



CCD 121.06
EFFECTIVE DATE: 11 January 2017

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 Commissioned Corps of the U.S. Public Health Service (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 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 policy regarding the timeliness of claims presented.
 - 2-2. All 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 Department of Health and Human Services civilian personnel who have administrative authority over Corps officers.
3. AUTHORITY:
 - 3-1. [42 U.S.C. §202](#), "Administration and Supervision of the 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 of HHS.

5. SUMMARY OF REVISIONS AND UPDATES: This Directive replaces Commissioned Corps Directive CCD121.06, "Protected Communications," dated 31 October 2013.

5-1. This Directive reflects the changes to 42 U.S.C §213a(a)(18) and 42 U.S.C. §213a(b), as authorized by the FDA Safety and Innovation Act (PL112-144, Section 1129), dated 9 July 2012.

6. POLICY:

- 6-1. Corps officers are free to make protected communications.
- 6-2. No person will restrict a Corps officer from making lawful communications to a Member of Congress (MC) or an Inspector General (IG).
- 6-3. Corps 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 Corps 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 Corps officer submits a reprisal complaint more than 1 year after the date that the member 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 Assistant Secretary for Health (ASH) is responsible for issuing policies to implement this Directive.
- 7-2. The responsibility for assuring the day-to-day management of the Corps rests with the Surgeon General (SG).
- 7-3. The responsibilities of the parties noted in the Appendix attached to this Directive are incorporated herein by reference.

8. PROCEDURES:

- 8-1. Please refer to the Appendix attached to this Directive.

9. HISTORICAL NOTES: This is the second issuance of this Directive within the Commissioned Corps Issuance System.

- 9-1. Commissioned Corps Directive CCD121.06, "Protected Communications," dated 31 October 2013.

Appendix

Responsibilities

Unless otherwise expressly provided below, the responsibilities in this appendix may be delegated in writing.

If a Corps 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.

1. 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).

1-1. 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, in the course of an investigation of an allegation, the IG determines that it is not possible to submit the ROI within 180 days after the date of receipt of the allegation being investigated, the IG shall provide to the Principal Deputy Assistant Secretary for Health (P-DASH) and the officer making the allegation a notice:
 1. Of that determination (including the reasons why the ROI may not be submitted within 180 days); and
 2. Of the time when the ROI will be submitted.
- c. 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.
- d. After completion of the investigation, the IG shall submit the ROI to the P-DASH and a copy of the ROI to the officer who made the allegation not later than thirty (30) days after the completion of the investigation.

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, or any document acquired during the course of the investigation. If the officer requests a copy of the summaries or interviews, 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.

2. The First Level Review ¹

The PDASH will receive the ROI from the IG.

2-1. Review and Recommendation

- a. Upon receipt of the ROI the P-DASH or designee as the first level reviewer, will review the ROI for sufficiency within fourteen (14) days of receipt in order to make a determination regarding the merits of the officer's complaint. If extenuating circumstances exist and the fourteen (14) day timeframe cannot be met, the P-DASH or designee will annotate the reasons for the delay on the official file. A review of the ROI for sufficiency will be completed as soon as possible to meet the established deadlines described below.
- b. The P-DASH or designee should determine whether the ROI contains sufficient information to make an initial determination. To determine sufficiency the P-DASH may want to consider whether the ROI includes the following (this is not intended to be exhaustive and not all reports may need to include all of these):
 1. The identification of all protected communications, all personnel actions alleged to be acts of reprisal taken after the protected communication were made, and affidavits from all responsible management officials (RMO).

The proper test for determining whether the Corps officer had a reasonable belief that the disclosed information constitutes evidence of a violation of law or regulation, gross mismanagement, or a threat (as defined in Appendix subsection 5(h)(1) is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the officer could reasonably conclude that the disclosed information evidences one of the categories outlined in Appendix subsection 5(h)(1).
 2. A justification if the alleged RMO identified in the complaint is not the subject of the investigation.
 3. A statement of facts beginning with the officer's initial protected communication and any subsequent protected communications.
 4. A list of all unfavorable personnel actions taken against the officer after the initial protected communication.
- c. If within the fourteen (14) day period the P-DASH determines that the ROI does not contain sufficient information to determine whether the officer's complaint has merit, the P-DASH will specify the reasons that the ROI is insufficient and request that the IG supplement its investigation.

¹ The PDASH will normally be the first-level reviewer in whistleblower retaliation cases. In special circumstances, however, the ROI may be sent directly to the DS, or a designee, to act as the sole deciding official.

Once the IG receives the request for a supplemental investigation, it is anticipated that the IG will expeditiously supplement the initial ROI and provide the revised ROI to the P-DASH.

- d. If the P-DASH or designee concludes that the ROI contains sufficient information to determine whether the officer's complaint has merit, the P-DASH or designee will proceed with the review of the ROI. The P-DASH should consider the following four factors to determine whether reprisal for making a protected disclosure occurred:
1. Did the officer make or prepare a protected communication? See section Appendix subsection 5(h).

In order for a communication to be protected, the officer must have a reasonable belief that their disclosure revealed misconduct protected by 10 U.S.C. §1034, the MWPA. The proper test for determining whether the officer had a reasonable belief is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the officer could reasonably conclude that the actions of the government evidence a violation of Appendix subsection 5(h).
 2. Was an unfavorable personnel action taken or threatened, or was a favorable action withheld or threatened to be withheld following the protected communication?
 3. Did the official responsible for taking, withholding, or threatening the personnel action know about the protected communication?
 4. Does the evidence establish that the personnel action would have been taken, withheld, or threatened if the protected communication had not been made? ²
- e. In addition to the four factors discussed above, the P-DASH should consider all available evidence of the RMO's intent or motive in taking any personnel action.
- f. From the date the P-DASH determines that the ROI report contains sufficient information, the P-DASH or designee will have thirty (30) days to review the IG report based on the criteria listed in Section 2.1 (D) through (G). The P-DASH will make a recommendation as to whether, by a preponderance of the evidence, the Corp officer's allegation is substantiated or not substantiated.
- g. The P-DASH will make a recommendation to the Deputy Secretary (DS), via a written Decision Memorandum, whether to substantiate the complaint. The P-DASH will also provide recommendations for an appropriate remedy for the officer if there are substantiated findings.

² For more information on military procedures for investigating a whistleblower complaint see: Air Force Instruction 90-301 Chapter 6 (<http://www.af.mil/Portals/1/documents/ig/AFI-90-301.pdf?timestamp=1441998269114>) JAG Guide to IG Investigations (<http://www.af.mil/Portals/1/documents/ig/jag-guide-ig-investigations.pdf>) and Department of Defense Inspector General Guide to Investigating Military Whistleblower Reprisal and Restriction Complaints (<http://www.dodig.mil/programs/whistleblower/ioguide.html>).

3. Second Level Review

3-1. Final Review and Determination

- a. Within thirty (30) days of receipt the P-DASH or designee's review and recommendation regarding the disposition of the complaint, the DS or designee will make a final determination whether to substantiate the officer's complaint within thirty (30) days of receipt. The DS or designee will determine whether the officer was retaliated against for making a protected communication by using the preponderance of the evidence standard.
- b. The DS or designee's determination is the Department's final decision in the administrative processing of the complaint.
- c. If the DS or designee, after reviewing the administrative record, determines that the Corps officer's allegation of whistleblower reprisal is not substantiated, the DS or designee will notify the officer in writing as to the reasons that the complaint was not substantiated and that no corrective action will be taken.
- d. If the DS or designee determines that the officer's allegations are substantiated, and that the Corps officer was retaliated against or restricted from making a protected disclosure pursuant to 10 U.S.C. §1034, the DS or designee will:
 1. Document the decision 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 necessary to amend any Department record to correct or remove personnel actions prohibited by 10 U.S.C. §1034(b); and
 3. 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 actions.

4. Corps Officer Appeal Rights

- 4-1. After receiving the DS or 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 PHS Commissioned Corps Records (BCCCR). The BCCCR may accept the findings of the DS based upon the IG investigation, or may initiate an independent review as part of the review process under rules generally applicable to the BCCCR.
- 4-2. A copy of the ROI (redacted using exceptions allowed by the FOIA) may be provided to the officer through the HHS FOIA Office.

5. 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.
 - 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, or 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, 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, training; relief and removal; separation; referral for mental health evaluations; counseling that is punitive, letter of reproof or reprimand, caution or censure; and any other significant change in duties or responsibilities inconsistent with the officer's grade. It also includes personnel actions that can be withheld such as evaluations, recommendations for promotions, awards, training, assignments or transfers. Finally, it includes the threat of personnel actions that a reasonable person might conclude as impacting on the Corps officer's career. For example, a statement made to a Corps officer that his or her career would be "crushed or destroyed" for filing an IG complaint or complaining to a Member of Congress. 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. A communication in which a Corps officer complains of, or discloses information that the Corps 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 Corps officer or employee of the Federal Government that indicates a determination or intent to kill or cause serious bodily injury to Corps officers of the armed forces or civilians or damage to military, Federal, or civilian property.
 2. A communication described in 5(h)(1) shall not be excluded from the protections because:

- a. The communication was made to a person who participated in an activity the Corps officer reasonably believed to be covered by section 5(h)(1);
 - b. The communication revealed information that had been previously disclosed;
 - c. Of the Corps officer's motive for making the communication;
 - d. The communication was not made in writing;
 - e. The communication was made while the Corps officer was off duty; and
 - f. The communication was made during the normal course of duties of the Corps officer.
3. The Corps officer may have written a letter, sent an email, or spoken to someone who can receive a protected communication.
4. Protected communications includes any lawful communication that is made (or prepared to be made) to:
- 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 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. Any group or investigator Testimony, or otherwise participating or assisting in an investigation or proceeding related to a communication under 5(h)(1) or filing or causing to be filed, participating in, or otherwise assisting in action brought pursuant to this directive
- i. Reasonable belief. A belief is reasonable if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the Corps officer could reasonably conclude that the disclosed information evidences one of the categories of wrongdoing.
- j. Remedial action. Appropriate relief to make the Corps officer whole to the extent possible, to include such action as is necessary to correct the record of a retaliatory personnel action.
- k. Reprisal. Reprisal 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, to retaliate against a member of the Corps who made or prepared to make a protected communication.
- l. Restriction. Preventing or attempting to prevent a Corps officer from making or preparing to make a protected communication to the MC or IG.
- m. Unlawful communications are not protected by statute or this directive. If a communication or disclosure is reasonably suspected of being unlawful pursuant to the 10 U.S.C. §1034,

Military Whistleblower Protection Act (MWPA), the Office of the General Counsel should be consulted on the issue of whether the disclosure of such information is entitled to protection under 10 U.S.C. §1034, the MWPA, and actions may be appropriate.

- 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.