Department of Defense
DIRECTIVE

NUMBER 1401.03
April 23, 2008

IG DoD

SUBJECT: DoD Nonappropriated Fund Instrumentality (NAFI) Employee Whistleblower Protection

References: (a) DoD Directive 1401.3, "Reprisal Protection for Nonappropriated Fund Instrumentality Employees/Applicants," October 16, 2001 (hereby canceled)
(b) Title 10, United States Code
(c) Title 5, United States Code
(d) DoD 1401.1-M, "Personnel Policy Manual for Nonappropriated Fund Instrumentalities," December 13, 1988

1. REISSUANCE AND PURPOSE

This Directive:

1.1. Reissues Reference (a) to update policy and responsibilities for NAFI employee whistleblower protection under section 1587 of Reference (b).

1.2. Clarifies responsibilities for recommending and directing corrective and disciplinary actions regarding substantiated allegations of reprisal for whistleblowing.

2. APPLICABILITY

This Directive:

2.1. Applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense (hereafter referred to as the "IG DoD"), the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to collectively as the "DoD Components").

2.2. Does not apply to employees in positions excluded from the coverage of section 1587 of Reference (b) by the President, based on a determination by the President that the exclusion is necessary and warranted by conditions of good administration.

3. DEFINITIONS

Terms used in this Directive are defined in Enclosure 1.

4. POLICY

It is DoD policy that:

4.1. All NAFI employees, former employees, or applicants for appointment to positions as such employees (hereafter referred to as "applicants") shall be encouraged to report violations of law, rule, or regulation; mismanagement; a gross waste of funds; an abuse of authority; or a substantial or specific danger to public health or safety; and to file complaints of reprisal with the IG DoD when such reprisals occur.

4.2. All NAFI employees, former employees, or applicants shall be free from reprisal in making protected disclosures, and their confidentiality shall be protected pursuant to section 1587 of Reference (b) and title 5, United States Code, appendix, "Inspector General Act of 1978," as amended, of Reference (c).

4.3. No appropriated fund civilian or NAFI employee or member of the Armed Forces who has authority to take, direct others to take, recommend, or approve any personnel action shall, with respect to such authority, take or fail to take a personnel action with respect to any NAFI employee, former employee, or applicant as a reprisal for making a protected disclosure.

4.4. Any violation of paragraph 4.3. by a person subject to chapter 47, Uniform Code of Military Justice (U.C.M.J.) of Reference (b) is punishable as a violation of section 892 (Article 92 of the U.C.M.J.) of Reference (b). Appropriated fund civilian employees of the Department of Defense who violate paragraph 4.3. may be subject to disciplinary or adverse actions for misconduct pursuant to chapters 43, 75, and 99 of Reference (c) or to other disciplinary action. The NAFI employees of the Department of Defense who violate paragraph 4.3. may be subject to disciplinary or adverse actions pursuant to DoD 1401.1-M (Reference (d)).

5. RESPONSIBILITIES

5.1. The IG DoD shall:

5.1.1. Receive complaints of reprisal by NAFI employees, former employees, or applicants, and expeditiously determine whether there is sufficient evidence to warrant an investigation.

5.1.2. Notify the NAFI employee, former employee, or applicant, and the Director, Administration and Management (DA&M), OSD, if the IG DoD determines that an investigation will not be conducted.

5.1.3. Conduct an investigation if it has been determined that investigation of a complaint of reprisal is warranted. Upon completion of the investigation, provide the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) and the DA&M with a report of findings of fact, conclusions, and recommendations.

5.1.4. Protect the confidentiality of NAFI employees, former employees, or applicants making protected disclosures unless the IG DoD determines that disclosure of the employee's, former employee's, or applicant's identity is necessary to resolve the complaint(s).

5.1.5. Ensure that matters reported by NAFI employees, former employees, or applicants in the underlying protected disclosure have been adequately addressed.

5.2. The DA&M shall have the authority and responsibility to:

5.2.1. Order a stay of a personnel action, when it is determined there are reasonable grounds to believe that a personnel action was taken as reprisal for making a protected disclosure.

5.2.2. Adjudicate complaints of reprisal, based on reports submitted by the IG DoD, as the final adjudicative authority within the Department of Defense.

5.2.3. Direct appropriate corrective action. The authority to direct corrective action may not be further delegated.

5.2.4. Recommend appropriate disciplinary action.

5.2.5. Notify the NAFI employee, former employee, or applicant in writing of the adjudication determinations concerning the employee's or applicant's complaint of reprisal.

5.2.6. Protect the confidentiality of NAFI employees, former employees, or applicants making protected disclosures unless the disclosure of the identity of the employee, former employee, or applicant is necessary to carry out the DA&M responsibilities under this Directive.

5.3. The Heads of the DoD Components shall:

5.3.1. Ensure that NAFI employees, former employees, or applicants making disclosures of information the employee or applicant reasonably believes evidences a violation of law, rule, or regulation; mismanagement; a gross waste of funds; an abuse of authority; or a substantial or specific danger to public health or safety; or any reprisal, are advised of their right to submit complaints directly to the IG DoD and of the procedures for doing so.

5.3.2. Protect the confidentiality of NAFI employees, former employees, or applicants making protected disclosures, unless a responsible official within the DoD Component determines that disclosure of the employee's, former employee's, or applicant's identity is necessary to resolve the complaint(s) and such disclosure is permitted by law.

5.3.3. Ensure that complaints of reprisal received from NAFI employees, former employees, or applicants are forwarded to the IG DoD.

5.3.4. Implement the corrective action directed by the DA&M and provide the DA&M and the IG DoD with a report on compliance.

5.3.5. Consider the DA&M recommendations for disciplinary actions against those responsible for taking unfavorable personnel actions against NAFI employees, former employees, or applicants in reprisal for their protected disclosure.

5.3.6. Disseminate the content of this Directive within their activities to ensure that NAFI employees, former employees, or applicants fully understand the scope and application of the Directive. The information should specify that NAFI employees have the right and are encouraged to disclose directly to the IG DoD suspected violations of law, rule, or regulation; mismanagement; a gross waste of funds; an abuse of authority; or a substantial or specific danger to public health or safety; and any reprisals; and the information also should include procedures for filing complaints with the DoD Component IGs.

6. RELEASABILITY. UNLIMITED. This Directive is approved for public release. Copies may be obtained through the Internet from the DoD Issuances Web Site at http://www.dtic.mil/whs/directives.

7. EFFECTIVE DATE

This Directive is effective immediately.

Gordon England

Enclosures – 2
E1. Definitions
E2. Information Requirements for Submitting a Reprisal Complaint

E1. ENCLOSURE 1

DEFINITIONS

The definitions listed below only apply to this Directive, unless otherwise noted.

E1.1. Abuse of Authority. An arbitrary and capricious exercise of power by an employee or military member that adversely affects the rights of any person, or that results in personal gain or advantage to himself or herself or to preferred other persons.

E1.2. Corrective Action. Any action permitted by law that is deemed necessary by the DA&M, OSD, to make the complainant whole, such as reinstatement, promotion, reassignment, back pay; or changes in DoD Component rules, regulations, or practices.

E1.3. Disciplinary Action. An adverse action against an offending employee or military member using the applicable adverse action procedures; or referral to the U.S. Attorney General of any evidence of criminal violation.

E1.3.1. A person subject to chapter 47 of Reference (b) is punishable under section 892 (Article 92) of Reference (b).

E1.3.2. Civilian-appropriated fund employees of the Department of Defense are subject to disciplinary or adverse actions under chapter 43, 75, or 99 of Reference (c).

E1.3.3. The NAFI employees of the Department of Defense are subject to disciplinary or adverse actions pursuant to Reference (d).

E1.4. Gross Waste of Funds. Unnecessary expenditure of substantial sums of money, or a series of instances of unnecessary expenditures of smaller amounts.

E1.5. Mismanagement. Wrongful or arbitrary and capricious actions that may have an adverse effect on the efficient accomplishment of the Agency's mission.

E1.6. NAFI Employee. A civilian employee who is paid from nonappropriated funds of Army and Air Force Exchange Service, Navy Exchange Service Command, Marine Corps Exchanges, or any other instrumentality of the United States under the jurisdiction of the Armed Forces, which is conducted for the comfort, pleasure, contentment, or physical or mental improvement of members of the Armed Forces. Such term includes a civilian employee of a support organization within the Department of Defense or a Military Department, such as the Defense Finance and Accounting Service, who is paid from nonappropriated funds on account of the nature of the employee's duties.

E1.7. Personnel Action. (with respect to a NAFI employee, former employee, or applicant):

E1.7.1. An appointment;

E1.7.2. A promotion;

E1.7.3. A disciplinary or corrective action;

E1.7.4. A detail, transfer, or reassignment;

E1.7.5. A reinstatement, restoration, or reemployment;

E1.7.6. A decision concerning pay, benefits, or awards, or a decision concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, or other action described in this section; and

E1.7.7. Any other significant change in duties or responsibilities that is inconsistent with the employee's salary or grade level.

E1.8. Protected Disclosure

E1.8.1. A disclosure of information by an employee, former employee, or applicant that the employee or applicant reasonably believes evidences a violation of any law, rule, or regulation; mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if the information is not specifically required by or pursuant to Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

E1.8.2. A disclosure by an employee, former employee, or applicant to any civilian employee or member of the Armed Forces, designated by law or the Secretary of Defense, to receive disclosures of information described in subparagraph E1.8.1., which the employee, former employee, or applicant making the disclosure reasonably believes evidences a violation of any law, rule, or regulation; mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.

E1.9. Reprisal. Taking or failing to take a personnel action because of a protected disclosure of information.

E2. ENCLOSURE 2

INFORMATION REQUIREMENTS FOR SUBMITTING A REPRISAL COMPLAINT

E2.1. Complaints. The NAFI employees, former employees, or applicants may submit complaints of reprisal (as defined in Enclosure 1, section E1.9.) to the IG DoD or other DoD Component IGs. Complaints of reprisal made to DoD Component IGs other than the IG DoD shall be forwarded promptly to the IG DoD.

E2.2. Filing Address. Complaints of reprisal to the IG DoD may be made by telephone at (800) 424-9098, by email at hotline@dodig.mil, or by letter addressed as follows:

Inspector General of the Department of Defense
ATTENTION: Defense Hotline
1900 Defense Pentagon
Washington, DC 20301-1900

E2.3. Content of Complaint of Reprisal. To submit a reprisal complaint and assist in the review of the complaint; employees, former employees, and applicants making complaints under this Directive should provide as much of the following information as possible:

E2.3.1. Full name, grade, duty title, organization, duty location, telephone numbers, and mailing address for receipt of correspondence from the IG DoD.

E2.3.2. A copy of the protected disclosure and any reply received. If unavailable, information regarding the protected disclosure should include the date the protected disclosure was made and to whom; the content of the protected disclosure; and whether, when, and by whom the matter was investigated.

E2.3.3. The personnel action taken or withheld. Provide available documentation about the personnel action or describe the type of personnel action and the date such action occurred or should have occurred.

E2.3.4. To the extent possible, the full name, rank/grade, duty title, organization, duty location, and telephone numbers of the officials believed to be responsible for taking, failing to take, or influencing a personnel action, or withholding a favorable personnel action alleged to be reprisal. Provide any corroborating evidence that may indicate that any official involved in the personnel action knew of the protected disclosure before taking the action.

E2.3.5. For additional guidance see the DoD Hotline Web site at www.dodig.mil/hotline/index.html.