

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

In the Matter of)
)
 NEIL LYNCH)
 _____)

OAH No. 14-1644-POC
Agency File No. APSC 2013-27

DECISION

I. Introduction

The Alaska Police Standards Council has discretion to revoke a police officer’s certification if it finds that he lacks good moral character. The Executive Director requests that the Council revoke Officer Neil Lynch’s certificate based on a single erroneous sentence in an affidavit written by his attorney and filed in a civil suit against his employer. Because the evidence supports a finding that Officer Lynch’s false statement was not meant to deceive and he possesses good moral character overall, the Council declines to revoke his certification.

II. Facts

A. Summary of Neil Lynch’s employment and events leading to Alaska Police Standards Council referral

Neil Lynch joined the North Slope Borough Police Department in October 2003 and still works there today. Officer Lynch requested a village rotational officer position in August 2006. In February 2007, the Department assigned Officer Lynch to a rotational position in the village of Nuiqsut, beginning March 21, 2007.¹ After getting the rotational assignment, Officer Lynch and his family moved out of Barrow.²

In 2009, Officer Lynch and other officers filed a wage and hour claim against the North Slope Borough.³ Officer Lynch continued to work as a village rotational officer until he was abruptly transferred from Point Hope to a full-time Barrow position on May 21, 2013.⁴ On May 24, 2013, Officer Lynch filed a motion for injunction in the underlying wage and hour claim in

¹ R. 171.

² In 2005, Officer Lynch injured his knee and was on medical leave for number of months. He and his family moved out of Barrow and spent time between Idaho, Washington, and Anchorage. Officer Lynch returned to light duty in Barrow in April 2006, and full duty in August 2006. His family join him in Barrow during autumn 2006.

³ *Lynch et al v. North Slope Borough*, Alaska Fed. District Court No. 4:09-CV-0002(RRB)

⁴ Lynch testimony. R. 124, Motion for Injunction. By agreement of the parties, the circumstances surrounding the transfer to Barrow are not at issue in this hearing.

an attempt to stop the transfer.⁵ Officer Lynch signed a sworn, seven-page, affidavit in conjunction with the motion for injunction. His attorney prepared the affidavit. Page five of the affidavit contains the following sentence: “As a rotational officer, I was not allowed to reside in Barrow, and my family was required to move out of Barrow when I accepted the village rotational officer position in March 2007.”

Chief Leon Boyea read the affidavit and determined that Officer Lynch’s statement that he and his family were required to move out of Barrow was false.⁶ A fact-finding and administrative investigation concluded that the statement that Officer Lynch and his family were required to move out of Barrow was false.⁷ The Department recommended termination.⁸ Officer Lynch appealed the discipline, and the finding of making a false statement was sustained. The discipline imposed, however, was reduced to two weeks of unpaid leave.⁹

During the disciplinary appeal, Chief Boyea referred the matter the Alaska Police Standards Council.¹⁰ Kelly Alzaharna, Executive Director of the Alaska Police Standards Council and former North Slope Borough Chief of Police, filed an accusation based on the alleged false statement. The accusation alleged that Officer Lynch lacked good moral and sought revocation of his police certificate.¹¹ Officer Lynch disputed the allegations and requested a hearing.

A four-day in-person hearing was held before the Office of Administrative Hearings March 10 – 13, 2015, in Anchorage. Officer Lynch was represented by Linda Johnson. The Executive Director was represented by Assistant Attorney General Leonard “Bob” Linton. The sole issue for hearing was whether the Officer Lynch’s police certificate should be revoked based on the alleged false statement that he and his family were required to move out of Barrow when he accepted the rotational position.

B. Facts about the village rotational officer program

Before it started the village rotational officer program, the North Slope Borough Police Department experienced high turnover. In order to increase retention and cut costs, in 2004, the

⁵ R. 124, Motion of Injunction.

⁶ Boyea testimony.

⁷ R. 69.

⁸ Captain Darryl Holman testimony; R. 49.

⁹ R. 36.

¹⁰ R. 13 – 16; Boyea testimony.

¹¹ Accusation

Department instituted the village rotational officer program.¹² Under this voluntary program, an officer was assigned to a village for a two-week-on, two-week-off schedule. The schedule allowed an officer and his or her family to reside out of the village and outside the North Slope Borough when not working.¹³

When the program began in 2004, rotational officers' pay was set to the Borough's Anchorage pay scale and leave accrual rates. The Anchorage pay scale was significantly lower than Barrow wages. The pay disparity was relatively short lived. The record does not contain exact date of the pay reinstatement, but it occurred no later than October 2006.¹⁴ Nor does the record show how the Department notified officers that the pay for rotational officers had been restored to Barrow rates.

1. North Slope Borough Police Department Regulation 4.25

The Borough adopted regulation 4.25, effective August 23, 2004, describing the rotational program.¹⁵ The regulation described the two week on, two week off schedule, the Anchorage pay rate, and leave accrual.¹⁶ It stated that the Department will pay for airfare to and from Anchorage to the village.¹⁷ It went on to state, "Travel is not a form of compensation. An employee who lives in a location closer than Anchorage, or where the airfare cost is less, is not entitled to the difference in compensation or travel consideration."¹⁸ This version of Regulation 4.25 was still on the books, and thus technically still in effect when Officer Lynch was assigned a rotational position.¹⁹

In 2004, several officers, including Officer Lynch, signed a memorandum to the Chief expressing concerns arising from the rotational officer program implementation as outlined in

¹² The rotational program was already in existence in Prudhoe Bay. The new program involved the gradual implementation of the rotational program to other villages. The rotational program was a change from the former practice of officers training in Barrow and then transferring every two years between the village and Barrow.

¹³ The opportunity for an officer and family to live outside the Borough when not working was seen as a benefit. It also saved the Department and Borough money.

¹⁴ Officer Churchill went on a rotational schedule in October 2006 with full pay at the Barrow rate, so the change must have occurred by then.

¹⁵ R. 32 – 35. The regulation contains additional information, but this discussion only identifies pertinent sections.

¹⁶ R. 32 – 35.

¹⁷ R. 33.

¹⁸ R. 33.

¹⁹ The record contains an updated 4.25 from 2009, which amended a July 2009 version.

regulation 4.25.²⁰ The 2004 memorandum outlined the officers' understanding of the rotational policy effects. While the primary concern was the reduction in pay and leave accrual, the 2004 memorandum also shows the officers' understanding that rotational officers would live in Anchorage, or outside the Borough while not working.²¹

2. *Village rotational program housing requirements*

When Officer Lynch accepted the rotational position in March 2007, officers were not required to live outside of Barrow during their two weeks off.²² Even during the time of the pay differential, the Department never issued written notice that rotational officers were required to live outside Barrow.²³ The Department never ordered a rotational officer to move from Barrow.²⁴ According to the Executive Director's witnesses, there was no policy, formal or informal, to move outside the Borough.²⁵ Yet, during the early days of the rotational program, Officer Neil Paskewitz inquired whether he could put his name in for the rotational program. Officer Paskewitz lived in Barrow and wished to participate in the rotational program while maintaining his residence in Barrow.²⁶ Officer Paskewitz was told by his superior officers that he could not go rotational because he lived in Barrow.²⁷ Officer Lynch and others were aware of Officer Paskewitz's wish to work on the rotational schedule and the Department's position that he was not able to while residing in Barrow.²⁸

Shortly after the pay disparity was removed in 2006, however, Officer Paskewitz was told he could apply for the rotational program. The Chief and supervising officers understood that when the pay disparity was erased, the basis for the unwritten requirement to live off-slope also disappeared.²⁹ On this record, it appears that most officers would generally have understood that once the pay grades were the same, there was no reason to require rotational officers to live off-slope.³⁰ Very few officers, however, have taken advantage of the ability to live on-slope and participate in the rotational program. The expectation, since the program's inception, and still

²⁰ Ex. W.
²¹ Ex. W.
²² Grimes testimony; Dunbar testimony; Potashnick testimony Executive Director testimony.
²³ Boyea testimony; Venable testimony; Executive Director testimony.
²⁴ Boyea testimony; Venable testimony; Executive Director testimony.
²⁵ Grimes testimony.
²⁶ Paskewitz testimony.
²⁷ Paskewitz testimony.
²⁸ Lynch testimony; Renschen testimony; Datta testimony;
²⁹ Executive Director testimony.
³⁰ Datta Testimony;

today, is that officers will likely reside off-slope with their families.

C. Department investigation

1. The fact finding and internal affairs investigation

As part of the fact finding investigation, Lt. Brymer interviewed current and former supervising officers, including the current Executive Director.³¹ All those interviewed stated that Officer Lynch was not ordered to move out of Barrow when he accepted the rotational position.³² In her first interview, Ms. Alzaharna stated that there was never a requirement to move outside the Borough.³³ Sgt. Renschen informed Lt. Brymer that Officer Paskewitz was told he could not accept a rotational position and live in Barrow.³⁴ Lt. Brymer interviewed Ms. Alzaharna a second time, and she explained that it may have been an issue for Officer Paskewitz, but by the time Officer Lynch went to a rotational position it was not an issue.³⁵ Lt. Brymer concluded that Officer Lynch's sworn statement that he and his family were required to move out of Barrow was false.³⁶ He recommended an Administrative Investigation, including an interview with Officer Lynch, based on the seriousness of the alleged misconduct.³⁷

2. Officer Lynch's statement during the internal affairs investigation

On July 23, 2013, Chief Boyea assigned Lt. Brymer to conduct the Administrative Investigation.³⁸ Lt. Brymer interviewed Officer Lynch on August 23, 2013.³⁹ Lt. Brymer showed Officer Lynch the Motion for Injunction that had been filed in the wage and hour lawsuit, and directed him to the sentence, "He (Lynch) was required to move off the North Slope with his family to take the rotational position."⁴⁰ Officer Lynch stated that it was misworded, and not exactly correct.⁴¹ He stated that when the rotational program was implemented, officers

³¹ Lt. Brymer interviewed Officer Daniel Churchill, former Captain Lori Potashnick, Alaska Police Standards Council Executive Director and former Chief Kelly Alzaharna, former Deputy Chief Chris Dunbar, Sergeant Paul Renschen, former Chief Grimes, and former Captain Greg Venable.

³² R. 65 – 70.

³³ R. 67; Ex. 6, Lt. Brymer interviews.

³⁴ R. 68.

³⁵ R. 68.

³⁶ R. 69.

³⁷ R. 70.

³⁸ R. 18.

³⁹ R. 18. The lag between assignment and interview was due to Officer Lynch's annual leave.

⁴⁰ R. 19; see R. 124. Lt. Brymer mistakenly showed Officer Lynch the motion, not his affidavit. The statement is essentially the same, except that the word "required" was underlined in the motion and not in the affidavit. Officer Lynch stated that he did not think he had seen what he was being shown and stated that the affidavit he reviewed was only eight pages and "required" was not underlined.

⁴¹ R. 20; Interview Lt. Brymer and Officer Lynch, August 23, 2013.

could not live in Barrow, but that it was lifted before he accepted the rotational position.⁴² Officer Lynch stated that the Borough did not require him to move “off-slope” but thinks it may have still have officially been what was required.⁴³ Officer Lynch stated that if he would have caught the misstatement when he read it, he would have changed the wording.⁴⁴ Officer Lynch told Lt. Brymer he did not mean to misrepresent or lie. They made a mistake and he did not catch it.⁴⁵

Lt. Brymer noticed that he had shown Officer Lynch the motion instead of the affidavit and met with Officer Lynch a second time on August 28, 2013.⁴⁶ Officer Lynch explained that he had already amended the affidavit to take out the word “required.”⁴⁷ The amended affidavit replaced the sentence stating his family was required to move out of Barrow with, “It was normal practice for officers who had been transferred to rotational positions to leave the Slope upon taking a rotational position.”⁴⁸

Lt. Brymer showed Officer Lynch the affidavit and explained he had mistakenly shown him the motion. Officer Lynch explained that he had quickly looked over the affidavit before signing it.⁴⁹ Officer Lynch also explained that he had just been “yanked” out of Point Hope about two days before he signed the affidavit and his mind was not focused on this issue.⁵⁰ He was not thinking clearly.⁵¹ Officer Lynch stated that moving “off-slope” was not required, but it was the expectation, and still normal practice.⁵² Officer Lynch agreed that it was not a correct statement that he was required to move out of the Borough.⁵³ Officer Lynch again stated his intent was not to mislead or doing anything unethical.⁵⁴

3. Follow up to the internal affairs investigation

Lt. Brymer sustained the finding that Officer Lynch provided a false statement on a

⁴² R. 21; Interview Lt. Brymer and Officer Lynch, August 23, 2013.
⁴³ R. 21; Interview Lt. Brymer and Officer Lynch, August 23, 2013.
⁴⁴ R. 21; Interview Lt. Brymer and Officer Lynch, August 23, 2013.
⁴⁵ R. 20; Interview Lt. Brymer and Officer Lynch, August 23, 2013.
⁴⁶ R. 21.
⁴⁷ R. 21; Interview Lt. Brymer and Officer Lynch, August 28, 2013.
⁴⁸ R. 22; R. 121.
⁴⁹ R. 22; Interview Lt. Brymer and Officer Lynch, August 28, 2013.
⁵⁰ R. 22; Interview Lt. Brymer and Officer Lynch, August 28, 2013.
⁵¹ R. 22; Interview Lt. Brymer and Officer Lynch, August 28, 2013.
⁵² R. 22; Interview Lt. Brymer and Officer Lynch, August 28, 2013.
⁵³ R. 22; Interview Lt. Brymer and Officer Lynch, August 28, 2013.
⁵⁴ R. 22; Interview Lt. Brymer and Officer Lynch, August 28, 2013.

sworn affidavit and submitted this finding to Captain Darryl Holman.⁵⁵ Capt. Holman notified Officer Lynch of the allegations, sent him a Notice of Contemplated Discharge, and provided an opportunity to respond.⁵⁶ Officer Lynch submitted a six-page response.⁵⁷ The response contained a list of officers and their opinions regarding whether officers were required to move of the Borough if they accepted a rotational position.⁵⁸ Many believed that there was a requirement that officers move. Others stated that rotational officers could reside anywhere they liked.⁵⁹ Capt. Holman believed that since Officer Lynch had already admitted that he was not required to move his family off-slope, other officer opinions on the matter were irrelevant to the investigation and proposed discipline.⁶⁰ Capt. Holman recommended discharge from employment.⁶¹

Chief Boyea referred the matter to the Executive Director on October 16, 2013.⁶² The referral summarized the fact finding and Administrative Investigative findings. The referral also outlined the nature of the alleged misconduct. It identified potential issues under *Brady v. Maryland*, and noted Chief Boyea’s opinions regarding the seriousness of Officer Lynch’s conduct.⁶³

D. The referral to the Alaska Police Standards Council and hearing

1. The Executive Director’s referral to the Council recommending revocation

After referral from Chief Boyea, the Executive Director began to investigate whether to recommend revocation of Officer Lynch’s certificate. The Executive Director reviewed the information submitted by Chief Boyea and concluded that the facts supported the allegation.⁶⁴ The Executive Director prepared the accusation, which states that Officer Lynch signed a sworn affidavit containing a statement he knew to be false.⁶⁵ The accusation contends that because of

⁵⁵ R. 18 – 23.

⁵⁶ R. 49; Holman testimony.

⁵⁷ R. 53.

⁵⁸ R. 53 – 61.

⁵⁹ R. 53 – 61. The response also contained a list of character references and argument as to why the proposed discipline was unfair.

⁶⁰ Holman testimony.

⁶¹ Holman testimony.

⁶² R. 13 - 16.

⁶³ R. 13 – 16; 373 U.S. 83 (1963). Chief Boyea stated that he believes Officer Lynch’s conduct violated the Cannons of Police Ethics, the Oath of Office, brought dishonor to the profession and “he has forfeited any right to the privilege and honor of serving the citizens of the North Slope Borough...”

⁶⁴ Executive Director testimony.

⁶⁵ Accusation.

the alleged false statement, Officer Lynch “lacks good moral character and is dishonest.”⁶⁶ The accusation concludes that the Council should exercise its discretion under 13 AAC 85.110(a)(3) to revoke the certificate for a police officer who does not meet the minimum standard of good moral character under 13 AAC 85.010(a).⁶⁷

2. *Officer Lynch’s statements*

In 2010, during deposition in the wage and hour case, Officer Lynch testified that he moved his family from Barrow in 2006, before he accepted the rotational position.⁶⁸ He stated that his family moved most of their things to his mother’s house in Idaho while he was on medical leave.⁶⁹ The rental receipts, airline boarding passes, and testimony of Alicia and Officer Lynch confirm that the family moved back to Barrow and lived there for 6-7 months prior to Officer Lynch’s rotational assignment. Officer Lynch stated that he decided to become a rotational officer, “mostly to move out of the Borough,” and, “provide a different style living for my kids and my wife.”⁷⁰ Officer Lynch testified at hearing that he did not mention his family moving back to the slope in 2006 because he forgot.

At hearing, Officer Lynch testified that he moved his family off-slope for a lifestyle change and because he believed regulation 4.25 required them to move.⁷¹ Officer Lynch did not admit that his statement that he was required to move off-slope was incorrect. Officer Lynch admitted that the Borough did not require or order him to move off-slope, but he still believed it was the policy to move off-slope when he accepted the job.

As to the amended affidavit, Officer Lynch testified that both the original and amended affidavits are accurate - that it was normal practice and also required to move off-slope. Officer Lynch testified he was sick of fighting with the Borough and fighting for his job. He told his attorney that he did not want to argue about the one word, “required.” The amended affidavit was meant to clarify that even though no one in the administration told him he to move off slope, it was the normal practice and the expectation to do so.⁷²

⁶⁶ Accusation.
⁶⁷ Accusation.
⁶⁸ R. 207 - 08; Lynch testimony.
⁶⁹ R. 207 – 08.
⁷⁰ R. 232.
⁷¹ Lynch testimony.
⁷² Lynch testimony.

3. *Opinions regarding Officer Lynch's moral character*

Former Chief Boyea believes that Officer Lynch's career as an officer should be over because he lied under oath.⁷³ The Executive Director was the only other witness to directly address Officer Lynch's moral character in a negative way. The Executive Director stated that Officer Lynch was untruthful during hearing regarding a conversation between the two of them discussing the lawsuit.⁷⁴ She testified that she had no concerns regarding Officer Lynch's honesty during her time at the Borough.⁷⁵

Other witnesses testified generally to issues arising from dishonest officer conduct, but only one specifically addressed Officer Lynch's alleged falsehood and its consequences. Lt. Brymer testified that if an officer lied under oath it would negatively affect moral; other officers would feel they could not trust the officer, and such behavior could destroy officers' pride in their work. Lt. Brymer went on to testify that other officers enjoy working with Officer Lynch. He had not heard any issues with distrust of Officer Lynch, and there were no moral issues that he was aware of due to Officer Lynch's continued employment.⁷⁶ The Executive Director presented no evidence regarding Officer Lynch's fairness, respect for the rights of others, and respect for the law- all aspects of good moral character.

In contrast, Officer Lynch presented thirty-four character reference letters.⁷⁷ The letters come from fellow officers, past and present supervisors, and the community.⁷⁸ The letters generally state that Officer Lynch has integrity, works well in the community, and is professional, courteous, honest, and dedicated.⁷⁹ The letters were supported by testimony. As an example, Sgt. Renschen, his direct supervisor in Point Hope, stated Officer Lynch was trustworthy, honest, and honest in his work. Thirteen current and former officers, including the current Department Chief, testified to Officer Lynch's good moral character, trustworthiness, and

⁷³ Boyea testimony.

⁷⁴ The accusation is based on the alleged false statement in the May 24, 2013, affidavit. The testimony relating to a supposed settlement discussion, unrelated to the affidavit, will not be considered as a basis for revocation.

⁷⁵ Executive Director testimony.

⁷⁶ Brymer testimony.

⁷⁷ Ex. Q. Officer Lynch asked the authors if they would be willing to write the letters on his behalf.

⁷⁸ Ex. Q.

⁷⁹ Ex. Q.

professionalism.⁸⁰ All were aware, to some degree, of the allegation of a false sworn statement.⁸¹

III. Discussion

The accusation against Officer Lynch is that he is dishonest, lacks good moral character, and that the Council should exercise its discretion to revoke his certificate.⁸² The Executive Director has the burden of proving by a preponderance of evidence the accusation against Officer Lynch.⁸³ In effect, the Executive Director's burden is twofold: it must prove Officer Lynch was dishonest, and that this dishonesty demonstrates a lacks good moral character. An unintentional misstatement should not be the basis for revocation.

A. The Council's definition of "good moral character"

"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.⁸⁴

Prior to 2013, a revocation based on lack of good moral character required a finding that the misconduct raised substantial doubt regarding each element- honesty, fairness, respect for the rights of others and the law.⁸⁵ *In re Whisler*, the Council determined that the Executive Director is not required to prove substantial doubt about each of the four elements of good moral character.⁸⁶ The Council determined that it had the discretion to revoke the certificate of an officer who has committed an act that raises substantial doubt about the officer's honesty, fairness, respect for the rights of others, and respect for the law as a whole. Under *Whisler*, "[a] substantial deficit in any combination of these elements could establish an absence of good moral

⁸⁰ Testimony of Officers Renschen, Brent Greenwood, Travis Welch, Kevin Griffin, Curt Hamilton, Ben Hunsaker, Kenon Paul, Steve Whelan, John Datta, Det. Sgt. Nick Sundai, Sgt. James Michels, and Chief Jonaton Owen.

⁸¹ Testimony of Officers Renschen, Brent Greenwood, Travis Welch, Kevin Griffin, Curt Hamilton, Ben Hunsaker, Kenon Paul, Steve Whelan, John Datta, Det. Sgt. Nick Sundai, Sgt. James Michels, and Chief Jonaton Owen.

⁸² Accusation.

⁸³ AS 44.62.460(e)(1).

⁸⁴ 13 AAC 85.900(7).

⁸⁵ *In re: Bowen*, OAH No. 10-0327-POC (Alaska Police Standards Council 2011).

⁸⁶ *Whisler*, OAH No. 13-0473 at 18 (Alaska Police Standards Council 2013).

character, even if for some elements no deficit or doubt was proved.”⁸⁷ Counsel for Officer Lynch requests the return to the *Bowen* standard, requiring a finding of substantial doubt as to each element. This decision declines to readopt the *Bowen* approach. *Whisler’s* well-reasoned analysis remains compelling and that analysis still requires that the elements of good moral character to be considered in the aggregate or collectively.⁸⁸

Additionally, the Council recently rejected a theory that a temporary lack of good moral character in an unusual circumstance could constitute a reason for the Council to decline revocation.⁸⁹ In *Hazelar*, the Council clarified that, “one either has good moral character or one does not have good moral character.”⁹⁰

B. The evidence falls short of supporting a finding that Officer Lynch intentionally submitted a sworn false statement.

The analysis starts with the finding that the sworn statement made by Officer Lynch in his affidavit was false. The evidence establishes that the Department did not require Officer Lynch and his family to move off-slope when he accepted the rotational position in 2007.⁹¹ The salient question, however, is whether Officer Lynch intended to deceive when he submitted the affidavit, or whether the false statement was an accidental oversight. This necessarily entails a consideration of Officer Lynch’s state of mind on March 24, 2007.

The facts of this case support a conclusion that Officer Lynch was not deliberately trying to deceive when he signed his affidavit. First, he did not write the affidavit. His attorney drafted the affidavit, and then asked Officer Lynch to review and sign it.

Second, at the time that he reviewed the affidavit, Officer Lynch’s state of mind was disturbed. He was upset by the abrupt order transferring him back to Barrow. He believed that the order was retaliatory. He contacted his attorney, who suggested they might be able to stop

⁸⁷ *Id.*

⁸⁸ *Whisler*, at 16.

⁸⁹ *In re Hazelar*, OAH No. 13-0085-POC (August 27, 2014).

⁹⁰ *Hazelar*, at Order Adopting the Executive Director’s Proposal for Action And the Recommended Decision As Revised By This Order, and Revoking Cpl. Hazelar’s Police Certificate.

⁹¹ The use of “required” and who was doing the requiring may be subject to different interpretations. Based on the underlying motion for injunction, this decision presumes that the either the Borough or the Department required Officer Lynch to move. In addition, the Executive Director paraphrased the statement at issue, saying Officer Lynch claimed he was “ordered” or “forced” to move. The affidavit used and the internal affairs investigation focused on the word “required.” There is no evidence Officer Lynch stated he was ordered off-slope.

the transfer by asking to have it enjoined by the judge in the wage and hour case.⁹² His upset state of mind also makes it somewhat more likely that he did not read the affidavit carefully. This is supported by Officer Lynch's statements to Lt. Brymer that his mind was not really on the affidavit, and he was not thinking clearly. He testified at the hearing that he quickly read the document before signing it.

Third, the incorrect statement was on page five of seven, in the middle of a paragraph.⁹³ It was not underlined, or otherwise highlighted. In general, the affidavit addressed major issues of the dispute between Officer Lynch and his employer, and reasons why Officer Lynch believed the transfer was retaliatory. The general point of the paragraph containing the false statement was that Officer Lynch's family did not live in Barrow, so keeping the rotational schedule was important to Officer Lynch.

The Executive Director argues that the issue of the alleged policy was of crucial importance to the affidavit. To the Executive Director, the allegation that Officer Lynch was required to move out of Barrow is central to his argument that the transfer to Barrow was retaliatory. Reading the affidavit as a whole, however, does not support the Executive Director's interpretation. The alleged requirement was not a major issue in the overall argument that the transfer was retaliatory.⁹⁴ This supports an inference that he did not notice the issue regarding the alleged policy that was in the middle of the paragraph.

Fourth, at least in 2004, at the time that he signed on the memorandum to Chief Paul Carr, Officer Lynch and others believed that the Department required officers to live outside the Borough in order to participate in the rotational program. This good-faith belief that the policy existed at one time makes it more believable that Officer Lynch would not have picked up on the misstatement in the affidavit. Taken together, these circumstances make it more likely than not Officer Lynch overlooked the statement regarding the alleged requirement.

Fifth, Officer Lynch's reaction to Lt. Brymer's bringing the misstatement to his attention

⁹² Lynch testimony.

⁹³ R. 75.

⁹⁴ A full reading of the affidavit and motion indicate that Officer Lynch felt the unexpected transfer from Point Hope to Barrow harmed him in multiple ways. Officer Lynch argued that the transfer was retaliatory and not based on misconduct. This in itself is an alleged harm. The transfer caused Officer Lynch to go from a two-week-on, two-week-off schedule to working a regular full-time schedule. The motion characterizes the transfer akin to a demotion; not a lateral career move. Officer Lynch also argued that he was treated differently than other officers due to the abrupt and permanent nature of the transfer.

tends to support his testimony that the use of the word “required” was an oversight, not a deliberate deception. Officer Lynch admitted to Lt. Brymer that “required” was not the correct word choice. Soon thereafter, he filed an amended affidavit with the court. If Officer Lynch had deliberately chosen the word “required” for his affidavit, he most likely would have defended the use of that word to Lt. Brymer. Instead, he seemed somewhat taken aback by the word “required” when showed that it was in the motion filed by his attorney.

The Executive Director argues that these actions show the opposite—that Officer Lynch’s admission to Lt. Brymer and then filing an amended affidavit is a the smoking gun that proves that Officer was lying in the affidavit, and that he knew he was lying. Although Officer Lynch’s action do tend to show that, had he focused on the question, he would have known that he had not been required to move, they do not show culpability. Rather, they support his theory that he was careless in signing his affidavit.

The Executive Director also argues that Officer Lynch was dishonest in testimony at the hearing when he testified that he believed the Borough’s regulation 4.25 required the move. The Executive Director is correct that Officer Lynch’s testimony that regulation 4.25 required him to move off-slope was not persuasive—the regulation, although unclear, does not state rotational officers must reside outside of Barrow.⁹⁵ Officer Lynch’s testimony on this topic appeared to be a poorly chosen litigation strategy, not dishonesty.

Sixth, the very fact that Officer Lynch was openly filing an affidavit in court, against his employer, lends credence to a finding that he did not intend to deceive. If he knew the statement was false, he would also know that his employer would be able to refute the statement. Unlike the Council’s decision in *Hazelar*, where Council found it more likely that the respondent was deliberately deceptive because the respondent’s alleged dishonesty occurred only when it was likely he would not get caught, here, Officer Lynch’s misstatement was almost certain to be

⁹⁵ Given the record overall, it is more likely than not that Officer Lynch was aware, in March 2007, that the Department would not require him to move out of Barrow. Officer Lynch was back in the Borough, on light duty, in April 2006. Officer Lynch has shown himself to be involved in the Department and he was interested in the rotational position. And although several officers testified that it was the expectation that rotational officer’s move off-slope and knew of Officer Paskewitz’s earlier issues, the fact remains that Officer Paskewitz and Officer Churchill were living in Barrow and rotating to the village. Based on this and the fact that the pay scales were now the same, Officer Lynch knew or should have known that living off-slope was no longer a requirement. Yet, this finding does not shed much light on the main issue in this case—whether his misstatement regarding the requirement was a deliberate falsehood or an oversight.

caught.⁹⁶ Moreover, a false statement would have severe deleterious consequences to Officer Lynch—making it less likely that his injunction would succeed, and giving the Department ammunition to use against him. In short, a knowing false statement by an officer who is already under the microscope defies logic. This also makes it more likely that the statement was an oversight.

The Executive Director attempts to counter this evidence by identifying alleged contradictory positions taken by Officer Lynch. For example, in 2010 Officer Lynch said that he wanted the rotational position so he could move out of the Borough and give his family a lifestyle change. In contrast, the affidavit asserted that he was required to move, and Officer Lynch testified at the hearing that he interpreted the regulation to impose this requirement. These statements, however, are not inherently contradictory. For example, one may want overtime and still be required to work overtime.

The Executive Director also identifies another alleged contradictory statement related to Officer Lynch’s testimony about when he moved off-slope. The Director argues that if Officer Lynch had already moved out of Barrow when he joined the rotational program, he could not have been required to move out for the rotational program. As noted, the Lynches did move out of Barrow when Officer Lynch went on medical leave, but the evidence shows that they moved back in fall 2006. Thus, neither of the alleged contradictory statements give significant support to a finding that Officer Lynch knowingly submitted a false sworn statement.

The Executive Director also argues that a deposition given in the wage and hour litigation demonstrated that Officer Lynch knows precisely what “requires” means and deliberately used it falsely. This argument revolves around a request that Officer Lynch, “admit you were not required to stay at police department headquarters during your tour of duty.”⁹⁷ Regulation 4.25 states that, “[r]otational Officers will be housed in the TDY quarters at the Police Station,” but goes on to say officers may find other housing at their own expense.⁹⁸ After questioning at his deposition, Officer Lynch admitted that the policy states an officer could find his own accommodation – even though no officer ever has, and it would be difficult and expensive were

⁹⁶ Compare *Hazelar*, at 25.

⁹⁷ R. 249.

⁹⁸ Although the regulation allows an officer to find village housing at their own expense, none has ever done so; village housing is difficult to obtain and very expensive.

one to attempt it. This evidence, however, does not help the Executive Director's case. It demonstrates that the *de facto* effect of the policy was that all officers lived in TDY housing, just as the *de facto* effect of the rotational program was the most officers lived outside Barrow when not on rotation. It also indicates that Officer Lynch may not be as attentive to word choice as one would hope—which supports that Officer Lynch did not deliberately make a false statement in his affidavit.

Nothing in this analysis excuses Officer Lynch's conduct. A veteran police officer should know that an affidavit is sworn testimony. The Council's past cases emphasize the utmost importance of honesty in police officers. As Chief Owen testified, however, the unfortunate reality is that strict attention is not always paid to affidavits. Yes, they are signed under oath and penalty of perjury, but they are drafted by others and are often prepared in the course of litigation. Here, considering the totality of the evidence, this decision concludes that it is more likely than not that Officer Lynch's false statement was unintentional.

C. Officer Lynch's sworn false statement does not raise substantial doubt about his honesty.

A false statement by an officer always raises doubt about his or her honesty. And a sworn false statement filed to the court is more troubling. If this decision found that Officer Lynch intentionally made a false statement, revocation would be appropriate, even though the false statement was not submitted in the course of his official duties. But that is not the case. The inquiry then is whether the conduct would cause a reasonable person to have substantial doubts about an individual's honesty.

Officer Lynch failed to recognize a false statement in a document he swore was true. He corrected the error when it was pointed out and he answered honestly in response to the internal investigation. Officer Lynch, as noted, should have taken greater care in reviewing the document. It shows a lack of due diligence and raises some doubt about his honesty. It is possible Officer Lynch could make similar errors in his regular police work if he is in a rush, upset, or given a document prepared by someone else. But the record does not contain evidence of such errors in his ten years as an officer.

The affidavit was not signed in the course of his duty. The false statement was not directly related to his duties to the public, directed toward his superiors, and did not arise during a formal investigation.⁹⁹

Officer Lynch's current co-workers or supervisors, who know of the false statement, do not doubt his honesty. Instead, the record contains statements from many who work with Officer Lynch and believe he is honest. Some weight must be given to these statements, even though they come from friends and supporters. Chief Owen testified that there have been only good reports and no problems with Officer Lynch since he took over as chief.¹⁰⁰ Chief Owen is aware of the misstatement in the affidavit and does not consider it a significant issue.¹⁰¹ Chief Owen testified that he trusts Officer Lynch to work independently and would consider reassigning him to a village.¹⁰² Lt. Brymer testified that he wanted to find that Officer Lynch intentionally submitted the false statement but could not make that determination. On the other hand, former Chief Boyea and the Executive Director doubt Officer Lynch's honesty. These are opinions that disagree held by reasonable people. The evidence as a whole, however, including Officer Lynch's demeanor at hearing, does not give rise to substantial doubt as to his honesty.

D. The evidence does not raise substantial doubt about other aspects of Officer Lynch's moral character.

Good moral character is defined as the absence of acts or conduct that would raise substantial doubt about an officer's honesty, fairness, respect for the rights of others, and respect for the law. The Council should consider all aspects of a person's character when determining if they have good moral character.¹⁰³ The facts in this record raise doubt about Officer Lynch's honesty, but as discussed, they do not raise substantial doubt. The Executive Director did not address the elements of fairness, respect for the rights of others and the law. The revocation recommendation is based on dishonesty alone and dishonesty in a single sentence, arguably a single word, in an affidavit prepared by his attorney is a civil lawsuit against his employer.

⁹⁹ See *State v. Public Employee Ass'n*, 257 P.3d 151, 162 (Alaska 2011).

¹⁰⁰ Chief Owen, an officer since 1988, previously worked for the Department, and was most recently Director of Public Safety in Palmer, before returning to the chief position in January 2015. Chief Owen developed the internal affairs investigation policy for the Department, conducted and was involved with many investigations throughout his career.

¹⁰¹ Owen testimony.

¹⁰² Owen testimony. Village positions have little direct supervision.

¹⁰³ 13 AAC 85.900(7).

This proposed decision maker is wary of going from having to prove doubt as to all four elements of good character just a few years ago, to basing a decision to revoke an officer's certificate on the single element of honesty, with nary a mention of the other elements, let alone consideration of "all aspects" of character. As noted, the record contains numerous credible statements praising Officer Lynch's character. The circumstances of the false statement alone do not support a finding that Officer Lynch lacks good moral character.

E. The Council should not revoke Officer Lynch's certificate.

The Council's regulations grant it discretion to allow a police officer to remain certificated, even if the facts show that the officer lacks good moral character.¹⁰⁴ As stated, the evidence here supports a finding that Officer Lynch has good moral character. In the event the Council concludes otherwise and finds that Officer Lynch does lack good moral character, revocation is still inappropriate.

1. Officer Lynch's conduct is not on par with prior revocation cases

Officer Lynch's behavior is less egregious compared with recent cases before the Council. Officer Lynch filed the affidavit in a civil lawsuit, not in the course of duty. Unlike other revocation cases, he was not performing a police duty; he did not submit a false police report; he did not have consensual sex with a victim of domestic violence hours after responding to the scene; he did not use police databases for personal gain, and he did not lie during an official investigation.¹⁰⁵ Officer Lynch's accusation is based on a single misstatement, not a pattern of deceit. In *Hazelar* the Council revoked an officer's certificate for dishonesty alone. The *Hazelar* facts supported revocation much more than they do in Officer Lynch's case. There, the officer told a confidential informant she could ignore a subpoena, was not forthright at multiple stages during the investigation, and had a history of providing "misleading and disingenuous" to a magistrate in a search warrant proceeding.¹⁰⁶ Officer Lynch's error falls far short of this.

2. The Council should be aware of Officer Lynch's defenses of retaliation and bias.

Officer Lynch argues that the fact finding, investigation, and referral to the Council are the result of bias and retaliation. Officer Lynch claims Chief Boyea does not like him and

¹⁰⁴ 13 AAC 85.110(a)(3).

¹⁰⁵ See *Bowen*; *Whisler*; *Hazelar*

¹⁰⁶ *Hazelar*, Executive Director's Proposal for Action, at 7 – 9 (adopted by the Council August 27, 2014).

wanted an excuse to fire him because of the wage and hour lawsuit and union activity.¹⁰⁷ Officer Lynch contends that other officers in the Department committed more egregious acts and were not referred to the Council. There is some support for this in the record.¹⁰⁸ Chief Boyea referred only three officers to the Council for possible revocation.¹⁰⁹ Two of the three were involved in the effort to unionize- Officer Lynch, president of the union effort, and Officer Gary Moore, the vice president of the union effort.¹¹⁰ Chief Owen, a former public safety director with a great deal of experience with officer discipline, stated that the discipline initiated and taken against Officer Lynch seems retaliatory.¹¹¹

Officer Lynch also paints that Executive Director as not credible, potentially unethical, and biased.¹¹² Officer Lynch's allegations against the Executive Director are not persuasive. The Executive Director's testimony and presentation were credible and professional throughout. Her position does not require her neutrality. The Executive Director is akin to a prosecutor trying to decide whether enough evidence exists to bring a charge, but with a much lower burden of proof. Officer Lynch makes much of her response to Lt. Brymer that moving off-slope was never part of the program. Like Officer Lynch's seemingly contradictory statements, hers were not. The Department never ordered someone off-slope and by the time Officer Lynch went

¹⁰⁷ Officer Lynch and other officers attempted to start a union. It never materialized.

¹⁰⁸ Officer Lynch's response to the proposed discipline, which verified that there was confusion regarding where rotational officers were to live, was not considered by the Department. The witnesses for the Department said there was never a policy requiring rotational officers to move off-slope even though there was.

¹⁰⁹ Boyea testimony.

¹¹⁰ The third was referred for sexual misconduct. The circumstances of that referral are not in the record.

¹¹¹ According to Chief Owen, the investigation files were in disarray when he arrived as Chief. Officer's own IA files were in their offices and at least one IA that he had conducted on an officer was no longer in the officer's file. Officer Lynch is the only officer with a "Brady" file, even though it appears other officers committed instances of dishonesty. These officers were not referred to the Council.

¹¹² Officer Lynch moved to dismiss prior to hearing, at the close of the Executive Director's case in chief and at the end of hearing. The original motion had three bases 1) misconduct of official position (Executive Director), 2) due process rights violation, 3) equal protection violation. Officer Lynch asserts that by bringing the accusation against him, the Executive Director violated the Executive Branch Ethics Act. The Office of Administrative hearings does not have jurisdiction, in this the Alaska Police Standards Council proceeding, to make ethics branch violation determinations. Officer Lynch was afforded due process rights through the hearing process and availability of Superior Court review. Lastly, the claim of equal protection violations is not compelling. Officer Lynch's case was referred to the Executive Director. She has referred each instance of alleged dishonesty to the Council.

The Executive Director filed a motion to quash Sheldon Schmitt's subpoena. It was granted orally. Chief Schmitt is currently Chief of Police in Sitka and serves as the Chair of the Council. Chief Schmitt was a Department officer. He left the Borough in 2002. Officer Lynch hoped to elicit information regarding some alleged harm bestowed upon Chief Schmitt's career by the Executive Director. The motion to quash was granted because actions unrelated to the rotational program, occurring more than a decade ago, are too tenuous to the case at hand.

rotational where he lived was not a concern to the Department. Her statements regarding Officer Lynch moving out of Barrow before he went rotational were true.¹¹³

Officer Lynch raised particular concern with the Executive Director's participation in the Lt. Brymer interviews and the potential conflict created. The Executive Director received the Officer Lynch referral and contacted John Skidmore, Director of the Alaska Department of Law's Criminal Division and legal advisor to the Council, to discuss whether to file an accusation and identify any potential ethical concerns.¹¹⁴ The Executive Director explained to Mr. Skidmore that she had worked with Officer Lynch, served as his Chief, and been a witness in the underlying civil case.¹¹⁵ Mr. Skidmore advised that there would not be an ethical violation associated with filing because she had not been the Chief for some time, she was not involved in the administrative investigation, and the accusation was related to a civil suit and not related to her time as Chief.¹¹⁶ The Executive Director referred Officer Lynch's case to the Council as she has in each instance of reported dishonesty.¹¹⁷

Retaliation and bias by the Borough or Executive Director are not viable defenses to an accusation of giving a sworn false statement. Casting aspersions against accusers is a common attempt to distract from the task at hand. Officer Lynch's actions are under scrutiny, not the Borough's, the Executive Director's, or the Council's. Still, the Council should be aware of the allegations claimed by Officer Lynch.¹¹⁸ Not only does the Council strive to ensure a professional police force, it strives to maintain a fair and diligent revocation consideration process. The task before it is weighty- whether or not to revoke a certification, an action with likely career-ending consequences. Ensuring the process is not tainted and free from impropriety is paramount. Being aware of these allegations ensures the Council can consider, what if any, weight they should be given.

¹¹³ During the fact finding interview, the Executive Director told Lt. Brymer Officer Lynch and his family moved out of Barrow in 2006. Like Officer Lynch, she forgot the family moved back to Barrow.

¹¹⁴ Executive Director testimony; Skidmore testimony.

¹¹⁵ Executive Director testimony; Skidmore testimony. At the hearing, Mr. Skidmore did not remember that the Executive Director had told him that she had been interviewed as part of the investigation into Officer Lynch's alleged false statement Skidmore testimony. The Executive Director testified credibly that she did inform Mr. Skidmore that she was interviewed during the investigation into Officer Lynch's alleged false statement.

¹¹⁶ Skidmore testimony.

¹¹⁷ The Executive Director has reviewed thirty-four reports of misconduct for truthfulness since coming into the position. She has referred thirty-one of thirty-four to the Council. The only reports of misconduct the Executive Director did not refer to the Council for revocation involved officers who were not yet certified.

¹¹⁸ If the Council decides that the allegations of bias and retaliation warrant consideration, such considerations would not impact analysis of Officer Lynch's actions, but might serve as a slight mitigator against revocation.

3. *Brady and Giglio* concerns do not warrant revocation.

Brady and *Giglio* are two cases that require prosecutors to disclose exculpatory or impeachment evidence to defense counsel.¹¹⁹ Prosecutors must disclose any finding of misconduct that reflects on truthfulness or bias, whether a pending charge of criminal conduct or credible allegation of misconduct.¹²⁰ *Brady* and *Giglio* issues can seriously compromise the district attorney's ability to file a charge and move forward on a prosecution.

The Executive Director argues that Officer Lynch's sworn false statement poses significant *Brady* issues and supports revocation of his certification. The record here does not necessarily support this assertion. Chief Boyea felt Officer Lynch's misstatement constituted a *Brady* issue and he was compelled to bring the issue to the Fairbanks district attorney and the Council's attention.¹²¹ In December 2013, Chief Boyea brought the issue to both then Assistant District Attorney Brian Sullivan and then District Attorney Michael Gray in Fairbanks.¹²² Both informed Chief Boyea that it was not a "big deal," indicating they did not have *Brady* concerns.¹²³ Nonetheless, the Department deemed Officer Lynch a "Brady cop," and notice of the sustained finding of an untrue statement was placed in his file.¹²⁴

At hearing, prosecutors addressed *Brady* concerns on behalf of the Executive Director.¹²⁵ The record indicates that even among prosecutors the exact scope of *Brady* issues is not set in stone.¹²⁶ Officer Lynch continues to work at the Department and potential *Brady* hurdles have yet to cause concern among his supervisors. Therefore, Council should not consider *Brady* issues a significant basis for revocation.

IV. Conclusion

The Executive Director proved that Officer Lynch submitted a sworn false statement. However, it did not establish that Officer Lynch intended to deceive. Nor did the Executive Director show that Officer Lynch lacks good moral character. After careful consideration, the

¹¹⁹ *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

¹²⁰ Marshall testimony. The standard practice is for a prosecutor to bring to court any potentially exculpatory information for in camera review.

¹²¹ Boyea testimony.

¹²² Boyea testimony.

¹²³ Boyea testimony.

¹²⁴ Owen testimony. He is the only officer known to have a "Brady file" in the Department.

¹²⁵ DA Marshall, DDA Campion.

¹²⁶ The Alaska Supreme Court is currently considering this and other police certification issues in *Alaska Police Standards Council v. Parcell*, S15364 (draft circulating as of April 1, 2015).

Council declines to revoke Officer Lynch's certificate. Officer Lynch will receive no benefit of the doubt regarding any future allegation of misconduct or dishonesty.

DATED: April 1, 2015

Signed

Bride Seifert
Administrative Law Judge

Adoption

The undersigned 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 20th day of April, 2015.

By: *Signed*

Sheldon Schmitt
Chair, Alaska Police Standards Council

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