BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF PUBLIC SAFETY

In the Matter of:	)	
	)	
L. R. C.	)	OAH No. 08-0625-SGL
	)	

DECISION

I. Introduction

This is an administrative proceeding in which the Department of Public Safety, Division of Statewide Services seeks to revoke Alaska Security Guard License Number 6XXXXXXX, belonging to L. R. C. The basis for the proposed revocation is his conviction in September of 2008 of the crime of Indecent Exposure in the Second Degree. The Commissioner of Public Safety has delegated decisionmaking authority over this particular case to the assigned administrative law judge. The case was heard in Kenai, Alaska on July 8, 2009.[1]

In this case, the most fundamental facts have previously been determined by a criminal proceeding, and the law prevents them from being reconsidered or altered here. In essence, the task of the administrative law judge is to assume those facts to be true and to determine, from the evidence offered, the context that surrounded those facts. As discussed below, that context leads to the conclusion that, under the applicable standard, Mr. C. may not continue to hold a security guard license in this state.

II. Facts

A. Evidence Received

At the hearing, Division Exhibits 1 through 6 and 8 were admitted without restriction and without objection. Exhibits 7, 7a, and 7b, on which a ruling on several objections was deferred, are now admitted solely insofar as they are prior consistent statements to rebut a suggestion of recent fabrication. C. Exhibits A, B, and AA through EE were admitted without restriction or objection; Exhibits F and G were admitted over objection as hearsay within an exception. A recording of investigative interviews, which has been marked Exhibit H, was submitted by respondent on August 4, 2009, and the division has objected to its admission. That objection is overruled in part and Exhibit H is admitted, subject to the limitation in the next paragraph.

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[1] An additional exhibit was received on August 4, 2009. More broadly, the handling of the case was delayed somewhat, by consent, to accommodate personal needs of Mr. C's. counsel.

In this case, the limitation regarding use of certain hearsay that is codified in AS 44.62.460(d) applies only to the extent preserved by timely objection.[2] It is not applicable to any of the evidence relied on below with the exception of Exhibit H, as to which there is a limiting hearsay objection from the division but not from the exhibit's proponent.

B. Findings

L. R. C. has been in the private security business for about 30 years.[3] He holds Alaska Security Guard License number 6XXXXXX, renewed in November of 2007.[4]

On September 9, 2008, Mr. C. pleaded no contest to, and was convicted of, Indecent Exposure in the Second Degree.[5] The count to which he pleaded charged the exposure as a Class A misdemeanor under AS 11.41.460(b).[6]

By virtue of the conviction, certain basic facts are conclusively established and may not be re-tried here.[7] Specifically, the conviction establishes each element of Indecent Exposure in the Second Degree under AS 11.41.460(b): that Mr. C. knowingly exposed his genitals in the presence of one or more people under 16 years of age and that when he did so he was in reckless disregard of the offensive, insulting, or frightening effect the exposure might have.

The purpose of the hearing in this case was to establish the circumstances of that knowing exposure. The following circumstances were established by a preponderance of the evidence.

In May and June of 2006, Mr. C. lived on the ground floor of a two-story apartment house with exterior walkways.[8] An eight-year-old girl lived in the apartment immediately above his. She was occasionally visited by her ten-year-old female cousin.

An exterior stairway led from the vicinity of the eight-year-old's apartment to the ground, passing in front of the dining room window of Mr. C.'s apartment.[9] Mr. C. kept food for his dogs by that window.[10] He was accustomed to feeding them from that container at mid-day,

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2 Order Denying Summary Adjudication and Addressing Further Proceedings (June 4, 2009), at 7.
3 Direct exam of C.
4 Administrative Record at 10.
5 Exhibit 8.
6 *Id.*
7 *Disciplinary Matter Involving Schuler*, 818 P.2d 138, 141 (Alaska 1991) (where respondent pleaded no contest to a Class A misdemeanor, his "conviction is conclusive proof of all of the elements of the crime for which he was convicted").
8 *See* Exhibit 1.
9 The window is shown from the inside in Exhibit 6 and from the outside in Exhibit 3, left side. Direct exam of Officer Ross.
10 Cross-exam of C.

while in the nude and with the curtains open.[11] It was also possible to see from the stairway into Mr. C.'s living room through a different window.[12] The distance from the stairway to the dining room window appears to have been a few feet, and from the stairway to the living room window about ten feet.[13]

In May-June of 2006, through one or both windows, the eight-year-old observed Mr. C. nude on multiple occasions, and the ten-year-old observed him on one occasion, with his genitals fully visible.[14] They saw him while they were going up or down the stairway. They recall that he did not promptly take steps to conceal himself. To them, he appeared to make eye contact with them, indicating awareness that they could see him.[15] In any event, because one element of the crime to which Mr. C. pleaded guilty is that the exposure was "knowing," it is not possible to revisit in this proceeding whether Mr. C. knew he was being observed; it must be assumed that he did.

Mr. C. presented evidence at the hearing designed to show that the girls *could* not see him through the windows, either because of glare, because of items placed in front of the windows, or because of the height of the windows. This evidence cannot be credited because the conviction establishes conclusively that he was observed, and that factual determination cannot be revisited here.[16]

III. Discussion

A regime for licensing security guards in Alaska was established in 1976 and has not been altered significantly since that time. A brief set of statutory provisions sets up a simple licensing process with few requirements.[17] There is a single statutory section relating to

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11 *Id.*

12 *See* Exhibit EE.

13 *See* Ex. 2, 3.

14 Testimony of T.B., H.B.; Exhibit H.

15 *Id.*

16 The evidence is also unconvincing, on balance. While it is likely that the girls were sometimes mistaken about their exact positions on the stairway when the exposures occurred, it is clear that the stair does provide views through the apartment windows. The windows are quite well shaded from glare for a person looking into them from at or above the level of the glass. As for clutter in front of one of the windows shown in a picture taken during a police search (Ex. 6), the apartment had apparently been visited by Mr. C. between the time of his police interview and the search so that items could have been moved, and items may also have been moved in the course of the search. Finally, Mr. C. initial police interview supports visibility; when first confronted by Officer Ross, Mr. C. almost instantaneous theorizing about how he might have been seen suggests some knowledge that he was readily observable through his windows. Ex. H.

17 AS 18.65.400 – 490.

discipline. The implementing regulations focus only on initial licensure and renewal; they do not address the standards or procedure for discipline.[18]

Alaska Statute 18.65.440 is the single provision of law relating to discipline. It provides that a security guard license is "subject to revocation" for any of five listed reasons. One of the reasons is "conviction of a felony or a crime involving moral turpitude while licensed."[19]

A. Revocation Is Mandatory Upon Conviction of a Crime of Moral Turpitude.

The first question raised by this case is whether the phrase "subject to revocation" in AS 18.65.440 should be interpreted to require revocation if one of the five conditions is met, rather than merely to authorize revocation as a discretionary matter. There is no legislative history shedding any light on this question. There is, however, important contextual evidence on the meaning of this phrase. The fifth ground that makes a license "subject to revocation" is "knowingly continuing the employment of an individual as a security guard who has been convicted of a felony or a crime involving moral turpitude . . . ."[20] Thus, any employer who is licensed as a security guard or as a security guard agency exposes its license to revocation if it knowingly continues to employ a person who has been convicted of one of these crimes. By making it a disciplinary offense to employ someone with such a conviction, the legislature has shown that it intended that no person convicted of a felony or a crime of moral turpitude should work as a security guard under any circumstances. It therefore seems likely that when it made licenses "subject to revocation" for one of the listed conditions, the legislature intended that they *must* be revoked if the triggering condition is proven.

B. The Conviction in this Case Is Not a Crime of Moral Turpitude Per Se.

The next question is whether Indecent Exposure in the Second Degree, which is not a felony, is a "crime involving moral turpitude." In general, crimes of moral turpitude are crimes that involve dishonesty, "depraved and inherently base" conduct, or—at the lower end of the spectrum—acts that indicate "bad character" or that reflect adversely on one's "personal values."[21] Thus, while moral turpitude encompasses heinous crimes, it also can encompass conduct that is not punished especially heavily by the penal system. By way of example,

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18 13 AAC 60.
19 AS 18.65.440(3).
20 AS 18.65.440(5).
21 *See Blizzard v. State*, 2002 WL 272415 (Alaska App.) and cases collected therein at note 5.

bookmaking has been so classified,[22] as has misdemeanor concealment of merchandise,[23] misdemeanor diversion of electricity,[24] and, in some circumstances, misdemeanor contributing to the delinquency of a minor.[25]

Moral turpitude is not a precise concept, and it can be applied differently in different contexts. When it is used in the occupational licensing context, courts often define the concept with an eye to the particular functions of the occupation being licensed.[26]

With some room for differing views of where the boundaries fall between the different categories in various contexts, there appear to be three categories in the hierarchy of moral turpitude as it relates to crimes. There are crimes that always involve moral turpitude—that is, they constitute moral turpitude *per se*. Murder, sexual assault, robbery, and forgery are among the crimes in this category.[27] There are crimes that always fall below the threshold for moral turpitude. Crimes with a *mens rea* of criminal negligence are often put in this category.[28] Third, there is an intermediate category of crimes that may be deemed crimes of moral turpitude depending on the surrounding circumstances of the particular conviction.[29]

One way to place a particular crime in the category of moral turpitude *per se* is to define it as such by regulation. Some Alaska agencies, including the Department of Public Safety in regulations applying to occupations other than the one at issue here, have taken the step of

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[22] *Carp v. Florida Real Estate Comm'n*, 211 So. 2d 240, 241 (Fla. App. 1968), cited with approval by *Wendte v. State, Bd. of Real Estate Appraisers*, 70 P.3d 1089, 1092 n.13 (Alaska 2003).

[23] *Disciplinary Matter Involving Schuler*, 818 P.2d 136, 139 (Alaska 1991) (Class A misdemeanor, no jail time).

[24] *Kenai Pen. Borough Bd. of Educ. v. Brown*, 691 P.2d 1034 (Alaska 1984).

[25] *Chrisman v. Com*, 348 S.E.2d 399, 404 (Va. App. 1986).

[26] *See, e.g., In re Thacker*, 881 S.W.2d 307, 309 (Texas 1994) (whether a crime is deemed one of moral turpitude in attorney licensing case "is resolved 'by a consideration of the nature of the offense as it bears on the attorney's moral fitness to continue in the practice of law'") (quoting prior authority); *In re Williams*, 464 S.E.2d 816, 816-17 (Ga. 1996).

[27] *See, e.g., Barry v. State*, 925 P.2d 255, 257 n.3 (Alaska App. 1996); *Attorney Grievance Comm'n of Md. v. Walman*, 374 A.2d 354, 358 (Md. App. 1977) (crimes involving intent to defraud as an element are always crimes of moral turpitude); *Turton v. State Bar of Texas*, 775 S.W.2d 712, 717 (Texas App. 1989) (crimes of intentional dishonesty for personal gain are crimes of moral turpitude on their face); *Thacker*, 881 S.W.2d at 309 (majority), 311 (dissent, shedding light on nature of majority's holding) (baby selling is crime of moral turpitude *per se*).

[28] *See, e.g., Barry*, 925 P.2d at 257 n.3 (Alaska's Office of the Attorney General did not contend criminally negligent homicide was a crime of moral turpitude).

[29] The Alaska Supreme Court recognized that such an intermediate category can exist when it stated in *In re Preston*, 616 P.2d 1, 5 n.10 (Alaska 1980) (*superseded on other grounds*, 731 P.2d 48) that "the surrounding circumstances" could determine whether "the conviction in this case involved moral turpitude." *See also, e.g., Walman*, 374 A.2d at 359-60 (whether failure to file a tax return is crime of moral turpitude "turns on the facts of the particular case"); *In re Kerr*, 611 A.2d 551 (D.C. App. 1997) (similar); *Turton* 775 S.W.2d at 717 (whether aggravated assault is crime of moral turpitude depends on circumstances).

creating a regulatory list of crimes that will be deemed crimes of moral turpitude.[30] This task has not been undertaken in the security guard regulations.

The division points to one Alaska administrative decision, *In re Gonzales*,[31] in which the Board of Nursing seemed to suggest that Indecent Exposure in the Second Degree is, in all cases, a crime of moral turpitude.[32] The authorities relied on in *Gonzales* do not support that conclusion, however. The Board of Nursing cited three authorities. First, it relied on a California case called *People v. Ballard*.[33] That case involved felony indecent exposure, an element of which was that the defendant have a purpose of sexually arousing himself,[34] and thus it was more akin to Alaska's first degree indecent exposure crime than to this state's second degree crime. Second, it relied on *Stidwell v. Maryland State Board of Chiropractic Examiners*,[35] a case about solicitation for prostitution and thus of no apparent value in assessing in what circumstances indecent exposure may be a crime of moral turpitude. Third, it relied on *Woodall v. Texas*,[36] which like *Ballard* involved an indecent exposure crime with the necessary element of "intent to sexually arouse."[37] *Woodall* is of little help in assessing Alaska's second degree crime, which lacks that element. Since the Board of Nursing does not seem to have grappled with the particular characteristics of the crime of Indecent Exposure in the Second Degree when it suggested that it is *per se* a crime of moral turpitude, that board's view carries little persuasive weight.

More persuasive than *Gonzales* on the issue of *per se* classification is a Georgia Supreme Court case relating to attorney discipline for a conviction of "public indecency, concerning [an] attorney's alleged 'lewd exposure of the sexual organ' in his apartment, observed by neighbors outside apartment."[38] The Georgia court found this crime not to be one of moral turpitude *per se* for attorneys, but rather one that should be examined on its particular facts.[39]

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30 12 AAC 40.967(17) (Medical Board); 13 AAC 62.020, 13 AAC 85.900(28) (Dep't of Public Safety in other contexts); 20 AAC 10.035 (Professional Teaching Practices Commission).

31 Board of Nursing Case No. 2306-01-006 (adopted 2004).

32 *Id*. at 15-16.

33 16 Cal. Rptr. 2d 624 (1993).

34 *Id.* at 629-30.

35 799 A.2d 444 (Md. App. 2002).

36 77 S.W.3d 388 (Texas App. 2002).

37 *Id.* at 395.

38 *In re Williams*, 464 S.E.2d 816 (Ga. 1996). The respondent was convicted under Ga. Code. 16-6-8(a)(2), a general intent crime that seems to have been interpreted to have similar elements to Alaska's Indecent Exposure in the Second Degree. *Cf. Watkins v. State*, 514 S.E.2d 244, 245 (Ga. App. 1999).

39 The court went on to affirm a special master's determination that the respondent's conduct in *Williams* did not represent a crime of moral turpitude. There are a number of potential distinctions between *Williams* and the present case, however.

Also militating against classifying Indecent Exposure in the Second Degree as a crime of moral turpitude *per se* is the fact that the Department of Public Safety did not so classify it in the department's own regulation concerning emergency prison guards.[40] Indeed, the regulation for this category of employees is written in such a way that Indecent Exposure in the Second Degree would under no circumstances be a crime of moral turpitude for purposes of emergency guard licenses. On the other hand, for peace officers, the department does by regulation deem Indecent Exposure in the Second Degree a crime of moral turpitude.[41] While neither of these regulations applies to security guards, their existence suggests that to classify Indecent Exposure in the Second Degree as automatically indicative of moral turpitude might be inconsistent with department policy in the context of guards not entrusted with as high a level of public trust as peace officers.

The crime of Indecent Exposure in the Second Degree can, at least in theory, encompass conduct that does not provide much indication of fundamentally "bad character" or poor "personal values," which form the lower threshold for moral turpitude. For example, a conviction might be obtained against a highly inebriated college student who, while staggering home from his or her first party, urinates while in view of (though perhaps a considerable distance away from) a passer-by.[42] It might be obtained against someone who undresses on a remote beach that is informally and locally regarded as clothing-optional, potentially offending[43] a family of tourists who happen to come to the beach. While such conduct reflects poor judgment, it does not rise to the level ordinarily associated with moral turpitude.

Because the range of conduct potentially covered by a conviction under AS 11.41.460 is so broad, the crime is best handled under the middle category of moral turpitude analysis: it is not a crime of moral turpitude *per se*, but it is potentially a crime of moral turpitude if the context so indicates. In a proceeding such as this one, the elements of the criminal conviction are deemed established, but additional evidence is considered to determine the circumstances that led to the conviction.

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40 13 AAC 62.020(b)(2).

41 *See* 13 AAC 85.900(28) (so classifying all crimes with a knowing or reckless *mens rea*).

42 In a similar vein, *cf. In re P.*, described in *Toutounjian v. I.N.S.*, 959 F. Supp. 598, 601 (W.D.N.Y. 1997).

43 The crime set out in AS 11.41.460 does not require that the person or people to whom the exposure is made actually be offended, insulted, or frightened; it requires only that the person charged be reckless of the risk that they might be.

C. In Its Factual Context, the Conviction in this Case Is a Crime of Moral Turpitude.

Mr. C. is licensed in an occupation that demands a significant degree of public trust. He dresses in a uniform, and indeed one of the girls in question apparently mistook him for a police officer.[44] Because the public is inclined to place trust in licensed security guards, it is particularly important that they maintain high moral standards and not put themselves in a position where they might abuse that trust.

To be sure, the Department of Public Safety does not classify Indecent Exposure in the Second Degree as a crime of moral turpitude under any circumstances for the purposes of licensing emergency prison guards. The circumstances of that job are very different, however: prison guards work in a monitored environment and generally with an adult population that is not particularly vulnerable to the harms associated with indecent exposure. Security guards, on the other hand, work in unmonitored settings and come in contact with the very population—those under 16—that AS 11.41.460(b) is designed to protect.

In this case, bearing in mind the nature of the license at issue, additional context has been established for Mr. C.'s crime that removes it from the category of comparatively innocuous exposures that technically fit within the elements of AS 11.41.460(b), such as the nude beach and drunken urination hypotheticals used above. Here there were multiple exposures even though, as the conviction establishes, Mr. C. was aware they were occurring. The exposures were made to eight- and ten-year-old girls, a particularly vulnerable audience. They were made in a setting—an area visible to a public stairway frequented by children—in which exposure of genitals is unacceptable by any formal or informal public value system in Alaska.

The repetitive nature of the conduct and the indifference to its potential effect on a particularly young and vulnerable audience indicates character and values inconsistent with a security guard license. These circumstances make Mr. C.'s crime one of moral turpitude.

[44] Exhibit H.

IV. Conclusion

Because he has been convicted of a crime of moral turpitude, L. R. C.'s Alaska Security Guard License is revoked. The revocation will be effective 30 days after the date of service of a final adoption order on page 10 below or as otherwise provided in Alaska Statute 44.62.520.

DATED this 3rd day of October, 2009.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

Adoption

Neither party has filed a proposal for action under AS 44.64.060 proposing any disposition other than adoption of the proposed decision.

The undersigned, by delegation from the Commissioner of Public Safety, adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of distribution of this decision.

DATED this 5th day of November, 2009.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

[This document has been modified to conform to technical standards for publication.]