

## LAW REVIEW<sup>1</sup> 027

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### The Military Whistleblower Protection Act

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

11.0—Veterans Claims

**Q: I have seen gross waste of funds and serious safety problems at the command where I am currently serving on active duty. I want to bring these problems to the attention of somebody who can address them, but I am afraid that my fitness report (FITREP) will suffer if I "blow the whistle." If I report the problems I have seen, am I legally protected from reprisal?**

**A:** Yes, by the Military Whistleblower Protection Act (MWPA). (Separate but similar laws protect federal civilian employees, including non-appropriated- fund employees, and employees of federal contractors.) The MWPA can be found in Title 10, United States Code, Section 1034 (10 U.S.C. 1034). The MWPA is implemented within the Department of Defense (DoD) by DoD Directive 7050.6 of 23 June 2000. Inspector General Departmental Guidance (IGDG) 7050.6 of 6 February 1996 sets forth the procedures to be followed in conducting

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<sup>1</sup>I invite the reader's attention to <https://www.roa.org/page/LawCenter>. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

<sup>2</sup>BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at [SWright@roa.org](mailto:SWright@roa.org).

MWPA investigations. At the time of writing, I am on active duty in Bahrain, conducting an MWPA investigation.

In accordance with IGDG 7050.6, there are three preliminary questions to be answered in an MWPA investigation:

- (1) Did the military member make or prepare a communication protected by statute?
- (2) Was an unfavorable personnel action taken or threatened, or was a favorable personnel action withheld or threatened to be withheld, following the protected communication?
- (3) Did the official(s) responsible for taking, withholding, or threatening the personnel action know about the protected communication?

In all close cases, the answer to the three preliminary questions is affirmative. In that case, we must answer the "big question": "Does the evidence establish that the personnel action would have been taken, withheld, or threatened if the protected communication had not been made?" In other words, if the first three questions are answered affirmatively, the burden of proof shifts to management to establish that the unfavorable personnel action was taken (or the favorable action withheld) for lawful reasons unrelated to your protected communication.

**Q: What is a "protected communication"?**

**A:** The MWPA specifically defines that term. Whether a communication is protected depends upon the recipient and in some cases the subject matter.

Any lawful communication to a member of Congress or an inspector general (IG) is protected, regardless of subject matter. For example, if you write to your U.S. senator to suggest that the next aircraft carrier be named the "USS Jerry Garcia," your letter is a protected communication, although it does not allege wrongdoing by anyone.

Your protected communication can also be made to "a member of a DoD audit, inspection, investigation, or law enforcement organization" or to "any other person or organization (including any person or organization in the chain of command) designated under component regulations or other established administrative procedures to receive such communications." In other words, you can make your protected communication to your commanding officer, department head, command master chief, etc.

If your communication is made to someone other than a member of Congress or an IG, your communication must relay information that you reasonably believe evidences one of the "protected subjects." Those subjects are a violation of law or regulation (including sexual harassment or unlawful discrimination), mismanagement, a gross waste of funds or other

resources, an abuse of authority, or a substantial and specific danger to public health and safety.

**Q: I have not made a protected communication, but my commanding officer apparently thinks that I have "blown the whistle" on him. If he marks me down on my FITREP because he incorrectly believes that I have made a protected communication, would that constitute a violation of the MWPA?**

A: Yes. See IGDG 7050.6, pages 2–4.

**Q: What is a "personnel action"?**

**A:** The MWPA definition is broad but not unlimited: "Any action taken on a member of the Armed Forces that affects or has the potential to affect the member's current position or career. Such actions include a promotion; a disciplinary or other corrective action; a transfer or reassignment; a performance evaluation; a decision on pay, benefits, awards, or training; referral for a mental health evaluation under DoD Directive 6490.1; and any other significant change in duties or responsibilities inconsistent with the military member's rank."

**Q: Does an action have to be "adverse" to amount to a violation of the MWPA?**

**A:** No, it only needs to be "unfavorable." For example, if your FITREP is downgraded from outstanding to lukewarm after you make a protected communication, that could amount to a violation, although your lukewarm FITREP does not meet the specific criteria to be considered "adverse."

**Q: If I make a protected communication in June and receive a downgraded FITREP in July, does that prove that there is a causal connection?**

**A:** No, but it at least means that it is possible that there is a causal connection. The fact that event B follows event A chronologically does not necessarily mean that there is any connection between the two events. The crowing of the rooster does not cause the sun to rise, although the rooster may believe that to be the case.

On the other hand, if the unfavorable personnel action comes first it cannot possibly have been caused by the protected communication. Your commanding officer is not a psychic. He or she does not know in June that you are going to make a protected communication in July. Some MWPA cases can be closed at the preliminary inquiry stage based on the sequence of events.

**Q: If I believe that I have been the victim of reprisal for whistleblowing, where should I make my complaint?**

**A:** You should make your complaint in writing to the Director of the Office of Departmental Inquiries, Office of the Inspector General, Department of Defense, 400 Army Navy Dr., Arlington

VA 22202-2884. The telephone number is 703-604-8507 or DSN 664-8507. You can also reach the DoD IG hotline at 1-800-424-9098. You must make your complaint within 60 days after you become aware of the unfavorable personnel action (or withheld favorable action).

Someone working for the Coast Guard would contact the Department of Transportation Inspector General to anonymously disclose information on waste, fraud, abuse and corruption. The nationwide toll-free number is 1- 800-424-9071 (Washington 202-366-1461). The DOT IG address is: Office of the Inspector General (J-1), Department of Transportation, 400 7th Street SW, Washington, D.C. 20590. There are also regional offices throughout the United States.

\*Note: Captain Wright's military title is used for purposes of identification only. The views expressed in this article should not be attributed to the Department of the Navy or the U.S. Government generally. You may write to him at ROA, or you may send him an e-mail at [swright@roa.org](mailto:swright@roa.org).