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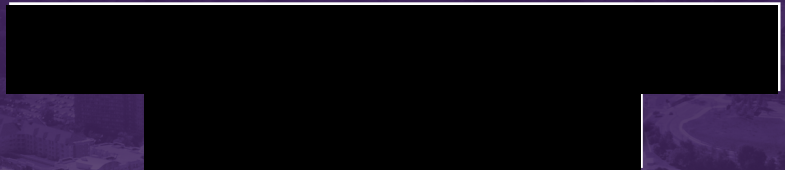
INSPECTOR GENERAL

U.S. Department of Defense

OCTOBER 15, 2024



REPORT OF INVESTIGATION:



NAVY CYBERWARFARE DEVELOPMENT GROUP U.S. NAVY FORT MEADE, MARYLAND

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WHISTLEBLOWER REPRISAL INVESTIGATION

NAVY CYBERWARFARE DEVELOPMENT GROUP U.S. NAVY FORT MEADE, MARYLAND

Executive Summary¹

The DoD Office of Inspector General (DoD OIG) conducted this investigation in response to a reprisal complaint alleging that [REDACTED] (the Subject), U.S. Navy, Fort Meade, Maryland, took an action affecting the eligibility for access to classified information against [REDACTED] (the Complainant), U.S. Navy, in reprisal for the Complainant making protected disclosures.²

The Complainant alleged that he made one protected disclosure on October 28, 2020, to the Subject during a meeting in which he reported that the Subject inaccurately represented a mission-readiness status to the U.S. Fleet Cyber Command (10th Fleet) and that the Subject retaliated against him for making that disclosure.

During our investigation, we found that the Complainant made additional disclosures on January 19 and February 5, 2021, accusing the Subject of abuse of authority.

After the Complainant made these protected disclosures, the Subject took one action affecting the Complainant's eligibility for access to classified information when the Subject recommended that the DoD Consolidated Adjudications Facility (DoD CAF) revoke the Complainant's security clearance eligibility.³

¹ This report contains information that has been redacted because it was identified by the DoD Office of Inspector General and the DoD as Controlled Unclassified Information (CUI) that is not releasable outside the Executive Branch. CUI is Government-created or -owned unclassified information that allows for, or requires, safeguarding and dissemination controls in accordance with laws, regulations, or Government-wide policies.

² The Complainant filed his initial reprisal allegations with the Office of the Naval Inspector General (NAVINSGEN) on April 22, 2022. On May 3, 2022, NAVINSGEN referred the Complainant's allegation that the Subject recommended revocation of his eligibility for access to classified information to the DoD OIG. NAVINSGEN is conducting a separate investigation into the Complainant's military whistleblower reprisal allegations under section 1034, title 10, United States Code, "Protected Communications; Prohibition of Retaliatory Personnel Actions."

³ The Defense Counterintelligence and Security Agency (DCSA) renamed the "DoD CAF" on June 17, 2022, to more accurately reflect its personnel vetting responsibilities. The DoD CAF is now the DCSA Consolidated Adjudication Services, or DCSA CAS. We will continue using the acronym DoD CAF throughout this report because all the actions took place before the second name change.

Based on a preponderance of the evidence, we determined that the Complainant made two protected disclosures and that the protected disclosures were contributing factors in the action taken against the Complainant. Therefore, we concluded that the Complainant established a prima facie allegation of reprisal against the Subject in the first stage of our analysis.⁴

As a result, we proceeded to the second stage of our analysis. For Complainants who are employees with access to classified information within the DoD, we must determine, by clear and convincing evidence, whether the personnel actions or the actions affecting eligibility for access to classified information would have been taken absent any protected disclosures. We found that there was not clear and convincing evidence to support the Subject's action affecting the Complainant's eligibility for access to classified information. In reaching this determination, we found that the Subject provided relatively weak evidence supporting [REDACTED] rationale to take the action affecting the Complainant's eligibility for access to classified information, and that the Complainant's disclosures gave [REDACTED] a strong motive to reprise. We were not able to analyze whether the Subject treated the Complainant disparately when [REDACTED] took the action affecting eligibility for access to classified information against the Complainant, as we found no similarly situated employees to make such analysis. On these bases, we substantiated the allegation that the Subject took an action affecting the Complainant's eligibility for access to classified information in reprisal for the Complainant's protected disclosures.

The DoD CAF restored the Complainant's eligibility for access to classified information after he provided his rebuttal to the Subject's recommendation to revoke. The Complainant retired from the Navy in [REDACTED]; therefore, no additional remedies can be afforded to him.

We recommend that the Secretary of the Navy consider appropriate action against the Subject.

⁴ Black's Law Dictionary defines a prima facie case as one that is "established by sufficient evidence and can be overthrown only by rebutting evidence adduced on [offered by] the other side."

Background

The Complainant

The Complainant worked as a program manager and later as the [REDACTED] [REDACTED] at the Navy Cyberwarfare Development Group (NCWDG) from August 2018 through August 2021. The Complainant previously worked as a staff member on the National Security Council. In the spring of 2019, [REDACTED], the former [REDACTED], assigned the Complainant a task to bring a project entitled "[REDACTED]" to meet its mission objective. The project fell under the signals intelligence (SIGINT) mission of the NCWDG. The Complainant led the [REDACTED] [REDACTED] project and later became the [REDACTED] [REDACTED] after an NCWDG reorganization. In this role, he was responsible for the maritime cyber activities' operations, intelligence, capabilities, and development.

During this period, the NCWDG [REDACTED], [REDACTED], and later [REDACTED], supervised the Complainant's department, and the Subject was the Complainant's reporting senior.

The Subject

The Subject was [REDACTED] [REDACTED]. The NCWDG conducts technical research and development to create, test, and deliver advanced cyber, cryptologic, and electronic warfare capabilities to the U.S. Navy using rapid prototyping and acquisition authority. The NCWDG is a task force under the 10th Fleet. During the relevant time frame, the Subject reported to [REDACTED] [REDACTED].

The Subject was the Complainant's second-level supervisor during the Complainant's time at the NCWDG. The Subject retired from the U.S. Navy effective [REDACTED].

Scope

This investigation covered the period of the Complainant's employment with the NCWDG, beginning [REDACTED], and ending [REDACTED], the date when the Subject recommended revocation of the Complainant's security clearance eligibility. We interviewed the Complainant, the Subject, and 10 witnesses under sworn oath or affirmation. We reviewed documentary evidence, including the Complainant's statements, DoD CAF records, written communications, emails, a report of preliminary inquiry, personnel records, character statements, and other qualifying records.

Whistleblower Protection for DoD Employees Eligible for Access to Classified Information

The DoD OIG conducts whistleblower reprisal investigations involving employees with access to classified information within the DoD under Presidential Policy Directive 19 (PPD-19), “Protecting Whistleblowers with Access to Classified Information,” October 10, 2012, as implemented within the DoD by Directive-type Memorandum 13-008, “DoD Implementation of Presidential Policy Directive 19,” July 8, 2013 (Incorporating Change 5, Effective April 19, 2021).

Legal Framework

Two-Stage Process

The DoD OIG employs a two-stage process in conducting whistleblower reprisal investigations under PPD-19, as implemented within the DoD by DTM 13-008. The first stage focuses on the alleged protected disclosures, the actions affecting eligibility for access to classified information, the subject's knowledge of the protected disclosures, and the timing of the actions. The second stage focuses on whether the subject would have taken or failed to take, or threatened to take or fail to take, the actions affecting eligibility against the employee absent the protected disclosures.

Sufficient evidence, based on proof by a preponderance of the evidence, must be available to make three findings.⁵

1. The complainant made a protected disclosure.
2. The complainant experienced an action affecting eligibility for access to classified information.
3. The protected disclosure was a contributing factor in the action.⁶

If a preponderance of the evidence supports these three findings, the analysis will proceed to the second stage. In the second stage, we weigh together three factors.

1. The strength of the evidence in support of the action affecting eligibility
2. The existence and strength of any motive to retaliate on the part of the subjects who were involved in the decision
3. Any evidence that the subject took similar actions against similarly situated employees who did not make protected disclosures

Once a contributing factor is established, the actions affecting eligibility for access to classified information taken by the subject against the complainant are considered reprisal unless clear and convincing evidence demonstrates that the subject would have taken or failed to take, or threatened to take or fail to take, those actions affecting eligibility for access to classified information absent the protected disclosures.⁷

⁵ A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. See title 5 Code of Federal Regulations section 1201.4(q).

⁶ A contributing factor need not be the sole, or even primary, factor. Rather, a contributing factor means "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). In the absence of testimonial or documentary evidence of intent, one way to establish whether the disclosure was a contributing factor is through using the knowledge/timing test, meaning that the deciding official knew of the disclosure, and the adverse action was initiated within a reasonable time of the disclosure.

⁷ Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than a preponderance of the evidence but a lower standard than beyond a reasonable doubt. See title 5 Code of Federal Regulations section 1209.4(e).

Protected Disclosure

A protected disclosure under PPD-19, as implemented within the DoD by DTM 13-008, is any disclosure of information by an employee that the employee reasonably believes evidences:

- a violation of any law, rule, or regulation;
- gross mismanagement;
- a gross waste of DoD funds;
- an abuse of authority; or
- a substantial and specific danger to public health or safety.⁸

Such disclosures are protected under PPD-19, as implemented within the DoD by DTM 13-008, when the Complainant makes the disclosures to authorized recipients, consisting of:

- a supervisor in the employee's direct chain of command up to and including the head of the employing agency;
- the Inspector General of the employing agency or Intelligence Community Element;
- the Director of National Intelligence;
- the Inspector General of the Intelligence Community; and
- an employee designated by any of the above officials for the purpose of receiving such disclosures.

Protected disclosures also include:

- exercising any appeal, complaint, or grievance regarding a violation of Section A or B of PPD-19;
- lawfully participating in an investigation or proceeding regarding a violation of Section A or B of PPD-19;
- cooperating with or disclosing information to an Inspector General, in accordance with applicable provisions of law in connection with an audit, inspection, or investigation conducted by the Inspector General; and
- reporting an urgent concern to Congress, via an Inspector General, in accordance with the "Inspector General Act of 1978," as amended (sections 401–424, title 5, United States Code).⁹

⁸ The test to determine whether the Complainant had a reasonable belief is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the Complainant could reasonably conclude one of the categories of wrongdoing protected by PPD-19 occurred.

⁹ The Inspector General Act of 1978, as amended, defines an urgent concern as a serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the funding, administration, or operations of an intelligence activity involving classified information, but it does not include differences of opinions concerning public policy matters. The definition also includes false statements to Congress and actions taken in reprisal for reporting an urgent concern per 5 U.S.C. § 416(a)(2).

Action Affecting Eligibility for Access to Classified Information

PPD-19, as implemented within the DoD by DTM 13-008, prohibits any officer or employee of an Executive Branch agency with authority to take, direct others to take, recommend, or approve any action affecting an employee's eligibility for access to classified information from taking or failing to take, or threatening to take or fail to take, any action affecting an employee's eligibility for access to classified information in reprisal for making a protected disclosure.

Findings of Fact

Contextual Events

During the COVID-2019 pandemic in 2020, the 10th Fleet asked its subordinate commands, including the NCWDG, to provide a Commander's Update Brief (CUB) 3 times per week. This requirement was later changed to once per week. The Complainant, [REDACTED], and the Subject all described the CUB as a one-page PowerPoint slide that includes three stoplights indicating the operational status of three mission areas. A green stoplight indicates the mission area is capable, a yellow stoplight indicates the mission area is partially capable, and a red stoplight indicates the mission area is not capable.

The [REDACTED] and the Subject both stated that each NCWDG department head sends their department's mission readiness status to the command duty officer, who combines the readiness statuses of the missions in the same area and converts the overall status of each mission area into either a green, yellow, or red stoplight on the CUB slides. The command duty officer then presents the CUB slides to the NCWDG executive officer, who reviews and then sends them to the NCWDG commanding officer, who sends them to the 10th Fleet. One of the stoplights represents the combined readiness status of all SIGINT missions.

[REDACTED] told us that in the spring of 2020, the Complainant began voicing his concerns about the [REDACTED] project lacking staff and training to meet its mission objective. The Complainant said to us that he told several members in his chain of command that he believed the [REDACTED] project was not mission capable, which he believed resulted in the NCWDG's overall SIGINT mission not being capable.

Disclosure 1: Misrepresentation of Mission Readiness Status

On October 28, 2020, the Subject had a biweekly [REDACTED] project meeting with the Complainant, [REDACTED] (Witness 1), and [REDACTED] (Witness 2), [REDACTED]. According to the Complainant, during the meeting he told the Subject that the NCWDG was neither fulfilling the vast majority of its SIGINT missions nor maintaining the qualified personnel required to conduct these missions, despite having billets designated for such purposes. The Complainant stated that he specifically pointed out that the SIGINT mission status should not be green and that the NCWDG misreported the SIGINT mission status on the CUB slides to the 10th Fleet. According to the Complainant, he told the Subject, "We are not accurately reporting," and the Subject responded to his statement by saying, "There are some things you just don't want people to know." The Complainant provided his handwritten meeting note taken contemporaneously during the meeting, in which he captured the Subject's response verbatim in quotation marks, followed by a hand-drawn sad face emoji. He also wrote, "Not fulfilled in totality -> creates risk of compliance issues," in his meeting note.

Witness 1 confirmed that the [REDACTED] team had routine meetings with the Subject. Witness 1 told us that [REDACTED] found an email titled “[Commanding Officer] Update” sent to the Complainant, Witness 2, and the senior enlisted leader of [REDACTED], coordinating a meeting on October 28, 2020. Witness 1 said that [REDACTED] did not doubt that the October 28, 2020 meeting occurred. When asked if the Complainant told the Subject that the reported SIGINT mission readiness statuses were inaccurate, or if the Subject misrepresented the mission statuses, Witness 1 told us that [REDACTED] did not recall that encounter.

Witness 2 was [REDACTED] on the [REDACTED] project. [REDACTED] recollection of the October 28, 2020 meeting was vague. [REDACTED] told us that the Complainant presented his liberal interpretation of the SIGINT authorities, and while the Subject did not agree with the Complainant’s interpretation, [REDACTED] seemed to appreciate the Complainant’s effort. Witness 2 said that [REDACTED] did not recall any discussion of the SIGINT mission readiness or the stoplight colors on the CUB slides. Witness 2 said that [REDACTED] also did not remember the Subject saying, “There are some things you just don’t want people to know.”

The Subject told us that [REDACTED] did not recall this specific meeting, although [REDACTED] confirmed that [REDACTED] met with the [REDACTED] team regularly. The Subject denied ever having any conversation with the Complainant about [REDACTED] alleged misrepresentation of any mission-readiness status to the 10th Fleet. The Subject also told us that [REDACTED] did not recall saying, “There are some things you just don’t want people to know.” The Subject went on to say that even if the Complainant had such a conversation with [REDACTED] it would be routine and matter of fact and that [REDACTED] doubted the Complainant would accuse [REDACTED] of misrepresenting the NCWDG’s mission in front of other senior leaders in the command. Additionally, the Subject told us that [REDACTED] supported the Complainant’s project. [REDACTED] supplied personnel and provided funding to build a special room to accommodate certain computer access requirements for the Complainant’s project.

The Subject explained that the [REDACTED] project was not an operational system; it was a mission to develop and deploy prototype offensive cyber—new capabilities. Therefore, [REDACTED]’s status did not contribute to the CUB slides or the readiness of the overall mission of the NCWDG.

In [REDACTED] June 6, 2024 letter in support of the Subject’s response to our preliminary conclusions, [REDACTED], former 10th Fleet Commander, wrote that the allegation the Subject misrepresented the CUB slides was “categorically false.” [REDACTED] wrote that [REDACTED] was not an operational system, and it would have been inappropriate for the Subject to include it in the CUB slide colors along with the status of the operational systems that the Subject appropriately included in the CUB slides. [REDACTED] further wrote that “[n]one of [the Subject’s] Research & Development acquisition projects ([REDACTED]) would impact the colors of the (mission readiness) stoplight chart,” and that the colors for each category on the chart were “at each Commander’s discretion.”

██████████ also stated that the Subject often made requests to ██████████ through meetings, emails, and Weekly Activity Reports. These requests were for additional manpower and funding for the ██████████ project and advocated for changes to cyber security policy, specifically for ██████████.

November 5, 2020 Training Event

On November 5, 2020, the Complainant attended a classified training offered by a partner organization, during which he “challenged” the trainer’s position that certain queries were not allowed. The Complainant argued that, hypothetically, given an active operation, a commissioned officer could give a lawful order to conduct queries outside of the permitted scope on the partner organization’s database. The trainer told him that no query could be conducted outside of the permitted scope according to the partner organization’s policy. The Complainant insisted on seeing the policy referenced by the trainer, but the trainer could not provide it. The debate compelled the trainer to notify the partner organization’s leadership. Two NCWDG junior enlisted members, who attended the training, overheard the debate.

The partner organization’s director suspended the Complainant’s access and associated accounts after learning the training event deteriorated. This same director later told ██████████ (Witness 3), during a call on December 1, 2020, that the Complainant’s “actions” during the training event were not deceitful in nature and that the Complainant’s intentions were in line with the country’s and the Navy’s objectives. However, the director also told Witness 3 that the Complainant’s “actions” were in “clear violation” of his approved work role, his provided training, the partner organization’s directives, and the national directives governing the access.

November 13, 2020 Command Preliminary Inquiry

In response to this incident, the Subject directed a command preliminary inquiry on November 13, 2020, to examine the facts and circumstances surrounding allegations that the Complainant violated Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892 (2019); Article 123, UCMJ, 10 U.S.C. § 923 (2019); and Article 133, UCMJ, 10 U.S.C. § 933 (2019).¹⁰

The two sailors who witnessed the incident told the inquiry officer that the Complainant’s behavior demonstrated his desire to circumvent policy and created confusion regarding which queries could be conducted within the boundary of law and policy. Additionally, the sailors conveyed that they did not feel comfortable taking future orders from the Complainant and had lost trust in the Complainant.

¹⁰ Article 92, UCMJ, “Failure to Obey Order or Regulation”; Article 123, UCMJ, “Forgery,” which addresses offenses concerning government computers; and Article 133, UCMJ, “Conduct Unbecoming an Officer.”

On November 20, 2020, the inquiry officer concluded that the Complainant did not violate the UCMJ. The inquiry officer recommended that no further investigation was warranted but noted that members are trained on the overarching policies and recommended that a senior officer “remediate” the Complainant to ensure he understood his leadership role within and outside of his command.

Both the [REDACTED] and the [REDACTED] approved the preliminary inquiry findings and deemed the inquiry legally sufficient. However, the Subject told us that [REDACTED] disagreed with the inquiry officer’s findings because the inquiry officer did not interview a key witness or consider the impact the Complainant caused to the working relationship between the NCWDG and the partner organization. The Subject told us that the [REDACTED] advised [REDACTED] that the case would not go forward with a court-martial, and the preliminary inquiry was “okay as it stood.” Witness 1 and Witness 2 told us that because the Complainant was instrumental in establishing the partnership between the NCWDG and the partner organization, his absence due to the suspension disrupted the NCWDG team’s integration with the partner organization. According to four witnesses we interviewed, the November 5, 2020 incident caused the partner organization to reduce its support of the NCWDG. As a result, NCWDG members temporarily lost some, but not all, access to the partner organization’s database and trainings. It took the NCWDG approximately 2 months to rebuild the partnership with the partner organization and to regain its full support.

The Subject told us that [REDACTED] lost all confidence in the Complainant as a result and that [REDACTED] believed the Complainant’s conduct was egregious. However, Witness 3 told us that [REDACTED] and multiple other people did not agree with the Subject’s opinion on this incident. Witness 3 told us that the Complainant was responsible for setting up this partnership to achieve rare mission objectives. Witness 2 told us that the negative impact caused by the incident paled in comparison to the overarching positive impact from creating this partnership. The Complainant explained that he initiated the partnership to mitigate a series of mission and capability gaps that he had identified.

December 10, 2020 Non-Judicial Punishment

On December 10, 2020, the Subject offered the Complainant non-judicial punishment (NJP), charging him with violation of Article 80, UCMJ, “Attempts,” and Article 133, UCMJ, “Conduct Unbecoming an Officer.” The Subject wrote in [REDACTED] offer of NJP that the Complainant attempted to violate a lawful hosting organization directive by telling his subordinates, “You will run a query if I give you a direct order, and if that causes problems, we can just say that leadership told us to do it.” [REDACTED] then wrote that his conduct compromised his standing as an officer and was prejudicial to good order and discipline. However, the preliminary inquiry concluded that the Complainant did not attempt to give any order to his subordinates; he was debating a hypothetical with the trainer. Additionally, the partner organization could not provide any directive or policy allegedly being violated.

The Subject told us that because the preliminary inquiry found the Complainant did not actually disobey an order or regulation or misuse Government computers, [REDACTED] dropped Article 92 and Article 123 from [REDACTED] NJP offer. Instead, [REDACTED] added Article 80 and kept Article 133.

December 10, 2020 Initial Security Access Eligibility Report

On December 10, 2020, the Subject suspended the Complainant's local access to Sensitive Compartmented Information (SCI) and submitted an initial Security Access Eligibility Report (SAER) to the DoD CAF, recommending that the Complainant's SCI access be suspended pending the outcome of his NJP proceedings and the DoD CAF's re-adjudication. The Subject wrote in this initial SAER:

[The Complainant] has demonstrated over a period of time, an unwillingness to comply with current policy and rules governing computer network operations. Choosing instead to challenge policy to suit his desired mission outcomes and justifying this by asserting, "existing laws and policies are not always aligned." Moreover, and specifically on November 5, 2020, [the Complainant] by virtue of his rank attempted to influence a junior operator to perform a query that the operator believed to be in violation of organizational policy. This undue influence resulted in the partner organization removing [the Complainant's] access to the specific project and suspending his associated accounts.

Further, on April 4, 2020, [the Complainant] received a formal and negative Page 13 counseling by me, as [REDACTED]. This counseling is a permanent part of [the Complainant's] Navy record. In it, I counseled [the Complainant] for his unprofessional and insubordinate conduct while speaking with a RDML [Rear Admiral Lower Half] at INDOPACOM in a negative manner about [REDACTED]'s Fleet Cyber Command—a command which is the Immediate Superior in Charge of NCWDG and therefore in [the Complainant's] chain of command.

Finally, on August 10, 2018, [the Complainant], via a signed and acknowledged Letter of Instruction given to him by [REDACTED], then [REDACTED] of Navy Cyber Warfare Development Group, was counseled for disobeying a clear and direct order.

In the initial SAER, the Subject mentioned that [REDACTED] directed a preliminary inquiry to look into the Complainant's potential violations of Article 92, Article 123, and Article 133 of the UCMJ. The Subject omitted the findings of the preliminary inquiry, which concluded that the Complainant did not violate Article 92, Article 123, and Article 133 of the UCMJ. The Subject also mentioned that [REDACTED] preferred charges against the Complainant for violating Article 80 and Article 133 of the UCMJ and recommended that the DoD CAF suspend the Complainant's SCI access, pending the outcome of the NJP.

The Subject referenced a Page 13 counseling in [REDACTED] initial SAER that detailed that in March 2020, the Complainant replied to an email from [REDACTED], Director for Intelligence for U.S. Indo-Pacific Command, without coordinating with the NCWDG chain of command in advance. The Complainant cited a third party's comment on an issue concerning

the 10th Fleet, which was led by [REDACTED] at that time.¹¹ In the Complainant's subsequent rebuttal to this SAER, he included both [REDACTED] and [REDACTED]'s character statements refuting the Subject's account of this event. [REDACTED] wrote:

As party to this interaction, I find that [the Subject]'s description of [the Complainant] mischaracterizes our exchange. [The Complainant], as always, composed himself with utmost professionalism, candor, and respect. [...] In no way did [the Complainant's] remark bring discredit on NCWDG. I find it not just peculiar, but disturbing that our exchange on blue force skill levels was somehow interpreted as betrayal of his unit or an insult to the Fleet Cyber Command/C10F.

The Complainant told us that he never received the Page 13 counseling until it was uploaded to his Navy records on or about December 9, 2020, and that it was backdated to April 20, 2020. The Complainant told us that he was never given the opportunity to respond to the Page 13 before it was entered into his Navy records. The Subject told us that [REDACTED] directed [REDACTED] administrative personnel to enter the Page 13 into the Complainant's records, but they did not follow through. However, our evidence indicates that the Page 13 was entered into the Complainant's records and later removed on July 9, 2021, by the Navy Personnel Command due to noncompliance with Military Personnel Manual (MILPERSMAN) 1070-320.¹²

We also reviewed [REDACTED]'s Letter of Instruction (LOI) referenced by the Subject. The LOI did not state that the Complainant disobeyed a clear and direct order. [REDACTED] later wrote a character statement in support of the Complainant and detailed the circumstances surrounding the incident, which was a miscommunication. [REDACTED] wrote:

I did not intend for my 10 August 2018 Letter of Instruction to be included in [the Complainant's] official record or to document substandard performance or misconduct. [...] During my tenure as his commanding officer, [the Complainant] was an exceptional performer and he fully complied with all orders issued to him.

His account of this incident was confirmed by the [REDACTED], who contributed to the miscommunication.

December 23, 2020 Detachment for Cause

On December 18, 2020, the Complainant declined the NJP offer and demanded a court-martial.¹³ The Subject told us that [REDACTED] did not have court-martial authority, and if [REDACTED] were to pursue court-martial, [REDACTED] would have to contact the court-martial convening authority, which was

¹¹ Page 13 refers to NAVPERS 1070/613, "Administrative Remarks," August 2012. According to MILPERSMAN 1070-320, "Administrative Remarks," October 2019, Page 13s filed in the official military personnel file are used to provide a chronological record of the significant miscellaneous entries, which are not provided elsewhere, or to provide more detailed information required to clarify entries in other military human resource documents.

¹² According to MILPERSMAN 1070-320, the governing authority for Page 13s, "Adverse entries must not be made unless the Service member concerned is first afforded an opportunity to submit a written statement regarding the adverse material. Should the Service member desire not to make a statement, he or she must document this decision in writing."

¹³ Under Article 15, UCMJ, 10 U.S.C. § 815, nonjudicial punishment may not be imposed on any Member of the Armed Forces if such Member demands a trial by court-martial.

Naval District Washington. The Subject also acknowledged to us in substance that there was not enough evidence to lead to a court-martial in [REDACTED] opinion, so [REDACTED] never made a request for a court-martial to the convening authority.

On December 23, 2020, approximately 5 days after the Complainant declined the NJP, the Subject requested that the Navy Personnel Command detach the Complainant for cause, citing substandard performance and misconduct. [REDACTED] wrote, "As a result of his refusal to accept the NJP, I submit this Report of Misconduct because [the Complainant's] actions warrant strong censure." [REDACTED] listed the Page 13, [REDACTED]'s LOI, the command preliminary inquiry, the proposed NJP, and the initial SAER as the basis for [REDACTED] Detachment for Cause (DFC) request. The Subject's descriptions of those events were similar to what [REDACTED] wrote in the initial SAER. In reference to the November 5, 2020 training event, and despite the Complainant never being charged or convicted of any UCMJ offenses, the Subject wrote in [REDACTED] DFC request, "[The Complainant] committed two military offenses: Violation of UCMJ, Article 80 – Attempts; Violation of UCMJ Article 133 – Conduct Unbecoming an Officer and a Gentleman."

Disclosure 2: The Complainant's First Abuse of Authority Allegation

On January 19, 2021, in response to the Subject's DFC request, the Complainant submitted his first rebuttal to the Navy Personnel Command, via the Subject and the 10th Fleet Commander. In this rebuttal, the Complainant claimed that the Subject abused [REDACTED] discretion. The Complainant provided the background and contextual events leading to the November 5, 2020 training event and his account of what occurred that day. He explained that his responsibilities as the initiator of this partnership and the technical director for the NCWDG team included seeking clarity on policy matters; identifying ambiguities, contradictions, or unintentional impediments in existing policies; and pursuing resolutions with the appropriate authorities. The Complainant wrote:

To suspend my security clearance—in essence calling me a threat to the nation's security—when I have done everything in my career to not only protect and defend it, but to advance it, I submit is an abuse of discretion. I have again and again proven my loyalty to our nation, its Constitution, and its national security interests by elevating the preparedness of both our Navy and our collective interagency cyber team. Oftentimes, this has meant bringing forth-respectful challenges to the status quo, asking that clear distinctions be made between policy and practice, and, when policies may no longer serve our collective national security interests, recommending and collaborating to develop improvements to such policy.

The Complainant included character statements from his subordinates, peers, supervisors, the former [REDACTED], the former [REDACTED], one rear admiral, two former commanders of the 10th Fleet, a [REDACTED], and the [REDACTED]. These character statements provided the

exculpatory context for the events cited by the Subject as adverse material and disputed the Subject's assertions that the Complainant's performance was substandard and that he was a threat to national security, such as the following three.

[Character statement 1]

I find that [the Subject]'s description of [the Complainant] mischaracterizes our exchange. [...] In no way did [the Complainant's] remark bring discredit on NCWDG. I find it not just peculiar, but disturbing, that our exchanges on relative blue force skill levels was somehow interpreted as a betrayal of his unit or an insult to Fleet Cyber Command/C10F. [...] It is my strongest possible recommendation that the Navy expunge these overly sensitive and baseless claims against [the Complainant].

[Character statement 2]

I have never met another Navy officer who has had such an important and significant impact on Navy cyber than [the Complainant.] [...] I am not surprised that someone like him who is constantly challenging the status quo would have clashed with NCWDG's culture, which in my experience (working at NCWDG for 3 years and working with NCWDG for 10 years) is risk averse and rigid. [...] [The Complainant] is the Navy's future in cyber warfare.

[Character statement 3]

I consider [the Complainant] to be an irreplaceable asset to our team at NCWDG and the Navy writ large. [...] [The Complainant's] regard and adherence to classification and compliance issues are beyond reproach.

Disclosure 3: The Complainant's Second Abuse of Allegation

On February 5, 2021, the Complainant submitted a second rebuttal to the Subject's response to his January 19, 2021 rebuttal. In this rebuttal, the Complainant remarked that the 10th Fleet acknowledged the Subject's dereliction in not providing the Complainant an opportunity to respond to [REDACTED] statements against him. He claimed that the Subject abused the authorities afforded to [REDACTED] by the Naval Military Personnel Manual (NAVPERS 15560D), August 22, 2002, and MILPERSMAN 1611-020, "Officer Detachment for Cause," March 30, 2007. He detailed how the Subject's actions violated his due process rights. Specifically, the Subject deprived him of opportunities to respond to adverse information not previously disclosed to him, strategically timed the personnel actions to prevent him from providing a timely response, omitted exculpatory evidence in [REDACTED] request to detach him for cause, and misstated facts to support [REDACTED] claims.

On July 9, 2021, the Navy Personnel Command disapproved the Subject's DFC request, removed the Page 13 from the Complainant's Navy records, directed the Complainant to be detached from the NCWDG, but not for cause, and ordered the Subject not to file the DFC request or the detachment order in the Complainant's official records, and not to mention the DFC in the Complainant's fitness report.

August 13, 2021 Action Affecting Eligibility

On June 7, 2021, the DoD CAF requested that the NCWDG Security Office provide supplemental information for the initial SAER. On August 2, 2021, the Complainant provided his response to the NCWDG's Director of Security for submission to the DoD CAF. [REDACTED] affirmed under oath that [REDACTED] submitted the Complainant's response to the DoD CAF via the Defense Information System for Security. [REDACTED] and [REDACTED] testified that the Subject did not interfere with the submission of the Complainant's response to the DoD CAF. However, for unidentified reasons, the DoD CAF never received the Complainant's response to the SAER.

The Complainant told us that his response was nearly identical to his rebuttal to the DFC request, which the Subject acknowledged to us that [REDACTED] reviewed "thoroughly." The Subject told us that [REDACTED] reviewed the Complainant's response to the DoD CAF, which [REDACTED] said was the same as his rebuttal to [REDACTED] DFC request. The Subject told us that [REDACTED] thought the Complainant lied throughout his response and misrepresented many things [REDACTED] said, but [REDACTED] said that it was his right to say what he wanted.

On August 13, 2021, the Subject submitted a follow-up SAER to the DoD CAF recommending that the Complainant's Top Secret (TS)/SCI eligibility be formally revoked. In the follow-up SAER, [REDACTED] wrote:

I stand by my recommendation that [the Complainant] has broken trust and should not be eligible for a TS/SCI clearance. I do not question his commitment or operational impact. However, he has broken the trust and confidence of me as a [REDACTED] [REDACTED] and perhaps more importantly, of his subordinates. He is reckless in how he handles classified information, as evidenced by the documentation sent in response to the Supplemental Information Request. It is imperative, in my opinion, that particularly in cyberspace all members comply fully with all policies and law. It was not inappropriate for [the Complainant] to question a policy, it was untrustworthy and inappropriate for him to continually question the policy, try to circumvent it, and try to get his subordinates to circumvent it. I find [the Complainant's] actions egregious and believe that he is a threat to national security because of them.

The Subject told us that [REDACTED] took this action in response to the Complainant's conduct during the November 5, 2020 training event. In [REDACTED] follow-up SAER to the DoD CAF, the Subject referenced that the Complainant was detached (but not for cause); however, [REDACTED] omitted the fact that PERSCOM denied [REDACTED] request to detach him for cause. Additionally, despite the initial SAER mentioning that the Complainant was pending NJP, the Subject omitted in the follow-up SAER to the DoD CAF that the Complainant demanded trial by court-martial, which the Subject declined to pursue, resulting in the Complainant never being found guilty of any offense.

Absent the Complainant's response, the DoD CAF made a preliminary decision on March 31, 2022, to revoke the Complainant's eligibility for access to classified information, assignment to duties that have been designated national security sensitive, and access to SCI. According to the Statement of Reasons, the DoD CAF made this decision solely based on the Subject's initial SAER and follow-up SAER. The DoD CAF stated to the Complainant:

You received a UCMJ, Article 15 non-judicial punishment proceedings. [...] On November 5, 2020, by virtue of your rank, you influenced a junior operator to perform a query that the operator believed was in violation of organizational policy. [...] The SAER dated December 10, 2020, also disclosed that on April 4, 2020 you received a formal and negative Page 13 counseling for your unprofessional and insubordinate conduct while speaking with a rear Admiral at INDOPACOM in a negative manner about the fleet Cyber Command, a command in your chain of command. Additionally, on August 10, 2018, you were counseled by the Commanding officer of Navy Cyber Warfare Development Group for disobeying a clear and direct order.

In July 2022, the Complainant appealed the DoD CAF's preliminary decision and resubmitted his response via the 10th Fleet. On March 13, 2023, the DoD CAF favorably adjudicated the Complainant's appeal and restored his eligibility for access to classified information.

Analysis

As described in more detail in the [“Legal Framework”](#) section of this report, the Complainant must first establish that they made a protected disclosure; that subsequent to the disclosure, they were subject to an action affecting eligibility for access to classified information; and that there is a prima facie case that the disclosure was a contributing factor in the personnel action or the action affecting eligibility for access to classified information taken against them. If the first part of the test is met, then we weigh the strength of the evidence in support of the personnel action, the subject’s motive to retaliate, and disparate treatment of others similarly situated who did not make protected disclosures, to determine whether the subject would have taken the same personnel action or action affecting eligibility for access to classified information absent the protected disclosure. If the evidence does not establish that the subject would have taken or failed to take, or threatened to take or fail to take, the action absent the protected disclosure, the complaint is substantiated. Conversely, if the evidence establishes that the subject would have taken or failed to take, or threatened to take or failed to take, the personnel action absent the protected disclosure, then the complaint is not substantiated. Below, we analyze each of the elements.

Protected Disclosures

We determined by a preponderance of evidence that the Complainant made two protected disclosures under PPD-19.

Disclosure 1: Misrepresentation of Mission Readiness Status

Archived electronic records showed that the Complainant contacted the Subject, Witness 1, and Witness 2 on October 28, 2020, requesting to speak to the Subject, and they arranged to talk. Therefore, they likely had a meeting on October 28, 2020. Additionally, all the witnesses who had supervised the Complainant before this disclosure testified that the Complainant had repeatedly told them about his project lacking staff and training to achieve mission objectives, consistent with his account of the October 28, 2020, meeting. Therefore, we determined that the October 28, 2020, meeting occurred and that the Complainant more than likely discussed his concerns during the meeting about his project needing resources.

We also analyzed, however, if the Complainant had accused the Subject of misrepresenting the mission status, whether the Complainant would have had a reasonable belief that the Subject misrepresented the SIGINT readiness status to the 10th Fleet. To determine whether the Complainant had this reasonable belief, we need to determine whether a reasonable person with knowledge of the essential facts known to and readily ascertainable by the Complainant could conclude that wrongdoing occurred.

The CUB slides were tools for the NCWDG to provide the 10th Fleet a snapshot of the status of the NCWDG's operational cyber intelligence systems. As [REDACTED], the Subject had the benefit of knowing the operating statuses of all the systems in the NCWDG, while the Complainant did not have this knowledge. [REDACTED] was not an operational system.

Although the Subject had the ultimate authority to approve the CUB slides, the spotlight colors in the CUB slides were determined jointly by the NCWDG's department heads, chief engineer, duty officers, and the executive officer. The 10th Fleet Commander confirmed that it would have been inappropriate for the Subject to include the Complainant's prototype project within the status of operational programs. The Complainant knew that his project was a research and development project. Although the Complainant may have been advocating for additional funding for his program, for which [REDACTED] and others confirmed the Subject was in favor, the preponderance of the evidence indicated that the Complainant did not have a reasonable belief that the Subject was intentionally misrepresenting the overall SIGINT mission readiness status or committing any type of wrongdoing by leaving [REDACTED] status off of the CUB slides.

Therefore, a preponderance of the evidence did not establish that the Complainant had a reasonable belief that the Subject was intentionally misrepresenting the mission readiness status, and his attempts to advocate for more assets for his project were not a protected disclosure.

Disclosure 2: Abuse of Authority

In the Complainant's January 19, 2021 rebuttal to the Subject's request for DFC, he stated that the Subject's action to suspend his access to classified information was an abuse of discretion, which is essentially an abuse of authority according to DoD Directive 7050.06.¹⁴ The Subject cited the Page 13 counseling, [REDACTED]'s LOI, and the November 5, 2020 training event as the basis for [REDACTED] decision to suspend the Complainant's access to classified information. However, the preliminary inquiry and character statements provided to the Complainant in his rebuttal of the DFC request showed that these incidents were miscommunications, mischaracterizations, and misunderstandings in nature, and that the Complainant did not commit any misconduct. Moreover, the Subject referenced NJP, which never occurred, in [REDACTED] DFC request.

As the Complainant's rebuttal highlighted the Subject's military justice and due process procedural violations, we considered his rebuttal as a disclosure of the Subject's actions that were arbitrary and capricious exercises of power that adversely affected the Complainant's rights. Given the fact that the Navy Personnel Command denied the Subject's DFC request for procedural violations based on the same information, we determined that

¹⁴ DoD Directive 7050.06 defines abuse of authority as "[a]n arbitrary or capricious exercise of power by a military member or a federal official or employee that adversely affects the rights of any person or results in personal gain or advantage to himself or herself or to preferred other persons."

the Complainant had a reasonable belief when he reported that the Subject abused [REDACTED] authority. The Complainant made the disclosure directly to the Subject, who was a supervisor in his direct chain of command. The disclosure was then routed to the 10th Fleet commander, [REDACTED] and eventually to the Navy Personnel Command. Therefore, the Complainant's January 19, 2021 disclosure to the Subject and the 10th Fleet Commander was protected under PPD-19.

Disclosure 3: Abuse of Authority

In the Complainant's February 5, 2021 rebuttal to the Subject's request for DFC, he stated that the Subject abused NAVPERS 15560D and MILPERSMAN 1611-020 by depriving him of due process, strategically timing the personnel actions to prevent him from providing a timely response, omitting exculpatory evidence in [REDACTED] DFC request, and misstating facts to support [REDACTED] claims. Because the Subject added an additional allegation of UCMJ Article 80 in [REDACTED] DFC request that was not included in the preliminary inquiry, the Complainant stated that he was never afforded an opportunity to respond to the additional derogatory information.

As the Complainant's rebuttal highlighted the Subject's military justice and due process procedural violations, we considered his rebuttal as a disclosure of the Subject's actions that were arbitrary and capricious exercises of power that adversely affected the Complainant's rights. Given the fact that the Navy Personnel Command denied the Subject's DFC request for procedural violations based on the same information, we determined that the Complainant had a reasonable belief when he reported that the Subject abused [REDACTED] authority. The Complainant made his rebuttal directly to the Subject, [REDACTED] in his direct chain of command. The disclosure was then routed to the 10th Fleet commander, who was the Subject's direct supervisor, and eventually to the Navy Personnel Command. Therefore, the Complainant's February 5, 2021, disclosure to his chain of command was protected under PPD-19.

Action Affecting Eligibility for Access to Classified Information

We determined, by a preponderance of the evidence, that the Complainant experienced one action affecting eligibility for access to classified information, under PPD-19.

In an August 2, 2021 follow-up SAER, the Subject recommended that the DoD CAF revoke the Complainant's eligibility for access to classified information. We determined that the Subject's action qualified as an action affecting eligibility for access to classified information.

Contributing Factor

We determined that the Complainant's protected disclosures were a contributing factor in the action affecting eligibility for access to classified information.

Whether protected disclosures were a "contributing factor" may be established when:

- the subject had knowledge, actual or inferred, of the Complainant's disclosures, and

- the actions affecting eligibility took place within a period of time subsequent to the disclosures,

such that a reasonable person could conclude that the disclosures were a contributing factor in the decision to take the actions.

Knowledge

The Complainant's disclosures that the Subject abused [REDACTED] authority were contained within the rebuttals he submitted contesting the DFC action. The rebuttals were routed through the Subject before submission to the Navy Personnel Command, and the Subject acknowledged to us that [REDACTED] reviewed the Complainant's DFC rebuttals "thoroughly." Therefore, a preponderance of the evidence establishes that the Subject knew of the Complainant's protected disclosures before taking an action affecting his eligibility for access to classified information.

Timing of Personnel Actions and Action Affecting Eligibility

The Subject submitted [REDACTED] follow-up SAER to the DoD CAF recommending revocation of the Complainant's eligibility for access to classified information 7 months after the Complainant made the first protected disclosure and 6 months after the Complainant's second protected disclosure.

The following table shows the sequence of the actions the Subject took against the Complainant.

Table: Actions Taken by the Subject Against the Complainant

Date	Action
November 13, 2020	The Subject directed a preliminary inquiry to look into the November 5, 2020 training event.
November 20, 2020	The preliminary inquiry found the Complainant did not violate the UCMJ.
December 10, 2020	The Subject offered the Complainant NJP.
December 10, 2020	The Subject suspended the Complainant's local access to classified information and submitted the initial SAER to the DoD CAF, recommending suspension of the Complainant's access to SCI.
December 18, 2020	The Complainant refused NJP and demanded court-martial, which the Subject did not pursue.
December 23, 2020	The Subject requested that the Navy Personnel Command detach the Complainant for cause.
January 19, 2021	The Complainant sent his first rebuttal to the Subject's DFC request, wherein he made his first protected disclosure.
February 5, 2021	The Complainant sent his second rebuttal to the Subject's response to his first rebuttal, wherein he made his second protected disclosure.

Table: Actions Taken by the Subject Against the Complainant (cont'd)

Date	Action
June 7, 2021	The DoD CAF requested that the NCWDG and the Complainant provide supplemental information to the initial SAER.
July 9, 2021	The Navy Personnel Command disapproved the Subject's request for DFC and removed [REDACTED] Page 13 counseling from the Complainant's records.
August 2, 2021	The Complainant submitted his response to the DoD CAF's request for supplemental information to the NCWDG's Director of Security. Through no apparent fault of his own, this submission never made it to the DoD CAF.
August 13, 2021	The Subject submitted the follow-up SAER to the DoD CAF, recommending revocation of the Complainant's eligibility for access to classified information.
March 31, 2022	Absent the Complainant's response, the DoD CAF made a preliminary decision to revoke the Complainant's eligibility for access to classified information.
July 2022	The Complainant appealed the DoD CAF's preliminary decision and resubmitted his response to the DoD CAF.
March 13, 2023	The DoD CAF favorably adjudicated the Complainant's appeal and restored his eligibility for access to classified information.

Source: The DoD OIG.

Based on the Subject's knowledge and the close timing between the protected disclosures and the action affecting eligibility, a preponderance of the evidence established that the protected disclosures could have been contributing factors in the action affecting eligibility.

Because the Complainant had successfully established the elements of a prima facie allegation by a preponderance of the evidence, the question then became whether there was clear and convincing evidence that the Subject would have taken the same action even absent the protected disclosures. In so doing, we considered the following factors: strength of the evidence, motive to retaliate, and disparate treatment of the Complainant.

Strength of the Evidence

Stated Reasons for the Subject Recommending that the DoD CAF Revoke the Complainant's Security Clearance Eligibility

The Subject told us that on learning of the events surrounding the November 5, 2020 training event, [REDACTED] directed a command preliminary inquiry to examine the facts and circumstances. The inquiry officer determined that the Complainant did not violate any article of the UCMJ. However, the Subject told us that [REDACTED] considered the Complainant's conduct during the November 5, 2020 training event egregious enough to warrant making an incident report to the DoD CAF and recommending that the DoD CAF revoke the Complainant's eligibility for access to classified information.

Evidence Against Stated Reasons for the Subject Recommending that the DoD CAF Revoke the Complainant's Security Clearance Eligibility

None of the NCWDG members we interviewed, including the Subject, expressed concerns or recommended prior disciplinary actions regarding the Complainant's handling of classified information. According to the written statements from the three individuals who witnessed the November 5, 2020 training event, the Subject's statements about the event did not accurately describe what occurred. The Complainant did not carry out any action or attempt to carry out any action. He did not give any order or attempt to give any order. The Complainant had engaged in a debate of hypotheticals. He argued what he believed could be done under specific circumstances to achieve mission objectives. The incident was a debate between the Complainant and the partner organization's trainer, and it was overheard by two junior enlisted sailors who did not appreciate the Complainant's argument.

Nevertheless, the Subject submitted [REDACTED] follow-up SAER to the DoD CAF requesting that it revoke the Complainant's security clearance, asserting that the Complainant demonstrated an unwillingness to comply with current policy. [REDACTED] further referenced in this SAER that the Complainant was detached, but [REDACTED] did not include information about PERSCOM denying [REDACTED] DFC request. Furthermore, despite the Subject informing the DoD CAF in the initial SAER that the Complainant was undergoing NJP proceedings, [REDACTED] omitted in [REDACTED] follow-up SAER that the NJP proceedings were dropped, and the Complainant was never charged, thereby giving the DoD CAF the impression that the Complainant had been punished for his conduct. Finally, the Subject did not provide the DoD CAF with factual evidence to support [REDACTED] claim that the Complainant was a threat to national security.

The Subject told us that the Complainant's conduct during the November 5, 2020 training event was egregious and that [REDACTED] believed the Complainant was a threat to national security. However, [REDACTED] actions did not correspond to [REDACTED] words. If the Subject deemed the Complainant a threat to national security as [REDACTED] claimed, [REDACTED] most likely would have recommended that the DoD CAF revoke his clearance immediately after the incident. However, the Subject did not suspend his local access until 35 days after the incident and did not recommend that the DoD CAF revoke his clearance until 9 months later. It appeared [REDACTED] pursued this action only after [REDACTED] attempts to give him NJP and detach him for cause were unsuccessful, and after the Complainant submitted a strong rebuttal to [REDACTED] initial SAER, which was the same rebuttal causing PERSCOM to deny [REDACTED] DFC request. [REDACTED] stated reasons appeared to be pretextual or, at a minimum, insufficient to establish that [REDACTED] would have taken the same action absent his protected disclosures.

Motive to Retaliate

Evidence for motive generally exists when protected disclosures allege wrongdoing that, if proven, would adversely affect the subject. This could be true in this case because the Complainant's protected disclosures reflected poorly on the Subject.

Protected Disclosures: Abuse of Authority

In his rebuttals to the Subject's DFC request, the Complainant accused the Subject of abusing [REDACTED] authority. His rebuttals were routed through the 10th Fleet commander, [REDACTED]. The allegations of abuse of authority and accompanying supporting documents reflected poorly on the Subject in front of [REDACTED] supervisor and ultimately the Navy Personnel Command, which would have given [REDACTED] motive to reprise.

In the Complainant's rebuttals to the Subject's DFC request, he provided exceptionally strong character statements from 11 officials, most of whom were senior in rank to the Subject. All of those with firsthand knowledge of the events cited by the Subject as adverse material provided detailed information of these events, which directly discredited the Subject's accounts of these events. One rear admiral wrote, "I find that the Subject's description of [the Complainant] mischaracterizes our exchange," and "I find it not just peculiar, but disturbing that our exchange on blue force skill levels was somehow interpreted as betrayal of his unit or an insult to the Fleet Cyber Command/C10F."

All 11 officials not only directly disputed the Subject's characterization of the Complainant's performance as substandard, but also stressed the Complainant's exceptional contributions to the Nation's cyber security. The Complainant successfully rallied 11 officers, including the Subject's former supervisor and a former Secretary of the Navy, to dispute the Subject's accusations against him. Their statements discredited the Subject and supported our conclusion that [REDACTED] actions against the Complainant were arbitrary and capricious. The Complainant's allegations of abuse of authority by the Subject called into question the Subject's character, leadership, and integrity, which gave [REDACTED] additional motive to reprise.

Animosity Towards the Complainant

August 13, 2021 Follow-up Security Access Eligibility Report

In the follow-up SAER recommending that the DoD CAF revoke the Complainant's eligibility for access to classified information, the Subject continued to refer to the November 5, 2020 training event as the Complainant:

- attempting to influence a junior operator to perform a query that the operator believed to be in violation of policy, and
- trying to circumvent policy and get his subordinates to circumvent policy.

These statements were not accurate. The Subject referenced the preliminary inquiry again in this follow-up SAER, but [REDACTED] omitted the fact that the inquiry officer did not substantiate misconduct. Furthermore, despite stating in the initial SAER that the Complainant was pending NJP, the Subject omitted in the follow-up SAER to the DoD CAF the fact that the Complainant demanded trial by court-martial, which the Subject declined to pursue. As a result, the Complainant was never found guilty of any offense.

Additionally, the Subject added in the follow-up SAER that the Navy Personnel Command decided to detach the Complainant, but not for cause. However, the Subject omitted the fact that this decision was a disapproval of [REDACTED] DFC request, which created an impression that this action was punitive. The Subject appeared to selectively choose the information to create such an impression. The Subject also mentioned in [REDACTED] follow-up SAER that the Page 13 counseling [REDACTED] first referenced in the initial SAER as in his permanent records was a “command counseling” and “[was] not in [the Complainant’s] permanent record.” However, [REDACTED] did not tell the DoD CAF that the Navy Personnel Command had removed the Page 13 just 1 month earlier due to non-compliance.

The Subject’s testimony made it appear as if [REDACTED] took the initiative to correct an administrative error for the benefit of the Complainant. However, the evidence indicates that the Subject entered the Page 13 in the Complainant’s records 8 months after the verbal counseling. The Navy Personnel Command identified this Page 13 as non-compliant and removed the Page 13 from the Complainant’s personnel records on July 9, 2021, at the same time that it denied the subject’s DFC request.¹⁵

Finally, about 8 months before submitting the follow-up SAER, the Subject referenced the Page 13 counseling in [REDACTED] DFC request and listed it as Enclosure 2, which contradicted [REDACTED] testimony that [REDACTED] found out the Page 13 counseling was not in the Complainant’s records.

The Subject recommended that the DoD CAF revoke the Complainant’s eligibility for access to classified information after every punitive action [REDACTED] had initiated failed to result in a derogatory determination. The Subject’s actions demonstrated [REDACTED] animosity towards the Complainant.

Disparate Treatment of the Complainant

We considered whether the Subject took similar actions affecting eligibility for access to classified information against other military members in [REDACTED] command alleged to have committed similar forms of misconduct but who did not make protected disclosures.

The Subject could not recall any other circumstances in which [REDACTED] recommended revocation of someone’s security clearance; [REDACTED] said that [REDACTED] more often did local suspensions of access, and [REDACTED] recalled the following circumstances that required a suspension.

- Two or three sailors were investigated by the Naval Criminal Investigative Service for possession of child pornography.
- One sailor was investigated by the Naval Criminal Investigative Service for child abuse.

¹⁵ According to MILPERSMAN 1070-320, the governing authority for Page 13s, “Adverse entries must not be made unless the Service member concerned is first afforded an opportunity to submit a written statement regarding the adverse material. Should the Service member desire not to make a statement, he or she must document this decision in writing.”

- One sailor violated the COVID protocol by showing up at a clinic to receive a vaccine soon after becoming COVID positive, while claiming that COVID was a hoax.

However, we were unable to gather any data to compare the Subject's actions with similarly situated personnel who were not whistleblowers. The Subject said that [REDACTED] "believed" [REDACTED] may have revoked another lieutenant commander's security clearance after he failed a polygraph, but [REDACTED] was not sure. [REDACTED] told us that [REDACTED] had "never personally seen an [REDACTED] try to give an order to an [REDACTED] to conduct an illegal query" inside an [REDACTED], or anything similar.

Totality of the Evidence

Weighed together, the evidence analyzed in the factors above did not clearly and convincingly establish that the Subject would have recommended in [REDACTED] follow-up SAER that the DoD CAF revoke the Complainant's eligibility for access to classified information absent his protected disclosures.

The Subject told us that [REDACTED] recommended that the DoD CAF revoke the Complainant's security clearance because [REDACTED] felt the Complainant's conduct during the November 5, 2020, training event was egregious. [REDACTED] told the DoD CAF that [REDACTED] felt the Complainant was a threat to national security, but [REDACTED] did not provide any factual evidence to the DoD CAF to support that assertion and failed to update and correct the record in [REDACTED] August 2, 2021 follow-up SAER. The DoD CAF ultimately reinstated the Complainant's eligibility.

Additionally, documentary and testimonial evidence contradicted [REDACTED] stated reason. The November 5, 2020 incident did not occur as [REDACTED] described in [REDACTED] August 2, 2021 recommendation to the DoD CAF. [REDACTED] portrayals of the incidents that [REDACTED] cited to establish a pattern of misconduct were exaggerated and inaccurate. Additionally, the Subject demonstrated motive to reprise against the Complainant.

Weighed together, we found a lack of clear and convincing evidence to establish that the Subject would have taken the same action affecting the Complainant's eligibility for access to classified information absent the Complainant's protected disclosures.

Preliminary Conclusions

A preponderance of the evidence established that the Complainant's protected disclosures were contributing factors in the Subject's decision to take the action affecting his eligibility for access to classified information. In the absence of clear and convincing evidence to the contrary, we concluded that the Subject recommended that the DoD CAF revoke the Complainant's eligibility for access to classified information in reprisal for his protected disclosures.

Subject's Response to Preliminary Conclusions

We provided a preliminary report of investigation to the Subject on May 17, 2024, and afforded [REDACTED] the opportunity to respond to our preliminary conclusion. The Subject responded in writing on June 14, 2024, and disagreed with our findings that the Complainant made alleged Disclosure 1 or that Disclosure 1 was protected. The Subject also disagreed that [REDACTED] reprised against the Complainant for Disclosure 2 or 3, and [REDACTED] requested that we reverse our preliminary conclusion. After carefully considering the Subject's response, we revised our analysis of Disclosure 1, but our overall conclusion remains unchanged.

Disclosures 2 and 3

The Subject acknowledged that the Complainant asserted in his rebuttals to [REDACTED] DFC request that the Subject abused [REDACTED] discretion, but the Subject disagreed with our preliminary conclusion that the Complainant's disclosures of the Subject's abuse of authority were protected disclosures. The Subject contended that a [REDACTED] is required to state their reasons within a request for an officer to be detached for cause, and the subject of the request is afforded the opportunity to disagree with the reasoning or the action itself, but that their statement expressing that contrasting opinion is not a protected communication. The Subject further stated that [REDACTED] knew [REDACTED] decision-making would be questioned at every level of the process and that it would open [REDACTED] up to critique from the Complainant, as it was his right to make arguments on his behalf. However, the Subject stated that the Complainant's disagreement with [REDACTED] decision could not then be considered a protected communication for which the DFC request could be considered reprisal.

We disagree that a military member cannot report violations of wrongdoing within a rebuttal to a commander's action—the same test applies to the Complainant's rebuttal to a commander's action as to any other claimed protected disclosure. Because the investigation into the Complainant's alleged misconduct was not substantiated, reporting the Subject's pursuit of a DFC despite a not-substantiated investigation would be a reasonably believed reporting of abuse of authority and protected under PPD-19.

Stated Reasons

In response to our preliminary report of investigation, the Subject provided additional information behind [REDACTED] reasoning for ordering the preliminary inquiry, offering NJP, and requesting a DFC as part of [REDACTED] responsibility to maintain good order and discipline. We agree that a commander has the responsibility to uphold good order and discipline when misconduct is discovered. Our report addresses only those actions affecting the Complainant's eligibility for access to classified information that occurred after disclosures 2 and 3.

The Subject told us that [REDACTED] felt the Complainant's conduct during the November 5, 2020 training event was egregious and that he was a threat to national security. In response to our preliminary conclusions, the Subject asserted that [REDACTED] first suspended the Complainant's local access to classified information to adequately safeguard national security while the DFC process played out. The subject stated that after [REDACTED] reviewed the Complainant's response to the suspension of access, [REDACTED] still felt a recommendation for revocation was the right course of action.

However, as previously noted in our report, it was not until after the Complainant had made protected disclosures related to his belief that [REDACTED] was abusing [REDACTED] authority and all other disciplinary and administrative actions had failed, that the Subject recommended the DoD CAF revoke the Complainant's eligibility for access to classified information. The Subject also failed to update the DoD CAF in [REDACTED] follow-up SAER that the Complainant was never charged or punished with NJP, as was [REDACTED] duty to do, giving the DoD CAF the impression that the Complainant was found guilty of misconduct. Additionally, the Subject offered no evidence of any additional investigative steps or emergent evidence that would inform or necessitate a decision to recommend revoking the Complainant's eligibility to access classified information and appears wholly inconsistent if the Subject believed the Complainant to be a "threat" to national security.

The DoD CAF ultimately disagreed with the Subject's recommendation to revoke the Complainant's eligibility for access to classified information and adjudicated the Complainant's eligibility favorably. Given the delay, the Subject's motive to retaliate, and the lack of evidence provided to the DoD CAF to support that the Complainant was a threat to national security, we found there was not clear and convincing evidence that the Subject would have taken the action absent the Complainant's protected disclosures.

In the absence of clear and convincing evidence to establish that the Subject would have taken the same action affecting the Complainant's eligibility for access to classified information absent the Complainant's protected disclosures, our overall conclusion remains unchanged.

Overall Conclusion

After providing the Subject an opportunity to respond to our preliminary report of investigation and having carefully considered [REDACTED] response, our conclusion remains unchanged. In the absence of clear and convincing evidence to the contrary, a preponderance of the evidence established that the Subject took an action affecting the Complainant's eligibility for access to classified information in reprisal for the Complainant's protected disclosures.

Recommendations

The DoD CAF restored the Complainant's eligibility for access to classified information after he provided his rebuttal to the Subject's recommendation to revoke. The Complainant retired from the Navy in [REDACTED]; therefore, no additional remedies can be afforded to him.

We recommend that the Secretary of the Navy consider appropriate action against the Subject.

Acronyms and Abbreviations

10th Fleet	U.S. Fleet Cyber Command
CAPT	Captain
CDR	Commander
CUB	Commander’s Update Brief
DFC	Detachment for Cause
DoD CAF	DoD Consolidated Adjudications Facility
LCDR	Lieutenant Commander
LOI	Letter of Instruction
MILPERSMAN	Military Personnel Manual
NAVPERS	Naval Military Personnel Manual
NCWDG	Navy Cyberwarfare Development Group
NJP	Non-Judicial Punishment
PPD-19	Presidential Policy Directive 19
RDML	Rear Admiral Lower Half
UCMJ	Uniform Code of Military Justice
SAER	Security Access Eligibility Report
SCI	Sensitive Compartmented Information
SIGINT	Signals intelligence
SJA	Staff Judge Advocate
TS/SCI	Top Secret/Sensitive Compartmented Information
VADM	Vice Admiral

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