



INSPECTOR GENERAL

U.S. Department of Defense



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WHISTLEBLOWER REPRISAL INVESTIGATION
LIEUTENANT COLONEL TERESA A. JAMES
WEST VIRGINIA ARMY NATIONAL GUARD (WVARNG)
CHARLESTON, WEST VIRGINIA

I. EXECUTIVE SUMMARY

We conducted this investigation into allegations that the following individuals reprised against Lieutenant Colonel (LTC) Teresa A. James (Complainant), U.S. Army (USA), WVARNG, former Commander, 151st Military Police Battalion (151st MP BN): Major General (MG) James A. Hoyer, USA, West Virginia National Guard (WVNG), The Adjutant General (TAG); Brigadier General (BG) Charles R. Veit, USA, WVNG, Assistant Adjutant General (AAG); [REDACTED]; and [REDACTED].

Complainant alleged she was denied a Meritorious Service Medal (MSM), administered a referred officer evaluation report (OER), and referred for a mental health evaluation (MHE) and to a medical evaluation board (MEB) in reprisal for making a protected communication.

We determined that Complainant made a protected communication of sexual assault to MG Hoyer, and that MG Hoyer, BG Veit, and [REDACTED] each had knowledge of that communication. We did not consider [REDACTED] a responsible management official (RMO) because he did not take any action against Complainant.

We did not substantiate the allegations that MG Hoyer referred Complainant for an MHE and to an MEB in reprisal for her protected communication. We conclude by a preponderance of the evidence that MG Hoyer did not violate Title 10, United States Code, Section 1034 (10 U.S.C. 1034), "Protected communications; prohibition of retaliatory personnel actions," which is implemented by DoD Directive 7050.06, "Military Whistleblower Protection."

We did not substantiate the allegations that [REDACTED] withheld Complainant's MSM award recommendation and administered her adverse comments/rating on an OER in reprisal for her protected communication in violation of 10 U.S.C. 1034.

We substantiated the allegation against BG Veit and concluded by a preponderance of the evidence that he administered Complainant an unfavorable OER in reprisal for her protected communication in violation of 10 U.S.C. 1034.

By letter dated October 23, 2015, we provided BG Veit the opportunity to comment on a preliminary report of investigation.

In BG Veit's response dated December 9, 2015, he disagreed with our conclusion.

After carefully considering BG Veit's response, we amended appropriate sections of the report but did not alter our original conclusion.¹

We recommend the Secretary of the Army direct that Complainant be given an appropriate military service award for her time served as the Commander, 151st MP BN, WVARNG. We recommend the Secretary of the Army remove Complainant's OER for the period November 1, 2011 to September 30, 2012, from her Official Military Personnel File (OMPF). We recommend the Secretary of the Army direct the Army Board for Corrections of Military Records convene a Special Selection Board to consider whether Complainant should be recommended/selected for promotion to Colonel.

We recommend the Secretary of the Army take appropriate action against BG Veit for reprising against Complainant.

We recommend the Secretary of the Army direct WVARNG file OER addendums in the OMPFs of both [REDACTED], USA, WVARNG, and [REDACTED], USA, WVARNG, [REDACTED] that reflect findings of a 2011 Army Regulation (AR) 15-6 investigation substantiating their misconduct.

¹While we have included what we believe is a reasonable synopsis of BG Veit's response, we recognize that any attempt to summarize risks oversimplification and omission. Accordingly, we incorporated BG Veit's comments where appropriate throughout this report and provided a copy of his full response to the cognizant management official together with this report.

II. BACKGROUND

From March 1, 1997, to May 19, 2015, Complainant was an Active Guard Reserve (AGR) Soldier in the WVARNG. From March 7, 2008, to October 1, 2012, Complainant served in a full time capacity as the (G3) Mobilization Officer planner and later as the Mobilization Division Chief and reported to [REDACTED]. On April 11, 2011, she took command of the 151st MP BN and held that position until September 30, 2012. Complainant performed her battalion commander duties on weekends, annual training, and during state and national emergencies.

BG Veit was the AAG-Army and ordered to Active Duty for Operational Support (ADOS) for various periods as the Deputy Chief of Staff for Operations (Wartime), Eighth United States Army in Korea.² He served in these positions from July 2010 to present. Previously, he was the Commander, 111th Engineer BDE, WVARNG.

MG Hoyer began serving as TAG on February 1, 2011. Previously, he served as the Director of the Joint Staff, WVNG.

[REDACTED] became the Commander, 77th BDE Troop Command, on November 1, 2011, after serving in the G1 for [REDACTED].

According to Complainant, she was sexually assaulted by [REDACTED] while in temporary duty status to attend a conference in December 2006.³ [REDACTED] had been the [REDACTED] at the time Complainant said she was assaulted and then went on to serve as [REDACTED].

III. SCOPE

This investigation covered the period from December 2010 through May 2015. We interviewed Complainant, witnesses, MG Hoyer, BG Veit, and [REDACTED]. We also interviewed witnesses suggested by Complainant and the RMOs. We consulted subject matter experts from the National Guard Bureau (NGB) and Walter Reed National Military Medical Center (WRNMMC). We analyzed documentary evidence and requested email files from the RMOs, although we could not obtain a complete email history.⁴

² In this capacity, he served as the Eighth United States Army (EUSA) Deputy Chief of Staff, Operations (G3) Wartime, to provide operational direction to EUSA and advise the Commanding General for Operations, EUSA; Chief of the National Guard Bureau; and the Director, Army National Guard, on wartime readiness issues. Between 2011 and 2013, BG Veit's ADOS in Korea totaled 109 days.

³ As will be discussed later in the report, Complainant's sexual assault allegation against [REDACTED] was subsequently investigated and substantiated by the NGB's Office of Complex Investigations (OCI).

⁴ The Director of Command, Control, Communications, and Computers (J6), WVANG, informed us that a DoD enterprise email migration occurred in December 2012, and all end users were responsible for manually archiving and maintaining long-term storage of their email. Email files that may have been relevant to this investigation may have been lost during migration.

Although we determined Complainant made 11 protected communications over a 22-month period, she clarified in her Department of Defense Office of the Inspector General (DoD OIG) complaint dated April 10, 2013, that she was retaliated against specifically for her October 2012 report of sexual assault. Accordingly, we focused our analysis on that communication of sexual assault as the remaining protected communications were not alleged to have motivated the reprisal actions.

IV. STATUTORY AUTHORITY

The DoD OIG conducted this whistleblower reprisal investigation pursuant to Title 10, United States Code, Section 1034 (10 U.S.C. 1034), "Protected communications; prohibition of retaliatory personnel actions," which is implemented by DoD Directive 7050.06, "Military Whistleblower Protection."

V. FINDINGS OF FACT

According to Complainant, on December 7, 2010, she met with MG Allen E. Tackett, USA, WVARNG, TAG, and notified him of allegations of sexual harassment and discrimination involving members of the WVANG. Complainant's matters of concern were substantially an equal opportunity (EO) complaint.

On January 4, 2011, MG Tackett appointed MG Melvin Burch, USA, AAG for Installations and Homeland Defense, WVNG, as an investigating officer (IO) under AR 15-6 to examine allegations of command climate, gender bias, and sexual harassment. Specifically, MG Tackett directed MG Burch make findings, in part, regarding:

- Whether [REDACTED] or any member of the Army leadership exerted undue command influence on members of the military who were subordinate to him/them in rank causing either separation of authority or hostile command climate against other military members and/or Senior Staff members;
- Whether gender epithets were used;
- Whether [REDACTED] or any Army Staff member told any military members they could not talk to Joint Staff/Senior Staff members or to the TAG about military related issues;
- Whether [REDACTED] or any other supervisory or military leader treat or treated female soldiers disparately because of their gender; and
- Whether physical assault or contact took place between [REDACTED] and either [REDACTED], or [REDACTED].

Shortly after the investigation began, [REDACTED] submitted his resignation and asked to be reassigned while being [REDACTED]. [REDACTED] teleworked with

approval from MG Hoyer (who assumed command in February 2011) while he addressed his [REDACTED].⁵ On January 18, 2011, [REDACTED] replaced [REDACTED] as [REDACTED]

On January 24, 2011, MG Burch completed his investigation and found that [REDACTED] had berated, belittled, and engaged in acts of hostility against Soldiers; used gender epithets; engaged in physical assault on three other Service members; and may have treated female soldiers disparately. MG Burch also found that [REDACTED], another member of the WVARNG leadership, had failed to exercise leadership skills, maturity, and good judgment in his dealings with female soldiers.

MG Burch opined the above mentioned conduct, in part, was “serious and has proven extremely damaging to the command climate ... between [REDACTED] and other military members. There is hostility, fear and strategic alliances that exist that prove detrimental to the good order and success of the National Guard.”

MG Burch recommended [REDACTED] reassignment “ [REDACTED] to a much lesser leadership position where he does not have the ability to use fear and intimidation tactics to affect change,” and that he undergo an [REDACTED]. The IO further recommended [REDACTED] receive a General Officer Memorandum of Reprimand (GOMOR) and an accurate OER reflecting the findings of his investigation.

On February 1, 2011, MG Hoyer replaced MG Tackett as the TAG and approved MG Burch’s findings.

On February 17, 2011, MG Hoyer administered a GOMOR to [REDACTED] and noted on the memo that BG Veit was present.

On March 1, 2011, MG Hoyer reassigned [REDACTED] to the [REDACTED] and on March 14, 2011, [REDACTED] was initiated for him.

On April 11, 2011, Complainant took command of 151st MP BN. [REDACTED], USA, was the 77th BDE commander and Complainant’s rater, and BG Veit was her senior rater.

In June 2011, while Complainant and her [REDACTED], attended a pre-command course, four Soldiers in her battalion were involved in a High Mobility Multipurpose Wheeled Vehicle (HMMWV) rollover accident.

On June 14, 2011, [REDACTED] appointed an IO to conduct a legal accident investigation under AR 385-10, The Army Safety Program, into the HMMWV rollover accident. The IO concluded that, in part, Soldier poor judgment contributed to the accident and recommended

⁵ The WRNMMC evaluated [REDACTED], determined him [REDACTED].

retraining on proper driving procedures, and that counselings or other corrective actions be taken to prevent a reoccurrence.

On July 1, 2011, BG Veit appointed [REDACTED], USA, [REDACTED], WVARNG, as an IO to conduct a Commander's Inquiry into an allegation of a hostile work environment with the WVARNG Office of Training and Operations (G3).

On July 12, 2011, [REDACTED] concluded the inquiry and provided a memorandum to BG Veit that indicated in part, that he did not believe a hostile work environment under EO/EEO or any other bias or prejudice existed within the G3.

On August 1, 2011, an assistant WVARNG Judge Advocate General (JAG) found the HMMWV accident investigation legally sufficient, that the recommendations were consistent with the findings, and recommended [REDACTED] adopt both investigative findings and recommendations.

On August 7, 2011, [REDACTED] administered letters of reprimand to three of the Soldiers involved in the HMMWV accident.

According to Complainant, she learned that her Soldiers received reprimands when the 151st MP Company Commander notified her of the punishment. Complainant said she contacted [REDACTED] and asked for a copy of the findings and actions taken, but [REDACTED] told her disciplinary action was administered at his level and that was all she needed to know. Complainant said [REDACTED] never asked her opinion (about punishment) and that "I never stated my intent was to give a letter of counseling to anyone."

On November 30, 2011, as [REDACTED] prepared to leave his position, he and BG Veit (as rater and senior rater) administered Complainant a change of rater OER for the period April 1 to October 31, 2011.⁶ [REDACTED] and BG Veit evaluated Complainant's performance as "Outstanding Performance-Must Promote," and "Best Qualified" respectively.

On February 18, 2012, [REDACTED] in Complainant's battalion was arrested and charged with driving under the influence (DUI). On February 27, 2012, he reported the incident to the training officer, who notified the chain of command, including Complainant, who was on leave at the time, and another officer on [REDACTED] behalf.

On March 26, 2012, there was a diesel fuel spill at the National Guard Armory in Gassaway, WV, home of the 151st MP BN Headquarters and Headquarters Detachment. According to the Director, Environmental Programs, WVARNG, an environmental program compliance manager was sent to investigate the matter, and found a cargo truck with a portable secondary containment unit had an open drain valve that spilled between 1,500-2,000 gallons of fuel and water. The Director believed a Soldier was ordered to release rainwater that accumulated in the containment unit and did so without required supervision that may have

⁶ [REDACTED] replaced [REDACTED] as 77th BDE commander in November 2011.

prevented the spill. According to the Director, a company contracted to remove the contaminated soil and restore the site at a cost of \$15,252.99.

According to Complainant, on March 27, 2012, BG Veit notified her of the fuel spill, but said despite the incident he was pleased with her performance as Battalion Commander. Complainant said that during this meeting they discussed her [REDACTED], and his qualities as a commissioned officer. Complainant said she told BG Veit that the [REDACTED] was the only officer in her battalion that could write coherently, and that BG Veit told her that he needed to be in compliance with height and weight standards. According to Complainant, the [REDACTED]. He was in compliance with standards by July 2012, at which time Complainant recommended him for Company Command.

In BG Veit's tentative conclusions letter (TCL) response, he stated that Complainant "had a fuel spill at her Headquarters" and that "it cost the WVARNG approximately \$30,000.00 to remediate." BG Veit said that after learning of the cost, he directed Complainant brief him on a plan to prevent a recurrence. BG Veit contended that when Complainant briefed him on her plan [April 12, 2012], he discussed reassigning the [REDACTED], but said Complainant did not want him moved he was the only officer on her staff that could write a Department of the Army memo. BG Veit said he told Complainant this "sent up a red flag in my mind" because it "highlighted even more issues [Complainant] was having within her command."

Although Complainant corroborated the April 12, 2012, brief to BG Veit on funding to support the clean-up, she disagreed that BG Veit discussed moving the [REDACTED], or that he mentioned any concerns with her keeping him on staff because he could write well. According to Complainant, the first she learned of the [REDACTED] transferring was after a September 2012 meeting between [REDACTED], the [REDACTED], her [REDACTED] and another [REDACTED] which she did not attend.

[REDACTED] recalled being present for a spring 2012 counseling BG Veit gave Complainant that dealt with the "handling of some sort of a fuel spill within the MP battalion" but couldn't recall the specifics. [REDACTED] testified that Complainant did report back to BG Veit on the fuel spill [April 12, 2012], but [REDACTED] was not present when she did.

By April 4, 2012, the fuel spill was remediated and the site restored to original conditions. According to Complainant, a faulty seal in a containment mechanism caused the spill, not operator error. This was corroborated by the WVANG JAG, who stated no misconduct was identified in the investigation into the incident.

In April 2012, the [REDACTED]
[REDACTED]

⁷ Under West Virginia law an individual can participate voluntarily in this program if it is the first DUI offense. After a license suspension for 15 days, one can operate their vehicle so long as it has an ignition interlock device installed for 120 days.

On April 19, 2012, the [REDACTED] gave Complainant his court documents, but she withheld discipline until she obtained more details from his supervisor and her [REDACTED]. Complainant stated she had no reason to believe the [REDACTED] would not complete the [REDACTED], and she was concerned he had endured significant stress because [REDACTED]. Complainant believed his [REDACTED] was an isolated incident and planned to give him a memorandum of reprimand (Battalion LOR). However, during a May 1, 2012, conference call, she agreed with [REDACTED] assessment that the [REDACTED] receive a GOMOR, and on May 7, 2012, she drafted a GOMOR with MG Hoyer's signature block and sent it to an assistant WVARNG JAG for review.

BG Veit contended in his TCL response that Complainant's intent to give the [REDACTED] a Battalion LOR was a violation of AR 190-5, paragraph 2-7a, "as this provision mandates a GOMOR." The regulation reads:

Army commanders will take appropriate action against intoxicated drivers. These actions may include the following: *a.* A written reprimand, administrative in nature, will be issued to active duty soldiers in the cases described below. [The description includes conviction by civilian court for a drunk driving offense.] Any general officer, and any officer frocked to the grade of brigadier general, may issue this reprimand.

BG Veit also contended in his TCL response that the [REDACTED] was transferred to another command, where he bragged about not getting into "much" trouble with the 151st MP BN for his [REDACTED], and that this created a negative effect on the good order and discipline of the gaining unit, which caused BG Veit to question Complainant's judgment and ability to enforce discipline. Although the [REDACTED] transfer request was initially denied on April 18, 2012, it was approved approximately 2 months later.

On April 10, 2012, BG Veit (as rater) signed a change of duty OER for [REDACTED] that covered the period July 1, 2010, to February 28, 2011 (the period during which MG Burch made his findings against [REDACTED]). BG Veit evaluated [REDACTED] performance as "Outstanding Performance, Must Promote" and checked "Yes" on Part IV, Performance Evaluation-Professionalism in all seven "Army Values," characteristics that included, in part, "Honor: Adherence to the Army's publicly declared code of values; Integrity: Possesses high personal moral standards; honest in word and deed; and Respect: Promotes dignity, consideration, fairness, and EO."

Despite MG Burch's AR 15-6 findings that substantiated [REDACTED] and [REDACTED] misconduct and his recommendation that [REDACTED] OER reflect those findings, BG Veit included no comments about [REDACTED] misconduct and gave him the highest rating possible. When DoD OIG asked why he did not give [REDACTED] a referred OER, BG Veit testified:⁸

⁸ AR 623-3, "Evaluation Reporting System," paragraph 3-26, a referred OER report is synonymous with an adverse report.

I never witnessed his outbursts. I did not see the investigation. I was never -- I never read the investigation. I was never offered to read the investigation report on -- what I saw as [REDACTED] as working in (inaudible) and from phone calls, stuff I had with him, he was good at getting things accomplished, getting reports done, getting SOPs, trying new processes and procedures. And what I saw of his performance, I thought he did a good job at trying to get the processes and procedures done. The investigation, I never saw and I heard that -- all I really remember is that because of his mental state and outbursts, that that was the reason that he was being relieved.

DoD OIG clarified that MG Burch conducted only one investigation, and that one investigation discussed the findings made against both [REDACTED] and [REDACTED]. Despite this, BG Veit testified he only recalled the investigative report on [REDACTED], stating "I specifically remember that one about [REDACTED]. I don't remember that one [investigation] saying anything about [REDACTED]. If you say it did, I'm not going to dispute it."

In his TCL response, BG Veit contended that during his interview, he and the WRI investigator were referencing two different investigations. Specifically, BG Veit indicated:

I had no knowledge of the investigation conducted by MG Burch on 24 January 2011 and did not review said investigation prior to issuing [REDACTED] his 2011 OER ... the only knowledge I had of a 2011 investigation of sexual harassment was an investigation on [REDACTED]. The investigator did not believe me and cited that [REDACTED] misconduct was referenced throughout the investigation therefore, I must have known. The reality is that the investigator and I were referencing two entirely different investigations. I was referencing an investigation that I was tasked to appoint and approve on [REDACTED]. I appointed [REDACTED] to conduct this investigation, I reviewed it, and then approved the findings and recommendations. It wasn't until November 2015 that I had the opportunity to review the other investigation conducted by MG Burch.

BG Veit did task [REDACTED] to conduct a Commander's inquiry into an allegation of hostile work environment; however, [REDACTED] report did not find or address any sexual harassment by [REDACTED]. MG Burch's AR 15-6 investigation, however, did specifically discuss a 2009 instance involving potential sexual harassment by [REDACTED].

Further, during his June 2013 interview with DoD OIG, both the investigators and BG Veit distinguished between [REDACTED] inquiry and MG Burch's AR 15-6 investigation, and BG Veit's testimony illustrated his understanding the two were distinct. Specifically, when asked about the investigation involving both [REDACTED] and [REDACTED] BG Veit testified:

That was an investigation that GEN Burch did, and my understanding of that is it relates back to there was a trip that [REDACTED] and [REDACTED] and [REDACTED] which I don't know if at that time her name was [REDACTED] or [REDACTED] but they weren't somewhere. I don't know if it was NGB or Little Rock, Arkansas, but it was something to do with the National Guard conference or something they were at. And I read that report. [REDACTED] made comments that were construed as being suggestive, I guess, inappropriate, suggestive. And as a result of that investigation, yes, [REDACTED] got a GOMOR.

MG Burch's AR 15-6 investigation substantiated misconduct by both [REDACTED] and [REDACTED]. [REDACTED] is mentioned on each of the four pages of findings and recommendations, and eight paragraphs are used to substantiate his misconduct. Two paragraphs are used to substantiate [REDACTED] misconduct.

BG Veit's June 2013 testimony that he "read that report" demonstrates not only that he knew of MG Burch's AR 15-6 investigation but that he knew the investigation substantiated [REDACTED] inappropriate behavior and resulted in him receiving a GOMOR. Balancing BG Veit's contention in his TCL response that he had not reviewed MG Burch's investigation until November 2015 against his June 2013 testimony that he had read the report, and his presence at the February 2011 meeting where MG Hoyer issued [REDACTED] a GOMOR, clearly supports finding that BG Veit knew of the AR 15-6 investigative findings substantiating misconduct on both [REDACTED] and [REDACTED].

AR 600-20, "Army Command Policy," Chapter 6, "The Equal Opportunity Program in the Army," paragraph 6-11a, states:

When evaluating officers, enlisted Soldiers, or DA civilian employees, rating officials will evaluate those individuals' commitment to the goals and objectives of the EO [equal opportunity] or EEO [equal employment opportunity] program. This includes the individuals' actions or non-actions toward the prevention and elimination of unlawful discrimination and/or sexual harassment. Raters are required to document significant deviations from that commitment and identify instances of reprisal/retaliation taken by the rated individual in that evaluation report (see AR 623-3). Substantiated EO complaints as a result of AR 15-6 investigation require a ... "No" in Part IV-Performance Evaluation Professionalism, A. Army Values, 5. Respect, on the OER.

Despite this requirement to document [REDACTED] significant deviation from an EO/EEO commitment on his evaluation, and despite the requirement that substantiated EO complaints resulting from an AR 15-6 investigation require the rated officer to receive a "No" in

Part IV of the evaluation, BG Veit did not document the significant deviation and marked “Yes” in Part IV (Performance Evaluation Professionalism, A. Army Values, 5. Respect) on [REDACTED] OER.

BG Veit also contended in his TCL response that even if he knew of MG Burch’s AR 15-6 investigation, he was prohibited by regulation from referencing [REDACTED] substantiated misconduct on his OER because the investigation was not complete on February 1, 2011, as DoD OIG indicated, but on March 1, 2011, when [REDACTED] completed her legal review. BG Veit argued that including [REDACTED] misconduct would have been a “legal impossibility” and “early reporting” prohibited by AR 623-3, paragraph 3-19b, because, in his view, MG Burch’s AR 15-6 investigation was not “officially completed until far outside the rating period.” [REDACTED] 2011 rating period ended on February 28, 2011.

However, according to the Department of the Army Office of the Judge Advocate General (OTJAG), the proponent of the regulation, “[a]n AR 15-6 investigation is complete when the appointing authority takes action IAW [in accordance with] AR 15-6, Paragraph 2-3, by approving, disapproving, or approving with exceptions and substitutions.”

In an email to DoD OIG about the AR 15-6, the WVNG JAG clarified:

This investigation was concluded on 24 Jan 2011. I received the investigation in its entirety within days of this date from MG Burch. I also concurrently conducted my legal review at the same time. According to MG Burch, at the time he gave me this investigation, Generals Hoyer and Tackett had already been briefed by him on the findings of this investigation. I did find this 15-6 legally sufficient around the first of Feb 2011 and the findings consistent with the factual information contained therein.

The WVNG JAG further explained that although she either forgot to document her legal review or misplaced it, she nevertheless concluded her legal review around February 1, 2011, and provided the investigation to MG Hoyer because he assumed responsibility for the investigation on February 1, 2011, when he became TAG.

This is evidenced by MG Hoyer’s signature on DA 1574, “Action by Appointing Authority,” below the sentence, “I assumed responsibility of this investigation upon assumption of command and concur with the IO’s findings and recommendations,” on about February 1, 2011, and refutes BG Veit’s argument that the investigation was not officially completed until far outside the rating period. Although MG Hoyer did not date the DA 1574, [REDACTED] clarified that “it would have been our practice in the JAG shop to have him do so closely in time to when he assumed command as TAG.” Although BG Viet stated to the contrary, there was nothing that prohibited him from referencing the misconduct on [REDACTED] OER.

AR 623-3, Evaluation Reporting System, Chapter 3-23(b-d), required that [REDACTED] substantiated misconduct be documented on his 2011 OER. Additionally, Chapter 3-23f requires that rating officials initiate OER addendums to report verified misdeeds or professional or

character deficiencies unknown or unverified when the OER was submitted. According to the DA Human Resources Command, there is no evidence BG Veit ever filed an addendum to document [REDACTED] substantiated misconduct.

On May 2, 2012, BG Veit verbally counseled Complainant and memorialized it later in an unsigned Memorandum for Record (MFR) he did not provide to her:

I told [Complainant] that TAG and I were both disappointed in her judgement. [REDACTED] self-reported that he had been convicted of DUI. [Complainant] stated that she considered the entire soldier in her decision to give him a letter of reprimand from the battalion commander ... this combined with the HMMWV roll-over last summer when she considered issuing counseling statements was punishment not commensurate with the magnitude of the incident.

BG Veit described the May 2, 2012, counseling session and testified:

I spoke to her and told her I questioned her judgment that a counseling statement for a HMMWV rollover [*sic*] ... I was kind of suspicious of her judgment ... but then when she had a second incident, a DUI, and I documented here when I talked to her, I said, 'all you would want to do is give him a battalion commander letter of reprimand?' So that's where I specifically questioned her judgment.

Complainant agreed that she met with BG Veit on May 2, 2012, but said she never received the unsigned MFR that BG Veit later drafted to memorialize the meeting. Complainant said BG Veit only discussed the [REDACTED] (the DUI) and not the HMMWV accident. In fact, the HMMWV accident, the investigation into the accident, its legal review, and the punishment [REDACTED] imposed upon the Soldiers involved occurred in 2011, before the start of Complainant's 2012 rating period. Complainant said [REDACTED] never asked her opinion (about punishment), that she never stated she intended to give a letter of counseling, and that [REDACTED] was responsible for the disciplinary action - reflected in the letters of reprimand he gave to three Soldiers involved in the accident.

BG Veit contended in his TCL response that WRI failed to delineate between the date of the HMMWV accident and date of investigation completion. Specifically, he argued the accident was not completed until April 2012 when [REDACTED] emailed the administrative officer that he considered the investigation closed when a WVARNG Joint Force Headquarters tracking system changed the investigation status from "open" to "closed." However, on August 7, 2011, [REDACTED] administered letters of reprimand to three Soldiers involved in the accident.

In the National Guard, a Selective Retention Board (SRB) meets annually to consider officers in the grades of colonel and below, and warrant officers in all grades, for continuation of their period of Federal recognition beyond 20-years of qualifying service. On May 7, 2012,

██████████ recommended to the SRB president that Complainant be retained in the WVARNG writing that she was a:

Confident leader who is respected by her superiors, peers and subordinates. [Complainant] is both technically and tactically proficient in MP Operations ... She leads from the front and is an officer her subordinates will follow. [Complainant] continues to be an asset to the military police battalion and the West Virginia National Guard.

Complainant and BG Veit met on May 14, 2012 to discuss her OER Support Form,⁹ the document reflecting her performance objectives and accomplishments as battalion commander during the current rating period. He also told Complainant her command tour would end on October 1, 2012. In BG Veit's TCL response, however, he also stated he discussed some of his concerns and issues with Complainant at this time. However, the OER Support Form, the form designed specifically to document frank and open discussions of performance and objectives, does not reflect any concern or issue BG Veit may have had with Complainant.

Complainant stated the meeting focused on her goals and accomplishments for the battalion, and that nothing derogatory was discussed. She said she brought her OER Support Form, but BG Veit told her he did not need a copy, and asked her to discuss the form verbally. BG Veit did not initial the support form to document the meeting.

On July 30, 2012, Complainant contacted an IG in the Inspections Division, SAIG (Secretary of the Army IG), about significant issues and reprisal actions taken against her and other Soldiers within the WVARNG. That IG forwarded her reprisal issues and other concerns to WVNG, State IG, for action. When she checked on her complaints, the State IG said that one was returned without action because IGs will not accept third-party or anonymous allegations of whistleblower reprisal (one complaint was made on behalf of another Soldier), and the other was found without merit.

On September 12, 2012, ██████████ told Complainant that the SRB recommended her for a 1-year retention instead of the standard two. ██████████ gave her a developmental counseling form that read, "The SRB next FY [fiscal year] will evaluate your complete packet, ensuring that these specific area(s) of concern have been addressed."

The areas of concern identified by the SRB included a military education deficiency, lack of updated DA photo, physical fitness, weight control, and TAG intent. ██████████ documented the board results, specifically counseling Complainant on her height and weight.

⁹ IAW AR 623-3, para 3-4, initial and follow-up counseling between the rater and the rated Soldier that is documented on the support forms (OER and noncommissioned NCOER) assures a verified communication process throughout the rating period... Discussion of duties and major performance objectives at the beginning of a rating period resolves misunderstandings and ambiguities before they can adversely affect performance and mission accomplishment. Throughout the rating period, the working copies of ... support forms focus on follow-up face-to-face counseling on mission requirements and performance.

██████████ stated he provided Complainant no formal, documented performance counseling that identified any performance deficiencies.

Complainant disagreed with the SRB recommendation and annotated on the counseling form, in part, that she would schedule an appointment for a DA photo but that she had completed all required officer education for her grade, currently met height and weight standards, and passed the physical fitness test within the limits of her medical profile.

Complainant testified that two weeks later she told the ██████████ that ██████████ had sexually assaulted her in 2006. Just before her battalion command tour ended, she told Brigadier General (Brig Gen) David Buckalew, USAF, Director of the Joint Staff, West Virginia Air National Guard (WVANG), she could not report to her new assignment as a personnel services officer because of some personal issues.

On October 1, 2012, Complainant's battalion command tour ended as planned, and MG Hoyer also directed ██████████ reassignment.

On October 2, 2012, Complainant told MG Hoyer that ██████████ sexually assaulted her in 2006 and requested convalescent leave.¹⁰ MG Hoyer approved 30 days of convalescent leave and absence from her new duty assignment until January 2013. He testified that following Complainant's protected communication, he told the chain of command of her allegation and that he was going to initiate an outside investigation into the matter. When asked if by chain of command he meant BG Veit, MG Hoyer responded, "Right, it would have gone through GEN Buckalew, my full-time deputy back to the appropriate staff sections."

After telling MG Hoyer she had been assaulted, Complainant contacted authorities in Arkansas (where she alleged the assault took place), the U.S. Army Criminal Investigation Command (CID), and the National Guard Sexual Assault Response Coordinator. Civilian law enforcement authorities did not investigate because the statute of limitations had run, and CID declined to investigate.

MG Hoyer notified the WVNG JAG and the NGB's OCI, which agreed to investigate. MG Hoyer testified that he, BG Veit, ██████████, and Brig Gen Buckalew were a part of a senior leaders group.

Although Brig Gen Buckalew could not recall specifics when asked if he or MG Hoyer notified ██████████ or BG Veit of Complainant's sexual assault allegation, Brig Gen Buckalew stated, "... I'm sure we shared that." Specifically, Brig Gen Buckalew testified of ██████████ "... I'm sure he was in that mix ...," that BG Veit "would have had to have known about it by November," and "... there's no reason why he wouldn't have been aware of the circumstances as the [sic] position that he holds." Brig Gen Buckalew also noted that BG Veit worked there daily as a state employee who "just happens to be military assigned as the Army assistant AG."

¹⁰ According to the NGB OCI report, when Complainant learned that ██████████ had done the same or similar things to other women, she felt a duty and a responsibility as a senior leader to report the 2006 sexual assault.

When first interviewed by DoD OIG, [REDACTED] testified he did not recall hearing that Complainant had alleged sexual assault. However, he later clarified his testimony and said that BG Veit asked him in November 2012 whether he was aware that Complainant was sexually assaulted.

BG Veit testified, "I learned about it sometime in December and I told [REDACTED] in January." He also stated, "GEN Hoyer mentioned something to me about it – when – and I don't remember exactly when [*sic*] he told me – because before I knew that they were connected, I knew that she was coming in to meet with GEN Hoyer because – about whatever." When asked his reaction to Complainant's sexual assault allegation against [REDACTED] BG Veit testified:

I was surprised. [Complainant] -- rumors, okay, she's had relationships with other people in the Guard previously. So I don't know if she and [REDACTED] had had a relationship before, if that was the first time or only time, whatever. I don't know. I never asked her about that ... I had heard rumors that she ... previously had had relationships with other people in the Guard.

In his TCL response, BG Viet stated he believed he did not learn of Complainant's sexual assault allegation until December 2012 when he was notified of the NGB OCI investigation. However, MG Hoyer and [REDACTED] similar testimony about when BG Veit knew, BG Veit's admitted knowledge of Complainant's allegation, and Brig Gen Buckalew's recollections, support that BG Veit knew of Complainant's sexual assault allegation as early as October, but no later than November 2012.

After Complainant's 30 days of convalescent leave, NGB wanted her medical records before approving additional leave. Complainant, however, refused to provide them, saying she feared news of her assault would be made public, and she did not trust the WVARNG State Surgeon, whom she alleged was [REDACTED] friend. MG Hoyer let her remain on convalescent leave until the investigation was completed, without approval from NGB, stating, "[Complainant] was not required to come in to work, and I took that upon myself that, hey, there's an investigation going on related to sexual assault. I'm not going to require [Complainant] to come in until this is resolved."

On October 23, 2012, [REDACTED] received Complainant's end-of-tour MSM award recommendation for endorsement and forwarding to MG Hoyer. He asked [REDACTED] and BG Veit whether she had to receive an award and was told that it was up to him as commander. [REDACTED], through his action officer, told [REDACTED] that "[y]ou can approve, disapprove or downgrade as you see fit but need to be consistent with OER remarks." BG Veit testified [REDACTED] asked him if Complainant had to get an award and he said, "No. The only award should be [*sic*] doing a good job or a great job or something like that, and if her performance was questionable, then certainly, she does not have to receive an award."

[REDACTED] cited performance issues and disagreements on investigations between Complainant and senior leaders as reasons why he did not forward her award recommendation to MG Hoyer. He also clarified that there were problems that were not being addressed:

For instance, there was this individual named [REDACTED]
[REDACTED] an IO was appointed ... but the investigation never went anywhere. It actually dates back well before [Complainant], but when she came on, [the IO] had the investigation, and nothing happened with it. And then that same [REDACTED]
[REDACTED] was working somewhere else and didn't stop him. And so I had to appoint an investigating officer ... And I had some disagreements with [Complainant] over that ... she disagreed with whether or not there should even be an investigation on these two instances.

[REDACTED] acknowledged appointing an IO to investigate a different soldier in Complainant's battalion without specifically discussing it with her. According to [REDACTED] he had two conversations about the Staff Sergeant investigations with Complainant but "... she seemed resistant to me."

Regarding the award, [REDACTED] testified:

Ultimately it was my responsibility not to process that. And the reason I didn't process it is because I didn't think it was warranted. ... And again, that has nothing to do with any protected communications that she may have made.

[REDACTED] also said:

With [Complainant] there was a constant, constant problem. I mean, it was one thing after another, after another. I mean, it took up so much of my time to deal with that, to deal with these investigations ... I wasn't angry, I was frustrated ... She was very high maintenance.

In late November 2012, [REDACTED] submitted Complainant's OER to BG Veit with a rater comment about Complainant's "weak transition." [REDACTED] testified, "that's when [BG Veit] asked me ... are you aware of whether or not she's having any personal problems or whether or not there has been any allegations that she was sexually assaulted?" [REDACTED] then testified that he thought "well, if [Complainant] is having personal problems, I'm going to take out the part ... about the weak transition." He said:

I just gave her basically what I thought to be an OER that was commensurate with her performance, in the sense that there were

good things about her performance, and there were bad things about her performance. And I mentioned the good things, and I mentioned the bad things ... the height, weight, and PT issues, and the conflicts she was having with senior leaders on some of these investigations that were taking place within the MP Battalion.

On November 19, 2012, [REDACTED] as rater, signed Complainant's OER covering the period from November 1, 2011, to September 30, 2012, and evaluated her performance as "Satisfactory Performance, Promote." His OER comments noted Complainant's communication difficulties, lack of aggressiveness in pursuing investigations, and lack of emphasis on physical fitness in the battalion.

On November 29, 2012, BG Veit, as senior rater, signed Complainant's OER and evaluated her performance as "Fully Qualified" without the "referred" box checked and transmitted it to Complainant. The adverse OER comments included:

- Complainant had communication difficulties and conflict with the command group in the handling of multiple investigations [REDACTED];
- Complainant's failure to aggressively pursue investigations/lack of emphasis on physical fitness in the battalion affected unit discipline and morale [REDACTED]
- Complainant made decisions that caused senior leaders to question her judgment (Veit); and
- Complainant had significant weaknesses in her battalion and full-time support staff (Veit).

BG Veit stated that he based Complainant's OER on her performance. Specifically, he questioned Complainant's desire to administer counseling statements to the Soldiers involved in the HMMWV accident and her intent to administer a Battalion LOR to the [REDACTED].

From December 10-14, 2012, the NGB OCI investigated the alleged sexual assault. On December 17, 2012, the NGB OCI outbriefed MG Hoyer, and he subsequently notified his staff of the results. MG Hoyer believed he directed Brig Gen Buckalew to alert the senior leaders group (including BG Veit) of the NGB OCI findings. The NGB OCI Manual in effect at the time of the investigation identifies the process for conducting complex administrative investigations involving reports of sexual assault, and indicates that an investigation outbrief to the TAG or ATAG will include a determination of whether the reported sexual assault is substantiated, if the determination has been made at the time of the outbrief.

On December 18, 2012, Complainant emailed [REDACTED] and BG Veit and asked them to elaborate on the derogatory information in her evaluation.

On December 19, 2012, BG Veit contacted the WVNG Personnel Management Officer and asked whether Complainant's OER should be referred. The Management Officer confirmed

that the negative comments required the OER be marked “referred,” and that same day, BG Veit notified Complainant that he changed her OER to a “referred report” and routed it to her on AKO. Although Complainant believed neither [REDACTED] nor BG Veit responded to her December 18 email, she allowed that problems with Army Knowledge Online (AKO) email may have prevented her from viewing any response.

According to MG Hoyer, after the NGB OCI investigation, BG Veit came to him:

... And said it was his intent to file a referred OER on [Complainant]. And I told Gen Veit in light of the investigation and the confirmation of an assault that I didn’t feel a referred OER was appropriate and told him that he needed to go back and look at – and I didn’t have an issue with it if they were going to document performance issues because there had been some performance issues. But I didn’t think a referred OER was appropriate in light of the fact that the assault had been confirmed, [Complainant] was within 18 months of a 20-year retirement.

When asked if MG Hoyer had a concern about giving Complainant a referred report, BG Veit stated, “I don’t remember if I told [MG Hoyer] it was a referred report or not. I might have. I don’t remember if I did or not, but my emphasis was on that I couldn’t get it submitted to HRC (Human Resources Command) because [Complainant] hadn’t signed it.”

On December 19, 2012, BG Veit emailed Complainant that her referred OER was uploaded to AKO and that she had until January 19, 2013, to respond. He acknowledged the inconsistency of Complainant receiving a referred OER and [REDACTED] not receiving a referred OER, testifying, “That’s not consistent.”

MG Hoyer testified he was not happy that BG Veit referred the report and personally spoke to him about his displeasure over not following his guidance.

On January 24, 2013, [REDACTED] recommended approval of the [REDACTED] MSM award and forwarded it to MG Hoyer. This award recommendation language was almost identical to the award recommendation for Complainant that he did not forward.

[REDACTED] stated he could not recall if he received both the [REDACTED] and Complainant’s award recommendations at the same time but testified he thought he had not forwarded either award. When shown both award justifications, [REDACTED] said he did not know if all the remarks were true, despite having forwarded the [REDACTED] award for approval. He said, however, that “I do think that [REDACTED] does a better job.”

[REDACTED] rated four battalion commanders during the 2011-2012 time period and gave Complainant the lowest rating, a “Satisfactory Performance, Promote,” rating. His other three commanders received “Outstanding Performance, Must Promote” ratings.

On February 10, 2013, MG Hoyer emailed the State Surgeon about medical courses of action to take regarding Complainant's availability to return to work based on any medical issues. MG Hoyer said "if there are no issues based on the review, my intent is to order her back to work or to WRNMMC for a fit for duty evaluation." The State Surgeon responded that MG Hoyer could tell her to return to work, and if she refused, she could sign full, unrestricted releases of her medical records from all of her mental health providers so he could generate a profile and seek convalescent leave approval from NGB. If she refused, the State Surgeon told MG Hoyer he could direct an MHE because of her self-reported mental illness and excessive absence from work, to protect the command and Complainant, and to ensure she received the behavioral health treatment she needed.

[REDACTED] was the only other senior AGR officer referred to [REDACTED] during this period. His [REDACTED], the first step before [REDACTED], occurred within 2 months after the substantiated findings against him were released. After receiving his permanent profile, [REDACTED] declared [REDACTED] [REDACTED]. Although there were significant delays in [REDACTED] (during which time MG Hoyer made him telework to stay away from the organization), much of the delay was attributed to administrative processing errors.

On February 15, 2013, after an [REDACTED], MG Hoyer issued him two GOMORs – the first for MG Burch's January 2011 substantiated findings and the second for the NGB OCI findings on sexual assault.¹¹

On March 5, 2013, MG Hoyer told Complainant the NGB OCI team substantiated her sexual assault allegation and directed her for an MHE because she was a sexual assault victim who told him the assault had a detrimental effect on her military performance. Complainant testified she had no reservations about the MHE referral.

On March 11, 2013, the [REDACTED], WRNMMC, placed Complainant on a temporary profile and recommended a low-stress job with a telework option, if possible. The Doctor diagnosed Complainant as having moderate PTSD.¹²

On March 18, 2013, MG Hoyer met with Complainant and offered her a low stress job with two duty location options – one on the main WVNG complex and the other very close to her home. However, Complainant asked to telework because she did not want to work with or near individuals she thought were friends of [REDACTED]. MG Hoyer denied her request because she was not in an MEB process, and his position was to disallow telework unless "there was an extenuating circumstance like the individual [REDACTED] or somebody was in the MEB process." A Victim Advocate was also present and said that

¹¹ MG Hoyer postponed taking action until [REDACTED] had completed [REDACTED]

¹² AR 40-501, 7-4c. "Soldiers receiving medical or surgical care or recovering from illness, injury, or surgery, will be managed with temporary physical profiles until they reach the point in their evaluation, recovery, or rehabilitation where the profiling officer determines that MRDP (Medical Retention Determination Point) has been achieved but no longer than 12 months. A temporary profile is given if the condition is considered temporary, the correction or treatment of the condition is medically advisable, and correction usually will result in a higher physical capacity."

MG Hoyer told Complainant “we have two options ... ‘you can either come back to work as a transition officer, or either ... go the MEB route.’”

Complainant became upset, stating that [REDACTED] was allowed to telework, and MG Hoyer explained to her that [REDACTED] was going through the [REDACTED]. MG Hoyer then consulted with Dr. Bacon and explained that Complainant’s emotional state concerned him. MG Hoyer testified:

And she got extremely emotional, very upset, and at a level to a scream, because I know it concerned my secretary ... and GEN Buckalew was sitting over here. The victim’s advocate, [REDACTED], was sitting next to her [Complainant]. In a very emotional and high pitch, she [Complainant] raised her hands and said, ‘I can’t come back to work here.’ ... And she proceeded to get even more emotional. So to try to calm the situation, I said, ‘what about an alternate work location at the St. Albans armory?’ which is very close to where she lives. And she got more emotional, raised her arms again and said, ‘I can’t come back to work here.’

Complainant wrote a letter to MG Hoyer, dated March 22, 2013, saying “I would like to return to work. However, due to my post-traumatic stress disorder symptoms at present, I do not believe returning to work, even at an alternative work site, would be beneficial to my recovery.” Complainant wanted to participate in cognitive processing therapy – a treatment designed to treat victims of sexual assault and PTSD.

The Doctor was not familiar with this letter but said “MG Hoyer and I discussed in detail the quandary he was in, in that he indicated that Complainant could not come back to work in any format other than telework or convalescent leave.” With respect to Complainant’s request for therapy treatment, the Doctor said, “cognitive processing therapy is very common for mental health treatment for PTSD” and “It’s done every day in Army Mental Health.” He also stated that it is not a full-time treatment but 1 hour per week and went on to say that for severe cases of PTSD where they cannot go back to work, they get an MEB. The Doctor described Complainant as having moderate, not severe, PTSD.

The Doctor said MG Hoyer told him he tried to create an accommodating work environment and a low stress job for Complainant, but she refused the options presented. He said, “So [MG Hoyer] was caught with an officer that in essence said she could not physically come to work. [MG Hoyer] didn’t feel like he could give convalescent leave anymore, which is fully supported: we don’t in mental health, give convalescent leave.”

After Complainant became emotional when MG Hoyer refused her full-time telework request, and she refused to return to work or accept the locations offered, MG Hoyer referred Complainant to an MEB. He consulted with the Doctor and determined an MEB was the appropriate action to take. The Doctor stated:

That if she could not return to work in a low-stress job, in some capacity that was devised by command, that then we would need to – I would need to refer her for a medical evaluation board. The first step in a medical evaluation board is the creation of a P3 psychiatric profile. That's the definition of a start of an MEB.

In accordance with WVNG policy, telework is a privilege granted by the Adjutant General only when it is in the best interest of organization, mission, and employees.

On April 5, 2013, the Doctor placed Complainant on a permanent profile annotating on the form that she had PTSD and needed an MEB. MG Hoyer wrote Complainant on April 9, 2013, that the Doctor completed her permanent physical profile and that she needed to meet with him to initiate an MEB package.

On April 10, 2013, Complainant filed a complaint with DoD OIG and alleged she was reprimed against, in part, by failing to receive an end of tour award, her OER, and the MHE and MEB referrals. Although she listed four communications as protected in her complaint, she emphasized one complaint in particular, her October 2, 2012, communication to MG Hoyer, stating, "I believe these actions are a direct result of retaliation for reporting my rape against an [REDACTED], in the organization."

On April 17, 2013, BG Veit told the Management Officer he wanted to annotate on Complainant's OER that she was unavailable for signature. The Management Officer responded the next day and advised that according to regulations (AR 623-3, Paragraph 3-28(d)), if the rated soldier failed to respond within the given suspense period, and if the senior rater had documentation (such as a read receipt) to show unavailability and refusal to sign, the senior rater could annotate that the rated soldier was unavailable. According to the Management Officer, BG Veit believed that despite not having a read receipt, Complainant had viewed the OER within AKO "MyForms."

On May 8, 2013, the Management Officer asked BG Veit about the status of Complainant's OER. On May 9, 2013, BG Veit signed the OER, annotated that she was unavailable for signature, and uploaded it to Headquarters, Department of the Army, who placed it into the interactive Personnel Electronic Records Management System (iPERMS).

On June 19, 2013, BG Veit told the Management Officer that Complainant had not opened up her OER within the AKO "MyForms." On June 20, 2013, BG Viet notified Complainant (via the Management Officer sending a certified letter) that because she had not viewed her OER within AKO, he was giving her an additional 30 days to respond to the referred OER.

On June 26, 2013, DoD OIG interviewed MG Hoyer, BG Veit, and [REDACTED]

On July 3, 2013, Complainant sent the Management Officer the OER referral acknowledgement letter and a letter requesting MG Hoyer conduct a commander's inquiry into, in part, her OER "injustices and regulatory violations," a lack of substantiating facts to justify the

referral, and a review of the events surrounding the annotation, "Soldier unavailable to sign." The Management Officer gave the documents to the WVNG JAG.

On July 12, 2013, the Management Officer asked the NGB OER branch to remove from Complainant's iPERMS file the referred OER BG Veit signed in May with the annotation "service member unavailable for signature." NGB removed the OER a few days later.

On July 28, 2013, Complainant provided her OER rebuttal to MG Hoyer and BG Veit. The rebuttal read, in part:

During this rating period, all preliminary inquiries and AR 15-6 investigations regarding alleged inappropriate conduct of soldiers within my command were conducted in accordance with the applicable regulations. Furthermore multiple attempts were made to assert unlawful command influence over the outcome of these investigations ... I communicated regularly with my Brigade Commander [REDACTED] throughout the rating period and kept him informed on all inquiries and investigations.

On August 13, 2013, the State IG emailed BG Veit and [REDACTED] saying that before advising MG Hoyer on Complainant's request for a commander's inquiry, he wanted to know if they intended to change their comments on her OER based upon her rebuttal.

According to the Management Officer, BG Veit told the State IG, [REDACTED] and Brig Gen Buckalew that Complainant's claims of inaccuracy were embellished, and he saw no reason to change his senior rater comments.

[REDACTED] stated he did not agree with Complainant's rebuttal but considered her claim she had not received written counselings, and out of fairness, he removed the two negative sentences that Complainant disputed and did so without instruction from anyone.

According to MG Hoyer, his responsibility "was to ensure it [OER] went through the process, not to get involved in whether it was changed or not."

On August 19, 2013, BG Veit emailed the Management Officer that he revised comments on Complainant's OER in accordance with the applicable provisions of AR 623-3 and directed that Complainant sign the OER no later than September 6, 2013. BG Veit had changed it from a referred OER to a non-referred OER by removing all negative comments.

On August 26, 2013, MG Hoyer concluded a commander's inquiry into Complainant's referred OER and notified her by memo that:

... the administrative processing was not in accordance with AR 623-3. However, shortly before my inquiry into this matter, the state MILPO (Military Personnel) office recognized the report may have been improperly referred to you for comment. In order to

align with requirements for a referred OER, a new referred OER packet was generated and sent to you on 21 Jun 13, with receipt on 1 Jul 13. The state MILPO office also worked with NGB to have the original report retracted from your iPERMS on/a 18 Jul 13. As a result of the second referred OER packet, and your written rebuttal, the OER was re-evaluated by the rating officials and the negative comments were removed ... thus, this portion of the commander's inquiry no longer requires action ... I recommend this OER be processed as written and filed in your Official Military Personnel File.

On September 20, 2013 in a memorandum to BG Veit, Complainant acknowledged receipt of the revised OER and stated, in part:

The previous submitted Officer Evaluation Report, signed 9 May 2013, has become a matter of permanent record in documents relating to my current medical processing. The revised report in this instance is an after the fact matter, whereas signing my revised report may have a negative impact on my rights to redress. My initial request for extension of the suspense date, approved by Brig Gen Buckalew, was to consult with military legal council [*sic*] for assistance. As of 19 Sep 13, my request for this assistance has been denied without reason. Therefore, without proper advisement of my legal remedies to correct these injustices already a matter of permanent record in my medical proceedings, I will not sign the revised Officer Evaluation Report.

According to HRC, on January 12, 2015, Complainant's OER was uploaded into iPERMS. Although the OER was not referred, in Complainant's opinion it remained unfavorable because [REDACTED] evaluation was "Satisfactory Performance, Promote," and BG Veit's evaluation was "Fully Qualified," as opposed to "Best Qualified." Complainant believed this OER did not accurately reflect her command time.

In May 7, 2015, MG Hoyer approved an MSM award for Complainant for the period May 20, 2005, to May 19, 2015, and gave her the award upon her retirement from military service on May 22, 2015. On May 20, 2015, the WVARNG addressed Complainant's non-receipt of an award for her command time in a media statement to the press.¹³ It said:

There was no award submitted by her chain of command for [Complainant] to the Adjutant General for approval. Military awards are not given automatically for any service member. When an official decoration is awarded to a service member for command time, it is not given for simply holding the position, but

¹³ Complainant contacted the media about alleged adverse actions taken against her as a result of her report of sexual assault.

a result of that individual's outstanding performance or achievements while in the position of command.

The justification for Complainant's retirement award [MSM] included accolades for the time served as 151st MP BN Commander. Specifically the justification noted:

- [Complainant's] excellent interpersonal skills and positive can-do attitude added to her successful career as a AG Corp LT ... on to a successful Military Police BN CDR,
- [Complainant's] many years in the MP BN, from initial commissioning through her BN Command tenure, saw much success in the wake of her oversight and leadership ... her tireless efforts led to a Soldier strength of up to a 601 personnel-strong MP BN; which stands ready today.

According to the Chief, Personnel Division, National Guard Bureau, Complainant's first year of eligibility for promotion consideration from Lieutenant Colonel to Colonel was FY 2015. The FY 2015 promotion board considered candidates with a date of rank between October 1, 2008 and September 30, 2009.

VI. ANALYSIS

A. Did Complainant make or prepare to make a protected communication, or was Complainant perceived as having made a protected communication? Yes

Complainant's Protected Communication to MG Hoyer alleging sexual assault

Complainant's October 2, 2012, communication to MG Hoyer that [REDACTED] sexually assaulted her is a protected communication under 10 U.S.C. 1034 since she reported what she reasonably believed was a violation of law to a member of the chain of command.

B. Was an unfavorable personnel action taken or threatened against Complainant, or was a favorable personnel action withheld or threatened to be withheld from Complainant? Yes

We determined that Complainant was the subject of five personnel actions as defined by DoDD 7050.06.

[REDACTED] *withholding of Complainant's MSM Award Recommendation and his OER comments*

[REDACTED] withholding of Complainant's MSM award recommendation is a withheld favorable personnel action because it had the potential to affect her current position or career.

[REDACTED] adverse comments and rating on Complainant's 2012 OER contributed to her OER referral and ultimate unfavorable OER because these actions had the potential to affect her current position or career. Further, DoDD 7050.06 defines a performance evaluation as a personnel action.

BG Veit's OER comments and rating resulting in unfavorable OER

BG Veit's adverse comments, rating, and referral of Complainant's 2012 OER (that ultimately culminated in the administration of a non-referred unfavorable OER) constitute an unfavorable personnel action because these actions had the potential to affect her current position or career. Further, DoDD 7050.06 defines a performance evaluation as a personnel action.

MG Hoyer's Referral of Complainant for an MHE

MG Hoyer's decision to refer Complainant for an MHE is an unfavorable personnel action because it had the potential to affect her current position or career.

MG Hoyer's Referral of Complainant to an MEB

MG Hoyer's decision to refer Complainant to an MEB is an unfavorable personnel action because it had the potential to affect her current position or career.

A preponderance of the evidence established that Complainant was the subject of five personnel actions.

C. Did the responsible management official(s) have knowledge of Complainant's protected communication(s) or perceive Complainant as making or preparing protected communication(s)? Yes

We determined that MG Hoyer, BG Veit, and [REDACTED] each knew of Complainant's protected communication.

MG Hoyer's Knowledge of Complainant's Protected Communication

MG Hoyer knew of Complainant's protected communication about her sexual assault allegation because she told him directly.

BG Veit's Knowledge of Complainant's Protected Communication

We determined BG Veit knew of Complainant's October 2012 sexual assault allegation to MG Hoyer. MG Hoyer testified he notified the chain of command, via Brig Gen Buckalew, after Complainant told him, and BG Veit was a member of the command senior leadership. Brig Gen Buckalew also testified he believed BG Veit knew of the allegation. Additionally, [REDACTED] testified that BG Veit asked him in November 2012 whether he was aware that Complainant was sexually assaulted. Despite BG Veit's testimony that he learned of the allegation in December 2012, we found the collective testimony of MG Hoyer, Brig Gen

Buckalew, and [REDACTED] to be more credible than BG Veit, and conclude that he knew of Complainant's sexual assault allegation as early as October but no later than November 2012.

[REDACTED] *Knowledge of Complainant's Protected Communication*

[REDACTED] initially denied knowing of Complainant's October 2012 sexual assault allegation, but later clarified that BG Veit discussed the matter with him in November 2012. MG Hoyer notified, via Brig Gen Buckalew, the chain of command after hearing from Complainant. [REDACTED] was also in the chain of command as Complainant's rater and immediate supervisor.

D. Would the same personnel action(s) have been taken, withheld, or threatened absent the protected communication(s)?

Award Recommendation Withheld

We determined [REDACTED] would have withheld Complainant's MSM award recommendation absent the protected communication.

[REDACTED] *Stated Reasons*

[REDACTED] withheld Complainant's MSM award recommendation because of Complainant's performance issues and her disagreements with senior leaders about battalion investigations. He expressed his frustration with having to deal with battalion issues and characterized Complainant as "high maintenance." [REDACTED] counseled Complainant once during the rating period, specifically to discuss the SRB results (which was mandatory).

Timing

The close timing of the protected communication and [REDACTED] decision to withhold the award recommendation could raise the inference of reprisal.

[REDACTED] *motive to reprise*

[REDACTED] lacked motive to reprise against Complainant for reporting her sexual assault allegation. Although he expressed frustration with Complainant and characterized her as "high-maintenance," there is no evidence he displayed any animosity toward her specifically because of her sexual assault allegation. To the contrary, he testified when BG Veit asked if he was aware that Complainant had been assaulted, he removed several sentences from her evaluation that referred to a weak transition.

Disparate Treatment

[REDACTED] treated Complainant disparately from the [REDACTED]. The [REDACTED] made no protected communications, and [REDACTED] forwarded his award recommendation. Complainant made a protected communication, and [REDACTED] did

not forward her award recommendation even though the justifications for both awards were substantially the same.

Other than the SRB counseling, [REDACTED] failed to formally document Complainant's performance deficiencies. Additionally, although he negatively characterized her performance and treated her disparately, we found no evidence he was motivated to reprise against Complainant for her protected communication. Therefore, as described above, a preponderance of the evidence established that [REDACTED] would have withheld Complainant's MSM award recommendation absent the protected communication.

[REDACTED] Adverse OER comments/rating

We determined [REDACTED] would have administered adverse comments with a "Satisfactory Performance, Promote" rating on Complainant's OER absent the protected communication.

[REDACTED] Stated Reasons

[REDACTED] reasons for his OER comments and rating were her disagreements with senior leaders about battalion investigations and a lack of emphasis on battalion physical fitness.

Timing

The close timing of the protected communication and [REDACTED] adverse comments and rating on Complainant's OER could raise the inference of reprisal.

[REDACTED] motive to reprise

[REDACTED] lacked motive to reprise against Complainant for reporting her sexual assault allegation. Although he expressed frustration with Complainant and characterized her as "high-maintenance," there is no evidence he displayed any animosity toward Complainant specifically because of her sexual assault allegation.

Disparate Treatment

Of the four battalion commanders [REDACTED] rated during the 2011-2012 time period, Complainant was the only one to receive a "Satisfactory Performance, Promote" rating – the three other battalion commanders received an "Outstanding Performance, Must Promote" rating. Complainant made a protected communication, and the three other battalion commanders did not.

Other than the SRB counseling, [REDACTED] failed to formally document Complainant's performance deficiencies, negatively characterized her as "high-maintenance," and treated her disparately. However, we found no evidence to support a finding that he was motivated to reprise against Complainant for her protected communication. Therefore, as described above, a preponderance of the evidence established [REDACTED] would have given

Complainant a “Satisfactory Performance, Promote” OER rating with adverse comments absent the protected communication.

BG Veit’s Adverse OER comments/rating

We determined BG Veit would not have administered Complainant an evaluation with adverse comments and a “Fully Qualified” rating absent her protected communication.

BG Veit’s Stated Reasons for the OER from his testimony and TCL Response

BG Veit’s stated reasons for his comments on Complainant’s OER were her lack of judgment and disciplinary leniency. His reasons are coupled with WRI’s responses below.

HMMVV Accident

Although BG Veit contended the HMMWV accident investigation was not complete until April 2012, the evidence shows [REDACTED] considered the legal accident investigation closed on August 7, 2011, when he administered letters of reprimand to the Soldiers involved. This was not only well before the closing date of the change-of-rater evaluation [REDACTED] and BG Veit gave Complainant (with the respective ratings of “Outstanding Performance – Must Promote” and “Best Qualified”), but well outside the rating period for which BG Veit was supposed to be evaluating her performance. AR 623-3 also prohibits rating officials from referring to either performance or incidents that occurred before or after the rating period. Moreover, BG Veit’s comment about questioning Complainant’s judgment for “considering” counseling the Soldiers involved in the HMMWV accident ignores the fact that [REDACTED], not Complainant, took action against the Soldiers involved, and that Complainant did not even learn that action had been taken until after the fact.

Additionally, BG Veit should have documented any concerns he had about Complainant’s performance or judgment in a counseling in 2011, or on the change of rater OER, as required by AR 623-3, paragraph 3-20. Complainant was not counseled on this matter in 2011, when [REDACTED] and BG Veit evaluated her performance as “Outstanding Performance-Must Promote” and “Best Qualified” (respectively) for the April 1 to October 31, 2011 period.

Fuel Spill

In his TCL response, BG Veit contended that the fuel spill reflected Complainant’s inability or lack of desire to enforce good order and discipline. However, he did not document any concerns on a counseling form or otherwise make Complainant aware of his concerns, and Complainant testified that BG Veit told her he was pleased with her performance despite the fuel spill. Complainant’s statement is supported by the WVNG JAG, who noted that no misconduct was identified as a result [of the investigation].

The [REDACTED]

BG Veit and Complainant agree that she told him about the [REDACTED] writing abilities, but their testimony differs regarding when and the substance of their discussion. Complainant denied that they discussed reassigning the [REDACTED] denied that she objected to it because he was the only good writer she had, and denied that BG Veit counseled her on the matter. If BG Veit did have any concerns or addressed those concerns with Complainant, there is no counseling statement or other documentation to support it. Moreover, Complainant recommended the [REDACTED] for company command, a move that would by necessity reassign him from Complainant's battalion, in June 2012.

DUI

In his TCL response, BG Veit contended that Complainant's intent to give the [REDACTED] Battalion-level LOR was a regulatory violation. However, merely thinking about different courses of action before agreeing with [REDACTED] that a GOMOR was appropriate cannot reasonably be considered a violation of any regulation. Further, the evidence showed that after her discussion with [REDACTED], Complainant prepared a draft GOMOR and sent it to the JAG office for review. BG Veit also argued that [REDACTED] bragging about command leniency caused him to question Complainant's judgment and ability to enforce discipline. This argument ignores the fact that the [REDACTED] punishment was one that Complainant discussed with [REDACTED], and which was ultimately meted out by MG Hoyer. Additionally, as the battalion commander, Complainant had no authority to impose any additional punishment on [REDACTED].

BG Veit testified he was disappointed that Complainant considered issuing a Battalion LOR to the [REDACTED] a Soldier who received a DUI, and, a year earlier, when she considered issuing counseling statements to the Soldiers involved in a HMMWV rollover accident. Although BG Veit's May 2, 2012, MFR (which was never provided to Complainant) indicated he verbally counseled her on these two incidents, as discussed above, a preponderance of the evidence supported that BG Veit only discussed his disappointment with Complainant's intention regarding the [REDACTED]. Additionally, as discussed earlier, it was [REDACTED], not Complainant, who issued LORs to Soldiers involved in the HMMWV accident.

May 14, 2012 Meeting

BG Veit contended he discussed some of his concerns and issues with Complainant during a May 14, 2012 meeting. Complainant disagreed and said nothing derogatory was discussed, but that the meeting focused on her goals and accomplishments for the battalion. Further, the OER Support Form, the form used to annotate performance counseling on a regular basis, was not used to document any of BG Veit's concerns and issues. Accordingly, WRI found insufficient evidentiary support for BG Veit's contention that he briefed Complainant on any shortcomings on May 14, 2012.

In his TCL response, BG Veit also stated that Complainant's judgment about punishment for the Soldiers involved in the HMMWV accident and the DUI, the fuel spill, and her desire to keep the [REDACTED] in her battalion collectively reflected her inability or lack of desire to enforce good order and discipline. However, ignoring the fact that several of these concerns took place outside of the rating period at issue, none of these issues either singularly or collectively rose to a serious enough level for either BG Veit or [REDACTED] to put their

concerns in writing in accordance with AR 623-3, paragraph 3-4(e)(2), which indicates “the documentation of counseling is critical, particularly when substandard performance is indicated.”

Timing

The close timing of the protected communication and BG Veit’s rating, adverse comments, and referral of Complainant’s OER raises the inference of reprisal.

BG Veit’s motive to reprise

BG Veit had motive to reprise against Complainant because her sexual assault allegation brought to light both his apparent favoritism shown to [REDACTED] and his violation of Army regulations requiring him to document substantiated findings of misconduct in [REDACTED] OER.

Although BG Veit recalled reading MG Burch’s investigative report on [REDACTED], he claimed not to remember that this same report also addressed [REDACTED] misconduct, despite [REDACTED] name being on each page of the four-page findings and recommendations section. [REDACTED] misconduct was discussed in eight paragraphs, while [REDACTED] misconduct was discussed in two paragraphs.

The evidence supports finding that BG Veit knew of MG Burch’s substantiated findings against [REDACTED] including finding specifically that [REDACTED] berated, belittled, and engaged in acts of hostility, used gender epithets, physically assaulted three other Service members, and may have treated female soldiers disparately. Complainant’s sexual harassment and discrimination complaint to MG Tackett in December 2010 were EO concerns MG Burch investigated in the January 2011 AR 15-6. AR 600-20 requires substantiated EO complaints resulting from an AR 15-6 investigation to be documented with a “No” in Part IV of the OER, and AR 623-105. Additionally, under AR 600–20, rating officials have a responsibility to document incidents of misconduct. BG Veit did not comply with this requirement or his responsibility when he failed to address the substantiated findings against [REDACTED] in his OER comments.

BG Veit’s decision to ignore MG Burch’s recommendation and failure to comply with Army regulations is evidence of his favorable treatment of [REDACTED] BG Veit’s OER comments were devoid of a single reference to the substantiated misconduct and instead contained favorable comments and an “Outstanding Performance-Must Promote” characterization.

We conclude BG Veit had motive to reprise against Complainant because her sexual assault allegation implicated [REDACTED] and highlighted BG Veit’s preferential treatment of him. Although BG Veit testified he verbally counseled Complainant once and memorialized that counseling in an MFR, he never provided her with a copy of that MFR or any other documentation discussing substandard performance. Moreover, he improperly included in his consideration events that were both outside the rating period and events in which she was not the responsible action officer.

Disparate Treatment

Comparing the OERs BG Veit gave Complainant and [REDACTED] reflects his disparate treatment of her. [REDACTED] made no protected communications, had substantiated misconduct, and BG Veit ignored both that misconduct and his regulatory obligations in light of that misconduct and still gave [REDACTED] a favorable OER. Complainant made a protected communication implicating [REDACTED] and even after being cautioned by MG Hoyer that a referred OER was not appropriate given her substantiated allegation of sexual assault, BG Veit wrote adverse comments, rated Complainant “Fully Qualified,” and referred her evaluation. BG Veit also testified he knew referring Complainant’s OER and not referring [REDACTED] OER was inconsistent.

As described above, a preponderance of the evidence established BG Veit would not have given Complainant a referred OER with adverse comments and a “Fully Qualified” rating absent the protected communication.

MHE and Subsequent MEB

We determined MG Hoyer would not have referred Complainant for an MHE and to an MEB absent the protected communication; however, for the reasons described below, we found no inference of reprisal.

MG Hoyer’s Stated Reasons for the MHE

After telling Complainant the NGB OCI team substantiated her allegation of sexual assault, MG Hoyer directed her for an MHE. He stated he did this to ensure Complainant had no mental health issues related to the assault that could place her in some danger to herself. Complainant testified she did not have a problem with the referral.

MG Hoyer’s Stated Reasons for an MEB

MG Hoyer sent Complainant to an MEB after consulting with the Doctor when she refused to work at any offered duty location. The Doctor conducted Complainant’s MHE and diagnosed her with PTSD. He recommended she be assigned low stress duties without leadership responsibilities and telework, if possible, but agreed with the job and locations MG Hoyer offered her. Complainant’s refusal to accept the duty locations offered, combined with her emotional reaction when MG Hoyer declined her permanent telework request, resulted in the decision to move forward with an MEB.

Timing

Complainant told MG Hoyer about the sexual assault 5 months before he directed she undergo an MHE and the subsequent MEB referral. The close timing of her protected communication and his subsequent actions could raise the inference of reprisal.

MG Hoyer’s motive to reprise

We found no evidence MG Hoyer had motive to reprise against Complainant for her protected communication. To the contrary, the investigation found MG Hoyer's actions – requesting an external investigation of Complainant's sexual assault allegation and locating jobs he thought would aid in her recovery – to be inconsistent with reprisal, and consistent with his stated goal of getting her the help she needed. Additionally, MG Hoyer punished [REDACTED] for his substantiated misconduct.

Disparate Treatment

[REDACTED] was the only other senior AGR officer referred to [REDACTED] during this period. His [REDACTED], the first step before [REDACTED], occurred within 2 months after the substantiated findings against him were released. After receiving his [REDACTED], [REDACTED] declared [REDACTED]. Although there were significant delays in the [REDACTED] (during which time MG Hoyer made him telework to stay away from the organization), much of the delay was attributed to administrative processing errors.

Additionally, [REDACTED], MG Hoyer accepted his resignation and issued him two GOMORs. [REDACTED]

MG Hoyer initially approved Complainant's request for 30-day convalescent leave and then allowed her to work from home while the NGB OCI completed its investigation. Nearly 6 months later, and after the report was issued, MG Hoyer referred Complainant for an MHE, reviewed the physician's recommendations, and offered Complainant duty in less stressful environments in two different locations. She refused to return to work at either location, and her emotional reaction to MG Hoyer's decision to not approve telework ultimately led to the MEB process.

MG Hoyer did not treat Complainant disparately. He approved [REDACTED] telework because he was in the [REDACTED] (and was unaware of the delays) and because he wanted [REDACTED] separated from the unit and other Soldiers because of his misconduct. Conversely, he wanted Complainant to return to the organization and be allowed time for continued medical treatment. Further, in keeping with WVNG policy, telework is a privilege granted by the Adjutant General only when it is in the best interest of organization, mission, and employees.

VI. DISCUSSION

Other than the SRB counseling, [REDACTED] did not document any of Complainant's performance deficiencies. Despite this lack of documentation, his negative characterization of Complainant, and his disparate treatment of her, we determined [REDACTED] was not motivated to reprise against Complainant because of her protected communication. We conclude, based on a preponderance of the evidence, that [REDACTED] did not administer

Complainant an OER with adverse comments and rating or withhold her MSM award recommendation in reprisal for her protected communication.

Although BG Veit stated there were more than enough reasons to issue Complainant an adverse OER, the only evidence he had documenting her performance deficiencies was an MFR he drafted, dated May 2, 2012, about a verbal counseling he had with Complainant. BG Veit did not sign the MFR and did not give it to Complainant.

BG Veit said he based Complainant's referred OER on this verbal counseling that questioned her judgment on two proposed disciplinary actions. One of these disciplinary actions was completed by [REDACTED] before Complainant even knew action was taken, and was outside the rating period. The other disciplinary action - the GOMOR for the DUI - was handled at the appropriate level with Complainant's full agreement and participation, and BG Veit's allegation that Complainant intended to violate the regulation by issuing a battalion level LOR for a DUI is not supported by the evidence.

BG Veit had motive to reprise against Complainant because her sexual assault allegation implicated [REDACTED] BG Veit's favorable and disparate treatment of [REDACTED] was reflected in his decision to ignore both the AR 600-20 requirement that raters document misconduct and a soldier's deviation from an EO commitment and MG Burch's investigative findings (subsequently approved by MG Hoyer) that recommended [REDACTED] OER document substantiated misconduct.

In contrast, BG Veit wrote [REDACTED] favorable OER comments despite knowing from the AR 15-6 investigation that [REDACTED] berated, belittled, engaged in acts of hostility, used gender epithets, and engaged in physical assault with three other Service members, and that he may have treated female soldiers disparately.

In light of our determination that Complainant's sexual assault allegation motivated BG Veit to reprise, coupled with his failure to document Complainant's performance issues, and MG Hoyer's direction that a referred OER was not appropriate, we conclude, based on a preponderance of the evidence, that BG Veit administered Complainant an unfavorable OER in reprisal for her protected communication.

Regarding MG Hoyer's decisions to refer Complainant for an MHE and to an MEB, the evidence showed he referred Complainant for an MHE to ensure she was fit for duty. His subsequent decision to refer her to an MEB resulted from her refusal to return to work and her emotional reaction to being denied telework. MG Hoyer made his decision after consulting competent medical authority and was consistent with Army regulations. Accordingly, we conclude based on a preponderance of the evidence that MG Hoyer did not refer Complainant for an MHE and to an MEB in reprisal for her protected communication.

VII. CONCLUSION(S)

We conclude, based on the preponderance of the evidence, the following:

A. MG Hoyer did not refer Complainant for an MHE in reprisal for her protected communication.

B. MG Hoyer did not refer Complainant to an MEB in reprisal for her protected communication.

C. [REDACTED] did not withhold Complainant's MSM award recommendation in reprisal for her protected communication.

D. [REDACTED] did not administer adverse comments/rating on Complainant's OER in reprisal for her protected communication.

E. BG Veit administered Complainant an unfavorable OER in reprisal for her protected communication.

VIII. RECOMMENDATIONS

We recommend the Secretary of the Army direct that Complainant be given an appropriate military service award for her time served as the Commander, 151st MP BN, WVARNG.

We recommend the Secretary of the Army remove Complainant's OER for the period November 1, 2011, to September 30, 2012, from her OMPF.

We recommend the Secretary of the Army direct the Army Board for Corrections of Military Records convene a Special Selection Board to consider whether Complainant should be recommended/selected for promotion to Colonel.

We recommend the Secretary of the Army take appropriate action against BG Veit for reprising against Complainant.

We recommend the Secretary of the Army request WVARNG file OER addendums in the OMPFs of both [REDACTED] and [REDACTED] that reflect findings of a 2011 AR 15-6 investigation substantiating their misconduct.



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