

(b)(7)(C) further alleged that her protected communication of July 2005 had also served as the basis for her removal from a mission-related temporary duty (TDY) trip⁴² [Tab B-1f, (b)(7)(C) Case File 1, (b)(7)(C) statement, p. 2].

Because (b)(7)(C) complaint appeared at first blush to meet the criteria for reprisal established by the Military Whistleblower Statute, the FB OIG initiated contact with the FORSCOM OIG (the Major Command IG directly superior to the FB OIG) and with the WIOB, DAIG—Assistance Division.⁴³ After engaging in the consultation required by AR 20-1 [Tab A-1] and *The Assistance and Investigations Guide* [Tab A-6], and pursuant to guidance from the DAIG and the FORSCOM OIG, (b)(7)(C) the FB Assistant IG assigned to (b)(7)(C) case, ultimately prepared a written “declination memorandum,” documenting that (b)(7)(C) complaint did not meet the criteria outlined in Title 10, USC, Section 1034 and therefore should not be investigated as a whistleblower reprisal [Tab B-1e, (b)(7)(C) Case File 1, Fort Bragg declination memo]. Specifically, (b)(7)(C) indicated that the command’s failure to provide (b)(7)(C) with a **Complete-the-Record** NCOER was not an unfavorable personnel action⁴⁴ for purposes of the Military Whistleblower Statute because: (1) under the criteria set forth in the regulation governing NCOERs, (b)(7)(C) was not eligible to receive a **Complete-the-Record** NCOER because she had already been rated in essentially the same duty position on her previous NCOER (with an end date of November 11, 2004), which NCOER had been filed in time for consideration by the board considering (b)(7)(C) for promotion to (b)(7)(C) [Tab B-4], (b)(7)(C) Case File 4, (b)(7)(C) 2004 NCOER],⁴⁵ and (2) even had (b)(7)(C) been eligible for a **Complete-the-Record** NCOER (which, under terms of the regulation, she was not), the issuance of such an evaluation

⁴² (b)(7)(C) was informed on September 6, 2005 that she would travel as part of a team to assist in addressing equipment issues associated with another unit’s preparation for deployment. (b)(7)(C) was subsequently advised on September 9, 2005, that she was not needed as part of the assessment team and would not be making the trip.

⁴³ According to Case Number FZ 06-0007 [Tab B-1a, (b)(7)(C) Case File 1, case notes, p. 1], (b)(7)(C) made her complaint to the FB OIG on Thursday, September 15, 2005, and the FB OIG reviewed the complaint and advised DAIG of the potential whistleblower reprisal allegation on Tuesday, September 20, 2005. Accordingly, it appears that the FB OIG exceeded the “two working day” standard for notifying DAIG by one day.

⁴⁴ It would also appear that under the same rationale, the failure to issue the **Complete-the-Record** NCOER did not constitute the withholding of a favorable personnel action.

⁴⁵ See AR 623-205, para. 3-33a(3) [Tab A-9]. A case note entry pertaining to case number FZ 06-0007 [Tab B-1a, (b)(7)(C) Case File 1, case notes, p. 2] and dated September 27, 2005, indicated that the FB OIG confirmed with a (b)(7)(C) and (b)(7)(C) at Human Resources Command that “a complete the record report was optional” and that the job titles, “Brigade Property Book NCOIC” and “Brigade S-4 NCOIC,” as set forth in (b)(7)(C) 2004 Annual NCOER and proposed by (b)(7)(C) for her **Complete-the-Record** NCOER, respectively, were essentially the same duty position. It was also noted that the job descriptions, which were outlined on the **Complete-the-Record** NCOER and on the prior Annual NCOER, were almost identical, word-for-word, and that “therefore a complete the record report would not be needed due to [the] last NCOER for (b)(7)(C) rating her for her current position.” [Tab B-1a, (b)(7)(C) Case File 1, case notes, p. 2].

was optional, at the rating chain's discretion⁴⁶ and, under the facts posed by [redacted] constituted neither an unfavorable personnel action nor the withholding of a favorable personnel action. Additionally, the FB OIG concluded that [redacted] removal from a scheduled mission-related TDY did not constitute an unfavorable personnel action, nor did it constitute the withholding of a favorable personnel action, as it did not effect and could not effect [redacted] position or career [Tab B-1e, Case File 1, Fort Bragg declination memo].

[redacted] authored the "declination memorandum" that was signed by [redacted], the mobilized reservist serving as the Primary IG at Fort Bragg during [redacted] deployment, and forwarded the declination to the FORSCOM OIG. The FORSCOM OIG received the "declination memorandum" on October 14, 2005 and forwarded it to DAIG. On January 20, 2006, the DAIG advised DoDIG of its concurrence in FB OIG's determination that [redacted] allegations did not meet the criteria for whistleblower reprisal [Tab B-1a, Case File 1, case notes, p. 3]. On February 28, 2006, the DoDIG concurred in the determination that further investigation of whistleblower allegation was not warranted [Tab B-1c, Case File 1, DoDIG concurrence]. On March 13, 2006, DAIG notified [redacted] in writing, that both the DAIG and DoDIG had concluded that neither the failure to process her **Complete-the-Record** NCOER nor her removal from a TDY assignment constituted an unfavorable personnel action for purposes of the Military Whistleblower Statute [Tab B-1d, Case File 1, DAIG notice to [redacted] of case closure].

Regarding [redacted] second and third case files, Number FJ 06-0107 [Tab B-2, Case File 2] and Number FJ 06-0155 [Tab B-3, Case File 3]: While the FB OIG "declination memorandum" related to her first allegation of whistleblower reprisal was being processed through the DAIG and DoDIG, [redacted] contacted the FB OIG with new concerns. On December 16, 2005 and again on January 13, 2006, [redacted] contacted the FB OIG regarding non-receipt of her **Annual** NCOER (as distinguished from her **Complete-the-Record** NCOER).⁴⁷ The Annual NCOER was to cover the period from December 2004 through and including November 2005 [Tab B-2, Case File 2, IGAR; Tab B-3, Case File 3, IGAR; Tab C-1b, pp. 1-2]. According to AR 623-205 [Tab A-9], to be considered timely, Annual NCOER had to arrive at the U.S. Army Enlisted Records and Evaluation Center no later than 60 days after the ending month of the report.⁴⁸ Accordingly, the command was required to ensure that [redacted] annual

⁴⁶ See AR 623-205, para. 3-33b [Tab A-9]. Although there is some disagreement on this issue, in the course of processing the instant investigation into the OSC-referred allegations, DAIG conferred with the U.S. Army Human Resources Command, the proponent of AR 623-205. The Human Resources Command attorney opined that any member of the rated NCO's rating chain is vested with discretion to issue or not to issue a Complete-the-Record NCOER [Tab B-6].

⁴⁷ An Annual NCOER is prepared 12 months after the last issued NCOER.

⁴⁸ AR 623-205, paras. 1-4b(1j) and 3-36h [Tab A-9].

NCOER arrived at the Enlisted Records and Evaluation Center no later than the end of January 2006. Given the nature of [REDACTED] concerns, [REDACTED] (who specialized primarily in Assistance cases and was not routinely assigned to work reprisal actions) was assigned to assist [REDACTED]. In response to [REDACTED] December 2005 complaint, [REDACTED] contacted members of the FB OIG deployed to Iraq and requested that they inquire of the command as to the status of the **Annual NCOER**. [REDACTED] was initially advised that the NCOER was complete but awaiting final signature. Note that at this time, [REDACTED] NCOER was not late as defined by AR 623-205. Accordingly, on January 5, 2006, [REDACTED] notified [REDACTED] of same and closed [REDACTED] second case [Tab B-2, [REDACTED] Case File 2, IGAR, p. 2].

[REDACTED] contacted the FB OIG again by telephone on January 13, 2006 and advised [REDACTED] that she had not yet received the signed copy of her **Annual NCOER**. [REDACTED] again contacted the FB OIG element deployed to Iraq and was advised that the Brigade Command Sergeant Major (CSM) would hand-carry the completed **Annual NCOER** from Iraq to Fort Bragg [Tab C-1b, [REDACTED] pp. 3-4]. [REDACTED] a Fort Bragg IG deployed with [REDACTED] to Iraq, also advised that the delay in issuance of the **Annual NCOER** was due in part to [REDACTED] who had given instructions to ensure that the duty position title cited in the NCOER accurately reflected that [REDACTED] was **not** the Noncommissioned Officer in Charge (NCOIC) of the Brigade S-4, as had been listed initially on the draft **Annual NCOER**.⁴⁹ [REDACTED] documented in FB OIG case files that he had notified [REDACTED] by voice message of the resolution of her complaint and had closed this third case on January 20, 2006 [Tab B-3, [REDACTED] Case File 3, IGAR, p. 2]. Note that at this time, [REDACTED] **Annual NCOER** still was not late as defined by the governing regulation.

Regarding [REDACTED] fourth case file, Number FJ 06-0218 [Tab B-4, [REDACTED] Case File 4]: [REDACTED] contacted the FB OIG again by telephone on February 2, 2006 to complain that she still had not received her **Annual NCOER** [Tab B-4a, [REDACTED] Case File 4, case notes, p. 1]. It was at the time of this complaint that [REDACTED] first asserted that the delay in processing her **Annual NCOER** was a "continuation of a reprisal she had alleged earlier," which case was at the time still awaiting final DoDIG review and approval of the "declination memo."⁵⁰ Continuing his prior efforts to assist [REDACTED] in resolving the issues associated with her **Annual NCOER**, [REDACTED] again undertook to investigate and found that the delay in completing [REDACTED] **Annual NCOER** was attributable to changes requested by the Brigade Commander, [REDACTED]

⁴⁹ Although [REDACTED] was not the NCOIC of the Brigade S-4 because she had remained at Fort Bragg with the provisional rear detachment and had not deployed with the Brigade to Iraq [Tab C-4b, [REDACTED] p. 5], it is undisputed that her duties remained essentially the same with regard to the provisional rear detachment.

⁵⁰ See discussion of [REDACTED] first complaint, documented in case number FZ 06-0007, discussed above [Tab B-1, [REDACTED] Case File 1].

in the recitation of [redacted] duty position, and to the Brigade's focus on the redeployment of the unit from Iraq and its reconstitution at Fort Bragg, North Carolina [Tab B-4a, Case File 4, case notes, p. 2]. Further, [redacted] found that the NCOER already had been completed, returned to [redacted] for signature, and signed by [redacted] but that she had not yet received her personal copy of the final document. According to FB OIG case notes [Tab B-4a, Case File 4, case notes, p. 2], [redacted] advised [redacted] by memorandum of February 9, 2006, that [redacted] complaint associated with the late **Annual NCOER** did not appear to meet the criteria for military whistleblower reprisal because failure to comply with the regulatory timeline was not an adverse personnel action that triggered whistleblower protections and that the delay in processing the NCOER had not adversely affected [redacted] in any way [Tab B-4e, Case File 4, memo for [redacted] p. 1]. [redacted] documented in the FB OIG case file that he had notified [redacted] that a late NCOER was not an adverse personnel action for purposes of the Military Whistleblower Statute and that [redacted] acknowledged understanding this [Tab B-4a, Case File 4, case notes, p. 2]. FB OIG records reflect that [redacted] closed this fourth case on February 22, 2006 [Tab B-4a, Case File 4, case notes, pp. 1-2]. Given that [redacted] allegation did not appear to meet the criteria for reprisal as set forth in the Military Whistleblower Statute, it does not appear that [redacted] actions were in error.

His determination that [redacted] allegations did not constitute reprisal notwithstanding, [redacted] testified to the FORSCOM IOs investigating the OSC-referred allegations that his review of [redacted] complaints to the FB OIG caused him to recommend to his supervisor, [redacted] that [redacted] be investigated for rendering a late NCOER in violation of the timeliness requirements set forth in AR 623-205 [Tab A-9; Tab C-1, p. 4; Tab B-4e, Case File 4, memo for [redacted] pp. 1-2].

[redacted] testified that on February 13, 2006, in the context of researching his recommendation to investigate [redacted] alleged failure to comply with the timeliness requirements of AR 623-205, he interviewed [redacted] provisional rear detachment commander, regarding the late **Annual NCOER**. [redacted] had served as the "senior rater" for both [redacted] proposed **Complete-the-Record NCOER** and for her 2005 **Annual NCOER**. [redacted] stated that [redacted] told him [redacted] had received her copy of the 2005 **Annual NCOER** three days prior and that the delay had resulted from [redacted] objection to the duty position title listed on an earlier draft of the **Annual NCOER** [Tab C-1b, p. 4]. The completed **Annual NCOER** properly listed [redacted] as performing in the provisional Battalion [redacted] (as [redacted] believed appropriate), not as the

[REDACTED] stated that his discovery regarding the disagreement over the duty position title set forth in [REDACTED] November 2005 Annual NCOER prompted him and [REDACTED] to question the accuracy of the previous "declination memorandum" issued in regard to [REDACTED] first complaint (finding that the Brigade's failure to render [REDACTED] a **Complete-the-Record** NCOER did not meet the criteria for whistleblower reprisal) [Tab C-1b, [REDACTED] p. 6]. The duty position title on [REDACTED] final 2005 Annual NCOER—NCOIC of the Provisional Battalion S-4—differed from that listed on her Annual NCOER for November 2004—Brigade Property Book NCOIC.

Accordingly, it appears that [REDACTED] and [REDACTED] concluded that in September 2005, when [REDACTED] was contemplating the issuance of a **Complete-the-Record** NCOER in anticipation of [REDACTED] promotion board, [REDACTED] had NOT previously received an NCOER for service in the same duty position that was to be the subject of the **Complete-the-Record** NCOER. They seem further to have concluded that [REDACTED] had thus NOT been barred by Army Regulation from receiving a **Complete-the-Record** NCOER. In light of their determinations, the complainants appear to have concluded that [REDACTED] September 2005 failure to provide [REDACTED] a **Complete-the-Record** NCOER constituted an unfavorable personnel action, and thus met the criteria for whistleblower reprisal [Tab C-1b, [REDACTED] p. 6; Tab C-2a, [REDACTED] p. 1].

The evidence of record in the FORSCOM OIG investigation of the OSC-referred allegations reveals to the contrary, however. The duty position title and duties cited in [REDACTED] November 2004 Annual NCOER and *proposed by* [REDACTED] for citation in her September 2005 **Complete-the-Record** NCOER were essentially the same in that they both referred to her work at the Brigade level and were almost identical, word-for-word [Tab B-4i, [REDACTED] Case File 4, [REDACTED] 2004 Annual NCOER; Tab B-4p, [REDACTED] Case File 4, [REDACTED] proposed **Complete-the-Record** NCOER]. And, although the duty position titles cited in the final 2004 and 2005 Annual NCOERs were different, the specific duties enumerated in both NCOERs were, for all relevant purposes, essentially the same.⁵²

⁵¹ It is uncontroverted that [REDACTED] was at all times assigned to the provisional unit comprising the rear detachment of the Dragon Brigade serving stateside at Fort Bragg; [REDACTED] did not deploy with the main contingent of the Dragon Brigade to Iraq. *See also supra* notes 4 and 40.

⁵² For example, both 2004 and 2005 Annual NCOERs described [REDACTED] as performing duties related to property book management; both cite to her "accountability of over 9,900 pieces of equipment valued in excess of 50 million dollars through the use of the Property Book Unit Supply Enhanced System"; both credit her with "support[ing] the 18 hour, no notice worldwide deployment requirement of XVIII Abn Corps Headquarters" and serving as the "principal advisor to the Brigade staff and subordinate units on logistics matters." The only differences between the duty descriptions appear to be that the duty position

Regardless, [redacted] and [redacted] appear to have decided between them that [redacted] first allegation regarding the **Complete-the-Record** NCOER required further review. They assert that they approached [redacted] who had redeployed from Iraq on or about January 21, 2006, about their concerns [Tab C-1b, p. 5].

On or about February 16, 2006, [redacted] met with [redacted] and [redacted] (who was generally responsible for investigating whistleblower reprisal claims and had worked [redacted] whistleblower complaint regarding her **Complete-the-Record** NCOER). [redacted] met again with [redacted] the next day to discuss the issues further. [redacted] was present at neither meeting. On February 17, 2006, after the second meeting, [redacted] prepared a memorandum for record (MFR) to capture the discussion from both days.

[redacted] MFR indicates that during the February 16, 2006 meeting he explained to [redacted] and [redacted] his belief that [redacted] failure to provide [redacted] with a **Complete-the-Record** NCOER before her promotion board could have constituted reprisal [Tab B-7, MFR, p. 1] and advised [redacted] that the FB OIG should reconsider its "declination memorandum" in regard to [redacted] first complaint of reprisal in September 2005. In his MFR, [redacted] asserted that [redacted] disagreed and directed [redacted] to take no further action in the matter [Tab B-7, MFR, pp. 1-2].

[redacted] MFR reflects that at his second meeting with [redacted] on February 17, 2006, [redacted] again asserted that because any **Complete-the-Record** NCOER was rendered solely at the discretion of the chain of command, the "declination" of reprisal in [redacted] case should not be revisited. [redacted] MFR also reflects that [redacted] chided him and the Assistance section (of which [redacted] was the Chief) for failing to counsel [redacted] that he could be perceived as mishandling [redacted] November 2005 **Annual** NCOER and that delay in issuing the NCOER could result in negative consequences. [redacted] MFR asserts that [redacted] viewed the late **Annual** NCOER issue as "minor" and one that could be fixed through action on the part of the Assistance section. Finally, [redacted] MFR asserts that given [redacted] state of upset, the Assistance section closed the case and contacted [redacted] to advise her that there was no reprisal as to the late **Annual** NCOER because "it didn't negatively affect her career in any way whatsoever" [Tab B-7, MFR, p. 1]. [redacted] MFR does NOT indicate that [redacted] directed that the case be closed.

titles and that the 2004 NCOER references her supervision of four subordinate NCOs; the 2005 Annual NCOER cites to her supervision of six such subordinates.

(b)(7)(C) was not present at either of the February 2006 meetings between (b)(7)(C) and (b)(7)(C) but he subsequently testified to the FORSCOM IOs investigating the OSC-referred allegations, that after those meetings, (b)(7)(C) advised him that (b)(7)(C) believed that (b)(7)(C) and (b)(7)(C) had "failed to stop (b)(7)(C) from reprising against (b)(7)(C) and that (b)(7)(C) allegation of Whistleblower Reprisal would be closed as an Assistance case and would not be handled as a whistleblower and no notification would be made to FORSCOM or DAIG" [Tab C-1b, p. 5]. (b)(7)(C) also testified that he was assured by (b)(7)(C) that he (b)(7)(C) had pressed (b)(7)(C) to consider the merits of reexamining (b)(7)(C) complaints, but that (b)(7)(C) was angry at them (b)(7)(C) and (b)(7)(C) and thus they concluded that they should close the case as (b)(7)(C) demanded [Tab C-1b, p. 6]. (b)(7)(C) sworn statement goes on to say that then closed the case as ordered by (b)(7)(C) "through" (b)(7)(C) [Tab C-1b, p. 6]. (b)(7)(C) further concluded in his sworn statement that "the facts warranted a declination of the 2 Feb 06 allegation for Whistleblower Reprisal (annual change of rater NCOER) and further review of the initial allegation of Whistleblower Reprisal (complete the record NCOER)." [Tab C-1b, p. 6].

(b)(7)(C) later annotated the FB OIG case notes [Tab B-4a, Case File 4, case notes, p. 2] to reflect that he had notified (b)(7)(C) that because the late Annual NCOER would not adversely affect or hinder her career or promotion, it was not an unfavorable personnel action. The case notes further indicate that (b)(7)(C) spoke telephonically with (b)(7)(C) who acknowledged that she understood [Tab B-4a, Case File 4, case notes, p. 2]. (b)(7)(C) testimony to the FORSCOM IO investigating the OSC-referred allegations also provides that he notified (b)(7)(C) of these findings and closed the case as an Assistance case [Tab C-1, p. 6].

(b)(7)(C) provided testimony to (b)(7)(C) on August 10, 2006; (b)(7)(C) testimony was transcribed and summarized in FB OIG MFR dated December 15, 2006 [Tab C-2b, p. 2].⁵³ In his testimony, (b)(7)(C) stated that he believed that (b)(7)(C) did not have a valid whistleblower complaint regarding her late Annual NCOER because there was no unfavorable personnel action. (b)(7)(C) also asserted his belief that regardless, there remained a requirement to report the mere whistleblower allegation to DAIG, but that he did not do so only because (b)(7)(C) had directed that the case be closed as an Assistance case [Tab C-2b, p. 2].

⁵³ (b)(7)(C) further explained his August 10, 2006 testimony in a handwritten statement dated December 20, 2006 [Tab C-2a]. Note that AR 20-1 authorizes IGs to document the testimony of a witness using either a verbatim transcript of an interview or by summarizing the witness's testimony in an MFR.

p. 2].⁵⁴ In his handwritten statement of December 20, 2006, [redacted] stated that [redacted] second whistleblower complaint **did not** (emphasis added), but asserted his belief that the FB OIG's findings regarding [redacted] complaint as to her **Annual NCOER** called into question the "no reprisal" decision on her first whistleblower complaint relating to her **Complete-the-Record NCOER** [Tab C-2a, [redacted] handwritten statement, p. 1].

[redacted] testified to the FORSCOM IOs investigating the OSC-referred allegations both that he had worked [redacted] first reprisal complaint in September 2005 (regarding her **Complete-the-Record NCOER**) and that he knew [redacted] had filed another whistleblower allegation in February 2006. [redacted] testified that in the context of a February 2006 meeting with [redacted] at which [redacted] had been present, [redacted] had tried to transfer responsibility for addressing the February 2006 allegation to him [redacted], but that [redacted] told [redacted] that the case "was [redacted] case and he [redacted] was to work it." [redacted] also stated that at this meeting, [redacted] never directed [redacted] to close the case, but rather clearly assigned responsibility to [redacted] for continuing to handle the matter. [redacted] further testified that he never heard [redacted] state that [redacted] reprisal complaint of February 2006 should not be reported to DAIG [Tab C-3b, [redacted] p. 2].

In his testimony to the FORSCOM IOs, [redacted] detailed his perceptions that while he had been deployed in Iraq from January 2005 through January 2006, [redacted] and [redacted] had not properly executed their duties stateside [Tab C-10a, [redacted] pp. 21-25]. [redacted] detailed how [redacted] would frequently contact the elements of the FB OIG deployed in Iraq and direct them to "run down information" on [redacted] behalf. [redacted] recalled regularly directing [redacted] during this period either to forward cases to Iraq where they would be worked or to work the case himself from Fort Bragg [Tab C-10a, [redacted] pp. 12-13].

Regarding [redacted] follow-on February 2006 complaint about her **Annual NCOER** [Tab B-4, [redacted] Case File 4], [redacted] asserted in testimony that [redacted] had tried to demonstrate that she continued to serve as a Brigade-level S-4, even though the Brigade headquarters was deployed to Iraq while she had remained stateside as part of the significantly smaller provisional rear detachment. [redacted] testified that he first heard of [redacted] complaint regarding her "late" **Annual NCOER** while he was in Iraq. On

⁵⁴ [redacted] views reflect a misapplication of Army Regulation 20-1. That regulation requires contact with DAIG only when "a soldier makes a reprisal allegation that **appears to meet the criteria** (emphasis added) outlined in Title 10, USC, Section 1034 (the Military Whistleblower Statute)." See AR 20-1, para. 8-9(c)(2) [Tab A-1]. This same requirement is mirrored in both the June 2004 [Tab A-6] and January 2006 [Tab A-7] editions of *The Assistance and Investigations Guide*. Because [redacted] complaint did not appear to meet the criteria of the Military Whistleblower Statute, even under the terms of [redacted] analysis, there was no requirement to notify DAIG.

conducting an initial inquiry as to the status of this NCOER, he had been advised that the NCOER was not yet due and that the command was trying to ascertain (b)(7)(C) duties and responsibilities for the period covered by the evaluation. (b)(7)(C) recalled sending a message back to the stateside FB OIG advising that the NCOER should be held for action until the Brigade redeployed to the United States, as it was scheduled to do in short order. (b)(7)(C) distinctly recalled advising the FB OIG to inform the Brigade that this issue was important, however, and that failure to deal with it properly could yield adverse consequences [Tab C-10a, (b)(7)(C) p. 14]. (b)(7)(C) testified that he heard nothing further about (b)(7)(C) situation until after he redeployed to Fort Bragg on or about January 21, 2006.

(b)(7)(C) testified that when he returned from deployment to Iraq he undertook immediately to reassert control of the FB OIG. (b)(7)(C) recalls that in late February 2006, he observed on (b)(7)(C) desk an undated handwritten complaint apparently taken from (b)(7)(C) and prepared by (b)(7)(C). This upset (b)(7)(C) because it appeared to him that (b)(7)(C) and (b)(7)(C) either were either not working the case as they should, or were purposefully delaying the case to trigger an allegation (regarding the late submission of her Annual NCOER) against the Dragon Brigade Commander, (b)(7)(C). (b)(7)(C) questioned (b)(7)(C) and (b)(7)(C) to assess what they had been doing to process (b)(7)(C) complaint [Tab C-10a, (b)(7)(C) p. 14].

(b)(7)(C) advised the FORSCOM IOs investigating the OSC-referred allegations that as his exchange with (b)(7)(C) and (b)(7)(C) was underway, (b)(7)(C) walked into the office. (b)(7)(C) excused (b)(7)(C) from the gathering and continued his conversation with (b)(7)(C) and (b)(7)(C) closing his office door for privacy. (b)(7)(C) verified that during this first meeting (b)(7)(C) expressed his belief that (b)(7)(C) case was a whistleblower matter and tried to shift responsibility for the case from (b)(7)(C) in the Assistance section to (b)(7)(C) in Investigations. (b)(7)(C) testified that (b)(7)(C) replied that this was not his case because it was not a whistleblower matter and that the FORSCOM OIG had agreed with (b)(7)(C) conclusion in this regard. Accordingly, (b)(7)(C) elected to retain the case with (b)(7)(C) in the Assistance section. Further, (b)(7)(C) asserted in testimony that he viewed the situation as an attempt by (b)(7)(C) to avoid executing the necessary paperwork and to divert attention from the Assistance section's slow processing of the case by turning the matter into (b)(7)(C) "problem to clean it up and by now it was, it was a shambles . . ." [Tab C-10a, (b)(7)(C) p. 16]. (b)(7)(C) also perceived that it was (b)(7)(C) intent to make it appear as though (b)(7)(C) was protecting (b)(7)(C) [Tab C-10a, (b)(7)(C) pp. 15-16]. (b)(7)(C) testified that he did not act in the case with a view to protecting (b)(7)(C) stating "[I] didn't particularly look out for (b)(7)(C) . . . he gets what he deserved and nothing more." [Tab C-10-a, (b)(7)(C) p. 16].

[REDACTED], testified to the FORSCOM IOs investigating the OSC-referred allegations that during the period at issue he had been serving as an IG on active duty in Iraq with [REDACTED]. He recalled that while deployed in late 2005, he had been contacted by the FB OIG and asked to ascertain the status of [REDACTED] 2005 Annual NCOER. [REDACTED] validated that [REDACTED] Brigade leadership, also deployed in Iraq, had delayed completion of the NCOER because the Brigade Commander [REDACTED] wanted to be certain of the accuracy of the duty position title cited in the evaluation. The Brigade Commander believed that the recitation of [REDACTED] duty title was inaccurate—that she was not serving as the Brigade S-4 NCOIC, as listed in the duty description cited on the draft Annual NCOER—but was serving stateside as the provisional Battalion S-4. [REDACTED] testified that he did not detect any animosity from the deployed Brigade leadership concerning [REDACTED] NCOER, merely a concern for accuracy [Tab C-4b [REDACTED] p. 5].

Discussion:

The preponderance of the evidence indicates that [REDACTED] first allegation of reprisal, regarding her **Complete-the-Record** NCOER, did not constitute a violation of the Military Whistleblower Statute because the specific duties on which [REDACTED] was rated in her September 2004 **Annual** NCOER were essentially the same as those for which she proposed to be rated in the **Complete-the-Record** NCOER. That given, the rating chain was precluded from issuing the **Complete-the-Record** NCOER under criteria set forth in the Army regulation governing NCOERs. Even had [REDACTED] been authorized a **Complete-the-Record** NCOER under terms of the regulation, the regulation also reserves to the rating chain the option to issue such an NCOER. Accordingly, no **Complete-the-Record** NCOER was mandated. That the decision not to issue [REDACTED] a **Complete-the-Record** NCOER did not constitute whistleblower reprisal was affirmed by the DAIG and approved by the DoDIG; both offices determined that further investigation of [REDACTED] whistleblower reprisal allegation in this regard was not warranted.

The preponderance of the evidence also indicates that [REDACTED] subsequent reprisal allegation regarding her late 2005 **Annual** NCOER, also did not constitute a violation of Title 10, USC, Section 1034. A late evaluation, absent other aggravating circumstances or evidence of adverse impact on a soldier's career or promotion, normally does not constitute an adverse action for purposes of the Military Whistleblower Statute. While inquiring into [REDACTED] reprisal allegation regarding her late **Annual** NCOER, and in contrast to their earlier finding of "no reprisal" regarding the **Complete-the-Record** NCOER, [REDACTED] and [REDACTED] developed the idea that [REDACTED] refusal to issue [REDACTED] a **Complete-the-Record** NCOER had, in fact, constituted reprisal for her protected communication to the Inspector General.

They alleged, in effect, that [REDACTED] improperly declined to provide [REDACTED] a **Complete-the-Record** NCOER, given that the duty position title cited in her 2005 **Annual** NCOER differed from the duty position titles cited in her 2004 **Annual** NCOER and proposed for citation in her **Complete-the-Record** NCOER. The findings of the investigation of the OSC-referred allegations do not support this assertion, however, because the specific duties [REDACTED] performed throughout the period covered by both NCOERs were essentially the same; neither the duties, nor the evaluation [REDACTED] received for her performance of those duties reflected adversely on her in any way. Finally, the preponderance of the evidence indicates that the complainants' allegation that [REDACTED] directed them to close [REDACTED] complaint with regard to her **Annual** NCOER as an Assistance matter and not to process it as a reprisal allegation, is not substantiated by a preponderance of the evidence. The evidence indicates that [REDACTED] merely directed that [REDACTED] continue to work the case, and did not direct him to take, or not to take, any specific action. Other than the complainants' assertions, there is no objective evidence that [REDACTED] took any action, or deliberately failed to act, in this case, with a view to protecting [REDACTED]

[REDACTED] *Reprisal Allegation, Complete-the Record NCOER:* FB OIG case files indicate that [REDACTED] first alleged whistleblower reprisal in September 2005 with regard to a proposed **Complete-the-Record** NCOER. [REDACTED] whose duties included the investigation of whistleblower reprisal allegations, served as the IG of record with regard to this first allegation. The evidence reveals that in November 2004, [REDACTED] had received an **Annual** NCOER addressing her performance of duties as the "Brigade Property Book NCOIC." The specific duties [REDACTED] performed as the "Brigade Property Book NCOIC" were essentially the same as those for which she proposed to be rated in the September 2005 **Complete-the-Record** evaluation, although [REDACTED] had modified the duty position title on her draft **Complete-the-Record** NCOER to read "Brigade S-4, NCOIC." Notwithstanding the slight difference in duty position titles, because the duties comprising both positions were essentially the same, [REDACTED] did not meet regulatory eligibility criteria for a **Complete-the-Record** NCOER. AR 623-205, the governing regulation authorizes a **Complete-the-Record** NCOER only when the rated noncommissioned officer has not previously received an NCOER for his or her current duty position. Thus, [REDACTED] whistleblower allegation related to her **Complete-the-Record** NCOER was properly declined. This allegation eventually was closed in March 2006 when DoDIG finally approved the "declination memorandum" in the case and agreed that no further action on [REDACTED] complaint was warranted.

[REDACTED] *Reprisal Allegation, Annual NCOER:* In February 2006, [REDACTED] alleged that the delay in processing her **Annual** NCOER (for the period of December 2004 through and including November 2005), also constituted whistleblower reprisal. Prior to February 2006, [REDACTED] had twice provided [REDACTED] with assistance in resolving issues associated with her

2005 Annual NCOER. Accordingly, [REDACTED] was the IG of record in [REDACTED] February 2006 follow-on allegation of reprisal and was responsible for properly handling her allegation. To be considered timely, [REDACTED] 2005 Annual NCOER had to be received at the Enlisted Records and Evaluation Center no later than the end of January 2006. A preponderance of the evidence shows that with regard to [REDACTED] 2005 Annual NCOER, [REDACTED] the Brigade Commander and [REDACTED] rating chain "reviewer," did not agree with the duty description cited in the evaluation. [REDACTED] concern about the accuracy of the duty description cited in the 2005 Annual NCOER apparently contributed to the delay in processing that evaluation. Additionally, at the time, [REDACTED] and the Dragon Brigade were focused on redeploying from Iraq to Fort Bragg. Ultimately, the 2005 Annual NCOER [REDACTED] received credited her with performing essentially the same duties as had her 2004 Annual NCOER; she received the same extremely high marks on both NCOERs.

A preponderance of credible evidence establishes that [REDACTED] did not know about [REDACTED] February 2006 reprisal complaint regarding her Annual NCOER until mid- to late-February 2006, when he observed a memorandum addressing the matter on [REDACTED] desk.

The February 2006 Meeting Hosted by [REDACTED] A preponderance of the evidence establishes that [REDACTED] and [REDACTED] met on February 16, 2006, in reference to [REDACTED] Annual NCOER. [REDACTED] and [REDACTED] met again on the matter the next day. [REDACTED] was not present at these meetings and cannot corroborate what was said in either. In their testimonies to the FORSCOM IOs about this meeting, [REDACTED] and [REDACTED] all agreed that [REDACTED] had told [REDACTED] that the case would NOT be shifted to [REDACTED] in the Investigations sections, but would remain with [REDACTED] who was to work it as an Assistance matter. A decision to assign casework to a particular subordinate certainly fell within the bounds of [REDACTED] discretion as Primary IG. Based on [REDACTED] testimony, it appears that [REDACTED] was aware that a "declination memorandum" had been issued in regard to [REDACTED] reprisal complaint regarding her **Complete-the-Record** NCOER, and that FORSCOM OIG had concurred in that declination and had forwarded the declination to DAIG.⁵⁵ Further, it appears that [REDACTED] properly deduced that the issue concerning the duty position title to be cited on [REDACTED] 2005 Annual NCOER did not materially affect the earlier determination that her complaint about her **Complete-the-Record** NCOER did not appear to meet established whistleblower reprisal criteria.

All three witnesses also agree that in the context of their meeting, [REDACTED] expressed concerns that [REDACTED] and [REDACTED] had in some

⁵⁵ DoDIG formally approved the "declination memorandum" on February 28, 2006 [REDACTED] Tab B: [REDACTED] Case File: DoDIG concurrence].

way "set up" the Brigade for failure in regard to [REDACTED] Annual NCOER. There is, however, conflicting testimony as to whether [REDACTED] told [REDACTED] to close the case as an Assistance matter, without reporting it to DAIG. [REDACTED] testified to the FORSCOM IOs that [REDACTED] told him to close the case and not to report it to DAIG. [REDACTED] and [REDACTED] contest this point. They testified that [REDACTED] told [REDACTED] that the case would remain [REDACTED] responsibility and that [REDACTED] would work it, but that [REDACTED] did not direct [REDACTED] to handle the case in any particular manner.

[REDACTED] February 17, 2006 MFR rendered shortly after the meetings at issue, corroborates [REDACTED] and [REDACTED] testimony and contradicts his own later statements to investigators. No where does [REDACTED] MFR indicate that [REDACTED] ordered the case to be closed; rather, [REDACTED] MFR provides that [REDACTED] expression of concern prompted [REDACTED] decision to close the case.

[REDACTED] sworn statement to the FORSCOM IOs investigating the OSC-referred allegations indicates that when [REDACTED] emerged from the meeting, he [REDACTED] told [REDACTED] that [REDACTED] thought they had failed to stop the Brigade Commander from reprising (against [REDACTED]), and that [REDACTED] allegation of reprisal would be closed as an Assistance matter. [REDACTED] sworn statement goes on to say he then closed the case as ordered by [REDACTED] "through" [REDACTED]. In contrast to [REDACTED] statement, there is no credible evidence that [REDACTED] issued an order to close the case; rather, the evidence indicates that it was [REDACTED] who directed [REDACTED] to close the case.

After considering the conflicting evidence presented, we find that a preponderance of the evidence supports a conclusion that [REDACTED] neither precluded [REDACTED] from handling the case as a reprisal allegation and reporting it to DAIG, nor did he expressly direct that [REDACTED] report the matter as a whistleblower complaint. In light of the above, it would seem that because [REDACTED] allegations did not appear to meet the criteria for whistleblower reprisal, [REDACTED] acted reasonably in deciding not to compel immediate FB OIG notification to the DAIG; AR 20-1 and *The Assistance and Investigations Guide* require reporting to higher headquarters only when a soldier makes a reprisal allegation that **appears to meet the criteria** outlined in the Military Whistleblower Statute. Rather, it appears that [REDACTED] directive left open the possibility that the allegation could be handled as a reprisal if and when [REDACTED] better developed the facts. Yet, there is no evidence in FB OIG records that [REDACTED] tried to acquire or formulate the additional information required to categorize [REDACTED] complaint as a whistleblower matter or that he made any effort on his own accord to notify DAIG of the situation.

Conclusion: The allegation that [REDACTED] acted improperly, in violation of established standards, in his handling of [REDACTED] complaints of reprisal is unsubstantiated. The allegation that [REDACTED] handled [REDACTED] complaints with a view to protecting [REDACTED] is similarly unsubstantiated.

OSC Allegation 2:

Allegation: That [REDACTED] ignored the requirements of AR 20-1 as it related to the investigation of whistleblower reprisal allegations after [REDACTED] informed the FB OIG and [REDACTED] 35th Signal Brigade, that her Company [REDACTED] was mistreating her. Allegedly in reprisal for [REDACTED] complaint to the FB OIG, [REDACTED] insinuated to her that he could arrange for her transfer to another unit. The complainants allege that rather than investigate the matter as he should have, [REDACTED] directed [REDACTED] merely to speak with [REDACTED] about the Whistleblower Protection Statute and the right of every individual to register a complaint with an Inspector General.

Summary of Findings: By a preponderance of this evidence, this allegation was unsubstantiated. A preponderance of the evidence indicates that [REDACTED] was never informed of [REDACTED] specific allegations against [REDACTED] and thus had no basis on which to direct [REDACTED] to take any action with regard to [REDACTED].

Relevant Authorities:

(1) DoD Directive 7050.6, *Military Whistleblower Protection*, provides that the DoDIG is the final approving authority for cases involving allegations of whistleblower reprisal [Tab A-5].

(2) AR 20-1, *Inspector General Activities and Procedures*, dated March 29, 2002 [Tab A-1], paragraph 8-9c(2), states that if "a soldier makes a reprisal allegation that **appears to meet the criteria** (emphasis added) outlined in Title 10, USC, Section 1034 (the Military Whistleblower Statute) [Tab A-8], the IG who receives the allegation will contact DAIG—Assistance Division promptly by telephone (within 2 days) for specific instructions on how to proceed."

(3) *The Assistance and Investigations Guide*, June 2004 [Tab A-6], Section 11-1, paragraph 2, states "[i]f, upon presentation, a soldier makes a reprisal allegation that **appears to meet the criteria** (emphasis added) outlined in 10 USC 1034, the IG who receives the allegation will contact the Whistleblower Investigation and Oversight Branch (WIOB), DAIG—Assistance