Case 20140312-024080

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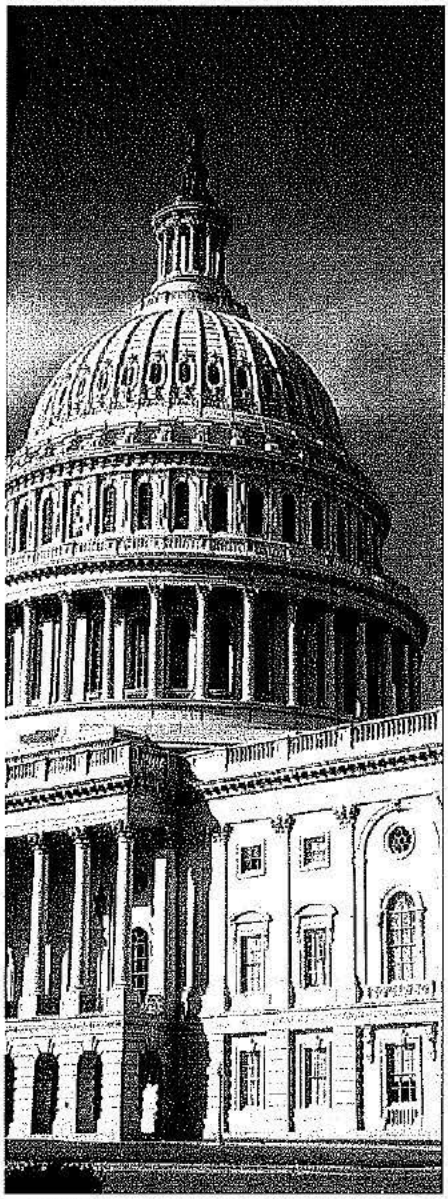
INSPECTOR GENERAL

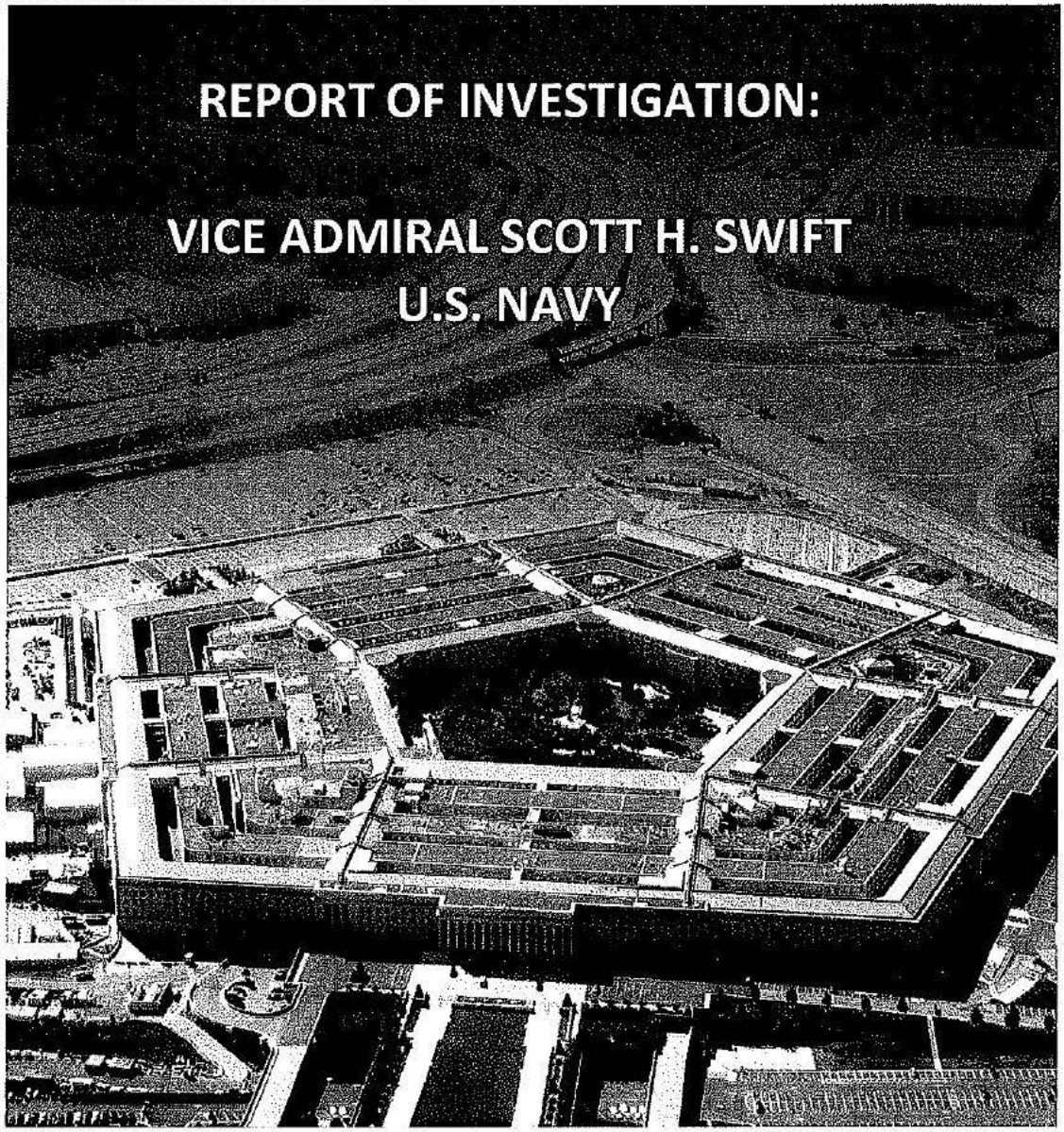
U.S. Department of Defense

August 21 , 2014



REPORT OF INVESTIGATION:

VICE ADMIRAL SCOTT H. SWIFT
U.S. NAVY



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AUG 21 2014

MEMORANDUM FOR INSPECTOR GENERAL

SUBJECT: Report of Investigation Concerning Vice Admiral Scott H. Swift, U.S. Navy (Case 20140312-024080)

We recently completed our investigation to address allegations Vice Admiral (VADM) Scott H. Swift, U.S. Navy, while serving as Commander, U.S. 7th Fleet, engaged in unlawful discrimination and violated Navy fitness reporting instructions.

We substantiated one allegation. We conclude VADM Swift violated Navy fitness reporting instructions (BUPERSINST 1610.10C) when he did not include a mandatory comment regarding nonjudicial punishment (NJP) in the Fitness Report (FITREP) of a subordinate to whom he administered NJP. We found the comment was required but absent in the FITREP of an officer whom VADM Swift punished at NJP. BUPERSINST 1610.10C requires a comment regarding NJP proceedings in FITREPs of officers subjected to NJP. We determined VADM Swift violated BUPERSINST 1610.10C when he omitted a mandatory comment regarding NJP in the officer's FITREP.

We did not substantiate the remaining allegation.

In accordance with our established procedure, we provided VADM Swift the opportunity to comment on the initial results of our investigation. In his response, dated August 6, 2014, VADM Swift acknowledged the required comment was not included in the report in question and accepted responsibility for its absence. VADM Swift provided the context in which the report was prepared and noted he complied with all other requirements pertaining to reporting officer NJP. After carefully considering VADM Swift's response, we stand by our conclusions. The report of investigation is attached.

We recommend the Secretary of the Navy consider appropriate corrective action with regard to VADM Swift.

Marguerite C. Garrison

Marguerite C. Garrison
Deputy Inspector General for
Administrative Investigations

REPORT OF INVESTIGATION:
VICE ADMIRAL SCOTT H. SWIFT, U. S. NAVY

AUG 2 1 2014

I. INTRODUCTION AND SUMMARY

We initiated this investigation to address an allegation that Vice Admiral (VADM) Scott H. Swift, U. S. Navy, former Commander, U.S. Seventh Fleet (7th Fleet), engaged in unlawful discrimination by including comments regarding nonjudicial punishment (NJP) in [redacted] subordinate's Fitness Report and Counseling Record (FITREP).[1]

We did not substantiate the allegation.

We conclude VADM Swift did not engage in unlawful discrimination by including comments regarding NJP in [redacted] FITREP. We found VADM Swift included narrative comments regarding completed NJP in the [redacted] post-NJP FITREP.

Secretary of the Navy Instruction 5350.16A, "Equal Opportunity (EO) Within the Department of the Navy (DON)," dated December 18, 2006, (SECNAVINST 5350.16A), prohibits discrimination based on race. Bureau of Naval Personnel Instruction 1610.10C (BUPERSINST 1610.10C), "Navy Performance Evaluation System," dated April 28, 2011, requires reporting seniors to include comments regarding concluded NJP resulting in a guilty finding or punishment in a subordinate's FITREP.

We determined VADM Swift did not engage in unlawful discrimination in violation of SECNAVINST 5350.16A by including comments regarding NJP in the [redacted] FITREP. We determined VADM Swift, designated as the [redacted] reporting senior, included the NJP comment because BUPERSINST 1610.10C required him to include information about the concluded NJP.

During the course of our investigation into unlawful discrimination, we discovered two potential emergent allegations in which VADM Swift violated BUPERSINST 1610.10C. In one allegation, VADM Swift did not include a required comment regarding NJP in a Navy [redacted] FITREP. In the other allegation, VADM Swift included a comment regarding NJP in the above [redacted] FITREP before the [redacted] submitted an appeal to the NJP.

We substantiated one of the allegations.

We conclude VADM Swift violated BUPERSINST 1610.10C by not including a mandatory comment regarding NJP in the [redacted] FITREP. We found VADM Swift did not include comments regarding NJP although the [redacted] waived appeal of [redacted] NJP and the NJP was

[1] We reviewed one additional allegation against Vice Admiral (VADM) Swift. Based on our preliminary review, the allegation did not warrant further investigation. We discuss the allegation in Section III of this report.

concluded. BUPERSINST 1610.10C requires a reporting senior to document concluded NJP proceedings in FITREPs. NJP is concluded when it is final on appeal or the member has waived appeal. We determined VADM Swift violated BUPERSINST 1610.10C when he failed to include a comment regarding a concluded NJP in the (b)(6), (b)(7)(C) FITREP. We also determined VADM Swift's omission of NJP comment resulted from administrative error in processing the FITREP and was not an affirmative decision to disregard fitness reporting instructions.

We also conclude VADM Swift did not violate BUPERSINST 1610.10C when he included comments regarding NJP in the (b)(6), (b)(7)(C) FITREP. We found a member of VADM Swift's staff advised the (b)(6), (b)(7)(C) that (b)(6), could exceed the 5-day period for appeal submissions.

BUPERSINST 1610.10C states that NJP is concluded when an appeal is final or waived. Regarding appeals, Judge Advocate General Instruction 5800.7F, "Manual of the Judge Advocate General (JAGMAN)," dated June 26, 2012, states that the officer who imposed the NJP shall grant or deny a request for a time extension to submit an appeal, and will advise the accused of that decision.

We determined VADM Swift did not delegate authority to his staff members to grant appeal extensions, and was unaware of his staff member's action. We also determined staff members had no authority to grant the (b)(6), (b)(7)(C) an extension. We further determined VADM Swift did not violate BUPERSINST 1610.10C when he included a comment regarding NJP in the (b)(6), (b)(7)(C) FITREP, because absent extension approval from VADM Swift, the NJP was concluded officially prior to VADM Swift signing the (b)(6), (b)(7)(C) FITREP and BUPERSINST 1610.10C required the reporting senior to include the NJP comment.

By letter dated August 1, 2014, we provided VADM Swift the opportunity to comment on the results of our investigation. In his response, via his counsel, dated August 6, 2014, VADM Swift acknowledged he "failed to include mandatory punishment language in the fitness report (fitrep) of an officer" he punished at NJP and accepted responsibility for its absence. He wrote, "As the officer responsible for that report it was my obligation to ensure that language was included." VADM Swift noted that he complied with all other requirements pertaining to reporting officer NJP, and that he would promptly correct the (b)(6), (b)(7)(C) FITREP upon conclusion of our investigation to include the mandatory NJP comment.[2]

VADM Swift asserted that he should have included the mandatory NJP comment in the (b)(6), (b)(7)(C) July 2013 FITREP. We disagree. VADM Swift should have included the NJP comment in the (b)(6), (b)(7)(C) May 27, 2013, FITREP. Neither FITREP contains the mandatory NJP comment. We also note VADM Swift reviewed fewer FITREPS in the May 2013 reporting group than the larger July 2013 group of 122 FITREPS he signed as he relinquished command.

[2] While we have included what we believe is a reasonable synopsis of VADM Swift's response, we recognize that any attempt to summarize risks over simplification and omission. Accordingly, we incorporated comments from the response throughout this report where appropriate and attached a copy of the response to this report.

VADM Swift also asserted that BUPERSINST 1610.10C cannot be violated because "The definition of violation is doing something not allowed by law or rule. BUPERSINST 1610.10C does not create such a standard." We disagree. BUPERSINST 1610.10C is the prescribed rule that governs Navy fitness reporting. Failing to comply with BUPERSINST 1610.10C creates a violation.

VADM Swift contended that BUPERSINST 1610.10C is "purely administrative in nature" and does not "create a standard which is inviolable." VADM Swift stated, "...the Bureau of [Navy] Personnel anticipates such oversights as mine...[and] upon receipt of the [fitness] report it is reviewed for accuracy and compliance with BUPERSINST 1610.1C[sic]. Fitness reports that are in error are returned to the originator for administrative correction."

Although we agree that the Bureau of Naval Personnel reviews FITREPS for erroneous information and returns FITREPS to originators for correction of observed errors, we do not agree with VADM Swift's statement that BUPERSINST 1610.10C cannot be violated. The (b)(6), (b)(7)(C) FITREPs that VADM Swift signed in May and July 2013, did not present erroneous information the Bureau of Naval Personnel could review and return to him for purely administrative correction. In both FITREPs, VADM Swift and his staff omitted NJP information from a required narrative FITREP block, thus the block did not contain erroneous information; it contained no information for the Bureau of Naval Personnel to review for error.

The prescribed procedure for VADM Swift, the FITREP originator, to later add previously omitted information such as NJP comment is provided in BUPERSINST 1610.10C, Chapter 15, which states that the command or reporting senior originating the report or the member's current command may request administrative changes to blocks 1-19, 21-26, and block 44 of the FITREP. Administrative changes are not permitted to block 41, the block in which VADM Swift was required to include NJP comment. A member can make changes to obvious administrative errors in the information submitted. A change to any other FITREP block, including inserting omitted information, requires submission of supplemental material.

In the (b)(6), (b)(7)(C) May and July 2013 FITREPs, VADM Swift omitted information from block 41 required by BUPERSINST 1610.10C. Block 41 is evaluative and requires VADM Swift to submit supplemental material to comply with BUPERSINST 1610.10C and correct the omission. Accordingly, VADM Swift's violation occurred in his omission of NJP information from the (b)(6), (b)(7)(C) FITREPs in May and July 2013, which violation was not, as he contended, an error in submitted information correctable through Bureau of Naval Personnel review.

After carefully considering VADM Swift's response and reevaluating the evidence, we stand by our initial conclusion VADM Swift violated BUPERSINST 1610.10C by failing to include a mandatory comment regarding NJP in the (b)(6), (b)(7)(C) FITREP.

We recommend the Secretary of the Navy consider appropriate corrective action with regard to VADM Swift.

This report sets forth our findings and conclusions based on a preponderance of the evidence.

II. BACKGROUND

VADM Swift was Commander, 7th Fleet, from September 7, 2011, to July 31, 2013. He commanded from the USS Blue Ridge and controlled the largest forward-deployed U.S. fleet. The 7th Fleet facilitated rapid crisis response and provided security and stability to the Pacific and Indo-Asia region. It consisted of 80 ships, 140 aircraft, and 40,000 Navy and Marine Corps personnel.

III. SCOPE

We interviewed VADM Swift and nine witnesses. We also reviewed FITREPs, personnel records, military justice documents, command climate surveys, equal opportunity documents, and relevant orders, instructions, and regulations.

The incoming complaint alleged that the (b)(6), (b)(7)(C) NJP was unjust and disproportionate to the offense because it was biased and based on "falsified statements and inconclusive/inaccurate evidence."

On August 16, 2013, the (b)(6), (b)(7)(C) appealed the NJP to superior authority – the Commander of U.S. Pacific Fleet (USPACFLEET). In (b)(6), appeal, the (b)(6), (b)(7)(C) requested "the NJP to be set aside" and the punitive letter of reprimand (reprimand) (b)(6), received be permanently removed from (b)(6), Naval records. (b)(6), based (b)(6), appeal on four grounds: 1) an outstanding military record; 2) the offense for which (b)(6), received NJP was viewed with greater "sensitivity" by (b)(6), command; 3) the investigation relied on untruthful information and was biased; and 4) the reprimand was excessive and could negatively affect (b)(6), career.

The USPACFLEET Commander concluded the "punishment [was] supported by [a] preponderance of the evidence and appropriate to the circumstances of [the] case" and that the "punishment was neither unjust nor disproportionate" and denied the appeal. Accordingly, we determined the allegation did not warrant further investigation.

IV. FINDINGS AND ANALYSIS

A. Did VADM Swift engage in unlawful discrimination by including a comment regarding NJP in the FITREP of (b)(6), (b)(7)(C) officer?

Standards

SECNAVINST 5350.16A, "Equal Opportunity (EO) within the Department of the Navy," dated December 18, 2006

Chapter 7.a prohibits discrimination based on race.

BUPERSINST 1610.10C, "Navy Performance Evaluation System," dated April 20, 2011

Chapter 13-10.e requires a reporting senior to document concluded NJP in a FITREP provided the NJP has resulted in a finding of guilty or award of punishment.

Facts

On July 11, 2013, VADM Swift administered NJP to the [redacted] VADM Swift found the [redacted] guilty at NJP and issued a reprimand to [redacted] The [redacted] received the written reprimand on July 12, 2013, and elected to appeal the punishment. On July 23, 2013, VADM Swift signed the [redacted] FITREP and included a comment regarding the NJP.

The [redacted] alleged VADM Swift engaged in unlawful discrimination by including a comment regarding NJP in [redacted] post-NJP FITREP. The [redacted] specified the unlawful discrimination was "the delineation of the NJP ... inside of the FITREP itself."

The [redacted] explained the comment regarding NJP should not have appeared in [redacted] FITREP. [redacted] stated, "The FITREP ... is an evaluation of one's performance ... [NJP] is a military administrative action that was taken ... being taken to mast and then found guilty ... and then to then have it being put in a fitness report ... to ... follow me, throughout the rest of my career, it just seemed strong."

Inclusion of NJP Comment

The 7th Fleet Deputy Fleet Staff Judge Advocate (Deputy FSJA) testified including the NJP comment in the [redacted] FITREP was an administrative requirement and was "routine administrative decision-making." The Deputy FSJA testified the allegation of racial motivation for the NJP comment was "completely unfounded." The 7th Fleet Staff Judge Advocate (FSJA) and the 7th Fleet Chief of Staff (CoS) echoed the Deputy FSJA's testimony that including the NJP comment in the [redacted] FITREP was not due to racial bias.

Review of Unit Punishment Book (UPB) and FITREPs

We reviewed the 7th Fleet UPB the Deputy FSJA maintained. The UPB contained information on NJP VADM Swift administered as Commander, 7th Fleet. The UPB contained the accused's name, rank, work section, race, gender, the adjudged offense, the NJP date, and the NJP results. The UPB documented that VADM Swift administered NJP to [redacted] officers of various racial backgrounds during his command.

We also reviewed the [redacted] officers' post-NJP FITREPs. VADM Swift included comments regarding NJP in all but one of the officers' post-NJP FITREPs. As noted above, the [redacted] FITREP did not contain the required comment. Witnesses testified the omission was due to administrative oversight and not the subordinate's race.

Command Climate Survey

In addition to our review of the UPB, we examined the results of a Command Climate Survey distributed to 7th Fleet personnel during VADM Swift's command. The 7th Fleet Command Representative for the Command Military Equal Opportunity Office (Command Representative) testified (b)(6), administered the command climate survey. The Command Representative explained questions were distributed throughout the 7th Fleet and respondents assessed the fleet's various discrimination levels.

The Command Representative also testified (b)(6), interpreted the survey results. (b)(6), stated, "... there wasn't really a whole lot of negative information ... [and] no strong evidence that there was any racial discrimination occurring at the command."

Testimony Regarding 7th Fleet Staff Diversity

The former Chief of Staff for the Information Warfare Division and the (b)(6), (b)(7)(C) immediate supervisor testified (b)(6), directorate was diverse. (b)(6), (b)(7) stated, "As a general rule, everybody worked well together." (b)(6), (b)(7) added (b)(6), did not notice any racial influence in FITREP writing.

The former assistant Chief of Staff for the Operations Division stated (b)(6), "never saw any racial bias at all on the staff." (b)(6), considered whether other 7th Fleet directorates exercised racial bias and stated, "... we were all working so hard. You don't have time to worry about that ... I just don't see it."

VADM Swift's Flag Secretary (Flag Sec) testified VADM Swift's staff was diverse and represented several races. The Flag Sec explained (b)(6), witnessed VADM Swift "interact with people from all different races," and VADM Swift never commented on race. The witness stated, "I've never had him drive anything ... because of somebody's race."

VADM Swift could not correctly identify the (b)(6), (b)(7)(C) occupational specialty, race, or ethnic background. When asked whether his motivation to include the NJP comment in the (b)(6), (b)(7)(C) FITREP was racial, VADM Swift stated, "I don't even know how to respond ... not only does that not comport with my views at all, it doesn't comport with any views that I would tolerate."

Discussion

We conclude VADM Swift did not engage in unlawful discrimination by including a comment regarding NJP in the (b)(6), (b)(7)(C) FITREP. We found VADM Swift included a narrative comment regarding completed NJP in the (b)(6), (b)(7)(C) post-NJP FITREP.

SECNAVINST 5350.16A prohibits discrimination based on race. BUPERSINST 1610.10C requires reporting seniors to include comments regarding concluded NJP resulting in a guilty finding or award of punishment in subordinates' FITREPs.

We determined VADM Swift, designated as the [redacted] reporting senior, included the NJP comment in the [redacted] FITREP not because the [redacted] was [redacted], but because BUPERSINST 1610.10C required [redacted] to include NJP information in the FITREP. We also determined VADM Swift and 7th Fleet staff did not treat [redacted] minority command members differently through NJP, in FITREPS, or otherwise. We further determined witness testimony and the command climate survey demonstrated a professional working environment and racial diversity among 7th Fleet staff. Finally, we determined that the FITREPs VADM Swift signed for other officers who received NJP, with one exception due to administrative oversight, contained comments regarding NJP as required.

B. Did VADM Swift violate Navy fitness reporting instructions?

Standards

BUPERSINST 1610.10C, "Navy Performance Evaluation System," dated April 20, 2011

Chapter 13-12.b requires a reporting senior to document completed NJP proceedings in FITREPs. NJP proceedings are concluded when they are final on appeal or the appeal has been waived.

Chapter 13-10.e requires memorializing NJP in a FITREP's "Comments on Performance" (narrative) section.

JAGMAN 5800 .7F, "Manual of the Judge Advocate General," dated June 26, 2012

Chapter 0116(a)(1) states an appeal of NJP shall be submitted within 5 working days (5 days), excluding weekends and holidays, of the imposition of nonjudicial punishment, or the right to appeal shall be waived in the absence of good cause shown.

Chapter 0116(a)(2) states if it appears that good cause may exist which would make it impracticable or extremely difficult for the accused to prepare and submit the appeal within the 5-day period, the accused should immediately advise the officer who imposed the punishment why good cause exists and request an appropriate extension of time within which to submit the appeal. Upon receipt of such a request, the officer who imposed the NJP shall determine whether good cause was shown and shall advise the offender whether a time extension is granted.

Facts

Due to the development of emergent allegations during our investigation, we examined FITREPs for all 7th Fleet officers to whom VADM Swift administered NJP. We discovered one [redacted] FITREP did not include a comment regarding concluded NJP.

FITREP Methodology

Naval officers receive performance evaluations in the form of a FITREP. The FITREP includes a description of the officer's current duties, a scaled evaluation of performance traits, comments describing the officer's performance, a competitive ranking of the officer's performance in comparison to other officers the reporting senior evaluated, and a promotion recommendation.

The narrative section contains comments regarding significant achievements and justifications for scaled performance traits. Comments on concluded NJP results are required in this section.

A reporting senior signs and approves a FITREP. Commanding Officers and officers in charge serve as reporting seniors by virtue of their command authority.

A Naval officer receives a regular FITREP annually. Officers may also receive a special report when they are permanently detached from a command with orders to report to another command or when their reporting senior detaches from the command.

7th Fleet FITREP Processing

The 7th Fleet CoS testified that officers initially prepared FITREPs and the officers' chain-of-command edited them. After editing, "the assistant Chiefs of Staff (Chiefs) … got together in a … closed-door session" and provided a ranking recommendation for officers across the staff.

The CoS explained that the Chiefs assembled ranking recommendations in a spreadsheet and forwarded the spreadsheet to the Flag Sec. The Flag Sec recorded the recommendations in the member's FITREP.

The Flag Sec admitted (b)(6), was "not savvy" in (b)(6), knowledge of the Navy fitness reporting instruction although ensuring FITREP accuracy was an essential component of (b)(6), job. (b)(6), added that staff members were not knowledgeable of Navy fitness reporting requirements and stated, "I'm feeling pretty bad about letting Admiral Swift down, because, you know frankly, I'm supposed to give (b)(6), (b)(7) correct advice, not incorrect advice" regarding FITREPs.

After recording the recommendations, the Flag Sec returned the FITREPs to the CoS. The CoS testified that after (b)(6), received the FITREPs from the Flag Sec, (b)(6), "package[d] the reports for presentation to the Commander … [and] the Commander sign[ed] the FITREPs."

Evaluation Criteria

The CoS explained that the most important part of FITREP preparation was the Chiefs' spreadsheet compilation. (b)(6), described the spreadsheet as the "key working document that we use[d] to make sure that the fitness reports … [were] appropriate."

The spreadsheet contained an officer's recent trait averages, career milestones, and two numerical rankings. The first ranking was a summary rank, or the member's numerical position compared to all members of the same rank within the member's work section. The second ranking was the soft rank, which was the member's numerical position compared to all members of the same rank across the staff.

VADM Swift confirmed the CoS's testimony regarding the spreadsheet's importance. He described the spreadsheet as "key to make sure that you're being allegiant to where that individual broke out against all the individuals that they're competing with," and reiterated his emphasis regarding the spreadsheet rankings throughout our interview. VADM Swift explained the spreadsheet ranking is the basis for the FITREP's trait average and promotion recommendation sections and testified the "rankings are the most important thing for promotion boards to understand."

VADM Swift testified he considered the FITREP narrative portion less important than the spreadsheet and FITREP ranking. He stated, "The lead statement [in the narrative] is a big influencer. The closing statement is a big influencer. The body is really for the individual to recognize what they've contributed to the staff."

Finally, VADM Swift explained that he expected the FITREPs his staff prepared would comport with Navy Instructions. He stated, "There was an expectation that those that were drafting the FITREP had an understanding of those rules and regulations."

The (b)(6), (b)(7)(C) NJP and FITREP

VADM Swift administered NJP to the (b)(6), (b)(7)(C) on October 12, 2012. The (b)(6), (b)(7)(C) received a reprimand from NJP and waived appeal. On November 6, 2012, VADM Swift reported the NJP results to the Navy Personnel Command for inclusion in the (b)(6), (b)(7)(C) permanent military record.

VADM Swift signed the (b)(6), (b)(7)(C) next regularly scheduled FITREP, an annual FITREP, on May 27, 2013. The FITREP did not contain comments regarding the concluded NJP. The next and final FITREP the (b)(6), (b)(7)(C) received from VADM Swift was a special report. The FITREP was issued because VADM Swift was departing the command. The special FITREP did not contain comments regarding the NJP.

The CoS testified (b)(6), did not edit the (b)(6), (b)(7)(C) FITREP although (b)(6), did "read and proof it" and acknowledged that the FITREP narrative block did not contain a comment regarding the NJP. The CoS explained that omitting the NJP comment was an oversight, but noted the NJP "was reported to the Bureau [of Navy Personnel]" which would include the NJP report in the (b)(6), (b)(7)(C) permanent military record.

VADM Swift testified omitting the comment on the (b)(6), (b)(7)(C) FITREP was an administrative oversight. VADM Swift admitted he should have included the comment on the (b)(6), (b)(7)(C) FITREP and stated that he was "guilty" of violating the BUPERS instruction.

The [redacted] NJP and FITREP

After VADM Swift imposed NJP on the [redacted] on July 11, 2013, the Deputy FSJA advised the [redacted] could appeal. The Deputy FSJA testified [redacted] used the standard Navy rights advisement to inform the [redacted] of [redacted] appellate rights. In the form, the [redacted] acknowledged [redacted] had "the right to immediately appeal ... within 5 days." The Deputy FSJA also testified the [redacted] requested an extension of time to appeal, and someone informed the [redacted] "had as much time as [redacted] needed to file it."

On July 23, 2013, VADM Swift signed the [redacted] FITREP just prior to relinquishing command. The [redacted] received a special report due to VADM Swift's detachment from the 7th Fleet. The FITREP's narrative section contained a comment regarding the NJP of July 11, 2013. VADM Swift departed the command on July 31, 2013.

On August 16, 2013, the [redacted] submitted an NJP appeal. The Deputy FSJA testified the [redacted] took "over a month to turn in" the NJP appeal.

The FSJA testified [redacted] discussed the decision to extend the appellate timeframe with the CoS, the Deputy FSJA, and the [redacted] former and current supervisors, but could not recall whether [redacted] had a "specific discussion" with VADM Swift regarding the decision to extend the appellate timeframe. The FSJA asserted the decision to extend the appellate timeframe was within [redacted] purview as the 7th Fleet legal advisor. [redacted] stated:

> Admiral Swift gave me, as his Fleet Judge Advocate, normal latitude to exercise something like that ... it was ... not something that ... we were going to talk to him and be like, 'Hey, sir. We're going to cut this off at 5 days and not give him anymore time' ... I do not recall talking to him ... That doesn't mean that I didn't ... I don't recall if I said, 'Hey, he's got 5 days. We're going to give him more time' ... definitely that discussion would have occurred ... But again ... [because] we were giving him more time, that's something that I would have just made the decision myself.

The FSJA added [redacted] would not discuss legal matters such as the NJP appeal that were "moving in the normal course of business" with VADM Swift. The FSJA stated:

> This is a discussion that ... I would have gone to him and said, 'Sir, we need to send this up, and here's why we need to send it up.' And he would have been fine with my justification, because that's the relationship that I had with him ... every decision I make is executing for the Commander. But I'm not telling him of every decision that I make ... I would have only come to him if ... we were going to take something that was going to be adverse to the individual.

The FSJA and the Deputy FSJA testified neither of them formally memorialized the decision to extend the appeal timeframe. The FSJA stated [redacted] "probably had a face-to-face discussion" with the [redacted] regarding the decision to grant an appeal extension. The Deputy FSJA echoed the FSJA's testimony and stated, "... I don't think ... we did sign anything ... because we are such a small staff."

The CoS testified the Commander is responsible for deciding whether to provide an extension to file a NJP appeal. The CoS added [redacted] did not recall details of the [redacted] request to extend the appellate timeframe.

VADM Swift testified he did not remember the [redacted] appealing NJP or requesting an appeal filing extension. VADM Swift stated:

> I would assume the appeal process is complete if – I mean I don't remember when he went to...[NJP], but it all – the clock all stops on the 31st of July at the change of command point ... I don't remember anybody coming to me and saying that there was an appeal.

VADM Swift also testified no member of his staff would have made the decision to extend the appellate timeframe. He emphasized he did not delegate his decision authority on extensions to file NJP appeals. VADM Swift emphatically testified, "No, no, no, no. That would have come to me. But I would have gone to the judge advocate to say what is the – what does the law require here."

Discussion

We conclude VADM Swift violated BUPERSINST 1610.10C by not including a mandatory comment regarding NJP in the [redacted] FITREP. We found VADM Swift did not include a comment regarding NJP although the [redacted] waived appeal of [redacted] NJP and the NJP was concluded. We also found VADM Swift expected his staff to prepare FITREPs in accordance with BUPERSINST 1610.10C, but his staff lacked knowledge regarding fitness reporting requirements.

BUPERSINST 1610.10C requires a reporting senior to document concluded NJP in the narrative section of the FITREP. NJP is concluded when it is final on appeal or the member waives appeal.

We determined VADM Swift violated BUPERSINST 1610.10C when he failed to include a comment regarding a concluded NJP in the [redacted] FITREP. We also determined that during FITREP preparation VADM Swift and his staff focused on ranking individuals for promotion recommendations and trait averages rather than on the FITREP narrative. We further determined that due to the emphasis on ranking recommendations, VADM Swift and 7th Fleet staff did not review FITREP narratives adequately to ensure content complied with BUPERSINST 1610.10C and contained mandatory comments regarding completed NJP. Finally, we determined VADM Swift's NJP comment omission resulted from administrative

error in processing the [redacted] FITREP and was not an affirmative decision to disregard reporting instructions.

We also conclude VADM Swift did not violate BUPERSINST 1610.10C when he included comments regarding NJP in the [redacted] FITREP. We found a member of VADM Swift's staff advised the [redacted] that [redacted] could file [redacted] appeal outside of the 5-day period for appeal submissions.

BUPERSINST 1610.10C states that NJP is concluded when an appeal is final or waived. Regarding appeals, JAGMAN 5800.7F states an appeal must be submitted within 5 days or the right to appeal is waived in the absence of good cause shown. If it appears that good cause may exist which would make it impracticable or extremely difficult for the accused to prepare and submit the appeal within the 5-day period, the accused should immediately advise the officer who imposed the punishment why good cause exists and request an appropriate extension of time within which to submit the appeal. Upon receipt of such a request, the officer who imposed the NJP shall determine whether good cause was shown and shall advise the offender whether a time extension is granted.

We determined the [redacted] NJP was concluded 5 days after VADM Swift imposed punishment upon the [redacted] and before VADM Swift signed the [redacted] FITREP. We also determined VADM Swift did not delegate authority to his staff members to grant appeal extensions, was unaware of his staff member's action, and his staff had no authority to grant the [redacted] an extension. We further determined VADM Swift did not violate BUPERSINST 1610.10C when he included a comment regarding NJP in the [redacted] FITREP, because absent extension approval from VADM Swift, the NJP was concluded officially prior to VADM Swift signing the [redacted] FITREP and BUPERSINST 1610.10C required the reporting senior to include the NJP comment.

Response to Tentative Conclusions

By letter dated August 1, 2014, we provided VADM Swift the opportunity to comment on the results of our investigation. In his response, via his counsel, dated August 6, 2014, VADM Swift acknowledged he "failed to include mandatory punishment language in the fitness report (fitrep) of an officer" he punished at NJP and accepted responsibility for its absence. He wrote, "As the officer responsible for that report it was my obligation to ensure that language was included." VADM Swift noted that he complied with all other requirements pertaining to reporting officer NJP, and that he would promptly correct the [redacted] FITREP upon conclusion of our investigation to include the mandatory NJP comment.

VADM Swift also explained the events surrounding drafting the [redacted] July 2013 FITREP and his FITREP drafting process. He stated:

> Not by way of mitigation, but for context, the fitrep in question was required as I relinquished command. It was one of 122 fitreps I signed at the time, triggered by my departure from Seventh Fleet…The process I implemented at Seventh Fleet for fitrep

> production started with the individual officer and proceeded through their chain of command for input and ranking, thus allowing those with greatest contact with the officer greatest input on their performance. I wanted to ensure those officers on my staff that I only had passing contact with had the same advantage as those officers I had more significant interaction with in my evaluation of their daily performance of duties. I relied upon the officers' chain of command for frank and appropriate assessments.

VADM Swift asserted that he should have included the mandatory NJP comment in the (b)(6), (b)(7)(C) July 2013 FITREP. We disagree. VADM Swift should have included the NJP comment in the (b)(6), (b)(7)(C) May 27, 2013, FITREP. Neither FITREP contains the mandatory NJP comment. We also note VADM Swift reviewed fewer FITREPS in the May 2013 reporting group than the larger July 2013 group of 122 FITREPS he signed as he relinquished command.

VADM Swift also asserted that BUPERSINST 1610.10C cannot be violated because "The definition of violation is doing something not allowed by law or rule. BUPERSINST 1610.10C does not create such a standard." We disagree. BUPERSINST 1610.10C is the prescribed rule that governs Navy fitness reporting. Failing to comply with BUPERSINST 1610.10C creates a violation.

VADM Swift contended that BUPERSINST 1610.10C is "purely administrative in nature" and does not "create a standard which is inviolable." VADM Swift stated, "...the Bureau of [Navy] Personnel anticipates such oversights as mine...[and] upon receipt of the [fitness] report it is reviewed for accuracy and compliance with BUPERSINST 1610.1C[sic]. Fitness reports that are in error are returned to the originator for administrative correction."

Although we agree that the Bureau of Naval Personnel reviews FITREPS for erroneous information and returns FITREPS to originators for correction of observed errors, we do not agree with VADM Swift's contention that BUPERSINST 1610.10C cannot be violated. The (b)(6), (b)(7)(C) FITREP that VADM Swift signed in May and July 2013, did not present erroneous information the Bureau of Naval Personnel could review and return to him for purely administrative correction. In both FITREPs, VADM Swift and his staff omitted NJP information from a required narrative FITREP block, thus the block did not contain erroneous information; it contained no information for the Bureau of Naval Personnel to review for error.

The prescribed procedure for VADM Swift, the FITREP originator, to later add previously omitted information such as NJP comment is provided in BUPERSINST 1610.10C, Chapter 15, which states that the command or reporting senior originating the report or the member's current command may request administrative changes to blocks 1-19, 21-26, and block 44 of the FITREP. Administrative changes are not permitted to block 41, the block in which VADM Swift was required to include NJP comment. A member can make changes to obvious administrative errors in the information submitted. A change to any other FITREP block, including inserting omitted information, requires submission of supplemental material.

In the [redacted] May and July 2013 FITREPs, VADM Swift omitted information from block 41 required by BUPERSINST 1610.10C. Block 41 is evaluative and requires VADM Swift to submit supplemental material to comply with BUPERSINST 1610.10C and correct the omission. Accordingly, VADM Swift's violation occurred in his omission of NJP information from the [redacted] FITREPs in May and July 2013. The violation was not, as he asserted, an error in submitted information correctable through Bureau of Naval Personnel review.

After carefully considering VADM Swift's response and reevaluating the evidence, we stand by our initial conclusion VADM Swift violated BUPERSINST 1610.10C by failing to include a mandatory comment regarding NJP in the [redacted] FITREP.

V. CONCLUSIONS

A. VADM Swift did not engage in unlawful racial discrimination by including a mandatory comment regarding concluded NJP in [redacted] FITREP.

B. VADM Swift violated BUPERSINST 1610.10C by failing to include a mandatory comment regarding concluded NJP in a [redacted] FITREP.

VI. RECOMMENDATION

We recommend the Secretary of the Navy consider appropriate corrective action with regard to VADM Swift.

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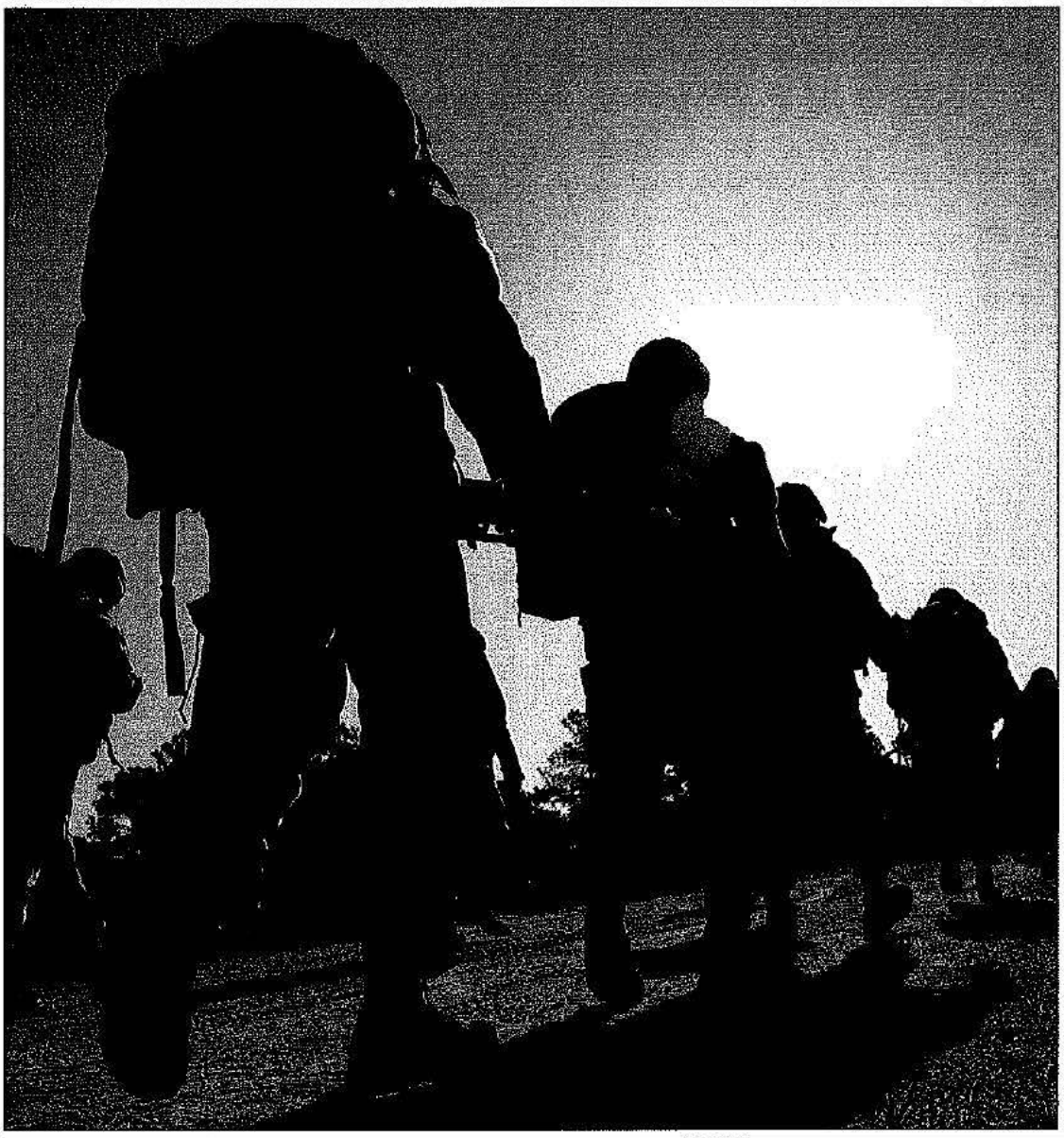

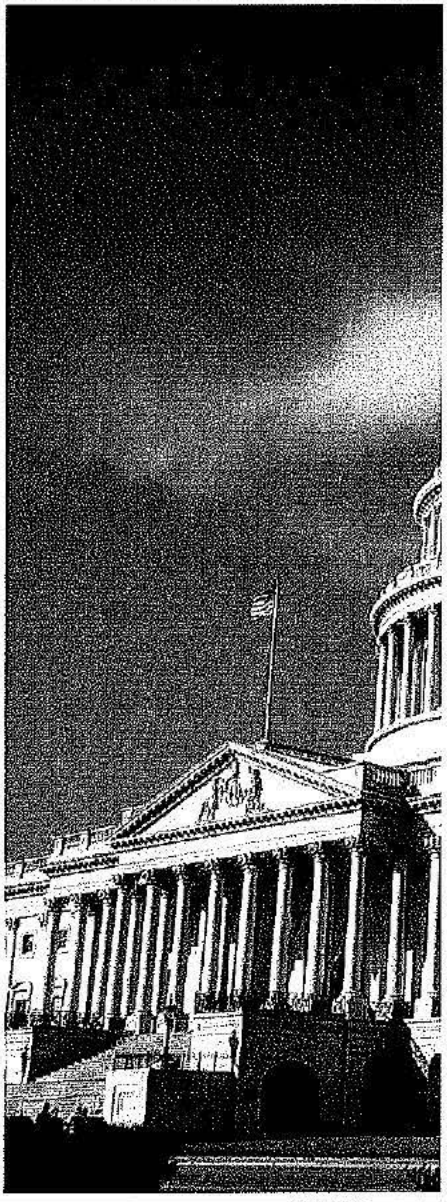

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