

Office of the Secretary of Defense

§ 145.3

(3) Any performance at which admission is charged normally would be considered a public performance.

(c) Government audio and video duplicating equipment and appropriated funded playback equipment may not be used for reproduction of copyrighted sound or video recordings.

§ 142.5 Responsibilities.

Heads of DoD Components shall establish procedures to comply with this Directive and shall provide necessary local guidance and legal interpretation.

PART 145—COOPERATION WITH THE OFFICE OF SPECIAL COUNSEL OF THE MERIT SYSTEMS PROTECTION BOARD

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AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 133.

SOURCE: 51 FR 17178, May 9, 1986, unless otherwise noted.

§ 145.1 Purpose.

This part establishes policy, assigns responsibilities, and prescribes procedures for cooperation with the Office of Special Counsel (OSC) of the Merit Systems Protection Board (MSPB) in fulfilling the responsibilities of the Special Counsel under Pub. L. 95-454 and 5 CFR 1201 and 1250 to conduct investigations of alleged prohibited personnel practices and to ensure the investigation of other allegations of improper or illegal conduct referred to the Department of Defense by the OSC. This part provides internal guidance to DoD officials, and does not establish an independent basis for any person or organization to assert a right, benefit, or privilege.

§ 145.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Office of the Joint Chiefs of Staff (OJCS), the In-

spector General, Department of Defense (IG, DoD) and the Defense Agencies (hereafter referred to collectively "as DoD Components").

(b) The provisions of this part that relate to prohibited personnel practices do not apply to the Defense Intelligence Agency (DIA) or the National Security Agency (NSA), as prescribed by 5 U.S.C. 2302(a)(2)(C)(ii.).

(c) This part does not restrict the IG, DoD, in coordinating investigative efforts on individual cases with the OSC where concurrent jurisdiction exists.

§ 145.3 Definitions.

Improper or illegal conduct. (a) A violation of any law, rule, or regulation in connection with Government misconduct; or

(b) Mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Office of the Secretary of Defense (OSD). (a) The immediate offices of the Secretary, the Deputy Secretary, the Assistant Secretaries, Assistants to the Secretary, and other officials serving the Secretary of Defense directly.

(b) The field activities of the Secretary of Defense.

(c) The Organization of the Joint Chiefs of Staff.

(d) The Unified and Specified Commands.

Personnel action. (a) An appointment.

(b) A promotion.

(c) An adverse action under 5 U.S.C. 7501 *et seq.* or other disciplinary or corrective action.

(d) A detail, transfer, or reassignment.

(e) A reinstatement.

(f) A restoration.

(g) A reemployment.

(h) A performance evaluation under 5 U.S.C. 4301 *et seq.*

(i) A decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action.

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

Prohibited personnel practice. Action taken by an employee who has authority to take, direct others to take, recommend, or approve any personnel action:

(a) That discriminates for or against any employee or applicant for employment on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation, as prohibited by certain specified laws (see 5 U.S.C. 2302(b)(1)).

(b) To solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests, or is under consideration for, any personnel action, unless the recommendation or statement is based on the personal knowledge or records of the person furnishing it, and consists of an evaluation of the work performance, ability, aptitude, or general qualifications of the individual, or an evaluation of the character, loyalty, or suitability of such individual.

(c) To coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity.

(d) To deceive or willfully obstruct any person with respect to such person's right to compete for employment.

(e) To influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment.

(f) To grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment.

(g) To appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in 5 U.S.C. 3110) of the employee if the position is in the agency in which the employee is serving as a public official (as defined in 5 U.S.C. 3110) or over

which the employee exercises jurisdiction or control as an official.

(h) To take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for being a whistleblower. (See whistleblower)

(i) To take or fail to take a personnel action against an employee or applicant for employment as a reprisal for the exercise of any appeal right granted by law, rule, or regulation.

(j) To discriminate for or against any employee or applicant for employment on the basis of conduct that does not adversely affect the performance of the employee or applicant or the performance of others.

(k) To take or fail to take any other personnel action if the taking of, or failure to take, such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in 5 U.S.C. 2301.

Whistleblower. A present or former Federal employee or applicant for Federal employment who discloses information he or she reasonably believes evidences:

(a) A violation of any law, rule, or regulation.

(b) Mismanagement, a gross waste of funds, or an abuse of authority.

(c) A substantial or specific danger to public health or safety.

(d) Such disclosure qualifies if it is not specifically prohibited by statute and if such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs.

(e) Where the information disclosed affects only the personal situation of the complainant, it is generally to be regarded as an allegation of a prohibited personnel practice or violation of other civil service law, rule, or regulation, and the complainant will not be considered a whistleblower.

§ 145.4 Policy.

It is DoD policy that:

(a) Civilian personnel actions taken by DoD management officials, civilian and military, shall conform to laws and regulations implementing established merit system principles and must be

free of any prohibited personnel practices, as described in 5 U.S.C. 2302 and § 145.3 of this part.

(b) It is the responsibility of each DoD management official to take vigorous corrective action and, when appropriate, to initiate disciplinary measures when prohibited personnel practices occur.

(c) DoD Components shall cooperate with the Office of Special Counsel by:

(1) Promoting merit system principles in civilian employment programs within the Department of Defense.

(2) Investigating and reporting on allegations of improper or illegal conduct forwarded to the Component by the OSC pursuant to 5 U.S.C. 1206(b) (2) or (3).

(3) Facilitating orderly investigation by the OSC of alleged prohibited personnel practices and other matters assigned for investigation to the OSC by law, such as the Freedom of Information Act and the Hatch Act.

(d) DoD Components shall cooperate with the OSC by providing appropriate assistance and information to its representatives during their investigations and by furnishing to the OSC investigators copies of releasable documents requested under the authority of the Civil Service Reform Act of 1978, 5 CFR 1250, the Privacy Act, and Civil Service Rule V.

(e) Close coordination between DoD and OSC personnel during an OSC investigation is encouraged to eliminate duplication of effort, and to avoid unnecessary delay in initiating, when appropriate, corrective or disciplinary action. This coordination shall be conducted in full recognition of the independent statutory basis for the OSC, as provided in Pub. L. 95-454 and of the responsibilities of the Department of Defense.

(f) OSC investigative requests involving classified information shall be accorded special attention and prompt consideration under existing administrative procedures.

(g) When OSC and a DoD Component or an employee assigned DoD counsel are engaged in litigation, release of information shall be accomplished pursuant to MSPB rules of discovery (5 CFR 1201, subpart B.).

§ 145.5 Responsibilities.

(a) The *Secretaries of the Military Departments* and the *Director, Defense Logistics Agency (DLA)*, shall prescribe implementing documents to ensure that:

(1) The policies, standards, and procedures set forth in this part are administered in a manner that encourages consistency in responding to investigations of alleged prohibited personnel practices.

(2) Alleged illegal or improper conduct referred to a Military Department or the DLA by the OSC or by OSD is carefully investigated.

(3) There is full cooperation with the IG, DoD, and the General Counsel, Department of Defense (GC, DoD), including assignment of military and civilian attorneys to represent employees suspected or accused by the OSC of committing a prohibited personnel practice or an otherwise illegal or improper act.

(b) The *General Counsel, Department of Defense* (GC, DoD) shall provide overall legal guidance, whether by the issuance of regulations or otherwise, on all issues concerning cooperation with the OSC. This authority extends to:

(1) Ensuring that DoD legal counsel is assigned upon request to represent a DoD employee suspected or accused by the OSC of committing a prohibited personnel practice or an illegal or improper act when the act complained of was within the scope of the employee's official responsibilities and such representation is in the interest of the Department of Defense; or, in unusual situations, that outside legal counsel is engaged where the use of DoD counsel would be inappropriate, and the same conditions are satisfied.

(2) Providing DoD legal counsel to seek intervention for the purpose of representing the interests of OSD or a Defense agency (other than the DLA) in an MSPB hearing resulting from charges of misconduct against an employee of OSD or a Defense agency, under the authority of the Civil Service Reform Act of 1978.

(3) Seeking the assistance of the Department of Justice in responding to requests by employees for legal representation in obtaining judicial review of an order by the MSPB, under 5 U.S.C. 1207.

(4) Modifying § 145.3 and Appendix to this part and issuing supplementary instructions concerning all aspects of DoD cooperation with the OSC, including instructions on OSC investigations of allegedly arbitrary and capricious withholding of information under the Freedom of Information Act or violations of the Hatch Act.

(5) Reviewing for adequacy and legal sufficiency with the IG, DoD, each report of an investigation that must be personally reviewed by the Secretary or Deputy Secretary of Defense on action taken or to be taken in response to an OSC finding of reasonable cause to believe there has been a violation of law, rule, or regulation, not including a prohibited personnel practice or allegation referred to the Attorney General of the United States for appropriate action.

(c) *The Inspector General, Department of Defense* (IG, DoD) shall:

(1) Investigate, or cause to be investigated, as appropriate, any complaint referred to the Department of Defense by OSC.

(2) Coordinate, where feasible, investigative efforts by DoD Components and the OSC, with particular emphasis on those conducted or initiated by action of the OSC.

(3) Submit the results of any investigation conducted under this part to the appropriate General Counsel.

(d) *The Deputy Assistant Secretary of Defense (Administration)* (DASD(A)) shall serve as the Senior Management Official, as described in § 145.6(b) concerning allegations by the OSC of prohibited personnel practices or other illegal or improper acts in the OSD.

(e) *The General Counsels of the Military Departments and the General Counsel of the Defense Logistics Agency* shall have the same authority for their respective Components as given to the General Counsel, DoD, under paragraphs (b) (1) and (2) of this section.

§ 145.6 Procedures.

(a) *Allegations of improper or illegal conduct received from the OSC under 5 U.S.C. 1206(b)(2), (3), or (c)(3).* (1) Allegations of improper or illegal conduct referred by the OSC to the Secretary of Defense or to a Defense agency (other

than the DLA) shall be forwarded to the IG, DoD.

(2) Allegations of improper or illegal conduct referred to a Military Department or to the DLA by the OSC shall be forwarded to the General Counsel of that Component.

(3) Upon receipt of a referral under paragraph (a) (1) or (2) of this section IG, DoD, or the GC of the Component concerned, as appropriate, shall ensure compliance with the Civil Service Reform Act of 1978 by obtaining a suitable investigation of an allegation, including compliance with time limits for reporting results of the investigation and personal review of the report by the head of the Component when required.

(4) Copies of each allegation referred under paragraph (a)(2) shall be forwarded by the General Counsel concerned to the IG, DoD.

(b) *OSC Investigations of Prohibited Personnel Practices.* (1) The head of each DoD Component shall designate a Senior Management Official to:

(i) Serve as a point of contact in providing assistance to the OSC in conducting investigations of alleged prohibited activities before any designation of an attorney of record for the Component or individual respondent for matters in litigation.

(ii) Monitor those investigations.

(iii) Ensure that appropriate Component personnel are fully apprised of the nature and basis for an OSC investigation, as well as the rights and duties of Component personnel in regard to such investigations.

(iv) Ensure that any corrective or disciplinary action considered appropriate because of facts disclosed by such an investigation is accomplished under paragraph (b)(2), in a timely manner.

(2) The designated Senior Management Official shall have authority to:

(i) Refer to responsible officials recommendations by the OSC for corrective action.

(ii) Seek OSC approval of proposed disciplinary action against an employee for an alleged prohibited personnel practice or illegal or improper act under investigation by the OSC when it is determined that such discipline is warranted.

(iii) Ensure that disciplinary action against an employee adjudged at fault following completion of an OSC investigation has been considered to avoid the need for a proceeding before the MSPB.

(iv) Ensure that information concerning members of the Armed Forces who are found by the Component to have committed a prohibited personnel practice or other violation of this Directive in the exercise of authority over civilian personnel is referred to appropriate military authority.

(3) The Senior Management Official shall:

(i) Establish a system under which an employee is identified to serve as the Liaison Officer for any OSC investigator who may initiate an investigation at a facility, base, or installation for which the employee is assigned liaison duties. It shall be the responsibility of the Liaison Officer to:

(A) Assist the OSC investigator.

(B) Ensure that all OSC requests for documents are in writing.

(C) Process such requests, as well as all requests for interviews.

(ii) Determine, to the extent practicable, whether an investigation is being, or has been, conducted that replicates in whole or in part the proposed or incomplete investigation by the OSC, and convey that information to the OSC whenever this might avoid redundant investigative effort.

(iii) Inform the General Counsel of the Component concerned of any OSC investigation and consult with the General Counsel on any legal issue related to an OSC investigation.

(iv) Ensure that Component personnel involved are given timely legal and policy advice, through arrangements effected by the Liaison Officer, on the nature and basis for an OSC investigation, the authority of the OSC, and the rights and duties of Component personnel, including those set forth in Appendix.

(v) Inform the IG, DoD, of any OSC investigation of an alleged prohibited personnel practice that is identified as having resulted from a whistleblower complaint or involves an allegation of otherwise illegal or improper conduct.

APPENDIX TO PART 145—LEGAL REPRESENTATION

1. An employee or member of the Armed Forces asked to provide information (testimonial or documentary) to the OSC in the course of an investigation by that office may obtain legal advice from DoD attorneys, both civilian and military, on that employee's or members's rights and obligations. This includes assistance at any interviews with OSC investigators. However, the attorney-client relationship shall not be established unless the employee is suspected or accused by the OSC of committing a prohibited personnel practice or other illegal or improper act and has been assigned DoD counsel.

2. An employee who believes that he or she is suspected or has been accused by the OSC of committing a prohibited personnel practice or other illegal or improper act may obtain legal representation from the Department of Defense under the conditions prescribed in §145(b)(1) of this part, except as provided in section 7, below. The attorney assigned shall be a military member or employee from another Component whenever an attorney from the same Component is likely to face a conflict between his or her ethical obligation to the employee client and to the Component employer, and in any case where the suspected or accused employee has requested representation from another Component. Outside legal counsel may be retained by the Component on behalf of the employee only under unusual circumstances and only with the personal approval of the General Counsel of the Department of Defense.

3. The General Counsel responsible for authorizing representation shall determine whether a conflict is liable to occur if an attorney from the same Component is assigned to represent the employee and, in that case or in a case in which the suspected or accused employee has requested representation from another Component, shall seek the assistance of another General Counsel in obtaining representation from outside the Component. The General Counsels of the Military Departments and the DLA shall ensure the availability of appropriately trained counsel for assignment to such cases.

4. To obtain legal representation the employee:

a. Must request legal representation, in writing, together with all process and pleadings served, and explain the circumstances that justify DoD legal assistance.

b. Indicate whether he or she has retained legal counsel from outside the Department of Defense.

c. Obtain a written certification from his or her supervisor that the employee was acting within the scope of his or her official duties, and that no adverse or disciplinary personnel action against the employee for the

conduct being investigated by the OSC has been initiated by the Component.

5. Employee requests for legal representation must be approved by the General Counsel, DoD, for employees of OSD or a Defense Agency (other than the DLA), or by the General Counsel of a Military Department or the General Counsel of the DLA for employees of those Components.

6. The conditions of legal representation must be explained to the accused employee in writing and accepted in writing by that employee.

7. DoD resources may not be used to provide legal representation for an employee with respect to a DoD disciplinary action against the employee for committing or participating in a prohibited personnel practice or for engaging in illegal or improper conduct, regardless of whether that participation or conduct is also the basis for disciplinary action proposed by the OSC.

8. After approval of an employee's request, under section 4, above, a DoD attorney shall be assigned (or, in unusual circumstances, outside counsel retained) as the employee's representative in matters pending before the OSC or MSPB. This approval may be limited to representing the employee only with respect to some of the pending matters if other specific matters of concern to the OSC or MSPB do not satisfy the requirements of this Directive.

9. An attorney-client relationship shall be established and continued between the suspected or accused employee and assigned DoD counsel.

10. In representing a DoD employee under this part, a DoD attorney designated counsel for the employee shall act as a vigorous advocate of the employee's individual legal interests before the OSC or MSPB; the attorney's professional responsibility to the Department of Defense and his or her employing Component will be satisfied by fulfilling this responsibility to the employee. Legal representation may be terminated only with the approval of the General Counsel who authorized representation, and normally only on the basis of information not available at the time the attorney was assigned.

11. The attorney-client relationship may be terminated if the assigned DoD counsel for the employee determines, with the approval of the General Counsel who authorizes representation, that:

a. The employee was acting outside the scope of his or her official duties when engaging in the conduct that is the basis for the OSC investigation or charge.

b. Termination of the professional representation is not in violation of the rules of professional conduct applicable to the assigned counsel.

12. The DoD attorney designated counsel may request relief from the duties of representation or counseling without being re-

quired to furnish explanatory information that might compromise the assurance to the client of confidentiality.

13. This part authorizes cognizant DoD officials to approve a represented employee's request for travel, per diem, witness appearances, or other departmental support necessary to ensure effective legal representation of the employee by the designated counsel.

14. An employee's participation in OSC investigations, MSPB hearings, and other related proceedings shall be considered official departmental business for time and attendance requirements and similar purposes.

15. The following advice to employees questioned during the course of an OSC investigation may be appropriate in response to the most frequent inquiries:

a. An employee may decline to provide a "yes" or "no" answer in favor of a more qualified answer when this is necessary to ensure accuracy in responding to an OSC interviewer's questions.

b. Requests for clarification of both questions and answers are appropriate to avoid misinterpretation.

c. Means to ensure verification of an interview by OSC investigators are appropriate, whether the employee is or is not accompanied by a legal representative. Tape recorders may only be used for this purpose when:

(1) The recorder is used in full view.

(2) All attendees are informed.

(3) The OSC interrogator agrees to the tape recording of the proceeding.

d. Any errors that appear in a written summary of an interview prepared by the interviewer should be corrected before the employee signs the statement. The employee is not required to sign any written summary that is not completely accurate. An employee may make a copy of the summary for his or her own use as a condition of signing.

PART 147—ADJUDICATIVE GUIDELINES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED INFORMATION

Subpart A—Adjudicative Guidelines

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