



Thursday, April 25, 2019
DCPAS Message 2019030

DEPARTMENT OF DEFENSE
DEFENSE CIVILIAN PERSONNEL ADVISORY SERVICE
4800 MARK CENTER DRIVE
ALEXANDRIA, VA 22350-1100

FOR: CIVILIAN PERSONNEL POLICY COUNCIL MEMBERS

FROM: Defense Civilian Personnel Advisory Service Director, Ms. Michelle *M. Lowe Solis*

SUBJECT: Implementation of Supervisory Standard: Whistleblower Protection

SUSPENSE:

- Agencies under Defense Performance Management and Appraisal Program (DPMAP) should develop and incorporate a supervisor performance standard for whistleblower protection for the 2019-2020 appraisal cycle as soon as practicable;
- Agencies under a performance management program other than DPMAP should develop and incorporate a supervisor performance standard for whistleblower protection consistent with their policies as soon as practicable

ACTION: Distribute guidance to DoD labor and employee relations practitioners, as well as other key Component stakeholders for immediate implementation.

REFERENCES:

- a. 5 U.S.C. § 4302 and 5 U.S.C. § 7515
 - <http://uscode.house.gov/view.xhtml?path=/prelim@title5/part3/subpartC/chapter43&edition=prelim>
 - <http://uscode.house.gov/view.xhtml?path=/prelim@title5/part3/subpartF/chapter75&edition=prelim>
- b. Section 1097 of the National Defense Authorization Act for Fiscal Year 2018.
- c. Memorandum for Executive Departments and Agencies, Updated Legal Requirements Regarding Agency Training and Discipline, U.S. Office of Special Counsel (OSC), February 1, 2018.

BACKGROUND/INTENT: Congress passed Section 1097 of National Defense Authorization Act for Fiscal Year 2018 (FY18 NDAA), which is codified in 5 U.S.C. Sections 4302 and 7515. These provisions require agencies to establish a supervisory whistleblower protection standard; report certain information to Congress; and administer disciplinary action where appropriate.

REQUIREMENT: Attached to this message is guidance from DCPAS Labor and Employee Relations (DCPAS LER). This guidance will be shared directly with senior labor and employee relations practitioners within DCPAS LER's community of practice. CPCC members should note the following key requirements of Section 1097 of the FY18 NDAA:

- Supervisory performance plans should be established or modified with a performance standard that adheres to the requirements in 5 U.S.C. § 4302(b);
- Agencies should modify their disciplinary policies to incorporate mandatory disciplinary of supervisors for retaliation against whistleblowers consistent with the requirements of 5 U.S.C. § 7515; and,
- Section 1097(d)(3) of FY18 NDAA includes an annual report to Congress on unacceptable performance in whistleblower protection. DCPAS LER will provide additional details for this Congressional reporting requirement in a future message.

POINT OF CONTACT: Mr. Allen Brooks, Director, DCPAS LER, 571-372-1711, allen.r.brooks2.civ@mail.mil.

Attachment(s):
As stated

www.dcpas.osd.mil

[@DCPASExcellence](https://twitter.com/DCPASExcellence) <https://twitter.com/DCPASExcellence>

[@DCPAS-Excellence](https://www.linkedin.com/company/dcpas-excellence) <https://www.linkedin.com/company/dcpas-excellence>

REFERENCE GUIDE

Implementation of Section 1097 of the National Defense Authorization Act of Fiscal Year 2018

April 19, 2019

Introduction

This reference guide addresses implementation of whistleblower protection as a new performance standard for supervisors, and Department of Defense components' responsibilities in meeting an associated reporting requirement set forth by Congress. This guidance is subject to change due to publication of any guidance from the Office of Personnel Management or Office of Special Counsel (OSC).

Background

Congress has recently enhanced protections of federal employees who engage in whistleblower activity. The Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 became law on October 26, 2017. The law requires agencies to propose disciplinary actions against supervisors who engage in whistleblower retaliation; provides certain whistleblower protections for probationary employees; provides guidelines to enhance Federal employee awareness of federal whistleblower protections; and enhances access to information by the OSC.

Most recently, Section 1097 of National Defense Authorization Act for Fiscal Year 2018 (FY18 NDAA), codified at sections 4302 and 7515 of title 5, United States Code (U.S.C.), focuses on the role of supervisors in protecting against whistleblower retaliation. Section 1097 of the FY18 NDAA prescribes provisions requiring agencies to establish a supervisory whistleblower protection standard; report annually on certain information to Congress; and administer disciplinary action where appropriate.

Analysis and Instruction

Supervisory Standard: Whistleblower Protection

Under 5 U.S.C. § 4302(b), agencies shall establish a whistleblower protection performance standard for each supervisor within their performance plan. The standard will establish principles for protection of the whistleblower, and be used to evaluate the supervisor's performance of such standard during the rating year. The supervisory whistleblower protection standard must include the degree to which a supervisor:

- (1) responds constructively to employees when they make a protected disclosures;
- (2) takes responsible action to resolve disclosures; and
- (3) fosters an environment in which employees feel comfortable making such disclosures to supervisory employees or other appropriate authorities.

To promote whistleblower protection, agencies will make note of the number of times the agency has entered into an agreement with the employee who alleges that the supervisor committed a prohibited personnel practice.

Informing Employees

Each Agency shall ensure that employees of the agency are informed of the rights and remedies available to them under law. This information includes:

- (1) information with respect to whistleblower protections available to new employees during a probationary period;
- (2) the role of the OSC and the Merit Systems Protection Board with respect to whistleblower protections; and
- (3) the means by which, with respect to information that is otherwise required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs, an employee may make a lawful disclosure of the information to OSC, DoD Inspector General, Congress, or, another employee of the agency who is designated to receive such a disclosure.

This information will be provided to each new employee no later than 180 days after the date the new employee is appointed. In addition, information regarding whistleblower protections will be made available to all employees online.

Supervisory Performance Standard

Agencies must establish a whistleblower protection standard for all supervisory performance plans during the 2019-2020 appraisal cycle for those agencies under Defense Performance Management and Appraisal Program (DPMAP). Changes to a supervisory performance plan can be made after the cycle has begun or during mid-cycle in DPMAP per DoD Instruction 1400.25, Vol. 431, Section 3.3(e). Agencies not included in DPMAP must adhere to their local performance management policy. The following is an example of a supervisory whistleblower protection standard used by the Department of Defense Inspector General (DODIG):

“Supports the Whistleblower Protection Program by responding constructively to employees who make protected disclosures under 5 U.S.C. 2302(b)(8); taking responsible and appropriate actions to resolve any such disclosures; and creating an environment in which employees feel comfortable making such disclosures.”

Congressional Reporting Requirement

Section 1097(d)(3) of FY18 NDAA includes an annual report to Congress on unacceptable performance in whistleblower protection. Agencies are encouraged to implement the new supervisory whistleblower protection standard with metrics to capture unacceptable performance in order to report to DCPAS by September 15, 2019. Report to DCPAS should include the:

- (1) number of annual performance appraisals that failed to meet the whistleblower standard,
- (2) reasons for the failed determination, and
- (3) type of performance-based or corrective action taken by the agency in response to such violation.

As the deadline nears, DCPAS will send a data call to the agencies which will prescribe the format by which to report.

Disciplinary Procedure

Agencies must administer disciplinary and/or adverse action against supervisory staff who take or fail to take an action against an employee in violation of 5 U.S.C. § 2302(b)(8), (b)(9), or (b)(14).

Determination of a violation will be made by the head of the Agency in which the supervisor is employed, an administrative law judge, the Merit System Protection Board, Special Counsel, a judge of the United States, or the Inspector General of the agency in which the supervisor is employed.

- For supervisory staff who commit a first offense in violation of the whistleblower protection standard, no less than a three (3) day suspension shall be proposed by the head of the Agency. Dependent upon the severity, the head of the Agency has the discretion to propose an additional action to include reduction in grade or pay.
- For supervisory staff who commit a second offense in violation of the whistleblower protection standard, the head of the Agency shall propose removing the supervisor.

Agencies should amend their Table of Penalties (if applicable) to include the new charge and revise the recommended penalty range accordingly. Supervisors will be afforded due process rights in proposed discipline in accordance with 5 U.S.C. § 7415(b)(1).

Labor Obligation

Because implementation of the supervisory whistleblower protection standard concerns supervisory staff, substantive or impact and implementation bargaining is not required.

Questions

If you have any questions concerning this reference guide, please contact the Labor and Employee Relations Line of Business at (703) 545-7482. You may also contact this office through email at dodhra.mc-alex.dcpas.mbx.hrops-lerd-employee-relations@mail.mil.

References

- a. 5 U.S.C. § 4302
- b. 5 U.S.C. § 7515
- c. Section 1079(e)(1)(A) of the National Defense Authorization Act for Fiscal Year 2018.
- d. Memorandum for Executive Departments and Agencies, Updated Legal Requirements Regarding Agency Training and Discipline, U.S. Office of Special Counsel, February 1, 2018.