



The Secretary of the Air Force
Office of the Inspector General
Complaints Resolution Directorate



JAG Guide to IG Investigations

SAF/IGQ
1140 Air Force Pentagon
Washington, D.C. 20330-1140

POC:
SAF/IGQ Legal Advisor
(703) 588-1537
DSN 425-1537
Current: as of 14 April 2010

TABLE OF CONTENTS

| | <u>PAGE</u> |
|---|-------------|
| <i>FOREWORD</i> | 4 |
| CHAPTER 1. INTRODUCTION | 5 |
| 1.1. Purpose..... | 5 |
| 1.2. IG Complaints Resolution Overview | 5 |
| 1.2.1. Phase 1: Complaint Analysis (CA)..... | 5 |
| 1.2.1.1. Reprisal Complaint Analysis (RCA)..... | 5 |
| 1.2.1.2. Non-Reprisal CAs..... | 6 |
| 1.2.2. Phase 2: Investigation | 6 |
| 1.2.3. Phase 3: Quality Review..... | 6 |
| 1.3. JAG Roles in IG Investigations..... | 6 |
| <i>CHAPTER 2. FRAMING ALLEGATIONS</i> | 6 |
| 2.1. General Considerations | 6 |
| 2.2 IG Matters..... | 7 |
| 2.2.1. Reprisal | 7 |
| 2.2.2. Restriction | 8 |
| 2.2.3. Improper Mental Health Evaluation (MHE) Referrals | 9 |
| 2.2.3.1. Framing | 9 |
| 2.2.3.2. Coercion and Voluntary Referral | 9 |
| 2.2.3.3 Improper Procedures | 10 |
| 2.2.3.4. MHE as Reprisal | 11 |
| 2.2.4. Abuse of Authority | 11 |
| 2.2.4.1. AFI 90-301 standard -- “Arbitrary” and/or “Capricious”? | 11 |
| 2.2.4.2. Reviewing Air Force Abuse of Authority Investigations..... | 13 |
| 2.2.4.3. Example. | 14 |
| 2.2.5. Fraud, Waste and Abuse (FWA). ¹ | 14 |
| 2.3. Matters <u>Not</u> Appropriate for the IG..... | 15 |
| 2.3.1. Command Matters..... | 15 |
| 2.3.2. Within Purview of Other Established Grievance or Appeal Channels | 15 |
| 2.3.3. UCMJ Offenses..... | 15 |
| 2.4. Allegation Requirements..... | 15 |
| 2.4.1. The Who..... | 15 |
| 2.4.2. The What..... | 16 |
| 2.4.3. The When..... | 16 |
| 2.4.4. The How..... | 16 |
| 2.4.5. An example of a properly framed allegation | 16 |
| <i>CHAPTER 3. PRE FACT-FINDING</i> | 16 |
| 3.1. Overview | 16 |
| 3.2. JAG Legal Advisor Qualifications..... | 16 |

¹ FWA is not solely an IG matter. Depending on the circumstances, Air Force Office of Special Investigations (AFOSI) might investigate FWA as a criminal matter. (AFI 90-301, Table 2.6, Rule 8)

| | |
|--|-----------|
| 3.3. The Investigation Plan (IP)..... | 17 |
| 3.4. The Proof Analysis Matrix (PAM) | 17 |
| 3.4.1. The Preferred Practice..... | 17 |
| 3.4.2. Sample Reprisal PAM | 17 |
| 3.5. Question Formulation | 17 |
| 3.5.1. Relevance..... | 17 |
| 3.5.2. Logical Progression | 18 |
| 3.5.3. Peeling Back the Onion | 18 |
| 3.5.4. Leading Questions | 18 |
| CHAPTER 4. FACT-FINDING (INVESTIGATIVE) ISSUES..... | 18 |
| 4.1. Rights Advisement for Witnesses/Subjects | 18 |
| 4.1.1. Military | 18 |
| 4.1.2. Civilian..... | 19 |
| 4.2. Immunity | 20 |
| 4.3. Witness Availability..... | 20 |
| 4.3.1. Active Duty Military | 20 |
| 4.3.2. DoD Civilians | 21 |
| 4.3.3. Civilians..... | 21 |
| 4.3.4. Retirees | 21 |
| 4.3.5. Minors..... | 21 |
| 4.3.6. Air National Guard; Reserve Personnel..... | 21 |
| 4.4. Third-Party Presence During Interviews..... | 21 |
| 4.4.1. Labor Union Representatives..... | 21 |
| 4.4.1.1. Formal Discussions Over Grievances | 21 |
| 4.4.1.2. Weingarten Rights..... | 22 |
| 4.4.1.3. When Rights Converge | 22 |
| 4.4.2. Attorneys..... | 22 |
| 4.4.3. Other Personal Representatives | 22 |
| 4.5. Recordings | 22 |
| 4.6. New or Additional Allegations | 23 |
| 4.6.1. During the Investigation | 23 |
| 4.6.2. Post-Investigation | 23 |
| 4.7. Computer Evidence..... | 23 |
| 4.8. CSAF “Hand-Off” Policy | 23 |
| 4.9. How Much Investigation is Enough?..... | 24 |
| CHAPTER 5. LEGAL SUFFICIENCY REVIEWS | 23 |
| 5.1. “Informal” Legal Review..... | 24 |
| 5.2. Formal Legal Reviews | 24 |
| 5.3. JAG Reviewer Qualifications | 24 |
| 5.4. Legal Sufficiency Test | 24 |
| 5.5. Review Guidance | 25 |
| 5.5.1. Preponderance of the Evidence Standard..... | 25 |
| 5.5.2. Deference to IO Findings..... | 25 |
| 5.5.3. Disagreement vs. Legal Insufficiency..... | 25 |
| 5.5.4. Adopting Lower Level Review..... | 26 |
| 5.5.5. Time Standards | 26 |
| 5.6. Legal Review Format..... | 26 |

| | |
|--|----|
| CHAPTER 6. OTHER INTEREST AREAS | 26 |
| 6.1. Special Notification Requirements | 26 |
| 6.1.1. Allegations Against O-6s (Or Equivalents) | 26 |
| 6.1.2. Allegations Against Senior Officials | 26 |
| 6.1.3. The Big Three (Reprisal, Restriction and Improper MHE) Referrals..... | 27 |
| 6.2. Investigating Retirees..... | 27 |
| 6.3. IG “Confidentiality.” | 27 |
| 6.4. Sexual Assault Allegations | 27 |
| 6.5. Domestic Abuse Allegations..... | 28 |
| 6.6. IG Information Release | 28 |
| 6.6.1. JAG Requests to IG | 28 |
| 6.6.1.1. Facilitating Command Action | 28 |
| 6.6.1.2. Defending Against Command Action | 29 |
| 6.6.1.3. Court-Martial Discovery | 29 |
| 6.6.2. JAG Role in Information Release | 29 |
| 6.6.3. Releases Pursuant to 10 U.S.C. § 1034..... | 29 |
| 6.7. “Appeals” of IG Investigations..... | 30 |
| ATTACHMENTS | |
| 1. IG Reference Materials for JAGs | 31 |
| 2. SAF/IGQ Guidelines for Improper MHE Referral Allegations | 32 |
| 3. Sample Reprisal PAM..... | 34 |
| 4. JA Primer: “Legal Sufficiency Review” for IG Investigative Case Files | 38 |
| 5. Sample Legal Reviews | 42 |
| 6. Matrix: Levels of Legal Review Required | 49 |

FOREWORD

The Secretary of the Air Force, Complaints Resolution Directorate (SAF/IGQ) administers the Air Force Inspector General (IG) Complaints Resolution Program for the Air Force community. The IG Complaints Resolution Program is a leadership tool to promptly and objectively resolve problems affecting the Air Force mission. When necessary, the IG accomplishes this through objective fact-finding in the form of IG complaint analyses and investigations that address both the concerns of complainants and the best interests of the Air Force. AFI 90-301, *Inspector General Complaints Resolution*, 15 May 2008, establishes the procedural requirements for the Complaints Resolution Program and IG investigations. The Judge Advocate General (JAG) Corps provides critical support to the IG throughout all phases of the Complaints Resolution Process. This guide focuses on JAG roles and responsibilities before, during and after IG investigations. This guide is drafted and maintained by AF/JAA. Please submit any comments or recommendations to the attention of AF/JAA, Air Staff Counsel, Inspector General Complaints Division.

CHAPTER 1. INTRODUCTION

1.1. Purpose. The intent of this guide is to provide JAGs, at all levels, the tools they need to effectively assist IGs throughout the Complaints Resolution Process, with particular emphasis on IG investigations.

1.2. IG Complaints Resolution Overview. The IG is the “eyes and ears” of the commander.² Any individual can submit an IG complaint to report inappropriate conduct or a violation of law, policy, procedure or regulation, even if the complainant is not the wronged party or was not affected by the alleged violation. However, not all allegations fall under the IG’s purview. When a complainant raises allegations that may be appropriate IG matters, the IG might not conduct an IG investigation for a variety of reasons. The IG uses a three-phase process to resolve all complaints:

1.2.1. Phase 1: Complaint Analysis (CA). During CA, the IG preliminarily reviews the complainant’s assertions and evidence to determine the potential validity, relevance of the issues to the Air Force and what action, if any, is required within IG, supervisory, or other channels.³ A CA is always required.⁴ The IG will attempt to properly frame allegations from the complainant’s assertions.⁵ The JAG should assist the IG in properly framing allegations. Because complainants may be unable to properly articulate the standard violated, IGs and JAGs should always read the complaint carefully and assess whether there has been a wrongdoing. Depending on what, if any, allegations can be properly framed, the IG will use a CA to select one of the following complaint resolution strategies: referral, transfer, dismissal, assistance or investigation.⁶ Another consideration is the timeliness of the allegation (was the complaint filed within 60 days of the alleged violation or misconduct, or is it otherwise timely?).⁷ Once the CA (or Reprisal Complaint Analysis) recommending investigation is completed, the IG forwards the analysis package to the Appointing Authority, who is normally the wing commander, for review.⁸

1.2.1.1. Reprisal Complaint Analysis (RCA). When a complainant’s assertions raise the possibility of reprisal in violation of 10 U.S.C. § 1034, IGs use a special complaint analysis format called a Reprisal Complaint Analysis (RCA). AFI 90-301, Attachment 20 contains a sample RCA. An RCA always includes an analysis of a four-part “acid test” for reprisal.⁹ Reprisal is a subset of *abuse of authority*. As such, even if the facts do not meet the standard for reprisal, they may constitute abuse of authority, which should be considered in the alternative and possibly investigated.¹⁰ IGs who recommend *dismissal* of a reprisal allegation in the RCA, even if the recommendation is to proceed with abuse of authority or another allegation, must forward the RCA to the Department of Defense, Office of the Inspector General (DoD IG) through their Major Command (MAJCOM) or State Joint Forces Headquarters (JFHQ- (State)) and SAF/IGQ. DoD IG is the final authority in all reprisal cases; they must concur with dismissal of those allegations.¹¹ In cases where reprisal is not dismissed, the IG proceeds with an investigation.¹²

² AFI 90-301, para.1.27.1.1

³ AFI 90-301, para. 2.12.

⁴ AFI 90-301, para. 2.11.

⁵ AFI 90-301, para. 2.12.1.

⁶ AFI 90-301, para. 2.13.

⁷ AFI 90-301, para. 1.42.2; Table 2.2, Rule 6; IGs and IOs should not rigidly apply this rule to justify dismissal of allegations that otherwise merit investigation.

⁸ AFI 90-301, para. 1.7.

⁹ AFI 90-301, Attachment 21; *see* paragraph 2.2.1 of this guide for the reprisal “acid test.”

¹⁰ AFI 90-301, para 5.6.2.4 and Attachment 22; *see* this guide for abuse of authority discussion.

¹¹ AFI 90-301, para. 5.6.2; 3.3.

¹² AFI 90-301, para. 5.7.

1.2.1.2. Non-Reprisal CAs. AFI 90-301, Attachment 2 contains a sample non-reprisal CA.

1.2.2. Phase 2: Investigation. An investigation should be conducted when either the preliminary evidence indicates there was wrongdoing or where the IG cannot sufficiently rule out wrongdoing without further investigation. In this regard, the CA is the decision tool. The Appointing Authority directs an investigation by appointing an investigating officer (IO) in writing.¹³ The Appointing Authority provides written notice to the subject's commander about the scope of the investigation.¹⁴ The subject's commander notifies the subject of the investigation. The IG notifies the complainant.¹⁵ Upon request of the IO, the commander makes witnesses available to the IO. The investigation phase includes: pre-fact finding, fact-finding and report writing. The JAG assists the IO throughout all investigative phases.

1.2.3. Phase 3: Quality Review. The IG staff conducts a quality review on every investigation to ensure completeness, compliance with AFI 90-301 and other appropriate directives, and objectivity. The IG obtains a legal sufficiency review before forwarding to the Appointing Authority for approval or to a higher-level IG for review.¹⁶ A legal sufficiency review is required for all IG investigations.¹⁷

1.3. JAG Roles in IG Investigations. JAGs at all levels play a critical role in the Complaints Resolution Process. During the CA (Phase 1), prior to an IG investigation, JAGs will assist the IG in properly framing allegations.¹⁸ During the investigative phase (Phase 2), as part of pre-fact finding, JAGs help IOs craft an Investigation Plan (IP), formulate a Proof Analysis Matrix (PAM) and review draft interview questions. When consulted, JAGs provide advice to both IGs and IOs on issues that arise during the actual investigation or "fact-finding." After the completion of all investigations, a JAG conducts a legal sufficiency review of the IG case file as part of the Quality Review Process (Phase 3). Depending on the allegations, the MAJCOM or higher-level law office may provide an additional legal review. In addition to these roles, JAGs support IGs by training commanders and IOs, facilitating IG information release and providing advice on a myriad of IG-related matters.¹⁹

CHAPTER 2. FRAMING ALLEGATIONS

2.1. General Considerations. Assisted by the JAG, the IG frames allegations during the CA phase (Phase 1). Framing allegations is the **single most important factor** in analyzing a complaint.²⁰ Allegations framed during the CA focus the entire investigation. JAGs and IGs must carefully examine the complainant's assertions, usually documented on an AF IMT 102, *Inspector General Personal and Fraud Waste & Abuse Complaint Registration*, to identify what standards were possibly violated. This may require research. The end goal is that all allegations clearly and concisely identify the complainant's assertions as a specific violation of law, rule or policy.²¹

¹³ AFI 90-301, para. 2.35.

¹⁴ AFI 90-301, Attachment 5.

¹⁵ AFI 90-301, Table 2.15., Rule 1C.

¹⁶ AFI 90-301, para. 2.58.1.

¹⁷ AFI 90-301, para. 2.59.1.

¹⁸ AFI para. 1.47.2.

¹⁹ See AFI 90-301, para. 1.47.

²⁰ AFI 90-301, para. 2.12.1.

²¹ AFI 90-301, para. 2.12.1.

2.2 IG Matters. IGs must determine whether the matters at hand are properly within the IG purview. Congress has specifically designated the IG as the appropriate agency to investigate allegations involving “**The Big Three**”: reprisal, restriction and improper mental health evaluation (MHE) referrals.²²

2.2.1. Reprisal. Reprisal is a violation of 10 U.S.C. § 1034. Reprisal occurs when a *responsible management official (RMO)*²³ takes (or threatens to take) an unfavorable personnel action²⁴; or withholds (or threatens to withhold) a favorable personnel action, to retaliate against a member of the armed forces who made or prepared to make a *protected communication*.²⁵ Any lawful communication, regardless of the subject, to an IG or Congress, is considered protected. Additionally, it is a protected communication when a member who reasonably believes he/she has evidence of a *violation of law or regulation* (regardless of whether he/she is the victim), discloses this to an *authorized recipient*²⁶ in the form of a *lawful communication*.²⁷

AFI 90-301, Attachment 21, sets forth an “acid test” for evaluating reprisal allegations. The “**acid test**” consists of four questions:

- 1. Did the member make or prepare a communication protected by statute?**
- 2. Was an unfavorable personnel action taken or threatened, or was a favorable action withheld or threatened to be withheld following the protected communication?**
- 3. Did the official responsible for taking, withholding, or threatening the personnel action know about the protected communication?**
- 4. Does the evidence establish that the personnel action would have been taken withheld, or threatened if the protected communication had not been made?**

When analyzing question 4, the IO is required to consider the following five factors: (a) reasons stated by the RMO for taking, withholding, or threatening the action; (b) reasonableness of the actions taken, withheld, or threatened considering the complainant’s performance and conduct; (c) consistency of the action(s) of RMO(s) with past practice; (d) motive of the RMO for the action; and (e)

²² See 10 U.S.C. § 1034, as implemented by DoD Directive (DoDD) 7050.06, *Military Whistleblower Protection*, 23 July 2007 and Public Law 102-484, Section 546, *National Defense Authorization Act for Fiscal Year 1993*, 23 October 1992, as implemented by DoDD 6490.1, *Mental Health Evaluations of Members of the Armed Forces*, 1 October 1997.

²³ RMOs include three categories: (1) deciding officials; (2) those who influenced/recommended the action; and (3) reviewers/indorsers (e.g., additional rater on EPR) (AFI 90-301, Attachment 1)

²⁴ Personnel actions include actions that affect or have the potential to affect a military member’s current position or career (e.g., an LOR, referral EPR). LOCs are not normally considered a personnel action in a reprisal case (See AFI 90-301, Attachment. 1 definition of “personnel action”).

²⁵ AFI 90-301, para. 5.3.1.1.

²⁶ Besides the IG, EO and family advocacy, *authorized recipients* of protected communications include, but are not limited to, First Sergeants, Command Chief Master Sergeants, Flight Commanders, Squadron Commanders and higher as well as others appointed IAW AFI 51-604 and AFI 38-101. (AFI 90-301 paras. 5.3.2; AFI 90-301, Attachment 1) For purposes of AFI 90-301, “chain of command” includes supervisors and raters. (AFI 90-301, Attachment 1) See *OpJAGAF 2000/39, 6 Jun 2000* regarding communications to safety offices, FWA monitors the Air Force Board for Correction of Military Records (AFBCMR), Secretary of the Air Force Personnel Council (SAFPC) or to the Air Force Personnel Center (AFPC).

²⁷ *Unlawful* communications include: (1) those that convey an admission of misconduct, violation of the UCMJ, or violation of other applicable criminal statutes and (2) communications that, in themselves, constitute misconduct, a violation of the UCMJ or violation of other applicable criminal statutes (e.g., threats, false statements etc.) (AFI 90-301, Attachment 1)

procedural correctness of the action. If questions 1 through 3 of the “acid test” are answered in the affirmative and question 4 is answered in the negative, a *prima facie* case of reprisal exists. If the answer to any of the first three questions is “no,” reprisal cannot be substantiated. If the answer to any of the first three questions is “no,” reprisal cannot be substantiated. However, *where appropriate*, the underlying personnel action should then be analyzed to determine whether an abuse of authority occurred.

An example of a *prima facie* case of reprisal is: A female Staff Sergeant (SSgt) files an Equal Opportunity (EO) complaint against her male supervisor for sexual harassment. The supervisor rates her enlisted performance report (EPR) as a “3.” The SSgt’s previous EPRs were all “5’s.” The supervisor has no documentation to justify downgrade to a “3.” The analysis follows: 1. Was there a protected communication? Yes, the EO complaint against her supervisor was a protected communication because the complainant reasonably believed she had evidence of a violation of law, regulation, or policy, and she filed her complaint with EO, an authorized recipient of protected communications. 2. Was there an unfavorable personnel action? Yes, the downgraded EPR. While a markdown is not always an unfavorable personnel action, a “3” EPR following prior “5” EPRs is most likely a negative personnel action because it documents a reduction in performance that has the potential to affect her career. This answer might be “no” if she had “3” EPRs in her record. 3. Did the person who took the action know about the protected communication? In all likelihood, yes, as the allegations were against the supervisor. The IG can speak to EO to determine if the supervisor was notified or interviewed for the prior complaint. If the answers to the first 3 questions are “yes,” the IG must report the reprisal allegation through IG channels to DoD-IG. Further complaint analysis will determine the need for investigation, but reprisal cannot be substantiated without an investigation. If investigation reveals the answer to question 4 is “no,” reprisal is substantiated.

2.2.2. Restriction. 10 U.S.C. § 1034 also states that a military member may not be *restricted* or prohibited from making a lawful communication to the IG or a member of Congress (i.e., making a protected communication).²⁸ Restriction can result from either private or public statements that may reasonably discourage Air Force members from contacting the IG or a member of Congress. Proper analysis of these complaints requires an in-depth review of the following issues: **1. How did the RMO limit or attempt to limit the member’s access to the IG or a member of Congress? 2. What was the intent of the RMO who allegedly restricted the member? 3. Would a reasonable person, under similar circumstances, believe he/she was actually restricted from making a lawful communication with the IG or a member of Congress based on the RMO’s actions?**²⁹ (i.e., would the communication have a “chilling effect” on others?) JAGs should review restriction investigations to ensure the investigating officer considered all available evidence of intent, as well as the reasonableness of the complainant’s belief he or she was restricted *from making a protected communication*. IO’s may need to consider the context of a conversation or memorandum to fully analyze restriction. For example, a commander who directs a member to stay within his chain of command because the member emailed the first sergeant saying he was going to complain to his Congressman about an upcoming deployment has probably restricted. Another example of restriction would be if, during a commander’s call, a squadron commander were to tell his unit that all problems will always go through him first. However, if during a commander’s call, the commander were to tell his unit that he prefers to solve problems within the chain of command because problems are usually resolved faster at lower levels, but members are free to use other grievance channels, this would not constitute restriction. *Finally, JAGs should be aware (and provide advice accordingly) that while restriction only applies to communications with the IG or*

²⁸ AFI 90-301, Attachment 21. The definitions for *RMO*, *protected communication*, *unlawful communication*, *authorized recipients* also apply to restricted access. (AFI 90-301, para 6.2)

²⁹ AFI 90-301, Table 6.2

member of Congress, disciplinary actions in response to making (or preparing to make) other protected communications may constitute reprisal.

2.2.3. Improper Mental Health Evaluation (MHE) Referrals.

2.2.3.1. Framing. These cases typically involve improper procedures or reprisal. For framing suggestions, see Attachment 2 to this guide, *SAF/IGQ Guidelines for Improper MHE Referral Allegations*. While one mental health referral could be framed against multiple standards, JAGs should review allegations to ensure fairness from “overcharging.” For example, a commander who directs a member to go to the ER for a suicide check, without providing any follow-up paperwork, has violated AFI 44-109, DoDD 6490.1, and DoDI 6490.4. However, framing three allegations for one improper referral would rarely be necessary to adequately investigate the allegation. JAGs should advise the IG on the best standard for investigation. Normally, this will be the highest standard, DoDD 6490.1. Insofar as DoDI 6490.4 and AFI 44-109 implement the DoD Directive, they may be included in the allegation or discussed in the administrative investigation. Note: as of the publication of this guide (March 2010), SAF/IGQ recommends IGs frame an MHE allegation as “unauthorized referral” or “improper referral” under DoDI 6490.1.

2.2.3.2. Coercion and Voluntary Referral. This section discusses complaints of “coercion,” mentioned in AFI 44-109, and “voluntary referral,” defined in DoDI 6490.4.

AFI 44-109, *Mental Health, Confidentiality, and Military Law*, 1 March 2000, paragraph 4.1. states, “Supervisory personnel, including commanders, may encourage Air Force members to voluntarily seek mental health care...Supervisors and commanders may not, however, under any circumstances attempt to coerce members to voluntarily seek a mental health evaluation.”³⁰ In the past, IOs and JAGs relied on various definitions of the word “coerce” to evaluate whether AFI 44-109 was violated.³¹ These complaints often involved tough calls, given a fine line between caring and coercion. An individual’s indication on an MHE intake form that he was there “voluntarily,” while compelling, was (and still is) not necessarily outcome determinative.

An example of a coercion case would be: Amn Jones has been acting strangely. He recently told his commander that he was “losing it,” and going to “go postal on someone.” The commander meets with Amn Jones at 1600 on a Friday before a three-day weekend. He tells Amn Jones that he’s not getting released for the weekend until mental health clears him. Amn Jones, feeling he has no choice in the matter, “volunteers” to go to mental health, escorted by his two supervisors.

DOD-IG-Military Reprisal Investigations (MRI) exercises oversight authority of mental health evaluation investigations. In cases where the Air Force alleges “coercion” under AFI 44-109, DoD-IG-MRI typically applies a standard of “voluntary referral” in its review. Recent (2007-2010) cases decided by DoD-IG- MRI relied on the definition of “Self-Referral (or Voluntary Referral)” found in enclosure 2 to DoDI 6490.4. The instruction defines voluntary referral as “[t]he process of seeking information about or obtaining an appointment for a mental health evaluation or treatment initiated by the service member independently for him or herself.” Thus, even in cases where a supervisor or commander “encouraged” a member to seek mental health care, DoD-IG-MRI has concluded the supervisor (or senior NCO) or commander violated DoDI 6490.4 and/or DoDD 6490.1 by

³⁰ AFI 44-109, para. 4.1.

³¹ For instance, to coerce means, “to compel to an act or choice.” *Merriam-Webster On-Line Dictionary*, <http://www.m-w.com/dictionary>. Conversely, voluntary means, “proceeding from the will or from one's own choice or consent.”

initiating the referral without authority (aka “unauthorized referral”) or by failing to provide the required notice and rights (aka “improper referral”). In those cases, DoD-IG-MRI concluded such situated Airmen would not have sought an evaluation without the persuasion of the supervisor or commander; thus, under the DoDI 6490.4, the referral was not voluntary. As a result, DoD-IG-MRI substantiated violations of DoDI 6490.4 and/or DoDI 6490.1.

As mentioned above, SAF/IGQ’s practice was to draft allegations against commanders and supervisors as violations of DODD 6490.1 and/or DODI 6490.4, rather than AFI 44-109. In essence, SAF/IGQ has adopted the higher standard of “voluntary referral” as applied by DOD-IG-MRI. Because of this change, an allegation of “coercion” under AFI 44-109 should be rare.

Whether using “voluntary referral” or “coercion,” it is important to recognize that many Airmen because of the subordinate-superior relationship do not think they may refuse instruction from their commanding officer or senior leadership (including SNCOs). As a result, a superior’s encouragement may lead a subordinate to think he has only two choices: 1) submit to a mental health evaluation “voluntarily” or 2) submit to a commander-directed evaluation. Either way, the member would receive a mental health evaluation. In this situation, the IO might conclude the member was coerced under AFI 44-109, or more recently, that the referral was not voluntary and was initiated in violation of the controlling DoD instruction.

It follows that where a commander determines a member needs to see a mental health provider, he or she should use one of the following processes: (1) If a commander concludes an Airman is a danger to self or others, the commander should initiate the procedures for an emergency commander directed evaluation.³² (2) Where a commander needs to know a member’s mental health fitness but has determined an Airman’s situation is non-emergent, the procedures for a routine commander directed evaluation are appropriate. However, when a commander or supervisor wants to *encourage* a specific airman to get help *somewhere*, the best method is to provide the Airman information on a variety of available services (i.e., chaplain, mental health, primary care, family support, Military One Source, etc.) and permit the airman to decide whether/where/when to seek help. If problems continue, commanders should utilize one of the applicable commander directed evaluation processes.

2.2.3.3 Improper Procedures.

Only a commander can “direct” a member to undergo an MHE.³³ Special procedures apply to involuntary referral of military members for an MHE. In all MHE referral cases (emergency or routine), the commander is required to notify the member in writing, of his or her rights.³⁴ JAGs must be familiar with the process and the notification requirements for routine and emergency referrals.³⁵ A procedurally improper MHE referral case will ordinarily not involve an in-depth review of the commander’s intent or motives. Good intentions do not negate technical violations of procedural requirements; however, good intentions may mitigate any command action that may eventually be taken as a result of the violation.

Although first sergeants and supervisors may not “direct” a mental health evaluation, they may be the subject of an IG investigation for violating the standards. For example, first

³² See DoDD 6490.1 and DoDI 6490.4

³³ AFI 44-109, para. 4.2.

³⁴ DoDI 6490.4, para. 6.1.1.4.1.

³⁵ DoDI 6490.4, Enclosure 4; DoDI 6490.4, para 6.1.1.4.1 and 6.1.1.5.4

sergeants and supervisors who run the entire process for the commander or escort members to Mental Health for a “suicide check” might be investigated for an unauthorized mental health referral under DoDD 6490.1, DoDI 6490.4 or coercion under AFI 44-109 (but see discussion of coercion above).

2.2.3.4. MHE as Reprisal. Sometimes a complainant will allege his or her commander referred him or her for an MHE in reprisal for making a protected communication. Treat such cases as potential violations of 10 U.S.C. § 1034 and frame the allegation as reprisal.

2.2.4. Abuse of Authority.

Abuse of authority is not a “catch-all” standard for actions that don’t seem “fair.” While actions may not be fair, they don’t always rise to the level of abuse of authority. Abuse of authority requires wrongdoing that had an impact either on the complainant (adverse loss) or subject (positive gain). IGs and JAGs should guard against using abuse of authority as the basis for an allegation if another standard more accurately characterizes the alleged inappropriate conduct or failure to act.

Reprisal is a subset of abuse of authority. If an allegation of reprisal does not meet the definition of reprisal under 10 U.S.C. §1034, IGs must still address and attempt resolution of the allegation as a personal complaint, such as abuse of authority. (AFI 90-301, 15 May 08, para 5.6.2.4)

2.2.4.1. AFI 90-301 standard – is it “Arbitrary” and/or “Capricious”? AFI 90-301, 15 May 08, Attachment 1 defines “abuse of authority” as an “arbitrary *or* capricious” exercise of power that (1) adversely affects the rights³⁶ of any person or results in personal gain or advantage to the abuser, and (2) the official did not act within the authority granted under applicable regulations, law or policy; or the official’s action was not based on relevant data and factors; or the official’s action was not rationally related to the relevant data and factors.³⁷ Attachment 22 of AFI 90-301 uses the term “arbitrary *and* capricious,” and provides a slightly different framework to assist the IO’s analysis. (emphasis added)

Although the Air Force uses "or" for "and" in some places, the standard has been applied as the normal administrative review standard under 5 U.S.C. § 706, the Administrative Procedure Act (APA). The APA states, “the reviewing court shall ... (2) hold unlawful and set aside agency action, findings, and conclusions found to be--(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law....”³⁸ Federal courts have used the terms “arbitrary and capricious,” “arbitrary or

³⁶ The AA acid test in Attachment 22 omits “the rights”

³⁷ The AA acid test in Attachment 22 omits “the official actions was not based on relevant data ... no rationally related to the relevant data and factors” and instead asks, “was the action arbitrary and capricious?”

³⁸See 5 USC Sec 706, Administrative Procedures Act: To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to [sections 556](#) and [557](#) of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party,

capricious” and “arbitrary” or “capricious” to refer to this narrow standard of review under the APA.

The best definition of the term “arbitrary and capricious” is found in *Motor Vehicle Manufacturers Association v. State Farm Insurance*, 463 U.S. 29 (1983). There, the U.S. Supreme Court reviewed whether NHTSA acted “arbitrarily and capriciously.”³⁹ The Court noted: “A reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency.”⁴⁰ The Supreme Court revisited this narrow standard of review in *Federal Communications Commission v. Fox Television Stations*, 129 S.Ct. 1800 (2009).⁴¹ The Court referred to the standard as “arbitrary [or] capricious” and summarized the governing principles as

The Administrative Procedure Act, 5 U.S.C. § 551 et seq., which sets forth the full extent of judicial authority to review executive agency action for procedural correctness, see *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 545-549, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978), permits (insofar as relevant here) the setting aside of agency action that is “arbitrary” or “capricious,” 5 U.S.C. § 706(2)(A). Under what we have called this “narrow” standard of review, we insist that an agency “examine the relevant data and articulate a satisfactory explanation for its action.” *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). We have made clear, however, that “a court is not to substitute its judgment for that of the agency,” *ibid.*, and should “uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned,” *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974).⁴²

Applying these principles, the Court wrote, “If the Commission's action here was not arbitrary or capricious in the ordinary sense, it satisfies the Administrative Procedure Act's “arbitrary [or] capricious” standard....”⁴³

Although AFI 90-301 uses “arbitrary or capricious” in the abuse of authority definition (Attachment 1) and “arbitrary and capricious” in the abuse of authority acid test (Attachment 22), both generally apply the administrative review standard articulated by the Supreme Court to determine whether an action was rational, based on relevant factors, and within the subject’s authority. As such, JAGs and IOs should not be concerned about whether the review standard uses “and” or “or,” but rather whether the action is rational, based on consideration of the relevant factors, and within the subject’s scope of the authority. In short, if the action was authorized and rationally based on and related to relevant data and factors, it is not “arbitrary [or] capricious” and is not indicative an abuse of authority. JAGs can find further discussion of the “arbitrary [and/or] capricious” standard in court interpretations of

and due account shall be taken of the rule of prejudicial error.

³⁹ *Motor Vehicle*, 463 U.S. at 34.

⁴⁰ *Motor Vehicle*, 463 U.S. at 42.

⁴¹ In *Fox*, the majority rejected a lower court’s decision to require an agency to explain why original reasons for a rule or policy are no longer dispositive and why the new rule was as good or better than the old rule at effectuating a statute. *Fox*, 129 S.Ct. at 1810.

⁴² *Fox*, 129 S.Ct. at 1810

⁴³ *Fox*, 129 S.Ct. at 1811.

the APA.⁴⁴

2.2.4.2. Reviewing Air Force Abuse of Authority Investigations. Occasionally an IO will look to the definitions of “arbitrary” and “capricious” in Attachment 1 and will find the subject was “arbitrary” but not “capricious” (or vice versa) and conclude abuse of authority is not substantiated.⁴⁵ Insofar as the Supreme Court and the Air Force have not required an action to be both “arbitrary” and “capricious,” such cases should be returned to the IO for reconsideration.

AFI 90-301 provides the AA acid test in Attachment 22 as a framework to assist IO’s in their analysis. As discussed above, the definitions and guidance vary somewhat from the definitions in Attachment 1. Nevertheless, the AA acid test provides the IO a framework to analyze whether the subject’s actions were arbitrary [and/or] capricious under the narrow administrative review standard; that is, whether the action was authorized and rationally based on and related to relevant data and factors. The AA acid test reads,

1. Did the responsible management official’s (RMO’s) actions either:
 - a. Adversely affect [the rights of]⁴⁶ any person? (e.g., demotion, referral OPR, extra duty, etc.)

or

- b. Result in personal gain or advantage to the RMO? (e.g., promotion, award, etc.)

If questions 1(a) and 1(b) are both answered "no," then it is not necessary to consider question 2.

If either part of question 1(a) or 1(b) is answered "yes," the IO must answer questions 2 and 3.

2. Did the RMO act within the authority granted under applicable regulations, law or policy? [or]

3. Was the action arbitrary and capricious: (*the AA acid test then refers to four factors borrowed from the reprisal acid test: reasons, reasonableness, consistency, motive.*)

⁴⁴ Traditionally, courts have applied a “narrow and deferential” review of the action and will not substitute its own judgment for that of the agency. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983). This narrow review asks whether the government action is “rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by statute.” *Id.* The government actor must “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Id.* (quoting *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 168 (1962)). Ultimately, the reviewing court must find a “clear error of judgment” to find an action arbitrary and capricious. *Id.* See also *Dep’t of the Air Force v. FLRA*, 352 U.S. App. D.C. 394 (D.C. Cir. 2002) (discussing arbitrary and capricious standard))

⁴⁵ AFI 90-301, 15 May 08, Attachment 1 defines capricious as determined by chance or impulse or whim rather than by necessity or reason, and defines arbitrary as based on or subject to individual discretion or preference or sometimes impulse or caprice. (AFI 90-301, Attachment 1)

⁴⁶ The definition in Attachment 1 includes “the rights of.” IOs should not take this too literally, such as “no one has the right to a quarterly award.” See para 2.2.4.3, example.

JAGs should be aware that the four factors provided in question 3 mirror the factors in question 4 of the reprisal acid test for a reason: if the IO discussed those factors in a reprisal allegation, the IO can **refer back to that analysis** rather than repeating the discussion.

Although the AA acid test does not place an [or] between questions 2 and 3, “or” is included in the definition of abuse of authority in Attachment 1 and is consistent with case law (“... may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency”⁴⁷)

It is important to note that the underlying question in question 3 is whether the action was rational, based on consideration of the relevant data and factors. If not, the action is arbitrary and capricious. In answering Question 3, IOs should examine the RMO’s action very narrowly, giving the RMO’s decision substantial deference (great weight) without substituting one’s judgment for that of the RMO.

If the answer to Question 2 is yes, and the answer to Question 3 is “no,” the action should not be considered an abuse of authority. If the answer to either Question 2 or 3 is “yes,” then the action is indicative of an abuse of authority.

2.2.4.3. Example. An example of abuse of authority might be: Colonel A offers Captain B an assignment working on his staff. Citing personal reasons, Capt B declines. Following this interchange, the relationship between the two cools markedly. A few months later, Capt B’s supervisor nominates him for a quarterly award for which Col A is the decision authority. After the submission deadline passes, Capt B is the only nominee, more than meets all the award criteria and seems highly deserving. However, without receiving a formal submission, Col A selects Capt C, his golfing buddy who received a conviction for driving under the influence during the award period, as his winner.

Capt B was denied an award for which he was otherwise highly qualified and the only nominee. Commanders and supervisors are afforded great latitude with regard to actions such as quarterly and annual awards. As such, the IO *might* find that Col A acted within his authority. Nevertheless, if Col A chose Capt C, his friend and, more importantly, a person who engaged in significant misconduct that quarter, and he based that action on the fact that Capt B decided not to work for him, then the IO could reasonably find the action was arbitrary and capricious. Col A’s decision was not rational, based on consideration of the relevant factors. If the IO concludes Col A’s action was arbitrary and capricious, the IO should substantiate abuse of authority.

2.2.5. Fraud, Waste and Abuse (FWA).⁴⁸ Fraud is any intentional deception designed to unlawfully deprive the Air Force of something of value or to secure from the Air Force an individual benefit, privilege, allowance, or consideration to which he or she is not entitled.⁴⁹ Actions that constitute fraud may be more appropriately framed against other regulations and statutes, such as DoDD 5500.7-R, *Joint Ethics Regulation (JER)*, 30 August 2003, or the Uniform Code of Military Justice (UCMJ). The only definitions for “waste” and “abuse” are found in AFI 90-301.⁵⁰ AFI 90-301 defines “abuse” as the intentional wrongful or improper use of Air Force resources.⁵¹ Examples include misuse of rank, position

⁴⁷ *Motor Vehicle*, 463 U.S. at 42.

⁴⁸ FWA is not solely an IG matter. Depending on the circumstances, Air Force Office of Special Investigations (AFOSI) might investigate FWA as a criminal matter. (AFI 90-301, Table 2.6, Rule 8)

⁴⁹ AFI 90-301, Attachment 1.

⁵⁰ AFI 90-301, Attachment 1.

⁵¹ AFI 90-301, Attachment 1

or authority that causes the loss or misuse of resources such as tools, vehicles, computers or copy machines. Abuse allegations may involve unnecessary purchases, such as disposing of newly acquired government furniture and acquiring new furniture merely because the supervisor's tastes have changed. AFI 90-301 defines "waste" as the extravagant, careless or needless expenditure of AF funds or the consumption of AF property that results from deficient practices, systems controls or decisions, as well as improper practices not involving prosecutable fraud.

2.3. Matters Not Appropriate for the IG. More often than not, a complaint's assertions will fall more appropriately under the purview of command or other agencies. AFI 90-301, Table 2.5, *Matters Not Appropriate for the IG Complaints Resolution Program*, contains a helpful but non-exhaustive list. While the Appointing Authority has great latitude to direct an IO to investigate any matter that he or she deems appropriate, normally the following should not be included as part of an IG investigation. **[Foot stomper: The IG should not investigate Privacy Act violations or violations of any other law under which the Air Force might face civil liability.]**

2.3.1. Command Matters. The IG is not a substitute for using the chain of command. Complainants should attempt to resolve their issues at the lowest possible level *using supervisory channels before* addressing them to the IG.⁵² *Commanders* have the inherent authority to investigate matters under their jurisdiction, unless preempted by higher authority. Commanders typically initiate a Commander-Directed Investigation (CDI) to investigate issues that affect their command.⁵³ **[Foot stomper: A CDI is never appropriate for "Big Three" allegations. Only the IG may investigate reprisal, restriction, and improper mental health evaluation allegations.]**

2.3.2. Within Purview of Other Established Grievance or Appeal Channels. The Air Force IG Complaints Resolution Program may not be used for matters normally addressed through other established grievance or appeal channels, unless there is evidence that those channels mishandled the matter or process.⁵⁴ As an exception to this general rule, the Appointing Authority may direct an IG investigation for a sexual harassment complaint filed with EO.⁵⁵

2.3.3. UCMJ Offenses. UCMJ offenses more appropriately fall under the purview of law enforcement and command. As such, the IG does not routinely investigate them.

2.4. Allegation Requirements. For due process purposes, IG allegations serve as *notice* to the subject. An allegation should clearly inform the subject what he or she allegedly did wrong. By far, improperly framed allegations are the most prevalent, and significant, error in IG investigations. Many allegations are either vague, poorly worded, or allege conduct that does not amount to unlawful or unauthorized conduct. IGs must properly frame allegations by precisely identifying the who, what, when, and how of an alleged violation of law, regulation or policy.⁵⁶

2.4.1. The Who. The allegation must indicate the subject's full name and rank (e.g., Major Roger Jackson). It is helpful, but not required, to include the subject's duty title, if relevant to the alleged violation (e.g., Commander, 1st Fighter Squadron). Each allegation must address only one subject.⁵⁷ Use

⁵² AFI 90-301, para. 1.46.1.

⁵³ The CDI is distinct from an IG investigation and beyond the scope of this guide. For information about properly conducting CDIs, see *SAF/IGQ CDI Guide*.

⁵⁴ AFI 90-301, para. 1.40.1.

⁵⁵ AFI 90-301, para. 9.4.2.1.

⁵⁶ AFI 90-301, para. 2.12.1.

⁵⁷ AFI 90-301, para. 2.12.2.

separate allegations when multiple subjects are alleged to have committed the same or similar misconduct.

2.4.2. The What. Allegations must identify a violation of law, policy or regulation (e.g. 10 U.S.C. § 1034).⁵⁸ They must address a violation of a standard. The standard used must be the correct standard (e.g., not “fraud, waste and abuse” but DoDD 5500.7-R, Joint Ethics Regulation, paragraph X) and normally it should be the highest standard applicable (e.g. don’t use an AFI if there is a DoDI that also covers the issue). Framing against the highest standard is particularly important in cases where DOD-IG-MRI is the final arbiter of the investigation. Note: When citing the highest standard, the allegation or discussion may still include references to the implementing standards (e.g., DoDD 6490.1 and implementing instructions DoDI 6490.4 and AF 44-109). Do not combine allegations (i.e., “reprisal and restriction in violation of 10 U.S.C. 1034”).

2.4.3. The When. The allegation, to the extent practicable, should precisely indicate the date of the alleged violation.⁵⁹ If the exact date is not known, the IG may qualify the date with the term, “on or about.” If the misconduct occurred during or between certain dates, use, “between on or about X May 200X and X July 200X.”

2.4.4. The How. The allegation must provide sufficient notice of how the standard was violated.⁶⁰ If applicable, the allegation should indicate the full name and rank of the affected party, who may or may not be the actual complainant. [**Foot stomper: The allegation should not identify the complainant, e.g., “Col Y did whatever to Captain X, *the complainant*....”]**]

2.4.5. An example of a properly framed allegation. On or about XX November 20XX, (**WHEN**) Major Roger Jackson, Commander, 1st Fighter Squadron, (**WHO**) issued a referral Enlisted Performance Report to Senior Airman Ava Wilson, in reprisal for making a protected communication (**HOW**), in violation of 10 U.S.C. § 1034 (**WHAT**).

CHAPTER 3. PRE FACT-FINDING

3.1. Overview. “Pre-Fact Finding” is the equivalent of case preparation. As in litigation, the end result of an IG investigation will typically reflect the amount of preparation put into the case. AFI 90-301 specifically charters the appointed IO to meet with their legal advisor before initiating the investigation.⁶¹ The JAG legal advisor must help the IG train the IO.⁶² In addition to training, the JAG should assist the IO to formulate his or her Investigative Plan (IP), Proof Analysis Matrix (PAM) and interview questions.

3.2. JAG Legal Advisor Qualifications. AFI 90-301 does not require the JAG legal advisor be someone other than the JAG who will ultimately conduct the post-investigation legal sufficiency review.⁶³ The assigned JAG legal advisor must be familiar with AFI 90-301, the *SAF/IGQ IO Guide*, this guide and, for reprisal or improper MHE cases, IGDG 7050.6, *Guide to Investigating Reprisal and Improper Referrals for Mental Health*, 6 February 1996. For reprisal, restriction, and improper mental health evaluation

⁵⁸ AFI 90-301, para. 2.12.1.4.

⁵⁹ AFI 90-301, para. 2.12.1.1.

⁶⁰ AFI 90-301, para. 2.12.1.3.

⁶¹ AFI 90-301, para. 2.36.2.

⁶² The *SAF/IGQ Investigating Officer Guide (IO Guide)* is a mandatory training tool per AFI 90-301, para. 2.36.1.

⁶³ AFI 90-301, para. 1.47.4.1. This change recognizes an office may not be adequately staffed to meet the 2-JAG requirement, and the legal advisor may be in the best position to draft the legal review. SJAs may still choose to assign a separate reviewer or endorse the final review.

investigations, the legal advisor must be familiar with the relevant statutes, directives, and instructions (i.e., 10 U.S.C. § 1034, DoDD 7050.06, DoDD 6490.1, DoDI 6490.4, AFI 44-109). It is preferred, but not required, that the JAG advising the IO should have attended the Installation IG Training Course offered by SAF/IGQ or have investigative or litigation experience and background.

3.3. The Investigation Plan (IP). The IG may complete an IP. The IO may also complete an IP, which the IG approves.⁶⁴ Attachment 7 to AFI 90-301 provides a sample IP. The IP outlines the: issues for resolution, preliminary facts including a chronology, applicable regulations, evidence required and administrative considerations related to the investigation (such as travel required). The IP is the IO's roadmap. It is the precursor to the proof analysis matrix and ultimately, the Report of Investigation (ROI). As such, it behooves the JAG legal advisor to review the IP and provide inputs to the IO and IG to ensure the investigation is properly focused on the issues presented. Additionally, the IP should plan the order of witness interviews. AFI 90-301 requires that the IO interview the complainant first and the subject last.⁶⁵

3.4. The Proof Analysis Matrix (PAM). The PAM is the IG version of a proof analysis. It provides a construct for identifying the evidence needed to prove or disprove an allegation. Additionally, the PAM provides a reference outline for the analysis section of the IO's ROI. While not addressed in AFI 90-301, the SAF/IGQ *IO Guide* encourages IOs to create a PAM for each allegation. The PAM is a living, breathing document, which, if done thoroughly and revised continuously throughout the investigation, will serve as a solid template for the ROI.

3.4.1. The Preferred Practice. The preferred practice is to build the PAM around the "elements" of the standard, including its definitions, while still incorporating the who, the standard and when. From a proof perspective, the crux of any issue, however, is the analysis of "did what." Definitions are critical to a determination of whether a standard was violated. For example, in a reprisal case, the first question of the "acid" test is whether the individual made a "protected communication" (PC). If the IO does not understand what qualifies as a PC and the subtle nuances involved in making that determination, then the IO's conclusion might be incorrect. The same logic applies to any standard violation. Understanding the standard is crucial to determining whether the subject violated it.

3.4.2. Sample Reprisal PAM. In a reprisal case, for example, the issue is whether the individual "reprised" in violation of 10 U.S.C. § 1034. To determine this, one must apply the reprisal "acid test." For a detailed sample PAM, see Attachment 3 to this guide.

3.5. Question Formulation. While not required by AFI 90-301, JAG legal advisors can and should assist the IO by reviewing his or her interview questions and techniques in advance. JAGs should review IO interview questions for relevance, organization, thoroughness and form. This review can help the IO conduct an unbiased search for the facts.

3.5.1. Relevance. Military Rule of Evidence 401 defines relevance as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." The key to relevance is whether the information sought might have a material effect on the outcome of the case. The interview questions should focus on the facts and circumstances surrounding, and leading up to, each allegation. Information that relates to the issues and concepts outlined in the PAM for each allegation will always be relevant: who, did what, to whom, when. DoD Inspector General Guide 7050.6, *Guide to Investigating Reprisal and Improper Referrals for Mental*

⁶⁴ AFI 90-301, para. 2.39.9, 2.40.13.

⁶⁵ AFI 90-301, para. 2.42.1.1. and 2.42.1.2.

Health Evaluations, 6 February 1996, is an excellent starting point for interview questions in reprisal and MHE cases.

3.5.2. Logical Progression. The best interviews are organized in such a way that they start with background and build up to the pivotal question or issue. While there is no “cookie cutter” method to ensure effective interviews, the recommended approach is to review events chronologically, instead of serially (allegation 1, allegation 2). Jumping from allegation to allegation often results in going back and forth between timeframes and leads to confusion. Use the chronology in the IP to frame questions that facilitate an orderly sequence of events.

3.5.3. Peeling Back the Onion. Thoroughness is required in all IG investigations. IG investigations are about people and for people. As such, they are inherently about relationships. Each person has a unique history that contributed to who they are today, and more importantly, why they act the way they do and/or perceive things as they do. IOs need to look beyond who, what, when, where and how. They need to address the “why,” whether or not motive is an element outlined in the PAM. Motive is always relevant. Sometimes the “why” cuts to the heart of the matter and reveals the most relevant facts in the case.

3.5.4. Leading Questions. Questions that either assume the answer or leave the witness no choice but to state a particular response (yes or no) are often unhelpful in ferreting out facts in an IG investigation. JAGs should train IOs to use the proper form. This means avoiding leading questions, except in limited circumstances, such as when confirming facts the IO already knows or when rephrasing an answer the witness previously provided. The end goal is for the witness to testify, not the IO.

CHAPTER 4. FACT-FINDING (INVESTIGATIVE) ISSUES

4.1. Rights Advisement for Witnesses/Subjects/Suspects. IGs and IOs may contact the JAG about the propriety of rights advisement for subjects, suspects or witnesses prior to or during a break in the interview or reinterview.

4.1.1. Military. The obligation of a military IO to advise a military member of her Article 31 rights hinges on whether the individual is a “suspect.” Over the years, the courts have consistently held that a “suspect” is an individual whom the questioner, at the time of the interview, either believes or reasonably should believe, committed an offense under the UCMJ. See, e.g., *United States v. Meeks*, 41 M.J. 150 (CMA 1994); *United States v. Hilton*, 32 M.J. 393 (CMA 1991). Thus, the question of whether an individual is a suspect turns on both a subjective and an objective test. If the questioner, regardless of the available evidence, actually believes the individual committed an offense, a rights advisement must be given. Even if the questioner does not personally believe the person being interviewed committed an offense, a rights advisement must be given if, based on all the known circumstances, a reasonable person would believe the individual committed an offense. See *United States v. Meeks, supra* at 161. This objective test is explicitly recognized in the definition of “suspect” contained in AFI 90-301, Atch 1. AFI 90-301 extends this requirement to civilian IOs.⁶⁶

The required rights advisement must be given without regard to the anticipated nature of any resulting disciplinary action. The individual’s status as a suspect controls this issue, not the severity of the offense or harshness of any possible subsequent punishment.

⁶⁶ AFI 90-30,1 para. 2.45.1, requires both military and civilian IOs who suspect military members of an offense to “advise them of their rights as specified under Article 31, UCMJ.” See also Attachment 1, Terms, which defines an IO to include an, “Air Force civilian appointed by a competent appointing authority to conduct an IG investigation.”

Applying the above to IG investigations, it is clear that not everyone who is the subject of the underlying allegation will be considered a suspect. First, an allegation, even if true, must amount to a violation of the UCMJ or some other criminal law. If it does not, no rights advisement is required. Second, even if an allegation would amount to an offense under the UCMJ or other criminal law, a rights advisement is only required if the IO believes, or reasonably should believe, that the individual committed an offense. To illustrate this point, consider two potential extremes. If, at the time the IO interviews the subject, all of the witnesses' testimony and other available evidence indicates the subject did not commit an offense, there would be no reasonable basis to believe the subject is a "suspect" and no rights advisement would be required. On the other hand, if all of the witnesses and other available evidence indicate the subject did commit an offense, a reasonable person would consider the subject to be a "suspect" and a rights advisement would be required. Of course, most cases will not be so one-sided, and will require the IO to carefully weigh the available evidence to determine if a rights advisement must be given. Again, IOs should consult with their servicing legal office. As a matter of practice in "close calls," the IO should err on the side of advising individuals of their rights.⁶⁷

The above rules apply equally to all alleged offenses, including reprisal allegations filed IAW 10 USC Sec. 1034. The statutory prohibitions on reprisal have been incorporated into AFI 90-301. As a result, reprisals can amount to either violations of a lawful general regulation or derelictions of duty, both of which are punishable under Article 92, UCMJ. Accordingly, if the IO, at the time the subject is interviewed, believes or reasonably should believe the subject committed the alleged reprisal, an appropriate rights advisement must be given. If not, a rights advisement is not required.

The lack of a requirement to advise a witness or subject of his Article 31 rights does not preclude the interviewee from invoking a right not to answer questions that may self-incriminate.

4.1.2. Civilian. Article 31 rights are afforded only to members who are subject to the Code, that is active duty military members, and reservists or Guard members in Title 10 status. Article 31 of the UCMJ does not provide civilian employees with any protection against self-incrimination. Cases involving Guard and Reserve personnel are further complicated by the witness' status at the time of the improper conduct and the time of interview. Thus, it is important to determine the subject's or suspect's military or civilian status at the time of questioning for purposes of determining what rights advisement must be given.

Even if suspected of an offense, a civilian witness or subject need not be advised of Fifth Amendment rights when interviewed as part of an investigation. Such rights are only required in conjunction with custodial interrogations (i.e., interrogations by law enforcement personnel in which the interviewee is not free to leave at will). Because IG investigators are not members of law enforcement, and do not accomplish interviews in custodial settings, *United States v. Miranda* does not require IOs to warn civilian employees of their Fifth Amendment rights when being questioned as subjects or suspects in an IG investigation, even if the IOs suspect them of committing a criminal offense. The absence of a requirement to advise civilian witnesses of their Fifth Amendment rights does not preclude them from invoking such rights if circumstances warrant.

Civilian employees are afforded some rights. The Supreme Court has held that "the government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized."⁶⁸ That is presumably why

⁶⁷ See AFI 90-301, para. 2.45.

⁶⁸ *Lefkowitz v. Cunningham*, 97 S.Ct. 2132 (1977). See also *Garrity v. New Jersey*, 385 U.S. 493 (1967) (statements of employee police officer derived in the course of a state investigation concerning alleged traffic ticket

IOs are required by AFI 90-301 to advise civilian employee suspects of the possibility of sanctions for failure to cooperate, and of the right not to answer self-incriminating questions. Furthermore, AFI 90-301 grants civilian employee suspects, but not subjects, the right to have counsel present during an interview.⁶⁹ Finally, AFI 90-301 requires IO's to read the following rights advisement to civilian employee suspects:

This is a non-custodial interview. While you have a duty to assist in this investigation and may face adverse administrative action for failing to cooperate, you will not be kept here involuntarily. You also have a right not to answer any questions that are self-incriminating. You have a right to be fully informed of any allegations that have been made against you. Do you understand your rights? Do you want a lawyer? Are you willing to answer questions?⁷⁰

For case by case guidance, IOs should consult with their servicing Staff Judge Advocate.⁷¹

4.2. Immunity. General Court-Martial Convening Authorities (GCMCAs) have the authority to grant military witnesses immunity from prosecution in exchange for providing testimony; IOs do not have this authority. The Department of Justice or state/local prosecutors have authority to grant immunity to a DoD civilian employee. The IO should never make promises to any witness – military or civilian -- that could be interpreted as *de facto* immunity (e.g., “Don’t worry, you won’t get in trouble.”). An implied immunity can cause significant problems for military and civilian prosecutors. If a military or civilian employee witness requests immunity or some other protection as a condition to providing a statement, the IO will consult with the commander and SJA before proceeding.

4.3. Witness Availability. IOs should work through the owning commander to make the witness available for interviews. Most witnesses are willing to cooperate with an IO. In the case of the unwilling witness, the means and ability to require their cooperation will vary depending on the witness’ status.

4.3.1. Active Duty Military. The witness’ commander can order the witness to testify. Military witnesses have a duty to testify and can only refuse to answer questions that would incriminate him or her. If the witness invokes a right against self-incrimination, the witness can only be ordered to testify if given immunity from prosecution. Given the IO does not have the authority to grant immunity, the IO should never state or imply a witness will not be prosecuted for his or her testimony. If a witness refuses to testify, the IO should stop the interview and consult with the SJA or legal advisor to determine whether an order to testify is prudent and proper. (See paragraph 4.2 Immunity)

fixing were “compelled” and hence inadmissible in subsequent prosecution, when employee was required by statute to waive his Fifth Amendment rights and answer incriminating questions or forfeit his job as a police officer).

⁶⁹ AFI 90-301, para. 2.43.

⁷⁰ AFI 90-301, Attachment 10, Part 2. Attachment 9, Part 2, of AFI 90-301 similarly requires IOs to advise subjects who are not subject to the UCMJ at the time of the interview as follows: “[t]his is a non-custodial interview. You are NOT suspected of any criminal act at this time. While you have a duty to assist in this investigation and AFI 90-301 mandates that you answer all questions except those that may incriminate you, you will not be kept here involuntarily.”

⁷¹ Contract employees and members of bargaining unions may possess additional rights to representation other than those outlined in this opinion. The IO, in conjunction with his or her servicing Staff Judge Advocate and local civilian personnel officer, should accomplish a close review of such agreements prior to initiating interviews with such employees to avoid any pitfalls or misunderstandings.

4.3.2. DoD Civilians. A DoD civilian employee's commander can direct the witness to testify. Like military witnesses, DoD civilians have a duty to testify and can only refuse to answer questions that would tend to incriminate him or her. If a civilian employee invokes a right against self-incrimination, the witness can only be ordered to testify if given immunity from prosecution. Given the IO does not have the authority to grant immunity, the IO should never imply or infer the witness will not be prosecuted. (See paragraph 4.2 Immunity) If a DOD civilian witness refuses to testify, the IO should stop the interview and consult with the SJA or legal advisor to determine whether directing the witness to testify is prudent and proper.

4.3.3. Civilians. “Civilian” witnesses cannot be ordered or directed to testify. This includes contractor employees, dependents of active duty military, non-DoD affiliated civilians, and non-appropriated fund (NAF) employees. The IO can always invite civilians to testify, but if the person refuses, the IO has no power to make them testify. Contractor employees might be obligated to testify in accordance with the terms of their contract. Requests to interview contractor employees should be coordinated through the contract administrator.

4.3.4. Retirees. As in the case of civilian witnesses who are not employees, the IO can invite a retiree to testify. A retiree cannot be compelled to testify unless recalled to active duty.

4.3.5. Minors. Minors fall into the category of “civilians,” and the same rules apply. Additionally, even if a minor agrees to testify, the IO must almost always obtain the consent of a parent or legal guardian. IO’s should consult their legal advisor or SJA before interviewing a minor. If consent is required, a parent or legal guardian must be present for all interviews of minors. [Suggestion: the IO should have the parent or legal guardian co-sign any statement of a minor.]

4.3.6. Air National Guard; Reserve Personnel. Air National Guard or Reserve component members, not in a duty status, cannot be required to participate in an interview. If a reserve component witness will not agree to participate while in a non-duty status, the IO can request the owning commander place the witness in a duty status, by placing the witness on orders, and ordering the witness to testify.

4.4. Third-Party Presence During Interviews. Sometimes a witness or a subject will request that a third-party be present during their IG interview.

4.4.1. Labor Union Representatives. Civilian subjects or witnesses who are members of collective bargaining units, and their labor unions, have specific rights with regard to labor organization presence during IG interviews. The Civilian Personnel Office can help you with the situation present at each installation.

4.4.1.1. Formal Discussions Over Grievances. If a DoD Civilian employee is a member of a bargaining unit, the labor organization (union) may have an independent right to be present during the interview. An IO must extend to a labor organization the opportunity to attend the interview of a collective bargaining unit employee if the investigation concerns a *grievance* (complaint by an employee about any term or condition of employment) and the interview amounts to a *formal discussion* (employee attendance required, structured, agenda, etc.). Presence by a union representative is an institutional right for protecting the bargaining agreement. The role of the labor organization is that of an interested

observer. The Civilian Personnel Office and JAG can help the IO navigate the unique labor law issues present at each base.⁷²

4.4.1.2 Weingarten Rights. DoD civilian employees may request the presence of a bargaining unit representative during an Air Force *investigatory interview* when the employee reasonably believes discipline may occur as a result. This is commonly called “Weingarten” rights. To exercise this right, the employee must request representation. *Generally, there is no duty for the IO to advise the employee of this right. The one exception is if it is provided for in the collective bargaining agreement.* If the employee invokes Weingarten rights, the IO should consult with the legal advisor or SJA and Civilian Personnel Office before proceeding with the interview. If a labor representative is present in the interview, he or she is a *personal representative* of the employee and may provide advice, consult with the witness, and suggest areas of inquiry, but may not obstruct the interview or instruct the witness not to answer legitimate questions. The IO has the authority to terminate the interview if he or she determines the union representative is impeding or attempting to impede the investigation.⁷³

4.4.1.3. When Rights Converge. The situation can occur where both the rights of a labor organization and the rights of an employee arise in the same setting. If the interview is about a grievance submitted by a bargaining unit employee, and the employee being interviewed reasonably believes that discipline may follow as a result of the interview, then both rights may be invoked, if the employee requests representation. This might result in two representatives from the labor organization.

4.4.2. Attorneys. Only a *suspect* has the right to have an attorney present during an interview. The attorney may not answer questions for the suspect.⁷⁴ Witnesses and *subjects* may consult with their attorney, but are not permitted to have the attorney present during the interview.⁷⁵

4.4.3. Other Personal Representatives. Third parties are generally not permitted to be present during IG investigations.⁷⁶

4.5. Recordings. The IO records all testimony electronically. These recordings are transcribed verbatim, with the exception of nonessential witnesses whose testimony may be summarized, at the discretion of the Appointing Authority.⁷⁷ Witnesses, on the other hand, are not permitted to record their interview.⁷⁸ IOs should consider informing witnesses of this prohibition in advance of their interview. If a witness records their IG interview, without permission, the IO should request the individual to voluntarily relinquish the recording to him or her for inclusion as part of the official IG record. An IO is the agent of the Appointing Authority and the IG. AFI 90-301, paragraph 2.3 states that communications made to the IG will not be disclosed unless required by law or regulation, when necessary to take adverse action against a subject or when approved by The IG (TIG). Additionally, paragraph 4.3 establishes that release authority for IG records rests with the Appointing Authority. If the individual declines to provide the recording or erase the file voluntarily, the IO should give the person a lawful order (or, in the case of a civilian, the IO should direct the person) to surrender it, subject to disciplinary action if they further refuse.

⁷² See 5 USC Chapter 71; *National Labor Relations Board v. Weingarten, Inc.*, 420 U.S. 251 (1975). Most IG complaints do not concern grievances, that is, no complaint by a bargaining unit employee has been made prior to the investigation. Often management initiates the process.

⁷³ AFI 90-301, para 2.4.4.3.

⁷⁴ AFI 90-301, para. 2.43.1.

⁷⁵ AFI 90-301, para. 2.43.2.

⁷⁶ AFI 90-301, para. 2.43.

⁷⁷ AFI 90-301, para. 2.42.2.3. and 2.42.2.4.

⁷⁸ AFI 90-301, para. 2.42.2.3.

4.6. New or Additional Allegations. Sometimes the investigation may raise additional allegations. This typically occurs during the investigation, when a witness' testimony reveals additional misconduct, or during the review process when a later reviewer notes issues raised, but not addressed, in the investigation.

4.6.1 During the Investigation. If a witness' testimony, or other evidence, raises the possibility of additional misconduct of the subject or another person, the IO should approach the IG, who, in turn, will forward the issue to the Appointing Authority to decide whether the additional issues will be investigated separately or as part of the on-going investigation.⁷⁹ If the Appointing Authority expands the scope of the investigation, the appointment letter must be amended. *Although not discussed in AFI 90-301, if the scope of the investigation has been expanded, the subject's commander should be notified and should provide the subject notice of the additional allegations.* If the subject has not yet been interviewed, the IO must read the subject in for all the alleged misconduct. If the subject has already been interviewed, but not been given adequate opportunity to respond to the substance of all misconduct under investigation, the subject should be re-interviewed and read in for all allegations.

4.6.2. Post-Investigation. The more challenging scenario occurs when later reviewers, including JAGs conducting legal reviews, discover misconduct that was not addressed in the ROI. When this occurs, the reviewer should discuss with the responsible IG whether the alleged misconduct was addressed, but simply not documented in the case file. If such is the case, the IG can include a brief memorandum for record in the case file or write an addendum. If the alleged misconduct was not considered, the IG should conduct a complaint analysis to determine a proper disposition of the issue(s). If investigation is warranted, the Appointing Authority will decide whether to reopen the investigation or consider the issues in a separate, but related, investigation.⁸⁰ JAGs must ensure the subject receives adequate due process, which includes notice and an opportunity to respond.

4.7. Computer Evidence. Occasionally, an IO may want to access a subject's or witness' e-mail or computer files for evidence of wrongdoing. Generally, real-time monitoring, such as intercepting e-mails *en route* to their destination, is out of the question. Because members believe they have greater privacy in what they put on their own official hard drives, accessing such files or e-mails is also probably not within the range of options for an IO.

This information is accessible through a search authorization issued by the proper authority after law enforcement officials demonstrate probable cause. However, because IG investigations are not normally criminal investigations, the search authorization route is not a viable option for the IO. The IO may be able to access computer files if the computer is shared by more than one user or is in a non-private area, for example, files or e-mails stored on a network (shared) drive. To access such files, two prerequisites apply: (1) the search must be reasonable (the IO must reasonably expect to find what he is looking for when the IO started looking and the execution of the search has to be rational, e.g., the IO can't read every file in the person's network folder if looking for a specific e-mail), and (2) the investigation must be work related (which, essentially, every IG investigation is).⁸¹ ***JAGs should conduct independent research prior to advising IOs on the search and seizure of computer evidence.***

4.8. CSAF "Hand-Off" Policy. The CSAF 26 November 2002 *Policy for Investigative Interviews*

⁷⁹ AFI 90-301, para. 2.42.4.1.

⁸⁰ AFI 90-301, para. 2.42.4.1.

⁸¹ See, e.g., *O'Connor v Ortega*, 480 U.S. 709 (1987).

applies to IG investigations and is incorporated into AFI 90-301.⁸² This policy requires a person-to-person hand-off of all subjects, suspects and any distraught witnesses following their investigative interview. The hand-off must take place between the IO and the individual's commander or commander's designated representative. The policy applies to everyone, *regardless of rank or position*. The IO needs to document the hand-off in the ROI.

4.9. How Much Investigation is Enough? As JAGs and as former or current trial and defense counsel, we know that due process requires more rigorous investigative efforts when the stakes are higher. Although this concept is not controlling, JAGs should consider the seriousness of the allegation, including the implications for both the subject and the complainant, in assessing whether the IG investigation was conducted sufficiently. For example, the resources expended on an investigation into an improper purchase of a pager might be significantly different than a case involving alleged improper purchases of multiple plasma screen TVs. JAGs should use their training and experience to help the IO evaluate whether additional witness testimony or documentary evidence would resolve conflicting or inconclusive evidence to satisfy the standard of proof.

CHAPTER 5. LEGAL SUFFICIENCY REVIEWS

5.1. “Informal” Legal Review. After the IO has completed his ROI, the attorney-advisor JAG to the IO should then conduct an “informal” review. This informal review will allow the IO to correct any flaws in the investigation or the ROI, such as: the need for additional investigation, failure to analyze witness credibility, correction of embarrassing typographical, spelling or grammatical errors and confirmation as to whether the case file otherwise meets all legal requirements.

5.2. Formal Legal Reviews. AFI 90-301 requires JA to conduct a written “legal sufficiency” review for all IG ROI.⁸³ The AFI also requires JA to conduct an additional legal review at the MAJCOM, JFHQ (State), FOA or DRU levels in cases involving allegations against a colonel (or equivalent), reprisal, restriction, improper mental health evaluations, *or* where a higher authority includes an *addendum* (such as when higher headquarters disagree with lower-level findings).⁸⁴

5.3. JAG Reviewer Qualifications. AFI 90-301 does not preclude the legal advisor assigned to assist the IO throughout the course of the investigation from conducting the legal sufficiency review (see glossary for the definition of legal sufficiency review). However, we have discovered the best practice is to have a “fresh set of JAG eyes” perform this function to ensure the most balanced product is forwarded up for MAJCOM and/or higher review. Certainly, we are cognizant of the fact that not all offices are manned to support this best practice, but we nevertheless highly encourage the field to execute it to the extent practicable. At a minimum, the JAG legal reviewer must be familiar with AFI 90-301, this guide, and relevant law, policy or regulation. It is preferred, but not required, that the reviewer JAG have attended the Installation Inspector General Training Course offered by SAF/IGQ.

5.4. Legal Sufficiency Test. AFI 90-301 provide the following requirements based on OPJAGAF 1998/109:

- (1) Has each allegation been addressed?
- (2) Does each allegation allege a violation of law, regulation, procedure or policy?

⁸² AFI 90-301, para 2.46.

⁸³ AFI 90-301, para. 2.59.

⁸⁴ AFI 90-301, para. 2.59.7; 2.69.3; .2.70; 2.72.8.1; 4.7.3.1; 5.7.7; 5.9.3; 6.8.4; 6.9.3; 7.8.3.

- (3) Did the IO reasonably apply the *preponderance of the evidence* standard in arriving at the findings?
- (4) Are the conclusions supported by and consistent with the findings?
- (5) Does the investigation comply with all legal requirements?
- (6) Does the investigation comply with all administrative requirements? and
- (7) Are there any errors or irregularities and, if so, what is the legal effect, if any?

5.5. Review Guidance.

A solid independent legal review is critical to the IG investigation process and IG-JA-CC relationships. The written review should reflect a thorough review of the case, to include references to evidence where applicable, and ample analysis to support (or refute) the IO's conclusions and findings. It follows that an independent legal review of all testimony and evidence is essential to complete this goal. Moreover, a solid legal review is a stand-alone document, which means if the legal review becomes separated from the ROI, the reader would nevertheless be able to understand the who, what, where, when, how, and why of the investigation and legal analysis.

A legal review that merely states a report of investigation is “legally sufficient” or provides a “yes” or “no” answer to the above criteria in AFI 90-301 (or OpJAGAF 1998/109) is inadequate because it fails to shed light on the reviewer's legal analytical reasoning. This leads to confusion, particularly when deficiencies and disagreements are identified during a higher-level IG or JA review. The higher level reviewers are left wondering whether the IG or JA reviewer simply missed an issue, or frankly, did not conduct a thorough review of the case file. Lower level JAs should identify from the outset if the IG's findings and/or conclusions require reassessment. In addition, any disagreement or impasse between JA and IG should be documented in the file before forwarding it to higher headquarters. Otherwise, the end result will be headquarters sending the case back to the field IG or JA for more analysis, which reduces efficiency and productivity in an already overburdened system.

5.5.1. Preponderance of the Evidence Standard. The standard of review for IG investigations is a preponderance of the evidence.⁸⁵ JAG reviewers should keep in mind that this legal standard is much less than that for beyond a reasonable doubt. AFI 90-301, Attachment 1, defines preponderance of the evidence as “when the greater weight or quality of the evidence points to a particular conclusion as more credible and probable than the reverse.... At all times, IOs may use their own common sense, life experiences and knowledge of the ways of the world to assess the credibility of witnesses they interview.” An IO's analysis must include a *credibility assessment*—this is critical.

5.5.2. Deference to IO Findings. While conducting the legal review, JAGs must not substitute their judgment for that of the IO. JAGs should give deference to the IO, much like an appellate court does to a trial judge. Reasonable minds may differ in these cases. If the facts and circumstances reasonably support the IO's conclusion, even if the JAG disagrees, then the ROI is still legally sufficient. That being said, where the preponderance of the evidence does not reasonably support the IO's findings, the finding is not legally sufficient. In this case, the JAG should advise the IO on whether additional investigation would change the outcome.

5.5.3. Disagreement vs. Legal Insufficiency. If the JAG simply disagrees with the IO's findings and conclusions, then document the rationale for this in the legal review.⁸⁶ A disagreement is not necessarily the same as legal insufficiency. In such cases, the Appointing Authority acts as the “tie-

⁸⁵ AFI 90-301, para. 2.48.

⁸⁶ AFI 90-301, para. 2.59.4.

breaker” by writing an addendum.

5.5.4. Adopting Lower Level Review. The AFI allows MAJCOMs, JFHQs, FOAs and DRUs to adopt a lower level legal review, except in reprisal, restriction, IMHE, and colonel (or colonel-select) cases.⁸⁷ These cases require a MAJCOM, JFHQ, FOA, or DRU review in addition to the lower-level review.⁸⁸ See Attachment 6 to this Guide, *Matrix – Levels of Legal Reviews Required*.

5.5.5. Time Standards. The legal review should take seven calendar days or less to complete.⁸⁹

5.6. Legal Review Format. While there is no single best way to write a legal review, a good place to start is this guide and its attachments. See Attachment 4, *Judge Advocate (JA) Primer: “Legal Sufficiency Review” for Inspector General (IG) Investigative Case Files*. See Attachment 5 for sample a legal review template. Sample reviews can be found on the AF/JAA Fields of Practice, Inspector General IGS/IGQ page. SAF/IGQ also maintains information for IGs and JAGs on the Portal at <https://www.my.af.mil/gcss-af/USAF/ep/contentView.do?contentType=EDITORIAL&contentId=cA1FBF31D2377130901239A196DB4034A&channelPageId=s6925EC1351F50FB5E044080020E329A9>

CHAPTER 6. OTHER INTEREST AREAS

6.1. Special Notification Requirements. JAGs advising commanders and IGs must be aware that allegations related to reprisal, restricted access, improper Mental Health Evaluation (MHE) referral, O-6s and senior officials have unique reporting requirements.⁹⁰

6.1.1. Allegations Against O-6s (Or Equivalent). SAF/IGQ records adverse information on colonel, colonel-selects, and civilian equivalents.⁹¹ JAGs assist SAF/IGQ by reminding commanders and civilians leading an organization to notify SAF/IGQ immediately through their IG when notified of allegations or adverse information of any kind against individuals in these grades.⁹² IGs notify SAF/IGQ upon becoming aware of any adverse information, not obviously frivolous, which, if true, would constitute misconduct, or improper, or inappropriate conduct as defined in AFI 90-301.⁹³ Additionally, a copy of any material collected addressing allegations of misconduct by a Colonel, Colonel-select, or civilian equivalent must be provided to SAF/IGQ in accordance with AFI 90-301.

6.1.2. Allegations Against Senior Officials. Only SAF/IGS handles and investigates complaints against O-7 selects (and above) and civilian equivalents.⁹⁴ If there is an allegation against an O-7 select or above, the IG will not investigate, but rather will immediately report that allegation to SAF/IGS through MAJCOM, FOA or DRU IGs IAW AFI 90-301, Chapter 3, Section 3A.

⁸⁷ AFI 90-301, para. 2.59.7.

⁸⁸ AFI 90-301, para 2.59.7 requires reprisal, restriction, and IMHE referral cases and IG investigations containing allegations against colonels (or civilian equivalent) to have a MAJCOM, JFHQ, FOA, or DRU legal review *in addition to* the lower-level review. AFI 90-301, paras 5.7.7 and 6.8.4, require reprisal and restriction cases to have two legal reviews, one must be from the MAJCOM, JFHQ, FOA, or DRU. AFI 90-301, para 7.8.3 requires IMHE cases must have a review from the MAJCOM, JFHQ, FOA, or DRU. If read in conjunction with para 2.59.7, IMHEs should have a MAJCOM-level review *in addition to* a lower-level review.

⁸⁹ AFI 90-301, Table 2.1.

⁹⁰ AFI 90-301, paras. 1.17.11; 5.5; 6.5; 7.6; Table 3.2.

⁹¹ AFI 90-301, 1.15.8.1.

⁹² AFI 90-301, para 1.49.3.

⁹³ AFI 90-301, para 4.3.3.

⁹⁴ AFI 90-301, para. 3.2.1.

6.1.3. The Big Three (Reprisal, Restriction and Improper MHE Referrals. IGs must notify SAF/IGQ through MAJCOM, FOA or DRU IGs within seven workdays.⁹⁵ This allows SAF/IGQ to notify DoD-IG-Military Reprisal Investigations (MRI) within ten workdays.

6.2. Investigating Retirees. Although not specifically referenced in AFI 90-301, the IG has the authority to investigate retiree misconduct that has a link to the Air Force, by virtue of the federal compensation they receive and UCMJ applicability.⁹⁶ As a practical matter, if a retiree refuses to cooperate with an IG during an investigation, unless recalled back to active duty, the IG has no basis to compel participation.

6.3. IG “Confidentiality.” Communications made to the IG are not privileged or confidential. However, disclosure of these communications (and the identity of the communicant) will be strictly limited to an official need-to-know.⁹⁷ The ROI will be marked “*For Official Use Only*” (FOUO) and released in accordance with 10 U.S.C. § 1034 and the Freedom of Information Act.

6.4. Sexual Assault Allegations. The Sexual Assault Prevention and Response (SAPR) Program reinforces the Air Force’s commitment to eliminate sexual assaults through awareness and prevention training, education, victim advocacy, response, reporting, and accountability. The SAPR program is implemented in Air Force Policy Directive (AFPD) 36-60, *Sexual Assault Prevention and Response (SAPR) Program* (28 March 2008), Air Force Instruction (AFI) 36-6001, *Sexual Assault Prevention and Response (SAPR) Program* (29 September 2008), and Department of Defense Instruction (DoDI) 6495.02, *Sexual Assault Prevention and Response (SAPR) Program Procedure* (23 June 2006). IGs and the JAGs advising them need to be aware of the implications of this program as they perform their missions.

Under the program, “sexual assault” is an umbrella term that encompasses the UCMJ offenses of rape, nonconsensual sodomy, indecent assault, or attempts to commit these offenses. The AFI defines sexual assault as “intentional sexual contact, characterized by use of force, physical threat or abuse of authority or when the victim does not or cannot consent. Sexual assault includes rape, nonconsensual sodomy (oral or anal sex), indecent assault (unwanted, inappropriate sexual contact or fondling), or attempts to commit these acts.”⁹⁸ This definition does not affect in any way the definition of any offense under the Uniform Code of Military Justice.

The SAPR program provides for “restricted reporting,” an option that enables *military members* to report allegations of sexual assault to specified personnel (health care providers, Victim Advocates, and the Sexual Assault Response Coordinator (SARC)), without triggering an investigation.⁹⁹ “Unrestricted” reporting means any report of a sexual assault made through “normal” reporting channels, such as the victim’s chain of command or law enforcement agency. Because the SAPR program does not include the IG as an agency that can receive a communication considered protected for purposes of restricted reporting, any disclosures of a sexual assault to the IG are unrestricted. The implication of this is that once a victim discloses the details of the sexual assault to the IG, the restricted reporting option is no longer available to him or her.

⁹⁵ AFI 90-301, para. 5.5.

⁹⁶ See Rule for Court-Martial 202.

⁹⁷ AFI 90-301, para. 2.3.

⁹⁸ See AFI 36-6001, *Sexual Assault Prevention and Response (SAPR) Program* (29 September 2008), Attachment 1.

⁹⁹ Restricted reporting is only available to military members of the Armed Forces and the Coast Guard when attached to the Department of Defense (active duty, Reserve and National Guard performing federal duties).

Upon receipt of a report of sexual assault, the IG should immediately contact the AFOSI, the lead agency for investigating sexual assault allegations. AFOSI has a duty to contact the SARC. IGs should consult with their JAG whenever there is any question about any issues that arise under the SAPR program.

6.5. Domestic Abuse Allegations. Department of Defense Instruction (DoDI) 6400.06, *Domestic Abuse Involving DoD Military and Certain Affiliated Personnel* (21 August 2007), implements DoD's policy to provide a "restricted reporting option" for adult victims of domestic violence or abuse, similar to that implemented in the sexual assault arena.

The "restricted reporting" option enables victims to report allegations of domestic violence or abuse to specified personnel (health care providers and victim advocates), without triggering an investigation. "Unrestricted" reporting means any report of a domestic incident made through "normal" reporting channels, such as the victim's chain of command or law enforcement agency. Because the policy does not include the IG as an agency that can receive a communication considered protected for purposes of restricted reporting, any disclosures of domestic violence or abuse to the IG is unrestricted.

Upon receipt of a report of domestic violence or abuse, the IG should immediately contact law enforcement in accordance with local procedures. IGs should consult with their JAG whenever there is any question about this instruction.

6.6. IG Information Release. AFI 90-301, Chapter 13 relates to IG records release. IG records contain protected information. As such, they may not be released, reproduced, or disseminated in whole or in part, or incorporated into another system of records, without the express permission of the Secretary of the Air Force, Inspector General, as indicated in AFI 90-301, paragraph 13.5.1. The Air Force Inspector General releases IG records in accordance with 10 U.S.C. § 1034, Official Use Requests, Freedom of Information Act (FOIA) requests, and Privacy Act (PA) requests. JAG involvement in the process ranges from providing legal reviews of information requested, withheld, and released pursuant either FOIA or PA. JAGs also provide guidance on processing complex OUR requests (i.e. subpoenas). In addition to reviewing the relevant law and instruction, JAGs should consult the AF/JAA Fields of Practice page titled "Information and Privacy Law."

6.6.1. JAG Requests to IG. JAGs typically request IG information in three contexts: (1) government counsel, on behalf of the commander, to facilitate command action that results from an IG investigation (e.g., non-judicial punishment (NJP)); (2) defense counsel, to prepare for or defend a court-martial (e.g., discovery); or (3) defense counsel, to defend a client against command action other than court-martial (e.g., administrative or NJP).

6.6.1.1. Facilitating Command Action. The Appointing Authority is the release authority for IG information used for purposes of command action.¹⁰⁰ The Appointing Authority will automatically provide the subject's commander a copy of the relevant portions of an approved and substantiated ROI, without attachments, to determine command action. The commander who seeks additional information, either individually or through his or her JAG, must file a written Official Use Request (OUR) directly to the Appointing Authority.¹⁰¹ AFI 90-301, section 13C outlines the requirements for an OUR.

6.6.1.2. Defending Against Command Action. This paragraph relates to requests from defense counsel who seek information to defend clients, who were subjects of IG investigations, in either

¹⁰⁰ AFI 90-301, para. 13.10.3.

¹⁰¹ AFI 90-301, 13.10 and 13.12.

administrative or NJP forums. JAGs advising commanders may, on behalf of the Appointing Authority, release to the subject relevant information *provided to command pursuant to an OUR*, for purposes of preparing a defense of an administrative or NJP command action.¹⁰² If information requested by the defense is beyond the scope of the original OUR, then the request must be forwarded to the Appointing Authority for a release determination. Denial of a defense OUR does not preclude the defense from making an appropriate FOIA or PA request. Information provided to the defense as part of an OUR may not be further released.¹⁰³ Although not required in the AFI, a recommended practice for JAGs advising commanders is to have defense counsel (or the defense paralegal) sign an endorsement that acknowledges their duty to protect the documents and prohibits further release.

6.6.1.3. Court-Martial Discovery. When defense counsel makes a discovery request for IG records, trial counsel should forward this, as an OUR, to SAF/IGQ for consideration. Should SAF/IGQ provide trial counsel with IG records, trial counsel must carefully review the request and release only *relevant* portions of the IG records to the defense. Due to the protected nature of the documents, trial counsel must comply with the provisions of the Privacy Act (PA) when using the records. Improper release of information (a willful, improper disclosure) may constitute a violation of the PA and subject the releaser to civil and criminal penalties. Trial counsel must make appropriate redactions and/or seek appropriate protective orders from the court or other legal authority with regard to further release of information. If applicable, portions of the record that trial counsel determines not to be relevant can be provided to the judge for an *in-camera* review. These documents will be further released to the defense only if ordered by the judge after the *in-camera* review. Trial counsel should destroy all copies of the records when no longer needed.

6.6.2. JAG Role in Information Release. JAGs will be consulted in any FOIA or PA requests for IG records.¹⁰⁴ SAF/IGQ is the initial denial authority for records related to all ANG cases, all investigations containing substantiated allegations against O-6s (or civilian equivalent) and cases closed out at the SAF/IGQ level.¹⁰⁵ IGS is the release authority for records relating to investigations of O-7 and above (or civilian equivalent). Otherwise, the MAJCOM, FOA or DRU IGs are the release authority for IG records finalized at their level.¹⁰⁶

6.6.3. Releases Pursuant to 10 U.S.C. § 1034. 10 U.S.C. § 1034 (e)(1) and (e)(2) require that all complainants must be provided a copy of the ROI without supporting documents, and subject to any redactions *required* under the FOIA. 10 U.S.C. 1034(e)(2) states,

the Inspector General shall ensure the maximum disclosure of information possible, with the exception of information that is not required to be disclosed under section 552 of title 5. However, the copy need not include summaries of interviews conducted, nor any document acquired, during the course of the investigation. Such items shall be transmitted to the member, if the member requests the items, with the copy of the report or after the transmittal to the member of the copy of the report, regardless of whether the request for those items is made before or after the copy of the report is transmitted to the member.¹⁰⁷

¹⁰² AFI 90-301, para. 13.12.1.3

¹⁰³ AFI 90-301, para. 13.8.3.

¹⁰⁴ AFI 90-301, para. 13.18.1.

¹⁰⁵ AFI 90-301, para. 13.17.1.2 and 13.17.2.2.

¹⁰⁶ AFI 90-301, para. 13.17.2.

¹⁰⁷ AFI 90-301, para 5.10.2.3

6.7. “Appeals” of IG Investigations. AFI 90-301 does not contain a formal appeal process. However, complainants may request the next higher-level IG review if they are not satisfied with the original investigation and desire such a review.¹⁰⁸ The complainant must provide additional information to justify a review. Simply disagreeing with the results does not constitute sufficient justification for further review or additional investigation.¹⁰⁹ Complainants and subjects may also request review of their case and/or personnel actions by the Air Force Board for Correction of Military Records pursuant to AFI 36-2603, *Air Force Board for Correction of Military Records* (1 March 1996).¹¹⁰ The AFBCMR does not have the authority to set aside a finding by DOD-IG-MRI, but may take corrective action on Air Force personnel records.

-

¹⁰⁸ AFI 90-301, para. 2.65.5 and Table 2.12.

¹⁰⁹ AFI 90-301, para. 2.65.5.2 and 2.65.5.3.

¹¹⁰ AFI 90-301, para. 2.65.5 and Table 2.12.

ATTACHMENT 1 -IG Reference Materials for JAGs

General:

AFPD 90-3, *Inspector General Complaints Program*, 18 August 2009

AFI 90-301, *Inspector General Complaints Resolution*, 15 May 2008

Reprisal:

10 U.S.C. § 1034, (Military Members) *Whistleblower Protection Against Reprisal*

5 U.S.C. § 2302, (DAF Civilian Employees)

10 U.S.C. § 1587, (NAF Civilian Employees)

10 U.S.C. § 2409, (Defense Contract Employees)

DoDD 7050.06, *Military Whistleblower Protection*, July 23, 2007

IGDG 7050.6, *Guide to Investigating Reprisal and Improper Referrals for Mental Health Evaluations*, February 6, 1996

Mental Health Evaluations:

DoDD 6490.1, *Mental Health Evaluations of Members of the Armed Forces*, October 1, 1997

DoDI 6490.4, *Requirements for Mental Health Evaluations of Members of the Armed Forces*, August 28, 1997

AFI 44-109, *Mental Health and Confidentiality in Military Law*, 1 March 2000

IGDG 7050.6, *Guide to Investigating Reprisal and Improper Referrals for Mental Health Evaluations*, February 6, 1996

Computer Searches:

Electronic Communications Privacy Act of 1986 as amended:

18 U.S.C. §§ 2510-2513 & §§ 2515-2521 (Wiretap Act),

18 U.S.C. §§ 2701-2712 (Stored Communications Act), and

18 U.S.C. §§ 3121-3127 (Trap and Trace Act)

18 U.S.C. § 1030 (Computer Fraud and Abuse Act)

18 U.S.C. §§ 1831-39 (Economic Espionage Act of 1996)

AFI 33-119, *Air Force Messaging*, 24 January 2005

AFI 33-129, *Web Management and Internet Use*, 3 February 2005

AFI 33-115V1 *Network Operations (NetOps)* 24 May 2006

Records Release:

DoD Regulation 5400.7/AF Supplement, *DoD Freedom of Information Act Program*, June 24 2002

DoJ *Freedom of Information Act Guide* (March 2007) http://www.usdoj.gov/oip/foia_guide07.htm

AFI 33-332, *Privacy Act Program* (29 January 2004)

<http://www.foia.af.mil>

<http://www.defenselink.mil/pubs/foi/index.html>

Other:

AF/JAA Fields of Practice, Inspector General IGS/IGQ Page:

<https://aflsa.jag.af.mil/AF/lynx/tolls/content.php?qrylvl=3&lvl2id=122391&lvl2folder=yes>

SAF/IGQ on the Air Force Portal: <https://www.my.af.mil/gcss->

<af/USAF/ep/contentView.do?contentType=EDITORIAL&contentId=cA1F31D2377130901239A196D4034A&channelPageId=s6925EC1351F50FB5E044080020E329A9>

SAF/IGQ *Investigating Officer's Guide* (check the SAF/IGQ portal page)

SAF/IGQ *Commander-Directed Investigation Guide* (check SAF/IGQ portal AF/JAA Fields of Practice)

TIG Brief <https://www.my.af.mil/afknprod/community/views/home.aspx?Filter=OO-IG-AF-04>

ATTACHMENT 2 – Guidelines for Improper MHE Referral Allegations

| ALLEGED WRONG-DOING | PERSON MAKING MHE REFERRAL | STANDARD | NOTES | SAMPLE ALLEGATION |
|----------------------------|--|---|---|--|
| Procedural Error | Commander | DoDD 6490.1, <i>Mental Health Evaluations of Members of the Armed Forces</i>, 1 Oct 97 or DoDI 6490.4, <i>Requirements for Mental Health Evaluations of Members of the Armed Forces</i>, 28 Aug 97 | The standard will depend on the specifics of the allegation. For example, DoDD 6490.1 does not address the requirement to allow the member two business days before referral for a routine (non-emergency) MHE, but DoDI 6490.4, para. 6.1.1.4 does. So, if the wrongdoing rests in this procedural issue, DoDI 6490.4 may be the appropriate standard. | “(Subject) improperly referred (complainant) for a routine Mental Health Evaluation by failing to consult a mental healthcare provider prior to the evaluation, in violation of DoDI 6490.1 on (date).” “(Subject) improperly referred (complainant) for a routine Mental Health Evaluation by failing to provide (complainant) the prescribed notification memorandum, in violation of DoDI 6490.4 on (date).” |
| | Personnel in supervisory chain (other than commander) OR Personnel not in supervisory chain | DoDD 6490.1, <i>Mental Health Evaluations of Members of the Armed Forces</i>, 1 Oct 97 | Other than the commander, personnel who make MHE referrals are overstepping their authority (i.e., only the member’s commander may direct a MHE). | “(Subject) referred (complainant) for a Mental Health Evaluation when not authorized to do so, in violation of DoDD 6490.1 on (date).” |
| | Non-Mental Health healthcare provider (e.g., dermatologist) | Refer to SG channels (ref. DoDD 6490.1, <i>Mental Health Evaluations of Members of the Armed Forces</i>, 1 Oct 97, para. 4.3.5) | DoDD 6490.1, para. 4.3.5, states that MHEs requested by non-Mental Health healthcare providers <u>not</u> part of the member’s chain of command are <u>not</u> covered by DoDD 6490.1 guidance. Complaints involving these providers should be referred to SG for disposition IAW AFI 90-301, Table 2.9. | Not applicable. |

| ALLEGED WRONG-DOING | PERSON MAKING MHE REFERRAL | STANDARD | NOTES | SAMPLE ALLEGATION |
|---|---|---|---|---|
| <p>Coercion</p> <p>*See discussion in this Guide on alleging involuntary or improper referral in violation of DoDD 6490.1 and/or DoDI 6490.4, rather than coercion in violation of AFI 44-109.</p> | <p>Personnel not in supervisory chain</p> | <p>DoDD 6490.1, <i>Mental Health Evaluations of Members of the Armed Forces</i>, 1 Oct 97</p> | <p>Personnel not in the supervisory chain who coerce members to seek a MHE are overstepping their authority (i.e., only the member’s designated commander may direct a MHE; personnel in the supervisory chain may encourage a MHE).*</p> | <p>“(Subject) referred (complainant) for a Mental Health Evaluation when not authorized to do so, in violation of DoDD 6490.1 on (date).”</p> |
| | <p>Non-Mental Health healthcare provider (e.g., dermatologist)</p> | <p>Refer to SG channels (ref. DoDD 6490.1, <i>Mental Health Evaluations of Members of the Armed Forces</i>, 1 Oct 97, para. 4.3.5)</p> | <p>DoDD 6490.1, para. 4.3.5, states that MHEs requested by non-Mental Health healthcare providers <u>not</u> part of the member’s chain of command are <u>not</u> covered by DoDD 6490.1 guidance. Complaints involving these providers should be referred to SG for disposition IAW AFI 90-301, Table 2.9.</p> | <p>Not applicable.</p> |

ATTACHMENT 3 - Sample Reprisal PAM

| Elements | Definitions | Testimony | Documents |
|---|---|--|---|
| <p>1. Did (the military member)(<i>complaint name here-SrA X</i>) make or prepare to make a communication protected by statute?</p> <p>ANSWER: YES</p> | <p>Protected Communication-(1) any <u>lawful</u> (if <i>lawfulness is at issue, use combined definitions at AFI 90-301, Atch 1, Protected Communication and Unlawful Communication</i>) communication to any member of Congress or IG/IG investigative staff or (2) cooperated or otherwise assisted (list out para. 3.13.1.2.1.1. through 3.16.1.2.1.8—if chain of command is at issue, list definition in Atch 1 to AFI) by providing information that the military member reasonably believed he has evidence of wrongdoing. (<i>AFI 90-301, Atch 1, definition of Protected Communication</i>)</p> <p>Make or Prepare-includes circumstances where (1) the military members was preparing a lawful communication or complaint that was not actually delivered or (2) where the member did not actually communicate or complaint but was believed to have done so by management officials (<i>AFI 90-301, Atch 1, definition of Protected Communication</i>)</p> | <p>SrA X (Section III, Tab D-1, p. 1)-complained to IG about Col A’s FWA on X May 200X</p> | <p>Section II, Tab B (AF IMT 102-complaint to IG, dated X May 200X)</p> |

| Elements | Definitions | Testimony | Documents |
|--|--|--|--|
| <p>2. Was an unfavorable personnel action taken or threatened or was a favorable action withheld or threatened to be withheld <u>following</u> the protected communication?</p> <p>ANSWER: YES</p> | <p>Personnel Action-Any action taken on a member of the armed forces that affects or has the potential to affect (for example a threat) that military member's current position or career. <i>(AFI 90-301, Atch 1, definition of Personnel Action contains a non-exhaustive list)</i></p> <p>Unfavorable-negative <i>(Merriam-Webster on-line Dictionary)</i></p> | <p>SrA X (Section III, Tab D-1, p. 3) said rec'd referral EPR in late June 200X</p> <p>Col A (Section III, Tab D-2, p. 5) acknowledged he gave SrA X the referral EPR dated X June 200X</p> | <p>Referral EPR, dtd X June 200X (Section III, Tab E-1)</p> |
| <p>3. Did <i>(Col A, Commander 1st FS-- subject name here)</i> the official responsible for taking, withholding or threatening the personnel action know about the protected communication?</p> <p>ANSWER: YES</p> | <p>Responsible Management Official (RMO)-RMOs are: (1) officials who influenced or recommended to the deciding official that he/she take, withhold or threaten a management (personnel) action; (2) officials who decided to take, withhold or threaten the management/personnel action or (3) any other officials who approved, reviewed or indorsed the management/personnel action. <i>(AFI 90-301, Atch 1, definition of RMO)</i></p> | <p>SrA X (Section III, Tab D-1, p. 6) stated she told Col A about the PC the day she made it.</p> <p>Col A (Section III, Tab D-2, p. 10) admitted SrA X told him about the PC the day she made it.</p> <p>SSgt Y (Sec III, Tab D-5, p. 4), IO for FWA CDI interviewed Col A as a subject in early Jun 200X</p> | <p>FWA CDI (Section III, Tab E-5) shows Col A interviewed in early June 200X; FWA SUBSTANTIATED against Col A in August 200X</p> |

| Elements | Definitions | Testimony | Documents |
|--|---|--|--|
| <p>4. Does the evidence establish that the personnel action would have been taken, withheld or threatened if the protected communication had not been made?</p> <p>ANSWER: YES</p> | N/A | SrA X was facing a court-martial for theft of government property and has a PIF a mile long. See below for further info | See below. |
| <p>4a. Reasons stated by the RMO for taking, withholding or threatening the action?</p> | <i>Note: Focus on RMO's testimony only here!</i> | <p>Col A (Section III, Tab D-2, pp. 7-11) Explained in detail all of SrA X's transgressions during the reporting period</p> <p>MSgt Z, First Sergeant (Section III, Tab D-4, pp. 6-8) corroborated Col A's testimony</p> | <p>SrA X's PIF (Section III, Tabs E-3 through E-11) includes charge sheet, Art. 15 for AWOL and 6 LORs this reporting period</p> <p>AFOSI ROI # (shows investigated for theft)</p> |
| <p>4b. Reasonableness of the action taken withheld or threatened considering the complainant's performance and conduct.</p> | Consider using "arbitrary and (or) capricious" standard here. | <p>Col A (Section III, Tab D-2, p. 11) spoke with JAG</p> <p>Capt P (Sec. III, Tab D-6, pp. 5-6) JAG, Chief of Military Justice, who advised Col A</p> | PIF (above) |

| Elements | Definitions | Testimony | Documents |
|--|--|--|--|
| 4c. Consistency of the actions of the RMO with past practice. | <i>Note—Look to RMO’s actions here. Can also look to practice across the unit, wing, command or AF if no RMO past practice.</i> | Col A (Section III, Tab D-2, pp. 12-13) explained 3 rd referral OPR given; similar cases | Referral EPRs of Amn S and R (Section III, Tabs E-12-13); co-conspirators with SrA X, also rec’d referral EPRs this period AFI 36-3602, on what can/must go into an EPR. |
| 4d. Motive of the RMO for deciding, taking or withholding the personnel action. | Motive -something that causes a person to do something (<i>Merriam-Webster Online Dictionary</i>) WHY they did it. | Col A (Section III, Tab D-2, p. 14) says he wanted to send a message to the court-members that this Amn is a “bad apple” Was not happy about FWA complaint, but the EPR was earned MSgt Z, CCF (Section III, Tab D-4, p. 9) says he agrees 110% with EPR and that CC did it for right reasons | |
| 4e. Procedural correctness of the action. | <i>Look to applicable AFI for processing the particular personnel action</i> | | AFI 36-3602, Referral EPRs shows followed procedures properly |

ATTACHMENT 4 - Judge Advocate (JA) Primer:
“Legal Sufficiency Review” for Inspector General (IG) Investigative Case Files

The purpose of this paper is to provide practical guidance to JAGs who conduct legal reviews of IG investigative case files pursuant to Air Force Instruction (AFI) 90-301, *Inspector General Complaints Resolution*, 15 May 2008. The AFI requires JA to conduct a written “legal sufficiency” review for all IG Reports of Investigation (ROI). The AFI requires JAGs to conduct an additional legal review at the Major Command (MAJCOM) Joint Force Headquarters (JFHQ-(State)), Forward Operating Agency (FOA) or Direct Reporting Unit (DRU) levels in cases involving allegations against a colonel (or equivalent), reprisal, restriction, improper mental health referral, *or* where a higher authority includes an addendum.

1. Has each allegation been addressed? (AFI 90-301, attachment 1)

a. Review:

- Case File Section III, Tab B** (AF IMT 102, any other complainant submission): What issues did the complainant raise in complaint?
- Case File Section I, Tab K** (Complaint Analysis): What allegations did the IG craft from the complaint and the complaint clarification?
- **Case File Section III, Tab A** (Appointment letter): What allegations was the IO appointed to investigate?
- Case File Section II, Tab B** (ROI Background and Allegations): Did the IO actually investigate the allegations the Appointing Authority directed?
- **Case File Section II, Tab C** (Findings, Analysis and Conclusions): Did the IO analyze each allegation in the ROI?

b. Guidance:

- All of the information in 1(a) above should be consistent.
- A common problem is an **“incomplete” investigation**. Return incomplete case files to the IG action officer (AO) for rework when:
 - The IO failed to address the issues that the complainant raised.
 - Ensure that the case file contains documentation as to the disposition of ALL issues raised by the complainant (even if they were invalidated during the complaint analysis stage). Find this in the case file Section I, Tab K, in the Complaint Analysis.
 - The IG may decide to open a separate case on the issues not addressed, in order to press on with the current case. Again, this needs to be explained.
 - The IO failed to investigate the allegations the Appointing Authority directed.
 - The IO failed to analyze each allegation in the ROI.
- Another recurring issue occurs when either the IO or a later reviewer **“reframes”** or crafts entirely **new allegations**.
 - Did he/she have that authority? (e.g., was the appointing letter amended?) If not, send the case file back to the IG action officer for administrative correction.
 - Does the subject will need to be readvised of a new allegation or substantially new information and given an opportunity to respond? (para. 2.42.1.2)

2. Does each allegation allege a violation of law, regulation, procedure or policy? (AFI 90-301, para 2.12.1.4, attachment 1)

a. Review Case File:

- Case File Section III, Tab B** (AF IMT 102, any other complainant submission): What issues did the complainant raise in the complaint?

- **Case File Section II, Tab B** (ROI Background and Allegations): What are the allegations that the IO actually investigated?
- **Case File Section III, Tab E** (Evidence): Does the evidence include copies of relevant portions of all applicable standards?

b. Guidance:

- Carefully examine the complaint to identify what standards-violations the complainant raised and if the correct version/standards are being used. (This may require research!)
- Do the allegations, as crafted, clearly and concisely identify the complainant’s assertions? (AFI 90-301, para. 2.12.1)
- Are the allegations matters properly within the IG purview? (AFI 90-301, Table 2.5)
 - If not, is there further explanation in the ROI as to why this is an IG investigation? Possible reasons why matters not normally in the IGs purview were investigated include:
 - The Appointing Authority designated the IG to conduct the investigation.
 - There are multiple allegations (both IG and non-IG issues) that are so interwoven that it is more appropriate to conduct a single investigation.
- Does each allegation:
 - *Address violation of a standard? (AFI 90-301, para. 2.12.2)
 - *Allege the correct standard? (AFI 90-301, para. 2.12.1.4)
 - Address only one subject and one allegation? (AFI 90-301, para. 2.12.2)
 - List subject’s full name and rank?
 - List the date of the alleged violation? (AFI 90-301, para. 2.12.1.1)
 - Provide sufficient notice of how the standard was violated? (AFI 90-301, para. 2.12.1.3)
 - Indicate the full name, rank of the complainant, if applicable?
- If the answer to one of the * items above is “no,” the IG will need to reframe the allegation to correct this error. This may require the IG to go back to the Appointing Authority to have the IO appointment letter amended.

c. Example: On or about XX November 20XX Major Roger Jackson, Commander, , wrongfully downgraded the Enlisted Performance Report of Senior Airman Ava Wilson, in reprisal for making a protected communication, in violation of 10 USC 1034.

3. Did the IO reasonably apply the preponderance of the evidence standard in arriving at the findings? (AFI 90-301, para. 2.48)

a. Review:

- **AFI 90-301, Attachment 1**, definition of Preponderance of the Evidence
- **Case File Section II, Tab C** (Findings, Analysis, Conclusion)
- **Case File Section III, Tab D** (Witness Testimony)
- **Case File Section III, Tab E** (Evidence)
- **Case File Section III, Tab C** (Chronology, if applicable)

b. Guidance:

- *An independent review of all the testimony and evidence is critical.*
- Do not rely on *assertions* in the ROI—confirm that the evidence is in the record.
- *All factual assertions should have a cite to the record for reviewer reference.*
- Ensure that the IO has not “made a case” for his/her position, but rather presented both sides of the story and has made a reasonable judgment call.
- Ensure that there is sufficient evidence available to make a reasonable conclusion. If critical questions have not been asked or information not gathered, then the case is “incomplete”--send it back to the IG action officer for rework.

4. Are the conclusions supported by and consistent with the findings? (AFI 90-301, paragraphs 2.48 - 2.50; attachment 1)

a. Review:

- **Case File Section II, Tab C** (Findings, Analysis, Conclusion)

b. Guidance:

- Judge advocates should carefully review ROIs against prevailing legal standards. They must ensure the investigative process is properly followed, the analysis of the facts and circumstances is reasonable, and the appropriate legal standards are applied to the facts. If the ROI is legally sufficient, but could have been more thorough in some respect, the JAG should provide this feedback to the IO, through the IG.
- If the JA simply disagrees with the IO's findings (and conclusions), then document the rationale in the legal review. (AFI 90-301, para. 2.59.4) A disagreement is not necessarily the same as "legal insufficiency."
- While conducting the legal review, JAGs should not substitute their judgment for that of the IO. JAGs should give deference to the IO, much like an appellate court does to a trial judge. Reasonable minds may differ in these cases. *If* the facts and circumstances reasonably support the IO's conclusion, even if the JAG disagrees, *then the ROI is still legally sufficient*. If not, the ROI is not legally sufficient and should be returned to the IO for corrective action.
- If one individual is the subject of multiple allegations, ensure that the findings and conclusions are internally consistent.

5. Does the investigation comply with all legal requirements? (AFI 90-301, paragraph. 2.59, attachment 1)

a. Review:

- AFI 90-301, para. 2.6.2, 2.59.1, 2.69.3, 2.69.4, 2.70.1, 5.7.7, 6.8.4, 7.8.3

b. Guidance:

- The legal requirements are outlined in paragraphs 1-4 above.
- "Legal" requirements overlap with administrative requirements (discussed below) insofar as AFI 90-301 contains requirements for format, content and objectivity/fairness. It is critical that the JA examine the Quality Review Checklist (QRC) to ensure the case file complies with AFI 90-301.
- Other legal requirements that might be relevant, besides those mentioned, include:
 - Were "suspects" (vice subjects) properly advised of their constitutional or statutory rights?
 - Was the subject given adequate **notice** of the allegations and sufficient **opportunity to respond**? (This includes any "reframed" allegation or allegations added after the subject's initial interview, either at the base or from a higher review level)
 - If computer evidence was obtained, was it legally obtained? See AFI 33-119

6. Does the investigation comply with all administrative requirements? (AFI 90-301, para. 2.59.5)

a. Review:

- AFI 90-301, Table 2.16
- AFI 90-301, Attachment. 10 (Case File required format)
- SAF/IGQ, MAJCOM, or locally required Quality Review Checklist (QRC)

b. Guidance:

- JAGs should ensure that the IG correctly completed the applicable QRC.
- Generally, administrative errors do not render the case file legally insufficient.

- If the case is not administratively sufficient, the JA should return the file to the IO through the IG for rework.

7. Are there any errors or irregularities and, if so, what is the legal effect? (AFI 90-301, attachment 1)

a. Review:

- AFI 90-301, Table 2.16

b. Guidance:

- Most procedural errors or irregularities in an investigation **do not invalidate** it
 - **Harmless errors** are defects in the procedures that do not have a materially adverse effect on an individual's substantial rights.
 - **Appointment errors** resulting in the appointment of an IO by an unauthorized official can render the investigation void. A properly authorized appointing official may subsequently ratify the appointment.
 - **Substantial errors** are those that adversely affect an individual's rights. If the error can be corrected without substantial prejudice to the individual concerned, the Appointing Authority may return the case file to the same IO for corrective action.
- Common IG case file errors include:
 - **Improperly framed allegations.** Allegations may be reframed with the concurrence of the Appointing Authority. Note that reframing an allegation *may* trigger a requirement for notice to the subject and (another) opportunity to respond. The test here is whether the subject was provided with reasonable notice in the original allegation.
 - **Reliance on evidence outside the record.** This is not permissible. If the information is important enough to comment on, then it must be included in the case file. This might require a witness statement.
 - **Reliance on the wrong standard.** The standards or elements of the case should be analyzed under the standards in effect at the time of the alleged incident. If the IO relied on the wrong standard but this does not affect the analysis, this should be documented in the case file.
 - **Unsworn statements.** If any statement is unsworn, the IO should have the witness *adopt* their testimony under oath, in writing.
 - **Summarized testimony.** The testimony of complainant, subject, and key witnesses must be recorded and transcribed verbatim. (AFI 90-301, para. 2.42.) Other testimony may be summarized, with Appointing Authority approval.
 - **Not all allegations are investigated.** As noted above, send back to the IG action officer as "incomplete."
 - **Witnesses requested by complainant or subject or key witnesses not interviewed.** If the IO failed to provide rationale for failing to interview these people, the case should be returned as incomplete.
 - **Copies of relevant documents/evidence not included in the file.** Anything material to the inquiry must be included, especially copies or extracts of relevant standards (law, policy, regulation alleged to have been violated).

If the case file is not legally sufficient, then the legal review must explain, in sufficient detail, what the IO must do to remedy any issues. Similarly, if the JA finds the case file is administratively insufficient, the legal review must also detail the remedy. If the legal review merely disagrees with the IO's findings and conclusions, then JA will provide the rationale for the disagreement to the Appointing Authority for final determination.

ATTACHMENT 5: -Sample Legal Reviews of IG Investigative Case File

**SAMPLE LEGAL REVIEWS ARE AVAILABLE ON THE
IGS/IGQ PAGE OF AF/JAA'S FIELDS OF PRACTICE**

MEMORANDUM FOR APPOINTING AUTHORITY

FROM: (Unit)/JA

SUBJECT: Legal Review of IG Investigation Concerning Allegations of Improper Mental Health Evaluation Referral, Restriction, Abuse of Authority, Reprisal and/or Other Wrongdoing (Note--use these terms and choose one(s) that summarize(s) the allegation(s)), ACTS # 200X-XXXXXX

1. We have reviewed the above referenced Inspector General (IG) Report of Investigation (ROI) case file and find it to be legally sufficient. *(If not legally sufficient, briefly state why)* The case may be further processed in accordance with (IAW) Air Force Instruction 90-301, *Inspector General Complaints Resolution*.

2. **BACKGROUND:** *Explain here the parties, allegations and IO's conclusions as well as all the relevant facts of the case.*

a. Complainant, *(Rank/Name)*, was a *(duty position)* assigned to *(unit and base of assignment)*. There were *(#)* subjects. The first subject, *(explain the rank/name(s) of subject(s), their unit(s), and base(s) of assignment and relationship to the complainant)*. Subject number two.... The complaint alleged *(summarize the allegations)*.

b. The investigating officer (IO) determined the allegations were, as follows: *(summarize findings –either substantiated or not substantiated--may have to list these out in bullet format if several)*.

c. *This series of paragraphs should provide whatever background information a reader will need to understand the findings, analysis, and conclusions of the IO or the JA view, if it differs from the IO. **IMPORTANT!!!** Cite the Section, Tab and page number in the Report of Investigation (ROI) to support each fact. (Section III, Tab D-2, p. 2)*

d. *Look to the applicable law to determine what facts are relevant. For example, in restriction, the intent of the responsible management official (RMO) is a factor to consider. Quote what the RMO said he or she meant by their statement.*

3. **(MAJCOMS ONLY) PREVIOUS LEGAL REVIEWS:** *Briefly summarize the lower level legal review and whether the MAJCOM/JA has adopted that same position.*

a. *(Unit)/JA* conducted a legal review of the ROI on XX Month 200X. The legal review indicated *(Unit)/JA* found the IO's conclusions and findings to be legally sufficient. (Section I, Tab B)

b. *(Unit)/JA*, however, disagreed with the IO and recommended the Appointing Authority not substantiate Allegation X. The Appointing Authority (did/did not) substantiated the allegation. As discussed further below, we concur with *(the JA, IG or IO's)* analysis. *[Discuss here whether the lower*

level JA disagreed with the IO's findings and conclusions on any allegations and whether the Appointing Authority agreed.]

4. **STANDARDS:** Briefly summarize the applicable legal standards here. These are templates for commonly used standards. [Note: As a style point, some JAGs prefer to include the legal standards in their Analysis or Discussion section, just prior to applying the relevant facts to that standard.]

a. **Reprisal.** Reprisals against military members for making protected communications are prohibited under 10 U.S.C. § 1034. The AFI 90-301 sets forth the “acid test” for evaluating reprisal allegations. The “acid test” consists of four questions:

1. **Did the member make or prepare a communication protected by statute?**
2. **Was an unfavorable personnel action taken or threatened, or was a favorable action withheld or threatened to be withheld following the protected communication?**
3. **Did the official responsible for taking, withholding, or threatening the personnel action know about the protected communication?**
4. **Does the evidence establish that the personnel action would have been taken withheld, or threatened if the protected communication had not been made?**

When analyzing question 4, the IO is required to consider the following five factors: (a) reasons stated by the responsible official for taking, withholding, or threatening the action; (b) reasonableness of the actions taken, withheld, or threatened considering the complainant's performance and conduct; (c) consistency of the action(s) of responsible management official(s) with past practice; (d) motive of the responsible management official for the action; and (e) procedural correctness of the action.

If questions 1 through 3 of the “acid test” are answered in the affirmative and question 4 is answered in the negative, a *prima facie* case of reprisal exists. If the answer to any of the first three questions is “no,” reprisal cannot be substantiated. However, where appropriate, the underlying personnel action should then be analyzed to determine whether an abuse of authority occurred. [Note: *Inspector General Guide 7050.6, a DoD publication, provides additional guidance on the acid test and reprisal investigations.*]

b. **Abuse of Authority.** [Note: See JAG Guide, para 2.2.4 for discussion on how to review an abuse of authority investigation. Use the text below, as applicable, to review a particular investigation]

Reprisal is a subset of abuse of authority. If an allegation of reprisal does not meet the definition of reprisal under 10 U.S.C. §1034, IGs must still address and attempt resolution of the allegation as a personal complaint, such as abuse of authority. (AFI 90-301, 15 May 08, para 5.6.2.4)

(Use as applicable) AFI 90-301, 15 May 08, Attachment 1, defines abuse of authority as an arbitrary or capricious exercise of power that 1) adversely affects the rights of any person or results in personal gain or advantage to the abuser, **and** 2) the official did not act within the authority granted under applicable regulations, law or policy; **or** the official's action was not based on relevant data and factors; **or** the official's action was not rationally related to the

relevant data and factors. AFI 90-301 defines capricious as determined by chance or impulse or whim rather than by necessity or reason, and defines arbitrary as based on or subject to individual discretion or preference or sometimes impulse or caprice. (AFI 90-301, Attachment 1)

(Use as applicable) AFI 90-301, 15 May 08, Attachment 22 defines “abuse of authority” as an arbitrary and capricious exercise of power that adversely affects any person or results in personal gain or advantage to the abuser.”

(This section describes the abuse of authority acid test and the definition of “abuse of authority.”)

AFI 90-301, 15 May 08, Attachment 1 defines “abuse of authority” as an “arbitrary *or* capricious” exercise of power that (1) adversely affects the rights of any person or results in personal gain or advantage to the abuser, and (2) the official did not act within the authority granted under applicable regulations, law or policy; or the official’s action was not based on relevant data and factors; or the official’s action was not rationally related to the relevant data and factors. Attachment 22 of AFI 90-301 uses the term “arbitrary *and* capricious,” and provides a slightly different framework to assist the IO’s analysis.

Although the Air Force uses “or” for “and” in some places, the standard has been applied as the normal administrative review standard under 5 U.S.C. § 706, the Administrative Procedure Act (APA). The APA states, “the reviewing court shall ... (2) hold unlawful and set aside agency action, findings, and conclusions found to be--(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law....” Federal courts have used the terms “arbitrary and capricious,” “arbitrary or capricious” and “‘arbitrary’ or ‘capricious’” to refer to this narrow standard of review under the APA.¹¹¹ The best definition of the term “arbitrary and [or] capricious” is found in *Motor Vehicle Manufacturers Association v. State Farm Insurance*,² 463 U.S. 29 (1983). There, the U.S. Supreme Court reviewed whether an agency acted “arbitrarily and capriciously,” and noted, “A reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency.”¹¹²

Blending these sources results in the framework (found in Attachment 22) to analyze abuse of authority:

1. Did the responsible management official’s (RMO’s) actions either:
 - a. Adversely affect any person? (e.g., demotion, referral OPR, extra duty, etc.)

¹¹¹ See *Federal Communications Commission v. Fox Television Stations*, 129 S.Ct. 1800 (2009); *Motor Vehicle Manufacturers Association v. State Farm Insurance*, 463 U.S. 29 (1983)

¹¹² Traditionally, courts have applied a “narrow and deferential” review of the action and will not substitute its own judgment for that of the agency. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34, 42-43 (1983). This narrow review asks whether the government action is “rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by statute.” *Id.* The government actor must “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Id.* (quoting *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 168 (1962)). Ultimately, the reviewing court must find a “clear error of judgment” to find an action arbitrary and capricious. *Id.* See also *Dep’t of the Air Force v. FLRA*, 352 U.S. App. D.C. 394 (D.C. Cir. 2002) (discussing arbitrary and capricious standard))

or

b. Result in personal gain or advantage to the RMO? (e.g., promotion, award, etc.)

2. Did the RMO act within the authority granted under applicable regulations, law or policy?

[or]

3. Was the action arbitrary and capricious: *(the test then refers to four factors borrowed from the reprisal acid test: reasons, reasonableness, consistency, motive)*

If Question 1 is answered “no,” it is not necessary to consider Questions 2 or 3. If either part of Question 1 is answered “yes”, proceed to Questions 2 and 3.

Although the acid test does not place an [or] between questions 2 and 3, “or” is included in the definition of abuse of authority in Attachment 1 and is consistent with case law (“... may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency”¹¹³)

The underlying question in question 3 is whether the action was rational, based on consideration of the relevant data and factors. If not, the action is arbitrary and capricious. In answering Question 3, IOs should examine the RMO’s action very narrowly, giving the RMO’s decision substantial deference (great weight) without substituting one’s judgment for that of the RMO.

If the answer to Question 2 is yes, and the answer to Question 3 is “no,” the action should not be considered an abuse of authority. If the answer to either Question 2 or 3 is “yes,” then the action is indicative of an abuse of authority.

c. Mental Health Evaluation Referral Procedures:

1. Commonly used IMHE standards: *(Discuss and use the following legal standards as applicable to the type of mental health evaluation investigation. Always check the source documents for currency.)*

AFI 44-109, para 4.1 provides that commanders may encourage Air Force members to voluntarily seek mental health care, but may not under any circumstances attempt to coerce members to voluntarily seek a mental health evaluation.

DODD 6490.1, para 4.2.1 provides that the responsibility for determining whether or not referral for mental health evaluation should be made under the standards set forth in this section rests with the commander.

DODI 6490.4, para 6.1.1.1 provides that the responsibility for determining whether or not a referral for mental health evaluation should be made under the standards of DODD 6490.1 rests with the member’s commander at the time of referral.

¹¹³ *Motor Vehicle*, 463 U.S. at 42.

DODD 6490.1, para 4.3.5 provides that “voluntary self-referrals” are not covered by the mental health referral processes.

DODI 6490.4, para E.2.1.11 defines self-referral (or voluntary referral) as “the process of seeking information about or obtaining an appointment for a mental health evaluation or treatment initiated by a Service member independently for him or herself.”

DODD 6490.1, para 4.3.1 directs that the legal protections provided in DODI 6490.4 must be followed.

DODI 6490.4, para 4.2 directs that a member shall receive certain rights and privileges when referred for mental health evaluation. (*Refer to DODI 6490.4 and AFI 44-109 for a template and specific notice requirements.*)

2. Coercion (if applicable): [*See discussion of “coercion” and the DOD defined “voluntary referral” in paragraph 2.2.3 of the JAG Guide to IG Investigations. For guidance on voluntary referrals, see paragraph 3 below.*] AFI 44-901, *Mental Health, Confidentiality, and Military Law*, 1 March 2000, paragraph 4.1. states, “Supervisory personnel, including commanders, may encourage Air Force members to voluntarily seek mental health care... Supervisors and commanders may not, however, under any circumstances attempt to coerce members to voluntarily seek a mental health evaluation.” [*JAGs should be aware that SAF/IGQ’s current practice is to investigate whether a referral was a voluntary referral, rather than coercive. Even where facts may not establish coercion, the facts may nevertheless indicate the referral was not voluntary and was initiated in violation of the controlling DoD instruction.*]

2. Procedural Violations (if applicable): The procedures for referring Air Force members for a command-directed mental health evaluation are outlined in (cite as alleged and investigated: AFI 44-109, paragraph 4, et al; DoDD 6490.1; DoDI 6490.4.) [*Note--refer to SAF/IGQ Guidelines for Framing Mental Health Evaluations.*] In this case the issue is whether the subject, complainant’s First Sergeant, had the authority to order the complainant to undergo a psychological exam.

[*Notes: AFI 44-109 supplements DoD requirements and must be read in conjunction with DoDD 6490.1 and DoDI 6490.4. The IG will normally frame MHE allegations as “unauthorized referral” or “improper referral,” rather than coercion, and will rely on the definition of voluntary referral found in DoDI 6490.4. See para 2.3.2 of the JAG Guide for further discussion of coercion, voluntary referral, and procedural violations.*]

d. Restriction. A military member may not be restricted or prohibited from making a lawful communication to the IG or a Member of Congress.¹¹⁴ Proper analysis of a restriction complaint requires an in-depth review of both of the following questions: (1) How did the responsible management official (RMO) limit or attempt to limit the member’s access to an IG or a Member of Congress? (2) What was the RMO’s intent? (*consider reasons, reasonableness, motive*) (3) Would a reasonable person, under similar circumstances, believe he/she was actually restricted from making a lawful communication with the IG or member of Congress based on the RMO’s actions? (AFI 90-301, Table 6.2)

e. *Discuss, as necessary, any other legal standard alleged, such as Joint Ethics Regulation, an Air Force Instruction etc.*

¹¹⁴ 10 U.S.C. § 1034; DoDD 7050.06; AFI 90-301, para, 6.3

5. **ANALYSIS:** *This is an allegation-by-allegation review of whether IO reasonably applied preponderance of the evidence standards to the facts to support IO's conclusions. The analysis should have subsections for each allegation in the ROI.*

a. **Allegation 1:** On or about XX Month 200X, (Subject Rank/Name), (Subject Unit), restricted (Complainant's Rank/Name) access to appropriate avenues of redress by ordering him/her not to go outside his/her chain of command in violation of 10 USC 1034. (Type the allegation verbatim from the case file. This assists in finding discrepancies. Do this for each allegation.)

b. *The degree of detail and analysis necessary will be driven by case complexity and thoroughness of the case file. If the JA simply disagrees with the IO's findings (and conclusions), then document the rationale in the legal review.¹¹⁵ A disagreement is not necessarily the same as "legal insufficiency." **While conducting the legal review, JAGs must not substitute their judgment for that of the IO. JAGs should give deference to the IO, much like an appellate court does to a trial judge. Reasonable minds may differ in these cases. If the facts and circumstances reasonably support the IO's conclusion, even if the JAG disagrees, then the ROI is still legally sufficient.** For more details about the mechanics of conducting the case file review, See Judge Advocate (JA) Primer: "Legal Sufficiency Review" for Inspector General (IG) Investigative Case File at attachment 4.)*

c. **(MAJCOMS ONLY):** *MAJCOMS may incorporate lower level legal reviews by reference and prepare an abbreviated review (if the report is legally sufficient and the lower level JA thoroughly reviewed the investigation) except for allegations involving reprisal, restriction, improper mental health referrals, and O-6 subjects. (AFI 90-301, 2.59.7)*

d. **(REPRISAL CASES ONLY)** *The ROI must contain the IO's acid test analysis for each reprisal allegation or the report is not legally sufficient. For example: The IO properly applied the "acid test" to analyze these allegations. The evidence from IG case file showed that.... Be alert for cases where reprisal is not substantiated, but there is evidence of abuse of authority, as defined in AFI 90-301, Attachment 1. Review abuse of authority in the alternative if reprisal is not substantiated. JAGs should do some independent analysis of the facts and standards in this section to ensure the IO properly applied the test and relied on facts that are accurately documented in the report of investigation.*

e. *Always include a conclusion for each allegation, such as:* For all of these reasons, we concur with the IO's assessment that Allegation 4 should be **SUBSTANTIATED** for restriction

6. **ERRORS AND ANOMALIES:** *The legal review must ensure the investigative process was properly followed, the analysis of the facts and circumstances is reasonable, and the appropriate legal standards were applied to the facts. If the ROI is legally sufficient, but could have been more thorough in some respect, the JAG should provide this feedback to the IO in this section. For common IG case file errors, See: Judge Advocate (JA) Primer: "Legal Sufficiency Review" for Inspector General (IG) Investigative Case Files (November 2005 ver.) Always include a statement about the effect of these errors on the overall legal sufficiency, such as: We note that the Investigating Officer (IO) failed to properly tab the file in accordance with Attachment 10 to AFI 90-301. We find that this error does not cause this ROI or the investigation to be legally insufficient.*

¹¹⁵ AFI 90-301, para. 2.59.4

7. **CONCLUSION:** The report of investigation is legally sufficient. The IO has complied with all applicable legal and administrative requirements in conducting this investigation. The report addresses all of the matters under investigation and the findings are supported by a preponderance of the evidence. Conclusions reached are consistent with those findings. *(If not, discuss what specific steps are needed to make the ROI legally sufficient. The IO should be able to take your legal review as a road map to correct his/her report.)*

NAME, Rank, USAF
Duty Title

I concur.

NAME, Rank, USAF
Staff Judge Advocate

Attachment:
Case File

ATTACHMENT 6 - Matrix: Levels of Legal Review Required

| Type: | Base Level | MAJCOM, JFHQ-(State), DRU or FOA | SAF/IGQ | Rationale |
|--|-------------------|---|----------------|---|
| Reprisal Allegation | Yes (N.1) | Yes (N. 2) | Maybe (N. 3) | DoD is final review authority. |
| Allegation involving O-6, O-6 Select or civilian equivalent subject (any wrongdoing) | Yes (N.1) | Yes (N.2) | Maybe (N.3) | High profile and interest cases; SOUIF implications |
| Restriction Allegation | Yes (N.1) | Yes (N. 2) | Maybe (N.3) | DoD is final review authority. |
| Improper Mental Health Evaluation Allegation | Yes (N. 1) | Yes (N. 2) | Maybe (N.3) | DoD is final review authority. |
| Abuse of Authority Allegation | Yes (N. 1) | Maybe (N.4) | Maybe (N.3) | Typically is in the alternative to reprisal, which DoD reviews as final authority |
| Any non-Big 3 (reprisal, restriction, or improper MHE) or O-6 Allegations | Yes (N.1) | Maybe (N.4) | Maybe (N.3) | |
| RCA | Recommended (N.5) | Maybe (N.5) | Maybe (N.3) | All RCAs that recommend dismissal of reprisal go to DoD for final approval |
| NAF or higher authority writes an Addendum | N/A | Yes (N.2) | Maybe (N.3) | All disputed findings in case file must be resolved. |

Notes:

1. AFI 90-301, paragraphs 1.47.4 and 2.59.1. require JA to conduct a written “legal sufficiency” review for all IG ROIs.
2. AFI 90-301 requires JA to conduct an additional independent legal review at the Major Command (MAJCOM) Joint Force Headquarters (JFHQ-(State)), Forward Operating Agency (FOA) or Direct Reporting Unit (DRU) levels in cases involving allegations against a colonel (or equivalent) cases involving reprisal, restriction, improper mental health referral, *and cases* where a higher authority includes an *addendum* (such as when higher headquarters disagree with lower-level findings). (See AFI 90-301, para. 2.69.4, 5.7.7, 6.8.4, 7.8.3.)

3. The SAF/IGQ legal advisor reviews all IG case files forwarded to SAF/IGQ, regardless of the type of allegation. The legal advisor, in his or her discretion, may choose to issue a separate written legal opinion for HQ JAA signature. Typically, this occurs in cases involving disagreement between the base and HHQ levels, containing significant legal or administrative deficiencies or where SAF/IGQ acts as the MAJCOM (i.e., for all ANG and USAFA cases). The SAF/IGQ legal advisor also reviews all RCAs forwarded to SAF/IGQ, that recommend dismissal of reprisal allegations. In his or her discretion, the SAF/IGQ legal advisor may issue a written legal opinion to support dismissal or recommend investigation.
4. The MAJCOM/JA, in its discretion, may choose to conduct a legal review in cases involving abuse of authority or any non-Big 3/O-6 allegations. Typically, this will occur in “mixed cases”—those involving Big 3 or O-6 and other allegations. SAF/IGQ strongly encourages MAJCOMS, in “mixed cases,” to conduct a written legal review of the entire case file, not just the Big 3 or O-6 allegations.
5. While the AFI does not require a “legal review” for RCAs, SAF/IGQ strongly recommends, at a minimum, a base level legal review of any RCA that recommends dismissal of any reprisal allegations. All such RCAs get forwarded, through channels, to DoD, for final approval. For this reason, MAJCOMS or SAF/IGQ may choose to conduct an independent review and/or issue a written concurrence or dissent. Any disagreements should provide a sufficient rationale.