

Inspector General Marine Corps Ethical Decision Game No. 1 (7-23)

Reprisal

by Inspector General of the Marine Corps Staff

You are the company commander for Bravo Company, 1/2 Mar. Your company is returning to Camp Lejeune after a six-month deployment to Okinawa, Japan, and your Marines are ready for some rest, but first, you have a mission to complete. Your company must turn over accounts before 3/2 Mar deploys to Okinawa.

You assign Sgt John Doe to the 1/2 Mar advance party. The advance party will arrive at Camp Lejeune 30 days prior to the arrival of the 1/2 Mar main body. The plan was for the advance party to take two weeks of well-earned post-deployment leave and then return to spend two weeks turning over accounts prior to the arrival of the 1/2 Mar main body.

Unfortunately, North Korea has upended your plans by launching a ballistic missile that landed between the Korean Peninsula and Japan. These aggressive actions have moved up the departure timetable for the 3/2 Mar rear party by two weeks. It looks like the 1/2 Mar advance party is going to have to turn over accounts quicker than planned. To handle the compressed timeline, the 1/2 Mar advance party officer in charge canceled all leave and ordered the advance party, including Sgt Doe, to immediately begin account turnover with the 3/2 rear party.

Sgt Doe was frustrated that his anticipated leave had been canceled but dutifully handled his account turnover responsibilities. During the turnover

process, he discovered multiple missing items, including eight special light sets used for search and rescue, each valued at \$3000. Sgt Doe immediately reported his findings to his platoon commander and complained about the cancellation of his post-deployment leave.

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A week later, Sgt Doe was shocked to learn the platoon commander had transferred him to the Fleet Augmentation Program within the Weapons Training Battalion at Stone Bay, NC.

Sgt Doe was irate that his leave had been canceled and felt that he was transferred as punishment for reporting the missing equipment.

Sgt Doe was fed up, so he made a complaint to the Division Command Inspector General (CIG) alleging that he was being reprised against by his platoon and company commanders for reporting the loss of high-value organizational gear, which embarrassed the command. The rumor mill spread quickly and soon everyone, including you, was aware that Sgt Doe's Inspector General (IG) complaint has named you as a subject.

What now captain?

Scenario Questions

1. Do you order Sgt Doe to cease all contact with the CIG?
2. Do you initiate your own investigation into Sgt Doe's behavior?
3. Do you immediately cancel Sgt Doe's orders and grant him his desired leave?
4. How does the Inspector General analyze complaints of reprisal?

UBA MC

EDGs involve real-world leadership challenges that usually have a significant ethical or legal component. They are typical of challenges that have confronted Marines in the past and could easily be encountered in the future. Readers should analyze the problem carefully and decide what action they would take.

Answers to the EDG Questions Presented on Page 80

1. If you answered yes to question #1, you have just bought yourself a substantiated reprisal finding. Title 10 U.S.C. § 1034 prohibits anyone from restricting a Marine from making lawful communications to a member of Congress or an IG. *Never* restrict a Marine from speaking to an IG. You should take *no* personal action against a Marine who you find out filed a complaint against you. Let the process play itself out.

2. You should not open your own investigation on Sgt. Doe's behavior unless you have a reason that is unrelated to the fact Sgt Doe made a protected communication. Tread carefully because reprisal actions include directing, initiating, or conducting a "retaliatory investigation" for the primary purpose of punishing, harassing, or ostracizing a member of the armed forces for making an IG complaint. *See SECNAVINST 5370.7E*.

3. You should not cancel Sgt Doe's orders and grant his leave request unless you have reason to believe that Sgt Doe's allegations have merit or that his transfer or leave denial was flawed. Valid decisions that are supportable should not be overturned just because an individual files an IG complaint.

4. The Inspector General of the Marine Corps (IGMC) reviews all allegations of military whistleblower reprisal complaints filed by Marines. Military whistleblower reprisal policy is contained in *SECNAVINST 5370.7C*. There are four key elements IGMC will weigh to assess if a complaint has investigative merit.

a. Element 1. Was there a protected communication (PC)? Any lawful communication by a Marine to a member of Congress or an IG is protected—as are reports made by a Marine of fraud, waste, abuse (FWA), mismanagement, or misconduct, if made to a member of a DOD audit, inspection, investigation, or law enforcement organization, chain of command, a court-martial proceeding, or any other person or organization designated to receive such communications. Notably, if the complaint is made

to a member of the press, relative, friend, or confidant, there is no PC. Furthermore, if the complaint does not relate to FWA, mismanagement, or misconduct, chances are IGMC will not find a PC has occurred.

b. Element 2. Was an unfavorable personnel action (PA) taken or threatened or a favorable PA withheld or threatened to be withheld from the Complainant? *DODD 7050.06* defines a PA as "any action taken on a member of the Armed Forces that affects, or has the potential to affect, that military member's current position or career," which includes promotion, a disciplinary or corrective action, a transfer or reassignment, a performance evaluation, a decision on pay, benefits, awards, or training, referral for a mental health evaluation, or any other significant change in duties or responsibilities inconsistent with the military service member's grade.

c. Element 3. Did the responsible management official(s) (RMO: e.g., supervisor) have knowledge that the complainant made or prepared to make PC(s) or perceive the complainant as making or preparing to make PC(s)? In other words, did a superior know about the complaint to the IG? The RMO must be someone capable of imposing a PA on the complainant.

d. Element 4. Would the same PA(s) have been taken, withheld, or threatened absent the PC(s)? At this step, IGMC will assess if there is an "inference of causation." Relevant factors include the timing of the PA, past practices, RMO's motive, etc.

These elements are weighted using a preponderance of the evidence standard (50+ percent or more likely than not). In this case:

1. Was there a PC(s)? *Yes, Sgt Doe reported missing gear to his chain of command and then made a complaint to the Division CIG.*

2. Was there a PA? *Yes, Sgt Doe was transferred out of his unit (his leave denial would not be considered a PA).*

3. Did the RMOs have knowledge of the PCs to the Division CIG? *Yes.*

4. Would the PA have been taken absent the PC(s)? *Yes. Here is where most cases turn.*

Although the timing of the PA was suspicious (a week after the IG complaint was filed), documentary and contemporaneous records showed that prior to departure from Okinawa, the 1/2 Mar advance party was provided a list of individuals assigned to the advance party and Fleet Augmentation Program Marines. Sgt Doe was on both rosters but was not informed about his assignment to the Fleet Augmentation Program at the time. Thus, a preponderance of the evidence indicated that Sgt Doe's complaint did not cause the PA in question.

Final Thoughts

- Never restrict anyone from speaking to a Member of Congress or IG. It is the law 10 USC 1034.
- Members are expected to report FWA when they see an incident. Stopping the report or interfering with a complainant's ability to report is a violation.
- Leaders are expected to address any report of FWA, regardless if the complainant desires to report the matter to a Member of Congress or IG.
- Keep notes, memorandum for the record, or emails that document your actions. Contemporaneous notes or records are key for IGs to understand what happened in realtime when decisions and actions are documented.



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