Agency Reports & Exhibits

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) [redacted].

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 Act[2] 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 [redacted], the OSC referred to the SA for investigation its conclusion that there existed a substantial likelihood that information provided by [redacted] Deputy Inspector General (IG), and [redacted] 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]. [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]

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[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] 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]

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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 [Tab 5]. (b)(7)(C) 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 [Tab 6]. On January 23, 2007, (b)(7)(C) (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 [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 [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 [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. [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 [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) Hotline[10] [Tab 14]. 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,

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[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.

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[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 presentment 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:

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[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

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[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 (b)(7)(C) (b)(7)(C) 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

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[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].

tour 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:

<u>FB OIG—2005-2006</u>:

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

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[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) (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) (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-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."

(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 3-29*a* 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 1-4*b*(1)*(j)* and 3-36*h*, addresses the timely submission of NCOERs, mandating that the issuing command will forward

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[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 06-0007[32] [Tab B-1]; (2) Case Number FJ 06-0107[33] [Tab B-2]; (3) Case Number FJ 06-0155[34] [Tab B-3]; and (4) Case Number FJ 06-0218[35] [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 reprised against her for a prior protected communication with the IG in July 2005[37] 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

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[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].

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

informed the FB OIG that she was surprised to learn that 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, was advised that would serve as her "reviewer" because he wanted to retain jurisdiction for all NCOERs issued in the brigade headquarters. 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]. concluded that the "delaying" actions of and had been in retaliation for her earlier protected communication to the FB OIG in July 2005.

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