

? September 200??

MEMORANDUM FOR THE NAVAL INSPECTOR GENERAL

From: Special Assistant for Legal and Legislative Matters

Subj: LEGAL REVIEW OF MILITARY WHISTLEBLOWER REPRISAL
INVESTIGATION IN THE CASE OF , USN

1. Synopsis. LCDR -----, alleges that CDR --- gave him two unfavorable fitness reports, prevented him from receiving an end-of-tour award, and wrote two negative letters to LCDR ----- new command, all in reprisal for various communications LCDR ----- made that were critical of CDR -----.

2. Background.

a. CDR ----- was the OIC of -----, Detachment -----, during the relevant period for this investigation. LCDR ----- was assigned to ---- Det ----- and reported to CDR -----.

b. LCDR -----h alleges that 5 unfavorable personnel actions were taken against him: 1) Lowered marks in his 31 Oct 2000 FITREP; 2) Much lower marks in his 1 Feb 2001 FITREP; 3) Not recommended for an end-of-tour award; 4) Letter to CO USS ----- alleging he had submitted fraudulent travel claim appeal; 5) Letter to CO USS ----- alleging he has submitted fraudulent --- -- Homestead application.

3. Timeliness of Reprisal Complaint.

Action	Date of Action	+60 Days	Date of Complaint	Comments
Lowered marks in the 31 Oct 00 fitrep	21 Nov 00	20 Jan 01	1 Aug 01	Untimely
Much lowered marks in the 1 Feb 01 fitrep	1 Feb 01	2 Apr 01	1 Aug 01	Untimely
Not recommended for end of tour award	1 Feb 01	2 Apr 01	1 Aug 01	Untimely
Letter to CO USS ----- re travel claims	post 23 Apr 01		1 Aug 01	Untimely
Letter to CO USS ----- re --- homestead application	post June 01		1 Aug 01	Timely

LCDR ----- submitted an explanation for his untimely complaint. The decision to investigate the complaint in light of LCDR ---- explanation seems reasonable and is not legally objectionable.

4. Review and analysis of the "four questions."

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

- A protected communication is:

i. Any lawful communication to a Member of Congress or an IG.

ii. A communication in which a member of the Armed Forces communicates information that the member reasonably believes evidences 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 or safety, When such communication is made a any of the following:

- A member of congress, an IG, or a member of a DOD audit, inspection, investigation, or law enforcement organization.

- 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.

(1) Anonymous Complaint to IG. This was a protected communication. Although the complaint was not actually made by LCDR ----, there is sufficient evidence to support a finding that CDR ----- believed LCDR ----- may have made the complaint.

(2) Communication to CO re ---- class and hiring issue. The CO qualifies as an individual in the chain of command who may receive a protected disclosure. In this case, however, I disagree with the investigating officers' finding that the communication disclosed a "violation of law or regulation, including sexual harassment or unlawful discrimination, mismanagement, a gross waste of funds or other resources . . ." (DOD Dir 7050.6). In the first communication LCDR ----- questioned the wisdom of conducting a ----- class when less than 10 students were enrolled and the usual class size exceeded 50. CDR -----'s response was that his staff needed to get BUPERS to get more students for the class, and that he was not prepared to cancel the class when he thought the problem was correctable. There is no indication that CDR ----- intended to ignore the fact that the class size was smaller than normal. The second disclosure was that CDR ----- attempted to negatively influence the hiring of a civilian ----- instructor. As the OIC it was

appropriate for him to be involved in hiring decisions. There is no evidence presented that would indicate he violated any civilian personnel law or regulation in connection with this hire. Other communications mentioned involved criticism of CDR -----'s leadership skill and did not rise to a disclosure of a "violation of law or regulation . . . "

(3) Command Assessment Survey. LCDR -----'s survey was anonymously submitted along with others from the command. CDR ----- admitted he recognized LCDR ----- as the author of that survey. Although the emphasis of the survey was pointing out perceived deficiency in CDR -----'s leadership skill, there was sufficient mention of inappropriate conduct to warrant characterizing the survey as a disclosure of an abuse of discretion. In any event, retaliation for being frank in a command assessment is wrong and should be remedied.

(4) Statement to Sexual Harassment Investigator. There is insufficient information to completely evaluate this communication. Since it was determined that CDR ----- had no knowledge of this communication, for the sake of efficiency I will assume it did qualify as a protected communication.

(5) Summary of Communications:

Date	Communication	Protected Status
Aug 2000	Anonymous hotline complaint to the Naval IG	Protected
18-19 Oct 2000	Communication to CO re OIC conducting ---- class, and role in hiring action. LCDR -----also indicated he made several critical remarks about CDR -----'s leadership skills.	Not Protected (IO found this to be protected)
Nov 2000	Command Assessment Survey	Protected
Dec 2000	Interviewed in connection with a sexual harassment investigation against OIC	Protected

b. Was an unfavorable personnel action taken or threatened, or was a favorable action withheld or threatened to be withheld following the protected communication?

- A personnel action is any action on a member of the Armed Forces that affects or has the potential to affect that 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.

(1) The investigating officers' analysis is legally sound.

(2) Summary of Personnel Actions:

Date	Action	Unfavorable Status	Responsible Management Official (RMO)
21 Nov 00	Lowered marks in the 31 Oct 00 fitrep	Unfavorable	CDR -----
1 Feb 01	Much lowered marks in the 1 Feb 01 fitrep	Unfavorable	CDR -----
1 Feb 01	Not recommended for end of tour award	Unfavorable	CDR ----- CDR -----
post 23 Apr 01	Letter to CO USS - ----- re travel claims	Not Unfavorable	
post June 01	Letter to CO USS - ----- re homestead application	Not Unfavorable	

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

CDR ----- was aware of all of the communications with the exception of the statement to the Sexual Harassment Investigator. CDR ----- was aware of the statements made during his October 2000 visit.

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

The investigating officers' analysis is legally sound. Even though I do not concur with the finding that the October 2000 communications qualify as protected, the analysis concerning the final fitness report is supported by the other protected communications and the investigating officers' determination that there was reprisal is legally justified.

6. Conclusion. The evidence legally supports the investigating officers' conclusions.

7. Recommend that should LCDR ----- submit a BCNR petition to have his final fitness report from CDR ----- remove, it should be granted.

----, JAGC, USN