



DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
104 ARMY PENTAGON
WASHINGTON DC 20310-0104

USOSC HQ DC '08NOV26
PM3:31

November 21, 2008

Ms. Catherine A. McMullen
Chief, Disclosure Unit
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

Re: Whistleblower Investigation—Fort Bragg Office of the
Inspector General (OSC File Nos. DI-06-1645 and DI-06-1904)

Dear Ms. McMullen:

The Department of the Army appreciates the opportunity to provide its recommendations to the Office of Special Counsel (OSC) regarding the release of its report in the above referenced case.

Background –

On December 21, 2007, the Department of the Army submitted to the OSC its report in the captioned case.

We understand that the report has been processed to the stage at which its release outside OSC is required. The report submitted by the Army to OSC contains the names and other identifying information of witnesses. The Army interposes no objection to OSC's disclosure of the report, in its entirety, to the complainant, the President, and to Congress for review provided that none of these entities release the report to the public. We understand, however, that the OSC places copies of reports in an open reading room for review by the general public. Pursuant to the rationale set forth below, the copy of the report made available to the public should be redacted in compliance with the Privacy Act, as reflected in Enclosure 1.

Analysis Pertaining to the Redaction of Department of the Army Information -

The Office of Special Counsel (OSC) is required to make available to the public reports from heads of agencies made under 5 U.S.C. § 1213(g)(1), but only to the extent that these reports do not contain any information, the disclosure of which is prohibited by law. 5 U.S.C. § 1219(a), (b). The Privacy Act (PA) prohibits an agency from disclosing any record which is contained in a system of records, except pursuant to the prior written consent of the individual to whom the record pertains or in those cases in which an exception applies. 5 USC § 552a(b). As discussed below, it appears as though OSC's investigative case files, to include the instant file, are contained in a system of records regulated by the PA. Therefore, under our reading of the statute, records made available to the public under § 1219 may be released only to the extent that disclosure is consistent with the PA.

OSC's system notice indicates that OSC's investigation case files are contained in a PA system of records. See OSC/GOVT-1, OSC Complaint, Litigation and Political Activity Files. This suggests that OSC would not render its investigative case files public absent either the consent of the individual to whom the record pertains, or an exception that allows for disclosure without consent.

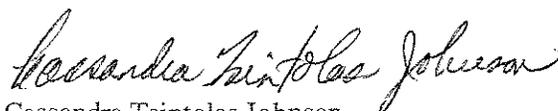
In this case, there is no indication that the consent of the individuals named in the report will be sought. Absent such consent, the only exception we have identified that might permit the disclosure of the OSC record to the general public is that of a routine use. The OSC system notice governing this system of records contains a routine use permitting the disclosure of these files to the public in only the following circumstances: 1) the matter under investigation has become public knowledge; 2) the Special Counsel determines that disclosure is necessary to preserve confidence in the integrity of the OSC investigative process or is necessary to demonstrate accountability of OSC officers, employees, or individuals covered by this system; or 3) the Special Counsel determines that there exists a legitimate public interest, except to the extent that the Special Counsel determines that disclosure would constitute an unwarranted invasion of personal privacy.

At this point, we are not aware that the investigation has become public knowledge nor does it appear to us that disclosure would be necessary to demonstrate the integrity of the OSC. Therefore, under our view of the PA, the OSC may disclose this investigative file if it determines that there is a legitimate public interest in doing so. However, if you choose to do so, we recommend that the record be redacted to ensure that its release would not constitute an unwarranted invasion of personal privacy.

We have redacted these reports in a manner that is designed to protect the privacy of the individuals involved in and associated with this investigation. Because the language of the applicable PA routine use mirrors the language of the Freedom of Information Act's (FOIA) exemption (b)(6), we have relied upon FOIA principles in redacting the report. Additionally, we have relied upon several DoD policy memoranda that have interpreted exemption (b)(6) of the FOIA to permit the redaction of information that personally identifies DoD personnel. (Enclosure 3).

We note that recently, the Department of the Army and the OSC were sued in Federal Court by the individual subject of an OSC investigative case file that was released publicly, in its entirety, by OSC. (Enclosure 4). The plaintiff in this case alleges that this public release violated his rights under the PA. We believe that limiting public release of the redacted report in the instant case complies with the PA, fulfills the mandate of OSC accountability to the public as set forth in your constituting statute, and minimizes litigation risk to both Army and OSC.

We appreciate the opportunity to present the Department of the Army's views on these matters. Should you have any questions, please do not hesitate to contact me at 703-614-3500.



Cassandra Tsintolas Johnson
Associate Deputy General Counsel
(Human Resources)

Enclosures



ADMINISTRATION AND
MANAGEMENT

OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950

SEP 1 2005

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, PROGRAM ANALYSIS AND EVALUATION
DIRECTOR, NET ASSESSMENT
DIRECTOR, FORCE TRANSFORMATION
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Withholding of Information that Personally Identifies DoD Personnel

This guidance was previously issued on February 3, 2005, but its importance mandates that it be published again to reinforce significant security considerations.

Organizations outside the Federal Government often approach DoD personnel to obtain updated contact information for their publications, which are then made available to the general public. The information sought usually includes names, job titles, organizations, phone numbers, and sometimes room numbers.

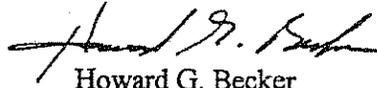
The Director, Administration and Management, issued a policy memorandum on November 9, 2001 (attached) that provided greater protection of DoD personnel in the aftermath of 9/11 by requiring information that personally identifies DoD personnel be more carefully scrutinized and limited. Under this policy, personally identifying information may be inappropriate for inclusion in any medium available to the general public. A December 28, 2001, memorandum from the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (attached) issued a policy limiting publication of personally identifying information on web sites.

The following policy augments the above cited memoranda and is in effect with regard to publication of information that personally identifies DoD personnel in publications accessible by the general public. In general, release of information on DoD personnel will be limited to the names, official titles, organizations, and telephone numbers for personnel only at the office director level or above, provided a determination is made that disclosure does not raise security or privacy concerns. No other information, including room numbers, will

OSD 17746-05

normally be released about these officials. Consistent with current policy, as delineated in the referenced memoranda issued in 2001, information on officials below the office director level may continue to be released if their positions or duties require frequent interaction with the public.

Questions regarding this policy should be directed to Mr. Will Kammer, Office of Freedom of Information, at 703-696-4495.



Howard G. Becker
Deputy Director

Attachments:
As Stated

cc: Secretary of Defense
Deputy Secretary of Defense



ADMINISTRATION AND
MANAGEMENT

OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950

FEB 03 2005

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, PROGRAM ANALYSIS AND EVALUATION
DIRECTOR, NET ASSESSMENT
DIRECTOR, FORCE TRANSFORMATION
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Withholding of Information that Personally Identifies DoD Personnel

Organizations outside the Federal Government often approach DoD personnel to obtain updated contact information for their publications, which are then made available to the general public. The information sought usually includes names, job titles, organizations, phone numbers, and sometimes room numbers.

The Director, Administration and Management, issued a policy memorandum on November 9, 2001 (attached) that provided greater protection of DoD personnel in the aftermath of 9/11 by requiring information that personally identifies DoD personnel be more carefully scrutinized and limited. Under this policy, personally identifying information may be inappropriate for inclusion in any medium available to the general public. A December 28, 2001, memorandum from the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (attached) issued a policy limiting publication of personally identifying information on web sites.

The following policy augments the above cited memoranda and is in effect with regard to publication of information that personally identifies DoD personnel in publications accessible by the general public. In general, release of information on DoD personnel will be limited to the names, official titles, organizations, and telephone numbers for personnel only at the office director level or above, provided a determination is made that disclosure does not raise security or privacy concerns. No other information, including room numbers, will normally be released about these officials. Consistent with current policy, as delineated in the referenced memoranda issued in 2001, information on officials below the office director level

OSD 02421-05

may continue to be released if their positions or duties require frequent interaction with the public.

Questions regarding this policy should be directed to Will Kammer, Office of Freedom of Information, at 703-697-1171.


Raymond F. DuBois
Director

Attachments:
As Stated

cc: Secretary of Defense
Deputy Secretary of Defense



ADMINISTRATION &
MANAGEMENT

OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 203014950



November 9, 2001

Ref: OI-CORR-101

MEMORANDUM FOR DOD FOIA OFFICES

SUBJECT: Withholding of Personally Identifying Information Under the Freedom of Information Act (FOIA)

The President has declared a national emergency by reason of the terrorist attacks on the United States. In the attached memorandum, the Deputy Secretary of Defense emphasizes the responsibilities all DoD personnel have towards operations security and the increased risks to US military and civilian personnel, DoD operational capabilities, facilities and resources. All Department of Defense personnel should have a heightened security awareness concerning their day-to-day duties and recognition that the increased security posture will remain a fact of life for an indefinite period of time.

This change in our security posture has implications for the Defense Department's policies implementing the Freedom of Information Act (FOIA). Presently all DoD components withhold, under 5 USC § 552(b)(3), the personally identifying information (name, rank, duty address, official title, and information regarding the person's pay) of military and civilian personnel who are assigned overseas, on board ship, or to sensitive or routinely deployable units. Names and other information regarding DoD personnel who did not meet these criteria have been routinely released when requested under the FOIA. Now, since DoD personnel are at increased risk regardless of their duties or assignment to such a unit, release of names and other personal information must be more carefully scrutinized and limited.

I have therefore determined this policy requires revision. Effective immediately, personally identifying information (to include lists of e-mail addresses) in the categories listed below must be carefully considered and the interests supporting withholding of the information given more serious weight in the analysis. This information may be found to be exempt under 5 USC § 552(b)(6) because of the heightened interest in the personal privacy of DoD personnel that is concurrent with the increased security awareness demanded in times of national emergency.

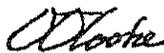
- Lists of personally identifying information of DoD personnel: All DoD components shall ordinarily withhold lists of names and other personally identifying information of personnel currently or recently assigned within a particular component, unit, organization or office with the Department of Defense in response to requests under the FOIA. This is to include active duty military personnel, civilian employees, contractors, members of the National Guard and Reserves, military dependents, and Coast Guard personnel when the Coast Guard is operating as a service in the Navy. If a particular request does not raise

security or privacy concerns, names may be released as, for example, a list of attendees at a meeting held more than 25 years ago. Particular care shall be taken prior to any decision to release a list of names in any electronic format.

- Verification of status of named individuals: DoD components may determine that release of personal identifying information about an individual is appropriate only if the release would not raise security or privacy concerns and has been routinely released to the public.
- Names in documents that don't fall into any of the preceding categories: Ordinarily names of DoD personnel, other than lists of names, mentioned in documents that are releasable under the FOIA should not be withheld, but in special circumstances where the release of a particular name would raise substantial security or privacy concerns, such a name may be withheld.

When processing a FOIA request, a DoD component may determine that exemption (b)(6) does not fully protect the component's or an individual's interests. In this case, please contact Mr. Jim Hogan, Directorate of Freedom of Information and Security Review, at (703) 697-4026, or DSN 227-4026.

This policy does not preclude a DoD component's discretionary release of names and duty information of personnel who, by the nature of their position and duties, frequently interact with the public, such as flag/general officers, public affairs officers, or other personnel designated as official command spokespersons.



D. O. Cooke
Director

Attachment:
As stated



COMMAND, CONTROL,
COMMUNICATIONS, AND
INTELLIGENCE

ASSISTANT SECRETARY OF DEFENSE

6000 DEFENSE PENTAGON
WASHINGTON, DC 20301-6000

December 28, 2001



MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DIRECTOR, DEFENSE RESEARCH AND ENGINEERING
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Removal of Personally Identifying Information of DoD Personnel from
Unclassified Web Sites

In accordance with DoD 5400.7-R, "DoD Freedom of Information Act Program," unclassified information which may be withheld from the public by one or more Freedom of Information Act (FOIA) exemptions is considered For Official Use Only (FOUO). DoD Web Site Administration policy (www.defenselink.mil/webmasters), issued by Deputy Secretary of Defense memorandum, December 7, 1998, prohibits posting FOUO information to publicly accessible web sites and requires access and transmission controls on sites that do post FOUO materials (see Part V, Table 1).

The attached November 9, 2001, memorandum from the Director, Administration and Management (DA&M), citing increased risks to DoD personnel, states that personally identifying information regarding all DoD personnel may be withheld by the Components under exemption (b)(6) of the FOIA, 5 USC §552. This action makes the information which may be withheld FOUO and inappropriate for posting to most unclassified DoD web sites.

Thus, all personally identifying information regarding DoD personnel now eligible to be withheld under the FOIA must be removed from publicly accessible web pages and web pages with access restricted only by domain or IP address (i.e., .mil restricted). This applies to unclassified DoD web sites regardless of domain (e.g., .com, .edu, .org, .mil, .gov) or sponsoring organization (e.g., Non-Appropriated Fund/Morale, Welfare and



Recreations sites; DoD educational institutions). The information to be removed includes name, rank, e-mail address, and other identifying information regarding DoD personnel, including civilians, active duty military, military family members, contractors, members of the National Guard and Reserves, and Coast Guard personnel when the Coast Guard is operating as a service in the Navy.

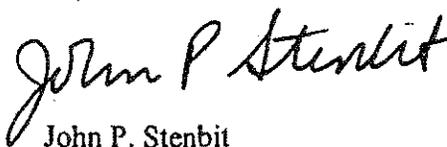
Rosters, directories (including telephone directories) and detailed organizational charts showing personnel are considered lists of personally identifying information. Multiple names of individuals from different organizations/locations listed on the same document or web page constitutes a list. Aggregation of names across pages must specifically be considered. In particular, the fact that data can be compiled easily using simple web searches means caution must be applied to decisions to post individual names. If aggregation of lists of names is possible across a single organization's web site/pages, that list should be evaluated on its merits and the individual aggregated elements treated accordingly.

Individual names contained in documents posted on web sites may be removed or left at the discretion of the Component, in accordance with the DA&M guidance. This direction does not preclude the discretionary posting of names and duty information of personnel who, by the nature of their position and duties, frequently interact with the public, such as flag/general officers, public affairs officers, or other personnel designated as official command spokespersons. Posting such information should be coordinated with the cognizant Component FOIA or Public Affairs office.

In keeping with the concerns stated in the referenced memorandum and in the October 18, 2001, DepSecDef memorandum, "Operations Security Throughout the Department of Defense," the posting of biographies and photographs of DoD personnel identified on public and .mil restricted web sites should also be more carefully scrutinized and limited.

Sites needing to post contact information for the public are encouraged to use organizational designation/title and organizational/generic position e-mail addresses (e.g., office@organization.mil; helpdesk@organization.mil; commander@base.mil).

Questions regarding Web Site Administration policy may be directed to Ms. Linda Brown. She can be reached at (703) 695-2289 and e-mail Linda.Brown@osd.mil. Questions regarding Component-specific implementation of the DA&M memorandum should be directed to the Component FOIA office.


John P. Stenbit

Attachment
As stated

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

05 APR -1 PH 2:26

CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS, FLORIDA

JAMES V. MUDD,)

Plaintiff,)

vs.)

UNITED STATES ARMY,)
UNITED STATES OFFICE OF SPECIAL)
COUNSEL, and UNITED STATES)
DEPARTMENT OF DEFENSE,)

Defendants.)

CASE NO. _____

2:05-cv-137-FTM-29DNF

COMPLAINT AND JURY DEMAND

Plaintiff JAMES V. MUDD (hereinafter "MUDD"), by and through his undersigned attorneys, sues Defendants, the UNITED STATES ARMY, the UNITED STATES OFFICE OF SPECIAL COUNSEL, and the UNITED STATES DEPARTMENT OF DEFENSE (hereinafter individually, "ARMY", "SPECIAL COUNSEL", and "DOD", and collectively, "Defendants"), and alleges as follows:

PARTIES

1. MUDD is an individual residing in Collier County, Florida who retired honorably as a Colonel in the United States Army after serving the United States of America with distinction for 26 years.

2. ARMY is a department of the United States Government with its principal location in Alexandria, Virginia.

3. SPECIAL COUNSEL is a department of the United States Government with its principal location in Washington, D.C.

4. DOD is a department of the United States Government with its principal location in Alexandria, Virginia.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the claims in this complaint pursuant to 28 U.S.C. § 1331.

6. This Court has venue over the claims in this complaint pursuant to 28 U.S.C. § 1402.

GENERAL ALLEGATIONS

7. MUDD graduated from the United States Military Academy at West Point and was commissioned as a Second Lieutenant in the ARMY in 1974.

8. MUDD served in the ARMY with distinction rising to the rank of Colonel until his retirement on September 1, 2000, having served his country faithfully for 26 years.

Upper Mississippi River Navigation Study

9. The Upper Mississippi River is a portion of the Mississippi River which extends from Minneapolis, Minnesota, to the confluence of the Ohio River just north at Cairo, Illinois. The Upper Mississippi River is 854 miles long and has 29 locks and dams located on it. The Illinois Waterway which serves as the connecting link between the Great Lakes, the Saint Lawrence Seaway, and the Mississippi River has 8 locks and dams located on it. The system of locks and dams on the Upper Mississippi River and the Illinois Waterway is referred to as the Upper Mississippi River-Illinois Waterway navigation system. The Upper Mississippi River-Illinois Waterway navigation system provides a transportation network linking the upper Midwestern United States to domestic and overseas markets.

10. During the 1980s, the U.S. Army Corps of Engineers (the "Corps") was given Congressional authorization to undertake a formal study of the Upper Mississippi River-Illinois Waterway navigation system.

11. As part of the Corps' Civil Works Project Development Process, separate reconnaissance studies of the Illinois Waterway and the Upper Mississippi River were undertaken from 1989 to 1991. The results of these studies indicated that major capital improvements would be needed on at least five locks in the navigation system.

12. A single Upper Mississippi River - Illinois Waterway Navigation Study (the "Study") was initiated by the Corps beginning in 1993 to describe and evaluate alternative project plans, assess environmental impacts and determine if a solution could be economically beneficial.

13. From the beginning, the Study was not without controversy. Environmental and taxpayer organizations argued that major capital improvements to the system were neither cost effective nor environmentally sound for the Mississippi River ecosystem. The navigation industry, on the other hand, argued that system modernization was vital to protecting the economic well being of the Upper Mississippi River basin.

14. By the year 2000, the estimated cost for the Study was almost \$21 million over the original estimate.

Involvement of Dr. Sweeney in the Study

15. The Economic Work Group (the "EWG") for the Study was responsible for determining the economic benefits of the various project alternatives. To fulfill its mission, the EWG's technical manager, Dr. Donald Sweeney, who was also referred to as the Study's lead economist, devised a new economic modeling technique for the Study.

16. According to the lead economist, his new modeling technique was a distinct improvement over the modeling technique utilized by the Corps for years because it, for the first time, attempted to account for the willingness of the navigation system users to continue using the system as user costs increase.

17. Under the new modeling technique, the elasticity of demand, or the willingness of the users to use the system as costs increase, is a vitally important component which was referred to as the "N" value.

Involvement of MUDD in Study

18. In April 1997, as a result of a Corps wide restructuring, the Mississippi Valley Division of the Corps became the division directly responsible for the Study. Prior to this time, responsibility had been shared between two different divisions within the Corps. The Rock Island District maintained the lead district status for the Study throughout the restructuring.

19. In July 1997, MUDD took over as Commander of the Rock Island District, Mississippi Valley Division of the U.S. Army Corps of Engineers.

20. After assuming command of the Rock Island District and familiarizing himself with the current status of the Study, MUDD became concerned with the apparent repeated failure of the lead economist and his team to meet deadlines.

21. MUDD also became concerned regarding some of the assumptions being made by the lead economist particularly as those assumptions related to the "N" value in the economic model.

22. MUDD asked the lead economist and the EWG for the fundamental basis surrounding the proposed N-value of 1.5 and was informed that the various economists could not determine an absolute N-value. The EWG informed MUDD that some economists had argued

for a value of 2.0 (very elastic) and others had argued for a value of 1.0 (very inelastic), and so ultimately they had compromised by consensus on the value of 1.5.

23. MUDD informed the lead economist and the EWG that as the N-value was a key component to the economic model, the Corps needed an N-value that could be logically defended and empirically supported during the public review process that followed the release of the draft and final reports. MUDD then asked the EWG to come up with a N-value that could be defended and supported.

24. Around this time, MUDD, in consultation with his Division Commander, had the lead economist reassigned off of the Study due to the repeated failures of he and his team to meet deadlines.

25. While the EWG was exploring options for a new N-value for the economic model, MUDD also approached experts in the area regarding the historical elasticity of grain on the Mississippi River and was advised that approximately 70% of the grain transported on the navigation system which originated in Iowa, the only state for which such data existed, was derived from eastern Iowa, 20% was derived from central Iowa, and 10% was derived from western Iowa, and was also informed that the elasticity of demand for use of the navigation system would depend in large measure on where the grain to be shipped was derived. MUDD presented this information, including some proposed elasticities derived from the experts and from the Iowa Grain Flow Survey, to the new lead economist and suggested that perhaps a more defensible position was to take a weighted average of the elasticities of the grain.

26. Shortly thereafter, the new lead economist approached MUDD and suggested an N-value of 1.2, which was the weighted average of the elasticities obtained by MUDD. In June

of 1999, MUDD accepted this recommendation and ordered that an N-value of 1.2 be utilized by the EWG in its efforts to utilize the economic model developed by Dr. Sweeney.

Sweeney Whistleblower Claims

27. After his removal from the Study in February 2000, the former lead economist, and the creator of the economic modeling system that is contingent on an appropriate N-value, filed an affidavit with the U.S. Office of Special Counsel accusing Corps officials of altering Study data in order to justify major capital improvements to the navigation system.

28. Specifically, the former lead economist charged that MUDD and others had intentionally altered the proposed N-value of 1.5 to 1.2 in order to support additional capital improvements on the navigation system.

29. Based solely upon this affidavit, the U.S. Office of Special Counsel found a substantial likelihood that the Corps violated regulations and wasted millions of dollars of taxpayer funds and requested that the Department of Defense investigate the allegations contained in the affidavit.

Investigations

30. In the Spring of 2000, the Department of the Army Inspector General ("DAIG") began an investigation into the alleged misconduct of Corps officials.

31. Also during this time, various environmental groups, who generally opposed any major capital improvements to the navigation system, assisted the lead economist in gaining wide media coverage of his allegations.

32. This large media coverage lead to hearings being called by Congress regarding the Study in the Spring of 2000. The Congressional hearings did not yield any allegations of fraud or criminal intent by any Corps officials, including MUDD. In fact, subsequent

Congressional findings indicate the exact opposite that Corps officials acted appropriately in attempting to fix a fundamentally flawed economic model.

33. In June of 2000, the National Academy of Sciences initiated a review of the Corps' methodology for the conduct of the Study, particularly the methodology being utilized in the economic model proposed by the former lead economist, which was initially scheduled to be released in November of 2000.

34. On September 1, 2000, MUDD retired from the Army and received an honorable discharge.

Release of the Report

35. On September 28, 2000, the Secretary of the Army approved the DAIG Report of Investigation (the "DAIG Report") and forwarded the same to the Secretary of Defense. Clearly printed at the bottom of each page of the DAIG Report was the language "For Official Use Only. Dissemination Is Prohibited Except As Authorized By AR 20-1."

36. The Report indicated among other things that MUDD took or directed actions which he knew, or reasonably should have known, would contribute to the production of a feasibility study failing to meet standards established in law and regulation.

37. On November 13, 2000, the Secretary of Defense forwarded the DAIG Report to the Office of the Special Counsel with an admonition that the Report contained information that may be considered as a basis for adverse actions against individuals and therefore it should only be distributed to those whose duties and official responsibilities required access to it in order to protect the privacy of those individuals and witnesses who requested confidentiality.

38. On November 17, 2000, the Department of the Army responded to an inquiry from the Office of Special Counsel regarding the timeline for the release of the National

Academy of Sciences review and informed the Office of the Special Counsel that the National Academy of Sciences had requested a three month extension within which to release the results of its investigation. Consequently, the National Academy of Sciences was not going to release the results of its investigation until February of 2001 at the earliest.

39. On November 20, 2000, the Office of Special Counsel gave a copy of the DAIG Report to Dr. Sweeney for his review and comments, which he placed in writing on December 1, 2000.

40. MUDD was not given a copy of the DAIG Report prior to its release, nor was he given the opportunity to comment on all of the allegations against him contained in the DAIG Report prior to it being released to the media.

41. On December 6, 2000, the Office of Special Counsel held a press conference whereby it released copies of the complete DAIG Report to all of the members of the press that were present and the Office also posted a complete copy of the DAIG Report on the Internet on its web-site.

42. By correspondence dated December 12, 2000, MUDD received a Memorandum of Admonishment from General John M. Keane, the Vice Chief of Staff for the Army. According to the Memorandum of Admonishment, MUDD was admonished for improperly taking or directing actions which he knew, or reasonably should have known, would contribute to the production of a feasibility study that would fail to meet standards established in law and regulation. General Keane did not officially admonish MUDD because he believed that MUDD's decision to change the N-value in the study was based on methodology that MUDD believed was more appropriate and reasonable.

43. By correspondence dated December 14, 2000, MUDD was informed by the DAIG that the investigation was concluded, that the findings had been approved by the Secretary of the Army and that the Vice Chief of Staff for the Army would be taking action that he deems appropriate.

44. In February of 2001, the National Academy of Sciences released its report finding that the economic model developed by Dr. Sweeney was fundamentally flawed.

MUDD Follow-Up

45. Both before its release by the Office of Special Counsel, and after, MUDD filed four separate requests with ARMY to receive a copy of the completed Report and copies of the transcripts of his own testimony in the investigation. Each of these requests were forwarded also to the Office of Special Counsel. Ultimately, MUDD was informed that the DAIG could not provide him with a copy of the Report, but was directed by a representative of ARMY to download a copy of the Report from the web-site for SPECIAL COUNSEL. Copies of these requests and responses are attached hereto at Tabs D and E of Composite Exhibit "1".

46. By correspondence dated January 28, 2001, MUDD informed ARMY that the Report was posted on the web-site for the Office of Special Counsel. ARMY did nothing to protect MUDD's rights to privacy regarding the improper dissemination of his private information. A copy of this correspondence is attached hereto at Tab G of Composite Exhibit "1".

47. By correspondence dated March 10, 2001, MUDD appealed his admonishment and the findings of the DAIG Report to the Vice Chief of Staff of the Army, in light of the findings of the National Academy of Sciences and provided additional materials that appeared to have been overlooked by the DAIG during its investigation. A copy of this correspondence is

attached hereto at Tab A of Composite Exhibit "1". As the issuing officer of the Memorandum of Admonishment and the individual in the chain of command that oversees the activities of the DAIG, the Vice Chief of Staff of the Army is the appropriate individual to receive MUDD's appeal. MUDD received no response to his appeal.

48. By correspondence dated January 3, 2003, MUDD advised the Vice Chief of Staff of the Army that he had received no response to his earlier appeal and requested a response. MUDD received no response to his appeal. A copy of this correspondence is attached hereto at Tab B of Composite Exhibit "1".

49. By correspondence dated April 16, 2003, MUDD, by and through the undersigned counsel, again appealed his admonishment and the findings of the DAIG Report to the Vice Chief of Staff of the Army. A copy of this correspondence is attached hereto at Tab H of Composite Exhibit "1".

50. By correspondence dated June 6, 2003, ARMY finally responded to MUDD's appeal with notice that his concerns were being reviewed. A copy of this correspondence is attached hereto at Tab I of Composite Exhibit "1".

51. By correspondence dated July 31, 2003, MUDD provided ARMY with additional support for his appeal in the form of notice that after two years of study and review, the Corps had determined that MUDD's N-value of 1.2 was an appropriate value for the elasticity of grain on the navigation system. A copy of this correspondence is attached hereto at Tab J of Composite Exhibit "1".

52. By correspondence dated October 2, 2003, MUDD provided ARMY with additional support for his appeal which corroborated the information contained in the July 31,

2003 correspondence. A copy of this correspondence is attached hereto at Tab K of Composite Exhibit "1".

53. After receiving no updates from ARMY since June 6, 2003, MUDD again contacted ARMY by correspondence dated December 9, 2003, requesting an update on the status of the appeal. A copy of this correspondence is attached hereto at page 1 of Tab L of Composite Exhibit "1".

54. By correspondence dated December 16, 2003, ARMY finally responded that the DAIG had completed its review of MUDD's appeal on September 26, 2003, but in light of the additional information provided in October, there was a delay in responding as they considered the additional evidence. A copy of this correspondence is attached hereto at page 2 of Tab L of Composite Exhibit "1".

55. Finally, by correspondence dated January 26, 2004, ARMY responded that the information provided by MUDD did not merit a change in the findings of the DAIG Report. A copy of this correspondence is attached hereto at page 3 of Tab L of Composite Exhibit "1".

56. MUDD attempted to informally achieve a resolution of this matter, but his efforts were rebuffed.

57. By correspondence dated August 10, 2004, because he had never received any response from the Vice Chief of Staff of the Army, the only individual who could effect a change in his admonishment and/or the DAIG Report findings, MUDD attempted one last effort to appeal the findings to the Vice Chief of Staff of the Army. A copy of this correspondence is attached hereto as Composite Exhibit "1".

58. By correspondence dated October 1, 2004, ARMY again denied MUDD's attempts to appeal his Memorandum of Admonishment and the DAIG Report findings. A copy of this correspondence is attached hereto as Exhibit "2".

59. As demonstrated by the above correspondence, MUDD has exhausted his administrative remedies.

Additional Studies

60. In August of 2003, the United States Department of Agriculture released a study of the elasticity of grain on the navigation system and found it, contrary to the assumptions of Dr. Sweeney and the EWG prior to the questioning by MUDD, to be highly inelastic.

61. In April of 2004, the Tennessee Valley Authority also released the results of a study that examined the economic model developed by Dr. Sweeney, and particularly his concept of the elasticity of grain on the navigation system, and found that the elasticity assumptions of Dr. Sweeney and the EWG, prior to the questioning by MUDD, were inaccurate.

62. Also in April of 2004, the Corps released its draft Study Report. Interestingly, despite the admonition of the National Academy of Sciences in February of 2001, the Corps continued to utilize the economic model developed by Dr. Sweeney. Moreover, the elasticity values utilized by the Corps in the draft Study Report are exactly the same as the N-value of 1.2 adopted by MUDD, and for which he was admonished.

63. In late 2004, after the appropriate public comment periods, the Corps issued its Final Report which continues to utilize the N-value adopted by MUDD.

Review Process

64. Once a draft feasibility report is issued by the Corps district responsible for the study, there is a two to three month public review and comment period for the draft report.

65. Once the public review and comment period is completed, the Corps then reviews the public comments and make appropriate adjustments, if any are required, to the draft and a final report is issued by the Corps district responsible for the study.

66. Upon issuance of a final report by the district, there is a second public review and comment period for one to two months. During this time, there are additional reviews of the final report by various state and federal agencies.

67. At the conclusion of the two review phases, the Corps Division Commander submits a final report to Corps headquarters, where it undergoes yet another review before the Chief of Engineers for the Corps issues a final report containing recommendations for improvement to the navigation system.

68. This final report is then reviewed by the Department of the Army, the Department of Defense and the Office of Management and Budget prior to any recommendations arising out of the report are submitted to the Congress.

69. Consequently, in 2000, when Dr. Sweeney first raised his claims, the Corps had not even begun to prepare its draft report, nor had any of the work been subjected to any public review or comments.

70. MUDD has retained the law firm of Porter, Wright, Morris & Arthur, LLP to represent him with regard to his claims in this action and is responsible to pay it fees for the services it provides in connection with the representation.

COUNT I – VIOLATIONS OF PRIVACY ACT

71. This is an action for violations of the Privacy Act, 5 U.S.C. § 552a, for damages.

72. MUDD realleges the allegations set forth in paragraphs 1 through 70 as if fully set forth herein.

73. On December 6, 2000, SPECIAL COUNSEL held a press conference where it released the complete DAIG Report to members of the media and posted the complete report on its web-site.

74. The DAIG Report contained personal information of MUDD's that is protected by the Privacy Act.

75. SPECIAL COUNSEL did not request prior permission from MUDD to release the protected information contained in the DAIG Report, nor has MUDD ever given SPECIAL COUNSEL permission to release his personal information to any third-party.

76. SPECIAL COUNSEL improperly released this personal information for the express purpose of injuring MUDD's reputation.

77. Prior to its release, SPECIAL COUNSEL was advised by the Secretary of Defense that disclosure of the DAIG Report should be limited to protect MUDD's personal information.

78. At all times relevant herein, the employees of SPECIAL COUNSEL were acting within the scope of their employment.

79. As a direct result of SPECIAL COUNSEL's improper release of MUDD's personal information, MUDD has suffered damages and continues to suffer damages.

WHEREFORE, Plaintiff JAMES V. MUDD demands judgment against Defendant UNITED STATES OFFICE OF SPECIAL COUNSEL pursuant to 5 U.S.C. § 552a for damages, attorneys' fees and costs, and for such other and further relief as this Court deems just and proper.

COUNT II – VIOLATIONS OF PRIVACY ACT

80. This is an action for violations of the Privacy Act, 5 U.S.C. § 552a, for damages.

81. MUDD realleges the allegations set forth in paragraphs 1 through 70 and 73 through 79 as if fully set forth herein.

82. After SPECIAL COUNSEL released MUDD's personal information in violation of the Privacy Act, DOD and ARMY were advised by MUDD that his personal information was being improperly disseminated by SPECIAL COUNSEL.

83. Shortly thereafter, ARMY notified MUDD that it could not release the DAIG Report to him, nor could it release its investigation materials to him pursuant to the Privacy Act, but that he could obtain the complete DAIG Report containing his personal information on the Internet on the SPECIAL COUNSEL's web-site.

84. Upon receiving notice of this improper release of MUDD's personal information, neither DOD nor ARMY took any actions to halt the unauthorized release of the information.

85. DOD and ARMY refused to halt the improper release of MUDD's personal information with the intent of injuring MUDD's reputation.

86. At all times relevant herein, the employees of DOD and ARMY were acting within the scope of their employment and/or acting in the line of duty.

87. As a direct result of DOD's and ARMY's refusal to stop the improper release of MUDD's personal information, MUDD has suffered damages and continues to suffer damages.

WHEREFORE, Plaintiff JAMES V. MUDD demands judgment against Defendants UNITED STATES ARMY and the UNITED STATES DEPARTMENT OF DEFENSES pursuant to 5 U.S.C. § 552a for damages, attorneys' fees and costs, and for such other and further relief as this Court deems just and proper.

COUNT III – FAILURE TO FOLLOW ARMY REGULATIONS

88. This is an action for damages for failure to follow Army Regulations.

89. MUDD realleges the allegations set forth in paragraphs 1 through 70 as if fully set forth herein.

90. Pursuant to paragraph 8-6 of Army Regulation 20-1, a suspect or subject is entitled to be told of any unfavorable information uncovered during the Inspector General's investigation and is to be given the opportunity to comment on the unfavorable information.

91. MUDD was never told of the unfavorable information contained in the DAIG Report, nor was he given an opportunity to comment on the unfavorable information prior to its being improperly released to the media.

92. Moreover, pursuant to Army Regulation 20-1, the DAIG report was not to be distributed beyond those individuals whose duties and official responsibilities require access to it to protect the privacy of the individuals and witnesses who requested confidentiality.

93. Contrary to Army Regulation 20-1, ARMY allowed the DAIG report to be released to the general public and did not protect the privacy of MUDD.

94. As a direct result of ARMY's failure to allow MUDD to comment on the unfavorable information prior to it being issued in final form, or to provide additional information to the investigators prior to the DAIG Report being issued in final form, MUDD has suffered and continues to suffer damages to his personal and professional reputation.

95. As a direct result of ARMY's failure to protect MUDD's privacy, he has suffered damages and continues to suffer damages to his personal and professional reputation.

WHEREFORE, Plaintiff JAMES V. MUDD demands judgment against Defendant UNITED STATES ARMY for damages, and for such other and further relief as this Court deems just and proper.



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
MANPOWER AND RESERVE AFFAIRS
111 ARMY PENTAGON
WASHINGTON, DC 20310

The Honorable Scott J. Bloch
The Special Counsel
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington D.C. 20036-4505

DEC 21 2007

Re: Whistleblower Investigation—Fort
Bragg Office of the Inspector General
(Office of Special Counsel Case Files
DI-06-1645 and DI-06-1904)

Dear Mr. Bloch:

In accordance with Title 5, United States Code (USC), Sections 1213(c) and (d), the enclosed report is submitted in response to your referral of information requesting an investigation of allegations and a report of findings in the above referenced cases.

The Secretary of the Army (SA), the agency head, has delegated to me the authority to review, sign, and submit to you the report required by Title 5, USC, Sections 1213(c), and (d) **[Tab 1]**.

Note that this report and its exhibits contain the names and duty titles of employees of the XVIII Airborne Corps and Fort Bragg Office of the Inspector General (FB OIG),¹ as well as of other Department of the Army soldiers and civilian employees. Subsequent release of this information may result in violations of the Privacy Act² and breaches of personal privacy interests. Accordingly, those releases required by Title 5, USC, Section 1213(e) excepted, the Department of the Army requests the opportunity to coordinate in advance, on any release of this report outside the Office of the Special Counsel (OSC).

INFORMATION INITIATING THE INVESTIGATION

By letter dated November 22, 2006 **[Tab 2]**, the OSC referred to the SA for investigation its conclusion that there existed a substantial likelihood that information provided by **[b)(7)(C)]** Deputy Inspector General (IG), and **[b)(7)(C)]** Assistant IG, both Department of Army civilian

¹ The Office of the Inspector General at issue is located at Fort Bragg, North Carolina and services all elements of the XVIII Airborne Corps located at Fort Bragg as well as other Fort Bragg installation tenant units.

² The Privacy Act of 1974, Title 5, USC, Section 552a.

employees of the FB OIG (hereinafter complainants), disclosed that [REDACTED] XVIII Airborne Corps and Fort Bragg Primary IG, had abused his authority and violated Army Regulation (AR) 20-1, *Inspector General Activities and Procedures*,³ the regulation governing the execution of IG functions and duties, by arbitrarily and capriciously delaying, hindering, or failing to order investigations into allegations filed against certain of his colleagues of similar rank.

The Department of the Army's review of the OSC referral rendered the following five specific allegations:

OSC Allegation 1: That [REDACTED] ignored the requirements of AR 20-1 as it related to the investigation of whistleblower reprisal allegations and the substantial and preponderant evidence of reprisal in the case of [REDACTED]. The complainants assert that SFC Clark's [REDACTED] Commander, [REDACTED], had refused to provide [REDACTED] a **Complete-the-Record** Non-Commissioned Officer Evaluation Report (NCOER) in retaliation for her previous request for assistance from the FB OIG. The complainants further allege that subsequently [REDACTED] delayed unduly the issuance of [REDACTED] **Annual** NCOER, so as to downgrade her duty position and the concomitant evaluation of her performance. The complainants allege that in response to [REDACTED] assertion that the delay in issuance of her **Annual** NCOER constituted continued reprisal, [REDACTED] ordered the case closed to protect [REDACTED].

OSC Allegation 2: 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 First Sergeant 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.

OSC Allegation 3: That [REDACTED] violated AR 20-1 by delaying an investigation into allegations that [REDACTED] Battalion Commander, 51st Signal Battalion,⁴ had physically assaulted [REDACTED].

³ Army Regulation (AR) 20-1, *Inspector General Activities and Procedures*, March 29, 2002 [Tab A-1], paras. 1-4. Note that AR 20-1 was revised, effective July 19, 2006, and again effective February 1, 2007. Because the March 2002 version of the regulation was in effect throughout the period during which the actions relevant to the allegations referred by OSC took place, all references to AR 20-1 in this report are to the 2002 iteration.

⁴ It is important to understand the structure of the XVIII Airborne Corps. The Corps is comprised of Divisions. Each Division is generally made up of several Brigades. Each Brigade is comprised of four to

[REDACTED] and had engaged in an inappropriate relationship with a subordinate non-commissioned officer (NCO), [REDACTED] even though a preliminary analysis of these allegations had revealed sufficient evidence to warrant further investigation. The complainants allege that it was only after some delay that [REDACTED] initiated a request for an investigation that ultimately substantiated allegations against [REDACTED].

OSC Allegation 4: The complainants allege that the FB OIG's preliminary analysis of [REDACTED] complaints yielded sufficient evidence to warrant investigation of an allegation that the 35th Signal Brigade Commander, [REDACTED] had prior knowledge of [REDACTED] misconduct (as set forth in OSC Allegation 3, above), but covered-up [REDACTED] complaint. The complainants further assert that with a view to protecting [REDACTED] [REDACTED] refused recommendations to order an investigation into the alleged cover-up.

OSC Allegation 5: That [REDACTED] delayed investigating a report that [REDACTED] Commander, 327th Signal Battalion, had condoned his troops' consumption of alcohol, in violation of orders, while deployed to Louisiana. The complainants allege that [REDACTED] only reluctantly signed a request for a Commander's Inquiry into the allegation, stating that he did not want to burden units while they were preparing for deployment.

CONDUCT OF THE INVESTIGATION

On December 6, 2006, the Army Office of General Counsel (OGC) forwarded the OSC request for investigation to The Inspector General (TIG) of the Army [Tab 3]. This referral was appropriate because TIG heads the Department of the Army Inspector General Agency (DAIG), the organization charged with developing policy, doctrine and procedures for Army IGs.⁵ Further, Army Regulation mandates reporting allegations of IG misconduct to TIG.⁶

On December 8, 2006, TIG referred the OSC allegations to the Office of the Inspector General (OIG), U.S. Army Forces Command (FORSCOM), for investigation [Tab 4]. On December 12, 2006, TIG appointed [REDACTED]

six Battalions and each Battalion is comprised of Companies. Companies are generally comprised of four or more platoons. The officer in charge of a Company is known as the Company Commander. The Company Commander is supported by the Company First Sergeant, the senior non-commissioned officer in the Company. The Company Commander is subordinate to a Battalion Commander, whose chief non-commissioned officer is designated the Battalion Command Sergeant Major. The next superior in the chain of command is the Brigade Commander, whose chief non-commissioned officer is designated the Brigade Command Sergeant Major. All are subordinate to the Division Commander, who is, in turn, subordinate to the Corps Commander. For purposes of this investigation it is important to note that both the "Dragon Brigade" and the 35th Signal Brigade were deemed to be "special brigades." Because of their "special" missions, both brigades reported directly to the XVIII Airborne Corps Commander.

⁵ AR 20-1, para. 1-4 [Tab A-1].

⁶ AR 20-1, para. 8-3h [Tab A-1].

(b)(7)(C) Primary FORSCOM IG, as the Investigating Officer (IO) in this matter (b)(7)(C) [Tab 5] appointed (b)(7)(C) Assistant FORSCOM IG, to assist him. The referral of this case from TIG to the FORSCOM OIG was appropriate. (b)(7)(C) the official on whose actions the investigation was to focus, served as the Primary IG of the FB OIG, servicing the XVIII Airborne Corps. The XVIII Airborne Corps reported to FORSCOM and FORSCOM reported directly to Headquarters, Department of the Army (HQDA). Oversight of the IG function followed these same reporting channels: the FB OIG reported to its next higher headquarters, the FORSCOM OIG, which in turn reported directly to TIG at HQDA.

By statute, an agency is afforded sixty days to complete the report required by Title 5, USC, Section 1213. On January 18, 2007, OGC requested that OSC grant an extension to permit sufficient time for the FORSCOM IG to complete its investigation (b)(7)(C) [Tab 6]. On January 23, 2007, (b)(7)(C) Chief, Disclosure Unit, OSC, granted the request for extension until March 30, 2007.

On January 30, 2007, the FORSCOM IG completed its draft OSC report of investigation (ROI) into these matters and submitted the ROI to DAIG for review.

Upon review of the draft FORSCOM ROI, Army OGC requested clarification and follow-up investigation by DAIG and the FORSCOM IG. Given these challenges, on March 30, 2007, OGC requested a second extension of time from OSC (b)(7)(C) [Tab 7]. (b)(7)(C) granted the request on April 2, 2007, authorizing the Army a new suspense of May 30, 2007 to complete and forward its report to OSC. Given the volume of evidence collected by the investigating officers and the complexity of analysis required, on May 30, 2007, OGC requested a third extension of time for DAIG and FORSCOM IG to complete the investigation and to compile and review the report and submit it for approval (b)(7)(C) [Tab 8]. OSC granted an extension through July 30, 2007.

Subsequent requests by OGC for extensions of time to compile, review and finalize the report were granted by OSC through December 26, 2007 (b)(7)(C) [Tabs 9-11]. On December 18, 2007, the DAIG Legal Advisor opined that the final FORSCOM OIG ROI into the OSC-referred allegations was legally sufficient. (b)(7)(C) [Tab 12]. On December 18, 2007, TIG approved the final report and forwarded it to OGC for final processing and submission to the Army leadership for review, signature, and submission to OSC (b)(7)(C) [Tab 13].

SPECIAL PROCEDURES ATTENDING THIS INVESTIGATION

After due deliberation, and for the reasons set forth below, DAIG/FORSCOM OIG opted not to employ standard IG investigative processes in the conduct of this investigation. Ordinarily, IGs conduct inquiries and investigations using particularized procedures set forth in AR 20-1. Of greatest

import to the matter at hand, IG investigations afford complainants and witnesses enhanced guarantees of confidentiality: AR 20-1 renders paramount the safeguarding of a complainant's or witness's personal identity and the nature of his or her contact with, and statements to, the IG.⁷ In contrast, the OSC statute, Title 5, USC, Section 1213(e), requires broad dissemination of the OSC investigative report within the federal government and to the complainants. And, although Title 5, USC, Section 1213(h) precludes OSC disclosure of complainants' identities absent their consent, it is silent as to the disclosure of witness identities.

To avoid conflict between the statutorily required distribution of OSC investigative reports and the confidentiality constraints governing IG investigations, DAIG/FORSCOM OIG opted not to employ IG procedures in conducting this investigation. Rather, the investigative requirements set forth in Title 5, USC, Section 1213 were viewed as independent authority to conduct the investigation. The Uniform Code of Military Justice (UCMJ), Article 136(b)(4) served to empower the appointed IOs to administer oaths.⁸ As appropriate, DAIG/FORSCOM OIG drew on AR 15-6, *Procedures for Investigating Officers and Boards of Officers*,⁹ for additional guidance as to the conduct of the investigation [Tab A-2].

In addition, evidence-gathering for the OSC-directed investigation was facilitated by the fact that previously, on May 21, 2006, [REDACTED], one of the OSC complainants, had filed similar complaints with the Department of Defense Inspector General (DoDIG) Hotline¹⁰ [Tab A-4]. Because those complaints related to an Army IG, they had been referred to the Department of the Army for investigation. At DAIG's direction, [REDACTED] and [REDACTED] of the FORSCOM IG had already undertaken to investigate the Hotline complaints at the time the OSC complaints were received and referred to them.¹¹ Thus,

⁷ In accordance with AR 20-1, para. 1-12, this emphasis on confidentiality is intended to protect individual privacy, maintain confidence in the IG system, and minimize the risk of reprisal; it encourages voluntary cooperation with IG investigations and promotes a willingness to ask the IG for help or to present a complaint for resolution [Tab A-1].

⁸ "The following person on active duty or performing inactive-duty training may administer oaths necessary in the performance of their duties: . . . (4) All persons detailed to conduct an investigation . . ." Uniform Code of Military Justice, Article 136(b)(4).

⁹ AR 15-6 promulgates guidelines for Army administrative investigations. Army commands and organizations frequently appoint investigating officers under provisions of AR 15-6 to investigate all manner of allegations and concerns [Tab A-2].

¹⁰ The DoDIG operates the Defense Hotline Program to "encourage DoD personnel to report suspected fraud, waste and mismanagement without fear of reprisal" (DoD Directive 7050.1, *Defense Hotline Program*, January 4, 1999) [Tab A-3]. Upon receipt of a complaint, DoDIG assigns it to the appropriate Department of Defense (DoD) component to conduct an inquiry, if warranted, and to report the results to DoDIG in the form of a Hotline Completion Report (DoD Instruction 7050.7, *Defense Hotline Procedures*, December 14, 1998) [Tab A-4].

¹¹ Because of their familiarity with the DoDIG Hotline investigation, the appointment of these same two officers to investigate the OSC-referred allegations was deemed an effective use of resources.

testimony and other evidence gathered in the course of ongoing investigative efforts responsive to [REDACTED] DoDIG Hotline complaint provided significant information relevant to OSC-referred allegations 1, 4, and 5, as set forth above.¹² The completed report of investigation of [REDACTED] Hotline complaints has not been finally approved by the DoDIG, as required by Department of Defense procedures. However, the preliminary findings as to the three Hotline allegations that overlap with OSC-referred allegations 1, 4, and 5 are wholly consistent with this report.

In the context of investigating both the OSC-referred and Hotline allegations, the FORSCOM IG IOs interviewed numerous witnesses, to include both OSC complainants. It is important to note that in his testimony to [REDACTED] regarding the OSC-referred allegations, [REDACTED] made reference to issues that pertain only to his DoDIG Hotline complaint, not to the OSC-referred allegations. [REDACTED] also spoke to matters associated with neither the OSC-referred allegations nor his Hotline complaint. The instant report focuses on the OSC-referred allegations. In certain circumstances, however, the report references information relevant to other allegations, but only to the extent such reference may be required to understand the matters referred by OSC to the Department of the Army.

¹² Several allegations comprise the DoDIG Hotline complaint filed by [REDACTED] (DoD Hotline Number 100621/DAIG Control Number DIH06-8198) [Tab 14]. Because of its criminal nature, the Hotline allegation that [REDACTED] condoned time card fraud by inappropriately permitting Fort Bragg Office of the Inspector General (FB OIG) civilian employees to take undocumented leave during military training holidays (days on which military members were entitled to a pass) was referred for criminal investigation by the U.S. Army Criminal Investigation Command (USACIDC). The remaining Hotline allegations were referred to The Inspector General (TIG), Department of the Army, and, as in the case of the OSC-referred allegations, were subsequently forwarded to the U.S. Army Forces Command (FORSCOM) Office of the Inspector General (OIG) for investigation. The Hotline allegations forwarded to the FORSCOM OIG include: (1) That [REDACTED] improperly allowed two temporary assistant IGs in the FB OIG to serve longer than 180 days without approval from TIG); (2) That [REDACTED] improperly failed to investigate an allegation against a field grade officer, [REDACTED] concerning an alleged cover up [NOTE: This allegation mirrors OSC-referred allegation 4]; (3) That [REDACTED] improperly delayed an IG investigation into allegations of wrongdoing by [REDACTED] [NOTE: This allegations mirrors OSC-referred allegation 5]; (4) That [REDACTED] improperly delayed an IG investigation against [REDACTED]; (5) That [REDACTED] improperly failed to serve as a fair, impartial, and objective fact-finder concerning the conduct of [REDACTED] a member of the OIG of the 82d Airborne Division, Fort Bragg, North Carolina; (6) That [REDACTED] improperly failed to contact the Department of the Army Inspector General (DAIG) upon presentation of a reprisal allegation in the conduct of an IG assistance case involving [REDACTED] [NOTE: This allegation mirrors OSC-referred allegation 1]; (7) That [REDACTED] improperly failed to serve as a fair, impartial, and objective fact finder concerning the conduct of the investigation of allegations of reprisal made by [REDACTED] and (8) That [REDACTED] improperly failed to comply with Title 5, Code of Federal Regulations, Section 2635.302(b), when he accepted a gift from [REDACTED] an employee of his receiving less pay, in violation of DoD 5500.7-R (Joint Ethics Regulation). As of the date of the submission of this report to OSC, both the USACIDC and the DAIG Hotline investigations have been completed and forwarded to DoDIG for approval. To the extent those investigations overlap with the OSC-referred allegations, this report and the Hotline reports are completely consistent.

BACKGROUND -- IG PROCEDURES AND THE ORGANIZATION AND FUNCTIONS OF THE XVIII AIRBORNE CORPS AND THE FORT BRAGG OFFICE OF THE INSPECTOR GENERAL

IG Procedures:

Army IGs serve as the commander's "eyes," "ears," "voice," and "conscience."¹³ In this capacity, IGs conduct inspections, inquiries, and investigations, and provide assistance to individuals. DAIG provides technical guidance to field OIGs. Proper execution of IG duties and responsibilities requires an IG to maintain his or her independence. Accordingly, IGs are never part of the "chain of command." Rather, IGs traditionally serve on the "personal staff" reporting to the general officer in command of the field units the IG services. This "personal staff" designation ensures IG independence while guaranteeing the IG direct access to the senior unit commander on any matter or issue.

AR 20-1 outlines a systematic fact-finding approach, the Inspector General Action Process (IGAP), for receiving and resolving allegations from complainants.¹⁴ Step 1 of the IGAP is to receive and appropriately process a complaint or request for assistance. Each complainant is requested to complete Department of the Army (DA) Form 1559 (Inspector General Action Request) (IGAR) to document the complainant's presentation of a request for assistance to the OIG. Step 2 encompasses the conduct of a "preliminary analysis" (PA) (also known as a "preliminary inquiry" (PI) or an "IG preliminary analysis" (IGPA)).¹⁵ During the PA/PI/IGPA phase, the assigned IG analyzes the information presented by the complainant to determine whether it indicates a systemic issue, an allegation of impropriety, a request for help, or a combination of these, and determines whether the OIG can provide the assistance the complainant seeks. The PA process may take a few moments, hours or days, but is designed to clarify matters of concern, identify issues, formulate allegations, and facilitate development of a plan of action.

Based on the information set forth in the IGAR and further developed in the course of the PA/PI/IGPA, an IG may address matters presented by a complainant in one of four ways.¹⁶ The IG may:

¹³ AR 20-1, para. 1-6(a) [Tab A-1].

¹⁴ AR 20-1, Ch. 4 [Tab A-1].

¹⁵ The preliminary analysis is referred to in IG regulations and parlance as a "preliminary analysis" (PA), "preliminary inquiry" (PI), or an "Inspector General Preliminary Analysis" (IGPA). The terms are generally interchangeable.

¹⁶ Depending on the issues presented, a single allegation may raise more than one issue, each of which may be addressed under a different course of action.

(1) Conduct an IG investigation or investigative inquiry. An investigation is appropriate when the complainant alleges wrongdoing by a specific individual. An investigation must be formally authorized by the organization's Primary IG or by the written directive of the general officer to whom the IG reports;¹⁷

(2) Conduct an IG assistance inquiry. An IG assistance inquiry addresses a request for help, information, or other like issues, but does not address specific allegations of wrongdoing;¹⁸ or

(3) Refer complaints and requests for assistance to another agency or an appropriate Army leader, commander, or management official for appropriate action. Referral is appropriate when the PA/PI/IGPA reveals that the allegation is of a nature that, if substantiated, would constitute criminal conduct or likely result in adverse action against the subject;¹⁹ or

(4) If a complainant's matters indicate a systemic issue or problem, the IG may initiate an inspection.²⁰

Additionally, one specific duty of an Army IG is to investigate allegations of violations of the Military Whistleblower Statute, promulgated at Title 10, USC, Section 1034. Department of Defense (DoD) Directive 7050.6, *Military Whistleblower Protection*, dated June 23, 2000,²¹ [Tab A-5], implements the Military Whistleblower Statute for the DoD and requires the IGs of the Military Departments to receive, report, and investigate allegations of whistleblower reprisal.²²

AR 20-1 and *The Assistance and Investigations Guide* published by the U.S. Army Inspector General School,²³ provide that if, upon presentation, a soldier makes a reprisal allegation that appears to meet the criteria outlined in the Military Whistleblower Statute, "the IG who receives the allegation will contact

¹⁷ AR 20-1, Ch. 8 [Tab A-1].

¹⁸ AR 20-1, Ch. 7 [Tab A-1].

¹⁹ AR 20-1, para. 8-3b(1) [Tab A-1].

²⁰ AR 20-1, Ch. 6 [Tab A-1].

²¹ Note that a new version of DoD Directive 7050.6 was published on July 23, 2007. All references in the instant report to the Directive are to the June 2000 iteration [Tab A-5], however, as it was the edition in effect at the time of the behaviors underlying the allegations set forth in the OSC referral.

²² See generally DoDD 7050.6, para. 5.3 [Tab A-5].

²³ *The Assistance and Investigations Guide*, U.S. Army Inspector General School, June 2004 [Tab A-6], Section 11-1. *The Guide* is a handbook published by the United States Army Inspector General School, Department of the Army Inspector General Agency Training Division, and distributed to all Army IGs. *The Guide* amplifies the policies and procedures set forth in AR 20-1. Note that *The Assistance and Investigations Guide* was revised in and reissued in January 2006 [Tab A-7]. With one exception, the June 2004 edition of *The Guide* was in effect throughout the period during which the actions relevant to the allegations referred by OSC took place. As to the February 2006 whistleblower complaint filed by [redacted] regarding the delay in issuing her Annual Non-Commissioned Officer Evaluation Report (NCOER), the January 2006 iteration of *The Guide* was in effect.

the Whistleblower Investigation and Oversight Branch (WIOB), DAIG—Assistance Division, promptly by telephone (within 2 days) for specific instructions regarding how to proceed.²⁴ If, as a result of coordination with the WIOB, DAIG—Assistance Division, it is determined that the soldier's allegations appear to meet the definition of whistleblower reprisal, the WIOB will direct the IG in receipt of the complaint to forward an "advisement letter," formally documenting the whistleblower allegation, either to the receiving office's superior OIG or to the WIOB, DAIG—Assistance Division, for the conduct of PA/PI/IGPA.

The PA/PI/IGPA will determine whether the complaint facially meets the criteria for whistleblower coverage under applicable law and regulations. If, at initial intake, or during the PA/PI/IGPA, it is determined that a soldier's allegations do not meet the criteria for whistleblower reprisal, the OIG that received the allegation will be instructed to forward a "declination memorandum" explaining the rationale underlying that determination via IG channels to WIOB, DAIG—Assistance Division, for further review and reporting to DoDIG, the final authority in all cases involving allegations of whistleblower reprisal.²⁵ If the PA/PI/IGPA reveals that the complaint meets the criteria for reprisal, a formal investigation is initiated. In most cases, the formal investigation is conducted by either DAIG or the OIG superior to the OIG that received the allegation. In some cases, with DAIG approval, the IG office that received the initial complaint may be directed to conduct the investigation. On completion, the results of the investigation must be forwarded through IG channels to DAIG and DoDIG for final approval.²⁶ Officials identified by the IG as having engaged in reprisal are termed "Responsible Management Officials" (RMOs).

The DoDIG assesses either the "declination" or the results of the formal whistleblower investigation, as applicable in a given case, and returns its final determination as to the sufficiency of the findings to DAIG. In turn, the DAIG informs the complainant of the final determination in the case.

Organization of the XVIII Airborne Corps and the Fort Bragg Office of the Inspector General (FB OIG):

From 2002 to 2003, portions of the XVIII Airborne Corps deployed to Afghanistan. [REDACTED] the Primary IG, together with certain other personnel of the FB OIG, deployed with the Corps to provide IG services in-theater and remained in Afghanistan from May 2002 to May 2003. In January 2005, portions of XVIII Airborne Corps again deployed for what was projected to be a year-long

²⁴ AR 20-1, para. 8-9c(2) [Tab A-1]. *The Assistance and Investigations Guide*, June 2004, para. 2 [Tab A-6], further clarifies that such contact is to be initiated within 2 working days. The recent update to AR 20-1 dated February 1, 2007, is consistent with the "2 working day" standard established by the June 2004 version of *The Assistance and Investigations Guide*.

²⁵ DoDD 7050.6, para. 5.1.3 [Tab A-5].

²⁶ DoDD 7050.6, para. 5.1.5 [Tab A-5].

four of duty in Iraq. Once again, from January 24, 2005 through on or around January 21, 2006, [REDACTED] deployed to Iraq with an element of the FB OIG to support the XVIII Airborne Corps. During both of [REDACTED] deployments, Department of Army civilians, soldiers not selected for deployment, and mobilized reservists continued FB OIG operations stateside at Fort Bragg, North Carolina. [REDACTED] an activated Individual Mobilization Augmentee (IMA),²⁷ served as the Primary FB IG during the period of [REDACTED] 2005-2006 deployment to Iraq.

It was during [REDACTED] deployment to Iraq and shortly after his January 21, 2006 return to Fort Bragg, North Carolina, that most of the events at issue in the OSC-referred allegations occurred.

Army IG offices are generally divided into three operational disciplines: Investigations,²⁸ Assistance,²⁹ and Inspections,³⁰ reflecting the function for which each section is responsible. Several of the OSC-referred allegations at issue appear to involve debate as to which section in the FB OIG should have been tasked to handle a certain case. The listing below documents the general structure and the of the XVIII Airborne Corps and FB OIG in the 2005-2006 period and the duty positions of key OIG witnesses to the events underlying the OSC-referred allegations:

FB OIG—2005-2006:

Primary IG

[REDACTED] Individual Mobilization Augmentee (IMA)

Assistance and Investigations Division

[REDACTED] Deputy IG, GS13

Assistance

[REDACTED] Chief, GS12

Investigations

[REDACTED] Chief, GS12
[REDACTED] Assistant IG, GS11

²⁷ Individual Mobilization Augmentees (IMAs) are reserve component soldiers who are assigned to a particular duty position in the Active Army. In the context of performing his reserve duty, the IMA trains to perform the duties of the Active Army position. When the Active Army soldier who holds the position is designated for deployment, the IMA is mobilized to serve in the position during that deployment with a view to ensuring continuity of operations in the rear.

²⁸ AR 20-1, Ch. 8 [Tab A-1]. The investigation function encompasses the investigation of allegations of misconduct, to include military reprisal allegations, and, as appropriate, to monitor the referral of, and subsequent action on, these allegations.

²⁹ AR 20-1, Ch. 7 [Tab A-1]. The assistance function generally focuses on rendering assistance to individual complainants.

³⁰ AR 20-1, Ch. 6 [Tab A-1].

Inspections Division

(b)(7)(C)

Deployed to Iraq

(b)(7)(C)

Primary IG

(b)(7)(C)

SUMMARY OF EVIDENCE AND INVESTIGATIVE FINDINGS

The evidence and investigative findings applicable to each allegation referred by OSC are summarized below.

OSC Allegation 1:

Allegation: That (b)(7)(C) ignored the requirements of AR 20-1 as it related to the investigation of whistleblower reprisal allegations and the substantial and preponderant evidence of reprisal in the case of (b)(7)(C). The complainants assert that (b)(7)(C) Brigade Commander, (b)(7)(C) had refused to provide (b)(7)(C) a **Complete-the-Record** Non-Commissioned Officer Evaluation Report (NCOER) in retaliation for her previous request for assistance from the FB OIG. The complainants further allege that subsequently (b)(7)(C) delayed unduly the issuance of (b)(7)(C) **Annual NCOER**, so as to downgrade her duty position and the concomitant evaluation of her performance. The complainants allege that in response to (b)(7)(C) assertion that the delay in issuance of her **Annual NCOER** constituted continued reprisal, (b)(7)(C) ordered the case closed to protect (b)(7)(C).

Summary of Findings: By a preponderance of the evidence, this allegation is unsubstantiated. (b)(7)(C) properly applied the Army Regulation governing NCOERs in determining that (b)(7)(C) was not authorized a **Complete-the-Record** NCOER because she had already received an **Annual NCOER** for service in essentially the same duty position. Even had (b)(7)(C) 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 (b)(7)(C) 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 (b)(7)(C) whistleblower reprisal allegation in this regard was not warranted. (b)(7)(C) appropriately directed (b)(7)(C) to address (b)(7)(C) subsequent complaint about her **Annual NCOER**. The 2005 **Annual NCOER** credited (b)(7)(C) with performing essentially the same duties as had her 2004 NCOER; she received the same extremely high marks on both NCOERs. The delay in issuing (b)(7)(C) **Annual** evaluation did not constitute either an "unfavorable personnel action" or the "withholding of a favorable personnel action." Given that

[REDACTED] complaint regarding her **Annual** NCOER did not appear to meet the criteria for whistleblower reprisal, there was no requirement for the FB OIG to inform DAIG of the matter. [REDACTED] direction that [REDACTED] "work" the complaint in no way precluded addressing the matter as a whistleblower complaint were new evidence to be developed, however.

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-4], 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 Division, promptly by telephone (within 2 working days) for specific instructions regarding how to proceed." *The Guide* provides that the field IG should be prepared to respond to the following specific questions:

- What protected communications (PCs) does the soldier claim he/she made?
- To whom were they made?
- When were they made?
- What matters were addressed in the PC (i.e., gross mismanagement, waste, public safety, abuse, etc.)?
- What were the unfavorable personnel actions alleged by the soldier?
- Who were the responsible Army officials alleged by the soldier to have taken or threatened the personnel action?
- When were the personnel actions against the soldier taken or threatened?
- When did the soldier first become aware of the personnel actions?

The Guide, Section 11-1, paragraph 5, further provides that the "[i]f, as a result of the coordination with WIOB, DAIG—Assistance Division, it is determined that the soldier's allegations appear to meet the criteria for coverage under the [whistleblower] law, then the IG receiving the complaint will be directed by the

WIOB to forward the case to either their MACOM (Major Command) IG or to WIOB for . . . preliminary analysis”

The Guide goes on to state that the PA/PI/IGPA will determine whether the complaint meets the criteria for coverage under the Military Whistleblower Statute and whether a formal investigation is warranted. If it is determined during PA/PI/IGPA that the soldier's allegations do not appear to meet the criteria, the MACOM IG will forward the case via IG channels to WIOB, DAIG—Assistance Division, for further review and reporting to IG, DoD. If the PA determines that the soldier's allegations meet the criteria, then the MACOM IG will coordinate with WIOB, DAIG—Assistance Division, to determine which whistleblower investigation strategy to use and then proceed with that strategy . . . [Tab A-6]

(4) *The Assistance and Investigations Guide*, January 2006 [Tab A-7], 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 Division, within two working days using the Whistleblower Advisement (below).” The “Whistleblower Advisement” analysis set forth in the 2006 version of *The Guide* is comprised of essentially the same list of questions set forth in the 2004 edition:

- What protected communications (PCs) does the soldier claim he/she made or prepared?
- To whom were they made?
- When were they made?
- What matters were addressed in the PC (i.e., gross mismanagement, waste, public safety, abuse, etc.)?
- What were the unfavorable personnel actions alleged by the soldier?
- Who were the responsible management officials (RMOs) alleged by the soldier to have taken or threatened the personnel action?
- When were the personnel actions against the soldier taken or threatened?
- When did the soldier first become aware of these personnel actions?

The 2006 iteration of *The Guide* at Section 11-1, paragraph 3, goes on to provide that the upon receipt of the “whistleblower advisement” and complaint document, WIOB . . . will refer the case to the appropriate IG for Preliminary Inquiry (PI) to determine whether the allegation meets the criteria for whistleblower reprisal. Paragraph 4 of this same section of *The Guide* states that “[a] PI will address the questions of whether a PC was made or prepared and if unfavorable personnel action was taken or threatened, if a favorable personnel action was withheld or threatened to be withheld A PI can result only in a recommendation that the case be declined or that more investigation is required. A declination would be indicated if there was no PC or no unfavorable personnel action. . . . If the evidence indicates there was a PC and there was unfavorable personnel action

... then you must conduct an inquiry or investigation. WIOB will maintain oversight of all Whistleblower cases."

(5) AR 623-205, *Noncommissioned Officer Evaluation Reporting System*, 15 May 2002 **Tab A-9**,³¹ prescribes the policies and procedures for the Noncommissioned Officer Evaluation Reporting System.

(a) AR 623-205, Chapter 3, Section V, provides that only evaluation reports authorized by the regulation will be submitted.

(b) AR 623-205, paragraph 3-29a provides that an **Annual** report will be submitted 12 months after the ending month of the last report.

(c) AR 623-205, paragraph 3-33 provides as follows with regard to the issuance of a **Complete-the-Record** NCOER:

3-33. Complete-the-Record Report

a. At the **option of the rater** (emphasis added), a Complete-the-Record Report may be submitted on an NCO who is about to be considered by a DA centralized board for promotion, school, or CSM selection, provided the following conditions are met:

(1) The rated NCO must be in the zone of consideration for a centralized promotion board

(2) The rated NCO must have been under the same rater for at least 90 rated days as of the ending month established in the message announcing the zones of consideration.

(3) The rated NCO **must not** (emphasis added) **have received a previous report for the current duty position** (emphasis added)

b. Complete-the-Record reports are optional. Therefore, the absence of such a report from the Official Military Personnel File at the time of the board's review will not be a basis to request standby reconsideration unless the absence is due to administrative error or delay in the processing at the U.S. Army Enlisted Records and Evaluation Center.

(d) AR 623-205, paragraphs 1-4b(1)(j) and 3-36h, addresses the timely submission of NCOERs, mandating that the issuing command will forward

³¹ Note that AR 623-205 was superseded by AR 623-3, *Evaluation Reporting System*, dated June 15, 2006. That regulation was again revised effective August 10, 2007. All references in the instant report to this regulation are to the 15 May 2002 version of AR 623-205, however, as it was the regulation applicable to the adjudication of SFC Clark's complaints **Tab A-9**.

originals of all completed reports by first-class mail in sufficient time to reach the U.S. Army Enlisted Records and Evaluation Center not later than 60 days after the ending month of the report.

Evidence:

The evidence indicates that four Inspector General case files were opened to address allegations made by [REDACTED] (1) Case Number FZ 06-0007³² [Tab B-1]; (2) Case Number FJ 06-0107³³ [Tab B-2]; (3) Case Number FJ 06-0155³⁴ [Tab B-3]; and (4) Case Number FJ 06-0218³⁵ [Tab B-4].

Regarding [REDACTED] first case file, Number FZ 06-0007 [Tab B-1], SFC Clark Case File-1: [REDACTED] visited the FB OIG on September 15, 2005, and made two allegations of reprisal. First, [REDACTED] alleged that [REDACTED] her Brigade Commander,³⁶ had reprisal against her for a prior protected communication with the IG in July 2005³⁷ by declining to provide her with a **Complete-the-Record**³⁸ NCOER for consideration by a Department of the Army centralized promotion board convened to consider her, among others, for promotion to [REDACTED]. [REDACTED] asserted that the **Complete-the-Record** NCOER would have covered the rating period from December 2004 to August 2005 [Tab B-4m], [REDACTED] Case File 4]. She further stated that she had advised her rater, [REDACTED] about her eligibility for promotion to

³² Case Number FZ 06-0007, opened on October 14, 2005, closed October 17, 2005 [Tab B-1].

³³ Case Number FJ 06-0107, opened on December 16, 2005, closed January 5, 2006 [Tab B-2].

³⁴ Case Number FJ 06-0155, opened on January 13, 2006, closed January 20, 2006 [Tab B-3].

³⁵ Case Number FJ 06-0218, opened on February 2, 2006, closed February 22, 2006 [Tab B-4].

³⁶ Throughout the exhibits, the Brigade to which [REDACTED] was assigned, the XVIII Airborne Corps Headquarters Brigade, is often referred to as the "Dragon Brigade," no doubt because of the dragon on the unit's identification patch.

³⁷ [REDACTED] July 2005 communication with the FB OIG was presumed to be a "protected communication" by the members of the FB OIG who worked her subsequent whistleblower reprisal complaints and by the FORSCOM OIG investigating officers (IOs) who investigated the OSC-referred allegations relating to [REDACTED]. Similarly, for purposes of this report, it is presumed that [REDACTED] engaged in a protected communication in July 2005. The record reflects that on July 26, 2005, [REDACTED] had sought assistance from the FB OIG, alleging that [REDACTED] (the commander of the "provisional" rear detachment of the "Dragon Brigade" that operated stateside at Fort Bragg, North Carolina, while the main body of the "Dragon Brigade" was deployed to Iraq under the command of [REDACTED]) was attempting improperly to influence the results of a Report of Survey, an investigation to assess liability for missing government property, that had been initiated against her, in her role as the manager of the Brigade Property Book. [REDACTED] alleged that [REDACTED] had directed further investigation into the circumstances surrounding the missing property even though the legal office had found the Report of Survey findings against her to be legally insufficient. The FB OIG investigated [REDACTED] complaints and found that the unit had employed improper property purchasing and accountability practices [Tab B-5a]. On August 12, 2005, the FB OIG advised [REDACTED] that its inquiry had been concluded, resulting in recommendations to the chain of command to take appropriate action to correct the issues she had brought to light. The FB OIG further advised [REDACTED] of its finding that she had been afforded appropriate due process rights throughout the Report of Survey process, and noted that the review and appeal process had not yet been brought to conclusion [Tab B-5b].

³⁸ AR 623-205, para. 3-33 [Tab A-9].

[REDACTED] and the need to submit the **Complete-the-Record** NCOER and other documents for the promotion board's consideration by September 15, 2005 [Tab B-1f, Case File 1, written statement, p. 1].

According to [REDACTED] her "rater," [REDACTED] directed her to prepare the **Complete-the-Record** NCOER. [REDACTED] did so and submitted her draft to [REDACTED] on September 1, 2005. At [REDACTED] direction, [REDACTED] incorporated one change in the draft and submitted the NCOER for review and signature by her "senior rater," [REDACTED]³⁹ the commander of the "provisional" rear detachment of the "Dragon Brigade."⁴⁰ The intent was that once [REDACTED] completed his portion of the evaluation, he would submit it for review and signature by [REDACTED] the Brigade Commander and the designated "reviewer" for [REDACTED] NCOER.⁴¹ [REDACTED] informed [REDACTED] that he had advised [REDACTED] and [REDACTED] of the time constraints associated with processing the **Complete-the-Record** NCOER. [REDACTED] asserted to the FB OIG that her senior rater, [REDACTED] had allowed the evaluation to sit unaddressed, on his desk, until on or about September 13, 2005, when [REDACTED] asked that one correction be made to the report. [REDACTED] incorporated the correction. [REDACTED] signed the NCOER and forwarded an electronically scanned copy of the evaluation to [REDACTED] who was deployed in Iraq [Tab B-1f, Case File 1, written statement, p. 1].

[REDACTED] informed the FB OIG that she was surprised to learn that [REDACTED] was to serve as the "reviewer" for her NCOER because he had been deployed to Iraq while she had remained stateside at Fort Bragg. Regardless, [REDACTED] was advised that [REDACTED] would serve as her "reviewer" because he wanted to retain jurisdiction for all NCOERs issued in the brigade headquarters. [REDACTED] told the FB OIG that she had advised the rating chain of the time constraints for completing and submitting the **Complete-the-Record** NCOER and that no one had apprised her of any problems in meeting the short suspense [Tab B-1f, Case File 1, written statement, p. 1]. [REDACTED] concluded that the "delaying" actions of [REDACTED] and [REDACTED] had been in retaliation for her earlier protected communication to the FB OIG in July 2005.

³⁹ It is important to distinguish between [REDACTED] commander of the "provisional" rear detachment of the "Dragon Brigade" (who was involved in the matters raised by [REDACTED] OSC Allegation 1) and [REDACTED] commander of the 35th Signal Brigade (who is referenced in the allegations made by [REDACTED] and the allegation regarding [REDACTED] OSC Allegations 3, 4, and 5).

⁴⁰ A "provisional rear detachment" unit is a "temporary" unit created when the main body of a permanently constituted unit, in this case the "Dragon Brigade" deploys. A provisional unit is comprised of the soldiers, civilians, and mobilized reservists who do not deploy, but remain at home station to continue the execution of the unit's mission in the absence of the main body and to provide requisite home station support and liaison, from afar, to the deployed main body. When the main body of the unit redeploys and returns to home station, the provisional rear detachment and the main body are reintegrated into a single unit.

⁴¹ The evaluation chain for a non-commissioned officer (NCO) is comprised of the "rater," who is usually the NCO's direct supervisor; the "senior rater," the second-level supervisor; and the "reviewer," a supervisor in the chain of command above the "rater" and "senior rater."

[REDACTED] 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, Case File 1, statement, p. 2].

Because [REDACTED] 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, [REDACTED] the FB Assistant IG assigned to [REDACTED] case, ultimately prepared a written “declination memorandum,” documenting that [REDACTED] 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, Case File 1, Fort Bragg declination memo]. Specifically, [REDACTED] indicated that the command’s failure to provide [REDACTED] 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, [REDACTED] 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 [REDACTED] for promotion to [REDACTED] [Tab B-4], Case File 4, 2004 NCOER,⁴⁵ and (2) even had [REDACTED] been eligible for a **Complete-the-Record** NCOER (which, under terms of the regulation, she was not), the issuance of such an evaluation

⁴² [REDACTED] 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. [REDACTED] 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, Case File 1, case notes, p. 1], [REDACTED] 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, Case File 1, case notes, p. 2] and dated September 27, 2005, indicated that the FB OIG confirmed with a [REDACTED] and [REDACTED] 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 [REDACTED] 2004 Annual NCOER and proposed by [REDACTED] 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 [REDACTED] rating her for her current position.” [Tab B-1a, 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 IG 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 [REDACTED] 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, [REDACTED] 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(1)j 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-15, [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

Brigade S-4 as initially proposed by [redacted] [Tab C-1b, pp. 4-5].⁵¹

[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, 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, p. 6, Tab C-2a, 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-4, Case File 4, 2004 Annual NCOER, Tab B-4p, Case File 4, 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.

[REDACTED] was not present at either of the February 2006 meetings between [REDACTED] and [REDACTED] but he subsequently testified to the FORSCOM IOs investigating the OSC-referred allegations, that after those meetings, [REDACTED] advised him that [REDACTED] believed that [REDACTED] and [REDACTED] had "failed to stop [REDACTED] from reprising against [REDACTED] and that [REDACTED] 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]. [REDACTED] also testified that he was assured by [REDACTED] that he had pressed [REDACTED] to consider the merits of reexamining complaints, but that [REDACTED] was angry at them [REDACTED] and [REDACTED] and thus they concluded that they should close the case as [REDACTED] demanded [Tab C-1b; p. 6]. [REDACTED] sworn statement goes on to say that then closed the case as ordered by [REDACTED] "through" [REDACTED] [Tab C-1b; p. 6]. [REDACTED] 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].

[REDACTED] later annotated the FB OIG case notes [Tab B-4a; Case File 4, case notes, p. 2] to reflect that he had notified [REDACTED] 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 [REDACTED] spoke telephonically with [REDACTED] who acknowledged that she understood [Tab B-4a; Case File 4, case notes, p. 2]. [REDACTED] testimony to the FORSCOM IO investigating the OSC-referred allegations also provides that he notified [REDACTED] of these findings and closed the case as an Assistance case [Tab C-1; p. 6].

[REDACTED] provided testimony to [REDACTED] on August 10, 2006; [REDACTED] testimony was transcribed and summarized in FB OIG MFR dated December 15, 2006 [Tab C-2b; p. 2].⁵³ In his testimony, [REDACTED] stated that he believed that [REDACTED] did not have a valid whistleblower complaint regarding her late Annual NCOER because there was no unfavorable personnel action. [REDACTED] 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 [REDACTED] had directed that the case be closed as an Assistance case [Tab C-2b; p. 2].

⁵³ [REDACTED] 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 [redacted] duties and responsibilities for the period covered by the evaluation. [redacted] 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. [redacted] 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, [redacted] p. 14]. [redacted] testified that he heard nothing further about [redacted] situation until after he redeployed to Fort Bragg on or about January 21, 2006.

[redacted] testified that when he returned from deployment to Iraq he undertook immediately to reassert control of the FB OIG. [redacted] recalls that in late February 2006, he observed on [redacted] desk an undated handwritten complaint apparently taken from [redacted] and prepared by [redacted]. This upset [redacted] because it appeared to him that [redacted] and [redacted] 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, [redacted] questioned [redacted] and [redacted] to assess what they had been doing to process [redacted] complaint [Tab C-10a, [redacted] p. 14].

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

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] 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

Division, promptly by telephone (within 2 working days) for specific instructions regarding how to proceed." *The Guide* provides that the field IG should be prepared to respond to the following specific questions:

- What protected communications (PCs) does the soldier claim he/she made?
- To whom were they made?
- When were they made?
- What matters were addressed in the PC (i.e., gross mismanagement, waste, public safety, abuse, etc.)?
- What were the unfavorable personnel actions alleged by the soldier?
- Who were the responsible Army officials alleged by the soldier to have taken or threatened the personnel action?
- When were the personnel actions against the soldier taken or threatened?
- When did the soldier first become aware of the personnel actions?

The Guide, Section 11-1, paragraph 5, further provides that the "[i]f, as a result of the coordination with WIOB, DAIG—Assistance Division, it is determined that the soldier's allegations appear to meet the criteria for coverage under the [whistleblower] law, then the IG receiving the complaint will be directed by the WIOB to forward the case to either their MACOM (Major Command) IG or to WIOB for . . . preliminary analysis . . ."

The Guide goes on to state that the PA/PI/IGPA will determine whether the complaint meets the criteria for coverage under the Military Whistleblower Statute and whether a formal investigation is warranted. If it is determined during PA/PI/IGPA that the soldier's allegations do not appear to meet the criteria, the MACOM IG will forward the case via IG channels to WIOB, DAIG—Assistance Division, for further review and reporting to IG, DoD. If the PA determines that the soldier's allegations meet the criteria, then the MACOM IG will coordinate with WIOB, DAIG—Assistance Division, to determine which whistleblower investigation strategy to use and then proceed with that strategy . . . [Tab A-6].

(4) *The Assistance and Investigations Guide*, January 2006 [Tab A-7], 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 Division, within two working days using the Whistleblower Advisement (below)." The "Whistleblower Advisement" analysis set forth in the 2006 version of *The*

Guide is comprised of essentially the same list of questions set forth in the 2004 edition:

- What protected communications (PCs) does the soldier claim he/she made or prepared?
- To whom were they made?
- When were they made?
- What matters were addressed in the PC (i.e., gross mismanagement, waste, public safety, abuse, etc.)?
- What were the unfavorable personnel actions alleged by the soldier?
- Who were the responsible management officials (RMOs) alleged by the soldier to have taken or threatened the personnel action?
- When were the personnel actions against the soldier taken or threatened?
- When did the soldier first become aware of these personnel actions?

The 2006 iteration of *The Guide* at Section 11-1, paragraph 3, goes on to provide that the upon receipt of the "whistleblower advisement" and complaint document, WIOB . . . will refer the case to the appropriate IG for Preliminary Inquiry (PI) to determine whether the allegation meets the criteria for whistleblower reprisal. Paragraph 4 of this same section of *The Guide* states that "[a] PI will address the questions of whether a PC was made or prepared and if unfavorable personnel action was taken or threatened, if a favorable personnel action was withheld or threatened to be withheld A PI can result only in a recommendation that the case be declined or that more investigation is required. A declination would be indicated if there was no PC or no unfavorable personnel action. . . . If the evidence indicates there was a PC and there was unfavorable personnel action . . . then you must conduct an inquiry or investigation. WIOB will maintain oversight of all Whistleblower cases."

Evidence:

The evidence associated with [REDACTED] complaints is drawn from four Inspector General case files.⁵⁶

On September 1, 2004, [REDACTED] visited the Fort Bragg OIG and met initially with [REDACTED] [Tab C-1b] [p. 10] and later with [REDACTED] then an Assistant IG at the FB OIG [Tab C-7e] [p. 2].

⁵⁶ The case designator assigned to an IG case identifies the Inspector General Office with primary responsibility for working the matter. FB OIG cases are identified by the letters "FJ"; FORSCOM OIG cases use the "FZ" designator. The four case files related to [REDACTED] include: Case Number FJ 04-0265, opened on January 25, 2005, closed August 12, 2005 [Tab B-8] [Case File 1]; Case Number FZ 05-0081, opened on January 25, 2005, closed January 9, 2006 [Tab B-9] [Case File 2]; Case Number FZ 06-0016, opened on October 27, 2005, closed January 27, 2007 [Tab B-10] [Case File 3]; Case Number FJ 06-0031, opened on October 27, 2005, closed December 5, 2005 [Tab B-11] [Case File 4].

(b)(7)(C) completed an IGAR alleging that her chain of command "mistreat[ed] soldiers across the board." Among (b)(7)(C) general complaints and the issues of greatest relevance to the OSC-referred allegation at issue were (b)(7)(C) allegations that (b)(7)(C) and (b)(7)(C) (the (b)(7)(C) and (b)(7)(C) respectively, of B Company, 327th Signal Battalion, to whom (b)(7)(C) reported in her capacity as platoon sergeant), in concert with (b)(7)(C) (the CSM of the 327th Signal Battalion, the parent unit of B Company),⁵⁸ had removed her from her position as a platoon sergeant and downgraded her NCOER in reprisal for her having made a complaint to her Brigade Equal Opportunity (EO) representative in July 2004 [Tab B-8c, Case File 1, Synopsis, p. 1]. (b)(7)(C) prior EO complaint had focused on her perceptions that soldiers in her platoon were treated poorly when compared with the treatment afforded the soldiers of other platoons in the company.

In verbal discussions with the FB OIG, documented in the case synopsis, (b)(7)(C) asserted that after evaluating her July 2004 complaint, the Brigade EO representative had determined that the concerns she raised were not EO-appropriate, but rather were command issues. Accordingly, the EO representative had forwarded (b)(7)(C) concerns to her company leadership, (b)(7)(C) and (b)(7)(C) for action as appropriate. (b)(7)(C) alleged that subsequently, on August 26, 2004, she had received an NCOER from (b)(7)(C) and (b)(7)(C) that NCOER had reflected a downgrade in her expected evaluation of her performance of duty as platoon sergeant [Tab B-8c, Case File 1, Synopsis, p. 1]. (b)(7)(C) had refused to sign the NCOER.⁵⁹ (b)(7)(C) reported that on August 31, 2004, she had been ordered by (b)(7)(C) to report to a company formation that was forming up outside the building; allegedly because (b)(7)(C) raised his voice at her and cursed her, (b)(7)(C) refused to obey the order and went instead to seek an audience with (b)(7)(C) about her NCOER. Based on her disobedience, (b)(7)(C) advised (b)(7)(C) that he had lost confidence in (b)(7)(C) and requested that she be moved from B Company. The very next day, (b)(7)(C) was re-assigned to C Company, as a section sergeant, a position of lesser stature than that she had held in B Company [Tab B-8c, Case File 1, Synopsis, p. 1]. (b)(7)(C) also asserted that her chain of command had improperly reformulated an NCOER she had issued to (b)(7)(C) a soldier for whom she was responsible in her role as platoon sergeant. (b)(7)(C) asserted that

⁵⁷ Note that the report reflects several different spellings of (b)(7)(C) last name.

⁵⁸ See *supra* note 4 for a discussion of the organization of the XVIII Airborne Corps and command and non-commissioned officer leadership relationships.

⁵⁹ Note that it is in the context of describing the events associated with her refusal to sign her NCOER that (b)(7)(C) appears to have first mentioned (b)(7)(C) to members of the FB OIG. She asserts that after receiving the NCOER from (b)(7)(C) and (b)(7)(C) she had consulted with (b)(7)(C) and (b)(7)(C) both of whom had advised her to sign the NCOER [Tab B-8c, Case File 1, Synopsis, p. 1].

[REDACTED] had substituted himself as [REDACTED] rater, in direct contravention of the published rating chain that established [REDACTED] as [REDACTED] rater [Tab B-8c, Case File 1, Synopsis, p. 1].

In her September 1, 2004 discussions with the FB OIG, [REDACTED] requested the IG's assistance in facilitating her move to a new duty position outside the 35th Signal Brigade to enable her to make a "clean start." [Tab B-8c, Case File 1, Synopsis, p. 1]. It is important to note that [REDACTED] IGAR made no reference to or allegation against [REDACTED] who served as the Command Sergeant Major of the 35th Signal Brigade, the parent unit of the 327th Signal Battalion and its subordinate companies.

There is no indication that the FB OIG undertook to contact FORSCOM OIG or DAIG to discuss or report [REDACTED] September 1, 2004 allegations of reprisal. The case synopsis indicates only that [REDACTED] advised [REDACTED] to request that her Battalion Commander conduct a Commander's Inquiry into her assertions of error and injustice regarding her NCOER and reassignment [Tab B-8c, Case File 1, Synopsis, p. 1].

While the FB OIG's PA/PI/IGPA of [REDACTED] complaint was ongoing, DAIG received a letter, dated November 9, 2004, from Senator Elizabeth Dole, referring a complaint from her constituent, [REDACTED] for the Army's response. [REDACTED] letter of complaint to Senator Dole contained vague references to reprisal, but did not claim that [REDACTED] was the subject of reprisal, nor did it name any person [REDACTED] believed to be responsible for any such reprisal. The letter mentioned the "Brigade CSM" (although there was no name provided, it was later presumed to refer to [REDACTED]) having made a statement about removing [REDACTED] from Fort Bragg, but did not assert that the CSM did anything improper or that the statement was made in reprisal for any protected communication [REDACTED] had made. In her complaint to Senator Dole, [REDACTED] indicated that she had visited the FB OIG regarding matters contained in her letter but had not yet received any word from that office [Tab B-8d, Case File 1, Senator Dole letter]. Although the DAIG did not formally transmit Senator Dole's letter to FORSCOM until December 16, 2004 and FORSCOM did not forward the letter to the FB OIG until January 25, 2005,⁶⁰ it appears that the FB OIG was informally advised of the letter and its contents because FB OIG investigators discussed the Senator's communication in an

⁶⁰ On December 16, 2004, DAIG assigned the Senator Dole letter to the FORSCOM IG for action; on January 25, 2005, FORSCOM further assigned it for resolution to the FB OIG. In forwarding the complaint to the FB OIG, the FORSCOM OIG email communication specifically directed the FB OIG to review the case for a possible military whistleblower reprisal violation and to forward the completed report to the FORSCOM OIG, which would send the case file on to DAIG, which would then respond to Senator Dole [Case File 2, Tab B-9a, case notes, p. 4, Tab B-9b, FORSCOM letter to FB OIG, p. 1, Tab B-9c, DAIG letter to FORSCOM OIG, p. 1].

interview they conducted with [REDACTED] on November 23, 2004 [Tab B-8e, Case File 1, testimony, p. 43].⁶¹

In a November 23, 2004 interview conducted by then [REDACTED] Chief of the Inspections Division, and [REDACTED] provided sworn testimony elaborating on her complaints against her chain of command [Tab B-8e, Case File 1, testimony]. [REDACTED] testimony centered on her receipt of the downgraded NCOER, her move from B Company to C Company, and the situation regarding [REDACTED] NCOER. In her testimony, [REDACTED] recalled speaking to both [REDACTED] and [REDACTED] during her September 1, 2004 visit to the FB OIG [Tab B-8e, Case File 1, testimony, pp. 23, 30-31]; although [REDACTED] initially handled her complaint, [REDACTED] testified that she had spoken also to [REDACTED] that same day about whistleblower reprisal and that he had told her then that he didn't "think it fit." [Tab B-8e, Case File 1, testimony, p. 23]. It was during her sworn testimony of November 23, 2004, that [REDACTED] also alleged for the first time that [REDACTED], the 35th [REDACTED] who supervised both [REDACTED] and [REDACTED] told her that "if I keep complaining, running to the IG, that he'll move [me] off Fort Bragg because [I] wasn't Fort Bragg material anyway." [Tab B-8e, Case File 1, testimony, pp. 32, 33].⁶² [REDACTED] testified that she felt [REDACTED] was "trying to" threaten her with his comments [Tab B-8e, Case File 1, testimony, p. 33].

In the only reference to [REDACTED] in the four case files pertaining to [REDACTED] allegations, the opening section of the transcript of November 23, 2004 interview indicates only that [REDACTED], then the [REDACTED] had directed the interview [Tab B-8e, Case File 1, testimony, p. 1]. There is no evidence that [REDACTED] issued a written directive for the interview. It is more likely that, in accordance with standard Inspector General procedures, [REDACTED] was briefed by a member of the FB OIG staff on the allegations set forth in [REDACTED] September 1, 2004 IGAR (and perhaps on the letter from Senator Dole) and verbally directed his staff to interview [REDACTED].

On December 16, 2004, DAIG formally assigned the Senator Dole letter to the FORSCOM IG for action [Tab B-9c, Case File 2, DAIG forwarding letter]. FORSCOM OIG case notes reflect that [REDACTED]

⁶¹ It is reasonable to presume that receipt of Senator Dole's letter may have prompted the FB OIG to undertake the interview of [REDACTED].

⁶² It is important to note that [REDACTED] had been assigned to Fort Bragg on a "compassionate reassignment" to permit her to care for her ailing mother who had suffered a cerebral stroke and had been placed in a nursing home in the local area near Fort Bragg. The Army provides for soldiers to receive a "compassionate reassignment" based on sensitive family or personal needs. Usually, soldiers can expect to be stabilized for at least one year in the location or with the unit to which they are compassionately reassigned.

complaints were viewed as "possible WB but is a non-WB reprisal at this time. Will include instructions to check for 1034 complaint in referral memo." [Tab B-9a] [Case File 2, FORSCOM case notes, p. 4]. On January 25, 2005, FORSCOM further assigned the case for action to the FB OIG. In forwarding the complaint to the FB OIG, the FORSCOM OIG email communication specifically directed the FB OIG to review the case for a possible military whistleblower reprisal violation and to forward the completed report to the OIG FORSCOM, which would send the case file on to DAIG, which would then respond to Senator Dole [Case File 2, Tab B-9a, case notes, p. 4; Tab B-9b, FORSCOM letter to FB OIG, p. 1; Tab B-9c, DAIG letter to FORSCOM OIG, p. 1]. It is important to understand that at this point responsibility for the management of the FB OIG had transferred to [redacted] [redacted] had deployed to Iraq on January 24, 2005 and would not return until on or about January 21, 2006.

Inexplicably, the FB OIG case file reflects no further action on this case until June 17, 2005, when it was assigned to [redacted] [Tab B-8c] [Wilson Case File 1, FB OIG case notes, p. 7]. FORSCOM case notes indicate that on two occasions: April 25, 2005 and 24 May 2005, FORSCOM received requests from [redacted] for extensions of time to work the case [Tab B-9a] [Case File 1, FORSCOM OIG case notes, p. 4]. It was not until August 11, 2005, however, that the FB OIG forwarded its Report of Investigative Inquiry (ROI), authored by [redacted] to FORSCOM, where it was received on August 24, 2005, and first reviewed on September 7, 2005 [Tab B-8c] [Case File 1, FB OIG case notes, p. 7; Tab B-9a] [Case File 2, FORSCOM OIG case notes, p. 4]. This initial ROI addressed [redacted] complaint that she had been reassigned to a different unit because she had registered a command-related complaint with the Brigade EO representative only as a violation of AR 600-20, paragraph 5-8c⁶³ and made no reference whatsoever to any allegation against [redacted] [Tab B-8f] [Case File 1, initial ROI]. The FORSCOM OIG case notes reflect that the FORSCOM reviewing officer spoke with [redacted] and advised him that [redacted] allegations should have been addressed as violations of the Military Whistleblower Statute. The FORSCOM reviewing officer recommended that [redacted] "do an advisement for the [whistleblower complaint] and take the AR 600-20 allegation out of the ROI and address it separately in [the whistleblower] inquiry." [Tab B-9a] [Case File 2, FORSCOM OIG case notes, p. 4]. It appears that [redacted] complied with these instructions and on October 21, 2005, forwarded a corrected ROI to FORSCOM [Tab B-9a] [Case File 2, FORSCOM OIG case notes, p. 4]. This second iteration of the ROI focused predominantly on [redacted] allegations

⁶³ AR 600-20, *Army Command Policy*, dated May 13, 2002, para. 5-8c(1) [Tab A-10], provides that "Commanders and supervisors are prohibited from initiating any type of disciplinary or adverse action against any Soldier . . . because the individual registered a complaint . . . with an equal opportunity office."

regarding [REDACTED] NCOER.⁶⁴ References to the allegations that members of the chain of command had taken adverse against [REDACTED] in response to her EO complaint had been removed [Tab B-8g, Case File 1, revised ROII]. Instead, the revised ROII contained a statement that [REDACTED] allegation of reprisal . . . "fell under [0 USC 1034]'Whistleblower Reprisal' and was reported to DAIG Assistance Division" and investigated a separate matter, and that accordingly the ROII [did not] address any allegations of reprisal [Tab B-8g, Case File 1, revised ROII, pp. 2, 17].

In accordance with AR 20-1 procedures governing the intake of whistleblower reprisal allegations and the FORSCOM OIG directive to address properly [REDACTED] complaints, the FB OIG submitted a "whistleblower advisement" in [REDACTED] case to FORSCOM on October 21, 2005 [Tab B-9a, Case File 2, FORSCOM OIG case notes, p. 4]. On October 27, 2005, apparently after consultation with WIOB, DAIG—Assistance Division, the FORSCOM OIG authorized the FB OIG to conduct a PA/PI/IGPA into [REDACTED] reprisal allegations. [REDACTED] began to work the case actively [Tab B-9a, Case File 2, FORSCOM OIG case notes, p. 4; Tab B-10, Case File 3, p. 3] and on October 28, 2005, initiated efforts to re-interview [REDACTED] as part of the PA/PI/IGPA. Upon determining that [REDACTED] had deployed to Iraq and would not return to Fort Bragg until November 2005, [REDACTED] made an effort to contact her by email. [REDACTED] unit redeployed to Fort Bragg on November 20, 2005 and on November 30, 2005, [REDACTED] requested assistance from [REDACTED] who remained the [REDACTED] of the 35th Signal Brigade, in making [REDACTED] available for interview [Tab B-11a, Case File 4, case notes, p. 1].

On December 1, 2005, the [REDACTED] re-interviewed [REDACTED] and requested that she complete a "Reprisal Against Whistleblower Questionnaire." Both verbally in her sworn testimony to [REDACTED] [Tab B-11e, Case File 4, sworn statement to [REDACTED] pp. 4-5] and in writing in her "Questionnaire" responses [Tab B-11c, Case File 4, Whistleblower Questionnaire, pp. 2-3], [REDACTED] denied that any Army official reprisal against her for making a protected communication and stated, for the first time, that she had been informed of her pending reassignment from B Company to C Company in the "middle of July 2004," prior to her protected communication with the Brigade EO representative [Tab B-11c, Case File 3, Whistleblower Questionnaire, pp. 2-3; Tab B-11d, Case File 3, FB OIG request to DAIG, p. 2-4]. She indicated

⁶⁴ The ROII substantiated that [REDACTED] and another officer had acted improperly with regard to [REDACTED] NCOER. The ROII unsubstantiated the allegation that [REDACTED] had failed to initiate a commander's inquiry into [REDACTED] allegations of error or injustice in regard to her NCOER in violation of AR 623-205, *Noncommissioned Officer Evaluation Reporting System*, para. 6-3 [Tab A-9], and unsubstantiated the allegation that [REDACTED] had failed to take action when he received a written complaint from [REDACTED] through the Brigade Equal Opportunity Advisor, in violation of AR 600-20, para. 6-2g [Tab A-10].

that the move was based on her poor working relationship with [REDACTED] and was not in response to her protected communication [Tab B-11e]. Case File 4- [REDACTED] sworn statement to [REDACTED] pp. 4-5]. She further indicated that she, [REDACTED] and [REDACTED] met and resolved her EO complaint within several days after it had first been referred to the chain of command for action and that about this same time she had agreed to be moved to C Company [Tab B-11a]. Case File 4, case notes, p. 3]. [REDACTED] made no mention of [REDACTED] in either her sworn testimony or in her written "Questionnaire" responses. Accordingly, in his December 7, 2005 written analysis of the case and the companion "declination memorandum," [REDACTED] concluded that there were independent bases for the unfavorable personnel actions against [REDACTED] (i.e., her poor working relationship with [REDACTED]); determined that the complaint did not meet the criteria for whistleblower protection, and recommended that the complaint be declined under the provisions of DoD Directive 7050.6, *Military Whistleblower Protection* [Tab B-11b]. Case File 4, FB OIG declination memorandum, p. 2]. The declination of [REDACTED] reprisal case was approved by DoDIG on March 16, 2007 [Tab B-12, DoDIG concurrence].

Other than [REDACTED] having directed the interview of [REDACTED] in November 2004 (at which interview [REDACTED] first mentioned [REDACTED] and his comments to her), he is not mentioned in any of the four Inspector General files pertaining to [REDACTED]. Further, it is important to note that [REDACTED] was deployed to Iraq from January 24, 2005 through on or about January 21, 2006, the period during which most of the investigative activity in [REDACTED] case took place. Most significantly, there is no evidence indicating that any member of the FB OIG with knowledge of [REDACTED] complaint against [REDACTED] informed [REDACTED] about that complaint or discussed it with him in any way.

[REDACTED] testified that he briefed [REDACTED] on the [REDACTED] allegation after receiving [REDACTED] first complaint in September 2004, and that the case was then referred to [REDACTED] and [REDACTED] as action officers. He further testified that "instead of following procedures," [REDACTED] had decided not to advise DAIG of a potential reprisal allegation as required by AR 20-1 and that [REDACTED] had told him simply to call [REDACTED] to ensure that [REDACTED] knew about the Military Whistleblower Act [Tab C-1b]. [REDACTED] p. 10]. In his statement [REDACTED] indicated that he contacted [REDACTED] about these concerns in "fall 2004." [Tab C-1b]. [REDACTED] p. 11]. [REDACTED] asserted that due to [REDACTED] decisions and directives, a full inquiry into [REDACTED] allegations had never been conducted and that in violation of AR 20-1, neither a "whistleblower advisement" nor a "declination memorandum" ever had been processed.

[REDACTED] testified that when [REDACTED] first sought help from the FB OIG in September 2004, [REDACTED] had worked her case. [REDACTED] recalled

that [REDACTED] had been exploring the "teach and train angle" with [REDACTED] on the Whistleblower Protection Act, so that [REDACTED] would not implicate himself as a Responsible Management Official (RMO). [REDACTED] did not associate [REDACTED] with this decision to "teach and train." [REDACTED] testified recalling that [REDACTED] had directed an interview of [REDACTED] in which [REDACTED] and [REDACTED] had participated on November 23, 2004. [REDACTED] asserted that he did not know what had come of the case as it was not his to work and that his employment with the FB OIG had been terminated shortly after the November 2004 interview.⁶⁵ [REDACTED] was unaware of any discussion in the FB OIG in which it had been decided not to investigate [REDACTED] [Tab C-7e] [MER p. 2].

In their respective testimonies to the FORSCOM IOs investigating the OSC-referred allegations, [REDACTED] and [REDACTED] (the Primary IG in the FB OIG during [REDACTED] Iraq deployment), all recalled [REDACTED] case but none, to include [REDACTED] to whom [REDACTED] asserted that he reported [REDACTED] alleged act of reprisal, could recall whether or not [REDACTED] had been reported as a RMO [Tab C-2d, p. 1] [Tab C-8c, p. 1] [Tab C-6, p. 2]. Notably, [REDACTED] makes no assertion that [REDACTED] was involved in the matter in any way [Tab C-2d].

When informed by the FORSCOM IOs investigating the OSC-referred allegations that [REDACTED] had not been named as an RMO, none except [REDACTED] could shed light on why that decision had been made or who had made it. [REDACTED] stated that the decision not to handle the case as a reprisal case was based upon conversations with [REDACTED] and [REDACTED] and that she had never heard anything from [REDACTED] concerning the matter [Tab C-8, p. 2].

[REDACTED] testified that he probably received [REDACTED] case from [REDACTED].⁶⁶ He remembered [REDACTED] being implicated in the case. He further recalled that [REDACTED] had evidenced a completely different tone between her initial interview in November 2004 (in which he did not participate) and her December 2005 interview (in which he did participate) [Tab C-3c, pp. 1-2]. He further testified that in her December 2005 interview, [REDACTED] never raised the issue of [REDACTED] reprising against her and thus he did not pursue it. Additionally, [REDACTED] testified that no one ever directed him not to investigate [REDACTED] role in this matter and that

⁶⁵ For a detailed discussion of the termination of [REDACTED] employment with the FB OIG, see "Stand Alone" Issue, pp. 68-70 of text.

⁶⁶ Records of the FB OIG reflect that [REDACTED] was transferred to new duty assignment, in due course, on or about July 5, 2006. Given that case notes reflect that [REDACTED] assumed responsibility for [REDACTED] case in mid-June 2006, it seems likely that [REDACTED] transferred the case to him in preparation for her reassignment and departure from the FB OIG.

he had no knowledge bearing on the question of whether [REDACTED] had directed [REDACTED] merely to coach and teach [REDACTED] about avoiding whistleblower reprisal [Tab C-3c, [REDACTED] p. 2].

When interviewed, [REDACTED] did not recall [REDACTED] case at all. He denied, however, that he ever would have never squelched a potential reprisal allegation by declining to report the allegation to DAIG. Further, he noted that he would have found it unacceptable merely to have his subordinates discuss the Military Whistleblower States in a "teach and train" approach with a named RMO. [REDACTED] asserted that he would have been sensitive to any whistleblower reprisal complaint, and particularly to any allegation against [REDACTED] because he had long-held concerns about the leadership environment in the 35th Signal Brigade, [REDACTED] unit [Tab C-10b, [REDACTED] pp. 1-2].

Discussion:

The preponderance of evidence does not support the OSC-referred allegation that [REDACTED] directed [REDACTED] to take improper and insufficient action in response to a whistleblower reprisal allegation against [REDACTED].

When [REDACTED] first complained to the FB OIG on September 1, 2004, her IGAR made no reference to an allegation of reprisal against [REDACTED]. This complaint was worked by [REDACTED] and by [REDACTED]. There is no evidence that either [REDACTED] or [REDACTED] took any action to report [REDACTED] complaint to the FORSCOM OIG or to DAIG as a whistleblower matter. Although [REDACTED] letter to Senator Dole referenced her "Brigade CSM" (presumed to be [REDACTED]), the letter made no assertion that the "Brigade CSM" had wronged [REDACTED] in any way. It is clear that [REDACTED] did not articulate her reprisal allegation against [REDACTED] until her interview on November 23, 2004.

Although [REDACTED] authorized the November 23, 2004 interview of [REDACTED], there is no evidence in any of the four Inspector General case files pertaining to [REDACTED] that [REDACTED] ever was informed of the outcome of the interview or of the specific allegation against [REDACTED]. There is not the slightest intimation in any of the files that [REDACTED] directed that [REDACTED] become involved in the case or that [REDACTED] take any action to address [REDACTED] alleged reprisal against [REDACTED]. [REDACTED] deployed to Iraq on January 24, 2005 and did not return to Fort Bragg until on or about January 21, 2006, after the final FB OIG "declination" in the case had been sent forward to FORSCOM. There is no evidence that [REDACTED] had any further contact with the case, or the related evidence after authorizing the interview of [REDACTED] in November 2004.

Although [REDACTED] testified that [REDACTED] directed him merely to discuss the whistleblower law with [REDACTED] and not to report the matter to DAIG, no one else recalls [REDACTED] being involved in this case or directing this course of action. In particular, [REDACTED] supervisor, to whom [REDACTED] said he reported [REDACTED] alleged act of reprisal, had no recollection that [REDACTED] had been involved in the matter. [REDACTED] asserted that he had no recollection of the case; [REDACTED] testified to the FORSCOM IOs that he was unaware that [REDACTED] had filed an allegation of reprisal against [REDACTED] and denied he had ever directed the office not to handle the matter as a reprisal allegation.

The evidence indicates that although some members of the FB OIG may have recognized that [REDACTED] alleged comments to [REDACTED] may have constituted a potential violation of the Military Whistleblower Statute, no one acted on this recognition or brought the matter to [REDACTED] attention. It appears that a decision was made not to pursue [REDACTED] allegations of reprisal as violations of the Military Whistleblower Statute; the initial FB OIG ROII into [REDACTED] allegations briefly addressed matters related to [REDACTED] reprisal allegations solely in the context of the Army Regulation proscribing disciplinary action against a soldier for having made an EO complaint (not as a potential violation of the Military Whistleblower Statute). The initial ROII did not address the matter of [REDACTED] alleged threats at all. There is no evidence that this error was the result of action or inaction by [REDACTED] or, given that [REDACTED] was deployed for almost the entire period during which [REDACTED] allegations were under consideration by the FB OIG, that [REDACTED] was even aware of the decision. Rather, it appears that the failure to address [REDACTED] allegations properly resulted from the independent actions (or perhaps the failure to act) on the part of an unidentified member or members of the FB OIG staff. The FORSCOM IOs investigating the OSC-referred allegations could not determine why the FB OIG decided to proceed in this manner, in major part because of the lack of documentation in the case file between September 1, 2004, and November 23, 2004, and also between November 23, 2004 and June 17, 2005. All evidence points to a serious mistake on the part of the entire FB OIG staff in failing to address [REDACTED] comments to [REDACTED] as a potential violation of the Military Whistleblower Act, not to [REDACTED] knowing and intentional disregard of [REDACTED] allegations.⁶⁷

In October 2005, after the FORSCOM OIG directed that the FB OIG take action to correct its erroneous handling of [REDACTED] reprisal complaints, the FB OIG reopened its inquiry. During her follow-on interview with [REDACTED]

⁶⁷ Note also that the FB OIG staff was short-handed and in a transition period—[REDACTED] who had been primarily responsible for [REDACTED] case, was preparing to leave the FB OIG for a new duty assignment. As [REDACTED] prepared to depart, she transferred the case to [REDACTED] who had not previously been involved in the matter and was left with only the written documentation in the case file on which to base his understanding of the allegations and craft the initial ROII.

(b)(7)(C) on December 1, 2005, (b)(7)(C) denied ever having been reprimed against by any member of her chain of command. Rather, (b)(7)(C) asserted that her removal from platoon sergeant duties and reassignment were due to her poor working relationship with (b)(7)(C). (b)(7)(C) stated for the first time that she had been advised unofficially of her impending reassignment prior to filing her complaint with her EO representative in July 2004. (b)(7)(C) made no allegation against (b)(7)(C) during her December 2005 interview. That given, (b)(7)(C) recommended (b)(7)(C) whistleblower reprisal case for "declination." DoDIG approved the declination of this case on March 16, 2007 [Tab B-12, DoDIG concurrence].

Conclusion: The allegation that (b)(7)(C) acted improperly, in violation of established standards, in his handling of (b)(7)(C) complaint against (b)(7)(C) or directed (b)(7)(C) to do so, is unsubstantiated.

Corrective Action Related to OSC Allegation 2: Although it does not appear that (b)(7)(C) was involved in any way with the FB OIG decision not to pursue (b)(7)(C) November 2004 allegation of reprisal against (b)(7)(C) information discovered in the course of investigating of the OSC-referred allegations prompts a conclusion that the FB OIG erred in failing to address (b)(7)(C) prior allegation of reprisal by (b)(7)(C) with her in the course of her December 1, 2005 interview. Accordingly, at the conclusion of matters related to the OSC-referred allegations, The Inspector General of the Army will direct the FB OIG to reopen (b)(7)(C) case to address properly and resolve her potential allegation of reprisal against (b)(7)(C).⁶⁸

OSC Allegation 3:

Allegation: That (b)(7)(C) violated AR 20-1 by delaying an investigation into allegations that (b)(7)(C) Battalion Commander, 51st Signal Battalion,⁶⁹ had physically assaulted (b)(7)(C) and had engaged in an inappropriate relationship with a subordinate non-commissioned officer (NCO), (b)(7)(C) even though a preliminary analysis of these allegations had revealed sufficient evidence to warrant further investigation. The complainants allege that it was only after some delay that (b)(7)(C) initiated a request for an investigation⁷⁰ that ultimately substantiated allegations against (b)(7)(C).

⁶⁸ Note that (b)(7)(C) is retired from the Army.

⁶⁹ See *supra* note 4 for a discussion of the organization of the XVIII Airborne Corps and command and non-commissioned officer leadership relationships.

⁷⁰ In their respective testimonies, (b)(7)(C) and (b)(7)(C) refer to this investigation as a "Commander's Inquiry." [Tab C-28; (b)(7)(C) p. 2; Tab C-1b; (b)(7)(C) p. 6]. Such reference is not inaccurate in that a "Commander's Inquiry" is a form of investigation authorized by Rule for Courts-Martial 303, *Manual for Courts-Martial*.

Summary of Findings: This allegation was unsubstantiated by a preponderance of the evidence. Contrary to the allegation, the evidence indicates that [REDACTED] ordered [REDACTED] to proceed quickly to investigate the allegations against [REDACTED] so that [REDACTED] superiors, the Commanding General of the XVIII Airborne Corps and [REDACTED] the 35th Signal Brigade Commander, could make informed decisions regarding [REDACTED] before his unit deployed.

Relevant Authorities:

1. AR 20-1, *Inspector General Activities and Procedures*, dated March 29, 2002 [Tab A-1], provides as follows:

(a) Paragraph 4-5b(2) provides that IGs will determine whether a complaint contains allegations of wrongdoing by an individual or contains information regarding an adverse condition. In both cases, the IG will either initiate an investigative inquiry or refer the allegation to the chain of command to work

(b) Paragraph 8-1b(2) defines an investigative inquiry as "the fact-finding process followed by IGs to gather information needed to address allegations of impropriety against an individual that can accomplish the same objectives as an IG investigation. . . . The investigative inquiry is the primary fact-finding process used by IGs to address allegations."

(c) Paragraph 8-2a(2) cautions that "[i]nspector general investigators will make or obtain conscious decisions on disposition of all allegations."

(d) Paragraph 4-1 addresses the "Inspector General Action Process" and provides that inspectors general will use the Inspector General Action Process (IGAP) . . . in receiving and resolving IGARS. The IGAP provides for a systematic fact-finding approach to problem solving. Specific actions or components of the IGAP are integral to the whole process and are not intended to be a group of individual steps that are accomplished independently during the process. The process does not require a dogmatic sequential approach of each step for every case, but using this process allows the IG to accomplish all critical tasks in resolving complaints."

(e) Paragraph 4-6a provides that "[t]he chain of command has the responsibility and the authority to address complaints. Inspector Generals will decide matters that are appropriate for the chain of command and then monitor the case after the referral is made to ensure the chain of command takes proper action. When appropriate, IGs should refer allegations to commanders while protecting confidentiality of the source to the extent possible."

Evidence:

[REDACTED] visited the FB OIG on October 19, 2004 and met with [REDACTED] [Tab C-1b], p. 6], who opened FB OIG case file, Number FJ 05-0012 that same day [Tab B-13].⁷¹

In an IGAR, [REDACTED] asserted that she had been assaulted by her Battalion Commander, [REDACTED] in October 2003 while they were deployed in Iraq as members of the 51st Signal Brigade. [REDACTED] asserted that she reported the assault to her Brigade Commander, [REDACTED]⁷² who conducted an inquiry in which it was determined that the alleged "assault" was merely a "verbal altercation." [REDACTED] perceived the inquiry as inadequate, categorizing it as "mere protocol," designed to cover-up rather than to investigate properly [REDACTED] misconduct. All-in-all, [REDACTED] believed that her Brigade Commander had failed to take appropriate action on her allegations of assault [Tab B-13], [REDACTED] handwritten statement, p. 1].

⁷¹ In several portions of the FORSCOM OIG report of inquiry into the OSC-referred allegations, the IOs note that FB OIG employees failed to transcribe recorded witness testimony. For example, although many of the witnesses interviewed in the context of the investigation of the OSC-referred allegations, to include the complainants, assert that [REDACTED] her husband, [REDACTED] and [REDACTED] the former Executive Officer of the 51st Signal Battalion, were interviewed in the course of the FB OIG investigation of [REDACTED] complaints, there was no documentation in the case file of any of these interviews, nor was documentation of any of these interviews included in the ROII. The FORSCOM IOs investigating the OSC-referred allegations were unable even to locate any audio tape used to record these interviews. Further, neither the FB OIG case files nor the final ROII in [REDACTED] case included documentation or evidence of the interviews of [REDACTED] or [REDACTED]. The FORSCOM IOs investigating the OSC-referred allegations located audio tapes documenting these interviews, however. The interviews were transcribed and considered as evidence for purposes of the OSC investigation. Note that IGs are not required to transcribe every witness interview. Other acceptable methods of recording witness interviews include summarizing testimony in a Memorandum for Record (MFR) format (*The Assistance and Investigations Guide*, Section II-6-4 [Tab A-9]); taking a written statement directly from the witness (*The Guide*, Section II-6-5); and recording information in "memoranda of conversations, handwritten notes, unsworn statements" (AR 20-1, para. 8-4g [Tab A-11]). The method employed depends on the level/phase of investigation (for example, transcribed testimony would be appropriate for a ROII but not necessary for a preliminary inquiry); the witness's relevance (for example, transcribed testimony might be appropriate for the interview of the subject of the investigation, but not necessary for other witnesses); and other factors. It is not appropriate, however, to conduct an interview and tape record the relevant witness testimony but then fail to memorialize or summarize the testimony in some written format. Yet, this substandard practice appears to have been common during the FB OIG investigation of [REDACTED] complaints. The Inspector General of the Department of the Army has directed that at the conclusion of matters related to the OSC-referred allegations, a team comprised of DAIG experts, will conduct an on-site "Staff Assistance Visit" with the FB OIG to assess that office's policies and procedures and to provide retraining and other on-the-spot assistance to the FB OIG in remedying any deficiencies identified.

⁷² It is important to distinguish between [REDACTED] commander of the 35th Signal Brigade (who is referenced in the allegations made by [REDACTED] and the allegation regarding [REDACTED] OSC Allegations 3, 4, and 5), and [REDACTED] commander of the "provisional" rear detachment of the "Dragon Brigade" (who was involved in the matters raised by [REDACTED] OSC Allegation 1).

[REDACTED] IGAR also alleged that [REDACTED] was engaged in an inappropriate relationship with a subordinate female NCO in his unit, [REDACTED] both [REDACTED] and [REDACTED] were married to others. Further, [REDACTED] asserted that [REDACTED] had a public altercation with [REDACTED] the husband of [REDACTED] but that no action had been taken against [REDACTED] for any of this misconduct [Tab B-13d] [REDACTED] request for XVIII Airborne Corps to direct FB OIG investigation, p. 1, Tab C-2e, [REDACTED] p. 2].

The case notes reflect that [REDACTED] PA/PI/IGPA of [REDACTED] allegations indicated they had merit⁷³ [Tab B-13a, case notes, p. 3, Tab B-13b, case notes, p. 1].

On November 22, 2004, [REDACTED] made the following case note entry in the file: "prepared an action memo to CG (Commanding General) allowing the Corps CG to sign the directive for the investigation." The case note continued, stating that the CG had signed the directive and requested that the FB OIG "keep him informed of its progress in the event he wants . . . to appoint an IO if allegations appear they may be substantiated."⁷⁴ [Tab B-13b, case notes, p. 1].

The content of this case note is borne out by papers documenting that on November 22, 2004, [REDACTED] signed and submitted a written request to [REDACTED] Commanding General, XVIII Airborne Corps, asking that he direct an FB OIG investigation into the allegations against

⁷³ A fair reading of the FB OIG case notes would support the inference that [REDACTED] belief that the allegations had merit was based on interviews, purportedly conducted by [REDACTED] and [REDACTED] on November 9, 2004, of [REDACTED] the female NCO with whom [REDACTED] allegedly engaged in an inappropriate relationship, and [REDACTED] her husband [Tab C-2f, [REDACTED] p. 2, Tab C-1, [REDACTED] p. 7, Tab C-7a, [REDACTED] p. 2]. Note however, that despite an exhaustive search, no documentation of these interviews has been discovered. Further, no evidence of [REDACTED] participation in the investigation of [REDACTED] allegations has been discovered.

⁷⁴ See AR 20-1, Ch. 8 [Tab A-3]. The November 22, 2004 directive from the CG, XVIII Airborne Corps and Fort Bragg was required to authorize the FB OIG to conduct a more detailed PA/PI/IGPA, while keeping the Commanding General apprised of allegations of misconduct against a senior field-grade officer and commander [REDACTED] under his jurisdiction. Second, it would appear that because [REDACTED] believed that [REDACTED] Brigade Commander, [REDACTED] may have been "too close to the situation," it was prudent to seek a directive from the CG, XVIII Airborne Corps to document and justify [REDACTED] decision not to involve [REDACTED] in the matter at this stage of the proceedings. Finally, because IG investigations are not the appropriate venue for the investigation of matters of a criminal nature or of allegations that are likely to result in adverse action against the subject. It is standard practice for an Inspector General to conduct a PA/PI/IGPA, and on determination that an allegation of criminal misconduct is likely to be substantiated, to refer the matter to the U.S. Army Criminal Investigation Command (USACIDC) for full investigation. Similarly, when an Inspector General conducts a PA/PI/IGPA that indicates that an allegation of misconduct is likely to be substantiated and to result in adverse personnel action against the subject, the matter is referred to the subject's command for investigation. Although adultery, fraternization, and conduct unbecoming an officer are crimes under Article 134 of the Uniform Code of Military Justice, when committed by members of the military, they are generally referred to the subject's command for action, barring aggravating circumstances that would favor the involvement of USACIDC.

[Tab B-13d] request for XVIII Airborne Corps to direct FB OIG investigation. [redacted] request for an investigative directive referenced a November 9, 2004 interview of [redacted] by the FB OIG in which [redacted] alleged that his spouse, [redacted] was engaged in a sexual relationship with [Tab B-13d] request for XVIII Airborne Corps to direct FB OIG investigation, p. 1].⁷⁵ The request cited to allegations that [redacted] had committed adultery, fraternized, and engaged in a prohibited relationship with [redacted] and that [redacted] had engaged in conduct unbecoming an officer.

[redacted] was aware that [redacted] had previously conducted a Commander's Inquiry into [redacted] assault allegations and that that inquiry had unsubstantiated the allegation of assault, instead substantiating a lesser finding that [redacted] had failed to treat [redacted] with dignity and respect. Apparently to address [redacted] allegation that [redacted] inquiry had been only cursory in nature, the request for an investigative directive also identified several "issues," among them whether [redacted] had conducted a "thorough and complete investigation" into [redacted] allegation that she had been assaulted by [redacted] [Tab B-13d] request for XVIII Airborne Corps to direct FB OIG investigation, p. 2].⁷⁶ It appears that the Commanding General, [redacted] signed the directive for investigation on the same day on which it was presented to him [Tab B-13e, CG, XVIII Airborne Corps approval of FB OIG request].

On or around December 2 or 3, 2004, as part of the FB OIG investigation directed by the Commanding General, XVIII Airborne Corps, [redacted] and possibly [redacted] interviewed: the Staff Duty NCO to whom the altercation between [redacted] and [redacted] was reported [Tab C-12] the Battalion CSM to whom the Staff Duty NCO reported the incident [Tab C-14]; and the Battalion operations officer [Tab C-13].⁷⁷ [redacted] testified that these interviews led him to believe there was a strong possibility that the allegations were true, that [redacted] knew about them, and that [redacted] had never interviewed or caused to be interviewed [redacted] or [redacted] key witnesses in the

⁷⁵ No documentation of [redacted] interview has ever been located. See *supra* note 71.

⁷⁶ In IG parlance, an "issue" is a concern that requires investigation, but does not rise to the level of a specific "allegation" against a specific person. In this case, given that it was known that [redacted] had previously investigated [redacted] complaint of assault, it does not appear inappropriate to categorize the concern as to the sufficiency of that investigation as an "issue." It is important to note that, at the recommendation of the FB OIG, the assault of [redacted] was further investigated by the AR 15-6 JO subsequently appointed by the Commanding General, XVIII Airborne Corps.

⁷⁷ It appears possible that [redacted] and [redacted] also interviewed [redacted] the Battalion Executive Officer, although as set forth in note 71, *supra*, no documentation of that interview ever has been located, despite an exhaustive search. And, as stated in note 71, *supra*, the audio tapes of the interviews of [redacted] and [redacted] were never transcribed by the FB OIG. Rather, the tapes were discovered pursuant to a search conducted by the FORSCOM IOs investigating the OSC-referred allegations and were subsequently transcribed.

case. [REDACTED] emphasized that he told [REDACTED] that the testimonies created a "reasonable probability that [REDACTED] was aware of the alleged improper relationship between [REDACTED] and the female subordinate and that the probability required that the allegation of a cover-up be addressed." [Tab C] p. 8.

It is undisputed that based on the evidence gathered in these interviews, the FB OIG concluded that a high-level command investigation into the allegations against [REDACTED] was necessary.⁷⁸ Pursuant to the recommendation of the FB OIG, on December 17, 2004, [REDACTED] appointed [REDACTED] another Brigade Commander, to conduct an investigation under provisions of AR 15-6 into allegations that [REDACTED] had engaged in an inappropriate relationship with [REDACTED] and had assaulted [REDACTED]. [Tab B-13g, CG, XVIII Airborne Corps Appointment of AR 15-6] p. 11. [REDACTED] was also tasked to review [REDACTED] allegation of assault [Tab B-13g, AR 15-6 Report] p. 3 of 4.

On January 26, 2005, [REDACTED] approved the findings and recommendations set forth in [REDACTED] report of his AR 15-6 investigation [Tab B-13g, CG, XVIII Airborne Corps Approval of AR 15-6] p. 4 of 4. [REDACTED] found insufficient evidence to establish that [REDACTED] had engaged in adultery with [REDACTED] but did find that they engaged in an inappropriate relationship. [REDACTED] further determined that [REDACTED] had assaulted and mistreated [REDACTED]. Further, [REDACTED] noted that [REDACTED] had previously directed a Commander's Inquiry into [REDACTED] assault allegation, but that this earlier Inquiry had determined that because [REDACTED] had no intent to cause [REDACTED] bodily harm, no assault had taken place. Rather, the prior Inquiry had determined that [REDACTED] simply failed to treat [REDACTED] with dignity, respect, fairness, and consistency in violation of AR 600-100, *Army Leadership*, paragraph 2-1.⁷⁹ In light of those findings [REDACTED] had taken only adverse administrative action against [REDACTED] filing a [REDACTED] in [REDACTED] local personnel file [Tab B-13a, case notes, pp. 3, 4, 7; Tab B-13c, FB OIG ROI] p. 5; [Tab B-13]. [REDACTED] specified that he had "uncovered no new facts and circumstances to change the understanding of the facts and circumstances surrounding the incident," but noted that proof of assault under Article 128 of the Uniform Code of Military Justice did not require evidence of "intent."⁸⁰ Accordingly, [REDACTED] determined that [REDACTED]

⁷⁸ See *supra* note 74. Allegations likely to result in adverse personnel action against the subject are referred to the chain of command for investigation.

⁷⁹ AR 600-100, *Army Leadership*, dated September 17, 1993.

⁸⁰ Under the Uniform Code of Military Justice, Article 128, the offense of assault requires proof that: (1) the accused attempted or offered to do bodily harm to a certain person; and (2) that the attempt or offer was done with unlawful forces or violence. The law imposes no requirement to establish the accused's specific "intent."

had both assaulted [REDACTED] and violated AR 600-100 leadership standards in his treatment of her [REDACTED] [Tab B-13c, FB OIG ROI, pp. 4-5].

Pursuant to the findings of the AR 15-6 investigation, the Commanding General removed [REDACTED] from command of the 51st Signal Battalion on January 26, 2005, and on the same date issued a [REDACTED] to [REDACTED] and [REDACTED] [Tab B-13k].

The case file indicates that based on the findings of [REDACTED] AR 15-6 investigation, the FB OIG produced a Report of Investigative Inquiry (ROI), dated February 25, 2005. The ROI reflected the same findings as set forth in the AR 15-6 investigation. The ROI included as enclosures the AR 15-6 investigation and the documentation of adverse action taken against [REDACTED] [REDACTED] [Tab B-13c]. [REDACTED] signature appeared on the ROI as the inquiry officer; because [REDACTED] was deployed to Iraq at the time, [REDACTED] who was serving as the Command IG at the time, signed concurring in the report [Tab B-13c, FB OIG ROI, p. 6].

In his sworn statement to the FORSCOM IOs appointed to investigate the OSC-referred allegations, [REDACTED] verified that [REDACTED] had visited the FB OIG office in mid- to late-2004 and made the complaints discussed above. [REDACTED] indicated that he had conducted the intake interview of [REDACTED] then had briefed [REDACTED] and transferred the case to [REDACTED] for action [Tab C-1b, p. 6]. [REDACTED] stated that [REDACTED] interviewed [REDACTED]⁸¹ and, in the course of that interview identified three allegations, following which [REDACTED] prepared a request for Commander's Inquiry addressed to the 35th Signal Brigade Commander, [REDACTED] [REDACTED] asserted that [REDACTED] had refused to sign the request for Commander's Inquiry. [REDACTED] said that he did not know how [REDACTED] had explained his refusal to either [REDACTED] or [REDACTED] but that he [REDACTED] had been present when he heard [REDACTED] say that he [REDACTED] did not want to "straddle units with distractors while they are preparing for deployment." [Tab C-1b, pp. 6-7].

[REDACTED] stated that [REDACTED] had complained that [REDACTED] had not taken any action on her allegation that [REDACTED] was having an inappropriate relationship and that [REDACTED] had covered it up [Tab C-2e, pp. 2]. [REDACTED] further corroborated [REDACTED] testimony that [REDACTED] refused to sign the referral of the assault/inappropriate relationship allegations to [REDACTED] [REDACTED] reiterated [REDACTED] assertion that [REDACTED] had not wanted to burden the 35th Signal Brigade as it prepared for deployment, that [REDACTED] directed closure of the case as an

⁸¹ See supra note 73. The FORSCOM IOs investigating the OSC-referred allegations could find no evidence that [REDACTED] participated in interviews related to [REDACTED] allegations.

Assistance matter, and that it was not until the FB OIG learned of the alleged altercation between [redacted] and [redacted] that [redacted] permitted [redacted] to seek a Commanding General's directive for investigation [Tab C-2a, p. 2; Tab C-2b, p. 2; Tab C-2e, pp. 1-2].

[redacted] confirmed that he had interviewed [redacted] about her complaint of assault and that he had told her initially that her allegations were without merit and that the FB OIG would not investigate further because her unit had already investigated them. Additionally, having subsequently determined the case to be a matter for the Assistance section, [redacted] proceeded to return the case to [redacted]. [redacted] further testified that [redacted] returned again to the FB OIG, at which meeting she raised for the first time the allegation of [redacted] inappropriate relationship with [redacted] and [redacted] public altercation with [redacted] [Tab C-7a, p. 2; and Tab C-7c, p. 2].⁸² [redacted] testified that because [redacted] did not have any first hand knowledge of the alleged inappropriate relationship, he [redacted] and [redacted] undertook to conduct follow-on interviews with both [redacted] and [redacted] but that he had not worked the case further and was not familiar with how the directive for an investigation was sought. [redacted] also stated that he did not receive any pressure from [redacted] not to report allegations against [redacted] during the conduct of the inquiry as by that time it was [redacted] case. Contrary to [redacted] assertion that [redacted] had generated a request for Commander's Inquiry and presented that request to [redacted] only to have it rejected, [redacted] does not recollect playing any role in the request for Commander's Inquiry. Further, [redacted] stated that [redacted] had never prevented him from reporting allegations against field grade officers to the appropriate authority in a timely manner [Tab C-7b, p. 1; Tab C-7c, p. 2]. [redacted] testified that he did not perceive that [redacted] was "covering up" for field grade officers at Fort Bragg [Tab C-7c, p. 2].

[redacted] testified that [redacted] was "disgust[ed]" with [redacted] behavior, viewing it as unacceptable on the part of a professional officer and Battalion Commander, and that [redacted] was not at all upset that the allegations against [redacted] had been substantiated. [redacted] did not perceive that [redacted] tried to influence the investigation in any inappropriate manner [Tab C-4a, p. 2; Tab C-4b, p. 5]. [redacted] also stated that [redacted] was very conscious of his

⁸² The FORSCOM IOs investigating the OSC-referred allegations could find no evidence that [redacted] had visited the FB OIG on two occasions or that she had divulged information relating to the allegation of adultery only on her second visit. All available information seems to support a finding that [redacted] visited the FB OIG on only one occasion, October 19, 2004, and that she complained about both her assault at the hands of [redacted] and [redacted] inappropriate relationship with [redacted] in the course of that single visit.

image as a professional officer and as the IG. He constantly projected the behavior that I would expect of a professional officer and IG, as described in AR 20-1." [Tab C-4a] p. 2.

In his testimony to the FORSCOM IOs, [redacted] recalled [redacted] allegations coming to light around the same time he undertook a two-week TDY trip to Iraq as part of a team conducting a pre-deployment site survey in preparation for the upcoming deployment by the XVIII Airborne Corps; [redacted] TDY trip to Iraq covered the period from October 25—November 5, 2004 [Tab C-10d] pp. 4-7. [redacted] could not recall exactly when he was informed of [redacted] allegations regarding the inappropriate relationship, but was fairly certain that he had learned of this allegation only after returning from this two-week trip [Tab C-10d] pp. 5-7.⁸³

[redacted] recalled discussing the allegations against [redacted] with [redacted] in early November 2004 and that [redacted] had viewed the allegations as serious enough to warrant commencing a search for a replacement for [redacted] in the event the inappropriate relationship was substantiated and [redacted] was relieved of command [Tab C-10a] p. 6. [redacted] told [redacted] that the Commanding General or Deputy Commanding General would be contacting him [redacted] about the allegations [Tab C-10d] p. 5-7. [redacted] testified that at the conclusion of his conversation with [redacted] he had returned to his office and told [redacted] that [redacted] had conducted a Commander's Inquiry "into the allegations" against [redacted]. Likely because he was deploying and because he knew that he had set the appropriate investigations in motion, [redacted] took no further action on [redacted] allegations, intending to leave it to the FB OIG staff and to the Commanding General to pursue the formal inquiry [Tab C-10d] p. 6-7.

[redacted] testified that he did not remember his staff IGs advising him to refer the improper relationship allegation to [redacted] for investigation at [redacted] level. [redacted] indicated that regardless, he would not have concurred in such a course of action because, as [redacted] direct superior, [redacted] was "too close" to the matters at issue. [redacted] denied both ordering the case closed as an Assistance matter and telling anyone not to investigate it. Rather, he emphasized that the allegations warranted attention and investigation, and that the FB OIG "needed to deal with [the allegations] in a timely and effective manner." [Tab C-10d] p. 5-7.

[redacted] recalled his dissatisfaction with the Assistance section's slow progress on the case. [redacted] specifically recalled, "I remember, in fact, taking [redacted] with me, going to the CG's office and getting a signed investigation directive and we came back here and [redacted] said, unless

⁸³ Note that [redacted] was interviewed four times by the FORSCOM IOs.

you see a problem, I'm going to wait until next week to start contacting witnesses and scheduling them for interviews. I was absolutely astonished that he would do that for two reasons. One, it involved a senior leader and we were beyond the point of . . . trying to figure out . . . I was astonished that we would just sit and wait." [Tab C-10a, p. 5].

[REDACTED] thought [REDACTED] was trying to stall inquiry into this case long enough to delay its resolution until the 35th Signal Brigade's deployment to Iraq. [REDACTED] testified that, in contrast, he wanted the section to complete a PI and to do it quickly. He knew the 35th was getting ready to deploy, and that if these allegations were true, one of the deploying units would lose its Battalion Commander. Were that to occur, [REDACTED] wanted the unit to have as much time as feasible before deployment to adjust to the loss of its leadership. [REDACTED] said that he made it very clear to [REDACTED] that he wanted him to move forward on the case so the Commanding General and Brigade Commander would have sufficient facts to make an informed decision on [REDACTED] status before the unit's deployment [Tab C-10d, p. 5-7].

[REDACTED] testified that in early- to mid-November 2004 (about two weeks prior to his [REDACTED] deployment to Iraq),⁸⁴ [REDACTED] had personally brought to his [REDACTED] attention allegations that [REDACTED] had engaged in an inappropriate relationship. [REDACTED] stated that [REDACTED] told him that the FB OIG had received unfavorable information about [REDACTED]. [REDACTED] testified that he offered to investigate the matter by appointing an AR 15-6 investigating officer at his level, but that [REDACTED] advised him not to do anything because he [REDACTED] intended to seek the Commanding General's advice on the matter [Tab C-11, p. 2].

Discussion:

There is no evidence, other than the unsupported testimony of the two complainants, that [REDACTED] blocked the referral of [REDACTED] allegations against [REDACTED] to the command for investigation. That slightly more than a month elapsed between receipt of [REDACTED] complaints (October 19, 2004) and [REDACTED] referral of the matter to the highest levels of the chain of command at Fort Bragg (November 22, 2004), does not appear unreasonable, particularly given that [REDACTED] was TDY in Iraq for two of the weeks at issue. Further, it appears that in the intervening period, the FB OIG undertook interviews of several significant witnesses in the case as part of a PA/PI/IGPA. It is reasonable to presume that [REDACTED] properly relied on information derived from those interviews to assess preliminarily whether [REDACTED] allegations were credible and to inform his decision to approach the

⁸⁴ Note that investigation revealed that [REDACTED] and the 35th Signal Brigade deployed to Iraq sometime between November 26 and 28, 2004.

Commanding General, XVIII Airborne Corps to secure a directive to investigate the case further.

It appears that within a reasonable period after being informed of [REDACTED] allegations, [REDACTED] discussed the allegations with [REDACTED]. Although [REDACTED] offered to address the issues internal to the 35th Signal Brigade, [REDACTED] advised against that course of action. [REDACTED] decision not to refer the allegations to [REDACTED] for resolution did not violate AR 20-1. As the Primary IG, it was within [REDACTED] discretion to elect a different method of investigation for these allegations. [REDACTED] decision that these allegations were too sensitive to be investigated at the Brigade level, but should be investigated at a more senior level under the auspices of the Commanding General, was reasonable and prudent and should be accorded deference.

[REDACTED] testified credibly that he had neither ordered the case to be closed in the office as an Assistance matter nor had he directed that the case should not be investigated properly. To the contrary, [REDACTED] made it very clear to [REDACTED] that he wanted him to move forward quickly on the case to facilitate timely decision-making by the Commanding General and Brigade Commander on [REDACTED] status. After the initial directive was signed by the Commanding General in late November, the IG investigation commenced. When the IG investigation developed information that the allegations appeared to be true and thus could lead to adverse action against [REDACTED], [REDACTED] recommended that the Commanding General appoint an AR 15-6 officer and secured the Commanding General's approval of that course of action. The completed AR 15-6 investigation was used as the basis for [REDACTED] removal from command and to inform an IG ROII. All indications are that, for the most part, the FB OIG properly handled and supervised the investigation as it developed and progressed.

Conclusion: The allegation that [REDACTED] delayed an investigation into the allegations made by [REDACTED] against [REDACTED] is unsubstantiated.

Corrective Action Related to OSC Allegation 3: The lack of documentation of key witness interviews in either the case file or the ROII related to [REDACTED] allegations significantly hindered the FORSCOM investigation of the OSC-referred allegations.⁸⁵ This deficiency made it particularly difficult to determine what transpired in the period between [REDACTED] complaint to the FB OIG on October 19, 2004 and [REDACTED] issuance of a directive for an IG investigation on November 22, 2004, the time frame especially critical to an analysis of the complainants' allegation. Substandard practices and procedures regarding the documentation and preservation of witness interviews appear to have pervaded FB OIG operations at this time. Accordingly, the Inspector

⁸⁵ See *supra* note 71.

General of the Department of the Army has directed that, at the conclusion of matters related to the OSC-referred allegations, a team comprised of DAIG experts will conduct an on-site "Staff Assistance Visit" with the FB OIG to assess that office's policies and procedures and to provide training and on-the-spot assistance to the FB OIG in remedying any deficiencies identified. The proper documentation of witness interviews will be a particular focus of the "Staff Assistance Visit."

OSC Allegation 4:

Allegation: The complainants allege that the FB OIG's preliminary analysis of [REDACTED] complaints yielded sufficient evidence to warrant investigation of an allegation that the 35th Signal Brigade Commander, [REDACTED] had prior knowledge of [REDACTED] misconduct (as set forth in OSC Allegation 3, above), but covered-up [REDACTED] complaint. The complainants further assert that with a view to protecting [REDACTED] [REDACTED] refused recommendations to order an investigation into the alleged cover-up.

Summary of Findings: This allegation was unsubstantiated by a preponderance of the evidence. The evidence indicates that [REDACTED] ordered [REDACTED] to proceed quickly to investigate the allegations against [REDACTED] so that [REDACTED] superiors, the Commanding General of the XVIII Airborne Corps and [REDACTED] the 35th Signal Brigade Commander could make an informed decision regarding [REDACTED] before his unit deployed. It is undisputed that previously, in June 2004, [REDACTED] had directed an investigation into [REDACTED] allegation that she had been assaulted by [REDACTED]. In fact, one of the "issues" subsequently investigated by the Commanding General's AR 15-6 officer (at the behest of [REDACTED] and in response to [REDACTED] complaints to the FB OIG) was whether [REDACTED] prior investigation of the assault had been thorough and complete. A preponderance of the evidence establishes that [REDACTED] was not aware of the separate allegation that [REDACTED] was engaged in an inappropriate relationship with [REDACTED] until November 2004, when [REDACTED] informed [REDACTED] of same. Although [REDACTED] immediately offered to investigate the allegation of inappropriate relationship, [REDACTED] believed the matter was more properly addressed at the level of the Commanding General, XVIII Airborne Corps and advised [REDACTED] accordingly. It would have been inappropriate and illogical for [REDACTED] or the FB OIG to categorize and investigate as a cover-up [REDACTED] failure to investigate an allegation of which he had been previously unaware.

Relevant Authorities:

1. AR 20-1, *Inspector General Activities and Procedures*, dated March 29, 2002 [Tab A-1], provides as follows:

(a) Paragraph 4-5b(2) provides that IGs will determine whether a complaint contains allegations of wrongdoing by an individual or contains information regarding an adverse condition. In both cases, the IG will either initiate an investigative inquiry or refer the allegation to the chain of command to work

(b) Paragraph 8-1b(2) defines an investigative inquiry as "the fact-finding process followed by IGs to gather information needed to address allegations of impropriety against an individual that can accomplish the same objectives as an IG investigation. . . . The investigative inquiry is the primary fact-finding process used by IGs to address allegations."

(c) Paragraph 8-2a(2) cautions that "[i]nspector general investigators will make or obtain conscious decisions on disposition of all allegations."

(d) Paragraph 4-1 addresses the "Inspector General Action Process" and provides that inspectors general will use the Inspector General Action Process (IGAP) . . . in receiving and resolving IGARS. The IGAP provides for a systematic fact-finding approach to problem solving. Specific actions or components of the IGAP are integral to the whole process and are not intended to be a group of individual steps that are accomplished independently during the process. The process does not require a dogmatic sequential approach of each step for every case, but using this process allows the IG to accomplish all critical tasks in resolving complaints."

(e) Paragraph 4-6a provides that "[t]he chain of command has the responsibility and the authority to address complaints. Inspector Generals will decide matters that are appropriate for the chain of command and then monitor the case after the referral is made to ensure the chain of command takes proper action. When appropriate, IGs should refer allegations to commanders while protecting confidentiality of the source to the extent possible."

Evidence:

OSC Allegation 4 involves the same FB OIG case file, Number FJ 05-0012 [Tab B-13] and facts as does OSC Allegation 3, above. Although [REDACTED] directed a FB OIG inquiry into the matters raised by [REDACTED] and sought directives from the Commanding General, XVIII Airborne Corps and Fort Bragg to investigate the allegations against [REDACTED] claims that [REDACTED] disregarded recommendations to investigate whether [REDACTED]

[REDACTED] the 35th Signal Brigade Commander, had prior knowledge of [REDACTED] misconduct but covered-up [REDACTED] complaint.

As set forth in the discussion of OSC Allegation 3, above, on December 17, 2004, the Commanding General, XVIII Airborne Corps and Fort Bragg acted on the recommendation of [REDACTED] to appoint an AR 15-6 Investigating Officer (IO) to investigate allegations against [REDACTED] [Tab B-13e; CG XVIII Airborne Corps approval of FB OIG request, Tab B-13g; CG XVIII Airborne Corps Appointment of AR 15-6 IO, p. 1]. The AR 15-6 report was accepted and approved by the Commanding General on January 26, 2005 [Tab B-13g; AR 15-6 Report, p. 4 of 4]. Based on that report, the Commanding General issued [REDACTED] a [REDACTED] and [REDACTED] [Tab B-13k].

The AR 15-6 investigative report served as the basis for the final FB OIG ROII into [REDACTED] allegations. Like the AR 15-6 investigation on which it was based, the FB OIG ROII, dated February 25, 2005, addressed, but did not substantiate the allegation that [REDACTED] had committed adultery; substantiated that [REDACTED] had engaged in an inappropriate relationship with [REDACTED] and substantiated that [REDACTED] had assaulted [REDACTED] and failed to treat her with dignity and respect [Tab B-13c; FB OIG ROII pp. 4-5]. The background section of the ROII addressed [REDACTED] inquiry into [REDACTED] allegations of assault, noting that on June 2, 2004, [REDACTED] had appointed an officer to inquire into the assault allegation.⁸⁶ The officer initially appointed by [REDACTED] to conduct the inquiry had determined that because [REDACTED] had no intent to cause [REDACTED] bodily harm, there was no assault. Rather, the inquiry officer concluded that [REDACTED] had failed to treat [REDACTED] with dignity, respect, fairness and consistency in violation of AR 600-100, *Army Leadership*, paragraph 2-1 [Tab B-13a, case notes, p. 6; Tab B-13c; FB OIG ROII, p. 4]. Based on this finding, and pursuant to legal advice from a judge advocate attorney, [REDACTED] had punished [REDACTED] by filing a [REDACTED] in his personnel file. The AR 15-6 IO appointed by the Commanding General of XVIII Airborne Corps at [REDACTED] recommendation, specified in his report that he had "uncovered no new facts and circumstances to change the understanding of the facts and circumstances surrounding the [assault] incident," but noted that proof of assault under Article 128 of the Uniform Code of Military Justice did not require evidence of "intent."⁸⁷ Accordingly, the AR 15-6 determined that [REDACTED] had both assaulted [REDACTED] and violated AR 600-100 leadership standards in his treatment of her [Tab

⁸⁶ There is no indication how or when SSG Perez's allegation of assault first came to the attention of the 35th Signal Brigade chain of command [B-13a, case notes, p. 6].
⁸⁷ Under the Uniform Code of Military Justice, Article 128, the offense of assault requires proof that: (1) the accused attempted or offered to do bodily harm to a certain person; and (2) that the attempt or offer was done with unlawful forces or violence. The law imposes no requirement to establish the accused's specific "intent."

[B-13c, FB/OIG ROII, pp. 4-5]. This same finding was reflected in the final FB
OIG ROII. The ROII was signed by [REDACTED] given [REDACTED]
deployment to Iraq at the time the ROII was completed, [REDACTED]
signed, concurring in the ROII as the serving Primary IG for Fort Bragg.

The IGAR submitted by [REDACTED] on October 19, 2004, detailed her
allegation that she had been assaulted by [REDACTED]. The fact that [REDACTED]
had previously ordered a unit investigation of the incident notwithstanding, [REDACTED]
alleged that the assault had been "covered-up" and that no action had
been taken against [REDACTED]. In support of her perception that her complaint
had been "covered-up," [REDACTED] asserted her belief that allegations related to
[REDACTED] alleged inappropriate relationship with [REDACTED] similarly
had been "covered-up" by the command [Tab B-13f, IGAR, p. 1].

The sworn testimony of [REDACTED] was taken on December 3, 2004, by
[REDACTED] and [REDACTED] it is possible that [REDACTED] also participated in
this interview [Tab B-14, testimony]. Regarding her allegation that
her assault had been "covered-up," [REDACTED] testified that the Brigade
Commander [REDACTED] knew about her allegation of assault and that she had
written a statement about the incident [Tab B-14, testimony, p. 26],
but that no one from the command had interviewed her about her allegation, and
the next thing she heard, [REDACTED] was found guilty only of committing
"verbal abuse" against her [Tab B-14, testimony, pp. 25-26].
[REDACTED] testified that [REDACTED] told her that "they were going to give
[REDACTED] a [REDACTED]" but that when she [REDACTED] saw [REDACTED]
OER "there was no reference to any kind of problem so if he got a
reprimand, it was after his OER was put out." [Tab B-14, testimony,
pp. 25-26].

In her December 3, 2004 testimony, [REDACTED] also testified to events
she had personally witnessed while deployed in Iraq and Kuwait, as well as to
events that had been related to her by others, all of which she perceived to
evidence that [REDACTED] was engaged in an inappropriate relationship with
[REDACTED] [Tab B-14, testimony, pp. 6-7]. [REDACTED]
testified that another soldier told her that that he had actually observed an
altercation between [REDACTED] and [REDACTED] ([REDACTED]
husband) in which [REDACTED] had confronted [REDACTED] about having sex
with [REDACTED] [Tab B-14, testimony, p. 7-8]. Given that the
incident had been observed by a number of people and "no one said anything,"
[REDACTED] concluded, "[b]ut of course since they covered up one incident with
me, it proves nothing that they wouldn't cover this up either."⁸⁸ [Tab B-14,
testimony, p. 8].

⁸⁸ It is important to note that [REDACTED] was not a witness to the altercation between [REDACTED] and [REDACTED]
[REDACTED], but that she had simply heard rumors around the Battalion as to what had occurred [Tab
B-14, testimony, pp. 7-8].

In his testimony to the FORSCOM IOs appointed to investigate the OSC-referred allegations, [REDACTED] explained that [REDACTED] had visited the FB OIG office in mid- to late-2004 to complain that she had been assaulted by her [REDACTED] LTC Thomas. [REDACTED] recalled that [REDACTED] had further alleged that [REDACTED] had engaged in an inappropriate relationship with [REDACTED] and that she [REDACTED] had reported the alleged assault and improper relationship (emphasis added) to [REDACTED], the 35th Signal Brigade Commander, but that he had failed to investigate her complaints and covered up the offenses. After taking in [REDACTED] information, [REDACTED] briefed [REDACTED] and turned over the case to [REDACTED] for investigation [Tab C-1, [REDACTED] pp. 6].

[REDACTED] testified that when [REDACTED], the primary action officer on [REDACTED] case, left the FB OIG for a new job with the XVIII Airborne Corps G-3, [REDACTED] case load was left for him [REDACTED] to complete. [REDACTED] testified that all of the evidence gathered during the FB OIG PI/PA/IGPA seemed to indicate that there had existed throughout the Brigade a perception that [REDACTED] was engaged in an inappropriate relationship with [REDACTED]. [REDACTED] noted that the testimonies of the 51st Signal Battalion [REDACTED] and Battalion S-3, [REDACTED], created a "reasonable probability" that [REDACTED] had been made aware of the alleged improper relationship. [REDACTED] testified that based on this "reasonable probability" he had concluded that [REDACTED] knew about [REDACTED] behavior, but had not undertaken to investigate or correct the matter. Accordingly, [REDACTED] concluded that an allegation of cover-up on the part of [REDACTED] should be addressed. [REDACTED] claimed that when he discussed this concern with [REDACTED], [REDACTED] told him that [REDACTED] had denied knowing anything about [REDACTED] inappropriate relationship, but that [REDACTED] had previously conducted an inquiry into [REDACTED] allegation of assault [Tab C-1, [REDACTED] pp. 7]. [REDACTED] testified to his belief that the allegation that [REDACTED] had covered-up the inappropriate relationship had never been addressed properly [Tab C-1, [REDACTED] pp. 7-8].

In his testimony to the FORSCOM IOs, [REDACTED] asserted that [REDACTED] had complained about [REDACTED] in her original IGAR, adding that [REDACTED] reported that she had visited [REDACTED] under the "open door policy"⁸⁹ and personally told him about [REDACTED] inappropriate relationship, but that [REDACTED] had "covered it up." [Tab C-2, [REDACTED] pp. 2]. [REDACTED] said that [REDACTED] told him that he [REDACTED] had asked [REDACTED] if he had looked into the allegations of an improper relationship and that [REDACTED] told [REDACTED] that he had already informally looked into the allegations of the improper relationship and they were "baseless . . ." [REDACTED] told [REDACTED] he

⁸⁹ Under the military's widely used "open door policy," any member of a command may seek a personal discussion with his or her commander on any matter of concern.

didn't do it, and that was the end of it." [Tab C-2a] p. 2; [Tab C-2e] pp. 1-2.

A review of [redacted] written IGAR reveals no reference to [redacted] most notably, the IGAR does not indicate that [redacted] had informed [redacted] personally of her complaints [Tab B-13f] [redacted] IGAR]. Neither does [redacted] reference [redacted] in her December 3, 2004 interview with [redacted] and [redacted] [Tab B-14] [redacted] testimony]. Both documents indicate that [redacted] made only vague references to the 35th Signal Brigade having undertaken an investigation into wrongdoing by [redacted] and that "the final findings were geared to cover up [redacted] behavior." [Tab B-13f] [redacted] IGAR p. 1].

In his testimony, [redacted] recalled discussing the allegations against [redacted] with [redacted] in the mid-November 2004 timeframe. Given that [redacted] was TDY from October 25 to November 5, 2004, his recollection of the timing of his conversation with [redacted] seems generally accurate. Although [redacted] recalled that [redacted] was knowledgeable of [redacted] allegation that she had been assaulted by [redacted] (because [redacted] had ordered an inquiry into those allegations), [redacted] testified that he was not sure what [redacted] knew about the allegation of [redacted] alleged **inappropriate relationship** with [redacted]. [redacted] testified that when he first advised [redacted] in November 2004 about the allegations of inappropriate relationship and that he [redacted] intended to notify the Commanding General of same, [redacted] told him there had been previous perceptions of an **inappropriate relationship**, and that he [redacted] had conducted a Commander's Inquiry [Tab C-10d] p. 5/7]. [redacted] further recalled that [redacted] had told him [redacted] that he [redacted] had concerns with [redacted] and had admonished [redacted] about the perceptions in the command [Tab 10d] p. 6/7]. According to [redacted] [redacted] offered to investigate the allegations regarding the **inappropriate relationship** internal to the Brigade, but that he [redacted] had declined the offer because the FB OIG was already "moving out with the case." [Tab C-10d] p. 5/7]. And, [redacted] did not believe that referring the allegations to [redacted] for investigation was a good idea because a Brigade Commander should not "investigate a direct subordinate" and [redacted] was "too close to the matter." [Tab C-10d] p. 5/7]. [redacted] testified that after talking with [redacted] he went back to the FB OIG and told [redacted] that [redacted] had previously conducted a Commander's Inquiry into the allegations against [redacted] [Tab C-10d] p. 6/7]. [redacted] testified that "he had made it very clear to [redacted] that he wanted him to move forward on the case so the Commanding General and Brigade Commander would have enough facts in order to make a [sic] informed decision on the fate of the battalion commander before they deployed." [Tab C-10d] p. 5/7]. It is uncontroverted that pursuant to [redacted] request on

November 22, 2004, the Commanding General signed the initial directive to the FB OIG to inquire into the allegations [Tab C-10d] p. 4/7.

[redacted] denied that he ordered the case closed as an IG Assistance matter or that he had instructed that it not be investigated. Rather, [redacted] acknowledged repeatedly his belief that the FB OIG needed to deal with the allegations "in a timely and effective manner." [Tab C-10d] p. 5/7.

[redacted] also testified that he could not recall if it had been brought to his attention that there was a potential allegation against [redacted] for covering-up the alleged improprieties of his Battalion Commander [Tab C-10d] p. 5/7. [redacted] denied covering-up any allegation against [redacted] and asserted that he did not believe [redacted] had covered-up [redacted] misconduct [Tab C-10d] p. 5/7.

Finally, [redacted] testified that during the AR 15-6 investigation appointed by the Commanding General, [redacted] one of the issues investigated was the alleged cover-up by [redacted] of [redacted] assault charge [Tab C-10a] p. 7.

[redacted] testified that he deployed from Fort Bragg, North Carolina to Iraq around November 26-28, 2004 and that he had met with [redacted] approximately two weeks prior. [redacted] stated that [redacted] advised him that the Inspector General had received some unfavorable information concerning [redacted] one of the Battalion Commanders subordinate to [redacted]—an allegation that [redacted] was involved in an inappropriate relationship with [redacted] [redacted] told [redacted] that even though the unit was about to deploy, he [redacted] could appoint an AR 15-6 officer to investigate the allegations. [redacted] recalled that [redacted] told him not to investigate because he [redacted] intended to approach the Commanding General about the matter. [redacted] stated that he had never heard allegations or observed "any indications of this type of impropriety" on the part of [redacted] prior to his November 2004 meeting with [redacted]. [redacted] testified that he had not previously conducted any type of Commander's Inquiry into allegations of an **inappropriate relationship** involving [redacted]. He recalled that he had previously conducted a Commander's Inquiry into allegations that [redacted] had assaulted an NCO. [redacted] testified that **had he known**, prior to his November 2004 discussion with [redacted] of allegations that [redacted] had engaged in an inappropriate relationship, he [redacted] would have investigated (emphasis added) [Tab C-11] p. 2.

[redacted] testified that after his discussion with [redacted] in November 2004, he [redacted] spoke with [redacted] and [redacted] about the allegation that [redacted] had engaged in an inappropriate relationship. [redacted] testified that after speaking with [redacted] and [redacted] he realized that there may have existed in his unit a perception that [redacted] and [redacted]

[REDACTED] were engaged in an inappropriate relationship and that the CSMs had tried between themselves to make personnel moves to address the concern and "stabilize the organization." [REDACTED] was clear, however, that neither of the CSMs had previously brought the matter to his attention and that he had not been aware of the allegation of the inappropriate relationship until his November 2004 conversation with [REDACTED] [Tab C-11] p. 2.

In his December 3, 2004, testimony to [REDACTED] and [REDACTED] CSM of the 51st Signal Battalion, indicated that during the unit's deployment to Iraq and Kuwait in the February 2004 timeframe, he had perceived the existence of an inappropriate relationship between [REDACTED] and [REDACTED]. [REDACTED] indicated that he had cautioned [REDACTED] many times to stay away from [REDACTED] that he had advised [REDACTED] about the perception that something inappropriate was going on; and that he had told the 35th Signal Brigade CSM, [REDACTED] about the situation and asked [REDACTED] to move [REDACTED] to another battalion once the unit returned to Fort Bragg. There is no evidence that [REDACTED] told [REDACTED] about his concerns [Tab C-14] p. 52.

[REDACTED] also testified that some time after the 51st Signal Battalion's redeployment to Fort Bragg in late 2004, he had received a telephone call from the Staff Duty desk asking him to come to the headquarters building because [REDACTED] was complaining that [REDACTED] was having an affair with his wife [Tab C-14] pp. 5, 7-8. [REDACTED] testified that he told [REDACTED] about the incident within 24 hours. [REDACTED] reported that he and [REDACTED] had decided between them that there was not enough credibility or "anything concrete" to [REDACTED] allegations, so they decided to keep the incident at the lowest level and to "try and satisfy [REDACTED] as well as maintain the dignity and respect of the battalion commander, [REDACTED] as well as the effects it would have on the unit." [Tab C-14] p. 43. There is no evidence that either [REDACTED] or [REDACTED] reported their concerns about [REDACTED] to [REDACTED] [Tab C-14] p. 52.

[REDACTED] testified that he assumed that [REDACTED] had told [REDACTED] about the incident at some point in time, but that he "had no idea" exactly when that might have occurred [Tab C-14] pp. 47, 48, 64. [REDACTED] reported that [REDACTED] had approached him around the last week of November 2004 and told him [REDACTED] that he [REDACTED] wished [REDACTED] had brought the incident to his [REDACTED] attention sooner [Tab C-14] p. 52. This was the first time that [REDACTED] had discussed with [REDACTED] the allegation that [REDACTED] was involved in an inappropriate relationship.

Discussion:

The preponderance of the evidence does not substantiate that [REDACTED] improperly failed to order an investigation into the allegation that [REDACTED] "covered-up" an inappropriate relationship between [REDACTED] and [REDACTED]. The evidence supports a finding that [REDACTED] had no knowledge of the allegation of an inappropriate relationship between [REDACTED] and [REDACTED] until [REDACTED] brought the matter to his attention in November 2004. It would have been overreaching to accuse [REDACTED] of "covering-up" an allegation of which he had been previously unaware.

First, contrary to the testimony of [REDACTED] and [REDACTED] there is no indication that [REDACTED] mentioned [REDACTED] in conjunction with a "cover-up" of the inappropriate relationship between [REDACTED] and [REDACTED] in either her IGAR or in her December 3, 2004 interview. [REDACTED] made only vague references to a perceived unit cover-up of the inappropriate relationship to buttress her assertions that the unit had also covered up her [REDACTED] allegation that she had been assaulted by [REDACTED].

Second, the preponderance of the testimonial evidence documented by the FORCSOM IOs investigating the OSC-referred allegations supports the premise that [REDACTED] did not know about [REDACTED] alleged inappropriate relationship with [REDACTED] until [REDACTED] told in late November 2004. There is no evidence that any of the witnesses interviewed by [REDACTED] and [REDACTED] in the context of their PA/PI/IGPA [REDACTED] and [REDACTED] had previously informed [REDACTED] about existing unit perceptions of an inappropriate relationship or of the altercation between [REDACTED] and [REDACTED]. In fact, [REDACTED] testified that he and [REDACTED] specifically decided not to tell [REDACTED] because they deemed the allegation to lack credibility. Although [REDACTED] testified to his presumption that [REDACTED] had informed [REDACTED] at some point in time, he did not know if, or when, that had occurred. [REDACTED] testified that he was unaware of the allegation of an inappropriate relationship until [REDACTED] advised him in November 2004. Further, [REDACTED] and [REDACTED] similarly testified that in a late-November 2004 discussion between them (according to [REDACTED] this discussion was subsequent to his conversation with [REDACTED] had told [REDACTED] that he [REDACTED] "wished" that [REDACTED] had informed him earlier of the perceptions that [REDACTED] and [REDACTED] were involved in an inappropriate relationship. [REDACTED] testified that [REDACTED] told him [REDACTED] that he [REDACTED] had been unaware of the allegation until hearing of it from [REDACTED].

In view of this body of evidence, it would have been inappropriate and unfair to hold [REDACTED] responsible for covering-up an allegation of which he had been previously unaware.

This finding leads inevitably to the conclusion that [REDACTED] testimonial recollection of his November 2004 discussion with [REDACTED] may be faulty. One possible explanation is that [REDACTED] may have misunderstood [REDACTED] statement that he had directed an investigation into **allegations of misconduct** against [REDACTED] to mean that [REDACTED] inquiry had addressed both the assault on [REDACTED] (into which [REDACTED] had inquired) and the inappropriate relationship (of which [REDACTED] had no knowledge until informed by [REDACTED]). But even if his conversation with [REDACTED] occurred as [REDACTED] recalls, it provides no evidence of a cover-up on [REDACTED] part. As recalled by [REDACTED] [REDACTED] comments reflected that [REDACTED] had inquired into the allegation of an inappropriate relationship, but had uncovered no substantiating evidence. Still, [REDACTED] had cautioned [REDACTED] about existing perceptions in the command. Even under this scenario, [REDACTED] would have had every reason to believe that [REDACTED] had acted appropriately when confronted with an allegation against his subordinate commander and would have had no basis on which to assert that [REDACTED] had covered-up [REDACTED] misconduct. And, it is undisputed that after speaking with [REDACTED] [REDACTED] went back to the office and told [REDACTED] that [REDACTED] had previously conducted a **Commander's Inquiry into the allegations** against [REDACTED].

At the time [REDACTED] allegations were brought to his attention, [REDACTED] was in the process of preparing for a January 24, 2005 deployment to Iraq. [REDACTED] believed that the FB OIG (and not [REDACTED] was in the best position to investigate the allegations against [REDACTED]. In this context, he urged [REDACTED] and [REDACTED] to determine quickly whether there existed a sufficient basis to bring the allegations to the attention of the [REDACTED]. Moreover, once [REDACTED] concluded that [REDACTED] and [REDACTED] had developed sufficient facts, [REDACTED] presented the matter to the Commanding General who immediately undertook to authorize the FB OIG to inquire further into the matter and subsequently initiated an AR 15-6 investigation. Presumably at [REDACTED] direction, one of the issues investigated in the context of the AR 15-6 was whether [REDACTED] had acted properly to address [REDACTED] allegation of assault. [REDACTED] showed no hesitation in directing a review of the sufficiency of [REDACTED] response to [REDACTED] assault allegation. There is no reason to believe that [REDACTED] would have hesitated to investigate [REDACTED] response to the allegations of inappropriate relationship had [REDACTED] perceived a "cover-up" on [REDACTED] part. The allegation that [REDACTED] refused to investigate [REDACTED] cover-up is discredited, no matter what one believes was said during [REDACTED] November 2004 conversation with [REDACTED]. One possibility is that [REDACTED] did not direct the investigation of a "cover-up" because he correctly believed that [REDACTED] had not been aware of the allegation of inappropriate relationship until [REDACTED] told him in late-November 2004. In the alternative, [REDACTED] may have mistakenly believed that [REDACTED] had already conducted a Commander's Inquiry into both the allegations that [REDACTED].

(b)(7)(C) had assaulted (b)(7)(C) and that (b)(7)(C) was engaged in an inappropriate relationship. Perceiving under either scenario that (b)(7)(C) had taken appropriate action with regard to the inappropriate relationship, (b)(7)(C) perceived no basis on which to accuse (b)(7)(C) of a cover-up.

Conclusion: The allegation that (b)(7)(C) refused to investigate the assertion that (b)(7)(C) had covered-up an inappropriate relationship between (b)(7)(C) and (b)(7)(C) is unsubstantiated.

OSC Allegation 5:

Allegation: That (b)(7)(C) delayed investigating a report that (b)(7)(C) Commander, 327th Signal Battalion, had condoned his troops' consumption of alcohol, in violation of orders, while deployed to Louisiana. The complainants allege that (b)(7)(C) only reluctantly signed a request for a Commander's Inquiry into the allegation, stating that he did not want to burden units while they were preparing for deployment.

Summary of Findings: The preponderance of evidence does not support complainants' assertion that (b)(7)(C) delayed the investigation of allegations against (b)(7)(C). A preponderance of evidence supports a finding that on April 23, 2004, (b)(7)(C) approached the FB OIG to complain that on April 2, 2004, he had been assaulted by three NCOs while on a rest and relaxation trip to New Orleans, Louisiana, at the conclusion of a deployment to the Joint Readiness Training Center, Fort Polk, Louisiana. It was determined that the troops' consumption of alcohol had been a factor in the assault. On April 29, 2004, within six days of receiving (b)(7)(C) complaint, (b)(7)(C) referred the assault allegations to (b)(7)(C) for a Commander's Inquiry. It was only in the context of that Commander's Inquiry that it was determined that the troops' consumption of alcohol had been approved by (b)(7)(C) in violation of XVIII Airborne Corps policy. The substantiated allegation against (b)(7)(C) was properly included in the FB OIG ROI rendered in the case.

Relevant Authorities:

1. AR 20-1, *Inspector General Activities and Procedures*, dated March 29, 2002 [Tab A-1], provides as follows:

(a) Paragraph 4-5b(2) provides that IGs will determine whether a complaint contains allegations of wrongdoing by an individual or contains information regarding an adverse condition. In both cases, the IG will either initiate an investigative inquiry or refer the allegation to the chain of command to work

(b) Paragraph 8-1b(2) defines an investigative inquiry as "the fact-finding process followed by IGs to gather information needed to address allegations of impropriety against an individual that can accomplish the same objectives as an IG investigation. . . . The investigative inquiry is the primary fact-finding process used by IGs to address allegations."

(c) Paragraph 8-2a(2) cautions that "[i]nspector general investigators will make or obtain conscious decisions on disposition of all allegations."

(d) Paragraph 4-1 addresses the "Inspector General Action Process" and provides that inspectors general will use the Inspector General Action Process (IGAP) . . . in receiving and resolving IGARS. The IGAP provides for a systematic fact-finding approach to problem solving. Specific actions or components of the IGAP are integral to the whole process and are not intended to be a group of individual steps that are accomplished independently during the process. The process does not require a dogmatic sequential approach of each step for every case, but using this process allows the IG to accomplish all critical tasks in resolving complaints."

(e) Paragraph 4-6a provides that "[t]he chain of command has the responsibility and the authority to address complaints. Inspector Generals will decide matters that are appropriate for the chain of command and then monitor the case after the referral is made to ensure the chain of command takes proper action. When appropriate, IGs should refer allegations to commanders while protecting confidentiality of the source to the extent possible."

Evidence:

There is one FB OIG case file, Number FJ 04-0152, associated with this allegation [Tab B-15].⁹⁰ This allegation derives from a complaint made by [REDACTED] to the FB OIG on April 23, 2004. [REDACTED] complained that his company commander, [REDACTED] had wronged him by vacating a suspension of punishment associated with a previously imposed Article 15.⁹¹ [REDACTED] alleged that he and another soldier had been assaulted by three NCOs at the conclusion of a rest and relaxation trip to New Orleans, Louisiana, following a deployment to the Joint Readiness Training Center, Fort Polk, Louisiana [Tab B-15a, IGAR, p. 3]. [REDACTED] was a member of the 327th Signal Battalion, a sub-element of the 35th Signal Brigade. [REDACTED] asserted all but one of the members of his unit who were present

⁹⁰ Case Number FJ 04-0152, opened April 23, 2004, closed October 28, 2004 [Tab B-15].

⁹¹ An Article 15 is non-judicial punishment authorized by the Uniform Code of Military Justice. If a commander finds a soldier guilty of the offense alleged, the commander may impose punishment, up to the limitations set by statute and regulation. A commander may, however, suspend the soldier's punishment for a period of time, in effect placing the soldier on probation. The suspension of punishment may be vacated if the soldier engages in subsequent misconduct before completing his probationary period.

at the time of the assault incident had been consuming alcohol. The FB OIG PA/PI/IGPA determined that the soldiers' improper consumption of alcohol while deployed had been a factor in the assaults. Given the facts brought to light by the PA/PI/IGPA, the FB OIG questioned whether [REDACTED] suspended [REDACTED] punishment had been vacated appropriately and whether [REDACTED] the 327th Signal Battalion Commander, had responded appropriately when [REDACTED] sought an audience with him to discuss the incident.

On April 29, 2004, [REDACTED] referred the allegations uncovered in the FB OIG PA/PI/IGPA to the 35th Signal Brigade Commander, [REDACTED] for investigation. Neither [REDACTED] complaint nor the referred allegations asserted that [REDACTED] had improperly authorized his troops' consumption of alcohol. In fact, [REDACTED] referral specifically directed [REDACTED] to determine whether the "... consumption of alcohol [was] IAW Fort Bragg Master Policy Number 42,"⁹² and "[w]ho authorized the consumption of alcohol during this trip . . ." [Tab B-15d] [REDACTED] referral of allegations, p. 2]. Excepting [REDACTED] testimony to the FORSCOM IOs investigating the OSC-referred allegations, there is no indication or evidence that prior to the referral of [REDACTED] allegations to [REDACTED] for investigation, the FB OIG suspected [REDACTED] of having authorized his troops' consumption of alcohol. In accordance with Fort Bragg policy, [REDACTED] would have been required to apply to [REDACTED] the first Colonel-level Commander in the 327th Signal Battalion's chain of command, for authorization to permit his troops to consume alcohol in a deployed environment. There is no evidence that [REDACTED] hesitated to refer the allegation regarding alcohol consumption to [REDACTED] for investigation or that [REDACTED] had any interest in "protecting" [REDACTED].

In response to the FB OIG referral, [REDACTED] initiated an AR 15-6 investigation. The AR 15-6 Investigating Officer (IO) completed his report on May 24, 2004 [Tab B-15e-2]. In addition to addressing the specific concerns referred by the FB OIG, the report raised three new issues—among them, the report substantiated that [REDACTED] had permitted his soldiers to consume alcohol while on a field training exercise, in violation of the Fort Bragg Master Policy Number 42 [Tab B-15e-2]. On September 4, 2004, [REDACTED] asked the Commanding General, XVIII Airborne Corps for authority to take administrative action against [REDACTED]⁹³ On September 8, 2004, the Commanding General granted [REDACTED] request and on September 9, 2004, [REDACTED] issued [REDACTED] a [REDACTED] [Tab B-15j].

⁹² Fort Bragg Master Policy No. 42 provides that "personnel will not purchase, possess, or consume alcohol during deployments or exercises without prior approval of the first colonel in the chain of command. This policy is punitive . . ."

⁹³ In most cases, the Commanding General of a large installation withholds to himself the authority to take adverse action against senior officers. A [REDACTED] such as [REDACTED] could request, on a case-by-case basis, that the Commanding General cede jurisdiction to permit [REDACTED] to take action against a particular subordinate officer.

Based on the AR 15-6 report, [REDACTED] crafted the FB OIG ROI; [REDACTED] added to the ROI a discussion of the substantiated allegation against [REDACTED] even though that allegation had not been originally referred by the FB OIG to the chain of command [Tab C-7e] [REDACTED] pp. 1-2].

In his sworn testimony to the FORSCOM IG IO investigating the OSC-referred allegations, [REDACTED] stated that a soldier had complained to the FB OIG that he had been punished for misconduct (in that a previously suspended punishment for a prior offense had been vacated) while deployed to Louisiana with his unit. [REDACTED] stated that the soldier specifically complained that [REDACTED] had allowed soldiers to consume alcoholic beverages during the deployment. [REDACTED] asserted that [REDACTED] the action officer on the case, had prepared a request for a Commander's Inquiry to [REDACTED] Commander, 35th Signal Brigade, who exercised jurisdiction over the 327th Signal Brigade. [REDACTED] testified that [REDACTED] would not sign a request for a Commander's Inquiry into the allegations against [REDACTED] because [REDACTED] did not want to distract the unit with allegations against its leaders while it was preparing to deploy.⁹⁴ [Tab C-1b] [REDACTED] p. 9]. [REDACTED] also testified that although [REDACTED] eventually referred the matter to [REDACTED] [REDACTED] had sent emails to [REDACTED] setting forth options as to how to proceed [Tab C-1b] [REDACTED] pp. 9-10]. It should be noted that the [REDACTED] case file contains no such email traffic.

[REDACTED] also testified to the FORSCOM IG about [REDACTED] delay in referring the allegations to [REDACTED] and his [REDACTED] desire not to bother [REDACTED] with such allegations while the 35th Signal Brigade was preparing for deployment. [REDACTED] added that but for [REDACTED] insistence, [REDACTED] would not have agreed to refer the allegations for investigation. [REDACTED] believed that [REDACTED] "fired [REDACTED]" in part because of [REDACTED] persistence in this case [Tab C-2c] [REDACTED] pp. 1-2].

[REDACTED] testified to the FORSCOM IG that the allegations against [REDACTED] first came to his attention only **after** he received the final report of the AR 15-6 investigation conducted on the order of [REDACTED] in response to [REDACTED] April 29, 2004 referral of allegations. [REDACTED] testified that he informed [REDACTED] that he was going to include the finding against [REDACTED] in the FB OIG ROI, even though the allegation had not been part of the original FB OIG referral to [REDACTED] [REDACTED] stated that [REDACTED] was not happy about this plan, but that [REDACTED] had never interfered with [REDACTED] decision to include the information in the final ROI and that [REDACTED] had never directed him not to pursue the allegation against [REDACTED]

⁹⁴ It appears that [REDACTED] battalion was preparing to deploy to Iraq in January 2005 as part of the larger Fort Bragg deployment in which [REDACTED] also participated.

[Tab C-7e] pp. 1-2]. Like [redacted] believed that this incident had played a part in his dismissal at the end of his probationary period of employment with the FB OIG [Tab C-7e] p. 2]. [redacted] cited to his "impression" that [redacted] had made several calls to [redacted] to voice his displeasure that [redacted] seemed to be continuously investigating matters in [redacted] Brigade [Tab C-7e] p. 2]. [redacted] also testified that he did not know of any instance where [redacted] violated AR 20-1 and that he generally felt that [redacted] "allowed him to freely report allegations against Field Grade officer [sic] in a timely manner." [Tab C-7c] p. 2].

[redacted] testified that he did not delay investigation into the allegations against [redacted] and that he would never have tried to "protect" [redacted] because his battalion was the frequent subject of IG allegations, particularly for leader misconduct. [redacted] testified that he had often made comments to his IG office concerning [redacted] and that "his command climate is a bit skewed . . . he [redacted] was 'beyond protection.'" [Tab C-10a] p. 11].

Discussion:

Other than the testimonies of the complainants, there is no objective evidence of delay on the part of [redacted] or any other member of the FB OIG in conducting a PA/PI/IGPA into [redacted] allegations or in referring [redacted] complaints to [redacted] for investigation. In fact, the allegations, as developed by the PA/PI/IGPA were forwarded to [redacted] within 6 days (4 working days) of [redacted] visit to the FB OIG. Additionally, there is no evidence to corroborate complainants' claims that [redacted] refused to sign the memorandum referring the allegations to the chain of command.

There is no evidence that, at the time the allegations were referred to [redacted] [redacted] was suspected of having authorized his troops to consume alcohol while in a deployed environment. In fact, the FB OIG referral expressly directed [redacted] to determine who had authorized the troops to drink and whether that authorization accorded with Fort Bragg policy. [redacted] did not name [redacted] in his complaint, nor were allegations against [redacted] developed in the PA/PI/IGPA conducted by [redacted] the case action officer. In fact, [redacted] testified that he was unaware of any allegation against [redacted] until after the completed AR 15-6 investigation was returned by [redacted] to the FB OIG in July 2004. [redacted] also denied knowledge of any allegation against [redacted] until [redacted] received the unit AR 15-6 report and advised him [redacted] of the finding naming [redacted]. [redacted] further denied that he ever would have attempted to protect [redacted] and asserted that, to the contrary, he was particularly sensitive to complaints from [redacted] unit, which [redacted].

perceived as beset by an unfavorable command climate. [REDACTED] the [REDACTED] [REDACTED] on the case testified that although [REDACTED] was not happy about the additional allegation involving [REDACTED] [REDACTED] never attempted to preclude him [REDACTED] from including the information adverse to [REDACTED] [REDACTED] in the final FB OIG ROIL.

Conclusion: The allegation that [REDACTED] delayed an investigation into allegations that [REDACTED] had improperly authorized his troops to consume alcohol while deployed is unsubstantiated.

Corrective Action Related to Allegation 5:

The FORSCOM IOs investigating the OSC-referred allegations noted that there was "no evidence of the use of case notes in the . . . [IG] database or the case file." "Case notes" refer to a chronological listing documenting each and every action taken in a particular case. Although not a formal requirement at the time that the FB OIG worked the cases at issue in the OSC-referral, IGs have long found the case note method to be of great utility in documenting the progression of cases. Thus, the January 2006 iteration of *The Assistance and Investigations Guide* mandated the use of case notes to document in the IG database and the case file all actions taken with regard to a specific case; the failure to use "case notes" is now considered a substandard practice.⁹⁵ The Inspector General of the Department of the Army has directed that at the conclusion of matters related to the OSC-referred allegations, a team comprised

⁹⁵ This observation appears on page 25 of the FORSCOM OIG report. The requirement to document the progress of an IG case in the case notes was not formally codified until the January 2006 version of *The Assistance and Investigations Guide* [Tab A-7]. The 2006 *Guide* was the first doctrinal IG publication to formally impose a requirement to use case notes, but the "case note" technique has long been used by IGs and taught at the IG School. Section 1-2, para. 27d of the 2006 *Guide* provides:

"d. Case Notes: Case notes should be a detailed chronological listing of everything pertaining to the case. They should include, at a minimum --

- phone calls, including names, phone numbers, summary of topics/discussion
- notifications, if verbal or written
- coordination with staff/command (who, what, ...)
- legal reviews
- any e-mails, faxes, or correspondence received or sent
- additional information as required

[Because the system] . . . allows more than one IG to input data into the same case file, IGs should make use of that capability and update cases notes, even if he or she is not the primary IG working a particular case but merely answered or processed information on behalf of -- or during the absence of -- the primary action officer."

Note, however, that this codification requiring case notes post-dated the FB OIG report pertaining to [REDACTED] and [REDACTED] which was opened on April 23, 2004 and closed on October 28, 2004.

of DAIG experts will conduct an on-site "Staff Assistance Visit" with the FB OIG to assess that office's policies and procedures and to provide retraining and other on-the-spot assistance to the FB OIG in remedying any deficiencies identified. The use of case notes will be a particular focus of this "Staff Assistance Visit."

"STAND ALONE" ISSUE

The following addresses a "stand alone" issue, not referred by OSC, but raised in the context of the investigation into the OSC-referred allegations.

In testimony to the FORSCOM IOs investigating the OSC-referred allegations and in specific reference to OSC Allegation 5, [REDACTED] asserted that [REDACTED] had terminated his employment with the FB OIG because [REDACTED] had complained to [REDACTED] about [REDACTED] repeated pursuit of investigations in the 35th Signal Brigade [Tab C-7e, p. 2]. [REDACTED] also asserted that [REDACTED] "fired [REDACTED] in part because of persistence in the case involving [REDACTED] [Tab C-2c, pp. 1-2].

To clarify the circumstances associated with [REDACTED] termination of employment with the FB OIG, DAIG undertook a review of this issue. A review of the various SF 50, *Notification of Personnel Action* forms filed in [REDACTED] personnel file at Fort Bragg evidence that he was first employed by the FB OIG on [REDACTED] as an excepted service appointment IG in the grade of [REDACTED] [Tabs C-7f-1 and C-7f-2, SF 50s]. [REDACTED] was hired under Emergency Hiring Authority, on a one-year appointment, slated to end on May 18, 2004. Such hiring authority was frequently employed to address the increasing staffing demands associated with the Global War on Terrorism. On May 16, 2004, [REDACTED] temporary appointment was extended for one year, to May 15, 2005 [Tab C-7f-3, SF 50]. He continued to work in the same job at the same pay. On December 26, 2004, however, [REDACTED] was offered a term position as a [REDACTED] in the XVIII Airborne Corps [REDACTED] and voluntary terminated his employment with the FB OIG to accept that job [Tab C-7f-4, SF 50]. In accepting the term position in the [REDACTED] secured for himself longevity accrual, benefits, and most importantly, a promotion. For unknown reasons, [REDACTED] resumed his employment in the FB OIG on February 1, 2005, after [REDACTED] had deployed to Iraq [Tab C-7f-5, SF 50]. On his return to the FB OIG, [REDACTED] retained the grade of [REDACTED] in this grade [REDACTED] was senior to [REDACTED] who had not yet been promoted to GS12.

It appears that shortly after [REDACTED] return to the FB OIG, likely sometime in early February 2005, [REDACTED] visited the civilian personnel office servicing Fort Bragg and requested assistance in terminating [REDACTED] asserting that [REDACTED] had engaged in inappropriate conduct, to include swearing and shouting at customers. Prior to the termination action being

completed, on February 15, 2005, [REDACTED] voluntarily returned to his [REDACTED] position in the XVIII Airborne Corps [REDACTED] [Tab C-7f-6] [REDACTED] SF-50. On February 4, 2006, his G-3 term appointment was extended through December 25, 2008 [REDACTED] [Tab C-7f-7] [REDACTED] SF-50.

Questions posed by the DAIG to [REDACTED] Chief, FORSCOM/Installation Management Agency Team, Fort Bragg Civilian Personnel Advisory Center and to [REDACTED] Fort Bragg attorney- [REDACTED] revealed that [REDACTED] had no involvement in the effort to terminate [REDACTED] employment with the FB OIG [REDACTED] [Tab C-7g]. That [REDACTED] was involved in [REDACTED] termination is rendered increasingly improbable when one acknowledges that [REDACTED] was deployed to Iraq at the time [REDACTED] sought [REDACTED] termination. Rather, it appears to have been [REDACTED] who engineered the effort to terminate [REDACTED].

The preponderance of the evidence does not substantiate that [REDACTED] fired [REDACTED] because of complaints that [REDACTED] was over-zealous in the performance of his IG duties. None of the available evidence indicates that [REDACTED] played any role in the effort to terminate [REDACTED] employment with the FB OIG.

LISTING OF VIOLATIONS OR APPARENT VIOLATIONS OF LAW, RULE, OR REGULATION

OSC Allegation 2: Information discovered in the course of investigating this allegation prompts a conclusion that the FB OIG erred in failing specifically to address [REDACTED] prior allegation of reprisal by [REDACTED] with her in the course of her follow-up interview on December 1, 2005.

OSC Allegation 3: Substandard practices and procedures regarding the documentation and preservation of witness interviews appear to have pervaded FB OIG operations during the period relevant to the OSC-referred allegations.

OSC Allegation 5: Although the requirement to document the progress of an IG case using "case notes" was not codified until publication of the January 2006 version of *The Assistance and Investigations Guide* (subsequent to the 2004 FB OIG investigation at issue in this allegation), the utility of the "case note" technique in properly and accurately recording the progress of an investigation has long been recognized by IGs and has been recommended by and taught at the IG School. The failure of the FB OIG IGs to document their investigation of [REDACTED] complaints through case notes contributed to a perception that the case file, and perhaps the investigation itself, was incomplete and lacked clarity.

CORRECTIVE ACTIONS TO BE UNDERTAKEN

As to OSC Allegation 2: The Inspector General of the Army will direct the FB OIG to reopen [REDACTED] case to address properly her potential allegation of reprisal against [REDACTED].

As to OSC Allegation 3 and OSC Allegation 5: The Inspector General of the Department of the Army has directed that, at the conclusion of matters related to the OSC-referred allegations, a team comprised of DAIG experts will conduct an on-site "Staff Assistance Visit" with the FB OIG to assess that office's policies and procedures and to provide training and on-the-spot assistance to the FB OIG in remedying any deficiencies identified. The proper documentation of witness interviews and the use of case notes will be specific concerns to be addressed in the context of the "Staff Assistance Visit."

CONCLUSION

Army Inspectors General play an extremely important role in ensuring that both the Army as an institution and its individual members adhere to the laws, rules, and regulations promulgated by Congress, the President, and the leadership of the Department of Defense and the Department of the Army. Inspectors General serve as the "eyes," "ears" and "conscience" of the Army and the commands in which they serve. In this role an Inspector General must uphold his or her sworn duty to serve as a fair, impartial, and objective factfinder and problem solver. An Inspector General must be sufficiently independent so that those requesting assistance will continue to do so—even when the complainant feels that his supervisor or commander may be the problem. Because of their distinctive position in the governance and oversight of the Army, Inspectors General have a particularly unique responsibility to conduct themselves in accordance with the highest standards of professionalism, adhering scrupulously to all laws, rules, and regulations and taking utmost care to ensure that their actions are, and will be perceived as, legally, ethically, and morally sound. Most notably, the Inspector General is a critical component of the Army's effort to prevent, investigate, and remedy whistleblower reprisal. On so many levels, the allegations referred by the OSC and addressed in the instant report remind each us of the importance of the Inspector General organization; caution us to be ever mindful of the fact that for our system to be able to function, those who see problems must be able to report them without fear of retaliation; and reinforce our duty to ensure that any employee who makes a disclosure of suspected fraud, waste, abuse, or violations of law or regulation is protected from both actual retaliation and the appearance thereof.

The Department of the Army takes very seriously its responsibilities to address, in a timely, thorough, and deliberate fashion, the concerns drawn to its attention by the OSC with respect to the matters discussed in this report concerning the leadership, policies, and procedures of the FB OIG. The

Department has addressed, in depth, the myriad of complex issues comprising the instant allegations referred by the OSC. Although none of the five allegations referred by OSC was substantiated, this investigation, together with others initiated in response to complaints filed in other venues by the OSC complainants, conferred a significant benefit on the agency by facilitating the identification of [REDACTED] unresolved potential whistleblower complaint of reprisal. Notwithstanding the length of time that has elapsed, the DAIG will reopen this case and bring it to a proper conclusion as required by law.

Further, the OSC-referred allegations have brought to light numerous systemic flaws in the operating practices employed by the FB OIG. A DAIG "Staff Assistance Visit" will assist in remedying these deficiencies and putting into place practices and procedures that will improve the overall professionalism, efficiency, and effectiveness of the FB OIG to perform its important mission.

Finally, the report addresses a single "stand alone" concern, separate and apart from the allegations referred to the Department of the Army by the OSC. Inquiry into the "stand alone" concern revealed neither a violation of law, rule, or regulation, nor a substantial and specific danger to public safety.

No evidence with national security implications has been disclosed in the context of this investigation. There is no criminal violation inquiry referral to the Attorney General pursuant to Title 5, USC, Section 1213(d)(5)(d).

This letter, with enclosures, is submitted in satisfaction of my responsibilities under Title 5, USC, Sections 1213(c) and (d). Please feel free to contact [REDACTED] of the Office of the Army General Counsel, [REDACTED] with any further questions or concerns you may have.

[REDACTED]

[REDACTED]

Assistant Secretary of the Army
(Manpower & Reserve Affairs)

Enclosures
as

TABLE OF CONTENTS

- Tab 1 -- Office of Special Counsel (OSC) letter to Secretary of the Army, dated November 22, 2006
- Tab 2 -- Delegation of Authority to Assistant Secretary of the Army (Manpower and Reserve Affairs), dated
- Tab 3 -- Office of the General Counsel (OGC) referral letter to The Inspector General (TIG), dated December 6, 2006
- Tab 4 -- SAIG-AC letter to U.S. Forces Command Inspector General (FOSCOM IG), dated December 8, 2006
- Tab 5 -- TIG Appointment Letter to FORSCOM IG, [REDACTED] dated December 12, 2006
- Tab 6 -- OGC request for extension to OSC, dated January 18, 2007
- Tab 7 -- OGC request for extension to OSC, dated March 30, 2007
- Tab 8 -- OGC request for extension to OSC, dated May 30, 2007
- Tab 9 -- OGC request for extension to OSC, dated July 25, 2007
- Tab 10 -- OGC request for extension to OSC, dated September 20, 2007
- Tab 11 -- OGC request for extension to OSC, dated November 23, 2007
- Tab 12 -- [REDACTED] opinion, FORSCOM OIG Report of Investigation legally sufficient, dated December 18, 2007
- Tab 13 -- TIG approval of FORSCOM OIG Report of Investigation, dated December 18, 2007
- Tab 14 -- Department of Defense (DoD) Hotline Action, Case Number 100621, Control Number DIH06-8198, referred June 29, 2006
- Tab A-1 -- Army Regulation 20-1, *Inspector General Activities and Procedures*, dated March 29, 2002
- Tab A-2 -- Army Regulation 15-6, *Procedures for Investigating Officers and Boards of Officers*, dated October 2, 2006

- Tab A-3 -- DoD Directive 7050.1, *Defense Hotline Program*, dated January 4, 1999
- Tab A-4 -- DoD Instruction 7050.7, *Defense Hotline Procedures*, dated December 14, 1998
- Tab A-5 -- DoD Directive 7050.6, *Military Whistleblower Protection*, dated June 23, 2000
- Tab A-6 -- *The Assistance and Investigations Guide*, extract, dated June 4, 2004
- Tab A-7 -- *The Assistance and Investigations Guide*, extract, dated January 2006
- Tab A-8 -- 10 United States Code, § 1034, Protected communications; prohibition of retaliatory personnel actions
- Tab A-9 -- Army Regulation 623-205, *Noncommissioned Officer Evaluation Reporting System*, extract, dated May 15, 2002
- Tab A-10 -- Army Regulation 600-20, *Army Command Policy*, extract, dated May 13, 2002
- Tab A-11 -- Army Regulation 600-100, *Army Leadership*, dated September 17, 1993
- Tab B-1 -- Inspector General Action Request System (IGAR) FORSCOM IG Case Number FZ 06-0007 (b)(7)(C) Case File 1)
- Tab B-2 -- IGAR Fort Bragg/XVIII Airborne (ABN) Corps IG Case Number FJ 06-0107 (b)(7)(C) Case File 2)
- Tab B-3 -- IGAR Fort Bragg/XVIII ABN Corps IG Case Number FJ 06-0155 (b)(7)(C) Case File 3)
- Tab B-4 -- IGAR Fort Bragg/XVIII ABN Corps IG Case Number FJ 06-0218 (b)(7)(C) Case File 4)
- Tab B-5 -- IGAR Fort Bragg/XVIII ABN Corps IG Case Number FJ 05-0314 and supporting documentation on Report of Survey against (b)(7)(C)
- Tab B-6 -- SAIG request for and legal opinion from U.S. Army Human Resources Command legal on Army Regulation 623-205
- Tab B-7 -- Memorandum for Record with enclosures, subject: (b)(7)(C) NCOER/Reprisal complaint (b)(7)(C) as reviewer), dated February 17, 2006, unsigned, received from (b)(7)(C) on August 10, 2006
- Tab B-8 -- IGAR Fort Bragg/XVIII ABN Corps IG Case Number FJ 04-0265 (b)(7)(C) Case File 1)

Tab B-9 -- IGAR FORSCOM IG Case Number FZ 05-0081 (DIH 05-0261 [REDACTED]
[REDACTED] Case File 2)

Tab B-10 -- IGAR FORSCOM IG Case Number FZ 06-0016 (DIH 06-6008 [REDACTED]
[REDACTED] Case File 3))

Tab B-11 -- IGAR Fort Bragg/XVIII ABN Corps IG Case Number FJ 06-0031 [REDACTED]
[REDACTED] Case File 4)

Tab B-12 -- DoD IG Concur with Declination, [REDACTED] case-DIH 06-6008,
dated March 16, 2007

Tab B-13 -- IGAR Fort Bragg/XVIII ABN Corps IG Case Number FJ 05-0012 [REDACTED]
[REDACTED]

Tab B-14 -- Testimony of [REDACTED] taken on December 2, 2004, by [REDACTED]
[REDACTED] and [REDACTED] Fort Bragg/XVIII ABN Corps IG office

Tab B-15 -- IGAR Fort Bragg/XVIII ABN Corps IG Case Number FJ 04-0152 [REDACTED]
[REDACTED]

Tab C-1 -- Testimony of [REDACTED] Assistant IG, XVIII ABN Corps
IG Office, Fort Bragg

Tab C-2 -- Testimony of [REDACTED] Deputy IG, XVIII ABN Corps IG
Office, Fort Bragg

Tab C-3 -- Testimony of [REDACTED] Assistant IG, XVIII ABN Corps
IG Office, Fort Bragg

Tab C-4 -- Testimony of [REDACTED] United States Army
Special Operations Command, Fort Bragg, NC, former Detailed IG and Chief of
Inspections, XVIII ABN Corps IG office

Tab C-5 --BLANK

Tab C-6 -- Testimony of [REDACTED] Joint Multinational
Readiness Center, Hohenfels, Germany, former Primary IG, Task Force Bragg IG office

Tab C-7 -- Testimony of and supporting documentation related to employment history of
[REDACTED] XVIII ABN Corps Operation Center, Fort Bragg, NC, former
Assistant Inspector General, XVIII ABN Corps IG office

Tab C-8 -- Testimony of [REDACTED] XVIII ABN Corps Office of the [REDACTED] Fort Bragg, NC, former Detailed Inspector General and Chief of Inspections, Task Force Bragg IG office

Tab C-9 -- Testimony of [REDACTED] XVIII ABN Corps IG Office [REDACTED] Fort Bragg

Tab C-10 -- Testimony (redacted and unredacted) of [REDACTED] XVIII ABN Corps IG Office, Fort Bragg

Tab C-11 -- Testimony of [REDACTED] Director Capabilities Development Integration Directorate, and TRADOC Integration Office Networks, US Army Signal Center, Ft. Gordon, GA, former Commander, 35th Signal Brigade, XVIII ABN Corps, Fort Bragg

Tab C-12 -- Testimony of [REDACTED] B. Company, 51st Signal Battalion, Fort Bragg

Tab C-13 -- Testimony of [REDACTED] Headquarters, 51st Signal Battalion, Fort Bragg

Tab C-14 -- Testimony of [REDACTED] 51st Signal Battalion, Fort Bragg