The Secretary of the Air Force
Office of the Inspector General
Complaints Resolution Directorate

Inspector General Guide for Investigating Officers

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Foreword

The Secretary of the Air Force, Complaints Resolution Directorate (SAF/IGQ) administers the Air Force Inspector General (IG) Complaints Resolution Program for the Air Force community. The IG Complaints Resolution Program is a leadership tool to promptly and objectively resolve problems affecting the Air Force mission. When necessary, the IG accomplishes this through objective fact-finding in the form of IG complaint analyses and investigations that address both the concerns of complainants and the best interests of the Air Force. AFI 90-301, *Inspector General Complaints Resolution* (23 August 2011), establishes the procedural requirements for the Complaints Resolution Program and IG investigations. This guide focuses on the duties and responsibilities of the Investigating Officer (IO). It does not supersede the direction contained in AFI 90-301, but presents the IO with a guide more specifically tailored to the duties of an IO. The information in this guide is for informational purposes only. In no way should this guide be cited or used as an authority/reference.

Chapter 1: Introduction

1.1. Guide Overview. The intent of this guide is to provide Investigating Officers (IOs) investigating Inspector General (IG) complaints the tools they need to effectively conduct IG investigations.

1.2. Authority to Conduct IG Investigations. The Secretary of the Air Force has sole responsibility for the function of the Inspector General of the Air Force (Title 10, United States Code, Sections 8014 and 8020). When directed by the Secretary of the Air Force or the Chief of Staff, the Inspector General of the Air Force (SAF/IG) has the authority to inquire into and report upon the discipline, efficiency, and economy of the Air Force and performs any other duties prescribed by the Secretary or the Chief of Staff. Pursuant to AFI 90-301, *Inspector General Complaints Resolution*, authority to investigate IG complaints within the Air Force rests with IG offices at all organizational levels. To conduct an IG investigation, IOs must be appointed in writing by an "appointing authority," typically a wing commander or, when delegated this authority, the wing IG.

1.3. Purpose of the IG System. An IG investigation is one aspect of the IG complaints resolution system. IGs have a number of tools to resolve complaints, including dismissal, referral, assist, and transfer. The IO normally only becomes involved when these other tools have not resolved the complaint, and the IG has determined an investigation is appropriate. IG investigations are administrative in nature – they are fact finding rather than judicial proceedings. They are not criminal proceedings in which proof beyond a reasonable doubt is required but administrative investigations providing commanders with facts upon which to base decisions. Investigations require collection of documents, taking sworn testimony from complainants, subjects, and other witnesses, and documentation of the findings in a Report of Investigation (ROI). Commanders appointed in accordance with AFI 51-604, *Appointment to and Assumption of Command*, and AFI 38-101, *Air Force Organization*, have an inherent authority to conduct a Commander-Directed Investigation (CDI) to investigate systemic or procedural problems or to look into matters regarding individual conduct or responsibility. CDIs are administrative investigations, and are independent of the IG system.

1.4. Standard of Proof. The standard of proof for an IG investigation is a "preponderance of the credible evidence." When it is more likely than not that events have occurred as alleged, a preponderance of the evidence exists, and the IO may consider the allegation to be substantiated. Put another way, the IO may substantiate a finding when the greater *weight* or *quality* of the evidence indicates the alleged misconduct occurred. When weighing the evidence, IOs should consider factors such as the witness's knowledge, bias, motive, intent and the ability to recall and relate events. At all times, you as the IO may use your own common sense, life experiences and knowledge of the ways of the world to assess the credibility of witnesses you interview. However, you must fully document these inferences in the ROI.

Chapter 2: General Considerations.

2.1. Matters Appropriate for IG Investigation. Complaints of any one of the "Big Three" issues – reprisal, restriction, or improper mental health evaluation referral – must be handled within the IG system. At their discretion, IGs may also choose to investigate other types of alleged wrongdoing, including abuse of authority; fraud, waste or abuse; and other violations of a law or regulation. AFI 90-301 provides more guidance on matters that are and are not appropriate for IG investigation; this guide seeks to merely highlight certain issues for IOs.

2.1.1. Reprisal. Reprisal is a violation of Title 10 of the United States Code, Section 1034. Reprisal occurs when a responsible management official (RMO)[1] 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 armed forces who made or prepared to make a protected communication. Any lawful communication, regardless of the subject, to an IG or to Congress, is considered protected. Additionally, a protected communication occurs when a member who reasonably believes he/she has evidence of a violation of law or regulation (regardless of whether he/she is the victim), makes a lawful communication disclosing this to an authorized recipient, such as a commander or first sergeant.

AFI 90-301 sets forth an "acid test" for evaluating reprisal allegations, and this "acid test" is fully defined in DoD IGDG 7050.6, Chapter 2. The "acid test" consists of four questions:

1. Did the member make or prepare a communication protected by statute?

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?

When analyzing question four, the IO is required to consider the following five factors: (a) reasons stated by the RMO for taking, withholding, or threatening the action; (b) reasonableness of the actions taken, withheld, or threatened considering the complainant's performance and conduct; (c) consistency of the action(s) of RMO(s) with past practice; (d) motive of the

[1] Responsible Management Official and other terms used in this guide are defined in Attachment 1 of AFI 90-301. Definitions can be extremely helpful to you in analyzing whether an allegation is substantiated.

RMO for the action; and (e) procedural correctness of the action. If questions one through three of the "acid test" are answered in the affirmative and question four is answered in the negative, then reprisal has generally occurred. If the answer to any of the first three questions is "no," or if the answer to question four is "yes," reprisal cannot be substantiated. However, where appropriate, the underlying personnel action must then be analyzed to determine whether an abuse of authority occurred. Reference the Abuse of Authority acid test and discussion contained in this guide and AFI 90-301.

2.1.2. Restricted Access (Restriction). 10 U.S.C. §1034 also states that a military member may not be restricted or prohibited from making a protected communication to an inspector general or member of Congress. Restriction can result from either private or public statements that may reasonably discourage Air Force members from contacting an inspector general or member of Congress. Proper analysis of these complaints requires an in-depth review of both of the following issues: (1) What was the intent of the RMO who allegedly restricted the member?; and (2) Would a reasonable person, under similar circumstances, believe he/she was actually restricted from making a protected communication based on the RMO's actions? An example of restriction would be if, during a commander's call, a squadron commander were to tell the squadron that all problems must go through him or her first. However, if during a commander's call, the commander were to tell the squadron that he or she prefers to solve problems within the chain of command and also informs the squadron that they are free to file complaints with their Congressman or IG, without fear of retribution, this would not constitute restriction.

2.1.3. Improper Mental Health Evaluation (MHE) Referrals. These cases typically involve coercion, improper procedures, or reprisal.

2.1.3.1. Coercion. Commanders and other supervisory personnel may encourage an individual to seek an MHE on his or her own, but they may not coerce the member to do so.[2] The difference between encouragement and coercion is often very difficult to discern. Typically, when an Airman reports to the Mental Health Clinic, he or she completes an intake form that asks whether the Airman has come to the clinic voluntarily. While an indication on the form that the Airman is there voluntarily may be compelling evidence, it does not necessarily end the inquiry. In deciding whether a commander or supervisor's action constitutes coercion, IOs might consider factors such as the complainant's age, intelligence, experience, length of military service, the circumstances surrounding the coercion, and whether the complainant knew of his or her right to refuse to voluntarily seek a

[2] See AFI 44-109, Paragraph 4.1.

mental health evaluation. A classic example of coercion is as follows: A1C Gant has been acting strangely. He recently told his commander that he was "losing it," and going to "go postal on someone." The commander meets with A1C Gant at 1600 on a Friday before a three-day weekend. He tells A1C Gant that he's not getting released for the weekend until he "volunteers" to go to mental health and get checked out. A1C Gant, feeling he has no choice in the matter, "volunteers" to go to mental health, escorted by his two supervisors.

2.1.3.2. Improper Procedures. If a commander suggests that a member obtain help at the Mental Health Clinic and the member refuses, the commander is left with the option of referring the member for a mental health evaluation (MHE). Only the member's commander can "direct" a member to undergo an MHE.[3] Special procedures apply to involuntary referral of military members for a MHE, and these procedures vary based on whether the situation is an "emergency" or a "non-emergency." In all MHE referral cases, the commander is required to notify the member in writing of his or her rights.[4] A procedurally improper MHE referral case will ordinarily not involve an in-depth review of the commander's intent or motives – in many cases involving substantiated MHE referral allegations, the commander or other personnel had good intentions toward the member but violated a procedural requirement.

2.1.3.3. MHE as Reprisal. A complainant may allege his or her commander referred him or her for an MHE in reprisal for making a protected communication. IGs will treat such cases as potential violations of 10 U.S.C. §1034 and frame the allegation as reprisal.

2.1.4. Abuse of Authority. IGs often receive complaints that a commander or other person in a position of authority has abused his or her authority through some action. IGs have discretion, in some cases, whether to investigate abuse of authority allegations or whether to handle them through some other means, such as referral to a commander. The definition of abuse of authority in the Air Force is "an arbitrary or capricious exercise of power by a military member or a federal official or employee that adversely affects any person or that results in personal gain or advantage to the RMO."[5] A test that expands upon this definition is included as Attachment 1 to this guide; use it when analyzing abuse of authority allegations. An example of abuse of authority may be if a supervisor writes a poor EPR on an Airman for refusing to take part in an off-duty squadron booster club fundraising event that is supposed to be voluntary. Abuse of authority is not a "catch-

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[3] See AFI 44-109, Paragraph 4.2.
[4] See DoDI 6490.4, Paragraph 6.1.1.4.1.
[5] See AFI 90-301, Attachment 1.

all" standard for actions that just don't seem fair – many "unfair" actions will not rise to the level of an abuse of authority. In addition, it is often possible that a standard other than abuse of authority might better describe the misconduct alleged. For example, some abusive conduct might actually rise to the level of violating Article 93 UCMJ, *Cruelty and Maltreatment*.[6] An abuse of authority analysis is required for all not substantiated reprisal allegations.

2.1.5. Fraud, Waste or Abuse (FWA).[7] As with some cases of abuse of authority, IGs are granted discretion whether to investigate fraud, waste or abuse complaints or whether to handle them through some other means. The FWA program is defined in AFI 90-301, Chapter 11. Fraud is any intentional deception designed to unlawfully deprive the Air Force of something of value, or to secure a benefit, privilege, allowance, or consideration to which an individual is not entitled.[8] Actions that constitute fraud may be more appropriately framed against other regulations and statutes, such as the Joint Ethics Regulation or the Uniform Code of Military Justice. "Abuse" is the intentional wrongful or improper use of Air Force resources.[9] Examples include misuse of rank, position or authority that causes the loss or misuse of resources such as tools, vehicles, computers or copy machines. Abuse allegations may involve unnecessary purchases, such as disposing of newly acquired government furniture and acquiring new furniture merely because the supervisor's tastes have changed. "Waste" is the extravagant, careless or needless expenditure of AF funds or the consumption of AF property that results from deficient practices, systems controls or decisions, as well as improper practices not involving prosecutable fraud.[10]

2.2. Matters More Appropriate for Alternative Grievance Channels. In some instances, alternative grievance channels (e.g. MEO) exist that are more appropriate than the IG system, depending on the issue. AFI 90-301, Table 3.6, lists several types of complaints that have previously established grievance channels. In addition, if the member's complaint centers on an adverse action for which another grievance channel is available, IGs generally must refer the complainant to the other grievance channel. Finally, if there is an allegation against an O-7 select or above, these issues must be referred to SAF/IGS (Senior Official Inquiries). IOs should feel confident that any allegations they are

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[6] The explanatory notes of Article 93, UCMJ, state that violations of this article include assault, improper punishment, and sexual harassment. It also cautions that imposing "necessary or proper duties" does not constitute an Article 93 violation even though the duties might be arduous or hazardous.

[7] FWA is not solely an IG matter. Depending on the circumstances, commanders or the Air Force Office of Special Investigations (AFOSI) might investigate FWA as a criminal matter. (AFI 90-301, Table 3.5, Rule 8)

[8] See AFI 90-301, Attachment 1.

[9] See AFI 90-301, Attachment 1.

[10] See AFI 90-301, Attachment 1.

directed to investigate are proper IG matters, as determining what matters are and are not appropriate for an IG investigation is the IG's responsibility, not yours as the IO. If you are investigating an IG matter and discover evidence of other possible wrongdoing, you must confer with your IG and JAG to determine who should investigate that wrongdoing.

Chapter 3: The Investigative Team – Qualifications and Responsibilities

3.1. Investigative Team Overview. A successful IG investigation requires the efforts of several key players: the appointing authority, the IG, the IO, the legal advisor, a technical advisor (if needed) and administrative assistants (if resources permit). This chapter addresses the qualifications and responsibilities of each team member.

3.2. Appointing Authority. AFI 90-301, Paragraph 1.7, lists who may serve as an appointing authority. Most often, the appointing authority will be a wing commander, or the wing IG, if the wing commander appoints the IG in writing for this responsibility. The appointing authority directs an IG investigation, appoints investigating officers through an appointment letter, and approves the ROI once it is complete. You will receive an appointment letter from the appointing authority containing framed allegations, a deadline, and other instructions. The appointment letter serves as your source of authority to conduct the investigation, and you are not authorized to conduct witness interviews or collect evidence without it. Additionally, the appointment letter should include the scope of the investigation, along with the issue or allegation that is being investigated. Investigators will not go beyond this scope without requesting written approval from the appointing authority, to include requesting approval to add issues or allegations for investigation.

3.3. The IG. The IG is responsible for training you and ensuring you succeed in your role as IO. The IG will provide you with facilities, help you arrange witness interviews, and provide administrative support. The IG is charged with training IOs and performing a quality review of all ROIs. An integral part of that training is the Investigating Officer computer-based training module available on the Air Force's Advanced Distributed Learning Service (ADLS) website.

3.4. The Legal Advisor. Legal advisors play a critical role in the IG investigative process. Every IO is assigned a legal advisor who will assist you with all aspects of your investigation, to include assistance in framing the allegation(s),[11] interviewing witnesses, and drafting the report. The legal advisor should make him or herself readily accessible during the investigation and should provide an "informal" legal review of your ROI to highlight any areas for improvement or legal issues. After your report is complete, another attorney (normally a different one from the legal advisor) will conduct a formal legal review of the ROI. The legal review is not optional and must be included as an exhibit in the ROI before

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[11] While the IO should be provided the framed allegations in his or her appointment letter, the IO may find evidence during the investigation that requires reconsideration of the allegations. If this occurs, the IO should immediately consult the legal advisor.

the ROI can be considered complete. The legal review must be completed prior to the appointing authority's final review and approval of the ROI. The appointing authority should not sign a ROI without a legal review.

3.5. The IO. The IG, legal advisor, and others provide support, but you, the IO, are ultimately charged with investigating the matter at hand. An IO must be a field grade officer, senior NCO, or Air Force civilian with a substantial breadth of experience, exceptional maturity, and demonstrated sound judgment (unless the IG obtains a waiver), must not be in the chain of command of any subject, and must be unbiased and objective.[12] The IO also should be fully available to conduct the investigation – not scheduled for leave, temporary duty, separation, retirement or other commitments that would detract from the investigation. If you believe you have duties that preclude you from giving the investigation your full attention, or if you have an existing relationship with a witness, complainant or subject that might reflect negatively on your objectivity, you need to raise this issue immediately to the IG.

3.5.1. Investigative Duties. Throughout the course of the investigation, you will:

- Thoroughly gather all necessary facts, through witnesses, documents or other items of evidence, to help the appointing authority make an informed decision.

- Investigate only the allegations authorized by the appointing authority in the appointment letter. If new or different issues come to light during the investigation, the IO has a duty to notify the appointing authority for further guidance. The IO must receive written approval from the appointing authority before broadening the scope of an investigation.

- Consult with the legal advisor when legal issues arise, such as whether to provide a rights advisement to a witness or subject, or how to confront a witness who refuses to testify. You should work closely with the legal advisor throughout the investigation.

- Be professional at all times. This requires you to be objective, neutral and fair. You should adopt a friendly, but not familiar, attitude. You should not disclose witness identities or opinions; deceive, browbeat, threaten, coerce, or make promises; or shout, lose composure, or otherwise show emotion or argue.

- Treat all information gathered as part of the IG investigation process as "For Official Use Only."

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[12] See AFI 90-301, Attachment 1.

3.5.2. Post-Investigative Duties. Once you have gathered the evidence, you will:

- Write an ROI that considers both sides of the issue, supports your findings based upon the preponderance of the evidence, and sufficiently documents how you reach your conclusions.

- Organize the case file in accordance with guidance found in Attachment 10 to AFI 90-301.

- Obtain a legal review of the ROI from a legal advisor. The individual performing the legal review should be different from the individual that served on the investigative team.

- Forward the case file to the appointing authority for action.

3.6. Technical Advisor. It may be necessary for the appointing authority to appoint a subject matter expert to assist you. The appointing authority should provide contact information for technical advisors in your appointment letter or, if a later need arises, in a separate technical advisor appointment letter. For example, if the allegation deals with improper official travel, experts in the servicing base finance office can identify and explain applicable provisions of the travel regulations. Because technical advisors are part of the investigative team, they also have an obligation to protect the privacy of the parties and witnesses. Technical advisors can provide testimony like any other witness or, upon the request of the IG, provide a separate written technical review of the case file after you write the ROI.

3.7. Administrative Assistant. Depending upon case complexity, the appointing authority or IG may assign you one or more administrative assistants. An administrative assistant can facilitate witness interviews, copy necessary documents and even act as a witness to the testimony. As part of the investigative team, assistants have an obligation to protect the privacy of all concerned. Normally, an administrative assistant will be appointed in writing, and the appointment letter will delineate the administrative assistant's obligations. During the investigation, administrative assistants should report to the IO.

Chapter 4: Initiating the Investigation (The Appointing Authority)

4.1. Frame the Allegations. Assisted by a legal advisor and IG, the appointing authority frames allegations *before* appointing an IO. You will receive the allegations as an attachment to your IO appointment letter. It is vitally important that you receive clear allegations to provide you with a direction for your investigation. The most common weakness in IG investigations is that allegations are vague, poorly worded, or allege conduct that does not amount to wrongdoing. Allegations should precisely identify who the subject is, what that person is alleged to have done, what standard was violated, and when the wrong allegedly occurred.[13] If you do not understand the allegations, or if as the investigation proceeds your allegations do not seem to provide you with enough direction, consult with the IG and your legal advisor.

4.2. Appointment Letter. Once the appointing authority decides an investigation is needed, he or she appoints an IO in writing. The appointing authority should provide you a letter of appointment. The appointment letter generally outlines the scope of the investigation, provides the name and contact information of your legal advisor, the name and contact information of your technical advisor (if any), authorizes you to collect evidence, requests recommendations if desired, establishes the ROI completion suspense date and states that the investigation is your primary duty until completion. The appointment letter is your authority to conduct an investigation, swear witnesses, and examine and copy documents, files, and other data relevant to the investigation. For purposes of the investigation, you are an extension of the appointing authority. Because you may need to show the appointment letter to other agencies to obtain their information, the appointing authority should include the allegations to be investigated as an attachment to the appointment letter, thereby protecting the privacy of other parties. You can then show the appointment letter to any person to obtain information without disclosing the actual allegations or names of people involved. A sample appointment letter is located at Attachment 5 to AFI 90-301.

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[13] See AFI 90-301, Paragraph 3.12.1.

Chapter 5: Conducting the Investigation

5.1. Preparation Tips. The end result of an IG investigation typically reflects the amount of preparation put into the investigation. You should meet with your legal advisor and IG for any training and for assistance in forming an investigative plan, proof analysis and interview questions before initiating the investigation.

5.1.1. **Investigative Plan.** AFI 90-301, Attachment 6, contains a sample investigative plan. The main idea of the investigative plan is to provide a road map for the IO – what facts you know at this point, what standards are at issue, what evidence you will need to gather, and when you plan to accomplish key tasks. Your IG should be able to provide you with assistance in developing an investigative plan, and may have begun to develop one for you already.

5.1.2. **Question Formulation.** Work closely with your IG and legal advisor when preparing interview questions to ensure the questions are relevant, organized, thorough, and in correct form.

5.1.2.1. **Relevance.** The key to relevance is whether the information sought might have an effect on the outcome of the case. The interview questions should focus on the facts and circumstances surrounding, and leading up to, each allegation. Information that relates to the elements laid out in the proof analysis will always be relevant.

5.1.2.2. **Organization.** The best interviews start with background and build up to the salient questions or issues. Ask pertinent background questions first. Work the witness toward the more difficult subjects. While there is no cookie-cutter method to ensure effective interviews, the recommended approach is to review events chronologically rather than by allegation (e.g., Thursday, then Friday, rather than allegation 1, then allegation 2). Jumping from allegation to allegation often results in skipping around in time and can be confusing to the person being interviewed and reviewers reading the transcript. Using a chronology is helpful in keeping questions in a logical sequence.

5.1.2.3. **Thoroughness.** Thoroughness is required in all IG investigations. Look beyond who, what, when, where and how. Investigations need to address the "why." Motive is always relevant. Be sure to:

- Pursue an issue when there is an indication the witness has additional information
- Find the source of second-hand information so that first-hand information may be obtained
- Determine the basis for witness opinions (i.e., A: "In my opinion, he's not a truthful person." Q: "What leads you to believe that?" A: "He lied to me three times." Q: "Explain")

- Ask for clarification when answers contain technical jargon, acronyms, slang or colloquial expressions
- Seek facts, not conclusions (i.e., A: "He was drunk"; Q: "What gave you that impression?" A: "He smelled like beer, his eyes were bloodshot, he was slurring his speech and couldn't stand up without swaying.")

5.1.2.4. **Form of Interview Questions.** Let the witness tell what happened and refrain from asking questions that suggest answers. Questions that either assume the answer or leave the witness no choice but to state a particular response (yes or no) are leading questions. Leading questions are generally less useful in getting at the truth, because the end goal is for the witness to testify, not you. Do not ask compound questions. A compound question is one that contains several questions in one. Compound questions can confuse the witness and often result in one answer, making it impossible later to determine which question the witness answered (e.g., Q: "Did you take Amn Dempsey to the store with you, or did you go alone?" A: "Yeah.")

5.2. Evidence Collection. Evidence is anything from which you determine the facts in a case. Evidence can be testimonial or physical, direct or circumstantial. Seek evidence that is accurate and, where possible, comes from individuals with direct knowledge. You should evaluate evidence while collecting it, and updating your proof analysis as you collect evidence is an excellent way to evaluate your evidence. Evidence collection often has a ripple effect – the disclosure of one piece of evidence often drives the need to confirm it, or refute it, through other evidence. Any evidence that is relevant should be gathered, even if it is hearsay, circumstantial, photocopied, or otherwise not the "best evidence." The best practice is then to trace that evidence back to a more reliable source. (e.g., Q: "Do you know anything about Col McBride threatening A1C Oliver with an Article 15?" A: "I heard something about that, but I wasn't there." A: "Can you tell me who told you about that?")

5.2.1. **Testimony.** In IG investigations, the majority of evidence often comes from witness testimony. Testimony includes oral statements, written statements and IO summaries of witness interviews. Testimony can be powerful, as in the case of a hand-written confession. On the other hand, testimony is based on a person's memory, so it may be incorrect or incomplete. Before testifying, all witnesses should receive a Privacy Act statement (see Attachment 4 for a sample.)

5.2.1.1. **Witness Availability.** Work through the appointing authority to make the witness available for interviews. Most witnesses are willing to cooperate with an IO. In the case of the unwilling witness, the means and ability to require their cooperation will vary depending on the witness' status.

5.2.1.1.1. **Active Duty Military.** The witness' commander can order the witness to testify. Military witnesses have a duty to testify and can only refuse to answer questions that may incriminate them.

5.2.1.1.2. **DoD Civilians.** A DoD civilian employee's commander can direct the witness to testify. Like military witnesses, DoD civilians have a duty to testify and can only refuse to answer questions that may incriminate them in some criminal conduct.

5.2.1.1.3. **Civilians.** Civilians not employed by the government cannot be ordered or directed to testify. This group includes contractor employees, dependents of active duty military, non-DoD affiliated civilians, and non-appropriated fund (NAF) employees. The IO can always invite civilians to testify, but if the person refuses, the IO has no power to make them testify. (See Attachment 3, Witness Invitation Letter.) Like all other witnesses, civilians can refuse to answer questions that may incriminate them in some criminal conduct.

5.2.1.1.4. **Retirees.** Retirees, unless they are recalled to active duty, cannot be compelled to testify. As in the case of civilians, the IO can invite a retiree to testify, but if the person refuses, the IO cannot force them. Like all other witnesses, retirees can refuse to answer questions that may incriminate them in some criminal conduct.

5.2.1.1.5. **Minors.** Minors (usually defined as people under age 18) fall into the category of "civilians," and the same rules apply. Additionally, even if a minor agrees to testify, the IO must first obtain the consent of a parent. A parent or guardian must be present for all interviews of minors. Like all other witnesses, minors can refuse to answer questions that may incriminate them in some criminal conduct.

5.2.1.1.6. **Air National Guard and Reserve Personnel.** Air National Guard or Reserve component members not in a duty status (Annual Training or Inactive Duty for Training) cannot be required to participate in an IG investigation. However, Guard or Reserve members who are in full-time civilian status (such as Air Reserve Technicians) can be directed to appear, as with any civil service employee. If a Guard or Reserve member who is not in military or civil service status does not agree to participate while on non-duty status, the IO can request the owning commander place the member on orders to provide testimony. Again, Air National Guard and Reserve personnel may refuse to answer questions that may incriminate them in some criminal conduct.

5.2.1.2. **Order of Witnesses.** Each witness should be interviewed individually. AFI 90-301 requires you to interview the complainant first and the subjects or suspects last. The recommended sequence is: (1) the

complainant; (2) subject matter experts; (3) regular witnesses; (4) subjects or suspects.[14] Inexperienced IOs are inclined to resolve cases quickly by talking to subjects or suspects first. This is a bad idea. Interviewing the subject early in an investigation removes the opportunity from the IO to gather evidence (testimonial or otherwise) that can be used to aid in determining the credibility of the subject as a truthful and knowledgeable witness. Interviewing the subject last ensures you have learned the necessary information to ask the right questions. This process can also enhance truth telling, as people are more likely to be truthful if they know the IO has information from others. If the subject interview is last, you can also challenge any statements that are inconsistent with other evidence you have already received. Finally, interviewing the subject last allows you to advise the subject of all adverse information against them and decreases the need to re-interview.

5.2.1.3. **Interview Locations.** Choosing the correct interview location can prevent a myriad of problems. The IG should provide a private interview room. In general, it is preferable to interview a witness at the IG-provided room rather than at the witness's duty location. If the witness is located at another installation or location, you have several options: (1) personally interview the witness at their location to observe their demeanor, which can be an important indicator of truthfulness; (2) delay the interview until the witness returns, if their absence is temporary and time permits; (3) conduct a telephonic interview; (4) mail, e-mail or fax the witness written questions and have them provide a sworn, written response; or (5) ask the witness to provide a sworn statement. In general, if a face-to-face interview is simply not possible, telephonic interviews are the best option. However, the IO can arrange to have an IG at the witness's location observe the witness's demeanor during the interview and verify the identity of the witness. If a telephone interview of a subject is conducted, you still must arrange to hand off the subject to the commander or a representative (See paragraph 5.2.1.9)

5.2.1.4. **Testimony Format.** All witnesses must be placed under oath before testifying.[15] This puts the witness on notice that the investigation is a serious matter and lets him or her know he or she could be criminally liable for failing to tell the truth. AFI 90-301, Attachments 7, 8, and 9 have interview formats for witnesses that include oaths. Explain to the witness before the read-in that you will be asking the witness to swear or affirm (the main difference being that affirming does not include the phrase "so help you God.") If a witness, previously sworn, must be re-interviewed, you do not need to re-

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[14] AFI 90-301, Paragraph 3.42.
[15] AFI 90-301, Paragraph 3.42.2

administer the oath, but can simply remind the witness that he or she is still under oath and obtain the witness's acknowledgement that he or she understands. All witness interviews should be recorded.[16] You must arrange to transcribe the testimony of the complainant, subject/suspect, and all key witnesses.[17] Digital recorders and computer software can make transcription easier and less expensive, and are now considered the norm in IG investigations. For witnesses whose testimony is not a central part of the investigation, summarized testimony may be acceptable at the discretion of the appointing authority. Summarized testimony does not mean that the testimony is not recorded. All testimony should be recorded and a determination made during or before drafting the ROI if verbatim testimony is needed from each witness interviewed. Summarized testimony carries less evidentiary weight because it is essentially a third party translation to the reader of the report. See Attachment 5 for a template for summarized testimony.

5.2.1.5. **Rights Advisement.** During any IG investigation, rights advisement for subjects, suspects or witnesses may become an issue. Work very closely with the legal advisor whenever there is a question about whether an individual should be read his or her rights.

5.2.1.5.1. **Military.** The mere fact that someone is the subject of an IG investigation does not automatically trigger the need for a rights advisement. The test is whether the IO, at the time the military subject is interviewed, either believes or reasonably should believe the individual committed an offense under the UCMJ or other criminal code. If so, then the subject or witness should be considered a suspect. You must advise suspects of their Article 31(b), UCMJ rights, using the format in Attachment 9 to AFI 90-301. Cases involving Guard and Reserve personnel are further complicated by their status at the time of the alleged conduct and the time of interview. Consult with the legal advisor in these cases.

5.2.1.5.2. **Civilian.** Even if suspected of an offense, a civilian witness or subject need not be advised of their Fifth Amendment ("Miranda") rights when interviewed as part of an IG investigation. Such rights are only required in conjunction with custodial interrogations (i.e., interrogations in which the interviewee is not free to leave at will). IG investigation interviews do not meet the threshold requirement for custodial interrogations. Even though you do not need to advise civilian witnesses of their Fifth Amendment rights, they may still invoke such rights and choose to remain silent if circumstances warrant.

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[16] AFI 90-301, Paragraph 3.42.2.3.
[17] AFI 90-301, Paragraph 3.42.2.4.

5.2.1.6. **Third Party Presence During Interviews.** An interview will normally only involve you and the witness. Sometimes a technical advisor or administrative assistant appointed to assist you will accompany you during interviews. Also, while interviewing witnesses of the opposite sex, you may want an assistant present to avoid any appearance of impropriety. Although you can have another person present during witness interviews, that person should not ask questions unless the appointing authority designates that person as an IO. The IO should also document in the ROI why the third party was present.

5.2.1.6.1. **Labor Union Representatives**. AFI 90-301, paragraph 3.44, sets out certain situations when labor union representatives may be present for an interview of a civilian who is part of a collective bargaining unit. Work closely with your legal advisor to determine whether a labor union representative should be allowed to be present during an interview and to define the participation that representative may have during the interview.

5.2.1.6.2. **Attorneys.** Only a suspect has the right to have an attorney present during an interview. The attorney may not answer questions for the suspect. Complainants, witnesses, and subjects may consult with their attorneys, but do not have the right to have an attorney present during interviews.[18]

5.2.1.6.3. **Other Personal Representatives.** As a general rule, third-party representatives for witnesses and subjects are not permitted to be present during IG investigation interviews. Consult with the legal advisor when special circumstances arise, such as a request for a crime victim to have a Victim Witness Assistance Program (VWAP) representative present.

5.2.1.7. **Confidentiality.** Communications made to the IO during an IG investigation are not privileged. Witness testimony can be revealed in specific situations, so never promise confidentiality to a witness. However, the disclosure of these communications will be limited. The ROI will be marked "For Official Use Only" and treated as closely-held information.[19]

5.2.1.8. **Immunity.** General court-martial convening authorities have the authority to grant witnesses immunity from prosecution in exchange for providing testimony. Subordinate commanders do not have this authority, and neither do you. Never make promises to a witness that could be interpreted as *de facto* immunity (e.g., "Don't worry; you won't get in trouble.") If a witness requests immunity or some other protection as a condition to providing a statement, consult with the IG and JA before proceeding.

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[18] See AFI 90-301, paragraph 3.43.
[19] See AFI 90-301, Paragraph 3.3.

5.2.1.9. **Handoff Policy.** This Chief of Staff of the Air Force policy requires a person-to-person handoff of all subjects and suspects, and any distraught witnesses following an investigative interview. The handoff must take place between the IO and the individual's commander or the commander's designated representative. The policy applies to all subjects, suspects, or distraught witnesses, regardless of rank or position. You need to document the handoff in the ROI or during the testimony of the witness. You must arrange for this handoff in advance, and explain it to the subject or suspect up front.[20]

5.2.2. **Physical Evidence.** Physical evidence consists of documents, computer records, photographs, and objects (e.g., tools), to name a few examples. While no specific "chain of custody" requirements are imposed on IG investigations, you should still take care to secure evidence as best as possible.

5.2.2.1. **Objects.** Occasionally, an IO will have to collect objects as part of an IG investigation.[21] Work with the legal advisor to obtain, secure and store the evidence. Obtain photographs of the objects to include in the case file.

5.2.2.2. **Documents.** Documentary evidence may be in the form of handwritten notes, correspondence, reports, newspapers, inventories and computer records such as e-mails. Written documentation, if authentic, can provide powerful evidence to help you reach a finding. Anytime a witness discusses a particular document during testimony, ensure the testimony identifies the document (e.g., "my letter, dated X, subject X"). If it would be helpful, you can create or have witnesses create documents to illustrate points in the investigation. This is called "demonstrative evidence." For example, you can have the witness diagram a location and where people were standing at a given time. Other examples of demonstrative evidence include organizational wiring diagrams and maps. Demonstrative evidence should be thoroughly and accurately labeled. All documents provided by the complainant should be marked "Complainant Provided."

5.2.2.3. **Circumstantial Evidence.** Especially in reprisal cases, you will need to prove issues such as motive, intent or knowledge. Because you cannot read minds, the chance of finding "direct" evidence of a person's state of mind is remote. Instead, you will need to rely largely on circumstantial evidence in such cases. Circumstantial evidence is evidence that tends to prove the existence of a fact, but does not absolutely make it necessarily true. For example, if you are trying to prove that a commander reprised against an Airman, the only direct evidence – evidence that if true would necessarily prove this fact –

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[20] See AFI 90-301, Paragraph 3.46.
[21] IOs considering searching and seizing evidence must consult their legal advisor.

might be if the commander testifies that he or she did in fact reprise. On the other hand, there may be quite a bit of circumstantial evidence to prove the commander reprised against an Airman, such as: witnesses testified that the commander seemed upset at the Airman's protected communication; the commander has never responded to any other member of the unit in such a harsh fashion; or the commander has made disparaging comments about the IG system in the past. None of these pieces of evidence proves that the commander necessarily reprised against the Airman – in other words, other explanations are possible – but they may well lead you to conclude that it is more likely than not that the commander reprised. Circumstantial evidence can be as compelling as direct evidence and often will be at the center of your analysis.

5.2.2.4. **Computer Evidence.** You can obtain e-mails, electronic documents, or other evidence on a computer system by asking the complainant or another witness to provide copies of such evidence. Occasionally, you may want to access a subject or witness's e-mail or computer files without their consent to obtain evidence. You must consult with your legal advisor if you are considering accessing any person's computer without their consent in order to prevent a possible unlawful search and seizure under the Fourth Amendment.

5.2.3. **Adding New Allegations.** Sometimes an IG investigation may discover additional possible misconduct that should either be investigated by the IG or by another office or agency. For example, an IO examining allegations of reprisal might find credible evidence that restriction has also occurred. Conversely, the IO investigating allegations of reprisal might find evidence that much more serious misconduct, such as larceny, has taken place. The IO has no authority to investigate these new matters unless appointed to do so. The IO's course of action depends on when the evidence of additional misconduct is discovered.

5.2.3.1. **During the Investigation.** If a witness's testimony or other evidence raises the possibility of additional misconduct by the subject or another person, approach the IG to decide whether the additional issues will be investigated separately (either as a separate IG investigation or through some other investigation) or as part of the current IG investigation. If after consultation with the legal advisor, the IG decides to expand the scope of the current investigation, the IG will ensure the appointing authority signs a new appointment letter authorizing you to examine the additional allegations. If any subjects have already been interviewed who are also subjects of the new allegations, you must re-interview those subjects to advise them of the additional allegations and give them a chance to respond. If a witness becomes a subject, you must re-interview them, advising them of their changed status, advise them of the allegation(s), and give them a chance to respond.1

5.2.3.2. **Post-Investigation.** The more challenging scenario occurs when a later reviewer, such as the attorney conducting the legal review, notices that the evidence raises possible misconduct the ROI failed to address. When this occurs, the reviewer, the IG and the IO should meet to discuss possible courses of action. If the ROI already contains all necessary information to address the additional misconduct, the IG may simply choose to have the appointing authority add the new allegations, re-interview the subjects to allow them to present any additional defense, and have the IO analyze the additional allegations in the report. If additional evidence must be gathered to properly analyze the additional misconduct, the IG will need to decide whether to have the IO (upon the appointing authority's direction) expand the investigation or to conduct an entirely new investigation into the additional misconduct. While individual cases vary, in general, it is preferable to keep the whole case together by investigating all related misconduct in one investigation. If the IG elects not to take this route, the original ROI should document the fact that additional misconduct raised by the investigation will be investigated separately.

5.2.4. **How Much Investigation is Enough?** You should consider the seriousness of the allegations, including the implications for both the subject and the complainant, in assessing whether the investigation has been sufficiently conducted. In general, cease investigating when you have enough evidence to support a conclusion on the allegations, and additional investigation is unlikely to yield evidence significant enough to change the outcome. If a complainant or subject has suggested additional witnesses to interview or evidence to review, you must either pursue these leads or fully document why doing so would not be likely to yield significant, relevant evidence.

5.2.5. **Prepare to Write.** Before beginning to write the report, organize all your evidence. Transcripts of all testimony must be obtained and reviewed – don't rely on your memory to pull together all the most relevant statements by witnesses. The IG is responsible for providing you with a private area in which to write your report, and all necessary supplies (such as a computer and printer).

Chapter 6: Report Writing

6.1. ROI Format. Two terms are used to describe the product the IO produces. The ROI is the product the IO writes. It contains an explanation of the IO's authority, lists the allegations, details the facts of the case, analyzes the evidence, and summarizes the IO's conclusions. The "case file" is the broader term for the entire binder of material the IO submits. The case file includes the ROI at Section II, but also includes witness interview transcripts, documentary evidence, administrative documents, legal reviews, and other materials. The ROI – the written report at Section II of the case file – must be a stand-alone document. It must reference all essential facts, documents, portions of regulations, interviews, etc., so that a reviewer can arrive at a determination without reference to information outside the report.[22] Write the ROI as if the reader had no prior knowledge of the case. The basic parts of the ROI are described in AFI 90-301, Attachment 12.

6.1.1. Authority and Scope. Attachment 12 to AFI 90-301 provides the language you should use to describe your authority to conduct the investigation. Simply fill in the blanks and paste this information directly into Section II, Tab A of the case file.

6.1.2. Introduction: Background and Allegations. In Section II, Tab B, provide a background of events that led to the alleged violations. This background section should consist of a complete recitation of the facts of the case. You need to include a reference for every factual statement in this portion of the report. An example is: "MSgt Wilcox called Amn Moseby a 'pig' and a 'loser.' (Section III, Tabs D-1, p.3; D-5, p. 6; E-6, p. 2)." If you can cite to specific line numbers on a page, your report will be even more helpful. You will also list all allegations in this section of the report, exactly as the appointing authority framed them.

6.1.3. Findings, Analysis, and Conclusion. This section will begin with more detailed explanation of the underlying facts of the case. Include every relevant fact in this portion of the report – do not assume that the reader knows what is in the testimony or documentary evidence. In this initial portion of Section II, Tab C, you are not drawing any conclusions about the allegations. Simply present all sides of the case – if witnesses disagree about what happened, explain the differences. You will have a chance to explain your conclusions about what really happened later in this tab. This portion of the report also may discuss any other issues that arose during the investigation (for example, why you chose not to interview a witness the complainant or subject). While no specific format is required, generally you will find it easiest and most logical to state the most relevant facts in

[22] AFI 90-301, Paragraph 3.51.1.

chronological order. Finally, after laying out all the relevant facts, you will analyze each allegation. This is where you will finally have the chance to explain your position as to whether the allegations substantiated. You want to explain your position using a solid logical thought process. You have invested significant time and effort gathering the facts – don't waste this effort with a poorly supported analysis. While no one format for writing your analysis is required, one helpful method for analyzing each allegation is to use the IFRAC method (Issues, Facts, Rules, Application, Conclusion). The IFRAC method of analytical writing simplifies the organization of the Findings, Analysis and Conclusion section of the ROI. (See Attachment 2 for an example of IFRAC in action).

6.1.3.1. **Issue.** The allegations, as framed by the appointing authority, are the issues you must resolve. You must address each of the allegations separately. Start the analysis of each allegation by first typing out, word for word, the original allegation. The wording of the allegation drives the analysis. Do not combine allegations in an attempt to simplify the process and *do not* change the wording of the allegation as framed by the appointing authority in the attachment to the appointment letter unless previously coordinated with and approved by the appointing authority.

6.1.3.2. **Facts.** After you have identified the issue, pull out the key facts that relate to the particular allegation at hand from the more comprehensive Background section you have already written. Again, support each fact with citations to relevant evidence. A fact is not a fact until it is supported with evidence. Many cases contain some evidence that points toward substantiation and some that points toward non-substantiation. You must take great pains to present the full story. As with the background section, for every factual assertion you should cite to evidence in the case file that supports that assertion.

6.1.3.3. **Rules.** Once the issue and facts have been identified, you will next focus on the applicable rules or "law" that guide you in resolving the issue. These rules come from sources such as regulations (AFIs, DoDDs, etc.), laws (statutes, the UCMJ, etc.), and policies (administrative decisions, local policy letters, etc.) Document what the relevant parts of the rules are. For example, if the allegation involved an AFI violation, annotate the AFI number, name and effective date (e.g., AFI 36-2706, *Military Equal Opportunity and Treatment Program,* 5 October 2010) and quote the applicable portions of the instruction, including any definitions. Summarizing rules can be dangerous, as many of them were carefully crafted. Use the original language from the instruction or other rule. Include the cover page of the instruction and excerpt as an exhibit.

6.1.3.4. Analysis. Now you will take the facts you have spelled out, apply them to the rules of law you have listed, leading you toward your conclusion. This requires analytical thinking. Consider the facts surrounding the issue, assess the preponderance of the evidence, and explain why the allegation is or is not substantiated. The reader must be able to follow your thought process. When finished reading the ROI, the appointing authority and other reviewers should feel comfortable that it is complete and that the conclusion naturally follows from the facts presented. To ensure the ROI is thorough and balanced, keep in mind the "Three C's" of analytical thinking and writing: *credibility*, *corroboration*, and *clarity*. Analysis requires more than just listing the facts and leaping to a conclusion. It requires a window into your thought process. The reader needs to appreciate why you weighed some items of evidence more heavily than others.

6.1.3.4.1. Credibility. When different witnesses tell opposing stories, you will have to assess who is more likely to be believed. The importance of documenting credibility determinations cannot be overemphasized. This is the one area where you have an advantage over subsequent reviewers – you are the only one who gets to interview the witness, and you are in the best position to determine whether the witness is telling the truth. The extent to which you document why you believe one witness is more credible than another witness largely determines how much deference reviewers will give your findings. This may require you to assess and comment upon factors such as:

- Nonverbals (Did the witness provide body language that made him or her seem evasive -- for example, shifting in the chair, looking away, lowering his or her voice?)

- Bias (Did the witness have a shaded viewpoint of the events at the time they occurred – for example, he or she was best friends with the subject?)

- Motive to lie (Does the witness have a reason to withhold the truth now – for example, does he or she has a personal interest in the outcome of the investigation?)

- Knowledge (Is the witness's testimony based on personal knowledge or second-hand information?)

- Perception (Did the witness have a clear view or hearing of the event or was he or she far away?)

- Veracity (Does the witness have a history of being truthful?)

- Any other information that may affect credibility

6.1.3.4.2. Corroboration. When testimony is corroborated by other credible evidence or testimony, witness credibility is enhanced. Always discuss any evidence that supports, or does not support, witness testimony.

6.1.3.4.3. Clarity. Clarify contradictions before finalizing the investigation. Whenever abbreviations or terms are used for the first time, spell them out or explain them. Avoid the use of slang, unfamiliar jargon, or obscene and profane language unless it is necessary.

6.1.3.5. Conclusion. Each allegation should be answered in a separate finding that states whether it was **substantiated** or **not substantiated**. No other conclusions (such as "partially substantiated" or "unsubstantiated") are proper. If the evidence is in conflict and cannot be reconciled, that simply means that the facts did not satisfy the proof by a preponderance of the evidence standard and therefore, the allegations are not substantiated. Summarize your conclusion and briefly state the reasons for the conclusion. For example, the conclusion can state, "The preponderance of the credible evidence indicates that Lt Col Thompson reprised against SSgt Cruz by threatening to downgrade SSgt Cruz's EPR as a result of SSgt Cruz's MEO complaint. Numerous witnesses agree that Lt Col Thompson threatened to mark SSgt Cruz down to a 3 or 4 EPR, and nothing in SSgt Cruz's record suggests she had any performance or conduct shortcomings. Accordingly, I find Allegation 1 to be **substantiated**."

6.1.4. Recommendations. If the appointing authority desires recommendations for corrective action, the appointment letter will state this. Do not make recommendations unless specifically directed. If you have not been tasked to provide recommendations, but feel it would be appropriate to do so, discuss the issue with the appointing authority and request permission to include recommendations. Recommendations should be tied to the findings and stated as succinctly and objectively as possible. Do not recommend specific punishments or administrative actions. If you believe a subject or other person should be disciplined, simply recommend the commander consider taking "appropriate disciplinary action" against that person. Recommendations are not binding on the appointing authority or a subject's commander.

6.2. Case File. AFI 90-301, Attachment 10, contains a case file format for non-senior official investigations. The attachment describes where to place documents such as witness interview transcripts, documentary evidence, and administrative documents.

6.2.1. Legal Reviews. All ROIs must receive a written legal review by the installation JA office. The legal review will address whether: 1) each

allegation has been addressed; 2) the allegations allege a violation of law, regulation, procedure or policy; 3) the IO reasonably applied the preponderance of the evidence standard in arriving at findings; 4) the conclusions are supported by, and consistent with, the findings; 5) the investigation complies with all applicable legal and administrative requirements; 6) any errors or irregularities exist, and if so, what is their legal effect. The legal review may disagree with your findings and conclusions, in which case the appointing authority will determine which position to support. The legal reviewer, however, should not deem a ROI "legally insufficient" and send it back for rework merely because the reviewer personally disagrees with the IO's findings and conclusions. Legal reviewers should use great caution not to substitute their judgment for yours, particularly in cases where the ROI contains thoroughly documented credibility determinations. If an ROI is deemed "legally insufficient," the legal reviewer must provide an explanation as well as steps to make the ROI "legally sufficient."

6.2.2. Technical Reviews. If a technical review was conducted, tab all technical reviews in the same order in which they are referenced in the ROI.

6.2.3. Appointing Authority Action. After the legal review is completed, the appointing authority will either approve or disapprove the ROI, in writing. If the appointing authority disagrees with one or more of your findings and conclusions, the appointing authority will document the rationale for the disagreement and state his or her position in an "addendum" to the ROI.

6.2.4. Addendum. An addendum is a document a reviewer authors to overturn the findings on one or more allegations, or to further explain the reason for agreeing with the findings. An addendum can also be used to slightly re-word allegations, so long as the fundamental nature of the allegations does not change. The appointing authority or a higher-level IG reviewer has the authority to author an addendum.[23]

6.3. Report Markings. The following language should be placed at the bottom of each page of the ROI: "This is a protected document. It will not be released (in whole or in part), reproduced, or given additional dissemination (in whole or in part) outside of Inspector General channels without prior approval of The Inspector General, SAF/IG, or designee. FOR OFFICIAL USE ONLY." Control the number and distribution of copies. Do not show the report or any portion of it to any witness, with the sole exceptions of showing summarized testimony to witnesses to get their concurrence that the testimony is accurate, and showing exhibits to witnesses as a part of questioning.

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[23] AFI 90-301, paragraph 3.59.5

Chapter 7: Post-Report Duties of the IO

7.1. Rework. Both the IG and the legal office will conduct reviews of the ROI. Depending on the type of allegations involved, the case may also receive reviews by higher-level IGs and legal advisors. All cases involving allegations of reprisal, restriction, or improper mental health evaluation referral will be reviewed at the MAJCOM and SAF/IGQ, and approved at the DoD/IG levels. Any IG or JA review may send the ROI back for rework if the ROI lacks sufficient evidence to determine a finding (i.e. "Substantiated" or "Not "Substantiated"), if the ROI fails to explore allegations raised by the complaint, or if the ROI is otherwise not legally or administratively sufficient. As the IO, you remain responsible for completing any rework directed by a review of the ROI.

7.2. Confidentiality. IG records and information are not released unless release is approved through a formal official use request, FOIA request, or Privacy Act request.[24] Do not discuss your knowledge of the case with co-workers, friends, or anyone else who does not have an official need to know the information.

7.3. Records. Any notes or other documents you have collected that were not included in the ROI should be turned in to the IG.

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[24] AFI 90-301, Chapter 14.

Attachment 1: Proposed Test for Abuse of Authority

If an allegation of reprisal does not meet the definition of reprisal under 10 U.S.C. §1034, IGs must still address and attempt resolution of the allegation as a personal complaint, such as abuse of authority. (AFI 90-301, Paragraph 6.7.3) Abuse of authority is an arbitrary or capricious exercise of power that adversely affects the rights of any person or results in personal gain or advantage to the abuser. (AFI 90-301, Attachment 1) Courts have interpreted the arbitrary or capricious standard in the context of government agency action under 5 U.S.C. § 706, the Administrative Procedure Act.[25] This precedent can be summarized into a test for abuse of authority:

1. Did the responsible management official's (RMO's) actions either:
   a. Adversely affect any person? (e.g., demotion, referral OPR, extra duty, etc.) or
   b. Result in personal gain or advantage to the RMO? (e.g., promotion, award, etc.)

If both questions one (a) and (b) are answered "no," then it is not necessary to consider question two. If either part of question one (a) or (b) is answered "yes," the IO should proceed to question two.

2. Was the RMO's action either:
   a. Outside the authority granted under applicable regulations, law, or policy?
   OR
   b. Arbitrary and capricious? You must use the following factors in your analysis:
   (1) What were the **reasons** the RMO took, withheld, or threatened the action?
   (2) What was the **reasonableness** of the action taken, withheld, or threatened considering the complainant's performance and conduct?
   (3) Were the actions taken by the RMO **consistent**?

The factors in question four of the reprisal Acid Test can also assist the investigating officer in determining whether abuse of authority has occurred. (AFI 90-301, Attachment 22).

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[25] See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (quoting *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 168 (1962)); see also *Dep't of the Air Force v. FLRA*, 352 U.S. App. D.C. 394 (D.C. Cir. 2002) (discussing the arbitrary or capricious standard).

Attachment 2: "IFRAC" Sample

Issue/Allegation: On or about 6 August 2011, Col Jim Schofield, 569 MDG/CC, reprised against SrA Jonathan Redus by issuing him nonjudicial punishment under Article 15, UCMJ, in violation of 10 U.S.C. §1034, because SrA Redus made a protected communication.

Facts:

SrA Redus was assigned to the 569 MDG in early April 2011 as an x-ray technician. (Section III, Tab D-1, p. 2) He served in this capacity without serious incident until the incidents involved in this complaint. The group commander, Col Schofield, described SrA Redus's performance during his first few months as "good but not great." (Section III, Tab D-2, pp. 3-4)

In late July 2011, SrA Redus was experiencing a problem with his military pay. Apparently, DFAS was withholding about $200 a month from SrA Redus's pay as recoupment for a debt it believed SrA Redus owed the government. SrA Redus believed this was an error. (Section III, Tab D-1, pp. 4-5) SrA Redus visited the base finance office and was told he had to call the DFAS help line. (Section III, Tabs D-1, p. 5; D-6, pp. 3-4) The DFAS help line was apparently unable or unwilling to stop the recoupment action. (Section III, Tab D-1, p. 6)

On or about 31 July 2011, after he received his Leave and Earnings Statement for July, SrA Redus decided to pursue this matter further. He made an appointment at the installation IG's office for 1330 that afternoon. (Section III, Tabs D-1, pp. 7-8; D-4, pp. 4-5; E-2) SrA Redus spoke with the Superintendent at the IG office, who took in the complaint. The Superintendent promised to look into the matter and get back with SrA Redus. (Section III, Tab D-4, p. 6) As part of his complaint analysis, the Superintendent spoke with Col Schofield by telephone on 1 August 2011. (Section III, Tabs D-2, p. 5; D-4, p. 7; E-3, p. 2) Upon discovering SrA Redus' debts were indeed valid, the Superintendent dismissed the complaint on 12 August 2011. (Section III, Tab E-3)

On 6 August 2011, Col Schofield issued SrA Redus an Air Force Form 3070, Record of Nonjudicial Punishment Proceedings.[26] The form notified SrA Redus that Col Schofield was considering nonjudicial punishment action because SrA Redus had allegedly failed to pay just debts, failed to report for duty on time on several occasions, and had disobeyed a physician's order concerning placement of x-rays in patient records. (Section III, Tabs D-2, pp. 9-10; D-4, p. 6; E-1) While the form was actually served on 6 August, several witnesses agreed that Col Schofield had decided by 3 August to issue nonjudicial punishment to SrA Redus. (Sections III, Tabs D-2, pp. 8-9; D-3, p. 6; D-4; pp. 7-8; D-7, p. 4) SrA Redus submitted a response to the proposed Article 15 action on

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[26] Col Schofield imposed nonjudicial punishment because the squadron commander, Lt Col Gedman, was on an extended TDY. (Section III, Tab D-2, p. 3)

10 August 2011, essentially asking Col Schofield not to reduce him in rank or impose forfeitures of pay. Col Schofield considered this response, and imposed the following punishment on 12 August 2011: suspended reduction to A1C, extra duties for 45 days, and a reprimand. (Section III, Tab E-1)

SrA Redus filed this complaint with the installation IG's office on 13 August 2011.

Rule:

Reprisals against military members for making protected communications are prohibited under 10 U.S.C. §1034. The *DoD Guide to Investigating Reprisal and Improper Referrals for Mental Health Evaluations*, IGDG 7050.6, and AFI 90-301 set forth the "acid test" for evaluating reprisal allegations. The "acid test" consists of four questions:

1. Did the member make or prepare a communication protected by statute, DoD Directive, or AFI 90-301?

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 preponderance of the evidence establish that the personnel action would have been taken, withheld, or threatened if the protected communication had not been made?

When analyzing question four, the investigating officer is required to consider the following five factors: (a) reasons stated by the responsible official for taking, withholding, or threatening the action; (b) reasonableness of the actions taken, withheld, or threatened considering the complainant's performance and conduct; (c) consistency of the actions of responsible management officials with past practice; (d) motive of the responsible management official for deciding, taking, or withholding the personnel action; and (e) procedural correctness of the action.

If the answer to the first three questions is "yes" and the answer to the fourth question is "no," then reprisal generally has occurred. If the answer to any of the first three questions is "no," reprisal cannot be substantiated. However, if an allegation of reprisal does not meet the definition of reprisal, IGs must still address and attempt resolution of the allegation as a personal complaint, such as abuse of authority. (AFI 90-301, Paragraph 6.7.3) Abuse of authority is an arbitrary or capricious exercise of power that adversely affects the rights of any person or results in personal gain or advantage to the RMO (AFI 90-301, Attachment 1).

Application:

The first three questions of the Acid Test are answered "yes." SrA Redus made a protected communication when he met with the IG Superintendent on 31 July 2011. The AF Form 3070 was an unfavorable personnel action, as it at least has the potential to impact SrA Redus's career. Col Schofield knew of this protected communication before issuing the AF Form 3070, as the IG Superintendent spoke with him on 1 August 2011 about the complaint – five days before Col Schofield issued the action and two days before Col Schofield decided to issue the action.

As to question four, however, the preponderance of the evidence indicates Col Schofield would have imposed nonjudicial punishment on SrA Redus even if SrA Redus had not filed an IG complaint. An analysis of the following factors of question four of the Acid Test supports this conclusion:

Reasons stated by the responsible official for taking, withholding, or threatening the action: Col Schofield testified about his reasons for issuing the action, and his testimony mirrors the offenses listed on the AF Form 3070 – SrA Redus had displayed irresponsibility in his finances, been late for work several times, and disobeyed an officer's order about placement of x-rays in the patient records. (Section III, Tab D-2, pp. 12-14) The evidence Col Schofield produced supported the validity of these reasons, and SrA Redus's response to the Article 15 action did not dispute that he had committed these offenses. (Section III, Tabs E-1 and E-4)

Reasonableness of the action taken, withheld, or threatened considering the complainant's performance and conduct: Nonjudicial punishment appears reasonable considering SrA Redus's misconduct and past performance. While commanders typically apply graduated punishment and SrA Redus had not received any other "bad paper," the offenses listed on the AF Form 3070 are fairly serious. Three witnesses, including the JAG Col Schofield consulted with, agreed that the seriousness of the offenses warranted a serious response such as Article 15 action. (Section III, Tabs D-3, p. 7; D-4, pp. 5-6; D-6, pp. 3-5) In fact, the JAG advised Col Schofield that SrA Redus's misconduct could have warranted a summary court-martial if Col Schofield decided on this action. (Section III, Tab D-6, p. 5) In addition, none of SrA Redus's past EPRs are outstanding, and witnesses generally agreed SrA Redus was not a stellar performer. (Section III, Tabs D-2, pp. 3-4; D-5, p. 5; D-7, p. 3; E-6; E-7) Imposing nonjudicial punishment in this instance appears to be reasonable.

Consistency of the actions of responsible management officials with past practice: SrA Redus is the only Airman on whom Col Schofield has imposed nonjudicial punishment in his 11 months as Medical Group Commander. (Section III, Tab D-2, p. 11) However, group commanders typically do not issue Article 15 actions, leaving this to squadron commanders. Col Schofield testified that he did issue three other Article 15 actions while he was a squadron commander, and one of these was for failure to pay just debts. (Section III, Tab D-2, pp. 11-12) Capt Kelleher, the JAG who advised Col Schofield on SrA Redus's Article 15, said his impression is that Col Schofield consistently takes a tough approach to disciplinary issues. (Section III, Tab D-6, p. 8).

Other witnesses seemed to agree with this assessment. (Section III, Tabs D-5, p. 7; D-8, pp. 3-4; D-9, p. 3)

Motive of the responsible management official for deciding, taking, or withholding the personnel action: Col Schofield appeared to have no motive of reprisal in issuing the Article 15 action. While he did issue it just days after SrA Redus's IG complaint, there is little evidence other than proximity in time to connect the IG complaint and the Article 15 action. Col Schofield was not the target of SrA Redus's 31 July IG complaint and thus would have little reason to be upset with SrA Redus for filing the complaint. The IG Superintendent agreed Col Schofield did not seem upset by the 31 July IG complaint. (Section III, Tab D-4, p. 8) The evidence seems fairly clear that SrA Redus did in fact commit the misconduct alleged in the Article 15 action, and while Col Schofield did not actually decide to issue nonjudicial punishment to SrA Redus until 3 August, he did discuss this option with Capt Kelleher on 30 July – one day before SrA Redus's protected communication. Capt Kelleher testified that while Col Schofield did not agree to do an Article 15 action on 30 July, he got the impression Col Schofield was leaning that way. (Section III, Tab D-6, p. 10) Col Schofield provided reasonable testimony about his motive, stating that failure to pay just debts is a particularly serious offense in his mind because so many resources are available to Airmen. (Section III, Tab D-2, pp. 16-18) He stated that he understands the role of the IG and does not hold it against SrA Redus for exercising his right to see the IG. In fact, he said he considered it a positive mark in SrA Redus's favor that he was attempting to do something to straighten out his financial situation. (Section III, Tab D-2, p. 19) The preponderance of the evidence indicates Col Schofield was motivated by a legitimate desire to discipline SrA Redus, not by reprisal.

Procedural correctness of the action: The Air Force Form 3070 appears to have been completed in a procedurally correct manner. A legal review found it legally sufficient. (Section III, Tab E-1, p. 2)

Conclusion:

The preponderance of the evidence indicates Col Schofield would have issued nonjudicial punishment to SrA Redus had SrA Redus not made his protected communication. Other than the fact that the Article 15 action came soon after the IG complaint, no evidence indicates Col Schofield issued the Article 15 action in reprisal for SrA Redus's protected communication. Therefore, I find Allegation 1 is **not substantiated.** Additionally, since Col Schofield's action was based on evidence of SrA Redus's UCMJ violations and since a commander has a responsibility to discipline members for their misconduct, Col Schofield did not abuse his authority in issuing nonjudicial punishment to SrA Redus.

Attachment 3: Witness Invitation Letter

IOs can invite civilian witnesses who are not DoD employees, but they need not appear. The best practice is for the IO to personally telephone the civilian witness and invite him or her to testify, using the language in this letter as a "script." Otherwise, the IO can provide the witness an invitation letter, using the recommended sample below.

(IO's name, rank, and office symbol)
Address
City/State/ZIP

Mr./Ms. _____
Address
City/State/ZIP

Dear Mr./Ms. _____

I have been appointed by [the appointing authority] to conduct an IG Investigation involving allegations of [general nature of the allegation – NO NAMES]. You are invited to appear as a witness as your participation will significantly contribute to the investigation. You are requested to appear at the IG's office, [building and room number], Other AFB, at [time and date]. Please contact me by [suspense date] to let me know whether you can appear on this date, or need to arrange another mutually convenient time for your interview. My phone number is _____. Thank you for your assistance. I look forward to our meeting.

Sincerely

NAME, Rank, USAF
Investigating Officer

Attachment 4: Sample Privacy Act Statement

Policy: The Privacy Act statement is required to be read and acknowledged by each witness at the beginning of the interview process.

Authority: Title 10, United States Code, Sections 8013 and 8020, and Executive Order 9397.

Principal Purpose: Information is collected during an inquiry or investigation to aid in determining facts and circumstances surrounding the allegations. The information is assembled in report format and presented to the Appointing Authority as a basis for DoD or Air Force decision-making.

The information may be used as evidence in judicial or administrative proceedings or for other official purposes within the DoD. Disclosure of Social Security number, if requested, is used to further identify the individual providing the testimony.

Routine Uses: Routine uses include:

Forwarded to federal, state, or military and local law enforcement agencies for law enforcement purposes

Released to commanders and others to determine the legal sufficiency of the report and any corrective actions.

Used as a basis for summaries, briefings, or responses to members of Congress or other agencies in the Executive Branch of the Federal Government

Provided to Congress or other federal and state agencies when determined to be necessary by The Inspector General, USAF

For any of the blanket routine uses published by the Air Force
(AFDIR 37-144, Privacy Act System of Records, formally AFP 4-36)

Mandatory or Voluntary Disclosure:

FOR MILITARY PERSONNEL: Disclosing your Social Security number is voluntary. Disclosing other personal information relating to your position responsibilities is mandatory and failure to do so may subject you to disciplinary action.

FOR DEPARTMENT OF THE AIR FORCE CIVILIANS: Disclosing your Social Security number is voluntary. However, failure to disclose other personal information in relation to your position responsibilities may subject you to adverse personnel action.

FOR ALL OTHER PERSONNEL: Disclosing your Social Security number and other personal information are voluntary. No adverse action can be taken against you for refusing to provide information about yourself.

I acknowledge that I have received a copy of this statement and understand it.

_____

Witness

Attachment 5: Standard Format for Summarized Testimony

SUMMARIZED SWORN TESTIMONY OF (RANK AND LAST NAME)

Summarized (sworn [and taped]) testimony of (rank and name of witness), (witness' duty position), (location), obtained by interview at (location), (date), from (time) to (time) hours by (rank and name of IO).

Full name of witness:

Grade of witness:

Organization:

Duty assignment of witness:

Write the following:

I interviewed (witness name) and advised (him) (her) of the nature of the investigation. I informed (witness name) of the authority for the investigation and of (his) (her) rights, as applicable.

The following is a summary of this witness' sworn testimony or statement: (Present a summary of the key points the witness made in response to questioning. It is critical the testimony reflect all the facts pertinent to the allegations.)

Note: After the last line of summarized testimony, place the advisement and certification statements below (verbatim). Directly below the statements, type the IO's signature block. On the bottom right side of each summarized statement, place the witness' last name in all caps and put the tab number and letter as listed in the index of the IG case file. Do not place the signature elements alone on a separate page. At a minimum, ensure three lines of testimony are carried over with the signature elements.

I advised (witness name) that this is an official investigation, and ordered (or directed to persons not subject to the UCMJ) (him)(her) not to divulge the nature of this investigation or the questions and answers, or discussions included in this interview with anyone except a chaplain, a union representative (if appropriate) or counsel unless otherwise authorized by the appointing authority, higher authority, or me.

Note: The IO must review the recorded interview tapes and transcript/summary to ensure accuracy.

I certify the above to be a true summary of sworn (or affirmed) testimony given on (date) at (place).

_____

Signature of IO and Date

Attachment 6

Sample Report of Investigation (ROI)

FOR TRAINING USE ONLY

REPORT OF INVESTIGATION

PREPARED BY

LT COL RONALD R. MCDONALD

77TH AIRLIFT WING

AIR SUPERIORITY COMMAND

CONCERNING ALLEGATIONS OF REPRISAL

WITHIN THE 77TH AIRLIFT SQUADRON

XX SEPTEMBER XXXX

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FOR OFFICIAL USE ONLY

(FOR OFFICAL USE ONLY WHEN COVERING A COMPLTED REPORT)

Section II Tab A -- Authority and Scope

1. The Secretary of the Air Force has sole responsibility for the function of The Inspector General of the Air Force (Title 10, United States Code, Section 8014). When directed by the Secretary of the Air Force or the Chief of Staff, The Inspector General of the Air Force (SAF/IG) has the authority to inquire into and report upon the discipline, efficiency, and economy of the Air Force and performs any other duties prescribed by the Secretary or the Chief of Staff (Title 10, United States Code, Section 8020). Pursuant to AFI 90-301, *Inspector General Complaints Resolution*, authority to investigate IG complaints within the Air Force flows from SAF/IG to IG offices at all organizational levels.

2. Col Rip Cord, Inspector General, Air Superiority Command, appointed Lt Col Ronald R. McDonald, on XX July XXXX to conduct the investigation into SSgt Maximillion O. Fright's allegations. The investigation was conducted from XX July XXXX to XX September XXXX, at Knute Rockne AFB (KRAFB), OH.

Section II, Tab B -- Introduction: Background and Allegations

BACKGROUND

1. The circumstances surrounding this allegation began on or about XX Feb XXXX, when the complainant, SSgt Maximillion O. Fright, Life Support Technician, 77th Airlift Squadron (77 ALS), KRAFB, OH, and another member of the 77 ALS reported to Lt Col Jack T. Boomer, commander, 77 ALS (77 ALS/CC), that MSgt Suzanne D. Wrong, Life Support Superintendent, 77 ALS, KRAFB, OH, had used her government computer in furtherance of a personal business. As a result of this allegation, and the resultant commander directed investigation (CDI), MSgt Wrong received a Letter of Reprimand (LOR).

2. SSgt Fright alleged MSgt Wrong knew he was the person that tipped off the 77 ALS/CC regarding MSgt Wrong's misuse of a government computer, which resulted in her LOR, and thereafter MSgt Wrong reprised against him by issuing him a Enlisted Performance Report (EPR) that rated him as an overall "4" in retaliation for SSgt Fright turning her in to the commander. (Section III, Tab E-4)

3. This investigation was initiated when SSgt Fright sent a letter to Gen James K. Topgun, Chief of Staff, United States Air Force, alleging he was reprised against by his second-level supervisor, MSgt Wrong. (Section III, Tab E-3).

4. During the course of investigating the allegation listed above, information came to light that an individual other than the subject might have acted out of process in the handling of the complainant's EPR. This information was referred to command and was not pursued herein.

ALLEGATION:

The following allegation was framed for investigation from SSgt Fright's letter to General Topgun:

> MSgt Wrong reprised against SSgt Fright by downgrading his EPR to an overall rating of "4" as a result of SSgt Fright's protected disclosure to the 77 ALS/CC, in violation of 10 U.S.C. 1034, on or about XX June XXXX.

Section II, Tab C: Findings, Analysis, and Conclusions

ALLEGATION:

MSgt Wrong reprised against SSgt Fright by downgrading his EPR to an overall rating of "4" as a result of SSgt Fright's protected disclosure to the 77 ALS/CC, in violation of 10 U.S.C. 1034, on or about XX June XXXX.

FINDING: *NOT SUBSTANTIATED*

ANALYSIS:

AFI 90-301 defines reprisal as follows: "taking or threatening to take an unfavorable personnel action or withholding or threatening to withhold a favorable personnel action on a military member for making or preparing a protected disclosure." In addition, AFI 90-301 provides a four-question test for use in determining if reprisal has occurred called the "Acid Test." Hereafter, the four-part "Acid Test" is applied for the purposes of analysis.

I. Did the military member make or prepare a communication protected by statute, DoD Directive, or AFI 90-301? **Yes.**

Lt Col Boomer testified SSgt Fright and TSgt David L. Truthspeaker, Information Manager, 77 ALS, KRAFB, OH, made the protected communication together when they informed him of MSgt Wrong's alleged misuse of a government computer (Section III, Tab D-10, p. 2). In addition, both SSgt Fright and TSgt Truthspeaker testified as to the protected disclosure (Section III, Tabs D-1, p. 1; D-13, p. 1). Lt Col Boomer is in SSgt Fright's chain of command and is designated to receive protected communications per AFI 90-301, paragraph 3.16.

II. Was an unfavorable personnel action taken or threatened; or was a favorable action withheld or threatened to be withheld following the protected communication? **Yes.**

SSgt Fright received an EPR rating of "4" for this reporting period from MSgt Wrong, the endorser, which contradicted the "5" rating given by MSgt Story, his rater (Section III, Tab E-1). An overall "4" EPR has the potential to affect SSgt Fright's competitiveness for promotion or other career matters.

III. Did the official(s) responsible for taking, withholding, or threatening the personnel action know about the protected communication? **Yes.**

MSgt Wrong knew who made the protected communication. She testified that she understood SSgt Fright and TSgt Truthspeaker were the ones who turned her in to the commander. (Section III, Tab D-2, pp. 4-5). MSgt Story also testified he told MSgt Wrong that SSgt Fright and TSgt Truthspeaker were the ones who turned her in to the commander. (Section III, Tab D-3, p. 4). MSgt Wrong also related that she knew that multiple members of her section provided statements regarding the incident reported in the protected communication at the request of the unit First Sergeant (Section III, Tab D-2, p. 5).

IV. Does the preponderance of the evidence establish that the personnel action would have been taken, withheld, or threatened if the protected communication had not been made? **Yes.**

(a) ***Reasons stated by the responsible official for taking, withholding, or threatening the action:*** MSgt Wrong's reasons for giving a "4" EPR rating to SSgt Fright were that SSgt Fright's duty performance warranted a "4." (Section III, Tab E-5). Specifically, she testified that SSgt Fright lacked attention to detail, required excessive supervision to complete tasks, and did not demonstrate a positive attitude. (Section III, Tab D-2, pp. 7-10) The preponderance of the evidence suggests MSgt Wrong's reasons are legitimate. MSgt Story related that SSgt Fright had to be refocused in his work and his production and attention to detail were lacking. (Section III, Tab D-3, p. 15). MSgt Story attributed this to burnout and his overall impression of SSgt Fright was that he was an "average worker." (Section III, Tab D-3, p. 15). TSgt Elmo Grazinni also corroborated MSgt Wrong's reasons, testifying SSgt Fright had performance issues and was insubordinate toward a superior. (Section III, Tab D-9, pp. 7-9)

(b) ***Reasonableness of the action taken, withheld, or threatened considering the complainant's performance and conduct:*** The following factors were the basis for determining that the preponderance of evidence indicated that the action taken was reasonable.

(1) The testimony of the complainant's rater, MSgt Story, stating he had to provide SSgt Fright counseling on more than one occasion to correct poor duty performance. (Section III, Tab D-3, p. 4).

(2) MSgt Story's statement that he was not confident a "5" rating was justified and he could have rated SSgt Fright a "4" or "5." (Section III, Tab D-3, p. 2).

(3) The testimony of SSgt Fright's previous supervisor, TSgt Grazinni, stating he had to administer SSgt Fright an LOR for failing to properly perform his duties as training manager, as well as TSgt Grazinni's testimony SSgt Fright was insubordinate toward a superior, an incident MSgt Wrong witnessed. (Section III, Tab D-9, p. 2).

(4) Testimony by TSgt Grazinni, who had intimate knowledge of SSgt Fright's performance during the rating period, stating he did not think SSgt Fright was deserving of a "5" for this rating period. (Section III, Tab D-9, p. 3).

(5) Testimony by CMSgt Henry Gunter, 77 ALS Senior Enlisted Manager, that he considered the EPR as written to be between a "4" and a "5." (Section III, Tab D-7, p. 9).

(c) ***Consistency of the actions of responsible management officials with past practice:*** MSgt Wrong testified she has issued three other "4" EPRs to members in the last two years, all for performance issues. (Section III, Tab D-2, p. 11). SSgt Powers testified MSgt Wrong's rating history in the unit showed that she did not give "firewall 5s," and SSgt Fright was not the only person to whom MSgt Wrong gave a "4" rating. (Section III, Tab D-5, p. 5). The EPR was consistent with feedback and counseling, both verbal and written, given to SSgt Fright during the reporting period. (Section III, Tabs D-2, p. 10; D-3, p. 2; D-9, p. 3; E-7 through E-12). The "4" rating was inconsistent with SSgt Fright's record to date, which consisted of all "5" EPRs. (Section III, Tab E-9).

(d) ***Motive of the responsible management official for deciding, taking, or withholding the personnel action:***

The preponderance of evidence indicates the protected communication, while potentially embarrassing to MSgt Wrong, did not cause the "4" EPR. MSgt Wrong and others consistently documented SSgt Fright's performance issues, including many incidents occurring before the protected communication. Several other witnesses with no similar motive to reprise, including MSgt Story, TSgt Grazinni, and CMSgt Gunter, indicated SSgt Fright deserved the rating he received.

Ample evidence indicates MSgt Wrong and SSgt Fright did not like each other. MSgt Story and TSgt Grazinni testified tensions escalated to the point where MSgt Wrong made extremely derogatory comments about SSgt Fright. (Section III, Tabs D-3, p. 9; D-9, p. 15). MSgt Story testified that SSgt Fright disliked MSgt Wrong and that SSgt Fright believed that MSgt Wrong disliked him. (Section III, Tab D-3, p. 4). Other witnesses testified to a similar poor relationship between MSgt Wrong and SSgt Fright. (Section III, Tabs D-9, p. 3; D-12, p. 1). Perhaps this relationship in part led to SSgt Fight's performance problems and MSgt Wrong's willingness to document them, but personal dislike is not synonymous with reprisal, especially when the personal dislike began well before any protected communication. All of the witnesses (except SSgt Fright) testified they do not believe SSgt Fright's complaint would have led MSgt Wrong to reprise against SSgt Fright. CMSgt Gunter testified he paid special attention to SSgt Fright's EPR to ensure MSgt Wrong treated him fairly after the LOR. CMSgt Gunter testified that he "absolutely" believes MSgt Wrong made an honest effort to fairly capture SSgt Fright's performance. (Section III, Tab D-7, p. 11). The preponderance of the evidence indicates reprisal was not a motivating factor in the "4" EPR.

(e) ***Procedural correctness of the action:*** MSgt Wrong, having performed duties as a first sergeant in previous assignments, was well aware of the process of writing and routing EPRs. (Section III, Tab D-2, p. 6). The EPR was completed correctly, and the testimony of SSgt Knowledge, a personnelist, confirms the form was completed in accordance with Air Force instructions. (Section III, Tab D-10, p. 1)

CONCLUSION:

The preponderance of evidence shows that MSgt Wrong did not reprise against SSgt Fright for making a protected communication to the 77 ALS/CC. The evidence demonstrates SSgt Fright would have received a "4" EPR regardless of whether MSgt Wrong knew SSgt Fright made a protected communication. SSgt Fright's EPR based upon a reasonable evaluation of his duty performance.

/// SIGNED///

RONALD R. MCDONALD, Lt Col, USAF

Investigating Officer