

## INSPECTOR GENERAL

### Allegations of Reprisal

This responds to your request for our review of the subject Report of Investigation (ROI), completed on 25 February 2013. The ROI and underlying investigation are legally sufficient. The ROI included three reprisal allegations against three named responsible management officials (RMOs). All three allegations were **NOT SUBSTANTIATED**. The case may be processed for closure in accordance with Air Force Instruction (AFI) 90-301, *Inspector General Complaints Resolution*.

### **BACKGROUND**

SAF/IGQ conducted an investigation<sup>1</sup> into a complaint made by Complainant, formerly assigned to the Force Support Squadron (FSS), Base X. The complaint arose during Complainant's assignment as the Commander of the FSS (FSS/CC). In his complaint filed on 31 July 2012, Complainant alleged that the Airlift Wing Commander (AW/CC), the Mission Support Group Commander (MSG/CC), and the Mission Support Group Deputy Commander (MSG/CD), reprised against him for making a protected communication during the course of a commander-directed investigation (CDI).<sup>2</sup>

Complainant was named "Acting Commander" of the FSS in April 2010, and with the MSG/CC's recommendation, he officially assumed command of the squadron in October 2010.<sup>3</sup> Immediately prior to his command, Complainant had been deployed to Afghanistan and was involved in a vehicle rollover accident in November 2009. This vehicle rollover accident led to Complainant's later diagnosis of post-traumatic stress disorder (PTSD).<sup>4</sup>

On 14 September 2010, MSG/CD provided Complainant with documented mid-term feedback.<sup>5</sup> MSG/CD rated Complainant as "Does Not Meet" standards in three areas: Job Knowledge, Leadership Skills, and Organizational Skills.<sup>6</sup> He was marked as "Meets" standards in the other four areas: Professional Qualities, Judgment and Decisions, Communications Skills, and Physical Fitness. No categories were marked "Above Average" or "Clearly Exceeds."<sup>7</sup>

On 20 April 2011, MSG/CD provided Complainant with a memorandum for record (MFR) with the subject "Re-vector and Counseling," in which he specifically identified areas in which he

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<sup>1</sup> Pursuant to an agreement between the MAJCOM Inspector General (MAJCOM/IG) and SAF/IGQ, MAJCOM/IG transferred this case to SAF/IGQ on 23 August 2012, because the complainant and two of the three named RMOs had transferred to three different major commands.

<sup>2</sup> ROI, Section III, Tab B.

<sup>3</sup> ROI, Section III, Tab D1, pg. 4, lines 14-21.

<sup>4</sup> ROI, Section III, Tab D19, pg. 8, lines 4-38.

<sup>5</sup> ROI, Section III, Tab E1.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

thought Complainant needed to improve.<sup>8</sup> On 9 May 2011, MSG/CD gave Complainant another “Re-vector and Counseling” MFR rebuking Complainant for his failure to provide MSG/CD with a weekly report concerning one of Complainant’s projects and directing him to do so. The MFR also provided ideas to assist Complainant with the completion of the project.<sup>9</sup>

After MSG/CD gave Complainant the two counseling MFRs, MSG/CC gave Complainant a “Feedback/Counseling” MFR on 11 August 2011. This MFR focused on Complainant’s issues in his squadron, his organizational ability, and his lack of follow-up. Additionally, it mentioned many missed suspenses, noted that Complainant’s pattern of behavior was not getting any better, and cited his failure to improve as the reason he was receiving a counseling session with MSG/CC.<sup>10</sup>

In September 2011, Complainant self-referred to the Base X Mental Health Clinic. Complainant’s mental health care provider diagnosed Complainant with chronic PTSD (from the vehicle rollover accident while deployed to Afghanistan) and major depressive disorder (MDD).<sup>11</sup>

According to the MSG/CC, in mid-November 2011 during a staff meeting, she noticed that Complainant was giving her a “thousand mile stare” and she was concerned for his well-being.<sup>12</sup> The MSG/CC stated that she asked the chaplain to speak to Complainant and see if he was okay.<sup>13</sup> The chaplain reported back that he was taking Complainant over to the Mental Health Clinic.<sup>14</sup> Complainant returned to the unit later that day and told the MSG/CC that he had been diagnosed with PTSD.<sup>15</sup> The MSG/CC assured Complainant that she would work with him.<sup>16</sup> Complainant told the MSG/CC that his mental health provider thought Complainant should take a break from command duties in order to recover. Complainant signed a consent form to have the MSG/CC discuss Complainant’s mental health issues with his provider, Capt SF. MSG/CC, Complainant, and Capt SF agreed on a plan to allow Complainant to take a break from his command duties in order to focus on therapy and family.<sup>17</sup> MSG/CC called in a reservist to perform Complainant’s command duties.<sup>18</sup> Complainant’s break from command duties extended from approximately 12 December 2011 through 15 January 2012. During this time, Complainant worked in the MSG front office.<sup>19</sup>

According to the MSG/CC, during Complainant’s hiatus from command duties, she had conversations with him about leaving command early and effecting an early permanent change of station (PCS) to Base Y, where Complainant was already scheduled to start Air Command and Staff College (ACSC) in August 2012.<sup>20</sup> Before suggesting the early PCS, the MSG/CC

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<sup>8</sup> ROI, Section III, Tab E2.

<sup>9</sup> ROI, Section III, Tab E3.

<sup>10</sup> ROI, Section III, Tab E4.

<sup>11</sup> ROI, Section III, Tab D19, pg. 8, lines 21-22.

<sup>12</sup> ROI, Section III, Tab D3, pg. 7, lines 35-38.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at pg. 8, lines 1-2.

<sup>15</sup> *Id.* at pg. 8, lines 9-11.

<sup>16</sup> *Id.* at pg. 8, line 16.

<sup>17</sup> *Id.* at pg. 8, lines 18-25.

<sup>18</sup> *Id.* at pg. 8, lines 27-31.

<sup>19</sup> *Id.* at pg. 8, lines 31-33.

<sup>20</sup> *Id.* at pg. 9, lines 11 and 39-41.

consulted with Capt SF and confirmed that an early departure would not hurt Complainant's recovery.<sup>21</sup> Complainant told the MSG/CC that he did not want to leave his command early.<sup>22</sup>

In mid-December 2011, Lt Col RB came to the 436 MSG to perform the duties of the second deputy commander position which had been vacant for a while.<sup>23</sup> Lt Col RB stated that while he was deputy commander for the entire group, he supervised three of the six squadrons, including Complainant's squadron.<sup>24</sup> Lt Col RB stated that he learned about Complainant's subpar performance through conversations with the MSG/CC and MSG/CD. The conversations led Lt Col RB to believe that they were using his supervision to help Complainant "get healthy and put him back in the seat."<sup>25</sup> The AW/CC, indicated as of December 2011, he was looking for the earliest date at which he could transition Complainant out of command and put his successor in place.<sup>26</sup> He stated, "The squadron was in extreme disarray and malperformance [sic] from lack of a commander and lack of [-] really a senior leader."<sup>27</sup> The AW/CC stated that he was not going to move Complainant out of command until a replacement was able to come in. In his opinion, Complainant, although an ineffective commander, was better than no commander.<sup>28</sup>

On 9 January 2012, Lt Col RB gave Complainant a letter of admonishment (LOA) for substandard performance, including repeated tardiness to work and failure to follow the MSG/CC's instructions for Honor Guard NCOIC selection.<sup>29</sup>

When Complainant returned to command, the MSG/CC was told by Complainant's mental health care provider, Capt SF, that Complainant's PTSD should not interfere with Complainant's ability to perform his job.<sup>30</sup>

On 15 February 2012, an anonymous written complaint, alleging MSG/CC and MSG/CD engaged in unprofessional conduct and undue command influence, was sent to the AW Staff Judge Advocate (SJA). The SJA referred the complaint to the AW Inspector General.<sup>31</sup> As a result of the anonymous complaint, AW/CC ordered a CDI.<sup>32</sup> On 22 and 27 February 2012, Complainant provided adverse testimony to the CDI investigating officer (IO) regarding MSG/CC's and MSG/CD's actions within the MSG.<sup>33</sup> AW/CC, MSG/CC, MSG/CD, and Complainant all denied any knowledge of who may have submitted the anonymous complaint.<sup>34</sup> By 16 March 2012, the CDI was completed with a finding that the allegations against MSG/CC

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<sup>21</sup> *Id.* at pg. 9, lines 34-35.

<sup>22</sup> *Id.* at pg. 9, lines 42-44.

<sup>23</sup> ROI, Section III, Tab D5, pg. 2, lines 31-32.

<sup>24</sup> *Id.* at pg. 2, lines 37-40.

<sup>25</sup> *Id.* at pg. 4, lines 41-46.

<sup>26</sup> ROI, Section III, Tab D2, pg. 12, lines 22-25.

<sup>27</sup> *Id.* at pg. 12, lines 29-31.

<sup>28</sup> *Id.* at pg. 13, lines 13-15.

<sup>29</sup> ROI, Section III, Tab E5.

<sup>30</sup> ROI, Section III, Tab D3, pg. 11, lines 1-8; Tab D19, pg. 17, lines 3-4.

<sup>31</sup> ROI, Section III, Tab E7.

<sup>32</sup> ROI, Section III, Tab D2, pg. 3, line 32.

<sup>33</sup> ROI, Section III, Tab E7.

<sup>34</sup> ROI, Section III, Tab D1, pg. 29, lines 16-18; Tab D2, pg. 3, line 47, pg. 4, line 2; Tab D3, pg. 26, lines 8-9; Tab D4, pg. 11, lines 12-15.

and MSG/CD were not substantiated.<sup>35</sup> Sometime between 16 March 2012 and 4 April 2012, AW/CC reviewed the report and concurred with the findings as written.<sup>36</sup>

Complainant was due to complete his fitness assessment (FA) in March 2012. The Director of the Fitness Center emailed Complainant on 7 February 2012 to remind him to schedule his FA.<sup>37</sup> On 20 March 2012, Complainant scheduled his FA for 29 March 2012.<sup>38</sup> On 28 March 2012, Complainant visited his primary medical care provider, who noted Complainant's medical records stated, "Patient's PT testing will be on hold until clearance from cardiology is obtained."<sup>39</sup> Complainant's 29 March 2012 FA was cancelled because of his documented duty limiting conditions.<sup>40</sup> Complainant, through his Sustainment Services Flight Commander, was reminded again on 13 April 2012 that his FA was two weeks overdue.<sup>41</sup> According to Complainant, he was trying to sort out a problem with the medical clinic and an incorrect notation regarding his duty limiting conditions.<sup>42</sup> Complainant corrected the duty limiting conditions situation by mid-April 2012.<sup>43</sup>

Although Complainant was originally scheduled to PCS from the 436 FSS in July 2012 based on an August ACSC date, MSG/CC told Complainant on or about 3 April 2012 he would be making his PCS early (by 15 May 2012) and his change of command would occur on 4 May 2012.<sup>44</sup> According to Complainant, Lt Col RB asked him to out-process the base by 4 May 2012 in order to have a clean break for the incoming FSS/CC.<sup>45</sup>

Complainant stated that he attended a meeting on or about 10 April 2012, during which the AW/CC announced to base leadership the removal of a squadron commander for a fitness failure and reminded them they were to maintain fitness standards or they would receive disciplinary actions.<sup>46</sup>

On 1 May 2012, AW/CC signed Complainant's narrative school promotion recommendation form (PRF), which included the push statement "Def[initely] Promote."<sup>47</sup> On 4 May 2012, AW/CC presented Complainant with a Meritorious Service Medal (MSM) at the FSS change of command ceremony. AW/CC was the approving authority on the MSM.<sup>48</sup>

Several days after the change of command, MSG/CC learned that Complainant did not have a current FA; he was more than 30 days overdue.<sup>49</sup> On 11 May 2012, AW/CC, issued a letter of

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<sup>35</sup> ROI, Section III, Tab E7.

<sup>36</sup> *Id.*

<sup>37</sup> ROI, Section III, Tab E6.

<sup>38</sup> *Id.*

<sup>39</sup> ROI, Section III, Tab E17.

<sup>40</sup> ROI, Section III, Tab E6.

<sup>41</sup> *Id.*

<sup>42</sup> ROI, Section III, Tab D1, pg. 37, lines 3-7.

<sup>43</sup> *Id.* at pg. 37, lines 33-42.

<sup>44</sup> *Id.* at pg. 30, lines 18-19 and 33-37.

<sup>45</sup> *Id.* at pg. 31, lines 30-32.

<sup>46</sup> *Id.* at pg. 33, lines 27-38.

<sup>47</sup> ROI, Section III, Tab E10.

<sup>48</sup> ROI, Section III, Tab E11.

<sup>49</sup> ROI, Section III, Tab D1, pg. 38, lines 4-6.

reprimand (LOR) to Complainant for dereliction of duty in failing to have a current FA, failing to complete his Defense Language Aptitude Battery (DLAB) test, and submitting a false virtual out-processing checklist.<sup>50</sup> Complainant submitted a response to the LOR and took responsibility for being overdue on the FA, out-processing while overdue, and not completing the DLAB test, but cited task saturation and an accelerated PCS as contributors to his oversight.<sup>51</sup> Complainant successfully completed a FA on 11 May 2012 and the DLAB test on 16 May 2012.<sup>52</sup> AW/CC did not change the LOR in light of Complainant's response.<sup>53</sup>

On 6 June 2012, AW/CC requested Complainant's removal from his scheduled ACSC class.<sup>54</sup> Also on that date, AW/CC signed an MFR requesting Complainant's MSM be revoked, stating the MSM was given in error.<sup>55</sup>

Because of the change of command, Complainant's close-out date on his officer performance report (OPR) was 4 May 2012. Complainant requested MSG/CC extend the close-out date on his OPR for seven days to capture his passing FA of 11 May 2012.<sup>56</sup> According to Complainant, another officer from a different group in the wing was recently allowed to extend the close-out date on his OPR to reflect a passing FA score.<sup>57</sup> MSG/CC did not allow an extension of the close-out date of Complainant's OPR, which resulted in an automatic referral OPR.<sup>58</sup>

On 8 June 2012, MSG/CC presented Complainant with an initial referral OPR, and Complainant provided his first rebuttal on 15 June 2012.<sup>59</sup> MSG/CC presented a second version of the referral OPR on 26 June 2012, and again Complainant provided rebuttal information.<sup>60</sup> The third version of the referral OPR was sent to Complainant on 30 July 2012 at his new duty station, and he filed rebuttal comments.<sup>61</sup>

Complainant signed the final version of his OPR on 28 August 2012.<sup>62</sup>

Complainant filed this IG complaint on 31 July 2012.

## ALLEGATIONS

**ALLEGATION 1:** O/A 11 May 2012 to 8 June 2012, the Airlift Wing Commander, had taken various unfavorable personnel actions against Complainant, Force Support Squadron Commander, in reprisal for making protected communications in violation of 10 USC 1034. **NOT SUBSTANTIATED.**

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<sup>50</sup> ROI, Section III, Tab E12.

<sup>51</sup> ROI, Section III, Tab E13.

<sup>52</sup> ROI, Section III, Tab E20; Tab E26.

<sup>53</sup> ROI, Section III, Tab E12.

<sup>54</sup> ROI, Section III, Tab E16.

<sup>55</sup> ROI, Section III, Tab E15.

<sup>56</sup> ROI, Section III, Tab D1, pg. 44, lines 45-47, and pg. 45, lines 8-9.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at pg. 46, lines 7-9.

<sup>59</sup> ROI, Section III, Tab E19.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

**ALLEGATION 2:** O/A 11 May 2012 to 8 June 2012, the Mission Support Group Commander, influenced AW/CC to take various unfavorable personnel actions against Complainant, Force Support Squadron Commander, in reprisal for making protected communications in violation of 10 USC 1034. **NOT SUBSTANTIATED.**

**ALLEGATION 3:** O/A 11 May 2012 to 8 June 2012, the Mission Support Group Deputy Commander, influenced AW/CC to take various unfavorable personnel actions against Complainant, Force Support Squadron Commander, in reprisal for making protected communications in violation of 10 USC 1034. **NOT SUBSTANTIATED.**

## **STANDARDS**

The standard of proof for substantiating allegations investigated by the IG is a preponderance of the evidence—a determination, considering all of the evidence, that it is more likely than not events have occurred as alleged.<sup>63</sup>

Military members who make protected disclosures are sheltered from reprisal by 10 U.S.C. § 1034, *Protected communications; prohibition of retaliatory personnel actions*, DoDD 7050.06, *Military Whistleblower Protection*, 23 July 2007, and AFI 90-301, *Inspector General Complaints Resolution*.<sup>64</sup> Attachment 21 of AFI 90-301 sets out an “acid test” for determining whether reprisal occurred. The four parts of the acid test are:

1. Did the military member make or prepare a communication protected by statute, DoD directive or AFI 90-301?
2. Was an unfavorable personnel action taken or threatened; or was a favorable action withheld or threatened to be withheld following the protected communication?
3. Did the official(s) responsible for taking, withholding, threatening or influencing the personnel action know about the protected communication?
4. Does the preponderance of the evidence establish that the personnel action would have been taken, withheld, or threatened if the protected communication had not been made?

Attachment 21 of AFI 90-301 also provides five criteria to be analyzed under the fourth question. These include: reasons for the action, reasonableness of the action, consistency of the action with past practice, motive of the person who took the action, and the procedural correctness of the action.

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<sup>63</sup> AFI 90-301, *Inspector General Complaints Resolution*, 23 August 2011, Incorporating Change 1, 6 June 2011), para. 3.48 and Atch 1. This is the version of the AFI in effect during the time of the investigation.

<sup>64</sup> AFI 90-301, *Inspector General Complaints Resolution*, 23 August 2011, and AFI 90-301, *Inspector General Complaints Resolution*, 23 August 2011, Incorporating Change 1, 6 June 2012. Both of these versions apply because some of the alleged unfavorable personnel actions (UPAs) occurred before the effective date of Change 1 and some of the alleged UPAs occurred on or after the effective date of Change 1. The revisions incorporated by Change 1 do not affect the analysis of the allegations performed by the IO in the ROI, because there were no substantive changes in the cited portions of the AFI.

If questions 1 through 3 of the acid test are answered in the affirmative and question 4 is answered in the negative, then reprisal has generally occurred.<sup>65</sup>

A protected communication is defined as:

1. Any lawful communication not conveying an admission of misconduct, violation of the UCMJ, or violation of other applicable statutes, to a member of Congress or an IG.

2. A communication in which a member of the Armed Forces communicates information that the member reasonably believes evidences a violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination, gross mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial and specific danger to public health or safety, when such communication is made to any of the following (this list is not all inclusive):

- a. Member of Congress or a member of their staff;
- b. An inspector general or a member of the inspector general's investigative staff;
- c. Personnel assigned to DoD audit, inspection, investigation, law enforcement, equal opportunity, safety, or family advocacy organizations;
- d. Any person in the member's chain of command; and
- e. The Chief Master Sergeant of the Air Force, command chiefs, group/squadron superintendents, and first sergeants.<sup>66</sup>

A personnel action is defined as any action taken on a member of the armed forces that affects or has a potential to affect (for example a threat) that military member's current position or career.<sup>67</sup>

A responsible management official (RMO) is defined as one who influenced or recommended to the deciding official that he/she take, withhold, or threaten a management action; one who decided to take, withhold, or threaten the management/personnel action; or any other official who approved, reviewed, or indorsed the management/personnel action.<sup>68</sup>

If an IO determines no reprisal occurred, the IO must then analyze the allegation under the abuse of authority standard.<sup>69</sup> Abuse of authority is an arbitrary and capricious exercise of power that adversely affects the rights of any person or results in personal gain or advantage to the abuser.<sup>70</sup> The acid test for whether abuse of authority has occurred follows:

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<sup>65</sup> AFI 90-301, Atch 21, Note 3.

<sup>66</sup> AFI 90-301, Atch 1.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> AFI 90-301, para. 6.7.3 and Atch 22.

<sup>70</sup> AFI 90-301, Atch 22

1. Did the RMO's actions either (a) adversely affect any person; or (b) result in personal gain or advantage to the RMO? If both 1(a) and 1(b) are answered "no," then there is no abuse of authority. If either 1(a) or 1(b) is answered "yes," then the IO must also answer question 2.

2. Was the RMO's action either (a) outside the authority granted under applicable regulations, law or policy; or (b) arbitrary and capricious?

In determining whether an action is arbitrary and capricious the following factors are considered: reasons the RMO took, withheld or threatened the action; reasonableness of the action taken, withheld or threatened considering the complainant's performance and conduct; and consistency of the action.<sup>71</sup>

## ANALYSIS

**ALLEGATION 1:** O/A 11 May 2012 to 8 June 2012, the Airlift Wing Commander, had taken various unfavorable personnel actions against Complainant, Force Support Squadron Commander, in reprisal for making protected communications in violation of 10 USC 1034.

### *Reprisal Acid Test*

1. Did the military member make or prepare a communication protected by statute, DoD directive, or AFI 90-301? **Yes.**

Complainant testified during a CDI, and that testimony included allegations that the MSG/CC and MSG/CD showed favoritism within the MSG.<sup>72</sup> This testimony was not made to a member of Congress or the IG. Consequently, in order for this testimony to be a protected communication, it must have been made to a person designated in part two of the definition of protected communication and it must have been information that the member reasonably believed evidenced a violation of law or regulation.<sup>73</sup> The testimony in question was given during a CDI that was directed by AW/CC.<sup>74</sup> As the initiating commander, AW/CC reviewed and approved the CDI report.<sup>75</sup> As the AW/CC, he was Complainant's wing commander; thus, the facts support Complainant's CDI testimony was a communication to a person in Complainant's chain of command. As Complainant's testimony relayed that MSG/CC and MSG/CD engaged in favoritism, Complainant could have reasonably believed that the testimony evidenced a violation of regulation, specifically, the *Joint Ethics Regulation*.<sup>76</sup> Therefore, the IO

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<sup>71</sup> *Id.*

<sup>72</sup> ROI, Section III, Tab E7.

<sup>73</sup> AFI 90-301, Atch 1.

<sup>74</sup> ROI, Section III, Tab E7.

<sup>75</sup> ROI, Section III, Tab D2, pg. 5, lines 15-21; Tab E7.

<sup>76</sup> See DoD 5500.07-R, *Joint Ethics Regulation*, Including Changes 1-7, 17 November 2011. See para. 1-415, pg. 14: "Each DoD Employee shall . . . [s]et a personal example for fellow DoD employees in performing official duties within the highest ethical standards." See para. 12-401(e), pg. 119: "Fairness. Open-mindedness and impartiality are important aspects of fairness. DoD employees must be committed to justice in the performance of their official duties. Decisions must not be arbitrary, capricious or biased. Individuals must be treated equally and with tolerance."



properly concluded Complainant made a protected communication when he testified during the course of the CDI in February 2012.<sup>77</sup>

2. Was an unfavorable personnel action (UPA) taken or threatened following the protected communication? **Yes.**

First, we must examine whether any of the actions taken against Complainant were UPAs. The IO concluded that the following were UPAs that occurred subsequent to Complainant's protected communication: AW/CC's issuance of an LOR to Complainant on 11 May 2012;<sup>78</sup> AW/CC's memorandum signed sometime between 4 May 2012 and 6 June 2012<sup>79</sup> requesting the revocation of Complainant's MSM;<sup>80</sup> AW/CC's initiation of Complainant's removal from ACSC on 6 June 2012;<sup>81</sup> and a referral OPR signed by AW/CC as the additional rater<sup>82</sup> on 22 August 2012.<sup>83</sup> On 4 June 2012, AW/CC also decided to establish an unfavorable information file (UIF) and file the LOR dated 11 May 2012 in the UIF.<sup>84</sup> We agree with the IO that the LOR, the memorandum requesting revocation of the MSM, the initiation to remove Complainant from ACSC, and the referral OPR were all UPAs, because they all were actions taken on a member of the armed forces that had a potential to affect that military member's career. The IO did not find the initiation of the UIF to be a UPA. This is probably because AFI 36-2907, *Unfavorable Information File (UIF) Program*, 17 June 2005, para. 1.3.2, requires that all LORs issued to officers be entered into a UIF. Because the UIF entry is an action taken on a member of the armed forces that had a potential to affect that military member's career, we consider it to be a UPA. As the LOR made the UIF mandatory and the UIF contained only the 11 May 2012 LOR, we will analyze the LOR and UIF as one UPA. The IO also determined the decision to make Complainant's change of command and PCS to Maxwell AFB earlier than planned was not a UPA. The IO did examine the reasonableness of the decision, because Complainant asserted in his response to the LOR that the accelerated PCS contributed to his failure to "line up his priorities appropriately" to ensure all requirements were completed before his change of command.<sup>85</sup> While the decision to accelerate Complainant's PCS was not a removal from command,<sup>86</sup> the practical effect of moving up the dates for the change of command and PCS was that Complainant left command two months earlier than planned. Therefore, we find the decision to move up the date of the change of command could be considered a UPA, because it was an action taken on a member of the armed forces that affected that military member's current position.

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<sup>77</sup> We note that Complainant's IG complaint, submitted on 31 July 2012, was a protected communication; however, there is no evidence to support that Complainant's IG complaint influenced AW/CC's indorsement of the referral OPR, the only personnel action taken after the filing of the IG complaint.

<sup>78</sup> ROI, Section III, Tab E12.

<sup>79</sup> This letter is undated.

<sup>80</sup> ROI, Section III, Tab E11; Tab E15.

<sup>81</sup> ROI, Section III, Tab E14.

<sup>82</sup> The IO also referenced MSG/CC's presentation of a first draft of the OPR on 8 June 2012 and a second draft on 26 June 2012 in the section addressing the allegation of reprisal by AW/CC. AW/CC did not sign these drafts and the drafts were never finalized. Therefore, this legal review will only address the 22 August 2012 signing of the OPR as a possible UPA by AW/CC.

<sup>83</sup> ROI, Section III, Tab E19.

<sup>84</sup> ROI, Section III, Tab E14.

<sup>85</sup> ROI, Section III, Tab E13.

<sup>86</sup> ROI, Section III, Tab D2, pg. 13, lines 11-26.

Next, it must be determined if AW/CC was an RMO with regard to any of the UPAs. The definition of an RMO includes one who decided to take the management action or one who approved, reviewed, or indorsed the management action.<sup>87</sup> AW/CC issued the LOR and entered it into a UIF;<sup>88</sup> initiated the action to revoke Complainant's MSM;<sup>89</sup> initiated the action to remove Complainant from ACSC;<sup>90</sup> and made the decision to move up Complainant's change of command date.<sup>91</sup> While there were no negative comments in AW/CC's block on Complainant's referral OPR, AW/CC did endorse the referral OPR as the additional rater.<sup>92</sup> Consequently, AW/CC was an RMO with regard to each one of these previously identified UPAs.

Finally, we must examine whether the UPAs followed the protected communication addressed in question 1 above. Complainant made the protected communication on 22 and 27 February 2012.<sup>93</sup> All of the UPAs, with the exception of the decision to move up the change of command, clearly took place after the protected communication.<sup>94</sup> AW/CC indicated in his testimony that he would have moved Complainant's change of command in December 2011 if he had a replacement.<sup>95</sup> MSG/CC recalled the decision to move Complainant was made in April 2012.<sup>96</sup> Complainant indicated MSG/CC told him of the decision in early April 2012.<sup>97</sup> While it appears AW/CC considered moving up Complainant's change of command in December 2011, the preponderance of the evidence supports the decision to actually do so was made in April 2012. Therefore all of the identified UPAs took place after the protected communication.

3. Did the official responsible for taking, withholding, or threatening the personnel action know about the protected communication? **Yes.**

The evidence establishes that AW/CC ordered the CDI into the anonymous complaint and reviewed the report of investigation.<sup>98</sup> Complainant's testimony was part of that report of investigation.<sup>99</sup> Further, AW/CC testified that he did know Complainant testified in the CDI.<sup>100</sup> Although it is not clear when exactly AW/CC became aware of Complainant's testimony in the CDI, the evidence suggests it was sometime before 4 April 2012, when AW/CC provided feedback on the CDI to MSG/CC and MSG/CD.<sup>101</sup> Therefore, the evidence supports AW/CC had knowledge of the protected communication before the UPAs were taken.

4. Does the preponderance of the evidence establish that the personnel action would have been taken, withheld, or threatened if the protected communication had not been made? **Yes.**

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<sup>87</sup> AFI 90-301, Atch 1.

<sup>88</sup> ROI, Section III, Tab E-12; Tab E14.

<sup>89</sup> ROI, Section III, Tab E11; Tab E15.

<sup>90</sup> ROI, Section III, Tab E14.

<sup>91</sup> ROI, Section III, Tab D2, pg. 13, lines 13-25.

<sup>92</sup> ROI, Section III, Tab E19.

<sup>93</sup> ROI, Section III, Tab E7.

<sup>94</sup> ROI, Section III, Tab E12; Tab E14; Tab E15; Tab E16; Tab E19.

<sup>95</sup> ROI, Section III, Tab D2, pg. 12, lines 22-25.

<sup>96</sup> ROI, Section III, Tab D3, pg. 11, lines 12-23.

<sup>97</sup> ROI, Section III, Tab B.

<sup>98</sup> ROI, Section III, Tab D2, pg. 5, lines 15-21; Tab E7.

<sup>99</sup> ROI, Section III, Tab E7.

<sup>100</sup> ROI, Section III, Tab D2, pg. 5, lines 34-45.

<sup>101</sup> ROI, Section III, E7. The memorandum through which AW/CC approved the findings of the ROI is undated. The letters documenting his feedback to MSG/CC and MSG/CD are dated 4 April 2012.

In analyzing whether the evidence establishes that the personnel actions would have been taken if the protected communication had not been made, the IO looked at the following factors: reasons for the action, reasonableness of the action, consistency of the action with past practice, motive of the person who took the action, and the procedural correctness of the action.

### Letter of Reprimand

**Reasons:** AW/CC gave Complainant an LOR for dereliction of duty, in that Complainant failed to stay current on his FA.<sup>102</sup> The LOR also indicated Complainant presented a false out-processing checklist and failed to take the DLAB test, but the main reason AW/CC gave the LOR, which he included in a UIF, was because of the failure to maintain currency with regard to his FA.<sup>103</sup>

**Reasonableness:** Complainant had allowed his FA currency to lapse more than 30 days, despite knowing he was going to PCS.<sup>104</sup> Complainant was also present at a meeting just a couple weeks prior when AW/CC explained to the base leadership that a squadron commander had been relieved of duty for failing a FA.<sup>105</sup> AW/CC said:

The failure to do something that I personally had made such a high[-]vis item for our wing and had just removed another squadron commander for a similar action spoke volumes to me about his character but also about his ability to continue in our Air Force. I just could not accept that this was less than an overt action that he had a responsibility, he knew about it, he knew it was important to me and for all of the squadron commanders and yet he failed to do that.<sup>106</sup>

AW/CC also stated, “Commanders don’t get to fail to meet standards . . . commanders are held to a higher standard.”<sup>107</sup> AW/CC had been clear regarding his expectations and Complainant failed to meet them. It is also important to note that prior to receiving this LOR, Complainant’s deputy group commander had counseled him on his deficiencies twice, his group commander had counseled him on his deficiencies once, and his deputy group commander had given him an LOA for his deficiencies.<sup>108</sup> The evidence supports the issuance of the LOR and placement of it in a UIF were reasonable.

**Consistency:** While Col C was the AW/CC, there was a case involving a squadron commander who failed a FA. In that case, the squadron commander’s group commander issued a letter of counseling (LOC), and the squadron commander was removed from command and lost a joint assignment.<sup>109</sup> The evidence suggests AW/CC did not agree with the decision to issue the LOC after he learned that the group commander had issued it.<sup>110</sup> While the overall results of the two

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<sup>102</sup> ROI, Section III, Tab E12.

<sup>103</sup> ROI, Section III, Tab D2, pg. 20, lines 45-47, pg. 21, lines 1-6; Tab E12.

<sup>104</sup> ROI, Section III, Tab D3, pg. 17, lines 25-30.

<sup>105</sup> ROI, Section III, Tab D3, pg. 18, lines 1-11.

<sup>106</sup> ROI, Section III, Tab D2, pg. 19, lines 5-10.

<sup>107</sup> *Id.* at pg. 21, lines 5-6.

<sup>108</sup> ROI, Section III, Tab E2; Tab E3; Tab E4; Tab E5.

<sup>109</sup> ROI, Section III, Tab D2, email correspondence.

<sup>110</sup> *Id.*

cases were similar, the difference between the LOC in the other commander's case and the LOR in Complainant's case is not of great concern in light of the fact that Complainant had previously received three verbal counselings and an LOA for deficiencies in his performance. Accordingly, there are facts to justify why AW/CC's decision to issue an LOR/UIF was different from the decision of a group commander to issue an LOC in the other case.

**Motive:** As indicated in the discussion of the reasonableness of the LOR/UIF, AW/CC's motive was to ensure his commanders understood the importance of maintaining standards. AW/CC indicated that he took action on the non-currency at the wing level instead of allowing the group commander to handle it because a previous "mishandling was fresh on my mind, in that administrative action was taken before I could interject and I wanted to ensure this was handled in accordance with my direction w/o undue influence."<sup>111</sup> Maintaining standards is critical to maintaining good order and discipline within a wing. Consequently, the evidence supports that AW/CC's motive in issuing the LOR/UIF was proper.

**Procedural Correctness:** AW/CC allowed Complainant more than the three duty days for rebuttal of the LOR set forth in AFI 36-2907, para. 3.5.1.4.<sup>112</sup> On its face, the LOR does not indicate that AW/CC ever actually notified Complainant of his final decision on the LOR, as required by AFI 36-2907, para. 3.5.1.6, and when such notification was made.<sup>113</sup> AW/CC testified that he told Complainant of his decision in a face-to-face meeting.<sup>114</sup> In his complaint, Complainant referenced the LOR presented to him on 11 May 2012 and "finalized on 4 June 2012." This supports that AW/CC did notify Complainant of the final decision on the LOR on 4 June 2012. This also indicates AW/CC notified Complainant more than the three duty days from receipt of Complainant's matters set out in para. 3.5.1.6 of AFI 36-2907. Notwithstanding the procedural anomalies, the evidence supports that Complainant was afforded due process in that he was allowed an opportunity to respond to the LOR and AW/CC considered the matters Complainant submitted before making his final decision on the LOR. The procedural anomalies did not prejudice Complainant.

### Revocation of MSM

**Reasons:** Complainant was awarded an MSM at the change of command ceremony on 4 May 2012.<sup>115</sup> AW/CC later requested the revocation of Complainant's MSM, stating that it had been given in error.<sup>116</sup> According to AW/CC's testimony, the failure of Complainant to maintain his FA currency was the reason for the revocation of the MSM.<sup>117</sup> **Reasonableness:** The reasonableness of initiating the revocation of the award is supported by AW/CC's statement that he would not have awarded the MSM had he known that Complainant did not have a current FA at the change of command.<sup>118</sup> **Consistency:** AW/CC further stated that he would revoke an

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<sup>111</sup> *Id.*

<sup>112</sup> ROI, Section III, Tab E12.

<sup>113</sup> *Id.* The indorsement indicating the LOR would remain in effect is not dated and there is no follow-on indorsement to indicate notification of that decision to Complainant.

<sup>114</sup> ROI, Section III, Tab D2, pg. 20, lines 12-15.

<sup>115</sup> ROI, Section III, Tab E11.

<sup>116</sup> ROI, Section III, Tab E15.

<sup>117</sup> ROI, Section III, Tab D2, pg. 19, lines 39-47.

<sup>118</sup> ROI, Section III, Tab D2, pg. 23, lines 42-43.

award on “anybody that got a referral report for part of the period of the award.”<sup>119</sup> This is consistent with AW/CC’s past practice, because AW/CC also did not give an award to the squadron commander that was relieved of command for FA failure.<sup>120</sup> Additionally, AW/CC stated that in previous commands, he has declined to award or has downgraded awards for retirement if the member did not meet standards.<sup>121</sup> **Motive:** AW/CC also clearly stated his motive for initiating the revocation in his testimony: “Somebody who does not meet standards should not get an MSM for decoration at the completion of their tour. . . . I see it as me as a commander ensuring that we uphold a standard as opposed to uh, me making a decision that this is . . . it’s a standard.”<sup>122</sup> **Procedural correctness:** AW/CC complied with AFI 36-2803, *Air Force Awards and Decoration Program*, 15 June 2001, para. 3.7, which allows commanders to “revoke an award if facts, later determined, would have prevented original approval of the award.”

### Removal from ACSC

**Reasons:** On 6 June 2012, AW/CC initiated the removal of Complainant from the Intermediate Developmental Education (SDE) Designation List, which removed Complainant from ACSC attendance, citing poor performance and disciplinary action.<sup>123</sup> AW/CC said, “For a commander . . . for those who are going to be Lieutenant Colonels, which is what ACSC attendance would guarantee . . . that does not meet the mustard. It’s unacceptable.”<sup>124</sup> **Reasonableness:** The IO found this action to be reasonable and mandated by the applicable instructions. Specifically, the IO found that once AW/CC issued the LOR to Complainant for dereliction of duty, AW/CC was required to request Complainant be removed from the ACSC attendance list pursuant to AFI 36-2301, *Developmental Education*, 16 July 2010. AFI 36-2301, para. 3.12.2.1, requires wing commanders to “[r]equest removal of officers . . . identified on IDE/SDE designation lists . . . [w]hen the officer’s . . . duty performance declines to an unacceptable level, or an officer receives disciplinary action.” While AFI 36-2301 does not define “disciplinary action,” it is reasonable that a wing commander would request removal of an officer from ACSC under AFI 36-2301, para. 3.12.1.1, if that officer had received an LOR/UIF for dereliction of duty. **Consistency:** Again, the case of the squadron commander who failed his FA provides a basis for comparison. When AW/CC was asked if he would take the kinds of actions he took concerning Complainant in the case of a high-performing commander, AW/CC explained that he did that with the squadron commander who failed the FA, specifically referencing that squadron commander’s assignment to a joint job was revoked.<sup>125</sup> While not exactly the same, the action shows consistency with regard to follow-on assignments in similar situations. **Motive:** AW/CC explained the motivation behind the request to remove Complainant from ACSC in his testimony: “Somebody who does not meet standards should not go on to Air Command and Staff College. . . . I see it as me as a commander ensuring that we uphold a standard as opposed to uh, me making a decision that this is . . . it’s a standard.” **Procedural Correctness:** The removal was procedurally correct under AFI 36-2301.

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<sup>119</sup> *Id.* at pg. 18, lines 37-38.

<sup>120</sup> ROI, Section III, Tab D2, e-mail correspondence.

<sup>121</sup> *Id.* at pg. 21, lines 6-9.

<sup>122</sup> ROI, Section III, Tab D2, pg. 19, lines 44-45, pg. 20, lines 2-3.

<sup>123</sup> ROI, Section III, Tab E16.

<sup>124</sup> ROI, Section III, Tab D2, pg. 20, lines 33-39.

<sup>125</sup> ROI, Section III, Tab D2, pg. 19, lines 32-37.

## Referral OPR

**Reasons:** On 22 August 2012, AW/CC signed Complainant's referral OPR as the additional rater.<sup>126</sup> The completed referral OPR states, "Complainant went non-current for his FA on 1 Apr 12 & failed to complete his FA prior to OPR closeout of 4 May 12; as FSS/CC and responsible for FAC [Fitness Assessment Cell] management, this is an extremely poor display of leadership."<sup>127</sup> The form also indicated on page 2 that Complainant did not meet standards in the areas of Leadership Skills and Physical Fitness.<sup>128</sup> AW/CC indicated the failure of Complainant to remain current on his FA was the reason for the referral OPR.<sup>129</sup>

**Reasonableness:** Airmen are responsible for maintaining physical fitness currency standards.<sup>130</sup> Pursuant to AFI 36-2905, failing to remain current, as well as failing to attain a passing score on the applicable FA, before the end of the performance report reporting period will result in a "DOES NOT MEET STANDARDS" rating on the member's OPR/EPR if, as of the close-out date of the performance report, currency or a passing score is not obtained.<sup>131</sup> Complainant's failure to take a FA before the close-out of his rating period mandated a "DOES NOT MEET STANDARDS" on his OPR. Further, raters must consider making comments on performance reports when the ratee receives a counseling, admonition, or reprimands.<sup>132</sup> Therefore, the evidence supports the comment and the indications that Complainant did not meet standards were reasonable.

**Consistency:** When questioned by the IO regarding another squadron commander in the wing who received an LOC for a FA failure and whose group commander extended his reporting period on an OPR to include a passing FA score, AW/CC wrote, "Regardless of [the group commander's] initial actions to provide [the squadron commander] with a passing test in advance of the OPR closeout, and his action of providing him with a LOC, in the end the result of the PT failure was [the squadron commander] was removed from command, he received a referral performance report and he lost his joint assignment because of his failed PT test."<sup>133</sup> This supports consistency in the decision to give Complainant a referral OPR.

**Motive:** AW/CC's motive in indorsing the referral OPR was clearly stated in his testimony: "It's failing to adhere to a standard and on his OPR because he did not take . . . the Air Force has made the standard, I didn't make it. The Air Force made the standard, the Air Force said... meets standards, does not meet standards . . . if you are non-current for your PT test on your OPR closeout, you do not meet standards."<sup>134</sup>

**Procedural Correctness:** While there were three different versions of the referral OPR, it appears the completed OPR, signed by AW/CC on 22 August 2012, was procedurally correct in

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<sup>126</sup> ROI, Section III, Tab E19.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> ROI, Section III, Tab D2, pg. 9, lines 25-28.

<sup>130</sup> AFI 36-2905, *Fitness Program*, 1 July 2010, AFGM3, 3 January 2012, Atch 1, para. 4.c.

<sup>131</sup> *Id.* at para. 4.c.

<sup>132</sup> AFI 36-2907, para. 3.1.1.

<sup>133</sup> ROI, Section III, Tab D2, email correspondence.

<sup>134</sup> *Id.* at pg. 19, lines 41-44.

accordance with AFI 36-2406, *Officer and Enlisted Evaluation Systems*, 15 April 2005, Incorporating Through Change 3, 11 October 2011. Complainant did request that MSG/CC extend the reporting period on his OPR in order to capture his passing FA after the OPR closed out and avoid an automatic referral OPR.<sup>135</sup> AW/CC explained why it would not have been proper to extend Complainant's reporting period:

[I]t [the FA] was brought to his attention in February before it was ever due. He had all of February, March . . . up until the change of command [4 May 2012] to complete the PT test and it was brought to his attention several times and knowing, knowing, knowingly decided not to take it. Only after he is held accountable to the standard that he decided that he would like to try to meet the standard.<sup>136</sup>

### Expediting Change of Command/PCS

**Reasons:** Complainant's original PCS date was late July 2012 based on a 6 August 2012 ACSC date.<sup>137</sup> On 3 April 2012, MSG/CC informed Complainant that his change of command would occur on 4 May 2012 with a PCS of 15 May 2012.<sup>138</sup> AW/CC stated that as of December 2011, well before Complainant's February 2012 protected communication, he was looking for the earliest date to have another commander take over Complainant's squadron.<sup>139</sup> He stated, "It was expedited since December [of 2011] in all fairness. If I had had someone that could come in in February (of 2012), I would have done a change of command in February."<sup>140</sup> Due to Complainant's performance issues, AW/CC testified: "We went for the earliest date we could get his replacement in there. The squadron was in extreme disarray and malperformance [sic] from lack of a commander and lack of really a senior leader. The next most senior leader was a Captain who was . . . for a large portion of the command been on crutches for a medical injury and hadn't even been around."<sup>141</sup>

**Reasonableness:** AW/CC stated that Complainant was struggling and managing Complainant was taking an inordinate amount of the group commander's time and attention. He states that while he thought Complainant was "an ineffective leader . . . his [Complainant's] ineffective leadership ability did not warrant removing him from command without someone there to replace him."<sup>142</sup> While AW/CC did not remove Complainant from command, the practical effect of his early PCS was a curtailment of his command by two months. Based on the deficiencies Complainant had demonstrated, as evidenced by two verbal counselings from his deputy group commander, one verbal counseling from his group commander, and an LOA from his deputy group commander, this action was reasonable.<sup>143</sup>

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<sup>135</sup> ROI, Section III, Tab E25.

<sup>136</sup> ROI, Section III, Tab D2, pg. 20, lines 33-37.

<sup>137</sup> ROI, Section III, Tab E21.

<sup>138</sup> ROI, Section III, Tab D1, pg. 30, lines 18-19, lines 35-36.

<sup>139</sup> ROI, Section III, Tab D2, pg. 12, lines 22-25.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at pg. 12, lines 29-32.

<sup>142</sup> *Id.* at pg. 13, lines 24-26.

<sup>143</sup> ROI, Section III, Tab E2, Tab E3, Tab E4, Tab E5.

**Consistency:** AW/CC indicated the other squadron commander who failed his FA was removed from command.<sup>144</sup> This supports consistency, in that commanders who failed to meet standards were not allowed to continue in command.

**Motive:** When testifying about why Complainant's change of command was accelerated, AW/CC stated, "The squadron was in extreme disarray and malperformance [sic] from lack of a commander and lack of [-] really a senior leader."<sup>145</sup> The three verbal counselings and LOA support there were deficiencies in Complainant's performance as a squadron commander. Therefore, AW/CC's stated motivation to move Complainant early is supported by independent evidence of Complainant's deficiencies.

**Procedural Correctness:** While Complainant contends that his PCS was inconsistent with normal Air Force PCS practice, he cited to no authority that supports the early move was procedurally incorrect. There is no evidence to support the move was procedurally incorrect according to AFI 36-2110, *Assignments*, 22 September 2009, Incorporating Change 1, 1 October 2011.

### ***Conclusion***

The preponderance of the evidence supports that Complainant made a protected communication through his testimony during the CDI, AW/CC took UPAs after that protected communication, and AW/CC knew of the protection communication. Because the preponderance of the evidence also establishes that the UPAs would have been taken even if the protected communication had not been made, Allegation 1 of reprisal is **NOT SUBSTANTIATED**. When an IO determines no reprisal occurred, the IO must then analyze the allegation under the abuse of authority standard.

### ***Abuse of Authority Acid Test***

1. Did the RMO's actions either (a) adversely affect any person; or (b) result in personal gain or advantage to the RMO? **Yes.**

AFI 90-301 lists a demotion, referral OPR, and extra duty as examples of actions that adversely affect a person.<sup>146</sup> All of the actions discussed as UPAs, the LOR/UIF, initiation of removal of the MSM, initiation of removal from ACSC, referral OPR, and early change of command, adversely affected Complainant in that they either had the potential to negatively affect his career or negatively affected his position at the time.

2. Was the RMO's action either (a) outside the authority granted under applicable regulations, law or policy; or (b) arbitrary and capricious? **No.**

The actions taken by AW/CC were within his command authority and properly executed under applicable Air Force instructions. In determining whether an action is arbitrary and capricious,

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<sup>144</sup> ROI, Section III, Tab D2, email correspondence.

<sup>145</sup> *Id.* at pg. 12, lines 29-31.

<sup>146</sup> AFI 90-301, Atch 22.



the following factors are considered: the reasons the RMO took the action, the reasonableness of the action taken considering the complainant's performance and conduct; and consistency of the action. As these are the exact same factors as the first three factors in determining question 4 of the reprisal acid test set forth above, see the discussion of those factors above.

### ***Conclusion***

AW/CC's actions adversely affected Complainant, but the actions were (1) within his authority as the AW/CC; and (2) not arbitrary and capricious. The preponderance of the evidence supports the IO's opinion that AW/CC did not abuse his authority.

**ALLEGATION 2:** O/A 11 May 2012 to 8 June 2012, the Mission Support Group Commander, influenced AW/CC to take various unfavorable personnel actions against Complainant, Force Support Squadron Commander, in reprisal for making protected communications in violation of 10 USC 1034.

### ***Reprisal Acid Test***

1. Did the military member make or prepare a communication protected by statute, DoD directive, or AFI 90-301? **Yes.**

See the discussion of this exact question concerning question 1 of the reprisal acid test for Allegation 1.

2. Was a UPA taken or threatened following the protected communication? **Yes.**

As indicated in the discussion of question 2 of the reprisal acid test for Allegation 1, the evidence supports that the following UPAs were taken concerning Complainant: the LOR issued to Complainant and the inclusion of that LOR in a UIF; the request to revoke Complainant's MSM; the initiation of Complainant's removal from ACSC; the referral OPR;<sup>147</sup> and the acceleration of Complainant's change of command and PCS.

Next, it must be determined if MSG/CC was an RMO with regard to any of the UPAs. The definition of an RMO includes one who influenced or recommended to the deciding official that he/she take, withhold, or threaten a management action; and one who decided to take the management action.<sup>148</sup> AW/CC issued the LOR and entered it into a UIF;<sup>149</sup> initiated the action to revoke Complainant's MSM;<sup>150</sup> initiated the action to remove Complainant from ACSC;<sup>151</sup> and made the decision to move up Complainant's change of command date.<sup>152</sup> Testimony from both AW/CC and MSG/CC supports that MSG/CC did not make a recommendation or influence

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<sup>147</sup> While the documents at ROI, Section III, Tab E19, indicate three different versions of the referral OPR were served on Complainant, the OPR signed by MSG/CC on 18 July 2012 is the version of the OPR that was finalized. Therefore, this legal review only addresses the version of the OPR signed by MSG/CC on 18 July 2012.

<sup>148</sup> AFI 90-301, Atch 1.

<sup>149</sup> ROI, Section III, Tab E-12; Tab E14.

<sup>150</sup> ROI, Section III, Tab E11; E15.

<sup>151</sup> ROI, Section III, Tab E14.

<sup>152</sup> ROI, Section III, Tab D2, pg. 13, lines 13-25.

AW/CC's decision to issue the LOR and place it in a UIF.<sup>153</sup> MSG/CC's testimony supported that she made recommendations concerning AW/CC's decision to move up Complainant's change of command and PCS and to request Complainant's removal from ACSC.<sup>154</sup> The evidence is somewhat unclear concerning whether MSG/CC influenced or made a recommendation on AW/CC's decision to request revocation of Complainant's MSM, but her testimony infers that she had a role in AW/CC's decision to do so.<sup>155</sup> Finally, MSG/CC was the rater on the referral OPR, and she signed the final version of the OPR on 18 July 2012, with her block containing the negative comment concerning Complainant's non-current FA status and the blocks for Leadership Skills and Physical Fitness marked "DOES NOT MEET STANDARDS."<sup>156</sup> Therefore, the evidence supports MSG/CC was an RMO concerning the initiation of the revocation of Complainant's MSM, the request to remove Complainant from ACSC, the referral OPR, and the acceleration of Complainant's change of command and PCS.

As set forth in the discussion of this question in the reprisal acid test for Allegation 1, all of these UPAs occurred after Complainant's protected communication.

3. Did the official responsible for taking, withholding, or threatening the personnel action know about the protected communication? **Yes.**

MSG/CC stated that she thought the CDI IO questioned more than one of her subordinate commanders.<sup>157</sup> Further, MSG/CC stated that AW/CC told her Complainant showed up late for his appointment to speak to the CDI IO.<sup>158</sup> This testimony establishes that MSG/CC knew about the protected communication.

4. Does the preponderance of the evidence establish that the personnel action would have been taken, withheld, or threatened if the protected communication had not been made? **Yes.**

Again, in analyzing whether the evidence establishes that the personnel action would have been taken if the protected communication had not been made, the IO looked at the following factors: reasons for the action, reasonableness of the action, consistency of the action with past practice, motive of the person who took the action, and the procedural correctness of the action.

#### Revocation of MSM and Removal from ACSC

**Reasons:** MSG/CC stated that she assumed Complainant was meeting standards going into the change of command where the MSM was awarded and that Complainant would not have received the MSM if she had known that he was not meeting standards with regard to his FA

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<sup>153</sup> ROI, Section III, Tab D2, pg. 18, lines 14-29; Tab D3, pg. 21, lines 18-20, pg. 24, lines 35-41. While MSG/CC did inform AW/CC about the fact that Complainant was not current on his FA in the context of Complainant's request for an extension of the OPR close-out date, the evidence supports AW/CC made the decision to issue the LOR/UIF without input from MSG/CC. ROI, Section III, Tab D3, pg. 21, lines 10-20. We find the conveyance of information that leads to a UPA, without more, does not amount to influencing a decision maker to take a particular action.

<sup>154</sup> ROI, Section III, Tab D3, pg. 10-11, pg. 21, lines 35-41.

<sup>155</sup> *Id.* at pg. 23-24.

<sup>156</sup> ROI, Section III, Tab E19.

<sup>157</sup> *Id.* at pg. 30, lines 34-36.

<sup>158</sup> ROI, Section III, Tab D3, pg. 27, lines 11-15.

currency.<sup>159</sup> MSG/CC said she recommended removal from ACSC because of the failure to remain current on the FA.<sup>160</sup>

**Reasonableness:** The IO correctly concluded that MSG/CC's recommendations concerning the request to revoke the MSM and to remove Complainant from ACSC were reasonable in light of Complainant's failure to meet standards concerning his FA currency while he was a squadron commander.

**Consistency:** MSG/CC previously recommended the removal of another squadron commander in the MSG from ACSC and recommended that commander not receive an end of tour award following substantiated findings in a CDI concerning leadership issues.<sup>161</sup> Thus, MSG/CC's support of revoking Complainant's MSM and removing him from ACSC is consistent with her past practice.

**Motive:** As discussed above in the "Reasons" section, MSG/CC's support for the request to revoke Complainant's MSM and his removal from ACSC focused on his failure to maintain his FA currency. MSG/CC's testimony clearly indicates her motive on this matter: "[Complainant] is a Commander. [AW/CC] stated clearly that if we are not fit we can't command and I think I owe it to the [A]irmen . . . it's a standard, and to me, [Complainant] did not meet a leadership standard."<sup>162</sup>

**Procedural Correctness:** As previously discussed under Allegation 1, these actions were properly processed under the applicable instructions.

#### Referral OPR

**Reasons:** In MSG/CC's block of evaluation, the completed referral OPR states, "Complainant went non-current for his FA on 1 Apr 12 & failed to complete his FA prior to OPR closeout of 4 May 12; as FSS/CC and responsible for FAC management, this is an extremely poor display of leadership."<sup>163</sup> The form also indicated on page 2 that Complainant did not meet standards in the areas of Leadership Skills and Physical Fitness.<sup>164</sup> MSG/CC testified that the failure to be current on the FA generated the referral OPR with the fitness markdown and the markdown for leadership.<sup>165</sup>

**Reasonableness.** As indicated in the discussion of the "Reasonableness" section of the reprisal acid test concerning the referral OPR for Allegation 1, the evidence supports the comment and the indications that Complainant did not meet standards were reasonable.

**Consistency:** There is no evidence in the ROI concerning whether MSG/CC ever completed a referral OPR for failure to remain current on the FA. This is probably because AFI 36-2905

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<sup>159</sup> *Id.* at pg. 24, lines 18-28.

<sup>160</sup> *Id.* at pg. 21, lines 24-41.

<sup>161</sup> ROI, Section III, Tab D3, pg. 21-23.

<sup>162</sup> *Id.* at pg. 21, lines 14-17.

<sup>163</sup> ROI, Section III, Tab E19.

<sup>164</sup> *Id.*

<sup>165</sup> ROI, Section III, Tab D3, pg. 21, lines 12-14.

mandates that failing to remain current on an FA before the end of the performance report period will result in a “DOES NOT MEET STANDARDS” rating on the member’s OPR if currency is not obtained as of the close-out date of the performance report.<sup>166</sup> It would be helpful to know if MSG/CC had experienced a similar situation, in which a squadron commander that was not current at the time of his/her OPR close-out date, to see if she also included the failure in the comment section of the OPR and marked down the block for Leadership Skills. MSG/CC testified the fact that Complainant was a commander in charge of the FAC was key in her decision to mark down the section on leadership skills.<sup>167</sup> It is highly unlikely that MSG/CC ever supervised another squadron commander that managed the FAC and was not current on the FA at the time of his/her OPR close-out.

**Motive:** MSG/CC’s testimony clearly expressed her motive concerning the referral OPR: “He’s the Commander over the process. He is a Commander. [AW/CC] stated clearly that if we’re not fit we can’t command and I think I owe it to the [A]irmen, without getting emotional again, it’s a standard and to me, he didn’t meet a leadership standard. He owns the program and the program manager reminded him three times.”<sup>168</sup>

**Procedural Correctness:** Again, there were three different versions of the referral OPR,<sup>169</sup> but it appears the final version of the OPR, signed by MSG/CC on 18 July 2012, was procedurally correct in accordance with AFI 36-2406.

Complainant did request that MSG/CC extend his reporting period so that it would include his passing FA from 11 May 2012.<sup>170</sup> MSG/CC declined to extend Complainant’s close-out date, stating that Complainant did not “have a compelling reason in my opinion for why he didn’t take his PT test.”<sup>171</sup> MSG/CC stated that Complainant blamed his non-currency on his accelerated change of command date, but she stated that she told him of the change of command date in early April, after Complainant had already become non-current and a month before the actual change of command.<sup>172</sup> MSG/CC also cited the fact that Complainant had received multiple reminders from his subordinates about testing and Complainant attended a meeting in March where the AW/CC informed the leadership about removing a squadron commander for a FA failure.<sup>173</sup> MSG/CC stated that this was part of a “pattern of him being responsible to do something and if we didn’t follow up, it didn’t get done . . . and then, with him, it was never his fault.”<sup>174</sup> Consequently, she reasonably declined to grant the extension.

Complainant also complained that MSG/CC did not provide him with documented mid-term feedback on AF Form 724. AFI 36-2406 indicates that a rater will, among other things, conduct feedback sessions; provide the original completed and signed Performance Feedback Worksheet (PFW); and document behavior that may result in further administrative or judicial action on

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<sup>166</sup> AFI 36-2905, 1 July 2010, AFGM3, 3 January 2012, Atch 1, para. 4.c.

<sup>167</sup> ROI, Section III, D3, pg. 21, lines 13-17.

<sup>168</sup> *Id.*

<sup>169</sup> ROI, Section III, Tab E19.

<sup>170</sup> ROI, Section III, Tab E25.

<sup>171</sup> ROI, Section III, Tab D3, pg. 17, lines 42-43.

<sup>172</sup> *Id.* at pg. 17, lines 27-30.

<sup>173</sup> *Id.* at pg. 18, lines 1-11.

<sup>174</sup> *Id.* at pg. 16, lines 25-26.

other than a PFW.<sup>175</sup> The testimony of both Complainant and MSG/CC reflects frequent contact and informal feedback between them.<sup>176</sup> Further, Complainant received a counseling memorandum titled “Feedback/Counseling” from MSG/CC on 11 August 2011.<sup>177</sup> Although MSG/CC deviated from the instruction in that she did not provide a PFW to Complainant, Complainant received several documented counseling sessions with different supervisors, to include MSG/CC, his rater.<sup>178</sup> The instruction states, “A rater’s failure to conduct a required or requested feedback session, or document the session on a PFW, will not, of itself, invalidate any subsequent performance report.”<sup>179</sup> It is evident that Complainant was aware that his leadership had concerns with his ability to successfully command. Even if MSG/CC had provided documented mid-term feedback on an AF Form 724, it would not have affected Complainant’s currency on his FA at the close of his reporting period. Complainant’s FA non-currency mandated the referral OPR, and the lack of a documented feedback session does not invalidate the referral OPR.

### Expediting Change of Command/PCS

**Reasons:** Complainant’s original PCS date was late July 2012 based on a 6 August 2012 ACSC date.<sup>180</sup> Upon Complainant’s return to the squadron following his break from command duties, MSG/CC stated that Complainant initially seemed okay but his performance again degraded. She said, “We put him back in the seat and there were a couple of weeks there to where things were going pretty good and then the overwhelming, the multitasking caught up again and we started getting back into the same bog that we were in.”<sup>181</sup> MSG/CC continued to confer with Capt SF, Complainant’s mental health provider, who confirmed several times that Complainant was up to the challenges of command.<sup>182</sup>

MSG/CC stated, “The Wing Commander saw his [Complainant’s] affect at a meeting, pulled me in and I said, yeah, this is starting to happen again and he goes[,] [‘L]et’s work on an early departure to give him the break . . . it’s time to do a change of command.[’]”<sup>183</sup> On 3 April 2012, MSG/CC informed Complainant that his change of command would occur on 4 May 2012 with a PCS of 15 May 2012.<sup>184</sup>

**Reasonableness:** As indicated in the discussion of the “Reasonableness” section of the reprisal acid test concerning the expedited change of command and PCS for Allegation 1, the evidence supports the decision to move up the change of command and PCS was reasonable.

**Consistency:** There is no evidence in the ROI concerning whether MSG/CC ever had another occasion to recommend the early change of command and PCS of a subordinate commander.

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<sup>175</sup> AFI 36-2406, para. 2.2.2.

<sup>176</sup> ROI, Section III, Tab D1 and Tab D3.

<sup>177</sup> ROI, Section III, Tab E4.

<sup>178</sup> ROI, Section III, Tab E1; Tab E2; Tab E3; Tab E4; Tab E5.

<sup>179</sup> AFI 36-2406, para. 2.10.

<sup>180</sup> ROI, Section III, Tab E21.

<sup>181</sup> ROI, Section III, Tab D3, pg. 11, lines 10-12.

<sup>182</sup> *Id.* at pg. 12, lines 1-2.

<sup>183</sup> *Id.* at pg. 11, lines 12-14.

<sup>184</sup> ROI, Section III, Tab D1, pg. 30, lines 18-19, lines 35-36.

**Motive:** MSG/CC's motive concerning her support of the expedited change of command and PCS was conveyed in her testimony: "[H]e's not performing at the level five new Squadron Commanders are running at. . . . He's not even close to keeping up with these guys. So [AW/CC is] like, ['F]air enough, I agree, let's move him.[']"<sup>185</sup> MSG/CC's testimony about how she notified Complainant of the decision further reflects the motives behind the decision: "So, April timeframe I called Complainant in and I said, ['H]ey, Complainant[,] the Wing Commander and I talked today. We're both starting to see you looking like you're having a struggle again. Back to that conversation, we don't want to hurt you. We don't want to harm your health. He's made the decision to accelerate your change of command out of here.[']"<sup>186</sup>

**Procedural Correctness:** As indicated in the discussion of the "Procedural Correctness" section of the reprisal acid test concerning the acceleration of the change of command and PCS for Allegation 1, there is no evidence to support the move was procedurally incorrect.

### *Conclusion*

The preponderance of the evidence supports that Complainant made a protected communication through his testimony during the CDI, MSG/CC took one UPA and recommended other UPAs after that protected communication, and MSG/CC knew of the protection communication. Because the preponderance of the evidence establishes that the personnel actions would have been taken even if the protected communication had not been made, Allegation 2 of reprisal is **NOT SUBSTANTIATED**. When an IO determines no reprisal occurred, the IO must then analyze the allegation under the abuse of authority standard.

### *Abuse of Authority Acid Test*

1. Did the RMO's actions either (a) adversely affect any person; or (b) result in personal gain or advantage to the RMO? **Yes**.

AFI 90-301 lists a demotion, referral OPR, and extra duty as examples of actions that adversely affect a person.<sup>187</sup> All of the actions either taken or recommended by MSG/CC that were discussed as UPAs, the initiation of removal of the MSM, request to remove Complainant from ACSC, referral OPR, and early change of command and PCS, adversely affected Complainant in that that they either had the potential to negatively affect his career or negatively affected his position at the time.

2. Was the RMO's action either (a) outside the authority granted under applicable regulations, law or policy; or (b) arbitrary and capricious? **No**.

The actions taken by MSG/CC were within her command authority and properly executed under applicable Air Force instructions. In determining whether an action is arbitrary and capricious, the following factors are considered: the reasons the RMO took the action, the reasonableness of

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<sup>185</sup> ROI, Section III, Tab D3, pg. 12, lines 18-21.

<sup>186</sup> *Id.* at pg. 12, lines 15-18.

<sup>187</sup> AFI 90-301, Atch 22.

the action taken considering the complainant's performance and conduct; and consistency of the action. As these are the exact same factors as the first three factors in determining question 4 of the reprisal acid test set forth above, see the discussion of those factors above.

### ***Conclusion***

MSG/CC's actions adversely affected Complainant, but the actions were (1) within her authority as the MSG/CC; and (2) not arbitrary and capricious. The preponderance of the evidence supports the IO's opinion that MSG/CC did not abuse her authority.

**ALLEGATION 3:** O/A 11 May 2012 to 8 June 2012, Mission Support Group Deputy Commander, influenced AW/CC to take various unfavorable personnel actions against Complainant, Force Support Squadron Commander, in reprisal for making protected communications in violation of 10 USC 1034. **NOT SUBSTANTIATED.**

### ***Reprisal Acid Test***

1. Did the military member make or prepare a communication protected by statute, DoD directive, or AFI 90-301? **Yes.**

See the discussion of this exact question concerning question 1 of the reprisal acid test for Allegation 1.

2. Was a UPA taken or threatened following the protected communication? **No.**

As indicated in the discussion of question 2 of the reprisal acid test for Allegation 1, the evidence supports that the following UPAs were taken concerning Complainant: the LOR issued to Complainant and the inclusion of that LOR in a UIF; the request to revoke Complainant's MSM; the initiation of Complainant's removal from ACSC; the referral OPR; and the acceleration of Complainant's change of command and PCS.

Next, it must be determined if MSG/CD was an RMO with regard to any of the UPAs. MSG/CD had supervised Complainant up through December 2011 and had given Complainant negative performance feedback in September 2010 and re-vectoring memoranda in April and May 2011.<sup>188</sup> In December 2011, Lt Col RB came to the MSG in the second deputy commander position and took over the supervisory duties of three of the six squadrons, including Complainant's squadron.<sup>189</sup> Lt Col RB stated, "MSG/CD was very demanding and unyielding and did not understand patience . . . to the degree which may have been required to work with Complainant successfully . . . which is why the Squadrons were divided out the way they were . . . two Squadrons were specifically assigned under me to relieve him of any influence that he might have had on them." Lt Col RB further stated, "At one point, MSG/CC said that MSG/CD was not allowed to have any interaction with LRS, Contracting Squadron, or the FSS."<sup>190</sup>

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<sup>188</sup> ROI, Section III, Tab E1; Tab E2; Tab E3.

<sup>189</sup> ROI, Section III, Tab D5, pg. 2, lines 31-32, lines 37-40.

<sup>190</sup> *Id.* at pg. 18, lines 40-41. Of note, Lt Col RB issued the LOA to Complainant for being late to work and failure to follow the direction of the 436 MSG/CC.

MSG/CD's testimony indicated that he had some peripheral knowledge about the actions taken against Complainant in 2012, but he did not make recommendations or influence any of those actions.<sup>191</sup> There is no indication in any of the other evidence that MSG/CD in any way influenced AW/CC or MSG/CC in their decisions regarding the UPAs that occurred subsequent to the protected communication. Therefore, the preponderance of the evidence supports that MSG/CD was not an RMO with regard to any of the UPAs and further analysis under the reprisal acid test is not necessary.<sup>192</sup>

### ***Conclusion***

The preponderance of the evidence supports that Complainant made a protected communication through his testimony during the CDI, and UPAs were taken against Complainant. The preponderance of the evidence further establishes that MSG/CD was not an RMO concerning the UPAs. Consequently, Allegation 3 of reprisal is **NOT SUBSTANTIATED**. When an IO determines no reprisal occurred, the IO must then analyze the allegation under the abuse of authority standard.

### ***Abuse of Authority Test***

1. Did the RMO's actions either (a) adversely affect any person; or (b) result in personal gain or advantage to the RMO? **No**.

As addressed in the discussion of whether MSG/CD was an RMO in any of the UPAs taken against Complainant, a preponderance of the evidence supports that MSG/CD did not take any action that either adversely affected Complainant or resulted in personal gain or advantage to MSG/CD. Therefore, it is not necessary to conduct further analysis under the abuse of authority acid test.

### **ERRORS AND ANOMALIES**

No errors or anomalies affected the legal sufficiency of the investigation.

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<sup>191</sup> ROI, Section III, Tab D4, pg. 15, 17-20.

<sup>192</sup> We also note the preponderance of the evidence supports that the personnel actions would have been taken if the protected communication had not been made, as set forth in the discussion of Allegations 1 and 2.



## CONCLUSION

The three framed allegations have been addressed; those allegations allege a violation of law; the IO reasonably applied the preponderance of the evidence standard in arriving at the findings; the IO's conclusions are supported by and consistent with the findings; and the investigation complies with all applicable legal and administrative requirements. The IO properly concluded that the allegations against AW/CC, MSG/CC and MSG/CD were **NOT SUBSTANTIATED**. The ROI is legally sufficient and the case may be closed in accordance with AFI 90-301.

OpJAGAF 2013/7 5 April 2013