

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE ALASKA POLICE STANDARDS COUNCIL**

In the Matter of)	
)	
ANTHONY HENRY)	OAH No. 16-0315-POC
<hr/>)	Agency No. APSC 2015-07

DECISION

I. Introduction

In 2016, the Executive Director of the Alaska Police Standards Council began proceedings to revoke the police certificate of Lt. Anthony Henry, a 23-year career police officer with the Anchorage Police Department. The Accusation filed against Lt. Henry alleged that he lacked good moral character. The Accusation was based on events in 2010 and 2014 regarding suspected drug abuse and sexual assaults in the Alaska National Guard—issues that became very public during the 2014 gubernatorial election campaign. (In this decision, the Alaska National Guard will be referred to for simplicity as “the guard.”)

Lt. Henry played a part in that saga. In 2010, it was Lt. Henry who notified the leader of the guard that APD had identified a member of the guard as a drug dealer. Having that meeting, however, was consistent with APD’s policy.

That same year, Lt. Henry attended another meeting with command staff of the guard. The meeting included the topic of sexual assaults in the guard. Lt. Henry did not follow up on this disclosure.

Nearly five years later, in 2014, when the issues with the guard had become very public, APD twice interviewed Lt. Henry about the events in 2010. Lt. Henry’s answers were often inaccurate, mixing up some incidents and denying events he did not remember.

Based on its investigation, APD fired Lt. Henry. Lt. Henry sued, alleging wrongful termination. He had evidence that APD was scapegoating and retaliating against him. The jury found for Lt. Henry and awarded damages.

The jury verdict did not moot this action to revoke. Lt. Henry’s actions and failure to act in 2010, his 2014 interviews, and his testimony in subsequent legal proceedings, still provided a basis for alleging that a reasonable person would have substantial doubt about Lt. Henry’s fairness, respect for the rights of others, and honesty.

As will be explained in detail in this decision, however, proving these allegations is challenging. Nearly five years elapsed between 2010 and the interviews in 2014. Although we could infer unfairness or lack of respect from Lt. Henry’s actions or failure to act in 2010, we

could also infer reasons for his conduct that would be consistent with good moral character. Similarly, although misstatements in an official interview is cause for inquiry, forgetting or making mistakes about events of long ago is not necessarily dishonest. The passage of time, and Lt. Henry's long and successful career, add to the difficulty of drawing negative inferences from the circumstances.

Following a week-long evidentiary hearing, and intense scrutiny of the 2014 interviews, the Executive Director has not proved that Lt. Henry lacks good moral character. Even if some of Lt. Henry's actions and inactions in 2010 can be criticized, they were not unfair or evidence of a lack of respect for victims. With regard to the issue of honesty, the tone, statements, and dialogue of the 2014 interviews make it more likely than not that Lt. Henry's misstatements were not intended to deceive. The Executive Director's action to revoke Lt. Henry's police certificate is denied.

II. Facts

After spending nine years in the U.S. Army, Anthony Henry joined APD in 1992.¹ He started as a patrol officer and was later promoted to lieutenant. He served APD in many capacities, including supervising the homicide, sexual assault, drug, vice, canine, SWAT (special weapons and tactics), and special assignment units.²

In 2010, Lt. Henry met three times with Major General Tom Katkus, the leader of the Alaska National Guard. Four-and-one-half years later, in 2014, he was questioned in an official investigation about why he had those meetings and what occurred during the meetings. Many of the answers he gave were incorrect.

Why Lt. Henry had those meetings in 2010, and why he gave incorrect answers in 2014, are the central questions in this case. Before turning to those questions, however, this decision will briefly describe the circumstances that led to the 2010 meetings and the 2014 interviews, and the aftermath and consequences of the interviews.

This story begins with a successful drug bust by Lt. Henry's team. It ends with Lt. Henry being fired by the Municipality of Anchorage and then prevailing in a wrongful-termination action against the Municipality. After describing the details of this story, this decision will turn to whether Lt. Henry's conduct warrants revocation of his police certificate.

A. The February 2010 drug bust that led to the Mexican cartel drug investigation and interdiction

¹ Henry Exhibit 1-35 at 3.

² *Id.* at 4-5; Henry testimony; Redick testimony.

On February 23, 2010, an officer in APD, Seth McMillan, observed a drug sale taking place in the parking lot of a big-box store in Anchorage.³ He radioed to officers in marked units who pulled over and arrested the suspect, E B.⁴ A significant amount of cocaine was found on Mr. B.⁵

The following day, Jack Carson, an officer with APD, and Joseph Hazelaar, a State Trooper on loan to APD, interviewed Mr. B.⁶ Mr. B told them that his friend, F Q, could assist them with investigating the drug supply chain.⁷ The officers contacted Mr. Q, who eventually admitted that he was selling drugs and had contacts with a Mexican drug cartel. Mr. Q also disclosed that he was a recruiter for the Alaska National Guard.⁸

Ofc. McMillan and Ofc. Carson were members of the Special Assignment Unit, and Tr. Hazelaar was working with the unit at the time of the B arrest. The Special Assignment Unit is an important part of this case. In 2010, Lt. Henry was the commander of the unit, and Sgt. Darrell Redick was his sergeant. The members of this unit were selected from applicants among the SWAT team.⁹ The unit would be called upon when other sections in APD, such as patrol or detectives, needed additional personnel for surveillance or serving warrants. In addition, the unit conducted “street-level drug enforcement.” This means that the unit would target small-scale illegal drug deals that could be enforced on the spot. When an investigation revealed an opportunity to conduct a large-scale operation up the drug supply chain, however, the unit would generally turn the matter over to a special task force called “Safe Streets.”¹⁰

Safe Streets was a multi-agency task force that focused on crimes related to drugs or gang violence.¹¹ The lead agency for Safe Streets was the FBI.¹²

Given the quantity of cocaine found on Mr. B, the Special Assignment Unit referred the case to Safe Streets shortly after the arrest of Mr. B and the identification of Mr. Q as an informant.¹³ The investigation was further enhanced because it came under the auspices of the

³ McMillan testimony; Henry Exs. 21 at 3, 6; 13 at 1.

⁴ McMillan testimony.

⁵ *Id.*; Henry Ex. 21 at 6.

⁶ Henry Ex. 13 at 1.

⁷ McMillan testimony.

⁸ *Id.*

⁹ Redick testimony; Henry testimony.

¹⁰ Redick testimony; Henry testimony.

¹¹ Henry testimony; Jt. Ex. 1-74.

¹² Kirkland testimony.

¹³ Henry testimony; Jt. Ex. 1-79; *See generally* Henry Ex. 21

federal Organized Crime Drug Enforcement Task Force (commonly called “OCDETF”).¹⁴ The investigation was given the nickname “Cool Arrow.”¹⁵ As an OCDETF case, Cool Arrow received additional funding and other resources from the federal government.¹⁶ Extending over a considerable time, Cool Arrow was a very successful drug investigation, leading to arrests of important drug figures up the supply chain, and to interdictions of significant quantities of drugs.¹⁷

B. The first 2010 meeting with Gen. Katkus

Shortly after the arrest of Mr. B and the identification of Mr. Q as an informant, Tr. Hazelaar and Ofc. Carson briefed Lt. Henry. Lt. Henry explained to the officers that because Mr. Q was a member of the National Guard, the head of the National Guard had to be informed that there was an active drug dealer in the agency. Accordingly, he scheduled a meeting with Gen. Katkus, the Adjutant General of the Alaska National Guard and the Commissioner of Veteran and Military Affairs for Alaska.¹⁸

Providing this information to Gen. Katkus was consistent with the policy of APD regarding discovery of criminal activity in the military.¹⁹ One purpose of this policy is to allow the military to take action to avoid a threat to national security should the criminal be in a position to affect a critical mission.²⁰

The junior officers were displeased that the identity of the informant had to be disclosed to the National Guard.²¹ Tr. Hazelaar and Ofc. Carson had represented to Mr. Q that his criminal activity would not be disclosed to his employer. The three officers also had some thoughts that the criminal activity might include others in the guard. They knew, for example, that Mr. B had a girlfriend who also worked in the recruitment and retention unit of the guard. They could imagine a drug network within the guard that could possibly go as high as Gen. Katkus.²² As Ofc.

¹⁴ Henry testimony; Kirkland testimony.

¹⁵ Exec. Dir. Ex. AP at 42.

¹⁶ Henry testimony; Kirkland testimony.

¹⁷ Henry testimony; McMillan testimony.

¹⁸ Jt. Ex. 1-43 at 1-3.

¹⁹ Henry testimony. Lt. Henry does not remember the February meeting, but he does remember that he was aware of the policy of disclosing investigations to the military and the reasons for that policy. *See also* Mew Designated Trial Transcript at 37 (Oct. 16, 2018; *Henry v. Municipality of Anchorage*, Case No 3:15-cv-00187-RRB) (testimony of Chief Mew that he knew Lt. Henry was keeping Gen. Katkus “in the loop” and did not find that unusual).

²⁰ Henry testimony.

²¹ McMillan testimony, *see also* Jt. Ex. 1-43 at 2 (Former Tr. Hazelaar statement); Jt. Ex. 1-15 at 18 (Ofc. Carson statement to Investigator Brown that he objected to telling Gen. Katkus about Mr. Q’s involvement because he had promised Mr. Q that his employer would not be informed).

²² McMillan testimony.

McMillan testified, however, he at least understood that their job did not include investigating Gen. Katkus.²³

Lt. Henry, Tr. Hazelaar, and Ofc. Carson met with Gen. Katkus on Friday, February 26, 2010.²⁴ Neither Gen. Katkus nor Lt. Henry remember that meeting.²⁵ Ofc. McMillan, who did not attend the meeting, testified that he learned from Tr. Hazelaar and Ofc. Carson that the details of Mr. Q's involvement were provided to Gen. Katkus and another high-ranking guard official at that meeting.²⁶

C. Other events of March 2010: the Chris Simmons incident; the March 11 meeting with Gen. Katkus; and the delivery of the F Q material to the guard

As explained above, after the February 26th meeting, many important events occurred that resulted in significant law enforcement actions. Three relatively minor events also occurred in March 2010 that are important only because they will surface later in the discussion of Lt. Henry's incorrect statements in his interviews. First, not long after Mr. Q was interviewed and became a confidential informant, an officer in APD named Chris Simmons, who was not working on the case, learned that Mr. Q was involved in a criminal matter.²⁷ Ofc. Simmons was a member of the guard, and knew that Mr. Q was also a member. He asked his friend Ofc. McMillan, who was also a member of the guard, about what was going on. They had a short conversation.²⁸ Later, Lt. Henry, who was not a member of the guard, learned that this conversation had occurred. He reprimanded Ofc. McMillan for unnecessarily talking about a case with an officer who was not involved in the investigation and who had connections with the guard. This incident is not important except to the extent that it goes to Lt. Henry's memory of the event.

Second, on March 11, 2010, the FBI met with Gen. Katkus, apparently to provide official FBI notice that a member of the guard was involved in an FBI investigation.²⁹ The contents of the briefing are not important here—only the fact that the briefing occurred.³⁰

²³ *Id.*
²⁴ *Id.*

²⁵ Henry testimony; Katkus testimony.

²⁶ McMillan testimony. *See also* Jt. Ex. 1-15 at 21 (Ofc. Carson statement to Investigator Brown that Gen. Katkus was briefed on all aspects of the investigation). Ofc. McMillan had no first-hand knowledge of this meeting and at least some of his testimony regarding his hearsay knowledge may be incorrect. However, precisely what was said at the meeting is not important because the Executive Director does not assert that the content of the briefing was wrongful.

²⁷ McMillan testimony. Ofc. McMillan recalled that Ofc. Simmons learned of Mr. Q's involvement by happenstance—possibly by seeing him at the station. *Id.* Ofc. Simmons did not testify but stated in an interview that Ofc. McMillan had called him to ask about Mr. Q. Jt. Ex 1-55 at 6-7.

²⁸ McMillan testimony. Ofc. McMillan testified that he did not disclose any information to Ofc. Simmons, but learned from Ofc. Simmons that the recruitment unit in the guard was “rumored to be dirty.” *Id.*

²⁹ Kirkland testimony; Katkus testimony; Henry testimony.

Third, in late March 2010, Col. Joseph Lawendowski of the guard received a packet of materials regarding Mr. Q, including an audio recording in which Mr. Q confesses to criminal activity.³¹ As a consequence of this delivery, Mr. Q was later forced to resign from the guard.³² Very little evidence regarding this delivery was provided at this hearing. As will be seen, however, Lt. Henry's reaction to questions about this delivery in his interview is evidence regarding his moral character.

D. Ofc. McMillan's May and June 2010 interactions with members of the guard and the June 4th meeting with Gen. Katkus

In June 2010, Officer McMillan received a call from a member of guard, Lt. Col. C, with whom he had served in Iraq.³³ Lt. Col. C said that K O, a member of the recruitment and retention unit of the guard, wanted to talk. Ofc. McMillan understood the talk would be about illegal drug activity. Ofc. McMillan consulted with Ofc. Carson regarding how to proceed. They agreed that Ofc. McMillan would not tell Lt. Henry about the contact. They knew that following up on this lead was beyond the scope of Special Assignment Unit, and that Lt. Henry would not permit it. Instead, Ofc. McMillan would have the meeting with Mr. O clandestinely. He and Ofc. Carson fashioned a cover story, under which they would falsely claim to Mr. O that they were working under the auspices of the FBI.³⁴

Later that day, Ofc. McMillan met with Mr. O. Ofc. McMillan terminated the meeting after a short time because Mr. O had no information but was merely fishing for information about himself.³⁵ Unknown to Ofc. McMillan, Mr. O was in contact with senior guard personnel regarding the meeting with Ofc. McMillan. Mr. O informed command staff that Lt. Col. C had

³⁰ No participant in this meeting who testified at the hearing has a clear memory of what occurred. Henry testimony; Kirkland testimony; Katkus testimony. Special Agent Kirkland, who was the Supervisor of the Safe Streets Task Force in 2010, remembered the meeting but not the specifics. She speculated that she may have known that Gen. Katkus had already been given some information by Lt. Henry two weeks earlier, and that this meeting was merely a follow up. Kirkland testimony.

³¹ Henry Ex. 67 at 17. According to Col. Lawendowski, Tr. Hazelaar delivered the packet to him. *Id.* According to Ofc. Carson (now Lt. Carson), who did not testify, however, he delivered the packet. Designated Carson Deposition at 495. Tr. Hazelaar, who did not testify, denies delivering the packet, and denies that Lt. Henry ever ordered any such action. Jt. Ex. 1-43 at 6. As will be seen, the issue of the packet could have been important for establishing Lt. Henry's lack of moral character, but, with the lack of evidence, it was not, which, conversely, provides support for Lt. Henry's position.

³² Henry Ex. 67 at 17.

³³ McMillan testimony.

³⁴ *Id.*

³⁵ *Id.*

persuaded him to have the meeting with Ofc. McMillan.³⁶ He also relayed that he had been instructed to not say anything about the meeting to command staff.³⁷

A short time after the meeting with Mr. O, Ofc. McMillan's cell phone received several calls from telephone numbers that he knew to be from Lt. Col. Tim DeHaas, the Chief of Staff for Gen. Katkus.³⁸ He did not answer the calls. He then received a call from Lt. Henry ordering him to return to the office.³⁹

Lt. Henry had learned of Ofc. McMillan's undisclosed investigation.⁴⁰ He was angry and delivered an animated verbal reprimand.⁴¹ He told Ofc. McMillan he did not like receiving a call from Gen. Katkus informing him that one of his officers was interviewing members of the guard.⁴² According, to Ofc. McMillan, he instructed Ofc. McMillan not to "screw with Katkus's people."⁴³ He asked Ofc. McMillan the name of his contact in the guard.⁴⁴ Ofc. McMillan identified Lt. Col. C only after being ordered to do so by Lt. Henry.⁴⁵ Lt. Henry then called Gen. Katkus and informed him that Ofc. McMillan had been talking to Lt. Col. C.⁴⁶ Lt. Henry agreed to meet with Gen. Katkus the next day, June 4th.⁴⁷ He instructed Ofc. McMillan, and later Sgt. Redick, to attend.⁴⁸ Lt. Henry also ordered Ofc. McMillan to cease having contact with Lt. Col. C.⁴⁹

On June 4th, Lt. Henry, Ofc. McMillan, and Sgt. Redick met at Gen. Katkus's office. Neither Lt. Henry nor Sgt. Redick spoke.⁵⁰ Ofc. McMillan recalls some discussion of his status

³⁶ Henry Ex. 67 at 17.

³⁷ *Id.*

³⁸ McMillan testimony.

³⁹ *Id.*

⁴⁰ *Id.* Lt. Henry has no memory of these events.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* Lt. Henry does not remember the conversation, but strongly disputes that he would have ordered Ofc. McMillan to disclose the name of his contact. Henry testimony. In his view, giving such an order would not be consistent with how he ran his unit. In addition, he doubts Ofc. McMillan's credibility, based on Ofc. McMillan's behavior in conducting a clandestine interview, concocting a false cover story involving the FBI, and either failing to follow APD procedures of taping the interview with Mr. Nieves or destroying the recording. Henry testimony. Although what happened is uncertain, this decision adopts Ofc. McMillan's version of the facts, because his statements regarding the events of June 3rd have remained consistent. In addition, his rendition of the June 4th meeting is generally consistent with Sgt. Redick's, which makes his testimony about the antecedents to that meeting more credible.

⁴⁶ McMillan testimony.

⁴⁷ *Id.*

⁴⁸ *Id.*; Redick testimony.

⁴⁹ McMillan testimony.

⁵⁰ Redick testimony.

with the guard, and was surprised that Gen. Katkus's chief of staff knew his re-enlistment date.⁵¹ Gen. Katkus recalls that the purpose of the meeting was to explain to Ofc. McMillan the problem of guard protocol he had caused because Mr. O outranked Mr. McMillan.⁵²

After the meeting had been underway for some minutes, Lt. Col. C was brought into the room. He was questioned about allegations of sexual assaults in the guard. Lt. Col. C claimed to have knowledge of victims and that victims were confiding in him.⁵³ Ofc. McMillan recalls that Lt. Col. C was ordered to disclose the names of the victims, which Lt. Col. C refused to do.⁵⁴ Sgt. Redick does not remember any order that Lt. Col. C must reveal the names of victims, but he recalls that Lt. Col. C did not want to reveal the names of victims.⁵⁵ Sgt. Redick and Gen. Katkus recall that the discussion with Lt. Col. C was generally over whether sexual assault victims were accessing the guard's reporting protocol, and seeking assurance that Lt. Col. C was following guard policies.⁵⁶ No specific victim, wrongdoer, or event of sexual misconduct was discussed or identified.⁵⁷ Sgt. Redick and Ofc. McMillan both characterized the conflict among Lt. Col. C, the chief of staff, and Gen. Katkus as showmanship.⁵⁸ Lt. Henry does not remember Lt. Col. C being at the meeting or any discussion of sexual assaults.⁵⁹

Neither Lt. Henry, Sgt. Redick, nor Ofc. McMillan took any action to open a police file regarding possible sexual assaults. Nor did they report the disclosure made by Lt. Col. C to the special victims unit—the unit in APD with jurisdiction over sexual assault investigations.⁶⁰

E. The investigations of drugs and sexual assaults in the guard

Although the June 4th meeting itself did not lead to any investigations of sexual assaults in the guard, the issue was, in fact, heavily investigated. The outcome of those investigations is not relevant to this inquiry, but the fact that the investigations did occur is important. Below, this decision will briefly describe the history of these investigations.

That same June, Lt. Col. C filed a complaint with the FBI.⁶¹ The complaint alleged sexual assaults and drug trafficking in the guard, coupled with a coverup of these crimes by Gen. Katkus

⁵¹ McMillan testimony.

⁵² Katkus testimony.

⁵³ McMillan testimony.

⁵⁴ *Id.*

⁵⁵ Redick testimony.

⁵⁶ *Id.*; Katkus testimony.

⁵⁷ McMillan testimony; Redick testimony.

⁵⁸ *Id.*; McMillan testimony.

⁵⁹ Henry testimony.

⁶⁰ *Id.*; McMillan testimony; Redick testimony.

⁶¹ Henry Ex. 64; Kirkland testimony.

(including an allegation that Gen. Katkus had been tipped off by Lt. Henry to a police investigation into illegal steroid trafficking).⁶² The Governor’s Office also was sending information in 2010 to the FBI regarding possible sexual misconduct in the guard.⁶³ The FBI investigated the allegations. It concluded that “the initial investigation into this matter did not reveal any reliable evidence of violation(s) of federal law for which the FBI has jurisdiction.”⁶⁴

In 2013, Lt. Col. C published a blog on the internet that reiterated and expanded his allegations regarding the guard.⁶⁵ It accused senior guard personnel of covering up drug and sexual assault crimes. It also implicated senior guard personnel in crimes including murder and drug cartel conspiracies. The blog specifically mentioned Lt. Henry’s attendance at the June 4th meeting, and alleged that Lt. Col. C had been ordered at that meeting to report crimes only to his chain of command, not to the police.⁶⁶

Also in 2013, Gen. Katkus obtained funding to investigate the guard for sexual misconduct. The investigation was conducted by Major Jane Wawersik. As a result of this investigation, guard members found to have committed misconduct were disciplined. Where the investigation revealed possible criminal activity, the matter was referred to the local police authorities.⁶⁷ APD conducted a careful review of the referrals.⁶⁸ None resulted in prosecution.⁶⁹ With regard to one serious case that was deemed by the district attorney to not be appropriate for prosecution, Gen. Katkus ordered further enhanced forensic techniques in an effort to make it prosecutable.⁷⁰ The effort was not successful.⁷¹

In February 2014, at the request of Governor Parnell, the National Guard Bureau Office of Complex Investigations opened an investigation into reports of sexual assault, rape, hostile work environment, and fraud in the guard.⁷² The Office published its report in September 2014. The report found that victims of sexual misconduct did not have confidence in the guard command, and did not trust the system in place for reporting of sexual misconduct.⁷³ The report also found

⁶² Henry Ex. 64; Kirkland testimony.

⁶³ Ex. Dir. Ex. AY at 67-68.

⁶⁴ Henry Ex. 64 at 9.

⁶⁵ Ex. Dir. Ex. H.

⁶⁶ *Id.* at 9.

⁶⁷ Ex. Dir. Ex. AY at 54.

⁶⁸ McCoy testimony. In 2010-14, Deputy Chief Kenneth McCoy was the supervisor of the unit that investigated sexual assault.

⁶⁹ *Id.*

⁷⁰ Katkus testimony.

⁷¹ *Id.*

⁷² Ex. Dir. Ex. B at 3.

⁷³ *Id.*

fault in leadership's support of the Equal Employment Opportunity/Equal Opportunity program, and a failure to properly administer justice.⁷⁴ A media storm following the release of this report increased scrutiny on agencies that had a role in investigating sexual misconduct, including APD.⁷⁵

In 2015, Governor Walker requested that former Superior Court Judge Patricia Collins investigate the issue. In a comprehensive review of circumstances and problems regarding sexual assault and harassment in the guard during 2010-14, Judge Collins found significant problems with regard to reporting of sexual misconduct in the guard, particularly during 2010-12.⁷⁶ Although her report faults the command climate as not conducive to reporting, she did not find that Gen. Katkus or other leaders took action to discourage reporting.⁷⁷ Rather, the command problems that she identified related to the available resources, including lack of trained personnel and channels of reporting for the chaplains who had knowledge of the problems.⁷⁸

Judge Collins's report also chronicled the guard's treatment of Lt. Col. C.⁷⁹ The report described the June 4th meeting, in which Lt. Col. C reported he had been ordered to release the names of victims, and a later internal guard investigation of Lt. Col. C, which criticized Lt. Col. C for failure to follow proper procedures regarding victims of sexual misconduct.⁸⁰ The report described the effect this treatment had on a victim who had confided in Lt. Col. C. The victim felt she was partly to blame for the guard's treatment of Lt. Col. C, and "felt even more afraid to make her sexual assault report unrestricted/public for fear that a similar fate might await her."⁸¹

F. The investigation and report by Rick Brown

In the fall of 2013, as information about the guard was circulating, Ofc. Carson disclosed to command staff at APD that, in his view, Lt. Henry had impeded the 2010 drug investigation into the guard by prematurely disclosing information about the investigation to Maj. Gen. Katkus.⁸² The Chief of APD, Mark Mew, then asked the FBI to investigate the incident.⁸³ When

⁷⁴ *Id.* at 3-4.

⁷⁵ Henry testimony; McCoy testimony.

⁷⁶ Ex. Dir. Ex. AY at 10, 78.

⁷⁷ *Id.* at 79.

⁷⁸ *Id.* at 62; 79.

⁷⁹ *Id.* at 67-70.

⁸⁰ *Id.*

⁸¹ *Id.* at 65.

⁸² Carson Designated Deposition Transcript Vol. II at 350-51; 361-62.

⁸³ Mew Designated Trial Transcript at 108.

that investigation revealed no wrongdoing, APD asked the State Troopers to investigate the matter.⁸⁴ The troopers declined.⁸⁵

The reason that APD was searching for an investigation outside of APD's Internal Affairs section was because this matter involved Lt. Henry. APD had history with Lt. Henry, which will be described briefly in the next section of this decision. That history meant that an APD investigation of Lt. Henry would likely be deemed retaliatory.⁸⁶

When the FBI and the trooper approach did not work, APD took the issue to the legal department of Municipality of Anchorage.⁸⁷ The Municipality hired independent investigator John R. (Rick) Brown to investigate APD generally, and Lt. Henry specifically, regarding the events of 2010 involving the guard.

In his investigation, Mr. Brown conducted 29 interviews, interviewing several of the key participants more than once.⁸⁸ He interviewed Lt. Henry on October 20, and December 18, 2014.

Before each interview, Lt. Henry signed his pre-interview admonitions, advising that he must answer all questions truthfully, and must not be evasive in his answers.⁸⁹ During the interviews, he gave answers that were incorrect. He insisted that he had only two meetings, not three, with Gen. Katkus in February-June 2014. He claimed that the initial disclosure to the guard of Mr. Q's involvement in the illegal drug trade was due to Ofc. McMillan's talkativeness, not to his decision to disclose Mr. Q's involvement. He denied that the topic of sexual assaults in the guard was ever discussed in any meeting. He denied that he ordered Ofc. McMillan to identify Ofc. McMillan's contact in the guard, or that he disclosed Lt. Col. C's name to Gen. Katkus.⁹⁰

In addition, Lt. Henry digressed during the interviews on topics that had not been directly inquired into by the interviewer. Then, late in the second interview, Lt. Henry engaged in a lengthy and argumentative dispute with Internal Affairs officer Lt. Vandegriff, who undertook some of the questioning.

Following his investigation, Mr. Brown issued on March 15, 2015, a 97-page report, detailing his findings. The report is part of the record in this revocation action. The report has been admitted into the record, however, only for purposes of historical accuracy—not for the truth

⁸⁴ *Id.* at 111.

⁸⁵ *Id.*

⁸⁶ Henry Ex. 24.

⁸⁷ *See, e.g.*, Mew Designated Trial Transcript at 22.

⁸⁸ Jt. Ex. 1 at 21-27.

⁸⁹ Jt. Exs. 1-36; 1-88.

⁹⁰ Jt. Exs. 1-36; 1-88.

of the matters asserted in the report. Mr. Brown did not testify at the hearing in this matter, and his report is not evidence of facts regarding events of 2010.

In his report, Mr. Brown sustained two violations of policy by Lt. Henry.⁹¹ First, he found that Lt. Henry violated policy by disclosing the names of informants B, Q, and C to Gen. Katkus without approval of a supervisor. In his view, these disclosures compromised ongoing investigations by his unit into illegal activity in the guard.⁹² Second, he sustained that Lt. Henry was dishonest and evasive in the October and December interviews.⁹³ He recommended that Lt. Henry be disciplined.⁹⁴

G. The employment-related disputes between Mr. Henry and APD 2012-2018

The Brown investigation and report is not the first incident in the complicated employment relationship between Lt. Henry and APD. This decision, however, will not explore the details of that relationship or catalog all of the complaints, counter-complaints, opinions, or actions that have been presented in this hearing. Rather, this decision will give only the most general background, as follows:

- Before 2012, Lt. Henry was generally regarded by at least some in command staff at APD as a highly-competent, reliable officer to whom APD could turn for assistance on high-profile and difficult cases.⁹⁵
- In 2012, Lt. Henry began to vigorously defend an officer under his command who had multiple sclerosis, and whom Lt. Henry felt was being treated unfairly.⁹⁶ This defense led to disputes with some members of APD, including some in command staff.⁹⁷
- The dispute regarding the officer with multiple sclerosis led to complaints with the Office of Economic Opportunity and the Equal Employment Opportunity Commission filed by Lt. Henry and the officer. Investigations by those agencies

⁹¹ *Id.* at 14-15.

⁹² *Id.* at 8-11.

⁹³ *Id.* at 15.

⁹⁴ *Id.* at 19. Mr. Brown also sustained one violation of policy by Chief Mew for failing to timely initiate an investigation into Lt. Henry's misconduct. *Id.* He recommended that Chief Mew be disciplined. *Id.*

⁹⁵ *See, e.g.*, Mew Designated Trial Transcript at 3-4, 27 (*Henry v. Municipality of Anchorage*, Case No 3:15-cv-00187-RRB); Henry Ex. 60 at 5.

⁹⁶ Henry testimony.

⁹⁷ *Id.* There is also evidence suggesting that Lt. Henry's professionalism may have deteriorated around this time. *See, e.g.*, Mew Designated Trial Transcript at 53; Jt. Ex. 1-32. This decision will not explore those issues because they are not relevant to the accusation at issue in this case.

led to findings that APD was retaliating against Lt. Henry and an order that retaliation cease.⁹⁸

- There is evidence in the record from which one could conclude that Mr. Brown was hired in order to give a nonretaliatory gloss to an employment action against Lt. Henry, and that the Brown investigation was instigated for retaliatory purposes, with a preconceived intent that Lt. Henry would be found to have violated policy.⁹⁹
- There is evidence in the record from which one could conclude that Mr. Brown was misled by members of APD. For example, he may have received inaccurate information regarding whether in February and March 2010, the Special Assignment Unit was engaged in an active, in-depth investigation of the guard independent of the federal investigation.¹⁰⁰
- As a result of the Brown report, APD fired Lt. Henry on April 1, 2015.¹⁰¹
- Lt. Henry sued the Municipality of Anchorage in federal court, alleging wrongful discharge.
- After a trial, in November 2018, the jury found that Lt. Henry’s protected activity (meaning his support for the officer in his command who had an illness, and his filing of complaints with appropriate agencies to protect himself and the officer) was a motivating factor, although not the sole cause, of the termination.¹⁰² The jury found that the Municipality had violated the covenant of good faith and fair dealing, and awarded damages to Lt. Henry.¹⁰³

H. The 2016 accusation and proceedings since 2016

In March 2016, before Lt. Henry’s federal case went to trial, the Executive Director filed an accusation against Lt. Henry, seeking to revoke Lt. Henry’s police certificate. The accusation was based on the findings in the Brown report, and the fact that APD had discharged Lt. Henry in circumstances that adversely affected APD, and reflected on his competence and moral character.¹⁰⁴

⁹⁸ *Id.*; for a summary of the complaints, see Henry Closing Brief at 22. *See also* Henry Ex. 24.

⁹⁹ *See, e.g.*, Henry Ex. 24.

¹⁰⁰ *See, e.g.*, Designated Trans. Carson Depo. at 431-33.

¹⁰¹ *See* Accusation ¶3; Henry Denial ¶3.

¹⁰² Signed Jury Verdict, Case 3:15-cv-00187-RRB Document 1080 Filed 11/09/18 (designated document from Lt. Henry not numbered as an exhibit).

¹⁰³ *Id.*

¹⁰⁴ Accusation (March 10, 2016).

Following the March 2016 accusation, the Executive Director filed a motion to preclude Lt. Henry from contesting the facts that were the basis for APD’s decision to terminate Lt. Henry. This motion, based on a doctrine called “collateral estoppel,” was denied because Lt. Henry had never received a due-process hearing to dispute the findings in the Brown report.¹⁰⁵

While the prehearing process in the revocation action was underway, Lt. Henry was also engaged in litigation in federal court with the Municipality of Anchorage. The parties recognized that the outcome of the litigation could significantly affect this revocation action. Therefore, on October 25, 2016, based on an agreement by the parties, the revocation action was stayed until 30 days after a dispositive decision in Lt. Henry’s federal action.¹⁰⁶

After the jury verdict in the federal action in November 2018, the stay in this action was lifted. The Executive Director amended the accusation so that the only grounds remaining for revocation were based on acts that, the accusation alleged, demonstrated a lack of moral character. A one-week hearing was held on May 20-24, 2019.¹⁰⁷ The accusation was further amended at the hearing to make clear that this revocation action was no longer based on the Brown report. The issues in this hearing were Lt. Henry’s honesty, fairness, and respect for the rights of others, based on his actions in 2010, and statements in 2014 and in subsequent testimony, without regard to the Brown report.¹⁰⁸

¹⁰⁵ Order Denying Motion to Preclude Relitigation of Previously Determined Issues and Facts (Sept. 27, 2016).

¹⁰⁶ Order Granting Stay (Oct. 25, 2016).

¹⁰⁷ All exhibits not withdrawn at the hearing are admitted into the record.

¹⁰⁸ Third Amended Accusation

III. Discussion

A. What conduct is alleged as grounds for revoking Lt. Henry's certificate?

Under the Council's regulations, the Council has discretion to revoke an officer's certificate if the officer demonstrates a lack of good moral character.¹⁰⁹ Thus, if Lt. Henry's acts, or failures to act, would cause a reasonable person to have substantial doubt about Lt. Henry's honesty, fairness, respect for the rights of others, or respect for the law, the Council would have discretion to revoke his police certificate.¹¹⁰

The accusation against Lt. Henry alleges that Lt. Henry demonstrated a lack of good moral character in three different ways:

- Lt. Henry was dishonest by giving false answers and evading questions in his official interviews and sworn testimony (Count I);
- Lt. Henry was unfair because he favored his self-interest, and the interest of Gen. Katkus, over the interests of Ofc. McMillan and victims of sexual assault (Count II);
- Lt. Henry was disrespectful of the rights of victims of sexual assault when he prematurely disclosed the name of an advocate for victims, and failed to follow up on a disclosure that criminal sexual assaults may have occurred at the Alaska National Guard (Count III).¹¹¹

Of these three charges, Count I, regarding honesty, is by far the most significant. As will be explained, the issues of fairness and respect for the rights of others are not well-developed in this record, and can be easily addressed. The issue of honesty, however, is a thorny issue requiring intense and deliberate scrutiny. For this reason, this decision will first address the issues of fairness and respect for the rights of others. The discussion regarding these issues will set the stage for the discussion of honesty.

¹⁰⁹ 13 AAC 85.110(a)(3).

¹¹⁰ 13 AAC 85.900(7); 13 AAC 85.110(a)(3).

¹¹¹ Third Amended Accusation, Counts I-III. "Good moral character" is defined by the Council in regulation to mean:

the absence of acts or conduct that would cause a reasonable person to have substantial doubts about an individual's honesty, fairness, and respect for the rights of others and for the laws of this state and the United States; for purposes of this standard, a determination of lack of "good moral character" may be based upon a consideration of all aspects of a person's character.

13 AAC 85.900(7). In a 2013 decision, *In re EX*, the Council determined that the Executive Director is not required to prove substantial doubt about each of the four elements of good moral character. OAH No. 13-0473 at 18.

B. Has the Executive Director proved that a reasonable person would have substantial doubt about Lt. Henry’s fairness?

The Alaska Supreme Court has approved the Council’s definition of “fairness” as “conduct ‘free from self-interest, prejudice or favoritism.’”¹¹² The Council has previously ruled on the fairness prong several times. For example, in *In re Leggett*, the respondent attempted to influence the investigation of his adult son who was a suspect in a crime.¹¹³ The respondent used a lie detector on his son and inappropriately communicated with the sergeant in charge of the investigation. The Council determined that this conduct raised substantial doubt about the respondent’s fairness because it demonstrated he lacked “impartiality and [had a] willingness to use his position and influence to the benefit of a family member.”¹¹⁴ In *In re Much*, the Council found two instances of unfairness: first, when the respondent wrongly used his position as a police officer to cause an unwarranted welfare check on his girlfriend’s child, which was unfair to the child’s custodial parent, and second, on a different matter, when he lied on a police report to cover up his errors, which was unfair to the victim who was seeking justice.¹¹⁵

In this case, the Executive Director has three theories of unfairness. Each, however, is considerably more attenuated than the grounds for unfairness found in previous cases.

The Executive Director’s first theory of unfairness concerns Lt. Henry’s statements in the October and December 2014 interviews blaming Ofc. McMillan for causing the February 26th disclosure to Gen. Katkus. The Executive Director argues that this was unfair to Ofc. McMillan because Lt. Henry himself was responsible for that disclosure, and wrongly blaming others for one’s own conduct is unfair.¹¹⁶ This theory, however, merges with the Executive Director’s theory of honesty. Simply put, if Lt. Henry honestly believed that Ofc. McMillan’s conversation with Ofc. Simmons caused the February 26th meeting, then it was not unfair for him to say so. If, however, Lt. Henry was deliberately lying about the cause of the meeting in order to shift blame to Ofc. McMillan, then it was unfair. The issue of whether the statement was a mistake of

¹¹² *Much v. Alaska Police Standards Council*, No. S-16225, 2018 WL 1779323, at *6 (Alaska 2018).

¹¹³ OAH No. 14-0647-POC (Alaska Pol. Stn’d Coun. 2017) available at <https://aws.state.ak.us/OAH/Decision/Display?rec=4690>.

¹¹⁴ *Id.* at 19.

¹¹⁵ OAH No. 13-0288-POC at 24 (Alaska Pol. Stn’d Coun. 2013) available at <https://aws.state.ak.us/OAH/Decision/Display?rec=4688>. The Supreme Court affirmed these holdings, stating that “Much exhibited favoritism by requesting a welfare check for his girlfriend that would not have been performed under normal APD procedures. Much’s failure to adequately investigate K.H.’s complaint and his dishonest report afterward demonstrated prejudice against her interests and a willingness to ‘use[] his official position to cover up his errors.’” No. S-16225, 2018 WL 1779323, at *6).

¹¹⁶ Ex. Dir. Closing Brief at 26.

memory, or a dishonest (and thus unfair) attempt to deceive will be discussed in detail in the section of this decision on honesty.

The Executive Director's second theory again involves Ofc. McMillan. The Executive Director alleges that Lt. Henry's requiring Ofc. McMillan to attend the June 4th meeting was unfair to Ofc. McMillan. The June 4th meeting was solely about guard business, not APD business. The meeting was uncomfortable for Ofc. McMillan, and it led to Ofc. McMillan leaving the guard.¹¹⁷ In the Executive Director's view, the course of events demonstrates that Lt. Henry put a personal interest in currying favor with Gen. Katkus ahead of the interests of Ofc. McMillan.

The Executive Director's third theory is that Lt. Henry was unfair to victims of sexual assault. This theory focuses on the events of June 3-4, when Lt. Henry told Gen. Katkus the name of Ofc. McMillan's contact, Lt. Col. C. This disclosure was followed by the confrontation between Lt. Col. C and Gen. Katkus at the June 4th meeting. This confrontation undercut Lt. Col. C's ability to advocate for the victims. The Executive Director alleges that Lt. Henry was trying to curry favor with Gen. Katkus by identifying Lt. Col. C, without regard to the effect on victims. That, the Executive Director concludes, was unfair to the victims.¹¹⁸

The Executive Director has failed to prove several key points necessary to establish either of these theories. First, a necessary element of unfairness is that the act being charged promotes the respondent's self-interests. The Executive Director has not, however, proved that Lt. Henry was motivated by trying to curry favor with Gen. Katkus. Lt. Henry and Gen. Katkus were acquaintances, but not close friends.¹¹⁹ No evidence shows that Lt. Henry would benefit by currying favor with Gen. Katkus. The only evidence that supports an inference of a special relationship between Gen. Katkus and Lt. Henry is that the June 4th meeting was about a guard issue, not a police issue. Because Lt. Henry had no clearly-evident business reason to order the meeting, we are asked to infer that it must have been for a personal reason.

¹¹⁷ McMillan testimony.

¹¹⁸ Lt. Henry argues strongly that this theory does not state a *prima facie* case of unfairness because (i) Gen. Katkus already knew that Lt. Col. Blaylock was Ofc. McMillan's source, and (ii) Lt. Col. Blaylock was not, in fact, an advocate for sexual assault victims. These arguments, however, are not well-taken. If Lt. Henry had reason to think that Lt. Col. Blaylock was an advocate, and that disclosing his name to Gen. Katkus would curtail his ability to be an advocate, it might well demonstrate unfairness even if the factual basis on which Lt. Henry was acting was later proved false. The question here, then, is not whether Lt. Col. Blaylock was an advocate—the question is whether Lt. Henry ever had reason to think that he might be an advocate.

¹¹⁹ Henry testimony; Katkus testimony; Ex. Dir. Ex. AP at 75.

This reasoning, however, is not persuasive—the meeting could just as easily have been for a police business purpose, including maintaining a good working relationship between APD and the guard. At most, the Executive Director has shown that Lt. Henry erred by agreeing to require Ofc. McMillan to attend this meeting. But an error of judgment regarding where the line between police business and guard business should be drawn is not the same as proving that Lt. Henry’s personal interests were affected by his actions.

Second, the Executive Director has not proved that Ofc. McMillan’s decision to leave the guard was a foreseeable consequence of the June 4th meeting. Although Ofc. McMillan did make that decision based on the meeting, Lt. Henry did not know what would happen at the meeting or that Ofc. McMillan’s decision regarding reenlistment was imminent or at issue.¹²⁰ Even granting that requiring Ofc. McMillan to attend a meeting that was not based on police business was an error, it would not be unfair unless Lt. Henry knew or should have known that scheduling the meeting would help his personal interests, and harm Ofc. McMillan’s personal interests. On this record, neither of these facts is proved.

Third, Lt. Henry’s disclosure of Lt. Col. C’s name to Gen. Katkus was not unfair to victims because Lt. Henry did not know that Lt. Col. C was an advocate for sexual assault victims. Although at that time, Ofc. McMillan had a sincere belief that Lt. Col. C was a true and effective advocate, Ofc. McMillan testified that he did not tell Lt. Henry anything about sexual assaults before the June 4th meeting.¹²¹ In the June 3rd conversation, Ofc. McMillan identified Lt. Col. C only as the contact who provided Ofc. McMillan with information in furtherance of Ofc. McMillan’s unauthorized investigation into *drug* activity in the recruitment unit of the guard. Lt. Henry had no reason to think that disclosing Lt. Col. C as Ofc. McMillan’s contact would have any negative repercussions for victims of sexual assault or for law enforcement in general. Therefore, he was not being unfair to victims by telling Gen. Katkus the name of Ofc. McMillan’s contact.

In sum, this case is far different from the earlier cases on unfairness, where the Executive Director proved that a police officer took action that the officer knew or should have known would help the officer’s personal interest while harming a third party’s interest. Here, Lt. Henry may have made errors of judgment. Those errors may have led to harm to Ofc. McMillan’s interests, and, from a particular point of view, could have been expected to harm victims’

¹²⁰ McMillan testimony.

¹²¹ *Id.*

interests. But many police officers make many errors every day, and those errors often result in some diminishment of a third party's interest. That does not mean that the police officer acted unfairly, only that the officer may have acted unfortunately. Without proof that an officer acted in the officer's interest without regard to the interests of others, an officer's errors will not cause a reasonable person to have doubt about the officer's fairness.

C. Has the Executive Director proved that a reasonable person would have substantial doubt about Lt. Henry's respect for the rights of others?

The Executive Director alleges that Lt. Henry's behavior immediately following the June 4th meeting would cause a reasonable person to have substantial doubt regarding his respect for the rights of victims of sexual assault.¹²² First, because Lt. Col. C was a source of information regarding possible sexual assaults in the guard, and because Lt. Henry ordered Ofc. McMillan to cease contact with Lt. Col. C, the Executive Director asserts that Lt. Henry potentially thwarted an investigation into those assaults. This, the Executive Director concludes, shows a lack of respect for victims.

Second, Lt. Henry failed to follow up on the disclosures made at the June 4th meeting regarding sexual assaults in the guard. In the Executive Director's view, "most APD supervisors hearing the allegations at the June 4, 2010 meeting would have contacted APD's special victims unit."¹²³ The Executive Director asserts that Lt. Henry's failure to act shows a lack of respect for victims.

The Council's past cases establish that victims have specific rights in the Alaska Constitution and in statute.¹²⁴ The Executive Director's theories that a police officer who commits an act that thwarts an investigation, or fails to act when the officer has knowledge that should trigger an investigation into a possible sexual assault, state a *prima facie* case of failing to respect the rights of others. The question here, however, is whether the Executive Director has proved Lt. Henry knew or should have known that his actions or failure to act would affect victims of sexual assault.

With regard to Lt. Henry's ordering Ofc. McMillan to have no further contact with Lt. Col. C, the Executive Director has no case. Lt. Henry had no reason to think that Ofc. McMillan was investigating sexual assaults (which he was not). Lt. Henry's unit did not investigate sexual

¹²² Ex. Dir. Closing Brief at 30-33.

¹²³ Ex. Dir. Closing Brief at 31-32.

¹²⁴ *In re EX*, OAH No. 13-0473-POC at 21-22 (Alaska Pol Stn'd Coun. 2013) (*citing* Alaska Const. art I, § 24 ("Rights of Crime Victims")), available at <https://aws.state.ak.us/OAH/Decision/Display?rec=4689>; *Much*, OAH No. 13-0288-POC at 23-24.

assaults. Even if Ofc. McMillan had knowledge about sexual assaults, or was using Lt. Col. C as a source of information about sexual assaults, all Ofc. McMillan could do with that information is report it to the special victims unit. Therefore, ordering Ofc. McMillan to have no more official contact with Lt. Col. C could not have squelched an ongoing investigation into sexual assault. Moreover, that Lt. Henry ordered Ofc. McMillan to cease his clandestine investigation into drug activity (which was the purpose of the order to stop contact with Lt. Col. C) was entirely appropriate. Nothing in Lt. Henry's order shows a lack of respect for victims of sexual assault.

With regard to Lt. Henry's failure to act after observing a discussion in which Lt. Col. C disclosed knowledge of alleged sexual assaults in the guard, that allegation is more troubling. Simply put, as Section II.E. of this decision shows, the disclosure of sexual assaults in the guard has triggered many investigations, including investigations by the FBI, APD, the guard (through its Office of Complex Investigations), and Judge Collins. Some of these investigations were triggered by little more information than that apparently possessed by Lt. Henry after the June 4th meeting.

For many reasons, investigations into sexual misconduct can, and should, be triggered by even a slight disclosure of information. The issue of sexual assault is sensitive, significant, and disturbing. The crime is likely to remain concealed, especially where, as here, the alleged perpetrators have power over the victims. Therefore, we generally would expect that a disclosure with even a small chance of being authentic should trigger a senior officer such as Lt. Henry to inquire further. This is the case even after accounting for the facts that the disclosure by Lt. Col. C on June 4th was sketchy, and that Lt. Col. C may not have been a reliable source.

Yet, although a reasonable person would be troubled by this unexplained failure to act, we must view this episode from the 30,000-foot level. We are being asked to judge Lt. Henry's respect for the rights of others based on a disclosure to him that took place over nine years ago. Because we could not question Lt. Henry at a time when he would have a contemporaneous memory of the event, we do not know how much Lt. Henry was paying attention to the conversation or what he heard. Indeed, we do not have reliable knowledge of what was said at the meeting.

We do know that Lt. Col. C did not identify any specific case, victim, or perpetrator at the June 4th meeting.¹²⁵ We also know that neither Sgt. Redick, Ofc. McMillan, nor Gen. Katkus (himself a former police officer) considered the disclosure to be sufficient to trigger further

¹²⁵ *Id.*; Redick testimony.

inquiry by the police. One factor that may relate to why this disclosure did not present as a police matter is that the guard had a reporting protocol, designed to facilitate victim privacy and counseling, out of which a police report could be generated based on the victim's decision and choice.¹²⁶

Against this particular failure to act, we have Lt. Henry's entire career in law enforcement, in which he demonstrated a dedication to acting to protect the rights of others.¹²⁷ We also have his testimony, which was genuine and persuasive, that he has a heightened respect for the rights of victims of sexual assault in part because his wife is an authoritative professional serving in that field.¹²⁸

Moreover, this allegation of a failure to act based on a vague and unclear disclosure is far different from the other cases where the Council ruled that a police or corrections officer failed to respect the rights of others. In *In re Bowen*, a police officer showed disrespect for a victim of domestic violence when he had sex with her while her husband was temporarily in jail.¹²⁹ In *In re EX*, a corrections officer misused official business to access confidential information of victims of sexual assault who had been assaulted by his own son.¹³⁰ In *In re Much*, a police officer failed to investigate a crime (and then covered up his negligence) when he had specific information of a specific crime, perpetrator, and victim.¹³¹ Each of these cases involves acts or failures to act that clearly showed a lack of respect for a victim. None required that the Council infer disrespect from uncertain circumstances.

In contrast, here, at best, the Executive Director has shown that Lt. Henry may have erred by not following up on Lt. Col. C's disclosure. We do not know why he made the judgment that

¹²⁶ For a description of the guard's reporting protocol see generally Exec. Dir. Ex. AY (report of Judge Collins). See also Kaktus testimony. That the reporting protocol in 2010 was not trusted by victims is a very valid concern; see Exec. Dir. Ex. AY, but here we are citing only to the existence of the protocol to help us understand why no one, including Lt. Henry, considered the June 4th disclosures to warrant further police inquiry. As Gen. Katkus testified, the reporting protocol allowed the victims to determine when a report should be made to the police. Respecting a victim's right to make that decision is important and may have contributed to the officers' inaction after the June 4th meeting.

¹²⁷ McMillan testimony; Redick testimony; Thelen testimony; McKinnon testimony; Bell testimony; Kirkland testimony; Mew Designated Trial Transcript at 3-4, 27.

¹²⁸ Henry testimony.

¹²⁹ *In re Bowen*, OAH No. 10-0327-POC (Alaska Pol Stn'd Coun. 2011) at 15, available at <https://aws.state.ak.us/OAH/Decision/Display?rec=4683>. Although *Bowen* did not find a lack of good moral character (because at the time, the Council required the Executive Director to prove a deficit in all four elements of moral character), the Council did find that "Trooper Bowen's conduct in this case would certainly cause a reasonable person to have substantial doubt about his respect for the rights of victims of crimes of domestic violence, and possibly of crime victims generally." *Id.*

¹³⁰ OAH No. 13-0473-POC at 21-22.

¹³¹ OAH No. 13-0288-POC at 24-25.

he made, but, given the passage of time, and given Lt. Henry's career, we cannot conclude that his failure to act was because he did not respect the rights of victims of sexual assault. Therefore, the Executive Director has not proved that a reasonable person would form substantial doubt about Lt. Henry's respect for the rights of others.

D. Has the Executive Director proved that a reasonable person would have substantial doubt about Lt. Henry's honesty?

The central issue in this case is Lt. Henry's honesty. Not surprisingly, the parties have very different theories about Lt. Henry's honesty. Each party believes that the record supports its theory.

Below, this decision will first describe each party's theory of the case, and then discuss how these theories will be analyzed, based on past cases decided by the Council. As will be seen, the approach adopted here will require close scrutiny of his answers to questions at his two 2014 interviews.

1. The Executive Director's theory for finding substantial doubt regarding Lt. Henry's honesty

The Executive Director's theory of dishonesty is threefold. First, the Executive Director alleges that Lt. Henry deliberately lied and was evasive at his October and December interviews when he asserted that there were only two meetings and denied that he had disclosed Mr. Q's involvement in criminal activity. The Executive Director alleges that he told these lies, and attempted to evade answering questions, to shield himself from blame for prematurely disclosing information to Gen. Katkus.¹³²

Second, the Executive Director alleges that Lt. Henry also deliberately lied when he denied that the topic of sexual assaults had been discussed at any of the meetings, and denied that he had ordered Ofc. McMillan to identify his source in the guard and cease all contact with that source (Lt. Col. C).¹³³ The Executive Director alleges that he told these lies to shield himself from blame for failing to take action when he learned of possible uninvestigated sexual assaults in the guard.¹³⁴

Third, the Executive Director alleges that after the interviews, Lt. Henry continued to lie in subsequent legal proceedings. Although Lt. Henry now admitted that three meetings occurred, that he caused the first one, and that sexual assaults were discussed in the June 4th meeting, he continued to say that he did not actually remember the February 26th meeting or the discussion of

¹³² Exec. Dir. Closing Brief at 16-18.

¹³³ *Id.* at 18-23.

¹³⁴ *Id.*

sexual assaults at the June 4th meeting. The Executive Director alleges that Lt. Henry is feigning a lack of memory in order to make the lies that he told in the interviews less culpable.¹³⁵

In sum, the Executive Director charges that Lt. Henry lied to “devise[] a strategy to shield himself.”¹³⁶ As will be seen, the Executive Director's theory is plausible—Lt. Henry did have a strategy and a plan to shield himself. The question here will be whether the Executive Director can prove that the plan included deliberate lies or subterfuge to avoid the truth.

2. Lt. Henry's theory of why the evidence does not support a finding of substantial doubt regarding Lt. Henry's honesty

Lt. Henry's defense of his honesty has several components. First, his defense is grounded in a commonsense argument regarding the capriciousness of memory. He notes that he went into the October and December interviews with a limited ability to prepare for the interviews. He was not allowed to discuss the issues under inquiry with his colleagues or subordinates.¹³⁷ Although he had some access to his emails, he was not allowed to research police files to refresh his memory about past events.¹³⁸ He was then questioned extensively about events that had occurred over four years in the past. Given this background, Lt. Henry asserts, “Mr. Henry's memory was not a lie or dishonest, it was a jumbled mess of events.”¹³⁹

As will be seen, Lt. Henry's argument is also plausible. We have all had our memories fail. We have all had our memories play tricks on us, where we mistakenly meld two events into one or vice versa. In analyzing the evidence, we must pay attention to whether Lt. Henry's misstatements are consistent with accidental misremembering or forgetting, or whether the misstatements arise in circumstances that show a plan to mislead. This will include analysis of whether his statements are a melding of related, but separate events, or whether they are more likely to have been deliberately constructed to throw the investigators off the scent.

¹³⁵ *Id.* at 17; 22-23. The Executive Director purports to raise a fourth theory of dishonesty, arguing that the Council must consider the *Brady/Giglio* line of cases. Under these cases, a prosecutor must disclose the dishonesty of a testifying police officer to a criminal defendant. *Id.* at 9-10. *Brady/Giglio* disclosure, however, is a consequence of dishonesty, not a theory of dishonesty. The Council's burden is to first determine whether Lt. Henry was deliberately dishonest. Knowledge of the consequences of a finding of dishonesty is helpful in determining whether to revoke the certificate of a dishonest officer. It is not helpful, however, in determining whether the evidence supports a finding that the officer was dishonest.

¹³⁶ *Id.* at 11.

¹³⁷ Henry testimony.

¹³⁸ *Id.*

¹³⁹ Henry Closing Brief at 13.

Second, Lt. Henry argues that he had no motive to lie. He knew that telling Gen. Katkus that a guard member had confessed to selling drugs was appropriate.¹⁴⁰ Therefore, he had no reason to tell a lie to shield himself from liability for disclosing Mr. Q’s criminal activity to Gen. Katkus. In addition, he argues, by the time of the interview (2014), based on the content of Lt. Col. C’s blog, he knew that Lt. Col. C was a conspiracy-theorist who was not reliable. This would mean that any failure to act on information from Lt. Col. C was immaterial, so again, in his view, he had no reason to lie about having heard a disclosure from Lt. Col. C.¹⁴¹

Lt. Henry’s “no motive to lie” argue is plausible, but not conclusive. On its face, the Executive Director’s argument that he had a motive to lie to throw the investigators off the scent and place blame on others is also plausible. Moreover, lies are not always logical or well-calculated to conceal, so knowing after the fact that a particular misstatement was not needed or effective does not establish a lack of motive to tell the lie in the first place. Thus, when analyzing the evidence, we will need to determine which argument regarding motive or lack of motive is more persuasive under the circumstances.

Third, Lt. Henry also argues that even if a person would form doubt about Lt. Henry’s honesty from his incorrect answers, that doubt could never be substantial because the incorrect answers were all regarding minor issues, such as the dates and content of meetings that, as things turned out, were not important.¹⁴² Although Lt. Henry certainly produced evidence that his actions did not, in fact, cause actual harm, his “no-harm, no-foul” argument is not well taken. Regardless of whether the outcomes from his 2010 conduct were harmless, if his misstatements were intended to mislead, the misstatements were not trivial. As discussed in the next section of this decision, the Council’s decision in *In re Hazelaar* instructs that the question to be analyzed is whether a dishonest statement creates substantial doubt of the officer’s honesty.¹⁴³ This inquiry should not be discounted by research into whether the dishonest statement actually derailed an investigation.

¹⁴⁰ To be clear, the Executive Director does not allege that Lt. Henry did anything wrong by telling Gen. Katkus about Mr. Q on February 26, 2010. The Executive Director alleges that Lt. Henry lied by denying that he was responsible for the disclosure and he did so because he thought that telling the truth would get him in trouble.

¹⁴¹ *Id.* at 29.

¹⁴² *Id.* at 15-16.

¹⁴³ OAH No.13-0085-POC (Alaska Pol. Stn’d Coun. 2014) at 1, available at <https://aws.state.ak.us/OAH/Decision/Display?rec=4685>; aff’d *Hazelaar v. Police Stn’d Coun.*, Case No. 1JU-14-883 CI (Alaska Super. Ct. 2016). *Hazelaar* is somewhat difficult to read because the controlling decisional document includes the Council’s Order, the Executive Director’s Proposal for Action, and the portions of the Administrative Law Judge’s recommended decision that were consistent with the Council’s order.

Moreover, at the time of the 2014 interviews, the entire state was genuinely concerned about the possibility that drug use and sexual misconduct in the guard had been whitewashed. This was not a minor matter, and we would have substantial doubt about the honesty of any person who was giving false answers in an interview regarding this subject in order to deflect blame away from himself. This is true even if the incorrect answers were about matters that, after considerable investigation, eventually turned out to be inconsequential. Thus, the inquiry here is not about the substance or effect of Lt. Henry's acts in 2010. The inquiry here is about whether he deliberately lied or engaged in subterfuge in 2014.

Fourth, Lt. Henry reminds us frequently that the source of this action against Lt. Henry's certificate is the tainted investigation conducted by the Municipality of Anchorage. Lt. Henry argues that he had reasonable grounds for concluding that the "investigation was a set-up intended to target and terminate his employment."¹⁴⁴ Although this decision makes no finding regarding the Municipality's motive, the evidence does show that Lt. Henry had reasonable grounds to believe that the Municipality was biased against him.¹⁴⁵ Lt. Henry asks us to discount his misstatements in the interview, and his resistance to having his memory refreshed, because the questions were unfair and he did not trust the interviewers.

This fourth argument, however, has limited application. The motive of the Municipality does not affect Lt. Henry's obligation to tell the truth in the October and December interviews. Indeed, knowing that the Municipality was attempting to frame him might just as easily make Lt. Henry more vigilant, and less likely to trust his memory, which, arguably, might have resulted in fewer misstatements, not more. Moreover, even granting that Lt. Henry had reason to not trust his interviewers' attempt to refresh his memory, we know now that, even with a full and trustworthy refreshing of his memory, Lt. Henry still asserts that he does not remember certain events. The trustworthiness of the interviewer, then, may not be an important issue to help us understand why Lt. Henry was so resistant to having his memory refreshed by the facts.

Nevertheless, two conclusions can be drawn from the evidence of the Municipality's alleged wrongdoing. First, Lt. Henry has raised a genuine issue regarding the Municipality's motive. This record contains considerable evidence that the Municipality's employment action

¹⁴⁴ *Id.* at 21.

¹⁴⁵ *See, e.g.*, Henry Ex. 24; Signed Jury Verdict, Case 3:15-cv-00187-RRB; Designated Trans. Carson Depo. at 431-33. To be clear, this decision does not make a finding of taint. This decision finds only that Lt. Henry had reasonable grounds to believe that the investigation was tainted.

against him may have been tainted.¹⁴⁶ Therefore, no person should assume that just because Lt. Henry was fired by a reputable police department, APD's action is evidence of Lt. Henry's culpability. It is not.

Second, on the opposite respect, no assumption should be made that just because the Municipality's action was tainted that the taint affects the Executive Director's action to revoke Lt. Henry's certificate. Lt. Henry made significant misstatements during an official investigation. Those misstatements give rise to questions about Lt. Henry's honesty, which provides grounds for this action. Nothing spreads the taint from the Municipality to this action. We must evaluate the evidence here standing alone, without regard to the motivation, or the outcome of any action taken by, the Municipality.

3. What do past cases of the Council direct is the proper approach to analyzing a claim of dishonesty by a police officer?

A fruitful source for guidance in how to analyze the facts in this case is the past decisions of the Council when an officer has been accused of dishonesty. In past cases, the Council has held police officers accountable for honesty. Several police officers have had their certificates revoked at least in part for giving untruthful answers to investigators who were investigating their conduct.¹⁴⁷

Yet, in many cases, the Council has noted that a police officer's act of making an incorrect statement does not necessarily mean that the police officer is dishonest. Instead, as explained below, the Council is looking for evidence that an officer was deliberately dishonest or engaged in subterfuge to avoid answering truthfully. When the evidence shows that more likely the officer's misstatement was an inadvertent mistake, the Council will not revoke the officer's certificate. The cases are discussed below.

¹⁴⁶ See, e.g., Henry Ex. 24; jury verdict.

¹⁴⁷ See, e.g., *In re Mattingley*, OAH No. 15-1088-POC at 9 (Alaska Pol. Stn'd Coun. 2016) (holding that police officer's untruthful statements to supervisors regarding circumstances of event during leave that resulted in Canadian law enforcement taking custody of his service weapon raised substantial doubt about his honesty); *available at* <https://aws.state.ak.us/OAH/Decision/Display?rec=4695>; *In re Much*, OAH No. 13-0288-POC at 19-23 (holding that police officer's evasive and misleading statements in official interview, and untruthful statements in a police report, raise substantial doubt about officer's honesty); *In re Hazelaar*, OAH No.13-0085-POC at Exec. Dir. Prop. for Action at 4-8 (finding substantial doubt about police officer's honesty based on officer's untruthful answer at official investigation, denial of his own admission of events under question, and disregard for truth in recorded conversation with confidential informant); *In re Lee*, OAH No. 16-0555-POC at 4 (Alaska Pol. Stn'd Coun. 2016) (holding that correction officer's four untruthful statements, two of which were under oath, raised substantial doubt about his honesty); *available at*: <https://aws.state.ak.us/OAH/Decision/Display?rec=4701>.

a. Lynch

In *In re Lynch*, a police officer submitted a sworn affidavit in a wage-and-hour claim against his police department.¹⁴⁸ The affidavit included a false statement. Based on this false statement, an action to revoke the officer’s police certificate came before the Council. The Council, however, found that the salient question in determining good moral character was whether the officer “*intended to deceive.*”¹⁴⁹ If “the false statement was an accidental oversight,” the Council would not find dishonesty.¹⁵⁰

The Council undertook a detailed factual inquiry into the officer’s state of mind at the time that he made the false statement. The Council found the following facts and circumstances relevant to this analysis:

- his attorney (not he) had drafted the affidavit,
- at the time he signed the affidavit, the officer was stressed and believed that he was being retaliated against,
- the false statement was neither prominent in the affidavit nor central to its import,
- the statement had some appearance of truth given that many officers assumed the policy existed,
- when confronted with the statement in his administrative investigation, the officer admitted the error, and then filed an amended affidavit with the court; and
- if the officer intended to deceive, the officer would not have filed a false statement in a court action against his employer because his lie would almost certainly be discovered.¹⁵¹

Based on these facts, the Council found that the statement was an oversight, not a deliberate lie.¹⁵² It declined to revoke the officer’s certificate.

The Executive Director argues that *Lynch* was overruled by *Parcell*.¹⁵³ In *Parcell*, the respondent was found dishonest because he was evasive, misleading, and not forthcoming.¹⁵⁴ To the Executive Director, this means that *Lynch* is no longer good law and that the Executive

¹⁴⁸ *In re Lynch*, OAH No. 14-1664-POC (Alaska Pol. Stn’d Coun. 2015) at 2; available at <https://aws.state.ak.us/OAH/Decision/Display?rec=4691>.

¹⁴⁹ *Id.* at 11 (emphasis added).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 11-14.

¹⁵² *Id.* at 15.

¹⁵³ Exec. Dir. Reply Brief at 2 (citing *Alaska Pol. Stn’d Coun. v. Parcell*, 348 P.3d 882, 888-89 (Alaska 2015)).

¹⁵⁴ 348 P.3d at 888-89.

Director is not required to prove that a police officer was intentionally dishonest in order to prove a lack of good moral character.

The Executive Director's argument is incorrect. The Council's regulations require that a lack of good moral character is an objective standard, based on when a reasonable person would conclude that the respondent committed an act that raises substantial doubt about the person's honesty. As the Council's decisions confirm, and as we all know from personal experience, a person, including a police officer, can honestly make a mistake when trying to remember events that happened in the past. A reasonable person is not going to have substantial doubt about the honesty of a person who genuinely, and in good faith, made a mistake based on a faulty memory, without intending in any way to mislead. Moreover, as discussed next, *Lynch* and *Parcell* do not conflict.

b. *In re Maxwell*

The Council's cases recognize that there is a middle ground between intentionally lying and making an innocent mistake. After it decided the *Lynch* case, the Council decided *In re Maxwell*—another case in which it had to determine whether a police officer was deliberately deceptive or had made an inadvertent false statement.¹⁵⁵ In *Maxwell*, a police officer who had accepted employment in another state, and then returned to Alaska, applied for, and received, a permanent fund dividend. Because he had taken a job in another state, however, he was no longer eligible for the dividend. Then, when interviewed by a State Trooper about the application, the officer said he had disclosed his absences, which was not true. The Executive Director charged the officer with dishonesty.¹⁵⁶

In analyzing whether the application meant that the officer was dishonest, the Council noted that “honest people can make honest mistakes.”¹⁵⁷ Addressing the middle ground between an honest mistake and a deliberate lie, the Council noted that a person who chose to ignore the risk of a mistake, and used subterfuge to create a plausible cover story, would be considered

¹⁵⁵ 16-0134-POC (Alaska Pol. Stn'd Coun. 2016); available at <https://aws.state.ak.us/OAH/Decision/Display?rec=4697>; overruled on other grounds by *Maxwell v. Alaska Pol. Stn'd Coun.*, Case No. 1KE-17-69 CI (Alaska Super. Ct. 2018) (on appeal to Alaska Supreme Court). To be clear, in *Maxwell*, the Council *did* revoke the officer's certificate. The revocation was not, however, based on honesty, it was because the Council determined that Maxwell had demonstrated a lack of respect for the law. The superior court overruled *this* aspect of the hearing, and the matter is now on appeal to the Alaska Supreme Court. The Council's finding that Maxwell was not deliberately dishonest in his PFD application, however, was not overruled. The Council's ruling and reasoning on the issue of honesty is valid precedent, and should be followed here.

¹⁵⁶ 16-0134-POC at 3

¹⁵⁷ *Id.* at 6.

dishonest.¹⁵⁸ Intent, which is difficult to prove, could be inferred from the facts and circumstances.¹⁵⁹ As the Council had made clear in *Much*, a reasonable person would consider the officer who was perhaps not outright lying, but nevertheless being devious and not forthcoming (while maintaining a plausible technical argument that he or she never actually lied) to be dishonest.¹⁶⁰ Thus, *Maxwell* confirmed both *Lynch* and *Parcell*, explaining that “the issue of honesty turns on a person’s intent and awareness of the risk that an act might be dishonest.”¹⁶¹ Those standards will be applied here to determine whether Lt. Henry was being dishonest, evasive, or sneaky in answering questions at his official interviews.

When the Council applied those standards in *Maxwell*, it did not find evidence of dishonesty. The Council found that the complexity of the issue of eligibility for a dividend, combined with the fact that the officer answered the questions on the application correctly, meant that the act of applying for a dividend *could* have been consistent with the officer forming an innocent belief that was eligible. Without additional evidence of intent, the Council declined to infer an intentional deception from the fact that the officer filed an application when he was ineligible.¹⁶²

With regard to the officer’s incorrect statements in his interview with a State Trooper, *Maxwell* noted that the officer’s incorrect responses could have been carefully orchestrated defenses for his act of application. In order to determine whether the officer’s statements in the interview were evidence that he was a sharp operator, and not just spontaneous erroneous answers, the Council relied on the recording of the interview. Listening to the recording provided assurance that the officer was not a sharp operator.¹⁶³ The Council found that the erroneous statements were not evidence of dishonesty because “having a bad memory for a particular event is not the same as being dishonest.”¹⁶⁴

As will be seen, the same approach applies here. Here, the Executive Director has charged Lt. Henry with being a sharp operator—one with a “focus on technical arguments.”¹⁶⁵ The

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See *Much*, OAH No. 13-0288-POC at 19 (finding officer dishonest because “he did engage in subterfuge and duplicity”); *Maxwell*, 16-0134-POC at 6 (stating that officer would be considered dishonest who “engaged in subterfuge and self-deception.”)

¹⁶¹ *Id.* at 6.

¹⁶² 16-0134-POC at 7-9.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 12.

¹⁶⁵ Ex. Dir. Closing Brief at 34.

recordings of Lt. Henry’s interview will be the most important evidence in the analysis of this charge.

c. *In re Waldron*

In the same year it decided *Maxwell*, the Council also decided *In re Waldron*.¹⁶⁶ Again, the Council did not find that a police officer who had given seemingly incorrect answers in investigatory interviews had been dishonest.¹⁶⁷ In *Waldron*, the evidence showed that the respondent was likely answering a different question than the question that the interviewer thought she had asked. The officer’s answers to the questions he thought had been posed were accurate.¹⁶⁸ The Council also allowed leeway for the respondent’s memory being inexact when he gave conditional answers to questions—saying what he “believed” and “thought” had happened, but not *confirming* that events definitely occurred as he believed.¹⁶⁹

d. *In re Hazelaar*

Finally, to understand how the Council determines when a respondent *is* being deliberately deceptive, we turn back to a 2014 decision, *In re Hazelaar*. *Hazelaar* is different from *Lynch*, *Maxwell*, and *Waldron*, because, in *Hazelaar*, the Council did, in fact, find that the respondent was deliberately deceptive. In that case, the Council again wrestled with whether a wrong answer given in an official investigation was “deliberately deceptive” or “simply a mistake.”¹⁷⁰ In determining that the answer was deliberately deceptive, the Council relied, in part, on the respondent’s testimony during the hearing. In that testimony, the officer never avowed under oath that his answer was, in fact, a simple mistake.¹⁷¹ The Council found this omission determinative. It also relied on the fact that the respondent had committed other acts that showed a lack of honesty. These other acts lent support to a conclusion that the wrongful answer in the interview was also not a simple mistake.¹⁷²

¹⁶⁶ OAH No. 16-0136-POC (Alaska Pol. Stn’d Coun. 2016); available at <https://aws.state.ak.us/OAH/Decision/Display?rec=4698>.

¹⁶⁷ *Waldron* at 9-14.

¹⁶⁸ *Id.* at 10.

¹⁶⁹ *Id.* at 11.

¹⁷⁰ *In re Hazelaar*, OAH No.13-0085-POC at Exec. Dir. Prop. for Action at 5.

¹⁷¹ *Id.* (“The Decision acknowledges that substantial evidence supports the conclusion that Hazelaar was deliberately deceptive when he untruthfully told Sgt. Johnson that he did not have contact with S.P, but states that substantial evidence also supports the conclusion that his ‘no’ answer, while untruthful, was simply a mistake. However, the Council lacks the one piece of evidence that would allow it to conclude that the answer was an innocent mistake—it lacks Hazelaar’s unequivocal testimony to that effect.”).

¹⁷² *Id.* at Exec. Dir. Prop. for Action at 4-7.

e. What approach should be taken here?

In sum, an important lesson from these cases is that the Council will not find that a police officer has been dishonest just because the police officer has made a mistake. In judging an officer's honesty, the Council is looking for evidence that the officer has been deliberately dishonest, or deliberately ignored a significant risk that the officer's statements might be dishonest.

Although the Council will consider the circumstances of the officer at the time of the alleged dishonest statement if those circumstances shed light on the officer's intent, here, as discussed above, Lt. Henry's circumstances cut both ways. He could have had a motive to lie because what occurred in 2010 could be held against him. But he also could have had a motive to tell to the truth because, ultimately, what he did in 2010 was not wrongful. He also had a reason to not trust the investigators, but how that distrust would affect his answers is not clear. Each of these factors will be applied in the analysis below, but with some caution. Unlike *Lynch*, Lt. Henry's circumstances do not lead to a persuasive result one way or the other.

Therefore, instead of relying solely on circumstances to reach the result, this decision will adopt the approach taken by the Council in *Maxwell*. As explained above, in *Maxwell*, the Council closely analyzed the transcript, and listened to the recording of the respondent's interview, looking for clues as to whether the respondent was spontaneously giving answers that he believed were true or whether he was a sharp operator giving deliberately incorrect answers. Inconsistencies and uncertainties may be evidence that Lt. Henry is knowingly forging an untrue story or sticking to a story that he knows is untrue. In listening to the recordings of Lt. Henry's two interviews, and describing in detail the interviews, we will be looking for a lack of spontaneity in answering questions—hesitations and mannerisms that would not show up in the transcript—to see whether the hesitations or mannerisms indicate a genuine struggle to remember, or come in circumstance that would be consistent with an attempt to spin, obfuscate, and coverup the truth.

As will be seen, this analysis is necessarily long and painstaking. The analysis will ebb and flow—sometimes noting mannerism or statements that support the Executive Director's theory, and sometimes those that support Lt. Henry's theory. At the end of this exercise, the question will be whether the Executive Director has proved that the facts and circumstances of Lt. Henry's misstatements would cause a reasonable person to have substantial doubt about Lt. Henry's honesty. We turn first to the October 2014 interview.

4. Analysis of the October 20, 2014, interview

a. Lt. Henry has a prepared approach to the interview

Mr. Brown begins the first interview by explaining that the purpose of the investigation is “to investigate the facts and circumstances surrounding two events.”¹⁷³ He explains that the first issue under investigation is “the release of confidential information by employees at APD relating to illegal drug dealing activity within the Alaska National [Guard], Recruitment and Retention Unit.”¹⁷⁴ He then explains that the second issue is whether APD had neglected its “responsibility[] to properly investigate criminal allegations of sexual assault referred by the Alaska National Guard.”¹⁷⁵

Shortly after the beginning of the interview, Lt. Henry brings up background that he tells Mr. Brown is “really relevant.”¹⁷⁶ The background in question is an audit that Mr. Henry had conducted of APD’s former drug unit. He then describes three tiers of investigatory levels within APD, with Special Assignment Unit conducting shorter investigations.

This could be an illustration of what the Executive Director considers a deliberate tactic to divert and obfuscate. The lengthy explanation of the audit, and the prior deficient procedure could be a diversion—Lt. Henry bringing up past derelictions of APD (tending to make others look bad), for which he was called in to clean up (tending to make himself look good).

Moreover, the point he is making here shows that Lt. Henry fully understands the issue and the potential charge against him. He knows that he is being accused of derailing an investigation by his unit into the guard. He is confident this did not occur because his unit did not take on such an in-depth investigation. So, without being prompted by the interviewer, he begins explaining why the allegations against him could not be true.

This diversion of the interview into a detailed explanation for why the charge must be false tells us that Lt. Henry fully understands the charge. This refutes one of Lt. Henry’s explanations for why he makes so many errors in this interview—his argument that his errors in recollection were due in part to the fact that the charges against him were never adequately explained. It may be that the explanation was cursory, but he clearly understood the issue, with or without an explanation.

¹⁷³ Jt. Ex. 1-35 at 2.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 5-10.

Lt. Henry's branching into a logical explanation so early in the interview also tends to confirm the Executive Director's view that Lt. Henry had carefully planned his defense. Here, Lt. Henry is giving an explanation of the procedure and policies of APD, so that the interviewer could understand the impossibility of the charge against him. This explanation is a well-reasoned and logical argument. The logic of explanation tends to exonerate him. It is obvious from this approach that Lt. Henry is an intelligent officer with a logical mind. There is nothing dishonest, however, with Lt. Henry wanting to tell his side of the story, even if Lt. Henry's explanation is long and not necessarily directly responsive to a question.

Moreover, this lengthy and well-planned discourse does not support the Executive Director's argument that Lt. Henry's later mistakes of fact are deliberate lies that were part of a meticulously planned defense. As we will see later, his mistakes of fact regarding the meetings are neither logical nor well planned out. Based on the logical approach we see here, we would not expect any plan that Lt. Henry devises to include telling senseless lies that will be easily shown to be false. Similarly, we would not expect the plan to include statements that are against his interests.

With regard to the question of whether Lt. Henry's giving a long and drawn-out explanation was part of a deliberate tactic to evade answering tough questions, observing Lt. Henry testify at the hearing, and listening to the recordings of his two 2014 interviews, makes this argument unlikely. Lt. Henry has a tendency to lecture and teach those to whom he is speaking. He speaks quickly and authoritatively. His launching into this discourse, as well as other speeches, during the interviews is not persuasive evidence that he was deliberately being evasive.

b. Lt. Henry associates memories that are genuine, confused, and illogical

After Lt. Henry finishes his long explanation, the questioning returns to the issue with the guard. Mr. Brown says, "bringing your attention to February of 2010."¹⁷⁷ He then asks whether Lt. Henry remembers "a drug investigation that was initiated into the recruiters, Recruitment and Retention, part of the Alaska Army National Guard."¹⁷⁸

In responding, Lt. Henry demonstrates a good memory of the event. He corrects Mr. Brown, telling him that the investigation was not into the guard, but into an individual guard member, named "Q."¹⁷⁹ Lt. Henry remembers that "his source of drugs was a civilian."¹⁸⁰ Then,

¹⁷⁷ *Id.* at 16.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 17.

however, Lt. Henry clearly becomes confused when Mr. Brown tells him that Q was “not initially” the name in question.¹⁸¹ Lt. Henry tells Mr. Brown, “I’m not aware of what you’re talking about then.”¹⁸² Listening to the audio recording confirms that at this juncture, Lt. Henry is genuinely confused.

Mr. Brown then attempts to refresh Lt. Henry’s memory by providing the name of Daniel B (which Mr. Brown pronounces, “Aah-loo-ah”).¹⁸³ Lt. Henry does not remember the name.¹⁸⁴ He asks Mr. Brown to spell it.¹⁸⁵ He advises Mr. Brown to confirm his (Mr. Brown’s) version of events with reference to arrest records.¹⁸⁶ Lt. Henry asks “who was my officer that worked it?” and, wanting to know which shift, “what time of day this occurred?”¹⁸⁷ This interchange supports a conclusion that Lt. Henry was not trying to hide the ball—Mr. Brown’s focus on B, rather than Q, genuinely threw Lt. Henry for a loop.¹⁸⁸

Lt. Henry then asks again for the name of the officer, explaining that he will be able to remember what shift the officer worked. He thinks that would help him understand his role in the B matter, because he worked swing shift.¹⁸⁹ When Mr. Brown gave the name of Carson, Lt. Henry remembered that Ofc. Carson was on light duty at this time.¹⁹⁰

When the inquiry turns back to Mr. Q, Lt. Henry mentions, without prompting, that “I know the FBI has been in contact with the Guard.”¹⁹¹ He also volunteered that “They may have provided information for administrative proceedings to be able to discharge him.”¹⁹² These unsolicited statements suggest that Lt. Henry is continuing to lay the groundwork for his defense—suggesting (incorrectly) that it was not he who gave the initial information to the guard.

¹⁸⁰

Id.

¹⁸¹

Id.

¹⁸²

Id. at 18.

¹⁸³

Id.

¹⁸⁴

Id.

¹⁸⁵

Id. at 19

¹⁸⁶

Id. at 18-19

¹⁸⁷

Id. at 19; 25. In between these two questions, Lt. Henry again launches in a long discourse on the policy of APD. It is becoming clear, however, that Lt. Henry is trying to educate and inform Mr. Brown about how APD worked.

¹⁸⁸

Nothing in this interchange supports Lt. Henry’s argument that Mr. Brown’s inquiry was *intended* to throw him for a loop. The transcript and the recording support that Mr. Brown is making a good-faith attempt to refresh Lt. Henry’s memory.

¹⁸⁹

Id. at 25.

¹⁹⁰

Id. At the hearing, Lt. Henry was closely questioned about how it happened that he could remember officers’ shift and light-duty assignments for a particular month four-and-one-half years later. Lt. Henry said that he remembered shift assignments because they stayed relatively stable. He did not know how he happened to remember Ofc. Carson’s light duty.

¹⁹¹

Id. at 34.

¹⁹²

Id.

In the same vein, just slightly later in the interview, when being asked for a third time about how he came to learn of Mr. Q, Lt. Henry first states “because he is – it’s a Task Force case.”¹⁹³ Then, without any prompting or reference, he brings up a telephone call from Gen. Katkus regarding Ofc. McMillan.¹⁹⁴

These statements constitute the strongest evidence in support of the Executive Director’s case. They shift the blame for disclosure of the investigation to someone other than Lt. Henry. They came unsolicited, as if they were the planned statements of defense that Lt. Henry felt he needed to slip in, even if not apropos of a question.

Listening to the audio recording, Lt. Henry’s mention of these seeming non-sequiturs are examples of Lt. Henry’s rapid-fire, stream-of-consciousness mode of speaking. That these associations came out of nowhere tells us that Lt. Henry had been mulling over the issue in his mind, and had constructed a defense to what he knew was the charge against him—being responsible for a premature disclosure of confidential information.

Nothing about these statements, however, necessarily confirms that Lt. Henry was lying or planning to lie later in the interview. These volunteered statements are not false—it was true that the FBI had been in touch with the guard and was involved in sharing information regarding Q.¹⁹⁵ It was also true that he had received a call from Gen. Katkus regarding Ofc. McMillan. That he apparently had thought through the issue, and had predetermined that certain memories of past events (which did in fact occur, although not exactly as he was remembering) would exonerate him, does not prove that his later misstatements and inaccurate memories were deliberate fabrications.¹⁹⁶

Eventually, Lt. Henry explains that he knew of Q from the federal case, and that Q came onto his radar screen based on the call from Gen. Katkus.¹⁹⁷ In his lengthy discussion with Mr. Brown on this issue, he never actually explains how the call from Gen. Katkus could have brought Q onto his (Lt. Henry’s) radar screen. He explains that Gen. Katkus was upset because he (Gen. Katkus) had heard that Ofc. McMillan had been saying that he was not trustworthy. He

¹⁹³ *Id.* at 39.

¹⁹⁴ *Id.*

¹⁹⁵ Kirkland testimony; Henry testimony.

¹⁹⁶ Although these statements prove nothing, the timing and content of these statements do fit with the Executive Director’s theory that Lt. Henry’s subsequent misstatements were part of a planned attempt to lie his way out of liability. Thus, all we can conclude at this juncture is that more scrutiny of the interview is necessary to determine whether Lt. Henry’s rapid-fire volunteering of accurate information in his defense means that his later misstatements were part of a deliberate attempt to conceal the truth.

¹⁹⁷ J t. Ex. 1-35 at 42-43.

also mentions that Ofc. McMillan had been talking to a friend within the guard, and this somehow was related to the call. This relationship, and how this relates to Mr. Q, however, Lt. Henry never does explain.¹⁹⁸

With this illogical association—between the call from Gen. Katkus and Q being on his radar screen—this rapid stream of verbiage from Lt. Henry now switches from being support for the Executive Director to support for Lt. Henry. The reason for this is that we know that Ofc. McMillan did have a conversation with Ofc. Simmons, and this conversation did, in fact relate to Mr. Q. That conversation, and Lt. Henry’s learning of the conversation, were events that in Lt. Henry’s mind, related to the guard, Ofc. McMillan, and Q, and the relationship among the three. That Lt. Henry would associate these memories—although incorrect and not a logical explanation—is an understandable association and mixing up of memories.

Indeed, we know now that there was a call from Gen. Katkus that led to a verbal reprimand of Ofc. McMillan on June 3rd. We also know that Ofc. McMillan was reprimanded by Lt. Henry for having told someone that Gen. Katkus could not be trusted.¹⁹⁹ Finally, as stated above, we know of an earlier reprimand regarding the Ofc. Simmons incident. The free-flowing association of these three (or possibly two) reprimand events that Lt. Henry makes during the October interview lends support for Lt. Henry’s position that he simply had mixed-up memories.

c. Lt. Henry’s answers are all over the map—some exonerating himself and some against his interests

Mr. Brown then switches topics and asks “[do] you recall speaking to Chief Mew about this, this case?”²⁰⁰ Lt. Henry interprets this question to relate to the Safe Streets/OCDETF case, answers yes, and describes the significant interddictions that were part of the federal case.²⁰¹ When Mr. Brown zeros in on whether Lt. Henry discussed the call from Gen. Katkus with his chain of command, Lt. Henry replies that he is sure that he talked with Captain Bill Plummer.²⁰² He

¹⁹⁸ Lt. Henry was correct that the conversation between Ofc. Simmons and Ofc. McMillan was about Q. Nothing about that conversation, however, involved not trusting Maj. Gen Katkus. The point here is that associating Gen. Katkus with Ofc. Simmons so that Lt. Henry would learn about Q is illogical and unpersuasive. This makes it less likely to be a product of a deliberate plan by Lt. Henry.

¹⁹⁹ McMillan testimony. The “not trusted” reprimand could be the same as the June 3rd reprimand. Although Gen. Katkus has no memory of telling Lt. Henry that Ofc. McMillan was saying he could not be trusted, and although Ofc. McMillan recalled that the “not trusting” reprimand was different from the June 3rd reprimand, the evidence shows that on June 3rd, Mr. Nieves may have told his supervisors that he had been advised by Ofc. McMillan on June 3rd to not say anything to his chain of command because they could not be trusted. Henry Ex. 67 at 17.

²⁰⁰ Jt. Ex. 1-35 at 52.

²⁰¹ *Id.*

²⁰² *Id.* at 57.

becomes defensive and describes the call with Gen. Katkus as “not a big deal.”²⁰³ He continues to lay the groundwork for his defense, suggesting that his supervisors might not remember those conversations.²⁰⁴ His caginess in bringing up his supervisors’ possible lack of memory provides some support for the Executive Director’s theory that Lt. Henry is a sharp operator—it shows that he was thinking about the implications of the questions and his answers.

Mr. Brown then asks a direct question about whether he had “set up a meeting between your unit and the command staff of the Alaska Army National Guard to advise them of the ongoing investigation?”²⁰⁵ Lt. Henry answered, “no.”²⁰⁶ He again explains that the issue that led to the call to him from Gen. Katkus was the issue with Ofc. McMillan.²⁰⁷ This answer is, as we know, incorrect. Listening to the audio recording of this interchange, however, does not support a theory that the “no” answer is contrived or part of a plan. The “no” is not vehement or repeated. It is an understated, almost swallowed answer, immediately followed by repeating that the call came from Gen. Katkus, not from Lt. Henry to Gen. Katkus.

As the conversation continues, Lt. Henry clearly places the blame for the disclosure on Ofc. McMillan: “that conversation would never even had to have taken place if Seth would have been closed lipped with his conversations.”²⁰⁸ Standing alone, this transfer of blame supports the Executive Director’s view that Lt. Henry was deliberately lying and making up a story that put the blame on someone else.

Close scrutiny of the actual conversation, however, does not support the view that Lt. Henry’s misstatement here is a planned, coordinated defense. Although he defends Gen. Katkus’s right to know about Q’s involvement, and says that having him in the loop is okay, he clearly censures the first disclosure as a premature spilling of the beans based on Ofc. McMillan’s loose lips.²⁰⁹ If he was lying in order to keep himself free from blame, he would not cast any “loose lip” aspersion or otherwise imply that the first disclosure was premature. If he had an accurate memory of what occurred, but was giving a deliberately false story to throw the investigators off the scent, he would have known that those aspersions and implications could come back to him. He had no reason to characterize the disclosure as premature or castigate anyone’s loose lips. His

²⁰³ *Id.*

²⁰⁴ *Id.* at 58-59.

²⁰⁵ *Id.* at 65.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 68-69.

²⁰⁹ For a further example of Lt. Henry both defending Gen. Katkus’s right to know while simultaneously censuring Ofc. McMillan’s alleged premature disclosure and “loose lips,” see *id.* at 97.

characterization of the first disclosure as premature could only hurt his case. Thus, at this point in the transcript, and listening to the audio, the evidence supports a conclusion that Lt. Henry’s “no” answer was the result of his misremembering and mixing up the meetings.

d. Lt. Henry adopts the position that there were only two meetings with Gen. Katkus

Lt. Henry then goes on to describe how the February briefing of Gen. Katkus led to a conversation with FBI Special Agent Kirkpatrick.²¹⁰ That conversation, in turn, led to a follow-up meeting between the FBI and Maj. Gen Katkus regarding the involvement of a guard member in a drug-enforcement action.²¹¹ He concludes, “And those are the only two times that I’ve ever talked to Tom about this.”²¹²

Lt. Henry repeats several times that there were only two meetings.²¹³ When told that Lt. Col. C attended one of the meetings, Lt. Henry states that he does not remember him being there, but says “that sounds like the first meeting that I had ever had with Katkus.”²¹⁴ He agrees, however, that if Lt. Col. C attended the meeting, that would be consistent with the statements he had read in Lt. Col. C’s “manifesto” regarding a meeting with Gen. Katkus, Sgt. Redick, and Lt. Henry.²¹⁵

Although he agrees that Lt. Col. C could possibly have been at that meeting, Lt. Henry denies that it was possible that the topic of sexual assault could have been discussed. He explained that to him, that topic would have been a red flag. If sexual assaults had been discussed, he is confident that he would have remembered.²¹⁶

Even when Mr. Brown attempts to refresh Lt. Henry’s memory, and twice tells him that the meeting that included Lt. Col. C occurred later in spring, around May or June, that does not help Lt. Henry remember that there were actually three meetings with Gen. Katkus.²¹⁷ He remembers only two. Earlier, Mr. Brown had seemed to confirm that the meeting caused by a call from Gen. Katkus regarding Ofc. McMillan was the first meeting—the one before the meeting

²¹⁰ *Id.* at 71.

²¹¹ *Id.* at 70-71. At first, Lt. Henry was not sure about the meeting involving the FBI, saying “I believe that happened, but I’m not certain of it.” *Id.* at 69. Shortly thereafter, he became more certain that the second meeting did occur and that he attended it. *Id.* at 71. This sequence tends to support Lt. Henry’s argument that his memory was uncertain and that his answers were good-faith attempts to remember events of over four years earlier. It also shows that at this point, he was open to having his memory refreshed.

²¹² *Id.* at 71.

²¹³ *Id.* 102, 103, 105

²¹⁴ *Id.* at 105.

²¹⁵ *Id.*

²¹⁶ *Id.* at 106-110.

²¹⁷ *Id.* at 106-110.

with the FBI.²¹⁸ This exchange generally supports Lt. Henry's testimony at the hearing that in October 2014 he was conflating the February 2010 meeting with the June 2010 meeting.

e. Lt. Henry is startled to learn that Ofc. Carson delivered materials regarding Q to the guard

How we view Lt. Henry's responses in the October interview is influenced by a significant exchange in the interview about a different topic. Here, Mr. Brown is asking questions about whether Lt. Henry had instructed anyone in his command to deliver police reports and recordings regarding Mr. Q to Lt. Col. Lawendowski at the guard.²¹⁹ Lt. Henry said, "well, I did not do it."²²⁰ He explained that the plan was that, at the end of the investigation, Gen. Katkus would be provided "the necessary information that he could take administrative action."²²¹

When Lt. Henry asked who delivered the materials, Mr. Brown said, "Officer Carson."²²² Lt. Henry denied that Ofc. Carson could possibly have been the one to deliver materials from the FBI. He alleged that if Ofc. Carson did that, he did it without authority.²²³ When Mr. Brown revealed that Ofc. Carson had said that he was ordered to do so by Lt. Henry, Lt. Henry did not hesitate to say that Ofc. Carson was lying.²²⁴

This exchange, and this allegation, are critical. Again, we have a situation where Lt. Henry places blame for an action on someone other than himself. If the Executive Director could prove that Lt. Henry had, in fact, known of, or ordered, the delivery of hard copy information to the guard, that would be significant. The vehemence of Lt. Henry's denial, and his willingness to place blame for the transfer of information on Ofc. Carson, could, if proven false, support an inference that Lt. Henry was, in fact, misreporting events in order to protect himself.

The reverse, however, is also true. If the Executive Director is unable to prove that Lt. Henry had ordered the transfer of information, then Lt. Henry's reaction here is a significant indication that Lt. Henry is likely telling the truth. If he was lying, and if he was concocting a version of events to place blame on others for his actions, he would have to be more careful in his response condemning Ofc. Carson's action. Instead, he exhibits a genuine, strong reaction. This would be indicative that he has been genuine throughout this interview.

²¹⁸ *Id.* at 66.

²¹⁹ *Id.* 93-94.

²²⁰ *Id.* at 94.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 96. *See also id.* at 113.

²²⁴ *Id.* at 114.

No significant testimony was introduced by either party regarding whether Lt. Henry ordered Ofc. Carson to deliver the materials on Mr. Q to Lt. Col. Lawendowski. The hearsay evidence in the record is not sufficient to prove that Lt. Henry did make that order. Because the Executive Director has the burden of proof, we must therefore conclude that Lt. Henry *did not order Ofc. Carson to deliver hard-copy information on Q to the guard.*

Reading this transcript, and listening to the audio, with the understanding that Lt. Henry did not make the order, affects how one interprets the evidence. When reading the transcript *before* the presentation of the evidence, an objective reader would necessarily be suspicious because Lt. Henry's reaction here could be feigned. Reading the transcript with the understanding that he did not make the order, one concludes that Lt. Henry's responses to Mr. Brown's questions were reasonable and genuine.

This conclusion that Lt. Henry was genuine in the exchange regarding the delivery of the materials carries over to other parts of the interview. His manner, and his quick and frank reaction to all questions throughout the interview, support his theory that his lapses in memory, his mixing up memories, and his answers based on those memories, were genuine.

f. Conclusion from the October interview: Lt. Henry's initial mixing up of memories is genuine

In sum, close review of the October interview shows that, with regard to Lt. Henry's initial responses, the Executive Director is only partially correct. The Executive Director is correct that Lt. Henry had a plan, and that his plan was to place blame for the initial disclosure to Gen. Katkus on Ofc. McMillan. The Executive Director is most likely incorrect, however, that Lt. Henry resorted to lies that he knew were false in order to implicate Ofc. McMillan. The best interpretation of the evidence is that Lt. Henry is mixing up facts about things that happened over four years before the interview. That memories fade, blur, and conflate over this time is fully understandable. Here, Lt. Henry most likely is placing blame on Ofc. McMillan for causing the initial disclosure because that is what his memory is. Although the Executive Director is correct that Lt. Henry's answers does raise some slight doubt about his honesty because they tend to exonerate himself and blame others, the inference of dishonesty is weak given the passage of time and Lt. Henry's manner of quickly and rapidly answering all question with a stream-of-consciousness approach.

We turn next to the December interview, which presents a more difficult analysis.

5. Analysis of the December 18, 2014, interview

The December interview is on a different footing than the October interview. Between the interviews, Lt. Henry has had time to reflect, and to do some limited research into the documents in his possession regarding what occurred in 2010.²²⁵ In addition, during this interview, the interviewers present him with hard facts to help refresh his memory. As will be seen, even with this time and documents, however, Lt. Henry continues to insist that there were only two meetings. The question here will be not whether Lt. Henry had initially mixed up his memories—we concluded from the October interview that he did, and that his mixing up the memories is understandable. Instead, the question now is whether he is feigning a continued failure of memory in order to make his first story more credible. This question continues past the December interview, and into his deposition, trial testimony, and testimony at the hearing in this matter.

a. Lt. Henry initially shows an ability to agree that his memory might not be completely accurate

The second interview begins with a further discussion of Ofc. Carson's delivery of materials regarding Mr. Q to the guard. Mr. Brown explains that he had mistakenly characterized Ofc. Carson's statement, because Ofc. Carson actually said that the order to deliver materials had come from either Lt. Henry or Sgt. Redick.²²⁶ Lt. Henry responds by explaining that any delivery of material would have originated with the FBI.²²⁷ He confirms again that he has no memory of giving the order or of Ofc. Carson being involved in the case.²²⁸ He is confident, however, that he would have been strategically aligned with the strategy that the information would be turned over to Gen. Katkus.²²⁹

This response is consistent with Lt. Henry's earlier position—no memory of providing materials to the guard, but he would support the approach. In addition, it shows that he can distinguish between his memory and the facts. Here, he recognizes that his memory is not necessarily complete—he could have had some role in a process that later resulted in a delivery of materials to the guard, even though he has no memory of the event. As will be seen, later in the

²²⁵ Henry testimony; Mew Designated Trial Transcript at 44. Lt. Henry explained that his research was very limited because he was not allowed to talk to others about what happened in 2010 and, because his computer access was restricted, did not have access to documents, such as police reports, that might refresh his memory. He did, however, have access to his emails, which included some document attachments. Henry testimony.

²²⁶ Jt. Ex. 1-87 at 3-7.

²²⁷ *Id.* at 5-6.

²²⁸ *Id.* at 8-9.

²²⁹ *Id.* at 8.

interview he seems to become more positional, insisting that his memory is the most reliable version of the events. Recalling that he has made clear here, and elsewhere, that he is relying on his memory, however, will be key to how we interpret these statements.

b. Lt. Henry continues to assert that the first meeting was caused by Ofc. McMillan

Mr. Brown then turns to the documents provided to him by Lt. Henry, which show a meeting with Gen. Katkus on February 26, 2010.²³⁰ Lt. Henry again explains that this was the meeting prompted by the call from Gen. Katkus to him, based on Ofc. McMillan's discussion of the case with Ofc. Simmons.²³¹ Thus, he still is insisting on a wrong version of events, even though he has had time to consider and access to some (limited) documentation. Because we might expect him to have corrected this error, reading the transcript of this exchange makes us wonder if Lt. Henry might be feigning his continued adherence to this incorrect version. Listening to the audio recording of the interview, however, does not reveal any hesitation or slip by Lt. Henry that would reveal that he no longer believes this to be the case.

c. Lt. Henry responds to Mr. Brown's rendition of facts in the conditional—consistent with his assertion that he does not remember many of the events of February 2010

After listening to Lt. Henry's explanation, Mr. Brown begins a comprehensive description of the facts regarding the drug bust and the development of Mr. Q as a confidential informant. He explains that Mr. Q was given an assurance that his name would not be released to the guard.²³²

Lt. Henry then interrupts Mr. Brown, and says "And he may have been."²³³ This is important—he does not say anything that indicates a current memory of events. He then launches into an explanation that "Jack or whomever" would not have had the authority to make that decision—meaning the decision to tell Mr. Q that his name would not be disclosed to the guard.²³⁴

Reading the transcript, this exchange sounds like it could be an actual memory of how events unfolded with Mr. Q. If so, that would implicate Lt. Henry in a lie because he denies having any memory of those events. Listening to the audio recording, however, this exchange does not present as Lt. Henry having an actual memory, and then disguising it by using conditional language. Instead, this exchange sounds like Lt. Henry giving another talk on what's

²³⁰ *Id.* at 13, 15.

²³¹ *Id.* at 13-15.

²³² *Id.* at 23-24.

²³³ *Id.* at 24.

²³⁴ *Id.*

right and what's wrong—explaining the rules for what can be promised to a potential informant, such as Mr. Q. As stated earlier, this manner of responding (instructing his listeners) is consistent with the observation of Lt. Henry's manner of responding at the hearing.

d. Lt. Henry explains that the drug investigation was a federal investigation, not a Special Assignment Unit investigation

When Lt. Henry states that he does not understand why providing information to Gen. Katkus would be an issue, Mr. Brown explains that it could compromise the investigation and the safety of the informants.²³⁵ Lt. Henry takes issue with that concern, asking whether there was one informant or two, to which Mr. Brown replies, incorrectly, that there were two.²³⁶ Lt. Henry then launches again into a long explanation about how an OCEDTF case is initiated—an explanation made necessary not because Lt. Henry is trying to obfuscate or avoid answering questions, but because Mr. Brown's theory that Special Assignment Unit was beginning an investigation into the guard (potentially thwarted by Lt. Henry's disclosure) is simply incorrect. As Lt. Henry explains, the plan at all times was that this would be a federally-managed case.²³⁷

Nothing in this exchange supports a theory that Lt. Henry was lying. Although, as we later find out, Ofc. Carson and Ofc. McMillan had a personal desire to investigate the guard, that was something they kept to themselves, and, as Ofc. McMillan testified, deliberately avoided telling Lt. Henry.²³⁸ Thus, even though Mr. Brown may have been led to believe that there was an ongoing indepth investigation by Special Assignment Unit, Lt. Henry understands that was not the case.

This wrinkle—the fact that Ofc. Carson and Ofc. McMillan had a different view of the investigation—is important for understanding the big picture. First, it helps explain how the independent investigator could conclude that Lt. Henry was lying—anyone who gave some credence to Ofc. Carson's and Ofc. McMillan's view would interpret Lt. Henry's statements in his two interviews as an attempt to mask and deny his role in sidetracking what they believed to be an ongoing investigation.

More important, Lt. Henry may or may not have known that his staff harbored a secret desire to undertake a deeper investigation, but, as he explained at the hearing, that happened

²³⁵ *Id.* at 24-25.

²³⁶ *Id.* at 26. Mr. Brown is characterizing Mr. Auelua as an informant. Although information was received from Mr. Auelua, he was not processed as an informant. *See* Henry Ex. 21.

²³⁷ *Id.* at 27.

²³⁸ McMillan testimony.

frequently.²³⁹ Special Assignment Unit was deliberately designed to avoid the deep investigation, but that did not prevent junior officers from wanting a deeper investigation.²⁴⁰ Unlike his interviewers, Lt. Henry never considered the clandestine “investigation” to be a real investigation. That he was continually instructing Mr. Brown regarding how the system really works is not a sign that he was trying to divert or subvert the interview process. It was clear that Mr. Brown was not getting it. That disconnect caused Lt. Henry to takeoff in lecture mode.

e. Lt. Henry digs in and continues to assert that there were only two meetings, even in the face of mounting evidence that there were three

Shortly after the long explanation that the investigation was always intended to become a federal investigation, the interview turned to the issue of Lt. Henry’s unwillingness to stray from his preconceived notion that there were only two meetings with Gen. Katkus. In addressing this subject, Mr. Brown confronted Lt. Henry with Lt. Col. C’s “manifesto,” which clearly identified the events of June 3, 2010, resulting in a meeting with C, Lt. Henry, and Gen. Katkus on June 4th.²⁴¹ Given that Lt. Henry’s own notes identified a February 26th meeting and March 11th meeting with Gen. Katkus, this should have led Lt. Henry to remember, or to concede that there could have been, a third meeting.

Lt. Henry offered up an explanation to Mr. Brown for why he was not going to concede a third meeting. He explained that he was aware of the allegation by Lt. Col. C of the June 4th meeting.²⁴² To determine whether this was accurate, during the time between the October interview and the December interview, he looked through his records. He found no confirmation of any meeting on June 4th. He did, however, find confirmation of meetings on February 26th and March 11th.²⁴³ That was consistent with his memory. Lt. Col. C had no credibility with Lt. Henry based on the contents of Lt. Col. C’s manifesto. Therefore, Lt. Henry decided that the June 4th meeting never occurred.²⁴⁴

Mr. Brown then offered Lt. Henry further proof that there was a June 4th meeting and that Lt. Henry was at the meeting. He read from a sworn statement made by Lt. Col. Lawendowski in

²³⁹ Henry testimony.

²⁴⁰ *Id.*

²⁴¹ Jt. Ex. 1-87 at 45-47.

²⁴² *Id.* at 45-46.

²⁴³ *Id.* at 46.

²⁴⁴ *Id.* at 51.

June 2010 as part of an internal guard investigation.²⁴⁵ The sworn statement from a reliable source stated that the meeting occurred in June.

Lt. Henry, however, continued to deny that the meeting occurred in June.²⁴⁶ At first he understood that Lt. Col. Lawendowski was the subject of the guard investigation and that as a result Lt. Col. Lawendowski was removed from the guard—meaning that Lt. Col. Lawendowski would not be reliable.²⁴⁷ Even after Mr. Brown corrected this error, Lt. Henry continued to insist, “[w]ell their dates are wrong.”²⁴⁸ He asked for further proof of a June meeting, suggesting they could interview Gen. Katkus and check the GPS tracker on Lt. Henry’s car.²⁴⁹ He explained that he was going from his notes, and that was all he could do.²⁵⁰

As will be seen, this pattern continues for the rest of the interview. Lt. Henry has taken the position that he will rely absolutely on his notes and his memory. Here, he offers up the possibility that he will change his position based on hard evidence, such as GPS data. Otherwise, he has set the tone that he will not be budged. During the next phase of the interview, that tone becomes even more hardened.

f. As Lt. Henry is questioned by Lt. Vandegriff, he sticks to his memory and consistently denies any memory of discussion of sexual assaults

One possible reason that Lt. Henry’s tone became more hardened is, at this stage of the December interview, Lt. Vandegriff, has taken over the questioning. This is an important change. Lt. Henry has an adversarial history with Lt. Vandegriff, relating to multiple internal affairs investigations.²⁵¹

As the December interview now ebbs and flows across topics, Lt. Henry’s push back against what he is told is consistent with his assertion that he clearly remembered only the two meetings, which, based on his notes, he is now sure occurred in February and March 2010. For example, on the issue of the timing of the disclosure being premature, Lt. Henry echoes his thoughts from the first interview—agreeing that if he had made the decision, the first meeting would have occurred later, but it was sped up because of Ofc. McMillan.²⁵² He makes this statement—which is bad for him, given that he was responsible for the disclosure that he himself

²⁴⁵ *Id.* at 51, 53-54.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 52.

²⁴⁸ *Id.* at 54.

²⁴⁹ *Id.* at 52, 54.

²⁵⁰ *Id.* at 55, 57.

²⁵¹ Henry testimony.

²⁵² *Id.* at 78-79.

characterizes as premature—while at the same time making a strong argument that disclosure to the military is necessary to allow the military to deal with drug issues and how they affect national security and military readiness.²⁵³

Then, in face of confusing information from Lt. Vandegriff, Lt. Henry’s response remains consistent. Lt. Vandegriff informs Lt. Henry that “all of the information on this investigation” was given to Gen. Katkus “on the 26th of February.”²⁵⁴ Lt. Henry is surprised by this information, and asks, “by who?”²⁵⁵ When Lt. Vandegriff tells him that the date of the delivery of information came from Tr. Hazelaar, Lt. Henry again asserts that “Joe’s got his dates wrong.”²⁵⁶

This push back by Lt. Henry is somewhat unexpected, given that he knows that a meeting occurred on February 26th and his own memory is that Q’s involvement was discussed at this meeting. Both the transcript and the recording, however, reveal genuine surprise by Lt. Henry to learn that “all information” was disclosed in February.

As we know, “all information” regarding Mr. Q was delivered later to Lt. Col. Lawendowski, in the form of a packet.²⁵⁷ Although Lt. Henry does not know this, Tr. Hazelaar told Lt. Vandegriff that the materials on Q would have been delivered much later—in his view, sometime in the next year.²⁵⁸ Thus, here, at best, we have Lt. Henry and Lt. Vandegriff talking at cross purposes. Lt. Henry apparently interprets “all information” to mean a packet of materials, sanctioned by the FBI, sufficient for the guard to take administrative action against Mr. Q. Lt. Vandegriff apparently interprets it to mean whatever information was disclosed in the oral briefing in February. Given this misunderstanding, it was reasonable for Lt. Henry to rely on his understanding of how the case would have unfolded, and harden his belief that others had their dates wrong, even though, as we know, Lt. Henry’s own memory of events was faulty.

Lt. Vandegriff then switches topics, and tries to refresh Lt. Henry’s memory regarding sexual assaults by telling him that Sgt. Redick recalled being at a meeting with the guard, long

²⁵³ *Id.* at 79. As thoroughly discussed above in the subsection regarding the October interview, these statements show that Lt. Henry was not deliberately lying about the reason for the February disclosure. If he were aware that he was, in fact, the source of the disclosure, he would only make the second argument regarding readiness. He would not concede the fact that the February 26th disclosure was premature.

²⁵⁴ *Id.* at 84.

²⁵⁵ Jt. Ex. 1-87 at 84.

²⁵⁶ *Id.*

²⁵⁷ Henry Ex. 67 at 17. Lt. Col. Lawendowski’s statement shows that the packet of information was delivered to the guard in March.

²⁵⁸ Jt. Ex. 1-43 at 4-5.

after the drug investigation started, at which the topic was sexual assaults.²⁵⁹ Again, Lt. Henry is surprised, and asks, “Did he have a meeting with them without me?”²⁶⁰

At the hearing, the Executive Director highlighted this response. In the Executive Director’s view, this illogical response was clearly an attempt to deflect. The Executive Director saw this response as an example of Lt. Henry grasping at straws, and trying desperately to wriggle out of the trap that he was finding himself in.

The Executive Director’s view, however, is not borne out by the evidence. In fact, again, the statement made by Lt. Vandegriff was not completely accurate. Topics other than sexual assaults were discussed at the June 4th meeting.²⁶¹ That Lt. Henry’s first thought was that Sgt. Redick must have been at a different meeting is fully consistent with, and lends considerable support for, him having a genuine and solid recollection that there were only two meetings, neither of which involved sexual assaults. He does not recognize Lt. Vandegriff’s description of the meeting as being consistent with any meeting he remembered from four-plus years earlier, so he is searching for an interpretation of the facts that would explain both his memory and Sgt. Redick’s description of the facts. Even taking a skeptical view of Lt. Henry’s honesty, his immediate and first reaction to the disclosure of Sgt. Redick’s testimony tends to show that he is genuinely convinced that there were only two meetings, neither of which involved sexual assault.

g. Lt. Henry and Lt. Vandegriff again talk at cross-purposes—Lt. Henry about the March meeting, and Lt. Vandegriff about the February meeting

This exchange is followed by a fair disclosure by Lt. Vandegriff, frankly telling Lt. Henry that they know that his dates and his memory are incorrect, and that the other participants in the February 26th meeting had a clear memory that it was ordered by Lt. Henry, and that they objected to it.²⁶² He suggests that Lt. Henry is mixing up the meetings. Lt. Vandegriff follows this up with a description of how Tr. Hazelaar was “very frustrated with you.”²⁶³ Rather than accept this explanation, Lt. Henry attempts to refute it by returning to his log book, and showing that he had meetings with the FBI before the March 11 meeting with Gen. Katkus. He justifies his actions by saying that he had consulted the FBI, and that the task force officers might not be aware of how or

²⁵⁹ Jt. Ex. 1-85 at 85.

²⁶⁰ *Id.*

²⁶¹ Katkus testimony; Redick testimony; McMillan testimony. At his interview with Mr. Brown, which was attended by Lt. Vandegriff, Sgt. Redick stated that Ofc. McMillan’s continued membership in the guard was a topic at the June 4th meeting. Jt. Ex. 1-48 at 20-21. He remembered clearly, however, that the issue of sexual assaults began to be discussed when Blaylock was brought in. *Id.*

²⁶² *Id.* at 88-89.

²⁶³ *Id.* at 89.

why the disclosures to Gen. Katkus were made.²⁶⁴ Nothing is wrong here with Lt. Henry’s answer. He and Lt. Vandegriff are at cross-purposes—he continues to talk about the March meeting, while Lt. Vandegriff is talking about the February meeting. The confusion is not Lt. Henry’s fault.

h. Lt. Henry continues to deny that he was responsible for the initial briefing of Gen. Katkus

Lt. Vandegriff then continues with his direct and fair explanation of events. He explains that Lt. Henry’s recollection of the meetings is different than that of the other attendees.²⁶⁵ He explains that the issue is whether Lt. Henry ordered his “troops” to brief Gen. Katkus before a briefing had been approved by the Chief or a determination had been made by the FBI.²⁶⁶ He then asks, “and you’re saying that did not occur?”²⁶⁷ To which Lt. Henry answered, “That is correct.”²⁶⁸

As stated above, this answer necessarily gives rise to some doubt about Lt. Henry’s honesty because we, who know that the answer is incorrect, cannot understand why Lt. Henry is so certain. One possible explanation for this wrong answer is, as the Executive Director alleges, the answer was all part of a plan to lie about the reason for the meeting.

Listening to the recording of the interview, however, Lt. Henry’s wrong answer comes immediately after the question posed by Lt. Vandegriff. Lt. Henry’s tone and rapid response are consistent with his view that his answer is simply that of a person who is relying on the evidence of his memory and his notes to form a strong opinion about the facts. Moreover, the answer, in face of the mounting and persuasive evidence being provided by Lt. Vandegriff, is not consistent with a person who is being deliberately dishonest. A deliberately dishonest person would have to back down or change his story because that person would be trying to manipulate the evidence and the interviewer—which would require a softening, not hardening, of one’s assertions once the evidence so strongly supports a different view.

i. Lt. Henry continues to deny that he was aware of Lt. Col. C

Lt. Vandegriff then switches back to Lt. Col. C, and Lt. Henry puts his foot in even deeper. Lt. Vandegriff talks to Lt. Henry about how, in 2010, Lt. Henry’s troops did an investigation behind his back, and that, as part of this investigation, Ofc. McMillan had a

²⁶⁴ *Id.* at 91-92.

²⁶⁵ *Id.* at 93.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 94.

²⁶⁸ *Id.*

conversation with his source, Lt. Col. C.²⁶⁹ Lt. Vandegriff explains that Lt. Henry found out, asked Ofc. McMillan to identify his source in the guard, and then called Gen. Katkus to say, “he’s working with C.”²⁷⁰ Lt. Henry immediately, vehemently, and repeatedly denied that this ever occurred.²⁷¹

There followed a lengthy back-and-forth regarding Lt. Col. C. Lt. Vandegriff again made an assertion that Lt. Henry required Ofc. McMillan to disclose his source.²⁷² Lt. Henry accused Lt. Vandegriff of relying on assumptions, not facts, and then made the following statement:

I had no knowledge that Seth was trying to work with C if that’s what you’re saying, about anything, okay? So that didn’t occur.²⁷³

This statement encapsulates the concern with Lt. Henry’s honesty that is raised by the December interview. Although this evidence does not support a view that Lt. Henry is deliberately concocting a false story, it certainly raises doubt about his honesty. To what extent can we rely on and trust a person who will assert positively, and without doubt, that an event did not occur four years ago based simply on the fact that he has no memory of the event?

Lt. Henry argued at the hearing that the reason he was so sure of his memory is that he was not allowed to research all records, or talk to others, in order to refresh his memory. But, this being the case, he should have been *less* willing to be absolutely certain of his memory, not more certain that the event he does not remember did not occur. The same is true of Lt. Henry’s argument that he did not understand the charge against him, that he knew he was the target of the investigation, and that he distrusted the fairness of the investigators. Those circumstances should make him more cautious, not more brazen or more likely to assert with certainty that events did not occur when he was relying only on an absence of memory of the event.

Thus, on the first reading of the transcript, this exchange appears to support a view that Lt. Henry’s honesty is in doubt. As explained below, however, a very close reading of the transcript reveals that Lt. Henry repeatedly expresses that his statements in the interview are based on his memory. In addition, the transcript and the recording reveal that his absolutist and positional statements—such as “that didn’t occur”—are argumentative statements regarding the reliable evidence, which, in his view, was limited to his memory and his notes.

²⁶⁹ *Id.* at 94-95.

²⁷⁰ *Id.* at 95.

²⁷¹ *Id.* at 95-97.

²⁷² *Id.* at 98.

²⁷³ *Id.*

j. The exchange between Lt. Vandegriff and Lt. Henry was an argument

Listening to the audio, it becomes clear that shortly after Lt. Vandegriff took over the questioning, Lt. Henry began treating the interview as an argument, rather than an interview. The argumentative approach is obvious. Lt. Henry becomes positional, and offers rational arguments for why his memory of how the disclosure occurred is more logical than the version offered by other witnesses.²⁷⁴ For example, when Lt. Vandegriff explains that sexual assaults were, in fact, discussed at a meeting attended by Lt. Henry, Lt. Henry begins to argue, and asserts that no such interchange took place because if it had, he would have reported it to the appropriate authority.²⁷⁵

With regard to Lt. Vandegriff's initial attempts to refresh Lt. Henry's memory, Lt. Vandegriff's tone sounds reasonable and fair at the start of the interview, and the recording does not indicate any attempt on his part to start an argument. Lt. Vandegriff did, however, make inaccurate, or at least confusing, statements regarding what occurred, and he was operating on an assumption that the Special Assignment Unit was conducting an investigation into the guard—something that Lt. Henry knew could not have been the case. As will be seen, although Lt. Vandegriff was reasonable and fair at the start of his participation in the interview, he eventually escalates the confrontational mode.

Indeed, to be fair to Lt. Henry, in response to Lt. Vandegriff's first question—about the February 26th meeting—Lt. Henry's response is what we would expect from a reasonable and honest person struggling to rely on a memory of over years ago: “That's my understanding. That's my recall of it.”²⁷⁶ Only later does he start talking in absolutes. Then it becomes obvious that he is having an argument, and does not want to lose the argument.

The low point in the interview is reached at the end, where Lt. Henry and Lt. Vandegriff engage in a pointless duel regarding whether Lt. Henry will answer “yes or no” to a question from Lt. Vandegriff. This dispute began when Lt. Vandegriff asked whether Lt. Henry ordered Tr. Hazelaar and Ofc. Carson to attend a meeting with Gen. Katkus.²⁷⁷ Lt. Henry responded that he

²⁷⁴ *Id.* at 78

²⁷⁵ Jt. Ex. 1-87 at 86-87.

²⁷⁶ *Id.* at 100. Although the passage on page 100 shows explicitly that Lt. Henry is arguing based on what he views as the most logical sequence of events, the argumentative approach actually begins much earlier. *See generally id.* at 77-122. The point is not that arguing in an official interview is acceptable. That, however, is an issue for his employer. The question here is whether that argument shows dishonesty. It does not. Lt. Henry's argumentative assertions were conditional—he was making assertions that, he argued, were the most logical. This means that he was not intending to deceive by asserting that his version was fact—instead he was arguing that his version was more likely than other versions.

²⁷⁷ *Id.* at 116-22.

remembered Tr. Hazelaar at a meeting five years ago, but not Ofc. Carson.²⁷⁸ After several minutes of sparring over whether that response answered the question, Lt. Henry agreed that Tr. Hazelaar would have been at that meeting because he had asked him to attend.²⁷⁹

To the Executive Director, this pointless exchange is evidence of Lt. Henry being evasive, which, the Executive Director concludes, raises doubt about his honesty. The Executive Director argues that if this decision fails to find that Lt. Henry's heated exchange with Lt. Vandegriff was evasive, then all interviewees in the future will be encouraged to engage in heated exchanges rather than answer a question.

That contention, however, is not well-taken. If this decision were to adopt the Executive Director's view, then any police officer who is argumentative when under cross-examination would be guilty of being dishonest.²⁸⁰ That would amount to open season on police officers because many police officers will argue with their interviewer or with opposing counsel during an investigation, cross-examination, or a deposition.²⁸¹ The question is not whether Lt. Henry was being argumentative—he was. The question is whether Lt. Henry was being deliberately argumentative in order to evade answering questions. If his being argumentative was a tactic, then, under the Council's precedents, it would raise substantial doubt about his honesty.²⁸²

Here, the evidence does not support a finding that the devolution of the interview into argument was a tactic. The tension between Lt. Henry and Lt. Vandegriff was palpable. Although the initial disintegration of the interview into argument was not necessarily Lt. Vandegriff's fault—he began his portion of the interview with courtesy and fairness—he did not prevent the disintegration, and he provided confusing information. Later, he may have been provoking Lt. Henry. For Lt. Henry's part, he initially tried to answer questions from Lt.

²⁷⁸ *Id.* at 118,

²⁷⁹ *Id.* at 121.

²⁸⁰ Moreover, any police officer who reads this decision as a blank check to prevaricate and evade, will be guilty of a woeful misreading. The true lesson of this decision is that any answer other than a factually accurate truthful answer provides the Executive Director with a reasonable basis to consider, and perhaps pursue, revocation of a police officer's certificate. An answer that is inaccurate, or an answer that evades the question, will be a basis for thorough and intense review of the officer's conduct to determine whether the circumstances demonstrate intentional deception. No officer should wish for him or herself the scrutiny that Lt. Henry has brought upon himself by his inaccurate and argumentative answers at his October and December interviews.

²⁸¹ For examples of police officers being argumentative when being cross-examined, see generally, e.g., Exec. Dir. Ex. AT (Deposition of Lt. Vandegriff, in *Henry v. MOA*; (Feb. 6, 2017)); Testimony of J. Richard Brown.

²⁸² *Cf.*, e.g., *Waldron*, OAH No. 16-0136-POC at 8. In *Waldron*, the Council considered whether the respondent's answers, which were not directly responsive to the question, were a tactic or simply an artifact of the respondent's manner of communication. The Council concluded, "His answers were not evasive, but were instead circuitous. He was not defiant or angry, but did become notably emotional at several times during the questioning, especially when he spoke about his family's serious crisis, even though this hearing occurred over a year later." For a case in which a respondent gave deliberately evasive answers, see *Much*, OAH No. 13-0288-POC at 19-21.

Vandegriff calmly and reasonably, but soon became positional, which only escalated the tension. Thus, Lt. Henry's argumentativeness is not proof of being evasive in order to avoid giving truthful testimony.

The more important question is why Lt. Henry was so absolute and positional during the latter stages of the interview. A reasonable person would necessarily have some doubt about any police officer who unreasonably exhibited a tendency to be absolutist and obstinate when faced with mounting evidence that his memory is incorrect. Indeed, in a previous decision, *In re Mattingley*, the Council noted an officer's continued adherence to an untruthful version of the facts after being confronted with evidence of the contrary.²⁸³

The difference between *Mattingley* and this case, however, underscores why Lt. Henry's failure to back down here is not necessarily evidence of dishonesty. In *Mattingley*, the respondent was confronted with direct evidence that he was lying about an event that was contemporaneous with the interview. Memory and sketchiness of records from which to reconstruct events were not at issue.²⁸⁴ In contrast, Lt. Henry was being asked about events that occurred many years earlier, for which records were inconclusive. Further, he did not trust his interviewers, who had been giving both correct and incorrect information in an attempt to refresh his memory.

At this juncture, Lt. Henry's argument that he had reason to believe that the Municipality of Anchorage was unfairly attempting to entrap him does come into play. This argument makes it somewhat more likely that Lt. Henry's being argumentative with Lt. Vandegriff, and not budging from his memory, was a result of Lt. Henry's state of mind, and not a deliberate attempt to deceive. As explained next, however, even more important evidence that he was not being deceitful is his frequent reminder to his interviewers that his statements, and his refusal to budge from his position, were based on his memory.

As described earlier, Lt. Henry had put his cards on the table and explained why he was being absolutist and not acceding to evidence that he could be incorrect. Several times, he told his interviews that he was relying solely on his notes and his memory.²⁸⁵ For example, when sparring with Lt. Vandegriff over which version of the facts was correct, Lt. Henry explained:

The thing with this, Kevin, is that like I said, from the very beginning, I came in with the memory of what I had and what I said. And then after that, I go back, it's not like I pulled this stuff up. And that is consistent with notes. And trying to remember this from five years ago . . . it's almost

²⁸³ OAH No. 15-1088-POC at 3.

²⁸⁴ *Id.*

²⁸⁵ Jt. Ex. 1-87 at 57, 86, 90-91.

impossible to try to do that, particularly, the volume of stuff just that month going on.²⁸⁶

Lt. Henry then explains that his answers are subject to the following caveat: “And that’s the only thing I’m telling you is that that’s memory.”²⁸⁷

We all understand that memory is fallible. Thus, Lt. Henry’s obstinate and argumentative answers are conditional, based on memory, as supported by notes. The analysis here is more analogous to *Waldron* than to *Mattingley*. In *Waldron*, the Council understood that a respondent answering questions in a conditional format based on memory is not the same as making a deliberate misstatement intended to mislead.²⁸⁸ Here, Lt. Henry repeatedly explains that he is answering the questions to the best of his ability based on his memory. No evidence contained in the transcript of the December interview indicates that he was deliberately misleading the investigators. Therefore, under the Council’s prior decisions, Lt. Henry’s answers were not dishonest.

In sum, Lt. Henry’s incorrect answers to Lt. Vandegriff’s questions do raise some doubt about his honesty. The evidence shows, however, that, more likely than not, these answers were based on honest, but mistaken memories. With regard to his obstinate assertion that his memories were fact, this obstinance was tempered by his caveat that he was relying absolutely on his memory. In addition, his argumentative discussion with Lt. Vandegriff likely was to some extent an artifact of Lt. Henry’s character and relationship with Lt. Vandegriff, not an intentional tactic to deceive or evade. Therefore, the December interview does not raise substantial doubt about Lt. Henry’s honesty.

6. Do Lt. Henry’s testimony at this hearing, at court in his suit against the Municipality, or in his deposition, raise substantial doubt about his honesty?

a. Are there inconsistencies in Lt. Henry’s subsequent testimony that indicate deceit?

At some point after his December 2014 interview, Lt. Henry realized that many of his answers in the October and December interviews were incorrect. He was wrong, for example, that there had been only two meetings with Gen. Katkus. He was wrong when he denied that he had set up the February meeting, and thus wrong in asserting that the impetus for the meeting was

²⁸⁶ *Id.* at 90.

²⁸⁷ *Id.* at 91.

²⁸⁸ OAH No. 16-0316-POC at 11.

Ofc. McMillan’s conversation with Ofc. Simmons. He was wrong when he denied that the topic of sexual assault was not discussed with Lt. Col. C at the June meeting.²⁸⁹

In his testimony at the hearing (and in his previous trial testimony and deposition), Lt. Henry explained his mistakes as lapses in, and conflating of, memory.²⁹⁰ He remembered some aspects of the June meeting, but confused the June meeting with the February meeting.²⁹¹

To this day, although he admits that the February meeting occurred, that admission is based on his review of documents and statements by others, not his first-hand memory.²⁹² He does not remember anything about the February meeting.²⁹³ Similarly, he does not remember anything about Lt. Col. C’s attendance at the June 4th meeting, nor any discussion of sexual assaults at that meeting.²⁹⁴

In the Executive Director’s view, Lt. Henry’s latter-day admissions, while still professing to lack an actual memory, are self-serving and feigned. The Executive Director argues that his sworn testimony at the hearing, the trial, and his deposition are further examples of evidence that raise substantial doubt about his honesty.²⁹⁵

In analyzing this argument, this decision will not undertake the careful walk-through of the testimony that was done for the October and December 2014 interviews. The reason for the careful review of the initial interviews was to see if they revealed mannerisms or statements that indicated fabrication, subterfuge, or evasive tactics. With the later testimony, we would expect Lt. Henry to be more polished. Indeed, review of Lt. Henry’s hearing testimony, and the designated portions of his trial and deposition testimony, showed that Lt. Henry stayed with his current approach and explanation of the facts of what happened in 2010, and how he was partly right, and partly wrong, in his 2014 interviews. Therefore, rather than describe the entire testimony, this decision will instead address only the specific arguments raised by the Executive Director regarding Lt. Henry’s deposition, trial testimony, and hearing testimony.

In making the argument that Lt. Henry’s subsequent sworn testimony raises doubt about Lt. Henry’s honesty, the Executive Director alleges that this testimony contains inconsistencies.²⁹⁶

²⁸⁹ Henry testimony.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ Exec. Dir. Closing Brief at 2-3, 5, 17.

²⁹⁶ *Id.* at 23.

The Executive Director has presented persuasive authority that being inconsistent can be evidence of fabrication and dishonesty.²⁹⁷

Yet, although the Executive Director designated the transcripts of Lt. Henry's deposition, and some of his trial testimony, as evidence in this matter, and observed all of Lt. Henry's hearing testimony, the only inconsistency that the Executive Director cites with regard to this subsequent testimony is that in his subsequent testimony he admitted that he made errors in his October and December 2014 interviews.²⁹⁸ Thus, to this extent, his subsequent testimony was not consistent with his October and December statements.

This is not, however, the type of inconsistency that we generally look for in judging credibility. That Lt. Henry later sees evidence that persuades him that his memory was incorrect is not proof that he was lying when he gave his initial statements. The type of inconsistency that is most telling with regard to honesty is when a person gives different versions of events without being prompted by seeing new evidence. Admitting error after seeing evidence that either refreshes a memory, or proves that the memory was mistaken, on the other hand, can be consistent with having made an honest mistake.

For example, if Lt. Henry was inconsistent in subsequent testimony in describing which events he remembers, and which he does not actually remember but admits happened, (in other words, if in some testimony he put some events in one category, and then later puts those same events in a different category), that might be evidence that his subsequent testimony regarding a lack of memory was feigned. The Executive Director, however, has not cited to any such inconsistency. An independent review of the hearing testimony, deposition, and designated federal trial testimony, reveals that Lt. Henry is generally consistent in his assertion that he has no current memory of the February 26th meeting or any discussion of sexual assault at the June 4th meeting, and that his admission of these facts is based on his research and knowledge gleaned from others.²⁹⁹ Thus, here, the issue of consistency in the subsequent testimony favors Lt. Henry more than it does the Executive Director.

²⁹⁷ *Id.* at 5.

²⁹⁸ *Id.* at 23.

²⁹⁹ Henry testimony; *see also, e.g.* Exec. Dir. Ex. AP at 44, 49-50, 61, 78, 84, 87, 113, 136, 141, 155, 184 (testimony of Lt. Henry in 2016 deposition that is consistent with his claim he had no memory of February meeting or topic of sexual assault at June meeting); Exec. Dir. Ex. AU.

b. Is it inherently implausible that Lt. Henry would not remember the topic of sexual assaults being discussed at the June 4th meeting?

The other argument that the Executive Director makes with regard to Lt. Henry's subsequent testimony is that it is inherently implausible that Lt. Henry would not have had his memory refreshed regarding the topic of sexual assaults being discussed in the June 4th meeting. Others at the meeting remember the topic. In the Executive Director's view, this means that he must be feigning his current lack of memory.³⁰⁰

With regard to why Lt. Henry does not remember anything about the issue of sexual assaults being discussed at the June 4th meeting, Lt. Henry emphasizes that he expected the meeting to be about drugs. Ofc. McMillan had disclosed to him that he had clandestinely met with a guard member about drugs. Ofc. McMillan never mentioned anything about sexual assaults.³⁰¹ Therefore, Lt. Henry went to the June 4th meeting expecting the meeting to be about Ofc. McMillan's misconduct in investigating drugs in the guard. He was not expecting anything regarding sexual assaults. It follows, Lt. Henry argues, that several years later his memory is limited to what he expected, and does not include additional issues.

Lt. Henry's argument is plausible. If we expect an event to unfold in a certain way, we may remember it as having occurred as expected, not as it actually occurred.

At this time, both the Executive Director and Lt. Henry can only speculate for why this event did not stick in his mind. It may be that he was not paying attention or that, because nothing was mentioned that could turn this into a police matter, such as specific instances or persons, it did not register as a startling event. Alternatively, as the Executive Director argues, his lack of memory may be feigned. The passage of time before he was questioned about it, however, prevents drawing a negative inference from Lt. Henry's lack of memory of the event at his 2014 interviews, 2016 deposition, or 2019 hearing testimony.

7. Viewing the evidence as a whole, is the doubt raised about Lt. Henry's honesty substantial?

In sum, this decision has carefully analyzed the record for evidence such as inconsistency, mannerisms, hesitations, or evasiveness that support the Executive Director's contention that Lt. Henry was deliberately dishonest in official interviews and subsequent testimony. Although evidence has been found that goes both ways on this issue, the evidence generally supports a

³⁰⁰ Exec. Dir. Closing Brief at 21, 23.

³⁰¹ McMillan testimony.

conclusion that Lt. Henry was fundamentally being honest when he gave statements based on an incomplete and confused memory.

This analysis, however, while correct as to each individual misstatement in the two interviews, does not fully do justice to the Executive Director's argument. The Executive Director is arguing that, put together, from a commonsense approach, Lt. Henry's explanations add up to an inherently implausible series of events. These events start with the observation that Lt. Henry's incorrect answers tend to exonerate him while blaming others. Add to that the fact that Lt. Henry did, indeed, frequently give long, seemingly unnecessary descriptions at his interview, and did, indeed, become argumentative, all of which may have tended to obfuscate the issue under inquiry. Finally, for him to have no memory of events that other witnesses (some of whom were lesser participants) remember, is, in the Executive Director's view, one too many coincidences.

On the other side of the coin, however, as fully described in the above analysis, Lt. Henry also makes a commonsense argument. As we all know, memory is capricious and unreliable. To mix up events, and entirely forget events, after four-and-a-half years, is credible.

This, then, is the dilemma that sinks the Executive Director's case. Here, the Executive Director's case against Lt. Henry is entirely circumstantial—we are being asked to draw inferences from circumstance that Lt. Henry was and is being intentionally deceptive.

There is nothing inherently wrong with the Executive Director relying on circumstantial evidence, and the Council has stated that, when the evidence is persuasive, it will draw inferences of deceptive intent from the circumstances in which a misstatement is given. The problem here, however, is that the opposite inference—the inference of a genuine lack of memory—becomes much stronger with the passage of time. Lt. Henry asserts that in 2014 his memory of 2010 was faulty, and that in 2016 and 2019, even after seeing evidence that could refresh his memory, he still has no memory of certain 2010 events. Given the length of time, these claims are viable and reasonable, even if other people do happen to have some memory of those events.

Moreover, Lt. Henry was a credible witness. The evidence of his career adds to his credibility. His dedication and honesty was not in question until 2012, the year in which he took on the burden of defending an officer whom he felt was being treated unfairly.³⁰² Many witnesses testified to their opinion that Lt. Henry was not motivated by personal interest, respected the

³⁰² Mew Designated Trial Transcript at 3-4.

rights of others, and was honest.³⁰³ These factors mean that the circumstantial evidence of deceit must be stronger than found in this record in order to support drawing negative inferences from circumstances.

Thus, in order to defeat Lt. Henry's arguments that he was honestly responding based on his memory, the Executive Director, who has the burden of proof, must produce evidence of deceit that supports the negative inferences we are being asked to draw from the circumstances. In this decision, we have scoured the record for such evidence. We have found none that is persuasive. Therefore, the Executive Director has failed to prove that Lt. Henry committed acts that would cause a reasonable person to have substantial doubt about Lt. Henry's honesty.

IV. Conclusion

The Executive Director has not proved that Lt. Henry's actions or inaction in 2010, and his statements in 2014 and in subsequent legal proceedings, would cause a reasonable person to have substantial doubts about Lt. Henry's honesty, fairness, or respect for the rights of others. Therefore, the Executive Director's action to revoke Lt. Henry's police certificate is denied.

DATED: July 1, 2019.

By: Signed
Stephen Slotnick
Administrative Law Judge

³⁰³ McMillan testimony; Redick testimony; Thelen testimony; McKinnon testimony; Bell testimony; Kirkland testimony; Mew Designated Trial Transcript at 3-4, 27.

Adoption

The Alaska Police Standards Council adopts this Decision under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 3rd day of December, 2019.

By: Signed
Justin Doll
Chair, Alaska Police Standards Council

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]