AMC DCSPER News Item

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Whistleblowing: A Basic Primer

This article provides background information on whistleblowing, its definition, the scope of protection that whistleblowers have, the evidentiary burdens applicable to the issue, and the process and procedures applicable to whistleblower complaints.

Background:
The Civil Service Reform Act (CSRA) of 1978 created a statutory process for handling complaints by Federal employees who believe that a personnel decision is being taken for disclosing certain kinds of information. These complaints allege that the personnel decision is a reprisal for engaging in protected activity. A reprisal is defined by statute as a prohibited personnel practice. Amendments to this process include the Whistleblower Protection Act of 1989.

Most allegations of reprisal for engaging in protected whistleblowing activity are filed with the independent Office of Special Counsel (OSC), established by the CSRA in 1979. Under certain specific facts and circumstances, the Merit Systems Protection Board (MSPB) has jurisdiction to entertain a reprisal complaint.

Definitions:
Whistleblowing means disclosing information that you reasonably believe is evidence of a violation of law, rule, or regulation, or gross mismanagement of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Personnel action is broadly defined to include disciplinary action (reprimands, suspensions, downgrades, removal), but also covers such matters as reassignments, details, transfers, performance-based actions, and decisions concerning pay, benefits, training, awards**.**

Scope of Protection:
An individual is protected if the disclosure is to the OSC, or the agency Inspector General, or an organization or individual (such as a congressional committee or the media), provided that the

disclosure is not specifically prohibited by law and the information does not have to be kept secret in the national defense or to conduct foreign affairs.

The class of individuals protected by this system includes employees, former employees and applicants for employment.

It is a prohibited personnel practice for an employee with civilian personnel authority to take or fail to take, or threaten to take or fail to take a personnel action because of the exercise of the protected right to disclose information. If an individual believes that a personnel action is a reprisal for engaging in protected whistleblower activity, he or she can seek corrective action.

Process and Procedures:

Appeal Rights

An individual can seek redress by filing a complaint with the OSC which is authorized to take corrective action. If OSC closes the matter without taking corrective action, or fails to take corrective action within 120 days, the individual can file an appeal to the MSPB.

--If the personnel action complained of is a suspension of more than 14 days, a downgrade, or removal, the employee can appeal directly to the MSPB.

--Special rules regarding the filing of complaints are applicable to those who are in collective bargaining units covered by federal labor-management relations law, and under negotiated grievance procedures.

Agency and Individual Burdens of Proof

--The individual who files a complaint must show that the disclosure of information was a contributing factor in the personnel decision.

--The agency must show by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure.

Corrective Action for the Prohibited Personnel Action of Reprisal:

--Includes a stay of the personnel action taken or threatened.

--A combination of one or more of the following remedies: return to position, reimbursement for attorney fees, back pay and benefits, medical and other costs and damages.

Individuals Accused of Reprisal:

--A reprisal is a prohibited personnel action for which discipline can be imposed.

--An individual can be named an "accused" or "suspect" by the OSC or can be a "witness" required to participate in an OSC interview.

--Army Regulation 27-40, Litigation, outlines procedures whereby those individuals who are a "witness", "accused" or "suspect" can request assistance of counsel from DA.

--A civilian employee or military member called as a "witness" in an OSC investigation has a right to request assistance of DA counsel, who can also be present during the OSC interview.

--If the OSC identifies a DA civilian employee as a "suspect" or "accused", or if the Labor Counselor at the activity concludes that an employee is an "accused" or "suspect", the installation labor counselor will inform the employee that they have a right to request counsel. The request must be approved by the DA General Counsel.

--If approved, counsel is assigned to represent the employee in any proceeding initiated by the OSC before the MSPB. Counsel provided by DA can not represent the employee in any proceeding initiated by DA against the employee.

--The OSC can not bring an action against a military member at the MSPB. However, if the OSC refers its report to the military members command for possible use under the UCMJ, the defense counsel provisions of the military justice system apply.

For More Information...

...regarding the Whistleblower system, and your rights and responsibilities under law and regulation, contact your local installation/activity Labor Counselor.

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