DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-051

[redacted] LCDR

FINAL DECISION

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the applicant's completed application on January 20, 2016, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 10, 2019, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

SUMMARY OF APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, who was a lieutenant commander (LCDR/O-4) on active duty when he submitted his application, asked the Board to remove from his record a Special Officer Evaluation Report (SOER) dated March 31, 2015. The SOER documents his removal from his primary duty as the head of a division at a regional office of the Coast Guard Legal Services Command (LSC), which provides advice to members on military justice matters and administrative and investigative proceedings. The Supervisor of the office, a commander (O-5), prepared and signed the SOER as both the applicant's Supervisor and Reporting Officer[1] and assigned him primarily below-standard marks of 3 on a scale from 1 (worst) to 7 (best) in the eighteen performance dimensions, a low mark of 2 for the dimension "Professional Presence," and a mark in the second spot on the officer Comparison Scale, which denotes a "marginal performer; limited potential." The commanding officer (CO) of the LSC, who had just been promoted to rear admiral, signed the SOER as the Reviewer. Because the SOER was derogatory, it includes an Addendum written by the applicant and endorsements responding to the Addendum written by the office Supervisor and the CO of the LSC. The applicant asked that this SOER be replaced with a regular, annual OER, with the executive officer (XO) of the LSC serving as his Supervisor and Reporting Officer and the Deputy Judge Advocate General (DJAG) serving as the Reviewer.

[1] OERs are normally prepared by a "rating chain" of three superior officers, including the Supervisor, who supervises the officer on a daily basis; the Reporting Officer, who is normally the Supervisor's Supervisor; and the OER Reviewer, who ensures the OER is consistent and substantiated. However, any CO, any SES employee, and any officer in grade O-5 and above may serve as both Supervisor and Reporting Officer for a Reported-on Officer (ROO). COMDTINST M1000.3A, Art. 5.A.2.d.

The applicant alleged that the SOER was not accurate, objective, or fair and was prepared in retaliation for his upholding of "the ethical standards required of all attorneys and the heightened ethical standards required of a prosecutor." He stated that his removal was contrary to policy and unsupported by sufficient documentation. After his removal, on April 17, 2015, he submitted a written request for redress, which was denied on June 1, 2015, and so he submitted a Complaint of Wrongs pursuant to Article 138 of the Uniform Code of Military Justice (UCMJ), which was denied by the rear admiral who had general court-martial jurisdiction over the CO of the LSC.

Summary of Applicant's Allegations About His Removal from Primary Duties

The applicant stated that pursuant to Article 1.F.2.a. of COMDTINST M1000.8A, removing an officer from his primary duties should only be done under "exceptional circumstances." He stated that he conducted himself at the LSC in the same manner and with the same professionalism that he had conducted himself in previous assignments, where his supervisors had considered his work to be excellent and evaluated him accordingly. He noted that he had received much higher marks—primarily 6s—on his first OER from the LSC, dated April 30, 2014. That first OER was prepared and signed by a different office Supervisor, who left in June 2014, but signed by the same Reviewer (the CO) who signed the SOER. He alleged that in light of his first OER at the LSC and the lack of documentation in his record notifying him of the alleged performance deficiencies, his removal is "particularly challenging to understand."

The applicant alleged that the timing of his removal—the day before a change of command and without any investigation—"effectively deprived [him] of any meaningful ability to address the allegations against [him]." He stated that his removal without an investigation was "highly inappropriate" and that commands are normally advised to conduct investigations before removing an officer. He stated that there "is simply no proof to support the allegations made against [him]" and those allegations amount to "the finger pointing of one person with no documentation or evidence to support his actions." He stated that no one interviewed him or tried to confirm any of the LSC's allegations against him.

The applicant stated that his Supervisor also assigned an LSC attorney to advise him about the removal process and thus denied him an independent attorney. Thus he was advised by an attorney who had a conflict of interest and "could not feel free to zealously represent [him] as he must be concerned that his own command would retaliate against him."

Summary of Allegations About the SOER

The applicant stated that the SOER was prepared in violation of OER procedures and "neither fairly nor accurately reflect[s] my attitude or performance throughout the marking period." With respect to OER procedures, the applicant stated the following:

- The SOER was prepared in violation of Article 5.A.7.c.(1) of COMDTINST M1000.3A (hereinafter "Officer Manual"), which requires that an SOER be submitted to the Personnel Service Center (PSC) no more than 45 days after it was initiated by the rating chain. He stated that the LSC failed to meet this deadline and submitted the SOER ten days late.

- The SOER was prepared in violation of Article 5.A.7.c.(2)(a) of the Officer Manual, which limits a rater's endorsement to a Reported-on Officer's (ROO's) Addendum to an SOER to a single page. He noted that his Supervisor's endorsement to his Addendum to the SOER is two pages long.

Regarding the content of the SOER, the applicant stated that it is inaccurate, unfair, and "mischaracterizes certain events and takes others out of context, portraying [him] in as negative a light as possible." He also made allegations and submitted evidence about particular comments in the SOER and the Supervisor's endorsement to his Addendum to the SOER:

A. From the Supervisor's endorsement to the Addendum: *"ROO's claim of successfully securing a guilty plea by an O-6 is also not true."*

The applicant stated that this comment is contradicted by the following positive comment in the SOER itself: "negotiated novel resolution in Gen. Court-Martial of O-6." He also stated that four of his exhibits prove that he resolved this court-martial:

1. The applicant's Exhibit 3 consists of two emails dated September 4, 2014. In the first, which was cc'ed to the applicant, his Supervisor advised the CO of the LSC that under 10 U.S.C. § 802(a)(8) and 42 U.S.C. § 215(a) and policies of both the Coast Guard and PHS, a PHS officer's retirement in November 2015 would not defeat the Coast Guard's court-martial jurisdiction if charges were pending. The Supervisor attached his research notes and a memorandum from the Department of Defense that supported his conclusion. In the second email, the applicant told the CO that he agreed with his Supervisor's conclusion that the Coast Guard would retain court-martial jurisdiction over the PHS officer but stated that neither the Coast Guard nor PHS could recall the officer to active duty after he retired and so they might "lose jurisdiction in November 2015" if PHS retired the officer instead of retaining him on active duty. Therefore, the applicant recommended adopting a plan that could be completed by November 2015 to avoid the risk that the officer would be "walking away from his conduct with no punishment." He recommended offering the PHS officer a deal in which the officer would accept non-judicial punishment (NJP) and, if he did not accept it, convening a Board of Inquiry.

2. Exhibit 4 consists of emails sent in October 2014. In the first, dated October 9, 2014, the applicant advised the CO that they "intend[ed] to deliver the offer to the defense next Thursday" and that the delay had been caused by "streamlining with PHS." In the second, the applicant provided "the documents that will be provided to the defense" to his Supervisor late Friday, October 17, 2014, who responded, "Please give me a chance to review them. I can have them back to you by Monday."

3. Exhibit 5 consists of emails sent in November and December 2014. In the first, dated November 25, 2014, the applicant advised his Supervisor that attorneys were finalizing a pre-trial agreement and stipulation of fact that would require the PHS officer to plead guilty at a General Court-Martial to three "fraternizations and dereliction for relief for cause"; sign a stipulation admitting his wrongdoing; receive at most sixty days of confinement; be protected from dismissal; pay no fine or forfeiture; and retire as an O-5 with a General Under Honorable Conditions character of service while

waiving his right to a PHS Board of Inquiry. The applicant stated that trying to retire the PHS officer as an O-4 would be a deal-breaker and that it was unclear whether the PHS officer had committed misconduct as an O-5. He recommended that the Admiral accept this settlement because the "punishment we are getting is much better than any of the reported cases with similar fact patterns. I'm convinced that there is no more room left to negotiate."

The applicant's Supervisor replied to this email, saying that the documents "seem like a good start" but that he had concerns and wanted the stipulation of fact to "be detailed so as to convey the nature of the misconduct to PHS and licensing authorities." He stated with regard to retiring the PHS officer as an O-5, instead of an O-4, "the fact of the matter is that for two months of his time as O-5 he was engaged in serious misconduct." He also stated that he did "not see this punishment as more stringent than other cases. At [the Coast Guard Academy], I was copied on all promulgating orders from the Air Force. Many involved doctors and almost all resulted in dismissal. When do we see the offer?"

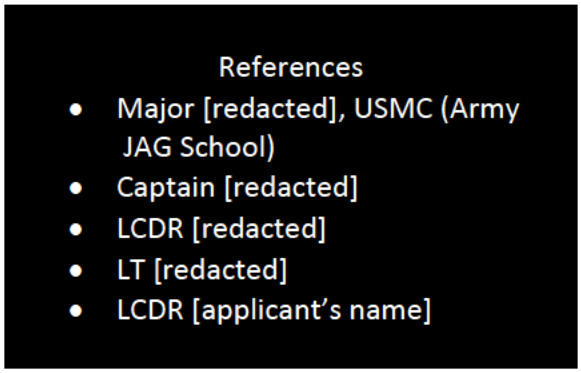
Then on December 15, 2014, the applicant forwarded a stipulation of fact that had been signed by the PHS officer and his counsel to his Supervisor, who replied, "Please do not sign this until I have an opportunity to review it."

4. Exhibit 6 is an email that the applicant sent to his Supervisor on March 23, 2015. He stated that he had been in contact with a State Medical Licensing Board Chief Prosecutor, who had told him that she was going to assign a prosecutor to the case, review the Coast Guard pre-trial agreement and stipulation of fact, review a redacted copy of the Coast Guard's report of investigation, and initiate an independent investigation. He stated that the signed pre-trial agreement was ready for decision and signature by the Admiral.

B. From block 7 of the SOER and the Supervisor's endorsement to the Addendum, respectively: *"claimed credit for developing major training program for CG lawyers when the program was in fact developed by the Army;"* and *"ROO made minor modifications to an Army .ppt on one training topic and forwarded it as ROO's own work product."*

The applicant argued that his Exhibit 7, an email from the CO, refutes these comments and shows that the author of the PowerPoint was cited appropriately but he "was ordered by the CO to remove the author's name from the PowerPoint" and followed that order. Exhibit 7 shows that on February 12, 2015, the applicant forwarded a PowerPoint on criminal discovery to the CO for "preliminary review" and noted that he was "still waiting on comments from several folks" and expected to make more changes. The CO responded on February 19, 2015; complimented the applicant on "great work"; and directed a few edits, including "remove slide 3. This presentation may get passed down over the years and the names will change. Further, if someone on the list is a judge they might get questioned about the presentation. Recommend instead that the presenter share orally w/ the audience who the MJ ringers are." The applicant explained that when he removed slide 3 pursuant to this order, the name of the author of the PowerPoint, an Army major, was removed. Therefore, he claimed, the Army author's name was

removed from the PowerPoint when he followed the CO's order. He also stated that he had "substantially augmented" the PowerPoint. The applicant submitted a printout of the slide that the CO told him to remove, which appears as follows:



C. From the Supervisor's endorsement to the Addendum: ***"Within the second week of our work together, ROO was counseled by the O-6 Staff Judge Advocate (SJA) for improperly charging a case, and then, worse, not informing the chain of command of the action."***

The applicant argued that his Exhibit 8, emails dated July 8, 2014, refute this comment. The first email is from the CO of the LSC, who was also the SJA, to the applicant. The CO stated that he had questions about a case and "a reminder about my expectations. Pls set a time w/ [redacted] that we can discuss w/in the next week." The CO stated that on May 14, 2014, the applicant had received a "pros memo" (prosecution memorandum) from a lieutenant, endorsed it, and "directed preferral and convening Art. 32." The charges were preferred on May 29, 2014, but the case tracker continued to show that they were being drafted. After the CO requested the pros memo at a meeting on June 4, 2014, the lieutenant sent him the pros memo on June 16, 2014, "well after charges were preferred." The CO asked the applicant why he had not followed the protocol of addressing the pros memo to the CO so that he could discuss it with the convening authority before preferral; who had provided the legally required Article 6(b) SJA's advice on the case to the convening authority; and why the case tracker had continued to say "charges drafted" after they had already been preferred and the case should have been on the pretrial list. The CO reminded the applicant of the protocol of routing pros memos to him with enough time left to permit review, discussion, and Article 6(b) advice to the convening authority. The CO also asked whether he had ever advised the applicant to follow a different protocol. In response, the applicant stated the following:

> The typical process was not followed due to conversations that you and I had. I looked back through my notes and was able to piece most of this together. Below is a brief timeline:
>
> On April 11, 2014, I met with Captain … [presumably the convening authority]. I discussed all of the cases at length with him. He was briefed on [this] case and indicated that he wanted to pursue a court-martial. Later that day, I briefed you at length about the … case, and we also spoke at length about the … case. You directed me to tell Captain … that you agreed that we should prefer charges. Further, you directed me to tell Captain … that if he had any questions we would be happy to arrange a conference call.

> During the week of either April 29 or May 5, I briefed Captain … about the … case as I've routinely done. During the briefing, I delivered the information you directed about the … case. Captain … had no questions and indicated he would be standing by for the charges. I considered this to be me delivering your Article 6(b) advice to Captain … .
>
> On May 14, [the lieutenant] completed the pros memo and routed it to me. I reviewed it, reviewed the draft charges, and directed her to prefer charges in accordance with your command intent.
>
> The June 4 meeting was moved to June 5. At the June 5 meeting, you asked for a copy of the pros memo. The meeting went from 1200-1300. At 1316, I sent an email to [the lieutenant] directing her to send you a copy of the pros memo. Being that [the lieutenant] is reliable, I did not follow up with her to ensure the memo was sent. As things turn out, this fell through the cracks.
>
> On June 16, we met in my [location] office for the … hot wash at 0800. After the meeting, you stated that you did not receive the [case] pros memo. I told you that I would remind [the lieutenant] again to send it to you. We spoke further about the … case. I told you that charges had been preferred. You asked if we had previously talked about doing so. I replied that we had. After our meeting ended, I sent [the lieutenant] a reminder email at 0849, and she provided the memo to you at 0910.
>
> The June 4 case tracker did not indicate that the charges had been preferred because I didn't receive an update on the … case from [the lieutenant] on May 30. Instead, I received an update on … from [another officer] on that date. [That officer and the lieutenant] were working the case together. [That officer] did not know that the charges had been preferred the day before, and I didn't ask [the lieutenant] for an update on [the case] because [the other officer] had already provided one to me.

The applicant claimed that on or about July 9, 2014, "LSC [the applicant's Supervisor] met with me and thanked me, on behalf of the CO, for explaining what had happened."

D. From blocks 3 and 5 of the SOER, respectively: ***"sought to 'deal' cases as early as possible in effort to reduce workload" and "Detached from important, time critical matters; made situation worse by statements to subordinates that important cases – including a rape case – be slow rolled & hopefully forgotten."***

The applicant claimed that the cases were not delayed as a result of his efforts. Instead, his Supervisor ordered him to wait and he followed those orders, and his efforts to correct the case processing delays were opposed by his Supervisor. He stated that his Supervisor directed him and his staff not to initiate settlement with the defense even though it is common practice to draft settlement documents and send them to the defense with a two-week deadline for accepting the offer. He stated that this procedure "allows for efficient and effective management of a caseload" and he instructed his staff to follow it. However, his Supervisor countermanded his instruction and said to wait for the defense to submit a written settlement offer. He offered his Exhibit 9, consisting of emails dated in late August 2014, as evidence:

- On August 20, 2014, the applicant told the CO of the LSC in an email that he wanted to request approval from a convening authority to make a settlement offer that would require the accused to plead guilty at a Special Court-Martial to false official statement, assault consummated by battery, and drunk and disorderly; to

waive his right to a separation board and request a discharge under other than honorable conditions (OTH); and to agree to confinement for up to ninety days. In return, the Government would dismiss the charges of abusive sexual contact and cruelty and maltreatment. The applicant requested an Article 6 meeting "by Friday" because the accused was in pre-trial confinement.

- In response, the CO asked whether the defense had proposed the settlement and what the basis for the deal was. The CO stated that a settlement agreement "seems a bit premature."
- The applicant replied that the deal was based on discussions with the defense counsel and that "[t]ime is of the essence because the trial date was set for September 30. If a deal can be reached, we would like to do so quickly so that … does not have to prepare motions. They are due September 3. I think we can have a signed PTA by next Friday, August 29. Then, we can have … concentrate on the … case." The CO responded that he had read the report of the investigation, was ready to discuss it, and would be "interested to hear what progress has been made on the further investigative steps at the end of [another attorney's] pros memo."
- The applicant's Supervisor, who had been in training that day but was cc'ed on these emails, told the applicant that afternoon, "My preference is to proceed with the court-martial and only present offers received from the defense, at least under the circumstances here. [The other attorney] has not yet been through a court and has very limited pre-trial experience. … This case is providing excellent training for her in a low risk litigation setting. It is excellent training because the issues are real and the cause is righteous, and both the detailed DC and MJ have lots of experience. This case is low risk because even in the worst case scenarios many of the command's good order and discipline needs will still be met." The applicant stated that he followed this order but it "slowed case processing by several months and interfered with [his] ability to manage the caseload."

E. From the Supervisor's endorsement to the Addendum: ***"The biggest case on ROO's docket (and opportunity to excel) involved a CAPT accused of horrible sex crimes. The case was fully investigated and charges were already drafted. Getting the matter charged required only finding a yeoman to sign the charge sheet, yet ROO continually made excuses for not charging in the case. Then we learned that ROO had told a subordinate O-3 that he was placing the case 'on slow pedal' and would not charge it until the CO and XO PCS'd [transferred]. ROO was holding up military justice matters in pure spite to his chain of command. This lead to ROO's removal from primary duties."***

The applicant stated that these comments refer to the PHS doctor's case addressed in the emails in his Exhibits 3 through 6 (see paragraph A above) and that it was his Supervisor who delayed the charging by approximately five months, from October 2014 to March 2015. He claimed that the emails show that after the CO ordered him to deliver a settlement offer to the defense, he told the CO on Thursday, October 9, 2014, that the documents, including a pre-trial agreement, stipulation of facts, and charge sheet, would be delivered on October 16, 2014. However, the following week, his Supervisor told him

not to deliver the offer that the applicant had negotiated and to wait until the defense submitted an offer. Then on Friday, October 17, 2014, after the applicant sent him copies of the settlement documents, the Supervisor again told the applicant not to send them to the defense, saying "Please give me a chance to review them. I can have them back to you by Monday." The applicant stated that he disagreed but followed this order.

The applicant alleged that in late November, his Supervisor ordered changes to the stipulation of facts, requiring that it be "detailed so as to convey the nature of the misconduct to PHS and licensing authorities. A bare bones stipulation of facts will not be sufficient." After the applicant "worked out the terms" of the stipulation with the defense, the Supervisor again ordered him to submit the draft for his review, saying "Please do not sign this until I have an opportunity to review it."

Then in January 2015, the applicant stated, his Supervisor directed him "to include in the Stipulation of Fact uncharged misconduct that the O-6 CAPT was not pleading guilty to at sentencing" to try to ensure that his medical license would be revoked. He disagreed because the defense would likely not agree and "the medical licensing issue was a separate matter unrelated to the guilty plea" that should not delay the criminal proceedings. Nevertheless, his Supervisor insisted, and the applicant obeyed. When he contacted the defense counsel, however, they refused to include the uncharged misconduct as a stipulation.

The applicant stated that he and a trial attorney "came up with a creative solution that took nearly two months to complete. We contacted attorneys at the state licensing board who indicated that they would conduct an independent investigation and consider other evidence outside of the PTA and Stipulation of Fact." Then they contacted a FOIA officer, who agreed to release a redacted copy of the report of the investigation to the state licensing board, as he advised his Supervisor in an email on March 23, 2015. Shortly thereafter, the applicant stated, his Supervisor allowed him "to charge the case and schedule the guilty plea and sentencing." The applicant alleged that his Supervisor also delayed the case "by conducting unnecessary research and tasking my staff to conduct unnecessary research before allowing the cases to be moved forward. His demand that the state licensing issue be worked out in the O-6 CAPT case is one example." The applicant cited his Exhibit 3 as another example, pointing out that his Supervisor's research notes on the issue of the Coast Guard's jurisdiction over the PHS officer include a two-page table listing statutes he had reviewed with short summaries of the statutes, which the applicant stated were "unnecessary statutes."

F. From block 3 of the SOER: ***"Relied on personal experience rather than researching legal questions, to detriment of mission."***

The applicant stated that, "[m]anaging a case load requires daily re-prioritization. There are never enough hours in the day to dig into every issue. Due to his lack of experience, [his Supervisor] didn't know what issues were important to research. He had a complete lack of understanding of what is a time critical issue while working in a time critical command." He alleged that his Supervisor also opposed his efforts to correct the case processing delays. He explained that because of his "performance and reputation," in the summer of 2014, the CO had asked him "to prepare a reform proposal for the practice of

military justice in the Coast Guard." The applicant's proposal "was later largely adopted by the Military Justice Working Group, where [he] served as the only O-4 member of the predominantly O-6 group." Part of his proposal included "streamlining the practice of military justice in the LSC … to increase efficiency and decrease confusion and tension by removing [the LSC office Supervisor] and the XO from any role and responsibility for the practice of military justice in the LSC. This is a return to the prior Maintenance and Logistics Command (MLC) structure and is consistent with all of DOD." He stated that he also recommended removing the Supervisor and the XO "from a supervisory role over the Chiefs of Justice ([the applicant and his counterpart]) by recommending that [his] position rating chains go from the CO to the Deputy Judge Advocate (DJAG) to TJAG." His Supervisor "read this proposal on the first day he report to the LSC on July 1, 2014. Shortly thereafter, [their] working relationship began to deteriorate, in [the applicant's] opinion, largely as a result of [his] reform proposal which recommended essentially eliminating [the Supervisor's] billet."

The applicant alleged that his Supervisor's billet "did not have a clearly defined role in the military justice process. The roles and responsibilities from one supervisor to the next did not remain consistent. Additionally, [his Supervisor] did not articulate any new expectations upon assuming his position [on July 1, 2014]. This led to a great deal of confusion and tension."

The applicant stated that on July 23, 2014, the CO again requested proposals for reforming the LSC and he drafted a proposal that he hoped "might start a constructive conversation that would relieve the tension in the working relationship between [him and his new Supervisor]. Again, [the applicant] proposed eliminating [the Supervisor's billet] and the [LSC XO] from an active role in military justice and proposed roles and responsibilities for [the applicant's] billet, [his supervisor's] billet, and the XO's billet." The applicant stated that after submitting his proposal to the CO, he tried to have a constructive conversation with his Supervisor about it, but his Supervisor "raised his voice to me and angrily said, 'I'm your supervisor!' and refused to discuss the subject."

Applicant's Allegations About His Performance

The applicant alleged that the SOER fails to acknowledge his positive performance during the reporting period, "which had direct and positive impact Coast Guard-wide." He listed the following accomplishments:

1. Personally managing 17 prosecutions with a 100% conviction rate;
2. Securing a guilty plea and justice for four victims in the high-visibility court-martial of the PHS doctor (O-6);
3. Spearheading the reform of the military justice system by drafting the initial plan "to create the later adopted Enhanced Special Prosecution Unit to develop and maintain increased expertise to hold sex offenders accountable";
4. "Developing the Coast Guard-wide in-house training plan to increase military justice proficiency, … [which] helped establish the LSC as the Coast Guard's military justice center of gravity"; and

5. "Recognizing [his] staff's achievements with letters of recommendation and evaluations, a commendation medal for one O-3, accelerated promotion recommendation for another O-3, and staff appreciation lunch."

The applicant concluded that the SOER is erroneous and unjust and must be removed so that he can continue his military career. In support of his allegations, the applicant submitted numerous emails and records, the most relevant of which are included in the Summary of the Record below.

SUMMARY OF THE RECORD

The applicant graduated from Pennsylvania State University School of Law and became a member of the Pennsylvania bar in 2000. Five years later, he was appointed a lieutenant (O-3) in the Coast Guard Reserve through the direct-commission law program and began serving on extended active duty. After completing Officer Candidate School, he served as a judge advocate for an Area Maintenance and Logistics Command from August 2005 to June 2009. He received both an Achievement Medal and a Commendation Medal and good OERs for his work during this tour of duty.

From July 2009 to July 2013, the applicant served as a judge advocate at a District legal office, providing advice on response and prevention law. He received very good OERs from this command. After he was selected for promotion to LCDR (O-4) in 2011, he was integrated into the regular Coast Guard and promoted to LCDR on April 1, 2012.

In July 2013, the applicant reported for duty as the head of the Military Justice Division at a regional office of the LSC that provided legal advice for 66 commands. He supervised three lieutenants, two law clerks, and two yeomen. On his first OER in this position, dated April 30, 2014, the (prior) office Supervisor served as both Supervisor and Reporting Officer for the OER and assigned the applicant one above-standard mark of 5, thirteen excellent marks of 6, and four best marks of 7 in the performance dimensions and a mark in the fifth spot (out of seven) on the officer Comparison Scale, denoting an "Excellent performer; give toughest, most challenging leadership assignments." He also wrote that the applicant was "[s]trongly recommended for promotion to O-5 with best of peers." The CO of the LSC signed this OER as the Reviewer.

On May 28, 2014, the applicant submitted a draft Military Justice Reform Proposal to a Military Justice Working Group of officers for their meeting the next day. In the draft, he stated that primarily because of a significant increase in the number of sexual assault cases, the work-load had increased about 50% and twelve more lieutenant attorneys (six in each LSC legal office) would be needed. He stated that "the desired end state of 6 Lieutenants in each office can be done in a billet neutral manner by rearranging existing billets within the LSC," specifically by reassigning lieutenants in billets from Area legal offices and collections and claims divisions to the Military Justice office. The applicant also recommended that the Chief of Military Justice be an O-5 with two subordinate O-4s, as well as the additional lieutenants, and that "the chain of command and OER rating chain be changed to eliminate the superfluous layers of management in the LSC. The O-4/O-5 Chiefs of Military Justice should report directly to the SJA. For purposes of the OER chain, the SJA will serve as the Supervisor with the DJAG and the TJAG as the Reporting Officer and Reviewer, respectively."

On or about July 1, 2014, a new Supervisor arrived to lead the office, including the applicant's division. On July 8, 2014, the CO/SJA told the applicant in an email (see applicant's Exhibit 8, paragraph C above) to schedule a meeting so that the CO could remind the applicant of his expectations because on May 14, 2014, the applicant had received a pros memo from a lieutenant, endorsed it, and "directed preferral and convening Art. 32" without first referring the matter to the CO/SJA. In addition, the CO noted, even after the charges were preferred on May 29, 2014, the case tracker had continued to show that the charges were being drafted and when the CO had requested the pros memo on June 4, 2014, he had not received it until after asking for it a second time on June 16, 2014. The CO asked the applicant why he had not followed the protocol; who had provided the required Article 6(b) SJA's advice on the case to the convening authority; why the case tracker had continued to say "charges drafted" after they had already been preferred and the case should have been on the pre-trial list; and whether he had ever advised the applicant to follow a different protocol. In response, the applicant stated because they had had a conversation in which the CO had agreed with the convening authority that charges should be preferred in the case and had told the applicant to tell the convening authority that he agreed, the applicant had decided to draft and prefer the charges without referring them to the CO/SJA and had believed that his own statement to the convening authority that the SJA agreed that charges should be preferred constituted the required Article 6(b) advice. The applicant stated that the case tracker had not shown that charges had been preferred because during a meeting on May 30, 2014, he had been updated on the status by a lieutenant who was working the case but was unaware that charges had been preferred the day before. He also told the CO that another lieutenant had forgotten to send the pros memo to the CO when he first asked the applicant to provide it.

On July 23, 2014, the applicant submitted proposed edits to a new outline of the reform of the LSC into a military justice command. His edits proposed that a new O-5 Chief of Military Justice billet be added to his LSC office and that the O-5 billet for the XO of the LSC be converted to the new O-5 Chief of Military Justice billet at the other LSC office. He proposed that the new Chiefs of Military Justice would report directly to the SJA for all military justice matters "while keeping the XO and … Supervisor informed for awareness" and that their rating chain should be the SJA as Supervisor, the DJAG as Reporting Officer, and TJAG as Reviewer. He also proposed adding many new responsibilities and authorities to the new Chief of Military Justice billets. He wrote that "[d]ue to the small number of personnel in the LSC, there is a limited need for an XO or … Supervisor billet," and that if retained, those billets should be assigned "all administrative matters so that the SJA and Division Chiefs are free to conduct operations."

On August 20, 2014, the applicant told the CO of the LSC in an email (applicant's Exhibit 9) that he wanted to request approval from a convening authority to make a settlement offer that would require the accused to plead guilty at a Special Court-Martial to false official statement, assault consummated by battery, and drunk and disorderly; to waive his right to a separation board and request an OTH discharge; and to agree to confinement for up to ninety days. In return, the Government would dismiss the charges of abusive sexual contact and cruelty and maltreatment. The applicant requested an Article 6 meeting "by Friday" because the accused was in pre-trial confinement. In response, the CO asked whether the defense had proposed the settlement and what the basis for the deal was. The CO stated that a settlement agreement "seems a bit premature." The applicant replied that the deal was based on discussions with the defense counsel and that "[t]ime is of the essence because the trial date was set for September

30. If a deal can be reached, we would like to do so quickly so that … does not have to prepare motions. They are due September 3. I think we can have a signed PTA by next Friday, August 29. Then, we can have … concentrate on the … case." The CO responded that he had read the report of the investigation, was ready to discuss it, and would be "interested to hear what progress has been made on the further investigative steps at the end of [another attorney's] pros memo." The Supervisor replied that afternoon, "My preference is to proceed with the court-martial and only present offers received from the defense, at least under the circumstances here. [The other attorney] has not yet been through a court and has very limited pre-trial experience. … This case is providing excellent training for her in a low risk litigation setting. It is excellent training because the issues are real and the cause is righteous, and both the detailed DC and MJ have lots of experience. This case is low risk because even in the worst case scenarios many of the command's good order and discipline needs will still be met."

On September 4, 2014, the new Supervisor and the applicant sent the emails regarding the Coast Guard's jurisdiction over a PHS officer that he included as Exhibit 3 (see summary at paragraph A.1., above).

On September 22, 2014, the applicant sent an email to his chain of command thanking them for their support. He stated that he "could not have asked for more understanding supervisors. You have really helped me begin to navigate the grieving and healing process as smoothly as possible. Thank you for allowing me access to my support network of friends, family, coworkers (including all of you), and clergy. As I navigate through the process, I've noticed that my train of thought wanders sometimes. Also, I've noted that my patience for some ways of the world is gone right now. I apologize ahead of time if this happens, and I request your continued patience and compassion. Thank you for looking after me. Your support is very humbling." One of them responded, "You're a good man. I worry we have not done enough. Hang in there."

In October 2014, the applicant sent the emails he included as Exhibit 4. In the first, dated October 9, 2014, he advised the CO that they "intend[ed] to deliver the offer to the defense next Thursday" and that the delay had been caused by "streamlining with PHS." In the second, he provided "the documents that will be provided to the defense" to his Supervisor late Friday, October 17, 2014, who responded, "Please give me a chance to review them. I can have them back to you by Monday."

On November 25, 2014, the applicant advised his Supervisor (applicant's Exhibit 5; see paragraph A.3. above) that attorneys were finalizing a pre-trial agreement that would require the PHS officer to plead guilty to three "fraternizations and dereliction"; admit his wrongdoing; receive at most sixty days of confinement; be protected from dismissal; pay no fine or forfeiture; and retire as an O-5 "Under Honorable Conditions" while waiving his right to a PHS Board of Inquiry. The applicant claimed that trying to retire the PHS officer as an O-4 would be a deal-breaker and that it was unclear whether the PHS officer had committed misconduct as an O-5. He claimed that the "punishment we are getting is much better than any of the reported cases with similar fact patterns. I'm convinced that there is no more room left to negotiate." The applicant's Supervisor replied to this email, saying that the documents "seem like a good start" but that he had concerns and wanted the stipulation of fact to "be detailed so as to convey the nature of the misconduct to PHS and licensing authorities." He also contradicted the applicant by stating that the evidence showed that the PHS officer had engaged in serious misconduct as

an O-5 and that the punishment the applicant had negotiated was not more stringent than usual. He stated that according to Air Force orders he had reviewed, many similar cases had "involved doctors and almost all resulted in dismissal." Then on December 15, 2014, the applicant forwarded a stipulation of fact that had been signed by the PHS officer and his counsel to his Supervisor, who replied, "Please do not sign this until I have an opportunity to review it."

On December 19, 2014, the CO of the LSC submitted to TJAG a report and recommendations from the Military Justice Working Group. The CO stated that there was a growing demand for legal services for members largely because of an increase in unrestricted reports of sexual assault, which had risen from 92 in 2011 to 194 in 2014. The CO made recommendations for increasing the competence of the JAG corps in prosecuting such cases and for establishing an enhanced special prosecution unit within the LSC with an O-5 as Chief of Military Justice, an O-4 as Chief Prosecutor or Senior Trial Counsel, and five or six lieutenant judge advocates at each LSC office. The CO listed options for staffing this new enhanced prosecution unit, and the first option for staffing the new O-5 Chief of Military Justice position was to convert the office Supervisor's O-5 billet to be the new Chief of Military Justice, although the position would "also have to remain supervisor/senior officer" over the office staff, "a not insignificant duty." The applicant's O-4 billet (head of the Military Justice Division in the LSC office) would be converted to be the new Senior Trial Counsel or Chief Prosecutor billet. The report included a memorandum about improving the military justice training program to handle the higher caseload.

On January 16, 2015, the applicant sent the Supervisor a proposed agenda for a meeting, which included "OER Expectations," the Supervisor's "Management Expectations," three requests for clarification from the applicant, and the applicant's recommendations, which included conducting orientation for new trial counsel, making sure that submitted documents were "signature ready," thinking proactively, providing an explanation if he planned "to do something outside the normal rules," and "[m]ak[ing] my boss look good. Give clients a range of reasonable options to consider. Always distinguish law from policy for clients."

On January 23, 2015, the CO advised the applicant that his endorsement of the applicant's application to attend school to become a military judge was conditioned on (1) being selected to attend the school by Headquarters; (2) demonstrating an "upward trend in performance based on shared expectations with, and observations from, [the Supervisor]"; (3) drafting the first block of the Military Justice Working Group's recommended training, which the applicant was to submit to his Supervisor in time for review so that it could be sent to the CO a few days before February 20, 2015; and (4) starting work on the other four blocks. The CO stated that the finished first training block should give "TJAG a full appreciation of how we intend to implement the training recommendations in our report, even though we are only providing TJAG w/ one block of instruction as an example."

On February 12, 2015, the applicant sent the CO a PowerPoint file for "preliminary review" (applicant's Exhibit 7) and noted that he was "still waiting on comments from several folks" and expected to make more changes. The CO directed him to make a few edits to the PowerPoint, including directing him to "remove slide 3." The CO explained that "[t]his presentation may get passed down over the years and the names will change. Further, if someone on the list is a judge they might get questioned about the presentation. Recommend instead that the presenter share orally w/ the audience who the MJ ringers are."

At 2:20 in the afternoon on February 23, 2015, the applicant sent the CO an email, which he cc'ed to the Supervisor and XO. He wrote the following:

> You asked for an explanation as to the circumstances that led to the … case being referred to Captain … Special Court-Martial Convening Order. This occurred due to a logistical impossibility that was created by delay, caused by the preservation of DOL as the Convening Authority. A creative work around was needed and was executed with no complications. The Trial Counsel were able to hit the ball out of the park. We got the findings and sentence we were looking for. Below, recommendations are discussed to correct these glitches.
>
> The facts are as follows. Trial Counsel received a deal signed by all parties, including the CA [convening authority], late Thursday night (Feb 12) with a guilty plea scheduled for six days later on the following Wednesday (Feb 18). The Judge had already scheduled the guilty plea several weeks prior, in January, because the parties indicated they had a deal and only needed to finalize the paperwork.
>
> In the weeks leading up to the signed deal, Trial Counsel went back to the defense with changes to the PTA and Stipulation of fact on five occasions. When the 5th request was brought to the defense, the defense indicated that they would not agree to any more changes. The defense was upset because they were losing client control. At this point, there was no good will between the parties. The Trial Counsel and I were concerned that the defense may back-out of the deal if any more complications arose. We were so concerned that we continued to prepare the case for trial.
>
> Luckily, however, we received the signed deal late on Thursday, February 12, and we began to prepare for the guilty plea. This is when we realized that we would need Admiral … original signature on the referral block of the charge sheet. We also realized that we did not have a Special Court-Martial Convening Order from Admiral …
>
> We knew that it would be logistically impossible to get the Admiral's signature and convene a Special Court-Martial. We were starting a three-day weekend and a snow storm was predicted to, and did, shut down offices on Monday through Wednesday, on the east coast.
>
> We began to brain storm. We knew that we could not seek a continuance. There was no good will with the defense. We were certain that the deal would be de-railed if we tried to move the date.
>
> We researched whether we could refer the case to Captain … SPCM. We found that RCM 604 allowed this. We reached out to [the Area Command]. We found that Captain … had done precisely what we planned to do in one of his cases. Then, we reached out to Captain … to make sure he would be available to sign the referral block of the charge sheet. We found that he was available. He had already been fully briefed on the case. His availability was the only question.
>
> We researched whether the PTA signed by Admiral … would be legally sufficient without Captain … signature. We found case law that allowed for this. United States v. McCants, 1973WL14741 (ACMR).
>
> I did not brief the chain of command because this was a well-researched and well-thought-out simple solution. In retrospect, now that the dust has settled, and I've had time to think about this, I would have liked to have briefed the chain of command for situational awareness.
>
> You asked me to provide you with recommendations as to how we can prevent this from happening in the future. I have three suggestions. One, convene standing courts. Instead of waiting until we need a convening order, let's create SPCM and GCM convening orders ahead of time. We had just done one for FORCECOM, and I made the mistake of thinking that we had done one for DOL.

Two, use convening authorities who are local. We would have had enough time to correct this if our CA was local. We could use [the District and Area] CAs for our cases instead of DOL and FORCECOM. Also, this will cut down on the time need for post-trial processing.

Three, the attempt to keep DOL involved from Norfolk as if he was present in … has necessitated a LSC structure involving too many attorneys with an active role in the pre-trial process. This creates delay and confusion.

At one point, the terms of the PTA were incorrectly briefed to the CA. This then required another change to the PTA which led to more delay. This could have been avoided if the Trial Counsel and I briefed the terms to the CA. We were very familiar with the terms because we were working directly with the defense. Instead, we are unreasonably expecting Norfolk attorneys to be experts in cases in which they have little to no involvement.

Our efforts to preserve DOL as the Convening Authority necessitate the involvement of LSC local to DOL in Norfolk, but remote from the Trial Counsel, Defense Counsel, and Judge when the trial is on the west coast. The excessive administrative overhead necessary to maintain this chain of command undercuts the ability of the Trial Counsel and their supervisor to be nimble and hand-cuffs our ability to take initiative. I recommend that this experiment be adjusted.

LSC attorneys from each coast are not able to be nimble. Norfolk attorneys are required to be experts in cases where they have little to no involvement while Alameda attorneys are required to navigate a hierarchy.

Going through this much administrative overhead is also counterproductive for defense counsel. It undermines the benefits of the plea deal and puts the deal at risk. Here, the defense started to lose client control. We need to make it easier for pleas to occur because the true winner in a plea deal is the government.

In order to avoid this kind of problem in the future, I recommend having fewer people in the chain of command chopping on the pre-trial work product such as PTAs and Stipulations of Fact. This is particularly important in cases where we need quick turnaround due to deadlines. When we need quick turnaround, the documents should go from O-4 to O-6 with all O-5s in information receiving mode only.

I'm not recommending cutting the O-5s out of the process. There is value in receiving input from senior officers. Instead, I'm recommending shifting them from an involvement mode to an awareness mode.

Also, specifically with regard to PTAs and Stipulations of Fact, I recommend that the drafting and review remain exclusively with the O-3 Trial Counsel and their O-4 Supervisor. This is a daily case management function. No one else is the chain of command should be requesting changes to these documents because they are too far removed from daily case management. It is not fair to them. They are too far removed from the case to be expected to provide meaningful input. For this reason, they shouldn't bear risk when things go wrong.

In addition, the O-3s and O-4 are the only people in the chain of command who bear risk when things go wrong in the courtroom. As such, they should be permitted to make their own daily case management decisions. Further, I recommend that the CA be briefed only by people in the chain of command who have a strong understanding of the terms of a settlement offer.

This was a very difficult email to write, but it is important that the command understands this situation. We will not be able to sustain a 50% increase in case load if we do not correct these glitches. I don't, however, want to be all doom and gloom. Through creative thinking, we were able to get the job done with no complications. As you know, in litigation you always get thrown

> some curveballs. We managed to hit this one out of the park. We got the findings and sentence we were looking for. I look forward to your input on this matter.

On February 24, 2015, the CO sent the applicant an email as a follow-up to a meeting the day before:

> I have thought long and hard about your status at LSC and your management of a large portion of our military justice docket. To me this is an issue of trust, and right now I can't fully trust you. My expectations for you are below. My goal is to set you and your staff up for success as you prove critical services to our large client bases. However, it is up to you to choose to elevate your actions and performance to meet the expectations. I will accept nothing less.
>
> CDR …, as your direct supervisor, will have a follow up conversation with you about our expectations to ensure that they are clear and understood.
>
> 1 – Truth to Power. I appreciate and value your frank input, even if I disagree with portions of it. I expect you to continue to provide TTP.
>
> 2 – Short term. Research and evaluate what must/should be done to ensure the legal sufficiency of the … case. Also include what notifications we should make, and in what format. In sum, I want you to fully consider all options/risks and obtain 0946 input. I want this completed so that we can take necessary action this week. I want to see your assessment, reviewed by [the Supervisor] by COB Thursday.
>
> 3 – Long term.
> - Personal Responsibility. Own your docket & take responsibility for its competent management. Expedience is important, but should not take precedence over making fully informed decisions. You will have to account for the geo separation from our flag clients in your planning. I expect you and your staff's work to be fully researched and evaluated – even more important when you are exploring creative solutions.
>
> - Chain of Command. Use and inform your chain of command. Briefing the chain of command is especially important when you are exploring creative solutions. As the SJA I have a duty under Article 6 to advise our convening authorities on military justice decisions that they must make. I will routinely rely on you to be actively involved in those decisions, but I am the SJA and I take full responsibility for everything that occurs on our criminal docket. [The Supervisor] and the XO are there to offer helpful input and they do that on a regular basis. I value their input.
>
> 4 – Trust. I need to be able to trust your work and your decision-making process. For me personally, I can better trust officers who own their mistakes and take full responsibility for corrective action. Similarly, after the fact self-serving rationalizations are not helpful to me. Trust has three components: honesty, competency and industry. If you are not honest, competent and industrious with your time, I need to check in more and can trust less.
>
> - Honesty. Honesty involves not only providing truthful answers, but also sharing or volunteering information that is important, but has not been directly requested. Our ethics rules require candor in all we do … no shading the truth. I demand the same.
>
> - Competency. Competency, in military justice, requires not just experience (which you clearly have) but also a willingness to exhaustively review our procedures, manuals and case laws to ensure, as much as possible, that our cases will survive litigation and appellate review. When our policies, procedures and manuals do not directly address a problem we are facing, we owe it to our shipmates and clients to ensure that our solutions represent not an individual's opinion but instead reflect the well considered views of the government. To avoid capricious action and ensure good governance of our military justice mission, we need to collaborate and carefully consider matters, not simply close cases. As the division chief I expect you to add value to the work of your subordinates.

> - Industry. Industry means working hard … to accomplish the mission. Check and rechecking to make sure the work is getting done. And the work must support the mission. In military justice matters, the mission is to provide commanders with options, explain those options, and then be prepared to support the commander's direction. Further, I expect you to be the hardest worker in your division … setting the example for the new JAGs that fall under your mentorship. Likewise, I expect you to be more committed to our mission than your subordinates.
>
> Please acknowledge your receipt of these expectations, copy to XO and [the Supervisor] and include whether you feel that you can meet the expectations.

The applicant acknowledged receiving the CO's email the same day. He stated that he had met with the Supervisor "for over an hour and went over your expectations in detail. I believe that they are reasonable. I intend to meet and exceed them."

On March 23, 2015, the applicant advised the Supervisor in an email (applicant's Exhibit 6; see paragraph A.4. above) that he had been in contact with a State Medical Licensing Board Chief Prosecutor, who had told him that she was going to assign a prosecutor to the case, review the Coast Guard pre-trial agreement and stipulation of fact, review a redacted copy of the Coast Guard's report of investigation, and initiate an independent investigation. He stated that the signed pre-trial agreement was ready for decision and signature by the Admiral.

Removal and SOER

On March 31, 2015, the applicant was removed from his primary duty as the head of the Military Justice Division. The SOER documenting his removal states that he was removed due to substandard performance pursuant to Article 5.A.3.e.(1)(b) of the Officer Manual. The office Supervisor who had arrived on July 1, 2014, served as both Supervisor and Reporting Officer for the SOER and assigned him one low mark of two for "Professional Presence," twelve below-standard marks of 3, three marks of 4, and two above-standard marks of 5. He assigned the applicant a mark in the second spot on the Comparison Scale, denoting a "marginal performer." The SOER includes a few positive comments supporting the marks of 4 and 5 but also the following negative comments supporting the lower marks:

- "Poor planning resulted in delinquent submission of 3 courts-martial (C-M) records of trial (ROT): CGHQ rebuke & threatened validity of C-M sentences upon review. Despite Counseling & CG Court of Criminal Appeals decision identifying delays as 'unreasonable,' submitted another ROT late."
- "Instead of seeking resources or guidance, improperly directed subord attorney to slow-roll work on major investigation involving rape, other sex offenses: suggested 'people would forget about it' – case months delayed, undermined good order & discipline, own authority."
- "Routinely argued against confinement, sought to 'deal' cases as early as possible in effort to reduce workload, rarely put in more than minimal workday."
- "Ignored repeated counseling, made critical decisions without briefing chain of command: criminally charged member without consulting Staff Judge Advocate; circumvented Command & dropped sexual assault charge in exchange for guilty plea to a lesser offense."

- "Failed to know or attempt to understand basic rules central to duties (incl: jurisdiction of courts, how confinement is reviewed, how Commanders report 'action' taken on a court-martial, proper use of Charge Sheet). Relied on personal experience rather than researching legal questions, to detriment of mission."
- "Acted for expedience rather than justice, client unit good order & discipline."
- "Despite repeated counseling on listening & noticing/reading audience, routinely ignored presence of seniors, or sent signals of disinterest (eg: when talked to, ROO avoided eye contact, started cappuccino maker, indifferent to grinding machinations drowning out speaker)."
- "Contemptuous in talks to CO & XO, meetings had to stop for ROO to cool off."
- "failed to compare JO's legal theories against published legal standards, adding little value or leadership."
- "Less sensitive to sharing workload: when sole O-3 subordinate regularly worked 13 – 15 hrs/day on MilJus, ROO failed to arrive on time, put in full days, or be available to support LT."
- "ignored direct tasking; caused considerable frustration, reduced morale, delayed delivery of legal service to clients."
- "Squandered prof-dev opportunities: instead of encouraging trial of worthy cases to allow new attys to gain essential military litigation experience, suggested settling real cases & paying $2000 to host mock trial."
- "Detached from important, time critical matters; made situation worse by statements to subordinates that important cases – including a rape case – be slow rolled & hopefully forgotten."
- "Failed to build teams; often inaccessible to subords b/c door was closed, wasn't in, or was wearing headphones listening to the radio. Lack of leadership raised as climate issue by several JOs. Tone deaf to workplace climate issues: ignored direct orders not to listen to sexually suggestive radio show in workplace to consternation of subordinates dedicated to fighting against sex assault & harassment."
- "ROO seemed generally disinterested in leading Division, executing MilJus mission, or serving in military environment. Late to work, early to leave, frequently sought excuses to be absent from office & attend training with civilian law offices, serve own interests: primary duties were rarely ROO primary interest. Application to become a military judge exceptionally well-prepared & submitted on time, but was first exceptional work product submitted by ROO. Failure to seize duties & lead prejudiced client good order & discipline, failed interests of justice, & undermined Command."
- "Pursued initiatives to reform to LSC to reduce amount of supervision over own position; ideas for CGJAG mil. justice reform adopted; negotiated novel resolution in Gen. Court-Martial of O-6; provided several non-MilJus training opportunities; however, generally apathetic to deadlines & even encouraged attorneys to let important cases languish."
- "Frequently lacked candor or respect when addressing supervisors: evasive about reason for 6 hour absence, first claimed 'the judge ordered me to a meeting' then admitted being

on a social call; claimed need for 2 days off for training to meet 'CLE requirements' when in fact CLE was not required; claimed credit for developing major training program for CG lawyers when the program was in fact developed by the Army; failed to advise any supervisors about withdrawing a case from a flag-officer's jurisdiction & re-referring it via a local O-6 due to poor planning & for own convenience; claimed not to understand multiple deadlines (submit case summaries, charge cases): poor client service, undermined Command's trust in ROO."

- "Uniform good, but needed counseling on basics like shaving & military bearing, addressing O-6 CO as 'sir.'"
- "Not recommended for promotion. Recent conduct indicates officer is not prepared to assume duties with increased responsibilities. Lacks the expertise expected of a 3rd tour attorney, the judgment expected of an O-4 & the candor expected from all officers, especially prosecutors."
- "Repeated counseling has had little impact. Following recent formal counseling demanding greater honesty & more sincere efforts to execute mission in a timely way, ROO told subordinate he was putting already delinquent, but ultra high-viz case 'on a slow pedal' until CO & XO tx'd [transferred], reflecting contempt to them & indifference to timely justice – serious core values problems."

On April 7, 2015, the Supervisor signed the SOER as both Supervisor and Reporting Officer. The same day, the Supervisor sent the applicant a copy of the SOER by email and noted that they had reviewed it together. He attached a "job aid" about responding to a derogatory OER and also named an officer at the Personnel Service Center who would answer his questions about the procedures for responding to the SOER. He also advised the applicant that an O-5 attorney could "provide you help with drafting your response in the addendum." The Supervisor also forwarded this email to the O-5, cc'ing the applicant, but with only the "job aid" attached, and told the O-5 that the applicant might reach out to him for assistance.

Request for Redress

On April 17, 2015, the applicant submitted a Request for Redress to his CO. He stated that the command had not allowed him a chance to correct deficiencies and that giving him that chance would have obviated his relief from his primary duties. He stated that relieving an officer of his duties was "an extremely unusual command action that is a process of last resort" and had been done without an investigation. He asked the CO to reverse the decision, return him to his billet (or an alternative billet under a different SJA) and to work together to prepare a fair, annual OER "that recommends promotion and adequately addresses many of the positive contributions I've made to the unit and the CG over the past year." As an alternative, he asked that the procedures be suspended and that the CO convene an independent administrative investigation because he thought that his removal had violated Coast Guard regulations.

SOER Addendum and Endorsements

On April 19, 2015, the applicant submitted an Addendum for inclusion in the SOER. He apologized for letting his staff down and denied any malfeasance or ill intent. He stated that "[w]ith the wisdom of hindsight, I would do some things differently, and if I could go back and

change things, I would." He included some of the same statements that he made in his application to this Board. He also stated that since he had arrived at the office, the caseload had increased by nearly 50% but for six months, he had had just one subordinate lieutenant instead of three. He stated that he had done his best

> while leveraging every opportunity to be more efficient and effective in order to further justice and advance good order and discipline. My job was to manage the battlefield, not every individual skirmish. … The large workload and limited staffing simply didn't afford me the opportunity to dig into every issue in every case. … If I didn't know something, it wasn't because I willfully disregarded it or deemed it unimportant. If I didn't recommend that we take a case to trial, it wasn't because I didn't care. I freely admit that I pushed to settle some cases in light of the competing demands, but I only acted as such when I believed that doing so served the interest of justice.
>
> I acknowledge that sometimes I moved faster than I would have liked and that I sometimes made errors, but I tried to learn from every one of them. There were other instances where I delayed actions for legitimate tactical reasons to improve the likelihood of success. … I regret not clearly communicating my intent to the [Supervisor] in some of these cases. Notwithstanding, in every instance I did the best I could to manage my limited staff and be responsive to my SJA/CO/XO and other senior decision makers who were 3,000 miles away and who started every work day three times zones in front of me. I never sacrificed or compromised a just outcome by pushing or delaying a case to simply avoid having to deal with the myriad of administrative hurdles associated with the practice of military justice, in general, or at the geographically distributed LSC, in particular.
>
> Furthermore, I firmly believe that my relief of primary duties was largely caused by a systematic communications break-down that led to an interpersonal conflict with the RO. I conducted myself with this RO the same way I've conducted myself with all of my previous supervisors. Up until now, my chains of command, including the LSC's recently departed Commanding Officer, considered my work to be excellent, and evaluated my performance accordingly.[2] Looking back, I know that I could have done better resolving this tension, but the same can be said for the RO. We should have worked together to improve our communications to prevent what I believe to be a classic instance of fundamental attribution of error. As noted above, I never acted with any ill intent and if the RO had a clearly defined role or clearly articulated to me his expectations, in advance of holding me to a standard that only he was aware of, I'm certain that things would have turned out differently.
>
> Despite appearances to the contrary, I was not and am not operating at peak effectiveness due to the recent and unexpected loss of my significant other … [who] passed away suddenly seven months ago of cardiac arrhythmia. We were together for six years, and we intended to spend our lives together. Her death crushed me and had a profound impact on me mentally. In the months that followed, my work performance suffered. I found that my patience, stamina, attention to detail, and mood were affected and sometimes continue to be affected. I have done the best I could to manage this, but it continues to impact my performance at times. I am sorry that the RO observed what he characterized as complacency, apathy, and absence, and I wish that I had handled my grief better, but to the extent that it's relevant, I ask you to consider the grief with which I continue to cope, due to this devastating loss, when assessing this package.
>
> Moreover, this OER fails to acknowledge many of the positive contributions I've made: [He listed the same achievements that he cited in his application to the Board.]
>
> In conclusion, I believe that I can still provide value to the Coast Guard based on my training, expertise, and this experience. How a person conducts himself in adversity reveals his character.

[2] The CO of the LSC who signed the SOER as Reviewer is the same CO who signed the applicant's prior OER as Reviewer.

> Please let me demonstrate my strong character and continue to learn and grow from this. Again, I hold myself personally accountable for any shortcomings in this evaluation. The decision to permanently relieve me of my primary duties should be based on fair, objective, and just observations of my performance. This OER fails to do that. …

On May 23, 2015, the Supervisor submitted his "Supervisor/Reporting Officer's Comments" to endorse the Addendum to the SOER. He stated that the applicant's Addendum had failed to address the substance of the SOER, including the performance and candor issues. He noted that the applicant placed blame on the volume of work, lack of staffing, personal trauma, and problems communicating with the Supervisor. The Supervisor stated that within days of arriving at the office, he

> received a complaint from HQ that ROO's shop had needlessly delayed submission of three court-martial cases, endangering HQ's ability to defend the convictions on appeal. At the time, no trials were in litigation and the Military Justice division that ROO supervised was fully staffed with competent attorneys and a yeoman.
>
> In July, ROO appeared reluctant to acknowledge the presence of supervisors, provided only terse replies to emails & generally ignored direction. Typically arriving late to work, ROO masked his location by keeping his door closed, and his "instant messenger" bubble colored so that it was difficult to tell if ROO was available electronically. ROO was counseled on respect for shipmates and the need to both be, and appear, available.
>
> Within the second week of our work together, ROO was counseled by the O-6 Staff Judge Advocate (SJA) for improperly charging a case, and then, worse, not informing the chain of command of the action. While ROO was the "Chief of Military Justice," our business rules required that ROO work for and at the direction of the Staff Judge Advocate, as well as for the officer supervisor. This case was the beginning of a pattern in which ROO routinely ignored the chain of command.
>
> ROO's intolerance of direction (or even discussions) became clearer on July 16 during a meeting with the XO. While discussing potential court-martial scenarios for a Captain accused of hideous sex offenses, ROO became so angry with the XO that the XO had to cancel the meeting. To that point, I had never seen a coworker address a senior with such contempt. ROO's attitude was inexplicable.
>
> As troubling, ROO frequently colored fact to suit his needs, eroding trust within the office. Two early examples include ROO's request for two days of TDY travel to Monterey, CA, so ROO could attend "Continuing Legal Education." When asked if the training was "for CLE," ROO said yes. CLE is required for some lawyers, depending on which state they are licensed in. I later learned that CLE was not required by ROO's home state. In a second incident, ROO arrived late to work (at around 1500 [hours]). In response to my questions, ROO explained he was "ordered" to attend a meeting by "the judge." Following more questions, ROO admitted not being "ordered" to any meeting. It was a social call. Both incidents occurred in July 2014 – well before the personal tragedy described in ROO's OER addendum.
>
> ROO's assertion that the OER reflects a communication problem with me also deserves attention. ROO was counseled on a nearly weekly basis about basic officership – being a good role model, shaving, being in uniform, arriving on time, taking responsibility, using the chain of command and building trust. The counseling was intended not to record failure, but to make ROO a success. I made a significant investment of time attempting to open the lines of communication with ROO – spending more time in counseling and discussion with ROO than with any other officer.

> During counseling sessions, ROO acknowledged every concern and promised to meet it. Each counseling session was collegial and left me with hope. But after the counseling sessions, ROO's performance and communication style would revert to the status quo ante.
>
> In Feb 2015, ROO's shop was preparing for a guilty plea in a sex crimes case. They had a "deal" signed by the Director of Logistics (DOL) (an Admiral) for the matter to be adjudicated at a "special court-martial." While this deal had been in the works for over a month, there was a problem: no "special court-martial" had been convened by DOL to hear this matter. Only ROO and ROO's shop were aware of this issue. Rather than alerting this command, ROO silently approached the Base to take the case as a new convening authority. This action usurped the authority of DOL to convene the court (ie: choose its size, members, & location) and also deprived DOL of the ability to take any further action on the case. All of this was done without the knowledge of DOL or the LSC's command cadre.
>
> Following this unprecedented, silent switch of convening authorities, ROO was formally counseled by the CO (but ROO became so angry the counseling had to stop), and then received written counseling from the CO, followed by verbal counseling from me, all of which related to performance and integrity. ROO promised to improve and to meet the CO's clearly explained expectations.
>
> The biggest case on ROO's docket (and opportunity to excel) involved a CAPT accused of horrible sex crimes. The case was fully investigated and charges were already drafted. Getting the matter charged required only finding a yeoman to sign the charge sheet, yet ROO continually made excuses for not charging in the case. Then we learned that ROO had told a subordinate O-3 that he was placing the case "on a slow pedal" and would not charge it until the CO and XO PCS'd [transferred]. ROO was holding up military justice matters in pure spite to his chain of command. This led to ROO's removal from primary duties.
>
> ROO's OER addendum includes bulletized accomplishments. The claim of 17 prosecutions is not true. Only 5 cases went to court-martial during the period. The ROO's support of the cases was far less than it should have been. ROO's claim of successfully securing a guilty plea by an O-6 is also not true. The claim of "spearheading" the creation of an "enhanced special prosecution unit" is partially true: ROO was on a committee that made the recommendation. ROO's claim to have created "the" Coast Guard-wide in-house legal training plan is overstated. ROO made minor modifications to an Army .ppt on one training topic and forwarded it as ROO's own work-product. It represented a fraction of the training required for the Service. ROO's final bullet about support to juniors is partially true: ROO submitted one OER and may have drafted letters of recommendations for interns. …

On May 26, 2015, the CO submitted his endorsement to the applicant's Addendum. He concurred in the Supervisor's marks and comments and stated that he himself had directed the applicant's removal. The CO stated that the applicant's claim that his work had always been assessed as excellent theretofore was

> not accurate: In some areas the ROO produced good results and I reinforced his performance. However, during my tenure in LSC, I met with ROO repeatedly and encouraged changes to improve performance in many other areas. If it was merely his performance that was in question then I would not have directed his removal. But at the beginning of this reporting period, I began to doubt ROO's integrity, ROO's commitment to proper prosecution and ROO's loyalty to shipmates.
>
> The first formal counseling session was in July 2014 when ROO charged a case without first consulting me. ROO provided an explanation for the charging that I found improbable. I explained to ROO it was my duty as the Staff Judge Advocate to provide legal advice on disposition options. ROO's job was to execute on my directions.

> In August, I discovered that ROO had endorsed a plea offer in the same case without first allowing me to consider and advise on the matter. I again explained to ROO our relative responsibilities. I was frustrated by ROO's indifference to my rank, responsibilities, and directions and I so informed ROO.
>
> In January, ROO submitted an application to be a military judge and attend the military judge school. I orally counseled and then wrote to ROO that I would conditionally endorse his application subject to improved performance.
>
> The next month I discovered that ROO had once again taken significant military justice action without informing me. In this case, ROO had removed a case from an admiral's jurisdiction by giving it to a subordinate captain. I directed that ROO prepare an explanation for me and that we talk about it the following Monday. The explanation was not submitted. During our meeting, ROO became so belligerent, I had to end the call. Following a cooling off period, we resumed the conversation and I counseled ROO on the need to rebuild trust. I explained that ROO needed to take personal responsibility for cases, continue to use and involve the chain of command, and that ROO needed to earn my trust. Trust, I noted, involved being competent, being honest, and being industrious in the execution of the LSC's mission. I followed up our discussion in writing and the supervisor met to discuss the matter with ROO. ROO wrote back that he found my expectations "reasonable" and intended to "meet and exceed" them.
>
> A few weeks later I learned that ROO had walked into a LT's office and, almost bragging, explained that he was placing a significant criminal case "on a slow pedal," and that he would wait to dispose of the case until after the XO and I rotated. At that point, I understood that ROO could no longer be trusted to execute the military justice mission as my representative and on behalf of our clients. He cared not for the command nor justice, nor his duties as an officer. …

On June 1, 2015, the Supervisor forwarded the SOER with the Addendum and endorsements to the applicant for signature. On June 11, 2015, the CO added a comment page to the SOER stating that the applicant "has reviewed this OER and was asked to sign it on two different occasions. Even after being counseled that his signature does not mean that he agrees with the content of the OER, he has refused to sign it."

Applicant's Article 138 Complaint

On June 9, 2015, the applicant submitted a Complaint of Wrongs under Article 138 of the UCMJ to the rear admiral who had general court-martial jurisdiction over his CO. The applicant asked him to convene an investigation and temporarily reassign him to a nearby office under a different SJA. He stated that his removal was unjustified and asked that the SOER be stopped and that his rating chain be changed to allow the XO of the LSC prepare his OER and the DJAG serve as the Reviewer. He included some of the assertions that he made in his application to this Board, including that the SOER violated Coast Guard policy because it was not fair, accurate, or objective; that the SOER "mischaracterizes certain events and takes others out of context, portraying [him] in as negative a light as possible"; that up until July 2014, his raters had given him excellent evaluations and that his performance had not changed during the reporting period for the SOER; and that his record did not contain documentation showing that he had been placed on notice of the deficiencies in his performance. The applicant also included his assertions that he had had to manage a nearly 50% increase in the workload while short-staffed; that his communications with the LSC XO and CO had been complicated by the fact that they were three times zones ahead; and that he regretted not communicating more clearly with the officer Supervisor about "how the prosecution team was resolving challenges in several cases." He stated that the "lack of regular communication" had created an interpersonal conflict and tension with the

Supervisor and that they "should have worked together to improve [their] communications and clearly identify the limits of [the applicant's] authority and what required approval." He claimed that "roles and responsibilities" had changed between the two Supervisors and that the new one had not "clearly articulate[d] any new expectations upon assuming his position. This led to a great deal of confusion and tension."

The applicant also argued in his Article 138 complaint that the SOER constituted retaliation by the Supervisor because the applicant had "upheld the ethical standards required of all attorneys and the heightened ethical standards required of a prosecutor." He described five alleged incidents that, he argued, involved unethical acts by the Supervisor:

- First, the applicant claimed that he and the Supervisor had "had a disagreement over the proper way to resolve an ethical challenge in the spring of 2008," when they were working in other positions and both had applied for a one-year detail to the a Department of Justice Admiralty unit, which at the time was "prosecuting the civil side of [a spill case] by suing the wrongdoers for money associated with the clean-up costs and damage to the environment." The applicant stated that he had told his CO at the time that the Supervisor would be ethically conflicted from working that case "because he was in possession of Grand Jury secret information from the criminal side of the same case … because he had been detailed as a Special Assistant United States Attorney" to that district to assist with the criminal prosecution in 2007. The applicant stated that his CO had understood the conflict, selected the applicant for the detail, and allowed the Supervisor to continue working the criminal side of the case. He stated that the Supervisor confronted him a few days later and "accused [him] of having 'cut him off at the knees' for approaching the CO with the ethics conflict." The applicant stated that he had assured the Supervisor that he "was trying to protect him" and had "no ill will." He alleged that the Supervisor had continued to believe that the applicant had stolen an opportunity from him.

  To support this claim, the applicant submitted an email about a different alleged ethical violation by the Supervisor in 2007. In the first email, a civilian attorney told the AUSA that the Supervisor had agreed that a safety and security inspection of a vessel would be conducted in the presence of the attorney at 1:30 p.m. on December 11, 2007, and that only the Master and replacement Chief Engineer would be questioned "to avoid government contact with represented individuals." However, the civilian attorney stated, when he boarded the vessel that day to pick up a witness for an interview with the AUSA, he found four Coast Guard inspectors in the ship's office "reviewing documents and questioning the Chief Officer who is represented by [legal counsel]. In addition, [another crewmember] and the Chief Engineer were present in the room. It is my understanding that they had also been asked questions without their counsel present." The attorney stated that this questioning had violated the crewmembers' rights and the State Bar's Rules of Professional Conduct. He stated that because the AUSA was in charge of the investigation, he was "personally responsible for the actions of your investigators including [the Supervisor]." The attorney concluded that at a minimum, no one on the investigative team should obtain any information from the inspectors and anyone on the team who had obtained such information had to recuse themselves.

- Second, the applicant stated that in the summer of 2014, the Supervisor (presumably the new one) had asked him to convene and oversee an investigation without informing CGIS. The applicant stated that he was told that "any witness statements and any evidence uncovered in the second investigation not be produced in criminal discovery. Instead, [he] was advised to keep the investigation in a 'lock box' and keep any information discovered as a result of this investigation a secret." He stated that he did not do as told because the request was unethical. He told the Supervisor that he "would not convene and oversee a second investigation that would not be produced to the defense because this would be a criminal discovery violation ... [and that he] and other members of the trial team could be penalized for this violation including potential loss of our law licenses."

- Third, the applicant alleged that in the summer of 2014, when he was working on a case in which the accused "was willing to plead guilty in return for serving five months in jail," the Supervisor had agreed that five months in jail was appropriate but asked the applicant to support his recommendation to the CO that the plea offer be rejected "to create an opportunity for a relatively new trial counsel to get some trial experience. [The applicant] refused to follow this request because [he] felt it was unethical" and an "unnecessary use of limited resources" since if the case went to court-martial, "the member would be in jail much longer than five months." Therefore, he refused to support the Supervisor's position, and ultimately the CO agreed to accept the plea offer.

- Fourth, the applicant stated that in early 2015, they were investigating a sexual assault case in which the victim had provided copies of some text messages between her and the suspect but had refused to turn over her phone. They were concerned about this so they obtained a search warrant. The victim's counsel was not pleased and contacted CGIS senior management. The applicant then explained to the Supervisor "that the search warrant was necessary in the event the victim was refusing to turn over text messages that would prove that the sexual relationship she had with the suspect was consensual" and that it would be "unethical to charge this suspect without first determining whether exculpatory, consensual sexual relationship text messages existed because we could be bringing criminal charges, without probable cause, against an innocent man." He alleged that the Supervisor either did not understand the need to get the phone or "was afraid that he would look bad to his superiors" because he "seemed concerned that others would think that he wasn't supporting a victim." The applicant also stated that the Supervisor "seemed to have no concerns about bringing criminal charges against a potentially innocent man without first recovering necessary evidence that could prove the man's innocence."

- Fifth, the applicant stated that early in the summer of 2014, after the CO had asked him to prepare a reform proposal for a Military Justice Working Group, the applicant had submitted one that recommended streamlining the prosecution of military justice cases "by removing the LSC's XO and [the Supervisor] from any role and responsibility for the practice of military justice in the LSC," which would be consistent with a prior structure and the other military services. He also recommended that the rating chain include the CO of the LSC and the DJAG. The applicant stated that the officer Supervisor read his proposal for reform the first day he arrived at the office, and shortly thereafter, their

> "working relationship began to deteriorate, in [his] opinion, largely as a result of [his] reform proposal."
>
> Moreover, the applicant stated, when the CO again asked for proposals to reform the LSC in late July 2014, he drafted another one that also eliminated the Supervisor and the XO of the LSC from any active role in military justice. He stated that he was trying "to relieve the tension" between him and the Supervisor and "hoped that the proposal might start a constructive conversation that would relieve the tension." Therefore, after submitting the proposal, he tried to have a constructive discussion with the Supervisor about it, but the Supervisor "raised his voice" and "angrily said, 'I'm your supervisor!' And refused to discuss the subject." The applicant stated that in early 2015, he again tried to relieve the tension by "drafting an agenda that proposed ways in which we could work together better and requested periodic meetings to check on progress." He alleged that the Supervisor told him he was "doing good" and did not counsel him on his performance or schedule any follow-up meetings. The applicant alleged that his removal from his primary duties was therefore "a complete surprise."

The applicant also alleged in his Article 138 complaint that his removal had violated Coast Guard policies and procedures. He stated that the CO had removed him without an investigation and one day before a change of command. He alleged that this timing "effectively deprived [him] of any meaningful ability to address the allegations made against [him]." The applicant stated that as attorneys, they "always advised commands to conduct an investigation when they are considering a Relief from Primary Duties. There is simply no proof to support the allegations made against me. These allegations are the finger pointing of one person with no documentation or evidence to support his actions." He alleged that no one had interviewed him or attempted to independently confirm the Supervisor's allegations. He also complained that because CG-094M is the only office with authority delegated by the JAG to assist individual members of the Coast Guard, he had been assigned an LSC attorney who reported to the Supervisor to assist him. He alleged that the LSC attorney could not zealously represent him for fear of retaliation.

The applicant also alleged that the Supervisor had "exploited and manipulated" an email sent but the CO of the LSC. He stated that during a webcam meeting between the LSC command cadre and himself, they had "discussed complex logistical problems" related to a recent guilty plea. He alleged that he had previously recognized these logistical problems and tried to address them in the reform proposals that he submitted to the CO but they had not yet been approved. He stated that the meeting "was a spirited and robust conversation between the CO and me" and that he had previously had many similar discussions with the CO. He alleged that they both "recognized that this was good for our working relationship" and that the CO "expected [him] to be his check and balance and demanded that [he] always 'tell truth to power.'" The applicant stated that they both benefited from this interaction as the CO "saw a fresh perspective while [the applicant] gained from his extensive experience and education." The applicant stated that these discussions were normally private between the two of them, but on this occasion, the applicant failed to recognize that "the environment was different" because the CO's subordinates (and the applicant's superiors) were overhearing their discussion and were unaware of their "unique working relationship." The applicant admitted that he had raised his voice to the CO, after which the CO "directed a 15 minute break" before they "resumed the meeting and worked out all the issues." The applicant alleged that the other officers, who were

not aware of his working relationship with the CO, "misconstrued the robust discussion as a subordinate being disrespectful to a superior officer," and the CO sent him an email in which he "outlined his expectations." The CO also directed the Supervisor to counsel him on the CO's expectations, which he did. However, the applicant alleged, the Supervisor did not set any "goals or objectives for future conduct" or establish a "follow-up process." After this counseling, the applicant stated, he told the CO in an email that his expectations were reasonable and he intended to meet them. He alleged that a few days later, they "apologized to each other and moved on without any residual consequences. … We were back to our strong working relationship." The applicant argued that the CO's email "was not meant to result in a special OER … [or] a tool used to lead to my temporary removal. Instead, it was a tool provided by the CO to help [the applicant] do a single, particular part of [his] job better. Any other use of this email is exploitation and manipulation." The applicant argued that an investigation would reveal that he had met the CO's expectations. He also asked that the Supervisor be ordered not to take further action personnel against him and not to discuss the matter with witnesses for the investigation because he had the "means, opportunity, and incentive to manipulate the investigation through witness intimidation and tampering." He alleged that the Supervisor had previously tried to intimidate witnesses by telling CGIS agents to question them without their lawyers present.

The applicant stated that the SOER was prepared in violation of Coast Guard policies because his rating chain did not meet the 45-day deadline and because the Supervisor had submitted a two-page endorsement, instead of a one-page endorsement.

The applicant noted that his fiancée had passed away eight months earlier of cardiac arrhythmia, and her death had had a profound impact on him mentally. He stated that his work performance had suffered and his patience, stamina, attention to detail, and mood were sometimes affected. He stated that if he had handled his grief better, he would not have raised his voice to the CO in the presence of his subordinates, and he asked that his devastating loss and grief be considered.

The applicant also listed the same accomplishments that he listed in his SOER Addendum and in his application to the Board. He enclosed copies of some of the documents and emails summarized above and concluded by stating that he had "always endeavored to give [his] very best each and every day" and "to see that final outcomes were just and fair" and by repeating his request that his case be thoroughly investigated.

Subsequent Service

Following his removal, the applicant was reassigned to an Area Command. On his next OER, dated April 30, 2016, the applicant received primarily marks of 5 with some marks of 6 in the performance dimensions and another mark in the fifth spot on the Comparison Scale. These marks were supported by many laudatory comments, and he was recommended for promotion to O-5. Subsequently, the applicant resigned from the Service.

SUMMARY OF THE VIEWS OF THE COAST GUARD

On June 22, 2016, a judge advocate (JAG) forwarded and adopted a memorandum provided by Commander, Personnel Service Center (PSC), as the Coast Guard's advisory opinion in

this case.

PSC noted that the application is timely but that the applicant failed to file an application for correction of the SOER with the Personnel Record Review Board (PRRB). PSC asserted that the applicant was removed from his primary duties by the CO of the LSC due to "loss of confidence" in accordance with Article 1.F.2.b. of the Officer Manual, under which an officer may be removed for failing to perform primary duties and thus hindering mission accomplishment; demonstrating neither the desire nor the ability to perform assigned duties; or behaving in a way that significantly undermines the officer's own leadership authority. Pursuant to Article 1.F.2.d.1., at the CO's discretion, an officer may be temporarily removed from primary duties at any time, and if the officer meets the criteria for removal in Article 1.F.2.b., the CO prepares and submits an SOER to PSC, who reviews the SOER and makes the final decision about removal.

Regarding the length of the Supervisor's endorsement to the applicant Addendum, PSC stated that the Officer Manual allows each member of the rating chain to submit an endorsement with one page of comments, and when one officer serves as both Supervisor and Reporting Officer for the OER, as in this case, PSC allows the officer two pages because the officer is acting in both capacities.

Regarding the claim that the SOER was not submitted within the 45-day deadline, PSC stated that no policy "holds rating chains accountable when OERs are not received within 45 days" and such a delay does not invalidate an OER. PSC stated that SOERs "present unique preparation requirements" for both the ROO and the rating chain and so their preparation "often exceed[s] the normal processing time [for an OER] as they require repeat consultation and an additional 14-day addendum period not associated with regular OERs." PSC also noted that in this case, the rating chain also had to obtain input from the prior Supervisor who observed the applicant's performance at the start of the reporting period in May and June 2014.

Regarding the lack of an investigation of the applicant's conduct, PSC stated that Coast Guard policy does not require an investigation under these circumstances and a CO may remove an officer "at any time if that officer fails to perform primary duties such that their performance hinders unit readiness or that officer's actions undermine their leadership authority." PSC noted that in this case, the conduct that led to the applicant's removal was observed by the CO and XO, as well as the Supervisor, and that complaints about the applicant had been received from multiple units. Therefore, PSC concluded, no investigation was needed.

PSC submitted sworn declarations from the Supervisor and the CO (summarized below) and argued that the applicant has not submitted sufficient evidence to prove that the SOER was retaliatory in nature or completed in violation of policy in the Officer Manual or the OER Manual, PSCINST M1611.1A. PSC concluded that the CO's decision to remove the applicant "was well supported" and that he has not shown that the SOER was erroneous or unjust.

Declaration of the Office Supervisor

The Supervisor stated that as such, he oversaw most of the LSC's work in half of the United States, including military justice, procurement law, real property advice, environmental law, employment law, and legal assistance. He stated that he supervised the applicant from July 2014 through March 2015, when the CO removed the applicant because the CO had "lost trust in

his leadership, integrity, and fidelity to the military justice mission." The Supervisor stated that he served as both the Supervisor and Reporting Officer for the SOER and that he has re-reviewed it and "stands by" his comments, as well as those of the CO.

Regarding the lack of an investigation, the Supervisor stated that an investigation was not needed because the applicant's performance in the incidents leading to his removal were personally observed by the CO, XO, and himself. In addition, the command had received complaints about the applicant's performance of duty from Coast Guard Headquarters, the Area Training Center, a Base command, and multiple junior members of the LSC.

Regarding the delayed submission of the SOER, the Supervisor admitted that he was late by about ten days in completing his endorsement to the Addendum. Regarding the two-page length of his endorsement to the Addendum, he stated that he served as both Supervisor and Reporting Officer for the SOER and each position is authorized a one-page endorsement to an Addendum under Article 5.A.7.c. of the Officer Manual. Therefore, when the Supervisor and Reporting Officer are the same officer, PSC allows that officer to submit a two-page endorsement.

Regarding the offer of LSC legal counsel to the applicant, the Supervisor stated that under Coast Guard policy, the applicant was not actually entitled to free legal counsel as a result of his removal and the SOER. Although he was not entitled to free legal representation, the command offered him the assistance of an O-5 attorney to help him "work through the process of responding to the removal and answering the derogatory OER. [The O-5] is one of our finest attorneys and had a solid relationship with [the applicant]." The Supervisor submitted a copy of the emails dated April 7, 2015, to support his claim. He noted that at the time, the O-5 was about to "fleet up" to become the XO of the LSC, and so the Supervisor would be working for him. In addition, he stated, the applicant never asked for the assistance of anyone else and, in addition to the O-5, "had support from CG-094M, the branch of CGJAG that provides personal representation" to Coast Guard attorneys. So an O-5 who was the most experienced attorney assigned to CG-094M also helped the applicant. Thus, the applicant received more legal support than policy required.

Regarding the timing of the applicant's removal, the Supervisor stated that the CO's confidence in the applicant had been slipping "for some time" and the applicant had received formal counseling in January, February, and March 2015, during which he had promised to take action on certain cases. However, they then learned that he had "declared to subordinates that he would not do that which he had promised us to do," and so he was removed from his post. He noted that while the applicant blamed him for the removal and attributed his removal to the "finger-pointing of one person," it was the CO's decision to remove the applicant. The Supervisor provided a chronology of alleged events that, he alleged, had caused the CO's and his own confidence in the applicant to wane over time:

- **July 1, 2014**: The Supervisor stated that when he arrived at the LSC he had "had a favorable estimation" of the applicant from previously working with him, "but that would change considerably."
- **July 3, 2014**: The Supervisor received a complaint from CG-0946 that the applicant's division "was failing to submit records of trial in a timely way," which was critical

because CG-0946 "has only 30 days from the date of the Convening Authority's action to get cases docketed with the CG Court of Criminal Appeals. CG-0946 complained that the last three cases … had all arrived late … mailed weeks after the convening authority's action. … Delaying mailing potentially threatens the validity of the results, an important issue when, as in each of those cases, the sentences included a Bad Conduct Discharge," and so required appellate review. Forwarding the record of trial required only that the staff make a copy of it before mailing it to CG-0946. The CO "spoke with [the applicant] about post trial processing deadlines the following week as part of our recurring Military Justice Tracker meeting."

- **July 7, 2014**: The Supervisor stated that during his first full week at the LSC office, he was speaking with the applicant and other officers in the division about the PHS O-6 doctor's case and mentioned that they could take the case to a Special Court-Martial if they "only wanted a conviction." The applicant abrasively replied, "No we cannot. We absolutely cannot. You cannot send an officer to Special Court-Martial." He stated that it was clear that the applicant had not read the law and was showing disrespect toward his new Supervisor.

- **July 8, 2014**: The Supervisor stated that the applicant was counseled on the expectations of the SJA because he had preferred charges in a case without allowing the SJA to advise the convening authority. The CO was concerned not only because the applicant had skipped this step but because the applicant "hid the charging decision from the LSC command cadre by indicating that the case was only 'under investigation' rather than 'charges preferred' on the LSC's military justice tracker." The CO told the applicant that "Pros memos are routed thru the chain addressed to me as the SJA, and received with enough time so that I can review them prior to preferral and discuss the case with you/[another officer] if necessary, and then I will provide oral advice to the convening authority followed by a summarized email. I am fine with having you … participate in my conversation to the CA and in some cases I will require your participation. But it is my obligation under 6(b) to be aware of case disposition options and to advise CAs accordingly." The Supervisor stated that he also told the applicant "to brief him on significant developments in cases and to seek his input before taking significant actions in cases, including forwarding of prosecution memos, preferring charges, or appointing Article 32 officers."

- **July 11, 2014**: The Supervisor stated that he held a one-hour counseling session with the applicant and discussed his "basic expectations for him and how I expected him to work for the LSC CO, but subject to my supervision. I also asked that he review each element of the OER [form] and develop a plan for meeting each dimension. The plan was never submitted."

- **July 16, 2014**: During a webcam meeting with the XO about the PHS doctor's case, the Supervisor stated, the applicant "became agitated and gruff. The XO directed that we stop the meeting before tempers flared any more. That night, I counseled [the applicant] about respect, customs and courtesies. I also encouraged him to consider apologizing to the XO for the hostility on the webcam. [He] later called the XO and apologized."

- **July 21, 2014**: The Supervisor stated that the applicant submitted an outline for a proposed brief for the case of the PHS doctor, who was suspected of "drugging and having sex with junior enlisted mental health patients, allowing at least one patient to use mari-

juana at his home, prescribing Marinol to mask the drug's metabolites during urine testing, engaging in other frat[ernization] and derelictions in the office, and possessing child pornography." The applicant "wanted to dispose of the case administratively. I preferred court-martial. [The applicant] was instructed to draft a presentation that explained the pros and cons of both options. His presentation was markedly one-sided, advocating his preferred course while suggesting serious folly in mine."

- **July 23, 2014**: In a discussion of whether a member who was in pretrial confinement could waive his right to a pretrial hearing, the Supervisor claimed, the applicant "insisted the hearing could be waived and seemed completely unconcerned that we could find no written law, rule or policy allowing complete waiver. The XO endorsed my idea to have defense counsel sign a detailed acknowledgement of rights in support of waiver. [The applicant] simply ignored our direction at the critical time and, tactically speak, the opportunity to have such an acknowledgement signed slipped away."

- **July 30, 2014**: The Supervisor stated that the applicant was absent from the office without approved leave until about 1500 hours. When asked where he had been, he claimed that he had been ordered "by the judge" to a meeting. When asked which judge, he explained that it was a state judge and conceded that it was a social call. "He insisted he was not trying to mislead me."

- **Late July 2014**: The Supervisor stated that the applicant asked the LSC to fund two days of travel to Monterey, California, to attend a CLE course on search warrants on August 7 and 8, 2014. When the Supervisor asked if the course was "for CLE," the applicant said "yes." Only after the applicant attended the course did the Supervisor learn that he was barred in a state that does not require CLE for military attorneys. The Supervisor stated that the applicant's "yes" was technically true but misleading.

- **August 5, 2014**: On this date, according to the Supervisor, the command learned that the applicant had "endorsed a plea agreement in [a case] to a convening authority" without routing it through the SJA as required. "This was a particularly big deal since the Article 120 (sexual assault) charge was dropped" through the plea agreement. The rear admiral who supervised all Coast Guard bases "was shocked to see the 120 charge dropped and correctly suspected that [the SJA] had not been briefed on the matter. This action undermined our standing with our clients and our trust in [the applicant]. This was the same matter in which [the applicant] had been reprimanded for charging without first seeking the approval of the Staff Judge Advocate on July 8."

- **August 20, 2014**: The Supervisor stated that the applicant proposed settling a case for 90 days' confinement—even though he knew the Supervisor wanted at least 6 months of confinement—supposedly to allow his staff time to prepare for another case. But the other case was already slated for a Summary Court-Martial, for which Trial Counsel does not even appear. The applicant forwarded the matter to the SJA, saying "We would like to request approval" for the plea agreement even though he knew the Supervisor disagreed. The SJA disapproved the request, noting that such a deal was "unnecessary so early in the [case] prosecution and that the workload in the other case was manageable." The judge ultimately sentenced the member to 7 months' confinement.

- **August 26, 2014**: The Supervisor stated that he counseled the applicant about his expectation that the applicant would "run non-urgent matters that required the [CO's] attention

through me. This had been an area of friction since my arrival. He insisted that he should not have to obtain my review on military justice matters because he was the 'chief of military justice.' He also referred me to a position statement he had written on how the command *should* be organized. I referred him (again) to the approved functional statements on how the command *is* organized: [The applicant] works for me."

- **Summer of 2014**: The Supervisor stated that the office was supporting the investigation into the rape of a member in training and there were "initial indications of the assailant's other sexual misconduct." The case deserved priority treatment, but unbeknownst to the LSC command cadre the applicant "was suggesting ways of 'killing' or 'slow rolling' the case so that 'people would forget about it.' Meanwhile, [the Training Center] was repeatedly demanding action on the case, but it progressed extremely slowly, even after the [Report of Investigation] was received from CGIS in the fall. We would not learn of [the applicant's] inappropriate direction to his staff until much later."

- **September 5, 2014**: The Supervisor had lunch with the applicant to try to improve their relationship. The applicant mentioned that he had been dating someone. Later that day, he received an email from the applicant stating that his girlfriend had died. The applicant was given the next week off, and they "offered him as much time as he needed away from the office to grieve and support his girlfriend's family."

- **October 20, 2014**: The Coast Guard Court of Criminal Appeals decided a military justice case and found many instances of "unreasonable delay" by the Trial Counsel, who had been the applicant (during a prior tour of duty). The Supervisor spoke to the applicant about post-trial processing on October 23, 2014, without mentioning the court's decision but mentioning the warning that the applicant had received from CG-0946 in July. The applicant insisted that they were meeting the deadlines, but at the time he was processing two post-trial matters, one of which was submitted to CG-0946 seven days late even though the sentence included a BCD and the other of which barely made the 120-day deadline.

- **December 18, 2014**: The Supervisor stated that the applicant submitted a draft "Action"—an important document stating what convictions and sentencing the convening authority had approved which is scrutinized on appeal—in the same case for which he had submitted the record of trial seven days late. The draft "Action" did not comply with the Manual for Courts-Martial. The Supervisor proposed significant edits based on that manual and the Army's Post-Trial Handbook. The applicant replied, "I disagree with the language change in the action. The way it is now worded will result in disapproval of the BCD. I'm 100% certain of this." When asked to explain his concern, the applicant stated that he "always used the same language in 'Actions'." After being shown the Forms for Actions in the manual, the applicant's response was "Oh." The Supervisor concluded that even after a year and a half of being responsible for drafting Actions as the head of the military justice division, the applicant had never read the rules.

- **January 9, 2015**: The CO and the Supervisor were asked to visit the Training Center, where the command wanted answers about why the case involving the rape of the trainee "was not moving." The SJA at the Training Center told them that he thought the applicant "was probably an impediment to progress," which showed that their clients were losing confidence in the LSC. This was the same case that the applicant had told his subordinates to "slow roll."

- **January 16, 2015**: The Supervisor stated that he had an extensive counseling session with the applicant and discussed their "mutual expectations and concerns" as noted in the applicant's summary email.
- **January 21, 2015**: The Supervisor met with the applicant to discuss his application to attend school to become a military judge. He told the applicant he could not positively endorse the application because did not have confidence in the applicant's judgment or work product. He stated that there had been no improvement in the applicant's performance regarding moving cases, checking facts, checking the law, and complying with the Manual for Courts-Martial and Military Judge's Bench Book.
- **January 23, 2015**: The CO counseled the applicant on his performance and also told him that he could not endorse the application as a military judge but would endorse his attendance at the school if his performance improved. The CO followed up on this counseling by sending the applicant an email summarizing the CO's requirements for an endorsement to attend the course.
- **February 4 to 6, 2015**: According to the Supervisor, during this period, he and the applicant discussed a draft PowerPoint presentation on criminal discovery that the applicant had submitted, which had 43 slides and detailed graphics outlining the applicability of rules and doctrines for discovery obligations. The Supervisor stated that the PowerPoint had so much information that he was not sure he could evaluate it himself, and he asked the applicant "how he built it." He alleged that the applicant told him that he had "cobbled it together from various trainings he attended, as well as other resources he had collected." The applicant also told him that it had not yet been reviewed by another attorney. The Supervisor later learned that the entire presentation had been adapted from a nearly identical one from the Army JAG School. As evidence, the Supervisor submitted a printout of the applicant's draft PowerPoint slides side-by-side with the Army's slides. It shows that the applicant's 43 slides are almost all identical to the Army's slides on military justice law and that, on the first slide, the applicant had removed the name of the Army major who authored the presentation and inserted his own. The applicant had deleted some of the Army's slides and inserted one slide about Military Rule of Evidence 612 and three slides with "Practice Pointers," such as "Always have a CGIS agent present for witness interviews"; "Do not provide written work product to the Convening Authority"; and "Bates stamp (aka number) the discovery and generally describe what you are producing in your response."
- **February 9 to 13, 2015**: The Supervisor stated that he was on temporary duty in another state this week, when the applicant was preparing for a guilty plea in a sex crimes case in which the DOL, a rear admiral, had signed a deal to have the case adjudicated at a Special Court-Martial. The deal had been "in the works" for several months, but the DOL had not signed an order to actually convene a Special Court-Martial and only the applicant and his staff knew. Instead of alerting the command, the applicant had a subordinate work with the Base CO to refer the case to a Special Court-Martial convened by the Base CO, which "usurped the authority of [the rear admiral] to convene the court," including its size, members, and location," and to take any further action on the case. The applicant did this without the knowledge of the rear admiral or the command cadre. When the Supervisor returned to the office, he had to piece together tips from others to learn about this "silent switch."

- **February 20, 2015**: The Supervisor stated that he briefed the CO about the "silent switch" at 11:30 a.m., and the CO "had serious concerns about the integrity of the process." The CO stated that the switch was "unprecedented in his 18 years of legal experience" and wanted to know if it constituted a legal error and, if so, whether there was a remedy. The Supervisor met the with applicant and directed him to prepare an outline by Sunday night "answering why this had happened, who was briefed and when, as well as the more substantive issues of whether this was legal error and if any corrective action was required or available." He explained that they wanted the outline Sunday night so that they could review it before a teleconference at 10:00 a.m. the next morning. The Supervisor stated that the applicant "thought this was overkill. To him, this was not a big deal. He relayed his belief that he should have been congratulated for developing an innovative solution. Nevertheless, he confirmed he could meet that deadline. Sunday passed. There was no email." (The applicant's email, quoted in the Summary of the Record above, was sent at 2:20 p.m. on Monday, February 23, 2015.)

- **February 23, 2015**: The Supervisor stated that he and the applicant met for a webchat with the CO and XO. The applicant "recognized no rank" in his greetings to them. The CO asked the applicant where the requested email was. The applicant claimed that he had sent the CO an email on Sunday "seeking clarification, then quickly changed tracks. He shot back at [the CO] that he did not know the email was due already. He claimed he thought it was due that Monday afternoon – after our meeting." The CO did not dwell on that issue but "pressed for details on what happened. [The applicant] defended his actions vehemently, raising his voice and expressing his anger that we failed to recognize what a good solution he developed. His tone, volume and language became increasingly contemptuous toward [the CO]. [The CO] – due for frocking to RDML the next week – directed that we take a ten minute break so that [the applicant] could cool down. For the first time, I heard [the CO] direct a subordinate to address him as 'sir.'" The Supervisor stated that when the call resumed, the applicant explained how he had researched the rules and developed a solution; how he had consulted two other attorneys, an O-4 and an O-6, and the latter stated that he had "used an identical strategy in the past." But "the complication was that [the applicant] did not consult with the chain of command – a recurring problem." After they received the applicant's email that afternoon, the Supervisor spoke with the O-4, who said that he had "walked in on [the applicant] flustered by the lack of a special court-martial and unsure how to proceed. The charge sheet was already signed by the [DOL rear admiral]. And [the rear admiral] had referred the matter to a general court-martial, not a special. [The O-4] explained how to withdraw charges from a court, and then how to paste a new 'flap' on the charge sheet to refer the matter to a new court. [The O-4] also showed [the applicant] the rules in the Manual for Courts-Martial that explained the procedure." The Supervisor concluded that the O-4's version of events "was much different" from the applicant's, which was "another example of not getting the truth from [the applicant]." The applicant later told the Supervisor that the O-6's "matter was also not identical to the one he had encountered," and this "admission was a step in the right direction."

- **February 24, 2015**: The Supervisor stated that after the CO sent the applicant an email about not trusting him, the Supervisor met with the applicant for over an hour and spoke to him in detail about the points made by the CO, "using concrete examples of [the applicant's] past actions that the bullets referred to." He discussed examples of the applicant's

lack of honesty, competence, and industry and also spoke about "basic customs and courtesies." He stated that the applicant "acknowledged he needs to improve and was lucky the CO did not take greater offense when he lost his temper." The Supervisor stated that he also tried to ensure that the applicant was "faring well emotionally" because the applicant "was an enigma in many ways, rarely showing emotion," so the Supervisor ended the meeting by trying "to find positives."

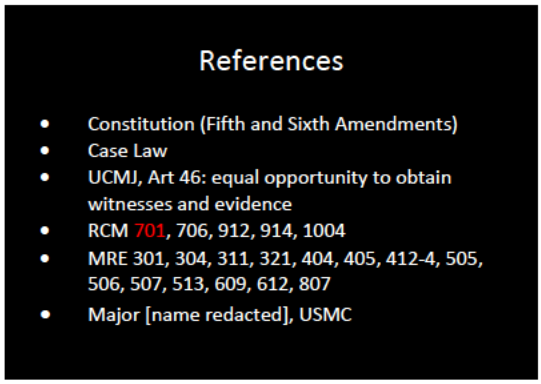
- **First week of March 2015**: The Supervisor alleged that he heard Howard Stern playing on the radio in the applicant's office and so entered and told him not to play Stern in the office. He stated that the applicant "should have known better" as he was "surrounded by three women prosecutors dedicated to preventing sexual assault and changing the culture that allows sexual assault." The Supervisor had "heard rumors" that the women were offended by the Howard Stern program.
- **March 16 to 20, 2015**: The Supervisor alleged that the applicant entered the office of a subordinate lieutenant and told her that he was placing the PHS doctor's court-martial "on a slow pedal" and did not intend to charge the case until after the departure of the CO and XO. When questioned by the Supervisor, the lieutenant stated that the applicant "had made similar comments about [that] case over a period of several months." After hearing about those comments, the Supervisor called Headquarters to learn about removing an officer from his primary duties because the applicant's statement to the lieutenant had been "completely contrary" to the CO's direction. He stated that the applicant had to be removed because he was in a "position of special responsibility," in which "he could do extraordinary harm to the military justice system."

The Supervisor also submitted responses to the applicant's allegations lettered A through F, above:

A. Regarding the applicant's claim (paragraph A above) that he successfully secured the guilty plea of the O-6 PHS doctor at a general court-martial, contrary to the Supervisor's comment in his endorsement to the Addendum, the Supervisor stated that the applicant was the "lead negotiator" on the plea agreement, but the case did not go to trial and the guilty pleas were not accepted until "well after" the applicant's removal. In addition, the Supervisor stated, the applicant's "handling of this case, and his duplicity while working on this matter, were among the central issues leading to [his] removal from primary duties."

B. Regarding the PowerPoint presentation, the Supervisor stated that this issue was particularly important because on Friday, January 23, 2015, the CO had tied his potential endorsement of the applicant's application to attend school to become a military judge to the applicant's development of a training program on "criminal discovery" within a month. On Sunday, January 25, 2015, the Supervisor said, he asked the applicant to set a time when they could consult on the training so that he could help the applicant succeed. On Wednesday, January 28, 2015, the applicant left the office at noon to work on the training. The following Wednesday, February 7, 2015, the applicant sent him the draft PowerPoint and said he had "cobbled it together" from sources he had collected. It was so elaborate that the Supervisor was not certain he "could give it the in-depth review it deserved," so he asked if any other attorneys had

reviewed it yet, and the applicant replied, "not yet." After reading it, the Supervisor made a couple of suggestions, "the most important of which was that other experienced counsel review the PowerPoint too." When they were discussing the PowerPoint, the applicant was "taking credit for the development of the slide presentation." The Supervisor provided pictures of the applicant's original first two draft slides, which appear as follows:



The Supervisor stated that after this meeting, the applicant forwarded the PowerPoint to the CO and took credit for it as though it were his own work. They later discovered it was almost entirely from the Army JAG School presentation. He stated that the CO had not placed any restriction on using or improving work developed by others, but there was an expectation that the applicant would be honest in answering their questions, and instead he had taken "credit for work that was, for the most part, not his." The Supervisor stated that the applicant's claims that he had "cobbled it together" and that no other attorneys had reviewed it were misleading because he had made only minor changes to the Army presentation, which had no doubt been reviewed by attorneys at the Army JAG School. He stated that the applicant's claims to the BCMR that he had cited the Army major appropriately and was ordered by the CO to remove the author's name are also misleading because he had presented the work as his own and listed the major as only a "reference" on the draft he submitted to the Supervisor.

C. Regarding the applicant's claim that the emails dated July 8, 2014, refute the Supervisor's comment that he had been counseled for improperly charging a case, the Supervisor noted that the CO, who was also the SJA, was clearly concerned about what had happened but was "reluctant to lay blame [in his email] in case there was some confusion." He stated that because the SJA "has scores of cases," his primary means of maintaining situational awareness of them is through the military justice tracker, which divides cases into categories, such as "pending investigations" (by CGIS and commands) and "pretrial matters" handled by LSC after a member has been charged and the LSC is responsible for moving the matter to trial. In the case at issue, the applicant had caused charges to be preferred before providing the SJA with a prosecution memo and opportunity to provide advice to the convening authority. In addition, the tracker continued to show the case as "pending investigation" even though charges had been preferred.

After the applicant sent his explanatory email on July 8, 2014, the Supervisor stated, they had a conference call with the CO/SJA to discuss the matter, and the applicant assured him that he understood the expectations. But the applicant "continued to push cases towards the resolution he wanted without providing the SJA (our CO) an opportunity to consult on the matter." The Supervisor stated that less than a month later, on 5 August 2014, the CO received an email from DOL-3 about the same case, stating that he had noticed that the charge of sexual assault had been dropped as part of the pretrial agreement and wanted to make sure that the CO knew about dropping the charge. But the CO did not know because neither he nor the Supervisor had been briefed on it. They discovered that the applicant had himself advised the convening authority on July 21, 2014—less than a week after the applicant was counseled by the CO about his mishandling of the case and promised to keep the CO better informed—to accept the plea agreement that dropped the sexual assault charge.

D. Regarding the applicant's claim that the SOER comments about him "dealing" cases early to reduce his workload and "slow rolling" cases are inaccurate, the Supervisor stated that one of the applicant's subordinates had quoted the applicant as having instructed him to "slow roll" a case and that the applicant had also directed "that evidence be sent to the slowest labs" and "expressed hopes that the case would be forgotten." The case had involved the rape of a student at the Training Center, and the applicant had "actively discouraged the Trial Counsel working on the case, insisting that they would lose if they went to trial." But after the applicant was removed, the case went to trial, and "the jury found the accused guilty of sexual assault as charged."

E. Regarding the applicant's claim that the Supervisor was responsible for the delays in the PHS doctor's case and had delayed the case by five months, the Supervisor stated that this accusation is absurd and that the applicant was providing only selected facts and taking quotations out of context. The Supervisor stated that on August 25, 2014, he did tell the applicant not to send a settlement agreement to the defense counsel, but that was only five days after the CO had told the applicant that initiating a plea deal was premature. Moreover, the Supervisor's "reluctance for the government to initiate plea discussions hardly explains why it took [the applicant] so long to charge [the PHS doctor]. Drafting charges can be challenging, but by 16 January 2015, the government and defense had already signed a Pre-Trial Agreement (PTA). Though the PTA was complete (and included the exact language for each charged and specification that [the PHS doctor] would plead guilty to) charges had not been preferred." The command repeatedly asked the applicant when the charges would be preferred "and received weak excuses." When the convening authority requested an update on March 24, 2015, the LSC "had been promising charges for months." The Supervisor stated that about that time, they learned that the applicant "had gratuitously informed a lieutenant in his office that 'he was putting the [PHS doctor's] matter on a slow pedal' and waiting to charge [him] until our CO and XO were gone. (The CO was due to [transfer] and the XO was slated to retire in the next two months.)" The Supervisor stated that contrary to the applicant's implication that the Supervisor did not allow him to charge the doctor for several months, they had been asking him to charge the doctor for months. When the Supervisor learned that the applicant had told a lieutenant that the case was "on a slow pedal," he told the applicant that he

would have the charges preferred himself if the applicant did not, and the applicant finally preferred the charges on March 26, 2015.

The Supervisor also stated that the applicant had urged settlement and argued that taking the PHS doctor to trial would be impossible because the doctor could retire during the proceeding and walk away. However, when the Supervisor researched the issue in September 2014, the applicant "began to acknowledge that we could maintain court-martial jurisdiction" but still recommended offering a plea deal to accept NJP and, if the doctor refused, forgoing military justice and handling the case administratively with a Board of Inquiry. The Supervisor stated that all along, the applicant had not favored charging the doctor, not because he thought the doctor was innocent but because he thought it would be "easier to administratively handle the case." (The Supervisor noted that the doctor had been accused of tying a junior enlisted patient in a mental health program to a bed in his home and shooting at targets rigged above her; of possessing child pornography; and of prescribing Marinol to mask marijuana consumption by "one of the junior enlisted women who was living with him.") The Supervisor denied that he had ever countermanded the order of the CO not to deliver a pre-trial agreement.

F. Regarding the applicant's claim that the Supervisor slowed cases by doing unnecessary research, the Supervisor stated that he sometimes did considerable research because the applicant had not. The applicant repeatedly "relied on instinct instead of law and policy to determine case dispositions. And repeatedly his instinct was proven wrong."

The Supervisor further stated, in response to the applicant's claim that the Supervisor had resented him because of the applicant's reform proposal for the LSC, that he "felt no such resentment and, in fact, … personally agreed with much of the substance of his recommendation. And I told him so. However, the proposed structure was not the organization we worked in." In response to the applicant's claim that the Supervisor's expectations were unclear, the Supervisor stated that they had "nearly daily meetings throughout [the reporting period]" and his "impression was that [the applicant] did not like being supervised, but supervision was necessary. … [The applicant] would periodically complain that he should report directly to the SJA. But the SJA (our CO) did not favor that model and insisted that [the Supervisor] be involved in the military justice mission."

In response to the applicant's claim that the SOER failed to recognize five areas of significant achievement (see pages 9 and 10 above), the Supervisor stated the following:

1. "While the arithmetic can be done to count or exclude cases based on when they began or ended," the Supervisor "found no way to arrive at numbers as high as [the applicant] claims."
2. The applicant was removed from his primary duties in large part because of his handling of the case in question.
3. In the Supervisor's discussions with the CO, the CO had nice things to say about the applicant's contributions to the working group but "the praise was not so rich as [the applicant] suggests it ought to have been."

4. The applicant's "training contributions to the command were not nearly as great … as the harm caused by his poor judgment elsewhere."
5. The Supervisor cannot "recall any of the specific actions" that the applicant described about recognizing his subordinates, but they may have happened before the Supervisor arrived.

Finally, the Supervisor stated that Commander, PSC denied the applicant's Article 138 complaint on July 7, 2015. Because his complaint had included allegations of conduct that would violate the Coast Guard's legal professional responsibility rules, the JAG had directed a separate inquiry into the complaint. The investigating officer had found that the applicant's allegations against the Supervisor were not substantiated and recommended that no action be taken. On November 17, 2015, the Acting JAG had concurred and closed the matter.

Declaration of the CO/SJA

The CO stated that although his primary office was far away, he frequently traveled to the applicant's office and personally observed the applicant. He also communicated with the applicant frequently via webcam and communicated with the Supervisor almost daily. By statute, he stated, court-martial convening authorities must at all times communicate directly with the SJA in military justice matters, and he had made his expectations about this clear to his military justice staff, including the applicant. However, in one case, the applicant "unilaterally took action that was clearly reserved for a flag officer convening authority based on advice from myself as Staff Judge Advocate. When I discovered what he had done and challenged him on the process, he developed a hindsight legal theory that proved to be inadequate and completely self-serving. In other cases, [the applicant's mismanagement] led to [his] manipulating case processing or case updates for self-serving purposes."

The CO denied that the SOER was retaliatory. He stated that it was triggered by his own decision to remove the applicant from his primary duties. He "lost trust in his ability to perform his duties, to advise Coast Guard clients, and to lead those entrusted to his supervision. Further, I could not trust him to give me legally accurate or trustworthy answers. The [S]OER accurately reflects the basis for my decision." The CO stated that he is confident that the applicant "was not retaliated against in any way by his direct supervisor. He was, however, held accountable. I believe that he often misconstrued the distinction."

The CO stated that he regrets the timing of the applicant's removal only because, in hindsight, he should have removed the applicant sooner. The CO stated that he kept hoping that the applicant would respond to the repeated guidance and counseling he had received, and the Supervisor "advocated on behalf of [the applicant], convincing me to give [him] additional opportunities to improve."

The CO disagreed with the applicant's claim that commands are always or even regularly advised to conduct an investigation before removing an officer and stated that an investigation was neither required nor needed in this case. The CO stated that he "had more than enough information and personal interaction with [the applicant] to make a decision. … I ultimately made the decision to remove him after I discovered that he again deliberately undermined my authority and expectations for a high visibility military justice case." He also stated regarding the

PHS doctor's case that the applicant's

> repeated obfuscation of the legal issues and process in this high visibility case was a prime consideration in my decision to remove him. Despite repeated direction and guidance, he did not handle this case appropriately. He did not adequately research the legal issues and instead provided me with answers that met his desires instead of answers that followed the law. This caused delays in the case as he had to be directed to conduct legally sufficient research. The charges he initially drafted were very poorly written. Further just before I removed him I discovered that he gave his subordinates direction to deliberately slow down the case processing so that the case would be resolved after my departure. I found this to be unacceptable conduct, particularly after I had counseled him several times, including in writing, about my expectations.

The CO agreed with the Supervisor that Coast Guard policy does not entitle officers to legal counsel to address an SOER, but the applicant "was free to consult with whomever he desired." Also like the Supervisor, the CO admitted that the SOER was submitted late but he reaffirmed its accuracy.

Regarding the PowerPoint presentation, the CO stated that the applicant "inappropriately took credit for creating a superb presentation that was actually developed by the Army JAG School. While using the work of others was not a problem for this project, taking credit for that work added to my inability to trust [him]. I did direct him to remove named individuals from a reference slide in the presentation as it would quickly be outdated. However, the names that were removed were not listed as authors, but merely references. [The applicant's] name remained predominately displayed on the first slide of the presentation."

Regarding the applicant's legal research, the CO stated that his failure to do adequate research was "another frequent theme in [the applicant's] performance. Although he did some very competent work on occasion, he was frequently sent back to conduct basic legal research to support his legal opinions, which he often claimed were based on prior experience. It was after one such claim that I called his supervisor from a prior unit to determine whether [his] claim was accurate. I discovered that it was not accurate."

The CO stated that while the applicant's performance "was positive in some areas," he "exaggerate[s] his role in 'spearheading' military justice reform." The applicant "provide[d] early input into the process," which was useful, and was part of the working group, but he "did not play a significant role in developing or maturing the reforms."

The CO stated that in general, he was not satisfied with the applicant's overall performance and counseled him numerous times. He also had "many discussions about managing [the applicant] with both of his supervisors, with his former supervisor, with other senior judge advocates, and with my chain of command. After numerous attempts to set him up for success, I concluded that [he] was more worried about himself than his shipmates. He did his best work when it was something that directly benefitted him – for example – his military judge application was fantastic. I wish I could say the same for his other work. Further, he clearly did not like to be supervised, either by me or by his direct supervisor, and that presented in his demeanor and respect for authority."

SUMMARY OF APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

After being granted extensions of the time to respond, the applicant submitted significant new evidence and stated that "more evidence continues to be discovered." He noted that he had filed a tort claim against the Coast Guard requesting relief "from torts associated with national and transnational organized crime" by the CO, the Supervisor, "and their co-conspirators," including "threats, obstruction of justice, false statements, conspiracy, witness intimidation, illegal surveillance, ethics violations, and criminal abuse of position."

The applicant argued that no investigation was conducted because the CO obstructed justice by preventing one. In addition, he accused the CO of "committ[ing] perjury when he authored an affidavit [presumably the CO's declaration summarized above] falsely claiming that [the Supervisor] did not engage in misconduct or retaliate against [the applicant]." He stated that in response to his allegations, the command conducted a "limited ethics investigation" of the Supervisor, and he attached his answers to the investigator's questions (see below).

The applicant stated that the next OER he received after he was removed, dated April 30, 2016, contained excellent marks like his prior annual OERs. Thus, he claimed, his "removal was to hide [the CO's, the Supervisor's], and their co-conspirators' criminal misconduct." He stated that their declarations to the Board and the rest of the advisory opinion "should be given no weight" because "[t]heir character for truthfulness has been impeached." He argued that the Supervisor's honesty "was impeached through the Article 138 [complaint] and answers to the investigator's questions" and that the CO's honesty "was impeached through his conduct and affidavit." He argued that they both perjured themselves in their declarations. He noted that the CO is now "at the head of the legal program that provided" the advisory opinion and its enclosures and argued that the CO has "show[n] that he cannot be trusted to investigate himself."

The applicant stated that the CO had admitted that the SOER "failed to comply with Coast Guard policies and procedures" and so it should be removed from his record and the Board should "grant any additional redress that you find proper." He stated that he had been "forced to resign for [his] own safety" and did not "feel comfortable providing the attached documents to [the Board] until [he] was freed from military control." The applicant also alleged that he was not revealing all of the facts and was withholding the names of witnesses to protect them. He concluded that he has "now reported the criminal misconduct that [the CO, the Supervisor], and their co-conspirators have attempted to prevent [sic] by removing [him] from [his] position." The applicant asked the Board to not only remove the SOER but "grant any additional redress that you find proper."

To support his claims, the applicant submitted the following documents:

- **Federal Tort Claim**: In an eight-page complaint attached to a federal tort claim form alleging $5 million in property damage and $50 million in personal injury, the applicant wrote that his claim is based on "torts associated with national and transnational organized crime," including "threats, obstruction of justice, false statements, conspiracy, witness intimidation, illegal surveillance, ethics violations, and criminal abuse of position." He stated that in March 2015, he had been removed from his position without an investigation or supporting documentation "to prevent witnesses from reporting to [him] the misconduct of [the Supervisor and CO]" and because they believed that he would report their misconduct. After his removal, he alleged, witnesses did report misconduct

by the Supervisor and CO to him but he was "withholding the names of witnesses with relevant and material information for witness protection."

The applicant alleged that his Supervisor had "engaged in criminal abuse of position" both during a prior tour of duty and as his Supervisor at the LSC detachment and had been forced to resign from the Coast Guard in 2016 "due to his misconduct associated with malicious retaliation against a defense counsel and presumably other accumulated misconduct" but "later backed out of the resignation." The applicant alleged that because the Supervisor had not resigned, a Board of Inquiry was scheduled to "fire him" and due to "concerns for [the applicant's] safety, [he] was reassigned to work in a secure facility that [the Supervisor] could not access." He alleged that the Supervisor had "tampered with witness testimony in a court-martial"; "ordered [the applicant] to conduct a secret criminal investigation, without the knowledge of [the] criminal investigative service, and not turn over any witness statements and evidence to criminal defense counsel in violation of criminal discovery rules"; "communicated with a person [in 2008] who he knew was represented by another lawyer," who reported the misconduct to the Supervisor's supervisor; "lied about the nature of his misconduct … by falsely stating that [the applicant] had reported [the Supervisor] to the California Bar Association for a different ethics violation"; "showed incompetence in the practice of criminal law, a lack of ethics, and a desire to save face, by requesting that [he] charge a criminal case without probable cause"; asked the applicant to "reject a fair and appropriate plea offer so that a new prosecutor could gain trial experience"; "showed incompetence in the practice of criminal law and litigation"; "lied about causing case delays by abandoning the heightened ethical obligations of a prosecutor in order to pursue his selfish personal goals of stopping his position from elimination during a re-organization and attempting to save his chance of promotion"; "engaged in misconduct related to civilian retirement issues"; "overcharged a criminal case in order to pursue his selfish personal goals of stopping his position from elimination during a re-organization and attempting to save his chance of promotion"; and attempted to intimidate the applicant and manipulate the removal process when the applicant requested an investigation. The applicant also alleged that the Supervisor had engaged in seven acts of ethical misconduct while assigned to another unit "beginning around 2002."

The applicant stated that he had reported all of the Supervisor's misconduct "up the chain of command" and that the CO knew all about it when he wrote his declaration for the advisory opinion that "falsely indicated [the Supervisor] had not engaged in misconduct or retaliation against" the applicant. He stated that the CO sometimes condoned the Supervisor's misconduct and sometimes directed it but "in all instances … obstructed justice with regard to [the Supervisor's] misconduct." The applicant alleged that the CO had "engaged in criminal abuse of position" while commanding the LSC in 2014 and 2015; while leading the Coast Guard intelligence program in 2015 and 2016; and while leading the Coast Guard legal program from 2016 to the present. He stated that in 2015, the CO "obstructed justice by having [the applicant's] request for an investigation related to [his] removal re-directed to one of his co-conspirators so that the request would be denied and no investigation would be conducted" and by altering "the results of the legal program's limited internal ethics investigation involving [the Supervisor]," which stopped the firing process. He alleged that the CO did this to hide his own, as well as the Supervisor's, misconduct, as shown by the CO's abrupt change of opinion regarding the

applicant's abilities. He stated that as head of the legal program, the CO "has the means, opportunity, and incentive to manipulate the investigation that will be associated with this claim." However, the applicant claimed, in 2016 the CO "was unable to obstruct a second investigation of [the Supervisor] that led to [his] resignation."

The applicant alleged in his tort claim that to justify his removal in 2015, the CO and Supervisor had "manufactured a false evaluation" and "made so many false statements in the false evaluation that they confused themselves." The CO also "placed [the applicant] under illegal surveillance in an attempt to gain information about the extent of [his] knowledge of the criminal activities of [the CO, Supervisor], and their co-conspirators." He claimed that he was "moved into an office with a Coast Guard intelligence officer who spied on [him] and also conducted illegal electronic surveillance. Additionally, non-uniformed personnel spied on [him] at [his] residence." He claimed that the CO had eight people try to get information from him about the extent of his knowledge of their criminal activities, including a former mentor, a former mentor and supervisor, a former supervisor, a former colleague, a friend of the intelligence officer who was spying on him, and others whom he did not know but who approached him at or near his residence.

Regarding the alleged threats, the applicant stated that the CO had threatened three attorneys who had been helping him and thereafter stopped and had caused two high-ranking officers to threaten the applicant—once with criminal prosecution—if he pursued his complaint. He alleged that to "maintain control over" him and stop him from pursuing his complaint, the CO also slowed the applicant's out-processing and caused orders to be sent to him but then prevented the applicant from accessing the orders "in an attempt to prevent [him] from being able to decline the orders and thus obligate [himself] to more military service [sic]." The applicant stated that he was forced to resign his commission for his own safety to be freed from the control of the CO and his co-conspirators.

- **Letter to the Chair**: In a letter to the Chair of the Board dated August 4, 2016, the applicant made many of the same allegations he made in his Federal Tort Claim and stated that he would be submitting more evidence associated with his filings. He stated that his assignment requests had been "virtually ignored" and that he was "essentially being forced out of the Coast Guard."

- **Answers to Investigator's Questions**: The applicant submitted a copy of a 24-page memorandum he submitted to an O-5 judge advocate with numerous supporting attachments in response to an email from that JAG dated September 1, 2015. The investigator asked the applicant about the Supervisor's alleged ethical violations regarding the detail they had both applied for in 2008; the civilian attorney's complaint to the AUSA; a request to convene an investigation in a "lock box" and keep the information secret; a request not to offer a plea deal so that a junior attorney would get trial experience; and a lack of understanding or a desire not to "look bad" when asking why the applicant wanted to obtain a search warrant to get the cell phone of an alleged victim of sexual assault. The applicant provided many details of why he believed that the Supervisor had committed ethical violations in these cases.

The applicant also answered questions about his allegation that the Supervisor had committed ethical violations in prosecuting the revocation of the license of a merchant mariner in 2002. He noted that in the mariner's response and appeal of the judge's decision revoking his license, the mariner had complained that the Supervisor had "stalked" the mariner for seven years; had proceeded with the revocation even though he knew the mariner had not violated any regulations; had engaged in *ex parte* communications with the judge during a hearing; had violated HIPAA by receiving medical records from a shipping company that was trying to discredit the mariner; had helped the shipping company defend itself against the mariner's lawsuits; may have contacted a represented party; falsified medical records; appeared incompetent, forcing the judge to help him try the case; and failed to conduct himself professionally. The applicant submitted copies of various documents in this case, including the mariner's filings and the decision on appeal, which concluded that the respondent had failed to prove that the Supervisor had committed any impropriety.

Regarding his removal and the SOER, the applicant accused the Supervisor of witness intimidation when, on June 8 and 10, 2015, the Supervisor tried to convince the applicant to sign the SOER. He submitted emails showing that on June 8, 2015, the Supervisor told PSC that he had asked the applicant to sign the SOER twice but he had refused even though the Supervisor had told him that the signature "does not mean that he agrees with the content"; on June 9, 2015, another officer told the applicant that the Supervisor was correct in stating that his signature "does not constitute agreement or disagreement; it acknowledges that you have read the report"; and on June 10, 2015, the Supervisor told the applicant that the CO had received his Article 138 complaint and asked him to confirm that he would not sign the SOER. The Supervisor pointed to the June 9, 2015, email and the language on the OER form as evidence that an ROO's signature "does not constitute agreement or disagreement."

The applicant included in his response to the investigator the allegations that he had made about the Supervisor in his Article 138 complaint and his application to the BCMR. And he provided the investigator with many of the same documents he submitted with his application to the Board. He also submitted the following documents pertaining to his performance in 2014 and 2015:

- In an email dated August 14, 2014, the applicant sent the CO another recommendation concerning the reorganization of the LSC in which he stated that the Chief of Military Justice should report directly to the SJA and the Supervisor and XO should have an "information receiving role" so that military justice decisions would not go through those two levels of management. He stated that he had not told the Supervisor or XO about this recommendation and he asked the CO not to attribute it to him.

- The applicant submitted an August 2014 email from a lieutenant who stated that she wanted to make an offer to a defense counsel for a plea deal in which the accused would plead guilty to several charges but have other charges dismissed; would not be confined for more than 90 days; and would waive the right to a board and request an OTH discharge. This was the case for which the CO stated that offering a plea deal seemed premature and the Supervisor stated that his preference would be to proceed

with the court-martial to give the lieutenant more experience. Other emails show that the defense offered a plea deal on September 24, 2014; that the CO forwarded it to the convening authority with a recommendation that he not accept the offer; that the trial counsel sent the defense counsel a pre-trial agreement with the convening authority's terms later the same day; and that the defense counsel replied on September 25, 2014, requesting a proposed stipulation of fact and stating that the member had agreed to the terms of the PTA, intended to sign it, and was prepared for trial on September 30, 2014.

- The applicant submitted an email dated December 2, 2014, in which the lieutenant stated that she had updated the attached prosecution memorandum dated October 18, 2014, to recommend mast, instead of court-martial, which "might be the right thing to do" because the member was already being punished by the state for DUI, there was no evidence substantiating that the accused member had been absent without leave or reported to work intoxicated, and the member's wife was denying the assault. She concluded, "If I had to guess, I don't think we're going to get a dismissal at a GCM with these facts. Could you review and let me know what you think?" In the prosecution memorandum, concerns a member who had been arrested for DUI while in uniform and was accused of several other offenses.

- In an email dated March 13, 2015, to a lieutenant attorney in the applicant's division, a special victim's counsel (SVC) provided notice that she was representing a particular victim. In an email to the applicant, dated March 19, 2015, which was cc'ed to the Supervisor, the SVC told the applicant that although in an interview with CGIS and her SVC, the victim had not consented to a full search of her phone, later the CGIS agents had approached the victim when her counsel was not present and persuaded her to allow a full search of her phone. The SVC reminded the applicant that CGIS agents should not be contacting victims who have legal counsel without legal counsel present and that the contact had been an ethical violation. The SVC noted that at one point the CGIS had mentioned getting a court order for the phone but instead they had talked to the victim without her SVC present.

- In an email dated March 27, 2015, the applicant submitted a charge sheet and a revised, longer prosecution memorandum to his Supervisor, in which he recommended that the member be taken to mast.

APPLICABLE REGULATIONS

The Military Assignments and Authorized Absences Manual, COMDTINST M1000.8A ("Assignments Manual"), states the following in relevant part:

> **1.F.2.a. Removal from Primary Duties (RPD)**
> All officers are assigned to positions accompanied by a set of primary duties. Under exceptional circumstances, normally due to the officer's inability to adequately perform those duties, the officer may be formally removed from his/her primary duties and transferred to another permanent duty station. …
>
> **1.F.2.b. Circumstances that may Warrant Removal from Primary Duties.**

An officer may be considered for permanent removal from primary duties under the following circumstances:

(1) The officer fails to perform primary duties such that their performance significantly hinders mission accomplishment or unit readiness, or
(2) After an adequate amount of time at the unit (normally at least six months), it becomes clear to the command that the officer has neither the ability nor desire to perform assigned duties, or
(3) The officer's actions significantly undermine their leadership authority.

1.F.2.d. Removing an Officer from Primary Duties

(1) At the command's discretion, an officer may be temporarily removed from primary duties at any time. Upon determining that an officer meets the requirements of Article 1.F.2.b. of this Manual for permanent removal from primary duties, the command will submit an OER in accordance with Articles 5.A.3.c and 5.A.4.h. of reference (q), Officer Accessions, Evaluations, and Promotions, COMDTINST M1000.3 (series). The command should inform the officer of the RPD process and way forward.

(2) After the OER is routed to Commander (CG PSC-OPM-3) or (CG PSC-RPM) per Article 5.A.2.i. of reference (q), Officer Accessions, Evaluations, and Promotions, COMDTINST M1000.3 (series), Commander (CG PSC-OPM) or (CG PSC-RPM) will review and make the final decision on removal from primary duties.

Article 5.A.2.c.(1) of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A ("Officer Manual"), states that "Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command."

Article 5.A.3.e. of the Officer Manual concerns SOERs and states the following:

The Commandant, commanding officers, higher authorities (including convening authorities) within the chain of command, and reporting officers may direct these reports. The circumstances for the special OER must relate to one of the situations described in Article 5.A.3.e.(1) through 5.A.3.e.(5) below.

(1) Subsequent to Substandard Performance or Conduct.

(a) A special OER may be completed to document performance or conduct that is substandard but not necessitating a removal from duties if deferring the report until the next regular report would preclude documentation to support adequate personnel management decisions, such as selection, retention, or reassignment. Depending on the circumstances, this OER may count for continuity.

(b) A special OER shall be submitted to permanently remove an officer from primary duties as a result of conduct or performance which is substandard or as directed by the permanent relief authority's final action on a permanent relief for cause request per by Article 1.F. of reference (q), Military Assignments and Authorized Absences, COMDTINST M1000.8 (series)). The OER will be defined as derogatory and shall follow the procedures for derogatory OER submission in accordance with Article 5.A.7.c. of this Manual. This OER will count for continuity.

Article 5.A.7.c. of the Officer Manual, "Derogatory Reports," states the following:

(1) Definition. Derogatory reports are OERs that indicate the reported-on officer has failed in the accomplishment of assigned duties. Section 2 of the OER shall clearly state "Per Article 5.A.7.c. of Officer Accessions, Evaluations, and Promotions, COMDTINST M1000.3 (series), this OER is a derogatory report." Rating chains are strongly encouraged to contact Commander (CG PSC-OPM-3) or (CG PSC-RPM-1) for guidance in derogatory OER preparations. Derogatory OERs should be completed by the rating chain and received by Commander (CG PSC) no later than 45

days after the OER was initiated by the rating chain. Derogatory reports are only those OERs which …

• • •

(c) Documents conduct or performance which is adverse or below standard and results in the removal of a member from their primary duty or position.

(2) Responsibilities. Derogatory OERs are processed as follows:

(a) Reporting Officer. The reporting officer shall provide an authenticated copy to the reported-on officer and counsel the reported-on officer of their option to prepare an addendum. The supervisor and the reporting officer shall be afforded the opportunity to address the reported-on officer's addendum via individual one-page signed endorsements to the reported-on officer's addendum. The reporting officer will then forward the OER and attachments to the reviewer.

(b) Reported-on Officer. The reported-on officer has the option to prepare an addendum using Coast Guard Memorandum limited to two pages with no enclosures. The addendum must be submitted to the supervisor within 14 days of receipt of the OER unless an extension is specifically requested from Commander (CG PSC- OPM-3) or (CG PSC- RPM-1).

[1] The reported-on officer's addendum does not constitute an official request for correction of a record but provides the reported-on officer an opportunity to explain the failure or provide their views of the performance in question. Commenting or declining comment does not preclude the reported-on officer from an official request for correction of the record under Article 5.B. of this Manual or submitting an OER Reply under Article 5.A.7.e. of this Manual. …

(c) Reviewer. The reviewer shall ensure that the evaluation of the reported-on officer is consistent and that the derogatory information is substantiated. If the reviewer finds otherwise, they shall return the report to the reporting officer for additional information and/or clarifying comments. Substantive changes to the OER require its return to the reported-on officer to provide another 14-day opportunity for the reported-on officer to revise the addendum.

FINDINGS AND CONCLUSIONS

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.[3]

3. The applicant alleged that his removal from primary duties in 2015 and the SOER documenting this removal are erroneous and unjust. In considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[4] Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Gov-

[3] *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).
[4] 33 C.F.R. § 52.24(b).

ernment employees have carried out their duties "correctly, lawfully, and in good faith."[5] In addition, to be entitled to removal of an SOER, an officer cannot "merely allege or prove that an [SOER] seems inaccurate, incomplete or subjective in some sense," but must show that the disputed SOER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.[6]

4. **Retaliation Not Proven**: The applicant has not proven by a preponderance of the evidence that his removal from primary duties and the SOER were retaliatory:

a. The applicant alleged that the Supervisor retaliated against him because the applicant had proposed a reorganization of the LSC that would eliminate the Supervisor's billet and cause him not to be promoted. The record shows, however, that the proposal that the applicant showed to the Supervisor in July 2014 did not eliminate the O-5 billet at the detachment. The applicant has not shown that this proposed reform, even if enacted swiftly, would have harmed the Supervisor's career or chances for promotion, and the Supervisor stated that he agreed with the applicant's proposal. On August 14, 2014, the applicant sent the CO another recommendation concerning the reorganization of the LSC in which he stated that the Chief of Military Justice should report directly to the SJA and the Supervisor and XO should have an "information receiving role" so that military justice decisions would not go through those two levels of management. But the applicant asked that this proposal not be attributed to him, and there is no evidence that it was. Nor is there evidence that this proposal, even if enacted swiftly, would have harmed the Supervisor's career or chances for promotion.

b. The applicant also alleged that the Supervisor had reason to retaliate against him because, seven years earlier in 2008, the applicant had received a detail assignment to the Department of Justice, instead of the Supervisor, after pointing out that if the Supervisor received the detail he would not be able to work a particular case on the civil side because he had already worked it on the criminal side. He alleged that the Supervisor complained that he had "cut him off at the knees" because of this. The record shows that the applicant received this detail, but there is no evidence of the alleged interactions; no evidence that the Supervisor acted unethically in applying for the detail (assuming he did); and no evidence that the Supervisor would have held a grudge seven years later about the applicant receiving a detail instead of him.

c. The applicant alleged that the Supervisor might have retaliated against him because the applicant was aware of a complaint against the Supervisor by a civilian attorney in 2007. The email shows that the civilian attorney complained to the AUSA that although he and the Supervisor had agreed that a vessel inspection would take place in the afternoon on December 11, 2007, in the presence of the attorney, when the attorney boarded the vessel, he found CGIS agents questioning represented crewmembers without their counsel present. The record does not show, however, that the Supervisor caused the alleged breach of professional ethics either intentionally or through negligence, and the

[5] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).
[6] *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), *cited in Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

CGIS agents themselves knew or should have known that they should not interview represented crewmembers without their counsel present. Moreover, the civilian attorney was apparently satisfied with whatever the AUSA and the Supervisor told him because he did not file a complaint with the bar.

d. The applicant alleged that the Supervisor retaliated against him because the Supervisor committed ethical violations in 2014 and 2015 that the applicant could have reported. However, the applicant submitted no evidence that substantiates any ethical violations by the Supervisor in 2014 or 2015. Nor is there evidence that the applicant reported or threatened to report any ethical violations by the Supervisor in 2014 or before he was removed from his primary duties in 2015. And when the applicant accused the Supervisor of ethical violations after he was removed, an investigation found that his accusations were unsubstantiated. Moreover, even if the applicant did report the Supervisor for ethical violations before he was removed, as explained below, the preponderance of the evidence shows that the CO would have removed the applicant from his position anyway because of the applicant's lack of candor and poor performance.

5. **Lack of Investigation**: The applicant has not proven by a preponderance of the evidence that his removal was erroneous or unjust because the CO did not convene an investigation into his performance before removing him. The applicant did not cite any law or policy that required an investigation, and the rules for removing an officer from his assigned duties in Article 1.F.2. of the Assignments Manual do not require one. In this case, the records—particularly the many emails submitted by the applicant—show that the CO, who had the discretion to remove him, worked very closely with the applicant as the SJA and was personally aware of and disturbed by the applicant's lack of candor and mishandling of significant military justice cases.

6. **Lack of Counseling and Documentation:** The applicant has not proven by a preponderance of the evidence that his removal was erroneous or unjust based on the alleged lack of counseling and documentation of poor performance. The rating chain's declarations and the emails in the record show that the applicant received regular feedback from his Supervisor and CO, as well as counseling sessions about poor performance, and he knew or should have known that they were greatly dissatisfied with certain aspects of his performance, in particular, his lack of candor and how he had been handling some important military justice cases.

7. **Timing of Removal**: The applicant argued that the timing of his removal by the CO—right before the CO transferred to another unit—was unjust because it "effectively deprived [him] of any meaningful ability to address the allegations against [him]." The Board disagrees. The record shows that the applicant was in frequent personal contact with the CO in February and March 2015 and received all due process with respect to his removal and the SOER. He has not shown that the CO's transfer to another unit impeded his ability to respond to the allegations against him.

8. **SOER Procedure**: The applicant has not proven by a preponderance of the evidence that the SOER should be removed because of a prejudicial violation of procedures:[7]

[7] *Hary*, 618 F.2d at 708.

a. The applicant alleged that the SOER violates policy because the officer who prepared both the Supervisor and Reporting Officer sections of the SOER was allowed to submit two pages of comments in response to the applicant's Addendum, instead of one. The Officer Manual, however, states that the "supervisor and reporting officer shall be afforded the opportunity to address the reported-on officer's addendum via individual one-page signed endorsements to the reported-on officer's addendum.[8] The policy does not address what happens when the Supervisor and Reporting Officer are the same officer, and according to PSC, when an officer performs both roles, he or she is allowed to submit a two-page endorsement—one page for each role. Therefore, the applicant has not shown that the SOER violates policy because the officer who prepared both the Supervisor and Reporting Officer sections of the SOER was allowed to submit a two-page endorsement.

b. The applicant alleged that the SOER was prepared in violation of policy because it was submitted more than 45 days after the end of the reporting period. An SOER is supposed to be "completed by the rating chain and received by Commander (CG PSC) no later than 45 days after the OER was initiated by the rating chain."[9] The record shows that the applicant was removed from his primary duties as of March 31, 2015. The Supervisor signed the SOER on April 7, 2015, and sent a copy to the applicant, who had fourteen days to submit an Addendum.[10] He submitted his Addendum on April 19, 2015, and the raters added their endorsements to the Addendum on May 23 and 26, 2015, more than 45 days after the end of the reporting period. Therefore, as the Supervisor and CO admitted, the SOER was not submitted to PSC within 45 days as the policy requires. The applicant, however, has not shown that he was prejudiced by the short delay, and so the Board cannot conclude that the SOER should be removed because of a prejudicial violation of the policy.[11] This Board has long held that lateness *per se* does not justify removing an otherwise valid performance evaluation.[12]

c. The applicant alleged that the SOER was erroneous and unjust because he was not assigned independent legal counsel to help him respond to his removal and write his Addendum. The applicant cited no law or policy that entitled him to assigned legal counsel to help him respond to his removal and write his Addendum, and the Board knows of none. The record shows, however, that the applicant was offered advice about the process from an officer assigned to PSC and from Coast Guard judge advocates. The applicant has not shown that the Coast Guard interfered with his right to obtain private counsel or deprived him of any right to assigned counsel.

9. **Other OERs**: The applicant alleged that the high marks and laudatory comments on his other OERs prove that the SOER is erroneous and unjust. The Board disagrees because an officer's performance and conduct over time are not necessarily consistent.[13]

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[8] Officer Manual, Article 5.A.7.c.(2)(a).
[9] Officer Manual, Article 5.A.7.c.(1).
[10] Officer Manual, Article 5.A.7.c.(2)(b).
[11] *Hary*, 618 F.2d at 708.
[12] *See, e.g.*, CGBCMR Docket Nos. 2018-138, 2016-211, 2015-159, 2012-073, 2010-141, 2005-053, 2003-110; 2002-015; 43-98; 183-95 (Concurring Decision of the Deputy General Counsel Acting Under Delegated Authority); and 475-86.
[13] *Grieg v. United States*, 226 Ct. Cl. 258, 271 (1981) ("[T]he fact that this fine officer had better ratings before and after the challenged OER is of no legal moment nor of probative value as to the rating period covered by the one OER with which he is dissatisfied.").

10. **SOER Comments**: As explained below, the applicant has not proven by a preponderance of the evidence that any of the SOER comments should be removed as misstatements of significant, hard fact:[14]

A. From the Supervisor's endorsement to the Addendum: *"ROO's claim of successfully securing a guilty plea by an O-6 is also not true."*

The applicant claimed that this statement is contradicted by the following positive comment in the SOER itself: "negotiated novel resolution in Gen. Court-Martial of O-6." However, "negotiating a novel resolution" in a case and "successfully securing a guilty plea" in the case are not identical. The Supervisor stated that the O-6 in question did not plead guilty until well after the applicant was removed from his duties. The emails show that the applicant was significantly involved in the negotiations but that charges were not even preferred against the O-6 until on or about March 26, 2015, a few days before the applicant was removed. Therefore, the applicant has not proven by a preponderance of the evidence that this comment should be removed from the SOER as unjustly misleading or a misstatement of fact.

B. From block 7 of the SOER and the Supervisor's endorsement to the Addendum, respectively: *"claimed credit for developing major training program for CG lawyers when the program was in fact developed by the Army;"* and *"ROO made minor modifications to an Army .ppt on one training topic and forwarded it as ROO's own work product."*

The preponderance of the evidence strongly supports the accuracy of these comments. The copies of the slides in the record show that when the applicant submitted his draft 43-slide PowerPoint to his Supervisor, he had replaced the name of the Army major who authored the original PowerPoint with his own name on the first slide; included the major's name as a mere "reference" on another slide; deleted some of the Army's slides; and inserted one slide about Military Rule of Evidence 612 and three slides with a few "Practice Pointers," such as "Always have a CGIS agent present for witness interviews"; "Do not provide written work product to the Convening Authority"; and "Bates stamp (aka number) the discovery and generally describe what you are producing in your response." The applicant has not proven by a preponderance of the evidence that the SOER comments about the PowerPoint presentation are unjustly misleading or misstatements of fact.

C. From the Supervisor's endorsement to the Addendum: *"Within the second week of our work together, ROO was counseled by the O-6 Staff Judge Advocate (SJA) for improperly charging a case, and then, worse, not informing the chain of command of the action."*

The preponderance of the evidence strongly supports the accuracy of this comment. The emails and rater's declarations show that in early July 2014, the applicant was counseled by the CO/SJA about improperly charging a case. They show

[14] *Hary*, 618 F.2d at 708.

that he had not provided the SJA with the prosecution memorandum before preferring charges so that the SJA could fulfill his legal duty to review the drafted charges and advise the convening authority about how to proceed. In addition, the applicant had failed to update the case tracker and so his chain of command did not discover what he had done until the CO had twice requested the prosecution memorandum and asked about the status of the case. The applicant has not shown that this comment is unjustly misleading or a misstatement of fact.

D. From blocks 3 and 5 of the SOER, respectively: ***"sought to 'deal' cases as early as possible in effort to reduce workload" and "Detached from important, time critical matters; made situation worse by statements to subordinates that important cases – including a rape case – be slow rolled & hopefully forgotten."***

The applicant has not overcome the presumption of regularity or proven by a preponderance of the evidence that these comments are erroneous or unjust. The applicant did not deny having told a subordinate that a rape case should be slow-rolled and would hopefully be forgotten or that he was putting the case against the PHS doctor on "slow pedal." And emails he submitted support the comment that he "sought to 'deal' cases as early as possible": In response to the applicant's email dated August 20, 2014, telling the CO/SJA that he wanted to request approval of a settlement offer from a convening authority, the CO replied that offering a deal "seems a bit premature" and asked for the basis of the proposed deal—i.e., why the government would offer the deal instead of proceeding to trial. In replying to the CO's question about the basis for the deal, the applicant offered only the fact that he had already discussed the deal with defense counsel and the trial was set for September 30, 2014. This response indicates that he considered an upcoming trial date to be sufficient reason in and of itself to offer a plea deal in a sexual assault case. The record also shows that the applicant had failed to ensure that DOL timely convened a Special Court-Martial for one case and long delayed preferring already drafted charges against the PHS doctor.

E. From the Supervisor's endorsement to the Addendum: ***"The biggest case on ROO's docket (and opportunity to excel) involved a CAPT accused of horrible sex crimes. The case was fully investigated and charges were already drafted. Getting the matter charged required only finding a yeoman to sign the charge sheet, yet ROO continually made excuses for not charging in the case. Then we learned that ROO had told a subordinate O-3 that he was placing the case 'on slow pedal' and would not charge it until the CO and XO PCS'd [transferred]. ROO was holding up military justice matters in pure spite to his chain of command. This lead to ROO's removal from primary duties."***

The applicant has not proven by a preponderance of the evidence that these comments about his handling of the PHS doctor's case are unjustly misleading or misstatements of fact. He blamed his Supervisor for the delay, but the record shows that even though the charges had been drafted and ready for preferral for weeks, and even though the CO and Supervisor had been asking him why the charges had not yet been preferred, the applicant did not prefer then until on or about March 26, 2015. Nor did the applicant deny having told a subordinate that he wanted the case on "slow

pedal" and that he intended not to prefer charges until after the CO and XO had left the LSC.

F. From block 3 of the SOER: ***"Relied on personal experience rather than researching legal questions, to detriment of mission."***

The applicant has not overcome the presumption of regularity or proven by a preponderance of the evidence that this comment is unjust or a misstatement of fact. He excused his failure to research certain legal questions based on the increased workload and lack of adequate staff, but the record shows that his rating chain was aware of those factors. And according to his Supervisor, the applicant was sometimes late to work and early to leave and not putting in nearly as many hours of work as his lieutenants. Some of the emails submitted by the applicant and the declarations submitted by the CO and the Supervisor support the accuracy of this comment, and the applicant has not submitted sufficient evidence to overcome the presumption of regularity accorded the comment.[15]

11. **Achievements**: The applicant alleged that the SOER fails to acknowledge or reflect some of his achievements during the reporting period, particularly those listed on page 10 above. His Supervisor and CO dispute the accuracy of those claims, however, and given the small amount of space for comments on an OER form, not every achievement by an officer can be commented on. To complete the SOER accurately, the Supervisor had to read the written descriptions of the levels of performance required for the numerical marks in each performance dimension on the OER form and decide which numerical marks the applicant had met the criteria for.[16] Then the Supervisor had to include a comment on an example or aspect of the applicant's performance to support each mark.[17] Given these instructions and the evidence in the record, the Board finds that the applicant has not proven by a preponderance of the evidence that the SOER fails to accurately reflect his performance during the reporting period.

12. The applicant made numerous allegations with respect to the actions and attitudes of his Supervisor, XO, CO and others involved in his removal, SOER, and investigation of his subsequent claims. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity and not dispositive of the case.[18]

13. The applicant has not proven by a preponderance of the evidence that the SOER is adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.[19] He has not shown that either his removal from his primary duties or the SOER is erroneous or unjust. The Board finds no grounds for removing or changing the SOER or for granting any other relief. The applicant's request should be denied.

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[15] 33 C.F.R. § 52.24(b).
[16] OER Manual, PSCINST M1611.1A, Article 2.E.4.b.
[17] *Id.* at Article 2.E.4.d.
[18] 33 C.F.R. § 52.24(b); *see Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that "appear frivolous on their face and could [not] affect the Board's ultimate disposition").
[19] *Hary*, 618 F.2d at 708.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of LCDR [redacted], USCG, for correction of his military record is denied.

May 10, 2019

[redacted]