United States General Accounting Office

GAO

Report to the Honorable
Barbara Boxer, House of Representatives

May 1992

# WHISTLEBLOWER PROTECTION

# Impediments to the Protection of Military Members




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GAO

**United States**
**General Accounting Office**
**Washington, D.C. 20548**

**National Security and**
**International Affairs Division**

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May 27, 1992

The Honorable Barbara Boxer
House of Representatives

Dear Mrs. Boxer:

You requested that we review the progress being made by the Department of Defense (DOD) to implement the Military Whistleblower Protection Act (10 U.S.C. 1034) enacted in September 1988. Our objectives were to determine whether

- there were impediments to implementing the law,
- DOD had informed service members of the law, and
- investigations of alleged cases of retaliations against whistleblowers were complete.

We reviewed whistleblower cases reported to the DOD Inspector General and the military service Inspectors General (IG) (the Army, Navy, and Air Force) headquartered in Washington, D.C. Early in our review, we found that the service IGs did not have information on whistleblower reprisal cases handled at lower levels.

## Background

Congress has encouraged government whistleblowers to report information concerning fraud, waste, or abuse. It has also sought to discourage retaliatory actions against whistleblowers. The Military Whistleblower Protection Act prohibits supervisors from taking retaliatory action against a service member who makes or prepares certain disclosures to the DOD IG, a service IG, or a Member of Congress. Examples of reprisals are transfers and lower performance appraisals. The law offers after-the-fact protection; that is, it corrects an adverse action. The law may also serve as a deterrent against future retaliatory acts.

Before 1988, laws provided procedures to protect only civilian whistleblowers. With the enactment of 10 U.S.C. 1034, military whistleblowers were statutorily protected for the first time. Previously, military whistleblowers were protected by regulations, and alleged reprisals were investigated and resolved under the general authority of the appropriate service IG or the DOD IG. Even now, military whistleblower cases that do not meet the criteria of the law are routinely investigated under the general authority of the service IGs or DOD IG.

The Military Whistleblower Protection Act provides certain protection to service members who

- communicate with (or prepare a communication with) a Member of Congress, the DOD IG, or a service IG (i.e. a protected disclosure);
- disclose information that the whistleblower reasonably believes constitutes a violation of law or regulation, mismanagement, gross waste of funds, or a danger to public health or safety; and
- subsequently have had an unfavorable personnel action taken or threatened to be taken, or have had a favorable action withheld or threatened to be withheld.

The act requires that the DOD IG investigate allegations of reprisal that are sent directly to it within 60 days of the individual's first having become aware of the adverse action.

Few cases have been investigated under 10 U.S.C. 1034. The DOD IG has completed 15 investigations from September 1988 (when the law was enacted) through June 1991. During 1990 the service IGs completed investigations on 35 whistleblower reprisal allegations. These investigations are not covered by 10 U.S.C. 1034, but rather are performed under the service IGs' general authority. The DOD IG substantiated one case and partially substantiated one other case. The service IGs partially substantiated three cases.

## Results in Brief

The Military Whistleblower Protection Act of 1988 protects only disclosures made to a Member of Congress, the DOD IG, or a service IG. However, in 1991 Congress enacted legislation that required DOD to administratively expand the protection to include disclosures to Defense auditors, inspectors, investigators, and other law enforcement officers. Nevertheless, impediments to the law's implementation still exist. Military members may be excluded from some of the law's protection if they do not follow the procedure of making the reprisal complaint directly to the DOD IG. The law does not prescribe the criteria necessary to prove military whistleblower reprisals, so the DOD IG adopted some of the criteria set forth in civilian law. The adopted criteria may be sufficient for whistleblower retaliation addressed within the military. However, the military law lacks a process to resolve complaints about whistleblower retaliation outside the service member's own department or agency.

Until recently, military members had not been routinely informed about their protection as whistleblowers. Efforts to publicize the law had been limited to the DOD IG's disseminating implementing regulations and other information within the IG network. Until January 31, 1992, the DOD IG did not require the service IGs to inform whistleblowers about their statutory protection unless the whistleblower specifically mentioned the law. The change in this policy may increase awareness, resulting in more persons being covered by the law. However, even under the revised policy, the DOD IG does not inform whistleblowers of their right to have their allegations reviewed by a Board for the Correction of Military Records and by the Secretary of Defense. Unless military members who seek the law's protection are informed of all opportunities for redress, they are not in a position to make informed decisions on whether to pursue further action or conclude the complaint with the DOD IG's investigation.

Our review indicated that the 15 investigations conducted by the DOD IG were generally complete. Our review of the 35 whistleblower reprisal cases conducted under the general authority of the service IGs indicated that 8 of the cases were incomplete. Of these eight cases, five had significant omissions that might have affected the conclusion of the investigation.

## Impediments to Whistleblowers' Statutory Protection

According to the DOD IG, a disclosure made to an entity other than an IG organization or Member of Congress would not be statutorily protected. For example, the Air Force organizes its criminal investigators under its IG, so disclosures to an Air Force criminal investigator would be protected. However, a disclosure made to an Army investigative unit would not be protected because the Army's criminal investigators are not part of the Army IG.

We found one case that was investigated, but was considered to be outside of the law's protection because the complainant had made the initial disclosure to an Army investigative unit rather than an IG or Member of Congress. Congress addressed this shortcoming by adding a new requirement in the fiscal years 1992 and 1993 Defense Authorization Act. This act directs DOD to prescribe regulations to protect whistleblowers who make disclosures to Defense employees who are auditors, criminal investigators, inspectors, and other law enforcement officers.

Even disclosures that meet these criteria may not be processed under the Military Whistleblower Protection Act if the subsequent allegation of reprisal is not ultimately sent to the DOD IG. Whistleblowers usually file a

grievance with a service IG, rather than the DOD IG. It is unlikely that the whistleblower would know to also direct an allegation of retaliatory action to the DOD IG. In one case, a lawyer wrote to the service IG and made reference to 10 U.S.C. 1034. The lawyer was apparently unaware that the allegation of reprisal must be directed to the DOD IG. This confusion is understandable. The law merely directs the DOD IG to investigate allegations that are submitted to it, but does not state clearly that allegations must be sent ultimately to the DOD IG.

## Differing Civilian and Military Whistleblower Protection Laws

Federal civilian employees, including those working for DOD, are protected from reprisal by different legislation (5 U.S.C. chapters 12 and 23) from military members. There are similarities and differences between the military and civilian whistleblower protection laws. Both prohibit taking an adverse personnel action or withholding a favorable personnel action from an employee in retaliation for the employee's having disclosed certain information. Both laws provide procedures for reviewing allegations of reprisal and seeking corrective action. However, the civilian law is more detailed and comprehensive in certain respects. However, the military law does not prescribe a burden of proof criteria on whistleblower reprisals and does not provide a process outside the service member's own department or agency to resolve reprisal complaints.

## Civilian Whistleblower Protection Law

The civilian whistleblower protection law establishes an administrative grievance process, which describes in detail how a whistleblower's allegations of a reprisal action must be resolved. The process takes place chiefly outside of the employee's agency, with the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB) playing the major roles. OSC has broad powers to conduct investigations and seek corrective action.

In response to a whistleblower's complaint, OSC is required to conduct an investigation to determine whether there are reasonable grounds to believe that a prohibited personnel practice occurred. If OSC makes an affirmative determination, it must submit a report to MSPB together with findings and recommendations. If the agency does not act within a reasonable time to correct the prohibited practice, OSC may petition MSPB for corrective action, and the whistleblower must be provided the opportunity to submit written comments.

The law requires MSPB to order corrective action as it considers appropriate whenever OSC shows that a disclosure is a contributing factor to the adverse action. Corrective action may not be ordered, however, if the agency shows by clear and convincing evidence that it would have taken the same personnel action in the absence of the whistleblower's disclosure. Thus, according to the standard of proof, the agency must show that the actions against the employee were warranted and not motivated as a reprisal for making a protected disclosure.

As a further means of protecting whistleblowers' interests, the civilian law gives whistleblowers the opportunity to seek corrective action directly from MSPB if OSC terminates its investigation, or fails to respond to the complaint within 120 days. The law also preserves the whistleblower's right to seek corrective action directly from MSPB if he or she has a right to appeal directly to MSPB under any other law, rule, or regulation. The same standards of proof applies, and the employee has the right to seek judicial review of MSPB's final decision.

## Military Whistleblower Protection Law

The Military Whistleblower Protection Act requires the DOD IG to investigate any timely allegation that an improper reprisal action has occurred and requires the DOD IG to report the results of its investigation to the Secretary of Defense and military member concerned.

In the absence of statutory criteria or other procedural guidance, the DOD IG has informally adopted an approach, which the service IGs have also adopted, that considers the following questions:

- Did the complainant make a protected disclosure?
- Subsequently, was an unfavorable personnel action taken (or threatened to be taken), or was a favorable action withheld (or threatened to be withheld)?
- Was the official(s) responsible for taking or withholding the personnel action aware that the complainant made a protected disclosure?
- Does the evidence establish that the personnel action would have been taken if the protected disclosure had not been made?

In addressing the last question, the DOD IG is to determine whether a disclosure was a contributing factor in the personnel action. To rebut any alleged causal link, the agency must "persuade" the DOD IG investigators that the personnel action would have been taken even if the protected disclosure had not been made.

The law also allows for a review of the complaint by the service's Board for Correction of Military Records (BCMR). In resolving the matter BCMR may request that the IG gather further evidence and may conduct an administrative hearing. The service secretary must issue a final decision with respect to such a review, and the secretary must order such action as necessary to correct the member's record concerning the prohibited personnel action.

Unlike the civilian law, the military law does not contain any standards of proof in order to establish that a reprisal occurred. The military law does not contain a provision that corrective action be ordered if it is shown that the whistleblower's disclosure was a contributing factor to the adverse action in question. Further, there is no requirement in the law applicable to military members that the agency show by clear and convincing evidence that its actions were proper and not a reprisal.

The military law provides for further review by the Secretary of Defense if the member is not satisfied with the disposition of the complaint.

## Informing Whistleblowers About the Law

DOD has written an implementing directive as required by the Military Whistleblower Protection Act. The law does not require DOD to directly inform service members of their rights under this act. However, in the directive the DOD IG emphasized the importance of familiarizing all members of service IG organizations with the law's provisions. The service IGs have indicated that they believe that because military members that complain of reprisal typically contact their local IGs first, and because the issue of reprisal directly affects few military members, awareness programs directed toward the IG community are more appropriate than exhaustive efforts to educate all military members about the law. Few whistleblower reprisal complaints have actually been received by IG organizations.

In the past the DOD IG told the service IGs that they needed to explain the Military Whistleblower Protection Act to a military member complaining of reprisal only if the member specifically mentioned the law. Subsequently, in letters dated January 31, 1992, the DOD IG instructed service IGs to inform all whistleblowers that only complaints made to the DOD IG came under statutory protection.

However, even under the revised policy, the DOD IG does not tell whistleblowers that they can request to have the matter reviewed by their

BCMR, and, subsequently, by the Secretary of Defense. A DOD IG official told us that to do so would only provide a false hope to military members unhappy with the IG's conclusions.

The law does not establish BCMRs as appeal authorities. Instead it relies on their existing authority to resolve an application for the correction of records made by a member or former military member. The law extends the service BCMRs' existing authority in resolving alleged whistleblower reprisal cases by adding the right to (1) review the DOD IG report of investigation, (2) request additional information, and (3) conduct evidentiary hearings. However, according to a DOD IG official, in practice BCMRs are unlikely to take on these functions because BCMRs were set up to conduct administrative reviews of evidence and to correct military records. They conduct hearings very infrequently, relying on the written record to make their decisions. A DOD IG official told us that because BCMRs rely so heavily on their investigative report, it would be unlikely that they would reach a different conclusion. Moreover, while the law allows the service BCMRs to recommend punishment for reprisals, it is entirely foreign from their traditional practices.

Nevertheless, without being informed of the opportunity for further review if unsatisfied with the DOD IG investigation, the whistleblower may be deprived from a potential redress. The law requires the DOD IG to conduct post disposition interviews; these interviews could also be used to inform the whistleblower of the opportunity for further review.

## Investigations Were Not Always Complete

We performed tests on 15 cases investigated by the DOD IG and 35 cases controlled by the service IGs to evaluate the completeness of the investigations. Although service IGs investigations are not covered by the law, we used the same criteria to evaluate all of the cases. We reviewed the case files to determine whether (1) all alleged adverse actions had been addressed, (2) the investigation had addressed the connection or "nexus" (causal link) between the disclosure and the adverse action, and (3) all principals had been interviewed.[1] Our tests indicated that all of the DOD IG cases were generally complete while 8 of the 35 service IG cases we reviewed did not meet the requirements of our completeness test. Five of

[1]We found several cases in which principals were not interviewed, but we subsequently concluded that this test was not useful because those not interviewed were often people who were involved but were not decisionmakers.

the cases had omissions that we believe were significant, and the remaining three cases had relatively minor omissions.

## Significant Omissions

We found significant omissions in five cases the service IGs investigated. One of these cases was not investigated for whistleblower reprisal. In the other four cases, the IGs did not address the possible nexus between the adverse action and the disclosure. Two of these cases had elements of mixed motive in which there was both a punishable act of misconduct and a disclosure to an IG or Member of Congress. Whistleblower protection should not be construed to protect employee misconduct. However, any misconduct could be used as a pretext for punishing whistleblowers, which is evident if the adverse actions are too harsh or other offenders are not normally punished for the same offense. In the other two cases, the timing of the disclosure and the adverse action were too closely connected to be dismissed or omitted from the findings of the investigation.

In two cases with mixed motive, the adverse actions seemed too severe for the misdeeds, which could indicate that the adverse actions might be a pretext for punishing whistleblowing. For example, a soldier was reduced in rank, forfeited pay, and received extra duty for slamming/loudly shutting the commanding officer's door. This conduct was interpreted as disrespectful to a superior officer and deserving of punishment. However, the punishment appeared to be too severe. Additionally, the reason the soldier was in the commander's office was to complain about the way the commander had treated him for having written his Congressman. This was a rare case in which the disclosure and the adverse action were directly linked and the severity of the punishment would make it difficult to conclude that the adverse action would have occurred in the absence of the disclosure.

The other two cases were also unsubstantiated, even though the timing of the disclosure and the adverse action was too close to be dismissed as coincidence. In one case the whistleblower said he was told he would get a good rating, but shortly after his supervisor learned about the disclosure he received a less favorable rating. Again, the circumstances of these cases make it difficult to conclude that these ratings would have been the same in the absence of the disclosure.

The five cases raise some concerns about the service IGs' investigations. However, a service IG representative told us that since adopting the DOD IG approach their investigations had improved. We agree that using the DOD

IG approach would help IG personnel more thoroughly address the salient points in a whistleblower reprisal case they might otherwise miss. In addition, the DOD IG is providing training to IG and other interested personnel on the subject.

## Minor Omissions

In three cases, there were omissions that probably would not have affected the outcome of the investigation. The service IG did not address a threat of an adverse action in one case. The threats were not carried out, and the IG did not investigate the threat because there was no adverse personnel action to correct.

The other two cases did not address one of several alleged reprisal actions. For example, the complainant in one of these cases did not clearly identify a rating as a problem. Rather, we had to sift through the complainant's long letter to identify the action that the IG had overlooked.

## Matters for Congressional Consideration

Whistleblowers who do not direct their reprisal complaints to the DOD IG may not receive the complete protection of the law. Congress may wish to amend the law to ensure that even whistleblowers who make their complaint of reprisal to a service IG have the law's protection.

## Recommendation

We recommend that the Secretary of Defense direct the DOD IG to inform whistleblowers that they can request to have the matter reviewed by a BCMR and then the Secretary of Defense.

## Agency Comments

In commenting on a draft of this report, DOD agreed with our findings, conclusions, and recommendation.[2] DOD indicated that, effective with the next time the DOD IG forwards to a military member a copy of the investigation report, the DOD IG would begin notifying the complainant of the statutory provisions for a review of the case by a BCMR. The DOD comments did not indicate that the complainant would also be notified of the statutory provision for a subsequent review by the Secretary of Defense. DOD comments are presented in their entirety in appendix I.

[2]The draft report that DOD reviewed did not have a "Matters for Congressional Consideration."

## Scope and Methodology

We reviewed the legislative history of the Military Whistleblower Protection Act and compared its provisions with those in civilian whistleblower laws. We interviewed officials and examined 15 investigative case files at the offices of the DOD IG that were completed between September 1988 and June 1991. We reviewed 35 case files at the offices of service IGs that were closed during 1990. These cases included 9 from the Army IG, 2 from the Navy IG, and 24 from the Air Force IG. We also interviewed officials from the service BCMRs.

We tested each investigation file for completeness. Such tests started with a review of each whistleblower's complaint and included an examination of whether each allegation of reprisal was addressed in the report of investigation. We then reviewed documentation of each adverse action to identify all case principals who took the actions against the whistleblower, and determined whether all of the principals were interviewed. We inspected written adverse actions (letters of reprimand, adverse performance reports, etc.) for indications of reprisal for whistleblowing, and determined whether these indications were addressed in the IG's report of investigation. Finally, we examined whether each investigation assessed each of the four questions in the DOD IG approach. We applied this test to 15 cases investigated by the DOD IG and 35 cases controlled by the service IGs. The service IG cases are not covered by the statute, but we used the same criteria to evaluate all of the cases.

We conducted our work from January through October 1991 in accordance with generally accepted government auditing standards.

As arranged with your office, unless you publicly announce the report's contents, we plan no further distribution until 10 days from the date of this letter. At that time, we will send copies to the Chairmen of the House and Senate Committees on Armed Services; the Director, Office of Management and Budget; and the Secretaries of Defense, the Army, Air Force, and Navy; and other interested parties. We will also make copies available to others upon request.

Please contact me at (202) 275-3990 if you or your staff have any questions concerning this report. Other major contributors to this report were Messrs. Foy Wicker, Assistant Director; Jack Perrigo, Evaluator-in-Charge; and James Tallon, Evaluator.

Sincerely yours,

Paul L. Jones
Director, Defense Force
Management Issues

# Comments From the Department of Defense

INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202-2884

APR 16 1992

Mr. Frank C. Conahan
Assistant Comptroller General
National Security and International
Affairs Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr Conahan:

This is the Department of Defense (DoD) response to the General Accounting Office (GAO) draft report, "WHISTLEBLOWER PROTECTION: Impediments to the Protection of Military Members," dated March 16, 1992 (GAO Code 391140/OSD Case 9000).

The DoD agrees with the report findings, conclusions, and the recommendation. The specific DoD comments in response to the recommendation are provided in the enclosure. The Department appreciates the opportunity to comment on the draft report.

Sincerely,

Derek J. Vander Schaaf
Deputy Inspector General

Enclosure

GAO DRAFT REPORT - DATED MARCH 16, 1992
(GAO CODE 391140) OSD CASE 9000

"WHISTLEBLOWER PROTECTION: IMPEDIMENTS TO THE PROTECTION OF MILITARY MEMBERS"

DEPARTMENT OF DEFENSE COMMENTS ON THE GAO RECOMMENDATION

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Now on p. 9

- **RECOMMENDATION:** The GAO recommended that the Secretary of Defense direct the Inspector General, Department of Defense (DoD), to inform [Military Member] whistleblowers that, when its investigation is concluded, he/she can request to have the matter reviewed by the cognizant Board for the Correction of Military Records, and then the Secretary of Defense. (p. 12/ GAO Draft Report)

**DOD RESPONSE:** Concur. The Inspector General, DoD, has established procedures to notify Military Members, who have submitted a complaint under Section 1034 of Title 10 United States Code, of the statutory provisions for review of their allegation by a Board for the Correction of Military Records. Such notification will be effective with the next time the Inspector General, DoD, forwards a Member a copy of his/her report of investigation.

Enclosure

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