



U.S. OFFICE OF SPECIAL COUNSEL

U.S. Office of Special Counsel  
Report of Prohibited Personnel Practice  
OSC File No. MA-18-5908  
(U.S. Department of Army/ [REDACTED] )<sup>1</sup>

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<sup>1</sup> This report represents the deliberative attorney work product of the U.S. Office of Special Counsel (OSC) and is privileged and confidential. Any release of information beyond persons specifically designated by OSC to have access to its contents is prohibited. Refer all Freedom of Information Act (FOIA) inquiries regarding this report to OSC's FOIA Officer at (202) 804-7000.

## I. INTRODUCTION

This Report by the U.S. Office of Special Counsel (OSC) presents the investigative findings in OSC File No. MA-18-5908, a complaint of prohibited personnel practices filed by ██████████. ██████████ is a veteran and former probationary employee for the U.S. Department of the Army Geospatial Intelligence Battalion (the Battalion) at the Army Intelligence and Security Command (INSCOM) located at Fort Belvoir, Virginia.

The Army terminated ██████████, a probationary human resources specialist, a month after he disclosed that the Battalion violated federal regulations by failing to accurately account for the duty status and location of its personnel. ██████████ disclosure to the National Ground Intelligence Center (Brigade) came after he observed constant disregard for regulatory personnel accountability requirements by both the Battalion and the Army Departmental Requirements Office (ADRO). For instance, ADRO had recently reported a service member as present for duty when he was in fact deceased.

OSC's investigation found credible evidence to support ██████████ *prima facie* claim of whistleblower retaliation under 5 U.S.C. § 2302(b)(8). In fact, the evidence shows that the Army terminated ██████████ *because* of his protected disclosure, as it cited his contact with the Brigade in its termination letter. Our investigation also found that the Army cannot show by clear and convincing evidence that it would have terminated ██████████ absent his protected disclosure. The Army's actions do not survive scrutiny: the Army did not contemplate, much less initiate, ██████████ termination until he blew the whistle.

OSC finds that Army officials engaged in prohibited personnel practices in violation of section 2302(b)(8). Full corrective action is warranted, including immediate rescission of ██████████ termination as well as any additional remedial action or appropriate measures contemplated in the statute. OSC further recommends training for all relevant military personnel who supervise civilians. Given the facts of this matter, the Army may also wish to consider appropriate discipline against involved officials.

## II. FACTUAL BACKGROUND

### A. ██████████ Highlights Personnel Accountability Regulatory Requirements

The Army appointed ██████████ to a GG-12 Excepted Service position as a human resources specialist-Military (S-1) for the Battalion on April 15, 2018. Charged with coordinating personnel services, ██████████ worked under the immediate supervision of Battalion Executive ██████████.<sup>2</sup> Battalion Commander Lieutenant Colonel ██████████ became his second-line supervisor in July 2018.<sup>3</sup>

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<sup>2</sup> ██████████ departed the Battalion in 2019 and is currently employed at INSCOM headquarters.

<sup>3</sup> ██████████ departed the Battalion in 2020.



Upon his arrival, ██████████ observed that the Battalion was not submitting a daily personnel status report (PERSTAT) to the Brigade, as required by Army MILPER Message 17-184.<sup>4</sup> In April 2018, ██████████ discussed his concerns with the Brigade S-1, the principal staff officer responsible for personnel support. As a result, the Battalion began submitting a weekly report.

To prepare data for the report, the Battalion required each branch to update the status of its personnel in the PERSTAT portal daily by 0900. Non-commissioned officers (NCOs) and platoon sergeants (PSGs) were responsible for the daily portal updates, and Branch Chief Captain ██████████ handled ADRO's personnel reporting. Every Friday, Sergeant ██████████ extracted the information from the PERSTAT portal, entered it into a spreadsheet, and submitted the spreadsheet to the Brigade. Personnel reporting was not in ██████████ performance objectives, but he prepared the weekly report whenever SGT ██████████ was out of the office.

Throughout summer 2018, ██████████ reminded management that personnel accountability was a priority and a "no fail mission," per Army regulation (AR) 600-8-6. MAJ ██████████ recalled that ██████████ repeatedly raised concerns about lapses in personnel accountability. In response, the Battalion reminded staff to update the PERSTAT portal daily, and MAJ ██████████ reviewed reporting requirements with three branches, including ADRO. MAJ ██████████ acknowledged that ADRO "was a problem" and that it often "failed" to update the portal.

In August 2018, after CPT ██████████ falsely reported former Chief Warrant Officer 2 ██████████ as present for duty when CW2 ██████████ was missing and deceased at home, ██████████ again reminded the Battalion of its reporting requirements. But MAJ ██████████ testified that his concerns went ignored.

**B. ██████████ Discloses that the Battalion Failed to Account for All Personnel**

██████████ began preparing the weekly PERSTAT report on August 16, 2018. Agency records show that ██████████ emailed First Sergeant (1SGT) ██████████, who was responsible for ensuring that the NCOs, PSGs, and CPT ██████████ accounted for their personnel. In his email, ██████████ wrote that he "urgently" needed 1SGT ██████████ help, because three Soldiers—CW4 ██████████, SGT ██████████, and SGT ██████████—were not listed (or accounted for) in the portal. Emphasizing the importance of this task, ██████████ underscored that "[d]aily Personnel Accountability is a no fail mission for us in the BN [Battalion] S-1."

The next day, ██████████ still lacked a reportable location for eight of the 89 individuals in the portal. He promptly emailed the PSGs responsible for the updates, copying 1SGT ██████████ and MAJ ██████████, reminding them that he would submit the PERSTAT report to Brigade by 1000. In his email, he implored them to "ensure every individual assigned military personnel duty status

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<sup>4</sup> Military personnel (MILPER) messages are utilized to disseminate information regarding procedural guidance and information to the military community. MILPER Message 17-184 communicates that "daily status reports must document the history of a Soldier's duty status on any specific duty date."



has been updated.” ██████████ meanwhile retrieved DA Form 31s for all personnel on leave and/or pass, allowing him to update the status of four (4) Soldiers. Noticing later that LTC ██████████ status had still not been updated, ██████████ contacted MAJ ██████████, who was responsible for updating the PERSTAT for the command group. Based on his efforts, ██████████ confirmed the location of all but three Soldiers in ADRO—CPT ██████████, CW3 ██████████, and CW4 ██████████—putting the Brigade at 97% accountability, still short of the 100% requirement. ██████████ then called CPT ██████████ and, unable to reach him, contacted an ADRO sergeant as a final step. Even after these efforts, ██████████ could not procure updates for the three Soldiers, who remained unaccounted for.

Concerned about the persistent issues with personnel accountability, specifically within ADRO, and the recent incident involving the deceased Soldier, ██████████ then made what he described as the “hard, but right, decision” to disclose the Battalion’s accountability problems: ██████████ updated the status of CPT ██████████, CW3 ██████████, and CW4 ██████████ to “unknown” and emailed the PERSTAT report to the Brigade.

██████████ knew that the report would “raise a red flag” but thought that it was important to alert the Brigade to the accountability lapses and perhaps prompt the Battalion’s compliance with its regulatory requirements. ██████████ believed that the repeated failures to accurately account for personnel violated AR 600-8-6, Section 1-24(b), and that it would be improper to speculate or falsify the three Soldiers’ whereabouts in the report.

Shortly after receiving ██████████ email to the Brigade, MAJ ██████████ directed him to recall the message and questioned his decision to send a report identifying lapses after “they just got in trouble with Brigade” for reporting a deceased Soldier as present for duty. MAJ ██████████ testified that ██████████ decision was a turning point, one that led her to believe he was “concerned about teaching us a lesson about accountability.”

**C. Brigade Expresses Extreme Concern at Personnel Accountability Failures, and MAJ ██████████ Advises ██████████ that his Disclosure Embarrassed the Battalion**

On August 21, the Brigade S-1 informed MAJ ██████████ that the deficient PERSTAT report led the Brigade Commander to change the PERSTAT policy—now requiring a report daily, rather than weekly—and that the Commander was perturbed by the Battalion’s reporting failure. To remediate, MAJ ██████████ notified the command that 100% of the Battalion’s personnel needed to be accounted for daily by 0900, and LTC ██████████ reassigned CPT ██████████, due to his continued failure to account for personnel.

Later that day, MAJ ██████████ met with ██████████. According to the memorandum for the record (MFR) documenting the meeting, MAJ ██████████ stated that the Brigade Commander was “extremely concerned at our failure of executing mission command.” She also noted that while she recognized that there was “certainly a failure at the company command level to ensure that the PERSTAT was accurate,” ██████████ disclosure resulted in “failing our new Battalion



Commander to her Brigade Commander and frankly, embarrassing our unit as a whole.”

██████████ disagreed; he explained that he provided the report to “make a point” and said that he did not “babysit” the unit. Questioned on ██████████ intended point, MAJ ██████████ testified: “[I]t was probably because there was [sic] the problems, especially with ADRO not accounting for people, and he actually tried to address it.”

**D. MAJ ██████████ Contacts the Civilian Personnel Advisory Center to Discuss Terminating ██████████**

MAJ ██████████ testified that she was frustrated and angry. She emailed the Civilian Personnel Advisory Center (CPAC) for assistance, writing that the entire command was “livid” with ██████████. MAJ ██████████ singled out ██████████ disclosure, writing that he “purposefully reported three military members AWOL to BDE to ‘make a point’ because he did not ‘babysit’ the unit.” To support ██████████ termination, MAJ ██████████ then generated a document of purported concerns. MAJ ██████████ testified that she never considered terminating ██████████ until he made his disclosure.

**E. The Army Terminates ██████████ during His Probationary Period and Specifically Cites his Disclosure to Brigade**

On September 19, 2018, the Army terminated ██████████ during his probationary period. The termination notice characterizes ADRO’s PERSTAT reporting failure as ██████████ fault, “a failure to exercise due diligence.” In MAJ ██████████ memorandum recommending ██████████ termination, she accused him of falsely reporting three Soldiers as status “unknown” in an official report. In her sworn OSC testimony, however, she recognized that ██████████ did *not* make a false report and that the report should not have been a basis for termination. She also testified that she “didn’t think ██████████ had done enough wrong to be terminated” and clarified her positions on the other charges that the Army included in the termination notice:

- On the charge of sleeping on duty: MAJ ██████████ did not view ██████████ dozing off as an issue when it happened and, therefore, decided not to counsel him. She only included the charge in the memorandum recommending ██████████ termination because she claims she thought she was required to list every possible negative regarding him.
- On the charge of violating a security protocol: MAJ ██████████ testified that she “did not consider the incident to be ██████████ fault” when it occurred and therefore simply made an on-the-spot correction. The reason for its inclusion in the termination recommendation is the same as that for the sleeping charge.
- On the charge of not integrating a Soldier onto a promotion list: After reviewing the regulatory language that ██████████ relied upon in recommending withholding Specialist ██████████ promotion, she was wrong to conclude that ██████████ mishandled the promotion.
- On the charge of missing a training: She would not have relied on this charge alone to support termination. ██████████ was not the only civilian to miss the afternoon session, and OSC received conflicting testimony on whether the training was mandatory.



- On the charge of rude and discourteous interactions: MAJ ██████ never reported rude or discourteous behavior from ██████ until *after* his August 17 disclosure, when the Brigade S-1 shop suddenly began griping about him. MAJ ██████ had dismissed prior isolated complaints about ██████ demeanor because they had come only from 1SGT ██████, known to be quarrelsome and disrespectful towards staff.

### III. LEGAL ANALYSIS

#### A. Army Officials Retaliated Against ██████ in Violation of Section 2302(b)(8)

To establish whistleblower retaliation under section 2302(b)(8), OSC must show by preponderant evidence that: (1) ██████ made a protected disclosure; (2) the Army took, failed to take, or threatened a personnel action; and (3) the protected disclosure was a contributing factor in the personnel action. *See* 5 U.S.C. § 2302(b)(8). If OSC proves its legal elements, the burden shifts to the Army to produce clear and convincing evidence that it would have taken the same personnel action in the absence of ██████ protected disclosure.

##### 1. ██████ Made a Protected Disclosure

██████████ made a protected disclosure when he reported three Soldiers' locations as "unknown" as part of the August 17 PERSTAT report. This disclosure is protected because ██████ reasonably believed that he was reporting a violation of laws, rules, or regulations—specifically, that the Battalion had not met its requirement under AR-600-8-6 to account for 100% of assigned personnel.<sup>5</sup> ██████ belief was reasonable because "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by [him] could reasonably conclude that the reported information evidenced an impropriety" identified by section 2302(b)(8). *See Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999).

██████████ belief was supported by his observation of the Battalion's deficient approach to accounting for personnel, evidenced most recently by its submission of a report that listed a deceased Soldier as present. Although updating a Soldier's duty status is a task of great importance for any command, it takes on even greater importance within the intelligence community, where individuals routinely have access to highly classified information. Despite that, the Battalion regularly derogated from its duty to account for 100% of personnel—failing to update personnel even after having recently suffered embarrassment for the same problem, and even after being reminded of this task's importance by ██████ and MAJ ██████ alike.

██████████ disclosure, as well as the surrounding circumstances, implicate a violation of AR-600-8-6. CPT ██████ failure to provide a reportable location on August 17, 2018, for the

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<sup>5</sup> A disclosure of information is protected where the employee reasonably believes it evidences: (1) a violation of law, rule, or regulation; (2) gross mismanagement; (3) a gross waste of funds; (4) an abuse of authority; or (5) a substantial and specific danger to public health or safety. *See* 5 U.S.C. § 2302(b)(8).



three Soldiers, including himself, on its face violated AR-600-8-6. Further, ██████████ specifically cited the regulation in the weeks leading up to his disclosure—including in his many reminder emails about updating the PERSTAT portal. Officials thus readily understood the meaning of ██████████ report of three Soldiers' status as "unknown", including the implicated regulatory violation. "Unknown" signaled that the Battalion still had lapses in personnel accounting, despite ██████████ repeated warnings and ADRO's recent reporting problem. With the PERSTAT report going to the higher command, that problem would now have to be addressed.

2. The Army Took a Personnel Action Against ██████████

The Army terminated ██████████ probationary employment on September 19, 2018, thereby taking a personnel action against him. *See* 5 U.S.C. § 2302(a)(2)(A)(iii).

3. ██████████ Protected Disclosure Contributed to His Termination

The evidence here shows that ██████████ disclosure was a contributing factor in the agency's decision to terminate his employment. Under the "knowledge/timing test," if the official taking a personnel action knew of a protected disclosure and the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action, then one has proven a *prima facie* case of reprisal for whistleblowing. *Redschlag v. Dep't of the Army*, 89 M.S.P.R. 589, ¶ 70 (2001).

Army officials were aware of ██████████ protected disclosure. ██████████ emailed the PERSTAT report to the Brigade S-1 on August 17, 2018. Brigade made note of it and expressed its extreme concern at the reporting failures. MAJ ██████████ spoke with ██████████ about the embarrassment that his disclosure had caused the Battalion. The official who terminated ██████████, LTC ██████████, was also aware of ██████████ protected disclosure because the Brigade addressed it with her in the days after.

The Army moved quickly once ██████████ blew the whistle. Just a week after his disclosure, MAJ ██████████ contacted CPAC to discuss termination; a month later, the Army took its action; and the termination notice specifically cites the protected disclosure to Brigade. Thus, under the knowledge/timing test, OSC has demonstrated a *prima facie* case of retaliation in the agency's decision to terminate ██████████. Ultimately, the Army cannot overcome the fact that ██████████ termination notice specifically cites his whistleblowing, recast as a charge of failure to exercise due diligence. That such a charge forms the basis of ██████████ termination demonstrates a defiance of the whistleblower protection statutes, which empower federal employees to make protected disclosures without fear of reprisal.



**B. The Army Cannot Show that It Would have Terminated ██████████ in the Absence of His Protected Disclosure**

Because OSC has presented a *prima facie* case of whistleblower retaliation, the burden shifts to the Army to show by clear and convincing evidence that it would have taken the same action in the absence of ██████████ protected disclosure. Clear and convincing evidence is “that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to allegations sought to be established.” See *Gergick v. GSA*, 43 M.S.P.R. 651, 663 (1990); 5 C.F.R. § 1209.4(e). Three factors are relevant: (1) the strength of the evidence in support of the agency’s action; (2) the existence and strength of any motive to retaliate on the part of agency officials involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but are otherwise similarly situated (collectively, the “*Carr* factors”). See *Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). These factors are not discrete elements but are weighed together to determine whether the evidence is clear and convincing, as a whole. See *Whitmore v. Dep’t of Labor*, 680 F.3d 1353, 1374 (Fed. Cir. 2012).

The Army cannot carry its burden. Explicit reference to ██████████ protected disclosure demonstrates on its face that ██████████ whistleblowing was the decisive and precipitating action that prompted the Army to terminate him. ██████████ termination and his disclosure are completely intertwined. In addition to the Army being unable to sever its decision to terminate ██████████ from the overt mention of his whistleblowing, the *Carr* factors favor ██████████

1. The Army’s Evidence was Culled in the Wake of ██████████ Disclosure and is Weak

Alongside the direct evidence that ██████████ whistleblowing contributed to his termination is MAJ ██████████ testimony that she “didn’t think ██████████ had done enough wrong to be terminated.” That MAJ ██████████ did not even move on purported concerns until *after* his whistleblowing shows that those alleged infractions are pretext for retaliation: The Army decided to cite them as grounds for termination only after articulating a goal of terminating ██████████ during his probationary period in light of his August 17 PERSTAT report. In short, ██████████ disclosure was the impetus for the Army’s accumulation of charges against him; any of those charges should be viewed skeptically. As the charges make clear, the Army’s evidence in support of ██████████ termination is infected by retaliatory motive—specifically, an expressed goal to terminate ██████████ for the August 17 PERSTAT report, a protected disclosure. That motive, which is expressly stated in ██████████ termination notice, undercuts the Army’s ability to meet its rebuttal burden.

The charges supporting ██████████ termination were—except for the charge explicitly referring to his disclosure—based on situations where MAJ ██████████ knew, or should have known, that she had no basis to act. For instance, she testified that she “did not consider the security [incident] to be ██████████ fault,” but she cited it in his termination notice, anyway. And she cited his alleged discourteous behavior but could not produce a single example of interactions



that occurred prior to his disclosure. MAJ ██████ also testified that she was wrong that ██████ mishandled the Soldier's promotion; she cited that, too.

2. Animus Prompted Officials to Terminate ██████ within a Month of his Disclosure

The abundant evidence of animus toward ██████ undercuts the Army's defense. Clear in her tone when discussing ██████ disclosure, MAJ ██████ testified to OSC that she was "still very upset." Specifically, she expressed anger and frustration with ██████ decision to submit the August 17 report shortly after the Battalion had been admonished for its previous lapse in accountability, concerning CW2 ██████ MAJ ██████ testified that her perception of ██████ "really started to change" after his disclosure. Her repeated characterizations of his disclosure as a "false report" and an attempt to "punish" the Battalion further evince her adoption of a negative view of ██████ based on his disclosure. *See Elder v. Dep't of the Air Force*, 124 M.S.P.R. 12, 30 (2016) (finding evidence of retaliatory motive in manager's statement that employee, by engaging in protected activity, "acted out" so as to undermine the "morale and discipline" of the unit and bring "discredit to my organization").

The timing of events leading up to ██████ termination further illustrates the Army's retaliatory motive<sup>6</sup> and the fact that ██████ disclosure was a clear demarcation point: *Before* he made his protected disclosure, MAJ ██████ testified that she never considered terminating ██████. Yet a week *after* his disclosure, MAJ ██████, impelled by her anger and the command's "livid" reaction to ██████ disclosure, contacted CPAC to initiate action. *See Fitzgerald v. Dep't of Homeland Sec.*, 107 M.S.P.R. 666, 676 (2008) (holding that an inference of retaliatory intent can be drawn from evidence of suspicious timing). MAJ ██████ testimony makes clear that she compiled a list of purported concerns—anything she had—to build a case against ██████. Using this list of concerns, most of which MAJ ██████ admitted were, at best, based on mistaken information and, at worst, known distortions of fact, the Army decided that it had ample support for terminating ██████ and moved forward. Even if those concerns carried weight, the Army's inaction until *just after* ██████ disclosure is compelling evidence that ██████ would not have been terminated absent his whistleblowing.

██████████ termination letter, reflecting that, refers to his disclosure explicitly. The Army's retaliatory drive arose as soon as ██████ blew the whistle to the Brigade. ██████ disclosure cast a negative light on the Battalion, highlighting continued failures to prioritize personnel accountability. *See Phillips v. Dep't of Transp.*, 113 M.S.P.R. 73, 83 (2010) (finding retaliatory motive where complainant's allegations reflected poorly on managers). Days after ██████ disclosure, MAJ ██████ informed him that the Brigade Commander was "extremely concerned at our failure of executing mission command." While there was "certainly a failure at

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<sup>6</sup> Although LTC ██████ officially terminated ██████, her heavy reliance on MAJ ██████ flawed representations is sufficient to impute animus to the Army. *See Mangano v. Dep't of Veterans Affairs*, 109 M.S.P.R. 658, 670 (2008) (holding that when analyzing retaliatory motive for an agency action, officials "involved" in the action may encompass not just the proposing or deciding officials but also other officials the decisionmakers relied on for information).



the company command level to ensure the PERSTAT was accurate,” she said, it was ██████████ disclosure that resulted in “failing our new Battalion Commander to her Brigade Commander and frankly, embarrassing our unit as a whole.” See *Carr*, 185 F.3d at 1322-23 (finding motive to retaliate based on criticisms of the management of the office for which the acting official had responsibility). MAJ ██████████ reiterated her concerns when she testified to OSC that, in her view, “██████████ sought to embarrass the Battalion by suggesting to the higher command that the Battalion still did not understand a basic Army Soldier function of accountability.” Besides causing embarrassment, ██████████ disclosure placed the Battalion under increased scrutiny from the Brigade, influencing the Commander to require daily—instead of weekly—PERSTAT reporting to promote 100% accountability.

3. The Army Cannot Show that it Treated ██████████ Like Similarly Situated Non-Whistleblowing Employees

The final *Carr* factor considers the agency’s treatment of non-whistleblowers in similar circumstances. Here, the lack of clear comparators hinders the Army’s ability to prove that it would have terminated ██████████ absent his protected disclosure. See *Chambers v. Dep’t of the Interior*, 116 M.S.P.R. 17, 55 (2011) (finding that agency’s failure to present evidence showing that it took similar actions against employees who were not whistleblowers supported a finding that agency failed to prove that it would have taken same actions against employee in absence of his protected disclosures). To the extent the Army maintains its position that ██████████ August 17 disclosure was a “false report,” the record reveals clear disparities in how ██████████ was treated.

CPT ██████████, the record shows, received just a negative counseling when, to conceal a Soldier’s absence, he falsely reported former CW2 ██████████ as present when, in fact, CW2 ██████████ was deceased. Not only did the Army effectively ignore CPT ██████████ intentionally false report, the Army even allowed him to remain responsible for personnel accounting—that is, until ██████████ flagged CPT ██████████ continued failures to accurately account for ADRO personnel. That the Army took only minor action against CPT ██████████ for submitting a false report—to *hide* a problem—yet swiftly terminated ██████████ for signaling ADRO’s lapses in accountability—to *highlight* a problem—shows a disparity in the Army’s treatment of the two, ██████████ whistleblowing operating as the differentiator.

Accordingly, weighing the *Carr* factors together, the Army cannot show by clear and convincing evidence that it would have taken the same personnel action against ██████████ in the absence of his protected disclosure.

#### IV. CONCLUSION

OSC’s investigation found reasonable grounds to believe that the Army violated section 2302(b)(8) when it retaliated against ██████████ for making a protected disclosure. Therefore, OSC requests that the Army provide ██████████ with full corrective action, including rescission of the probationary termination, removal of related derogatory information from his personnel file,



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compensatory and consequential damages, and backpay. *See* 5 U.S.C. § 1214(g)-(i). OSC also requests that the Army agree to OSC-provided prohibited personnel practices training for all relevant military personnel who supervise civilians. Finally, the Army may wish to consider discipline against the involved officials, including MAJ ██████████