth in Paragraph h.(1)(a-c) of this Appendix.
- k. Remedial Action (also referred to as corrective action). Appropriate relief to make the PHS officer whole to the extent possible, to include such action as is necessary to correct the record of a retaliatory personnel action.
- l. Reprisal or Retaliation. Reprisal or retaliation occurs when a Responsible Management Official (RMO) takes or threatens to take an unfavorable personnel action; or withholds or threatens to withhold a favorable personnel action, as reprisal or to retaliate against a member of the USPHS Commissioned Corps for making or preparing to make, or being perceived as making or preparing to make a protected communication.
- m. Restriction. Preventing or attempting to prevent a PHS officer from making or preparing to make a protected communication to the MC or IG.
- n. Whistleblower. A whistleblower is an officer who makes or prepares to make, or is perceived as making or preparing to make a protected communication.
- o. Whistleblower complaint. A complaint alleging whistleblower retaliation made by a member of the U.S. Public Health Service Commissioned Corps pursuant to the Military Whistleblower Protection Act (MWPA) codified in 10 U.S.C. § 1034.