

**BEFORE THE ALASKA POLICE STANDARDS COUNCIL**

In the Matter of

WILLIAM KEMPER

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OAH No. 15-1383-POC  
Agency No. APSC 2014-25

**FINAL  
DECISION**

**I. Introduction**

In July 2014, Respondent William Kemper was one of three Anchorage Airport Police and Fire Department K-9 officers who, during a training exercise, briefly lost track of, then recovered, an explosives training aid. One year later, the Executive Director of the Alaska Police Standards Council filed an accusation seeking to revoke Mr. Kemper's Alaska Police Officer Certification as a result of this incident. At hearing, however, the Executive Director did not meet his burden of showing that revocation is mandatory, nor that it would be appropriate under the circumstances of this case. Indeed, the evidence showed that certain basic allegations in the Amended Accusation against Officer Kemper were simply wrong, having been based on incomplete and inaccurate information provided by AAPFD. The Executive Director's requested revocation of Officer Kemper's certification is therefore denied.

**II. Factual and Procedural History**

**A. AAPFD K-9 unit overview**

William Kemper was certified as an Alaska police officer on July 12, 2006, and joined the Anchorage Airport Police & Fire Department on May 5, 2008.<sup>1</sup> AAPFD is the law enforcement organization responsible for safety and security at Ted Stevens Anchorage International Airport. Organizationally, AAPFD is part of the Department of Transportation and Public Facilities ("DOT"). Its officers are jointly trained and certified as police officers and fire fighters.

During the time at issue in this case AAPFD included a four-officer canine unit run in cooperation with the Transportation Security Administration (TSA). The AAPFD K-9 officers received specialized training through TSA, used TSA-owned dogs, and were required to be

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<sup>1</sup> R. 21.

recertified annually by TSA.<sup>2</sup> The agencies' relationship was finalized through a Statement of Joint Objectives, referred to as "the SOJO."<sup>3</sup>

TSA Field Canine Coordinator David Vasek oversaw the K-9 training activities and the AAPFD K-9 program's compliance with TSA policy and objectives.<sup>4</sup> During the time at issue in this case, and as of the time of the hearing, AAPFD was overseen by Chief Jesse Davis.<sup>5</sup> Chief Davis was not a proponent of AAPFD having a separate K-9 unit, and the K-9 program was formally discontinued shortly after the events giving rise to this appeal.<sup>6</sup>

**B. The canine program, canine training, and training aids**

*I. K-9 Unit structure and training overview*

Before they can finally join the K-9 unit, officers must complete TSA's ten-week training course at Lackland Air Force Base in Texas. This training program focuses on becoming a dog handler; it is not an explosives course.<sup>7</sup> Most of the instruction focuses on caring for the dog and performing the responsibilities of a handler, such as interpreting the dog's cues, keeping the dog motivated, et cetera.<sup>8</sup>

During the period in question, the department had three other canine handlers – Wesley McQuillin, Dustin Schmidt and Herman "Scott" Trent. Officer Trent was the most senior canine officer, and the more junior officers generally looked to him for guidance on policies and procedures.<sup>9</sup> The canine officers usually worked in two-person shifts, although the four officers sometimes overlapped for part of the week.<sup>10</sup>

Once officers complete the Lackland program, they still must be certified by TSA, and then recertified each year.<sup>11</sup> Beyond the formal program at Lackland and the annual TSA certification, explosives detection canines participate in frequent training in order to maintain proficiency. Training is constant, with TSA requiring canine officers to log a certain number of training hours each week.<sup>12</sup>

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<sup>2</sup> Vasek testimony.

<sup>3</sup> Vasek testimony; McQuillin testimony, Trent testimony. Apparently because the SOJO is considered a confidential federal security document, it is not included in the agency record in this case, and the Executive Director did not submit it as an exhibit, under seal or otherwise.

<sup>4</sup> Vasek testimony.

<sup>5</sup> Chief Davis joined AAPFD in 2008, and became Chief in 2011.

<sup>6</sup> Trent testimony; Vasek testimony; Ex. 2-1, p. 9.

<sup>7</sup> McQuillin testimony; Vasek testimony.

<sup>8</sup> McQuillin testimony.

<sup>9</sup> McQuillin testimony.

<sup>10</sup> McQuillin testimony; Trent testimony.

<sup>11</sup> McQuillin testimony; Vasek testimony.

<sup>12</sup> McQuillin testimony.

TSA and other AAPFD K-9 trainings are conducted in a variety of locations and circumstances, including, frequently, training in public areas.<sup>13</sup> Officers train in any area where they might be required to respond in the event of a bomb threat.<sup>14</sup> When training on airport grounds, training may be conducted “anywhere in the airport, night or day.”<sup>15</sup> An example of an airport training might involve an aid being hidden in a bag under a seat at a gate, and a handler then being called in to search several gates. Other times, aids are hidden throughout a larger area, for example, an entire terminal.

In addition to the airport terminal itself, the AAPFD officers trained at locations including rental car lots, open fields, hotels, parking lots, and on airplanes.<sup>16</sup> TSA Field Canine Coordinator David Vasek explained that officers “have to train in public areas due to the current threats in the world; we have to train realistically.”<sup>17</sup>

Trainings require, at a minimum, two officers – one handling the dog, and the other observing both the dog and the handler. The four AAPFD officers conducted trainings in groups of two, three, or four, depending on the circumstances. For the majority of the week, only two K-9 officers were on shift at one time. Accordingly, most training involved two officers - with one officer first running his dog through the scenario while the other one took notes and monitored the area, and the officers then switching roles so the second officer could run his dog through the scenario.<sup>18</sup>

## 2. *Training aids*

When training explosive-detection dogs, officers use “training aids” containing explosives. These training aids are not “bombs” or “live explosive devices,” but they do contain explosive material.<sup>19</sup>

Various different types of explosives are used in training. The training aid at issue in this case was “water gel” – a gelatinous ammonium nitrate mixture packaged to approximately the size and shape of a hot dog.<sup>20</sup> Water gel is a “fairly innocuous” training aid.<sup>21</sup> Because it is a

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<sup>13</sup> Vasek testimony.

<sup>14</sup> Vasek testimony.

<sup>15</sup> Vasek testimony.

<sup>16</sup> Vasek testimony.

<sup>17</sup> Vasek testimony.

<sup>18</sup> McQuillin testimony.

<sup>19</sup> Spinde testimony; Whitehurst testimony.

<sup>20</sup> Whitehurst testimony; Trent testimony; R. 289.

<sup>21</sup> Spinde testimony.

"secondary explosive," water gel cannot explode without an initiator, such as a blasting cap.<sup>22</sup> In the absence of an initiator, water gel melts, rather than explodes, if exposed to high heat.<sup>23</sup>

TSA monitors and controls access to the training aids used by K-9 officers. TSA stores the training aids in a secure area within the airport, and canine handlers must check them in and out through a written log.<sup>24</sup>

In July 2014, TSA policy required K-9 handlers to "maintain constant accountability" for the training aid "at all times" to make sure the training aids were not lost or stolen.<sup>25</sup> While TSA policy has since changed to require "eyes on the training aid at all times," this requirement was not in place in July 2014.<sup>26</sup> Rather, K-9 handlers were expected to maintain "visual accountability of the training area."<sup>27</sup>

The actual monitoring of training aids during training is made logistically difficult by the nature of the trainings. When officers are conducting training within the airport, for example, training aids are hidden throughout an entire concourse or gate section, including in secure hallways, bathrooms, and individual gates.<sup>28</sup> Additionally, if an officer were closely watching the hidden training aid each time, the detection canines would pick up on that visual cue, and start only "working" in a particular area if it is being watched – an outcome that would undermine the effectiveness and purpose of the training itself.<sup>29</sup> But handlers were required to "know where the training aids are" and "maintain accountability that they stay there."<sup>30</sup>

### **C. Misplaced training aids within canine programs**

Both locally and nationally, canine officers conducting training exercises have, on occasion, misplaced training aids during training exercises.<sup>31</sup> TSA's training aids contain printed instructions for any members of the public who find such aids.<sup>32</sup>

#### *1. Policies and procedures relating to loss of training aids*

Chapter P200 of the AAPFD Policy and Procedures governs the Canine Unit. Section P200 IV.C.F.j of the AAPFD Policy & Procedures provides: "In the event that a training aid is

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<sup>22</sup> Whitehurst testimony; Trent testimony.

<sup>23</sup> Whitehurst testimony; Trent testimony.

<sup>24</sup> Vasek testimony; McQuillin testimony; Trent testimony.

<sup>25</sup> Vasek testimony.

<sup>26</sup> Vasek testimony.

<sup>27</sup> Vasek testimony.

<sup>28</sup> Trent testimony; Vasek testimony.

<sup>29</sup> McQuillin testimony.

<sup>30</sup> Vasek testimony.

<sup>31</sup> Vasek testimony; Spinde testimony; Ex. 2-1, p. 17.

<sup>32</sup> McQuillin testimony; Spinde testimony.

damaged or some/all of the source is lost or destroyed, the handler will write a report and file it to the original case. The handler will notify the Unit Commander and the TSA field representative."<sup>33</sup> However, AAPFD has no written policy specifically addressing the procedures to be followed when a training aid is temporarily misplaced but then quickly recovered.

Section P200 IV.C.F.i directs that "all training aids shall be safely cared for and properly documented in accordance with TSA procedures." The "Statement of Joint Objectives" (SOJO) governing the relationship between AAPFD and TSA is a confidential federal security document and is not included in the evidentiary record in this case. Although Mr. Vasek testified that the SOJO requires handlers to notify the Field Canine Coordinator if a training aid is lost, the exact language of any requirement in that regard was never established in this hearing.<sup>34</sup>

### 2. *Lost training aid incidents*

At the hearing in this matter, various former K-9 officers testified about local incidents in which training aids went missing, including:

- A passenger locating and turning into airport authorities a training aid that had been hidden in an airport bathroom;
- TSA officers picking up a backpack containing a training aid while a K-9 officer was briefly distracted by a passenger's question;
- A custodian locating a training aid in a trash can;
- A TSA K-9 trainer having to use his body to physically block a rental car from being driven away with a training aid; and
- A training aid being partially eaten by a bird.<sup>35</sup>

With the exception of the bird eating part of an aid - which was reported because the bird's actions changed the actual volume of the explosive material in the training aid - these incidents of temporary loss were not reported either to AAPFD or the TSA.<sup>36</sup>

### 3. *April 2014 incident*

On April 21, 2014, while training at an airport car rental facility, AAPFD K-9 officers Trent and Schmidt inadvertently lost an explosive training aid for roughly five hours.<sup>37</sup> In that incident, after an AAPFD officer placed a C-4 explosive training aid on the bumper of a vehicle, a

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<sup>33</sup> R. 56.

<sup>34</sup> See Vasek testimony ("if a training aid is unaccounted for, it requires instant notification to myself"); McQuillin testimony ("it doesn't say immediately notify").

<sup>35</sup> McQuillin testimony; Spinde testimony; Vasek testimony; Ex. 2-1, p. 17.

<sup>36</sup> Spinde testimony; Trent testimony; Ex. 2-1, p. 17.

<sup>37</sup> Davis testimony; Ex. 2-3.

rental company employee then mistakenly rented that vehicle to a member of the public, who drove it away before anyone realized the mistake.<sup>38</sup>

Officers Trent and Schmidt did not report this incident to TSA Field Canine Coordinator Vasek or Chief Davis immediately upon realizing the training aid vehicle was missing. Rather, they reported it only after first driving around to look for the missing aid.<sup>39</sup> When they were still unable to locate the missing vehicle half an hour after first discovering the training aid was missing, they notified Mr. Vasek and Chief Davis that the aid was missing.

Because the location of the training aid was unknown, AAPFD enlisted the assistance of the Anchorage Police Department, which alerted its officers to be on the lookout for the missing rental car. The FBI and ATF were also notified, as was the employer of the driver who had rented the car. After more than five hours, the missing aid was eventually located and retrieved by AAPFD officers.

At some point, local, state and national news media became aware of this incident. After the training aid was recovered, Chief Davis held an informal press conference at which he stated that neither the driver of the rental car, nor the general public, were ever in danger during the incident. News articles quoted Chief Davis as saying that "the amount of explosives in the vehicle was small and didn't pose a threat to the driver or the public," that "the driver of the rental was never in danger," and that "[w]hen we say 'explosives,' it's not a stick of dynamite[:] it's a very small piece of explosive."<sup>40</sup>

AAPFD did not conduct an administrative investigation of the April 2014 incident, and neither officer involved was disciplined as a result of that incident.<sup>41</sup> All members of the AAPFD K-9 team were aware that no discipline was imposed on either of the two officers involved.<sup>42</sup>

Following the April incident, Chief Davis issued Officer Trent a non-disciplinary Letter of Instruction requiring him to "develop an approved operating procedure" to prevent a similar occurrence in the future.<sup>43</sup> Chief Davis further tasked Officer Trent with conveying these procedures to the rest of the K-9 team. One procedural change that arose was a decision that, during vehicle training, the team should get the keys to all vehicles being used for training. Neither a formal "key" policy nor any other policies related to this issue were reduced to writing.

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<sup>38</sup> Trent testimony; Vasek testimony.

<sup>39</sup> Trent testimony.

<sup>40</sup> Ex. 2-3, pp. 1, 2.

<sup>41</sup> Davis testimony; Trent testimony.

<sup>42</sup> Trent testimony; McQuillin testimony.

<sup>43</sup> R. 42.

Another recommended change was for the officers to conduct trainings in groups of three, rather than in pairs, to increase the number of eyes on the training area. However, AAPFD continued to schedule the K-9 officers mostly in two-person shifts, so, as a practical matter, most of the training continued to be done in pairs.<sup>44</sup>

Also following the April 2014 incident, TSA Field Canine Coordinator Vasek conducted a brief, informal training for the K-9 officers, at which they reviewed a powerpoint presentation about explosives training aids generally.<sup>45</sup> The training covered the obligation to report missing aids to the field canine coordinator, but did not specifically identify a need or requirements to notify the coordinator "immediately" in such an instance, and did not specifically address what to do if a training aid were briefly misplaced but then quickly recovered.<sup>46</sup>

#### **D. July 30, 2014 incident**

The incident giving rise to this case unfolded during a routine training exercise conducted by Officers Trent, Kemper, and McQuillin on July 30, 2014. As they had done many times before, the officers were using the DOT vehicle storage lot in Anchorage.<sup>47</sup> This is the same lot where the TSA had recently conducted the officers' annual certification training, and the officers believed it to be a secure lot for training purposes.<sup>48</sup>

When they arrived at the DOT lot, Officer Trent went into the office to speak with DOT shop foreman Brian Flaherty about their training plans. The three rows of vehicles they were using for the training were the exact same rows that had been used in the officers' recent TSA recertification training.<sup>49</sup> Officer Trent left that meeting with the understanding that the portion of the lot where the officers intended to train was available for training, with Mr. Flaherty holding the only keys for those vehicles.<sup>50</sup> Because this was his understanding, Officer Trent did not take the vehicle keys from Mr. Flaherty.<sup>51</sup>

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<sup>44</sup> McQuillin testimony.

<sup>45</sup> Vasek testimony.

<sup>46</sup> McQuillin testimony; Trent testimony. Mr. Vasek did not testify about the content of the training, and the powerpoint presentation is not part of the record.

<sup>47</sup> McQuillin testimony; Flaherty testimony.

<sup>48</sup> McQuillin testimony; Trent testimony; Spinde testimony; R. 52, 208, 243.

<sup>49</sup> McQuillin testimony; Ex. 2-9, p. 3; R. 208, 243.

<sup>50</sup> Trent testimony; R. 278; Ex. 2-1, p. 6. To the extent to which Mr. Flaherty meant to suggest in his testimony that he provided other instructions, that testimony was not persuasive, and is not consistent with his earlier statements. See Ex. 2-1, p. 6 (Arbitrator finding that Flaherty "did not contradict" Trent testimony that Mr. Flaherty told him the three rows of cars identified were okay to use).

<sup>51</sup> Trent testimony; Ex. 2-8, p. 3 (Officer McQuillin: "[W]hen we had our annual evaluation and we went to that exact lot with the TSA evaluator and the regional trainer and the [FCC] and they did the walk around of the lot, they didn't collect any keys and, I know, it is a bad example to follow, but I guess there is some-sort of false sense of

After setting out signs indicating that K-9 training was taking place, the officers placed the training aids.<sup>52</sup> The officers were using two training aids – cast booster and water gel. TSA policy requires that training aids be covered by some sort of a barrier to prevent scents from mixing, so that the canines continue to most strongly associate their "reward" with the scent of the explosive alone, as opposed to associating it with the scent of the explosive and whatever it had been placed near. During the July 30, 2014 training exercise, the water gel was wrapped in a paper towel, which is a TSA-approved barrier. Officers Kemper and Trent placed the training aids, placing the cast booster on a vehicle in the middle row, and placing the water gel on top of the engine compartment of a Ford Expedition in the back row. As required, the officers and their canines then waited in their vehicles for thirty minutes to allow the training aids' odors to emanate.

*1. Training scenario by Officers McQuillin and Trent*

Through a game of rock-paper-scissors, the officers determined that Officer McQuillin and his dog, Hunter, would run the training exercise first.<sup>53</sup> Officer Trent "had the clipboard," which means that he was making the TSA-required notes on what was happening during Hunter's search.<sup>54</sup> Officer Kemper was serving as a third set of eyes on the training area generally.

It took Hunter forty minutes to find the two training aids. Officer McQuillin then brought Hunter to his vehicle, which he had parked near the search area when he and Hunter began the training exercise.<sup>55</sup>

Officer Trent was scheduled to run his dog, Elvis, next. Officer Trent gave the clipboard to Officer Kemper, and began running the exercise, with Officer Kemper now taking notes on Elvis's performance.

Unbeknownst to Officers Trent and Kemper, however, Officer McQuillin had not just returned Hunter to his vehicle. Rather, he had then moved his vehicle away from the search area back to the shop foreman's building, and gone inside to have a snack and use the restroom. Officer McQuillin did not alert Officers Trent and Kemper that he was leaving the training area, nor that he intended to take a break before returning to the training area.<sup>56</sup>

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trust in knowing that at least it was a secured lot, we used all the exact same vehicles and they had I want to say at least five aids out there that day").

<sup>52</sup> Trent testimony; McQuillin testimony; Ex. 2-1, pp. 6-7.

<sup>53</sup> Trent testimony; McQuillin testimony.

<sup>54</sup> McQuillin testimony.

<sup>55</sup> McQuillin testimony; Trent testimony.

<sup>56</sup> Officer McQuillin would later explain that it had not occurred to him to do so, because of the procedures normally followed when officers trained in pairs. Under those procedures, one officer ran his dog, while the other



In the meantime, unaware that Officer McQuillin was not also watching the training area, but also under the misimpression that the entire lot was secure, Officers Trent and Kemper had continued with the training. Officer Kemper now had the clipboard, and Officer Trent began running Elvis through the training scenario.

## 2. *DPS employee's removal of the Ford Expedition*

Unbeknownst to any of the three officers, one row of vehicles in the DOT lot was not, in fact, secure. Apparently due to a recent change by the Department of Public Safety (DPS), whose headquarters building adjoins the lot, this row now contained pool vehicles for use by DPS employees, and their keys were held not by Mr. Flaherty, but by DPS Vehicle Coordinator Deanna Humphries.<sup>57</sup>

At some point while the officers were preparing their training scenario and conducting the first exercise, DPS office assistant Laura Spire had arrived at the DOT lot because she needed to use a state vehicle that morning to run some office errands. Shortly before 9:30 a.m., with keys obtained from Ms. Humphries, Ms. Spire came to the DOT lot and picked up a Ford Expedition from the motor pool.<sup>58</sup>

The vehicle whose keys Ms. Spire had been given for her errands was the same Ford Expedition on which the K-9 handlers had previously placed the water gel training aid. Ms. Spire did not notice the signs indicating that canine training was underway, nor did any of the officers notice her. Unaware of any possible problem, Ms. Spire left the DOT lot and began her errands.

## 3. *Discovery of loss and search for missing vehicle*

In the meantime, unaware of this development, Officer Trent was running Elvis through the training scenario, with Officer Kemper on the clipboard. After Elvis found the first aid, he and Officer Trent moved to the back row of cars. It was then that Officer Trent observed that the Expedition on which they had placed the water gel was now missing.

Still believing the lot was secure, Officer Trent immediately began searching the lot in his patrol car to try to locate the missing vehicle, while Officer Kemper went into the shop to speak with Mr. Flaherty.<sup>59</sup> Trying to determine where the Expedition had been moved, Officer Kemper provided Mr. Flaherty with its license plate number. When Mr. Flaherty looked up the vehicle's

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held "the clipboard" and monitored the area. With Officer Kemper now holding the clipboard and Officer Trent preparing to run his dog, Officer McQuillin considered himself to be "outside the training scenario," rather than as a third set of eyes. McQuillin testimony; R. 194, 196-197.

<sup>57</sup> R. 107, 114.

<sup>58</sup> Spire testimony; R. 31.

<sup>59</sup> Trent testimony; R. 52-53.

information, he informed Officer Kemper that the vehicles against the fence were "loaner vehicles" used by state employees.<sup>60</sup> This was the first time the officers learned that Mr. Flaherty did not have keys for the entire lot.<sup>61</sup> While Officers McQuillin and Trent drove around the lot to see whether the vehicle had been moved within the lot or to one of the garages on site, Officer Kemper stayed with Mr. Flaherty, who was trying to locate the vehicle through the DPS vehicle coordinator.<sup>62</sup>

#### 4. *Communications with Ms. Spire and return of the training aid*

Upon determining that the water gel was in one of the DPS loaner vehicles, Mr. Flaherty called DPS vehicle coordinator Deanna Humphries, who identified the employee who had taken the Expedition. At some point, although the record is unclear about when, at least some of the officers had a discussion with Mr. Flaherty about it being safe for Ms. Spire to drive back.<sup>63</sup> It further appears that Officer Trent, the team's explosives ordinance disposal expert, was involved in determining that it would be safe for her to do so.<sup>64</sup> Accordingly, Mr. Flaherty directed Ms. Humphries to have Ms. Spire stop her errands and return the vehicle to the lot.

Ms. Spire left in the Expedition shortly before 9:30 a.m.<sup>65</sup> Ms. Humphries first called Ms. Spire at 9:35, but Ms. Spire did not hear the call so did not answer.<sup>66</sup> Ms. Spire returned Ms. Humphries' call at 9:54.<sup>67</sup> Ms. Humphries told her that canine officers were conducting a training and had left something in the car, and that she needed to return the car immediately.<sup>68</sup> Ms. Spire, who assumed the training aid was narcotics, left her errands and drove back to the DOT lot.<sup>69</sup>

When Ms. Spire returned to the lot, Officer Trent removed the training aid from under the hood of her car, Officer Kemper told her she was "good to go," and she drove off to resume her errands.<sup>70</sup> Ms. Spire was back running her errands by 10:17 a.m.<sup>71</sup>

<sup>60</sup> R. 53. During this discussion, Officer McQuillin emerged from the shop restroom, and Officer Kemper told him about the missing vehicle. McQuillin testimony.

<sup>61</sup> R. 53, 204, Trent testimony; McQuillin testimony.

<sup>62</sup> Trent testimony; McQuillin testimony; R. 52-53.

<sup>63</sup> R. 40, 229.

<sup>64</sup> McQuillin testimony; R. 40. In the April 2014 incident, the officers had the driver of the rental car stay where he was, rather than continuing to drive the car with the training aid attached. Officer Trent explained that this was because the training device in that case was affixed to the bumper, creating a stronger likelihood that the item would fall off or get lost on the road. While the aid falling off would not have caused an explosion, it would have made it far more difficult to recover, as the officers were expected to do. Trent testimony.

<sup>65</sup> R. 31.

<sup>66</sup> R. 31; Spire testimony.

<sup>67</sup> R. 31.

<sup>68</sup> Spire testimony; R. 125-126.

<sup>69</sup> Spire testimony; R. 125-126, 130.

<sup>70</sup> Spire testimony; Hahn testimony; Trent testimony.

<sup>71</sup> R. 31.

## 5. *Lack of notification*

After recovering the water gel, the three officers left the DOT lot and relocated to another area for their remaining field training exercises that day.<sup>72</sup> However, at no point while the aid was missing or after it had been recovered did any of them report the temporary loss of the training aid either to TSA Field Canine Coordinator Vasek, or to anyone within the AAPFD chain of command.

Because Officer Kemper was not interviewed during the investigation that followed and did not testify at the hearing, the reason he did not report the incident is not clear from the record. However, the other two officers involved have both explained that they did not believe it was necessary to report the temporary loss due to the quick subsequent recovery of the training aid. When interviewed during the subsequent investigation, Officer Trent summarized his impression at the time as: "It was missing initially; we located within a short amount of time, and we just went about our day."<sup>73</sup> Officer Trent did not think notification was required, given "the short duration it was missing" and what he perceived to be "the lack of severity of the situation as far as how these [incidents of temporary loss and recovery] were treated in the past."<sup>74</sup>

Officer McQuillin, likewise, did not think notification was required. Officer McQuillin has explained he did not believe that the particular circumstances here – where the aid went missing but was then recovered – were required to be reported.<sup>75</sup> In his hearing testimony, Officer McQuillin likened the scenario to driving a car that temporarily slides off the road, then recovers and returns to the roadway. Just as an officer would presumably not report a temporary, transient loss of vehicle control, Officer McQuillin did not understand the circumstances here to require a formal report.

Officer McQuillin has also explained that, being significantly junior to Officer Trent, the most senior canine officer, he followed Officer Trent's lead in evaluating the situation. It is more likely than not that Officer Kemper did the same.

## 6. *Chief Davis and David Vasek learn of the incident*

Sometime after returning to work on July 30, Laura Spire mentioned the incident in passing to Alaska State Trooper Captain Randall Hahn, framing it as a humorous anecdote.<sup>76</sup> Captain Hahn, in turn, emailed Chief Davis, asking: "would you mind giving me a call about the

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<sup>72</sup> McQuillin testimony.

<sup>73</sup> R. 285-286.

<sup>74</sup> Trent testimony.

<sup>75</sup> McQuillin testimony.

<sup>76</sup> R. 112-113. Ms. Spire thought the training aid contained narcotics.

training that was being conducted in our back lot this morning and a training aid that managed to drive off?"<sup>77</sup> This was the first Chief Davis had heard of this incident.<sup>78</sup>

After their discussion, Captain Hahn sent a follow-up email, titled "Timeline this Morning:"

Our OA left in the vehicle a little before 0930 this morning. Our vehicle coordinator was contacted by DOT about ten minutes later and made her first call to the OA. That call wasn't received and another call was placed to her at 0954. She returned to DOT with the vehicle and was cleared and back running her errands by 1017.<sup>79</sup>

Later that afternoon, Chief Davis called Officer Trent to inquire about Captain Hahn's report.<sup>80</sup> Officer Trent confirmed to Chief Davis that the team had lost but then recovered a training aid, and further confirmed they had not reported the incident because of its "short duration."<sup>81</sup> Chief Davis also contacted David Vasek to inform him of the incident.

#### **E. Post-incident meetings and documentation**

##### *I. Team meeting with Chief Davis*

The morning after the incident, Chief Davis met briefly with all three officers.<sup>82</sup> Chief Davis did not specifically ask Officers Kemper or McQuillin any questions about the incident during this meeting, and neither made substantive comments during the meeting.<sup>83</sup> When asked, Officer Trent reiterated his estimate that the aid was missing for about twenty minutes.<sup>84</sup> Neither Officer Kemper nor Officer McQuillin disagreed with this estimate or suggested it was inaccurate.<sup>85</sup>

Chief Davis then told the officers he was opening an administrative investigation (AI), and ended the meeting.<sup>86</sup> Chief Davis assigned AAPFD Lieutenant Gary Delk to conduct the investigation.<sup>87</sup> The Notice of Administrative Investigation summarized the complaint against each officer as follows: "On or about July 30, 2014, you were conducting routine K9 training and violated safety practices which resulted in the temporary loss of an explosives training aid."<sup>88</sup>

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<sup>77</sup> R. 42; Hahn testimony.

<sup>78</sup> Davis testimony.

<sup>79</sup> R. 43.

<sup>80</sup> Davis testimony; R. 40.

<sup>81</sup> Davis testimony; R. 40.

<sup>82</sup> Davis testimony; McQuillin testimony; Trent testimony; R. 41.

<sup>83</sup> McQuillin testimony; Davis testimony.

<sup>84</sup> Davis testimony.

<sup>85</sup> Davis testimony.

<sup>86</sup> Davis testimony; McQuillin testimony; Trent testimony; R. 41.

<sup>87</sup> R. 34, 37.

<sup>88</sup> R. 37, 312.

## 2. TSA paperwork

The same day they met with Chief Davis, the officers also met with Field Canine Coordinator David Vasek. Mr. Vasek found the training aid incident "concerning," and felt that he "should have been notified immediately."<sup>89</sup> However, Mr. Vasek believed that the incident was the result of a miscommunication, and did not suggest or advocate any discipline for the officers.<sup>90</sup> Mr. Vasek did not believe the officers should be terminated, and shared those views with Chief Davis.<sup>91</sup>

Pursuant to TSA protocols, Mr. Vasek had each officer complete an ATP "Form 5400.5, Report of Theft of Loss – Explosive Material."<sup>92</sup> Officer Trent had previously filled out a Form 5400.5 as part of the April 2014 incident.<sup>93</sup> Officers Kemper and McQuillin had not previously filled out a Form 5400.5, and took guidance from Officer Trent in filling theirs out.<sup>94</sup>

The form filled out by Officer Kemper is not in the agency record, although the record does contain what appears to be a typed written statement by Officer Kemper that may have been attached to that form.<sup>95</sup> Of the three officers, Officer Kemper provided by far the most detailed narrative of events. His single-spaced, page-long narrative described the history of using the lot for K-9 training, the basis for the officers' belief that the lot was secure, his role in placing the water gel, the roles played by each officer during the first training scenario, his and Officer Trent's roles during the second scenario, his and Officer Trent's realization that the vehicle with the aid was gone, the realization that Officer McQuillin was not watching the second training exercise, and the steps the officers took to locate and retrieve the missing training aid.<sup>96</sup>

According to Officer Kemper, once Mr. Flaherty informed them that the back row of vehicles contained loaner vehicles, Officer Kemper "consulted with Officer Trent, who is an EOD tech, about the dangers of water gel being in an engine compartment," and was advised "that it

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<sup>89</sup> Vasek testimony.

<sup>90</sup> Vasek testimony.

<sup>91</sup> Vasek testimony. To the extent to which Chief Davis recalls Mr. Vasek saying otherwise, Mr. Vasek's testimony on this point was more credible.

<sup>92</sup> Vasek testimony. See R. 48-53.

<sup>93</sup> Trent testimony; McQuillin testimony; Vasek testimony.

<sup>94</sup> McQuillin testimony; Trent testimony. In the companion case, 15-1086-POC, but not in this case, there arose a factual issue about an entry on Officer McQuillin's and Officer Trent's form 5400.5, and about Lt. Delk's misinterpretation of the information they provided. In that case, Lt. Delk misinterpreted a question on the form as asking how long the aid was missing, when the question actually asked what time the aid went missing; and then what time the loss was discovered. Lt. Delk relied on his misinterpretation of the form to conclude that Officers Trent and McQuillin had been dishonest in filling out the form. Although Chief Davis was aware that Lt. Delk had misinterpreted the form, he did not inform the Council of Lt. Delk's error when recommending the decertification of Officers Trent and McQuillin based, in part, on this alleged "falsification."

<sup>95</sup> R. 50.

<sup>96</sup> R. 52.

had little to no danger ignition."<sup>97</sup> Officer Kemper's report indicated that once Ms. Spire had been contacted and told to return the vehicle immediately, she returned "approximately 15 minutes later."<sup>98</sup> Officer Kemper reported that, when Ms. Spire returned, she asked if the officers had left a narcotics training aid in the car, and that he had "replied 'yes' in order to keep the incident low key."<sup>99</sup>

### 3. *The "daily K9 report" logs*

The officers were not directed to fill out any other reports or forms related to this incident, either by TSA or by AAPFD, and none of them did so.<sup>100</sup> Lt. Delk and Chief Davis later took issue with the fact that the officers did not reference the incident in their weekly AAPFD K-9 activity logs. Those logs were a time accountability tool created by the AAPFD Deputy Chief to better understand how the K-9 officers spent their time. The logs included time entries for each day, and were submitted at the end of the workweek.<sup>101</sup> There was no written policy describing what information should or should not be included, and the K-9 officers varied in the degree of detail they included in their logs.<sup>102</sup>

Officer Kemper's entries were generally broad descriptions of an overall activity during a particular window of time, such as "0400-0545 | Patrol | North Terminal."<sup>103</sup> Because officers completed and turned in the logs at the end of each week, the weekly log covering July 30 was completed nearly a full week later, well after the AI had been initiated and the officers had completed the required TSA Form 5400.5.

Officer Kemper's July 30 entry in his K-9 activity log reflected that he had checked in at 0400, conducted patrol from 0400-0545, attended a "shift brief" Ebola training at 0600, checked out explosives at 0645, conducted canine training in "DOT vehicles and open area" from 0700 to 1210, and then completed administrative tasks from 1210-1300.<sup>104</sup> His July 31, 2014 entries include the team's meeting with Chief Davis, as well as time spent on TSA paperwork.<sup>105</sup> Given the general scope of entries on Officer Kemper's daily K-9 log, and the lack of policy guidance

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<sup>97</sup> R. 52.

<sup>98</sup> R. 52. This is consistent with Ms. Spire's statement, during the investigation, that she returned to the lot "probably within 10 or 15 minutes" of speaking with Ms. Humphries. R. 129-130.

<sup>99</sup> R. 52.

<sup>100</sup> McQuillin testimony; Trent testimony.

<sup>101</sup> McQuillin testimony; R. 45-47.

<sup>102</sup> McQuillin testimony; R. 45-47.

<sup>103</sup> R. 47.

<sup>104</sup> R. 47.

<sup>105</sup> R. 47.

stating otherwise, there was nothing improper about Officer Kemper not specifically referencing the training aid incident on his "daily K9 report" log.

**F. K-9 officers' job status during the administrative investigation**

Prior to the July incident, Officer Kemper had made plans to leave AAPFD and return to school at the start of the 2014-2015 school year<sup>6</sup> Pursuant to those plans, Officer Kemper ultimately resigned from AAPFD well before Lt. Delk completed his investigation report.<sup>107</sup> His notice of resignation stated his departure from AAPFD was unrelated to the investigation, and stated that he intended "to fully cooperate with the AI should I be asked to do so."<sup>108</sup> His last day of employment was August 22, 2014.<sup>109</sup>

Between the July 30 incident and his departure in late August, Officer Kemper continued to work in the same capacity as he previously had done. Likewise, after Officer Kemper's departure, Officers Trent and McQuillin continued to work in the same capacity as they had before the incident, including providing K-9 security services for visiting dignitaries, representing AAPFD at a job fair at Chief Davis's request, and otherwise serving in the same capacity as they had before the incident.<sup>110</sup>

**G. Administrative investigation**

As noted, Lt. Delk was assigned to conduct the investigation. This was the first administrative investigation Lt. Delk had ever conducted. Between August 14 and September 18, 2014, Lt. Delk interviewed Captain Hahn, Ms. Spire, Ms. Humphries, Mr. Vasek, Mr. Flaherty, Officer Trent and Officer McQuillin. However, Lt. Delk never interviewed Officer Kemper.

Chief Davis later asserted that Officer Kemper "refused to be interviewed." At the hearing, Chief Davis testified that this characterization was based on information received from Lt. Delk. But Lt. Delk testified that he never contacted Officer Kemper directly during the investigation.<sup>111</sup> According to Lt. Delk, he "reached out" to a union officer about the possibility of interviewing Officer Kemper before his departure from AAPFD in August. They had an interview scheduled, but Officer Kemper called in sick that day, so the interview did not take place. After Officer Kemper left AAPFD, Lt. Delk continued to communicate with the union about trying to schedule an interview, but the union officer said he had not been able to reach

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<sup>106</sup> Davis testimony.

<sup>107</sup> R. 15; Davis testimony.

<sup>108</sup> R. 15.

<sup>109</sup> R. 15.

<sup>110</sup> McQuillin testimony; Trent testimony.

<sup>111</sup> Delk Testimony

Officer Kemper. Lt. Delk does not know what the union did to try to reach Officer Kemper, including not knowing whether they left him any phone messages, and he personally never tried to contact Officer Kemper directly.<sup>112</sup> Lt. Delk's Administrative Investigation checklist contains notes regarding scheduling interviews with Officers McQuillin and Trent, but do not mention an interview with Officer Kemper.<sup>113</sup>

In the other interviews Lt. Delk conducted before interviewing any of the K-9 officers:

- Mr. Vasek told Lt. Delk about other incidents in which training aids had gone missing, explaining "that this happens in these programs some times."<sup>114</sup>
- Mr. Vasek told Lt. Delk that he believed the incident occurred due to a miscommunication between the officers.<sup>115</sup>
- Laura Spire told Lt. Delk she had missed a call from Ms. Humphreys at 9:35, had called her back at 9:54, and had returned to the lot within 10 or 15 minutes thereafter.<sup>116</sup>
- Laura Spire expressed great distress about the possibility that the training aid could have exploded, yet Lt. Delk did not explain to her that, in fact, the training aid lacked an initiator and so could not have exploded.<sup>117</sup>
- Captain Hahn told Lt. Delk that DPS pool vehicles had recently been relocated, so the last time the K-9 officers had trained in the lot "they may very well have been given free access to every vehicle there with the understanding that it wasn't going to go anywhere."<sup>118</sup>
- Captain Hahn told Lt. Delk that he remains "completely supportive" of AAPFD K-9 officers continuing to conduct training exercises in various public locations, and did not want this incident to "to suppress the continued working relationship or continued interactions" between the AST and AAPFD.<sup>119</sup>

Lt. Delk did not interview Officers Trent and McQuillin until more than six weeks after the incident. In his interview, Officer McQuillin explained that he was used to training in pairs along with Officer Kemper, and that, with three officers present for the July 30 training, he had assumed that Officer Kemper -having "the clipboard" and no leashed dog - was responsible for the training aids once Officer McQuillin had finished the exercise and was taking his dog for a break.<sup>120</sup> Officer Trent, on the other hand, described his expectation that Officer McQuillin

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<sup>112</sup> Delk testimony.

<sup>113</sup> R. 35-36.

<sup>114</sup> Vasek testimony.

<sup>115</sup> Delk testimony; Vasek testimony.

<sup>116</sup> R. 129-130.

<sup>117</sup> R. 134-136.

<sup>118</sup> R. 114.

<sup>119</sup> R. 109, 120.

<sup>120</sup> R. 193-195, 197-19



would have stayed on scene to "observe the area."<sup>121</sup> Both officers acknowledged a breakdown in communications among the team members during the training exercise.<sup>122</sup> Additionally, both officers:

- Explained that the team had mistakenly believed the DOT lot to be "secure" for purposes of conducting a training;<sup>123</sup>
- Stated they did not know exactly how long the training aid was missing, and that 20-30 minutes was an estimate;<sup>124</sup>
- Denied that the team made "an intentional decision" not to report the incident, and instead described their attention having been focused on quickly retrieving the training aid, without realizing at the time that the brief, temporary loss of the aid was required to be reported;<sup>125</sup>
- Described additional precautionary measures the team was now taking, two months later, to avoid a similar incident from occurring.<sup>126</sup>

Additionally, Officer Trent, an AAPFD explosives expert, explained to Lt. Delk that the water gel alone could not have exploded; that, if exposed to very high heat, it would melt rather than explode; and that, when he removed the water gel from the Explorer, "it wasn't warm."<sup>127</sup>

#### H. Lt. Delk's AI report

Lt. Delk completed his report on September 20, 2014.<sup>128</sup> Lt. Delk concluded that the training aid was lost due to the three officers failing to follow policies, failing to communicate with one another, and failing to "ensur[e] direct responsibility as oversight of the explosive training aids in which they are all responsible for (sic)."<sup>129</sup> Lt. Delk then sustained each violation he had been asked to investigate, and also reported that his investigation had shown additional violations.<sup>130</sup>

The original violations sustained by Lt. Delk were as follows: violating various AAPFD and TSA safety rules; violating safety rules under circumstances that created a "substantial risk of serious physical injury" to the driver; violating the SOJO by, inter alia, not notifying the Chief

<sup>121</sup> R. 267-268.

<sup>122</sup> R. 195 (McQuillin); 269-270 (Trent).

<sup>123</sup> R. 204, 208, 242-243 (McQuillin); 278-279 (Trent)

<sup>124</sup> R. 199, 202, 226, 247-248 (McQuillin); 271-273, 275-276 (Trent).

<sup>125</sup> R. 206-207, 246 (McQuillin); 276-278, 286 (Trent). Officer McQuillin also stated that, in retrospect, they should have notified TSA Field Canine Coordinator David Vasek and could have made notifications within the AAPFD chain of command. R. 207. Officer Trent was not asked his opinion on whether, in retrospect, they should have acted differently vis-à-vis making notifications. R. 252-311.

<sup>126</sup> R. 208-209 (McQuillin); 279, 287-288 (Trent).

<sup>127</sup> R. 301-302, 305-307.

<sup>128</sup> R. 315.

<sup>129</sup> R. 328.

<sup>130</sup> R. 328-332.

and the Field Canine Coordinator after discovery of the loss; unbecoming conduct, because other agencies were aware of the loss; and neglect of duty, through the lack of communication that led to the loss.<sup>131</sup>

Lt. Delk also concluded that the officers had violated policies and procedures prohibiting "falsification of any report" and "making a false statement" because they did not mention the incident on their weekly K9 log, and, in the cases of Officers McQuillin and Trent, because of how they responded to a question on the ATF Form 5400.5.<sup>132</sup> Lt. Delk's conclusion about the form 5400.5 was rejected by Chief Davis, who recognized that Lt. Delk had misinterpreted the questions at issue.<sup>133</sup> Nonetheless, Chief Davis terminated Officers McQuillin and Trent after the AI was complete.<sup>134</sup> Both officers were "shocked" at their eventual termination.<sup>135</sup>

**I. AAPFD's original and revised recommendations regarding Officer Kemper's police officer certification**

On August 22, 2014, Chief Davis submitted a separation F-4 form notifying the Council of Officer Kemper's resignation. Chief Davis answered "no" to the question asking whether Officer Kemper had "resigned in lieu of termination." Chief Davis also answered "no" to the question "do you recommend de-certification?"<sup>136</sup> However, Chief Davis indicated that he would not rehire Officer Kemper.<sup>137</sup> In an accompanying memorandum, he explained that Officer Kemper was "currently the subject of an Administrative Investigation," and alleged that Officer Kemper had "refused an interview."<sup>138</sup>

On November 28, 2014, Chief Davis responded to a subpoena request from the Executive Director about the prior F-4 form. In a cover letter, Chief Davis stated that the investigation concluded on Friday, November 21, and that Mr. Kemper "resigned and refused to cooperate or participate in the investigation."<sup>139</sup> Chief Davis based this statement on reports from Lt. Delk; he had no personal knowledge of Officer Kemper's cooperation or participation.<sup>140</sup>

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<sup>131</sup> R. 328-330.

<sup>132</sup> R. 330-331.

<sup>133</sup> Davis testimony.

<sup>134</sup> R. 334-337.

<sup>135</sup> Trent testimony; McQuillin testimony.

<sup>136</sup> R. 12.

<sup>137</sup> R. 12, 14.

<sup>138</sup> R. 14. Chief Davis's memorandum also indicated that events surrounding a prior Administrative Investigation in 2014 "cause me to question his integrity, professionalism, and his willingness to accept personal responsibility." R. 14. However, neither the Accusation nor the Amended Accusation in this case allege facts related to that investigation, and such allegations are therefore not at issue in this case.

<sup>139</sup> R. 11. Chief Davis's cover letter to the Council also indicated that a "final determination meeting was held for Officer Kemper" following the Administrative Investigation. R. 11. But this does not appear to be accurate. Chief Davis testified that such meetings were held with Officers Trent and McQuillin, and such meetings were

The cover letter further stated that, "had [Officer Kemper] not resigned: it is likely that he may have been terminated with the other two officers named in that investigation."<sup>141</sup> Chief Davis provided "a revised narrative" for the Council's consideration.<sup>142</sup> The "revised narrative" contained the following allegations:

- That Officer Kemper knew he was required to immediately report the loss of the training aid, but he did not do so;
- That Officer Kemper "colluded with other officers to keep the loss of the aid from the department leadership and the TSA;"
- That Officer Kemper's written statement to the TSA - his form 5400.5 - "minimize[s] the loss ..." and
- That Officer Kemper "refused to participate in any part of the Investigation."<sup>143</sup>

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required as part of the collective bargaining agreement. But there is no evidence that any meeting was held with or about Officer Kemper, despite the letter's statement.

<sup>140</sup> Davis testimony

<sup>141</sup> R. 11.

<sup>142</sup> R. 13.

<sup>143</sup> R. 13.

### **K. Procedural history of revocation action**

On July 13, 2015, the Executive Director submitted a two-count Accusation seeking revocation of Officer Kemper's police officer certification on the grounds that he had resigned in lieu of discharge for conduct warranting revocation. After the Notice was served on Officer Kemper, he submitted a Notice of Defense and requested a hearing in this matter.

The matter was partially consolidated for hearing with a related appeal filed by Officer McQuillin.<sup>144</sup> Because Officer McQuillin was engaged in employment arbitration over the same facts giving rise to the accusation in both cases, all parties agreed to postpone the hearing until the resolution of the employment matter.

After Officer McQuillin prevailed in his arbitration, with a decision discrediting Lt. Delk's findings and reversing Officer McQuillin's termination, Officer McQuillin, who had been pro se, retained counsel, while Officer Kemper continued to represent himself. In April 2016, the Executive Director filed Amended Accusations in both cases, adding an additional count under 13 AAC 85.1 10(a)(3) (good moral character).

The consolidated hearing took place over June 30, July 1, and July 5, 2016. The Executive Director was represented by Assistant Attorney General John Novak, Officer McQuillin was represented by Mera Matthews, and Officer Kemper did not participate in the evidentiary hearing.<sup>145</sup> Testimony was taken from Field Canine Coordinator David Vasek, DPS employee Laura Spire, Lt. Gary Delk, Chief Jesse Davis, AST Captain Randall Hahn, DOT employee Brian Flaherty, Officer McQuillin, Scott Trent, retired AAPFD Officer Martin Spinde, and an explosives expert, Dr. Frederic Whitehurst. Following the close of the Executive Director's case and the close of consolidated testimony, Officer Kemper elected not to present additional evidence. The record closed on August 11, 2016, and the matter was taken under advisement.

### **L. Credibility of Witnesses**

Because Officer Kemper did not testify, the findings of fact in this matter necessarily rely on the testimony of other witnesses and on the documentary evidence. Officer McQuillin, who

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<sup>144</sup> OAR Case No. 15-1086-POC.

<sup>145</sup> The consolidated hearing convened on June 30; Officer Kemper did not appear. When contacted by phone, he indicated that he had inadvertently miscalendared the hearing, and was unavailable to participate. Officer Kemper was advised of the opportunity to participate in the consolidated evidentiary hearing via telephone. Officer Kemper was also advised of the opportunity to obtain recordings of the hearing sessions in the event that he could not or did not attend. The parties also discussed that, given the limited number of hearing days scheduled and the large number of witnesses identified for the consolidated hearing, a separate hearing date would need to be scheduled at a later time for the presentation of Officer Kemper's witnesses, if any.

was also a case party in the partially consolidated hearing, was a particularly thoughtful and credible witness. His manner was direct and forthright, and he sought to carefully distinguish the views he held at the time of the incident from the views he now holds – for example, as to whether it was necessary to report the loss of the training aid. He testified credibly that he accepts responsibility for the poor communication amongst the team members, and for the team not notifying anyone about the missing aid, but also was credible in explaining that, at the time the incident occurred, he genuinely did not understand the policy to require notification under these circumstances.

Chief Davis was a less credible witness than Officer McQuillin. In his testimony, Chief Davis attempted to minimize statements he had made to the media in April 2014 about the lack of danger posed by misplaced training aids. Chief Davis also sought to disavow a letter he had signed and sent to the Council about Officer McQuillin's employment status the month before the hearing.<sup>146</sup> Chief Davis's credibility in this matter was also diminished by his submitting to the Council Lt. Delk's inaccurate finding about the TSA form 5400.5 filled out by Officers Trent and McQuillin. Chief Davis knew that Lt. Delk had misunderstood the questions on the form 5400.5, and that this misunderstanding had led to his damning conclusion that Officers Trent and McQuillin had "falsified" their responses. But, despite knowing Lt. Delk was flat wrong about the form, Chief Davis did not correct this blatantly false finding in the AI report when he transmitted that report to the Council. While simultaneously testifying about the importance of trustworthiness, Chief Davis testified that it "never occurred to him" to clarify the misimpression left by his submission of the uncorrected false finding in the AI report. The two separate instances of Chief Davis backtracking from his official statements related to this matter, and his misleading submission of erroneous information to the Council, all make his testimony in this matter less trustworthy, and so, less credible.<sup>147</sup>

Lt. Delk was also a less credible witness than Officer McQuillin. In both his written report and his testimony, Lt. Delk tended to minimize or exclude potentially exculpatory

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<sup>146</sup> The May 2016 letter related to the impact of the arbitrator's order reinstating Officer McQuillin, notes that the arbitrator had "rejected various parts of the investigation that could call into question Officer McQuillin's moral character," and urges that "for purposes of any future proceedings involving this matter, Officer McQuillin has been ordered reinstated so he should not be considered a discharged employee." Ex. 2-2. Chief Davis testified that the letter was written by someone "in the Governor's office," and that he signed it "under protest." The letter does not reflect that it was signed "under protest."

<sup>147</sup> Additionally, Chief Davis testified that David Vasek told him that other employees had or would be fired under similar circumstances. This is the opposite of what Mr. Vasek testified to, and Mr. Vasek's testimony on this point was more credible.

information, while exaggerating or taking out of context potentially negative information. Examples of this in his written report include Lt. Delk's reliance on the outermost possible time estimates to identify a timeline of events; failing to include unrefuted statements about water gel not being dangerous; relying on a nonsensical interpretation of the ATF form to conclude that Officers Trent and McQuillin had been dishonest; and otherwise demonstrating a less than impartial approach to the investigation. Within his testimony, the most obvious example of questionable judgment and/or non-credible testimony was Lt. Delk's refusal even now to consider the possibility (endorsed by literally every other witness) that he was misunderstanding a question on the ATF form and the responses to that question by Officers Trent and McQuillin.<sup>148</sup> More broadly, Lt. Delk often offered questionable characterizations of information obtained in his investigation.<sup>149</sup> This includes Lt. Delk's characterization of Officer Kemper as "refusing to participate" in the investigation, when Lt. Delk never contacted him directly to attempt to arrange an interview. The overall impression left is that Lt. Delk is willing to cherry pick facts or information to support a preferred outcome.

Brian Flaherty gave obviously incorrect testimony about the events of July 30, 2014. He testified with complete confidence that a fourth officer, Officer Schmidt, was present; that Officer Trent was a "bomb guy," not a canine officer; that only two canine officers and two canines were present; and to other related "recollections" that are inconsistent with the undisputed evidence. Mr. Flaherty's recollection of the events is clearly flawed, and his testimony was given considerably less weight as a result.

#### **M. Factual findings and evidentiary issues**

1. *Cause of the loss.* The training aid was lost because of a lack of clear communication among the three officers, and between the officers and DOT personnel. Certainly,

<sup>148</sup> While the interpretation of the form itself was not directly an issue in the case against Mr. Kemper, the testimony on this issue in the consolidated hearing provided a window into Lt. Delk's decisionmaking and credibility.

<sup>149</sup> For example, Lt. Delk described Officer Trent as having initially provided time estimates for when the aid went missing and for how long, "but then [saying] he doesn't know what time because he doesn't wear a watch." Lt. Delk went on to criticize Officer Trent for "not wearing a watch," in light of the need for police officers to accurately document the time while carrying out various duties. But Officer Trent's actual statement in his interview with Lt. Delk was that he removes his watch *when running his canine through a training exercise*, an explanation entirely lost in Lt. Delk's retelling. Another example is that, in describing his contacts with David Vasek, Lt. Delk remarked that Mr. Vasek trained and supervised K-9 officers but was not himself a K-9 handler, and testified with certainty that Mr. Vasek told him he was "not qualified to be a K-9 handler," even though he would have liked to be one. But Mr. Vasek testified he has worked both as a K-9 trainer and a K-9 handler, and described in some detail his experience handling and training K-9s. 6/30/16 hearing testimony at 2:05:04 ("I was a canine handler, trainer, and instructor" in the military); 2:05:40 ("I've had responsibility in training and working with hundreds of detector dogs"). As a final example, Lt. Delk repeatedly sought to offer opinion testimony about car engine temperatures to support his conclusions about the supposed dangerousness of having Ms. Spire drive the Explorer with water gel on top of the engine compartment. Lt. Delk's testimony about this topic was well out of step with other witnesses who testified.

Officer McQuillin was negligent in leaving the training area without informing the other officers. But all three officers should have discussed their respective roles at the start of the exercise. The officers also should have obtained the keys to each vehicle being used in the exercise, although their failure to do so was understandable in light of their belief about the lot being secure.

2. *No threat to public safety.* The presence of the water gel on the vehicle being driven by Ms. Spire did not pose a threat to public safety generally or to her safety in particular. Lt. Delk's conclusion to the contrary was inaccurate.<sup>150</sup> Likewise, the Amended Accusation's characterization of the water gel as "a live explosive training aid" was incorrect.<sup>151</sup> Water gel is a secondary explosive, and could not have exploded without a blasting cap. Dr. Whitehurst, a retired FBI materials analyst and doctorate-level analytical chemist, testified that water gel is a "secondary explosive" requiring a great deal of sudden energy in order to detonate, and that a car accident would not produce enough shock for this to occur. Indeed, even shooting it with a gun would not make it explode. "In order for them to be dangerous we have to initiate them in some way."<sup>152</sup> In the absence of an initiator, the presence of water gel does not present a danger, let alone the "immediate threat" alleged here.<sup>153</sup> In short, in addition to conflicting with his own prior statements about the training aid that went missing in April 2014, Chief Davis's conclusions about the inherent dangerousness of the training aid were not borne out by the testimony of those with actual technical training in explosives.<sup>154</sup>

3. *Timing.* The allegation in the Amended Accusation that "the training aid was missing for approximately 70 to 75 minutes" is incorrect.<sup>155</sup> Captain Hahn's investigation on the day of the incident is the most reliable source of information about how long the vehicle was gone from the lot. Based on Captain Hahn's summary, as reported to Chief Davis on July 30, 2014, it is more likely true than not true that the training aid was gone for less than 50 minutes.<sup>156</sup> The amount of time that the officers were unaware of the training aid's location was considerably less. Additionally, given the information provided by Captain Balm's timeline, Officer Kemper's statement in his ATP Form 5400.5 - that the training aid was returned approximately fifteen

<sup>150</sup> It is unfortunate that Lt. Delk did nothing to clarify to Ms. Spire that the explosive gel was not, in fact, dangerous under these circumstances. The failure to convey this information caused Ms. Spire unnecessary distress, which remained visible at the hearing.

<sup>151</sup> Amended Accusation, para. 3.

<sup>152</sup> Whitehurst testimony.

<sup>153</sup> Dr. Whitehurst noted that explosive aids are routinely transported by law enforcement agencies across highways and through the mail.

<sup>154</sup> See Ex. 2-3.

<sup>155</sup> See Amended Accusation, para. 3.

<sup>156</sup> See R. 156.

minutes after Ms. Spire was reached and told to return the vehicle – was a fair and reasonable estimate.

4. *Awareness of requirement to report temporary loss and recovery of training aid.* The Executive Director did not prove that, at the time the training aid was briefly lost and recovered, Officer Kemper knew the temporary loss and recovery was required to be reported. Rather, it is more likely true than not true that the officers were confused about the requirements governing this situation – an understandable confusion given the lack of a clear AAPFD policy on temporary losses; the lack of any training on this specific type of occurrence; the significant history, described by multiple witnesses, of other situations in which aids have briefly been misplaced during training exercises without reporting; and the actions of the senior-most K-9 officer, Officer Trent. Considering this same question in Officer McQuillin's employment case, the arbitrator reached the same conclusion:

The officers were wrong, as far as this record shows, in their conclusion that their duty to report the loss was eliminated by the brief period the location of the training aid was unknown and the fact that it came back safely. But the other local examples (set out [above]) of training devices briefly lost and safely recovered – sometimes by Department officers and sometimes by TSA officers or trainers – without a subsequent report shows that the misconception was not theirs alone but was broadly shared.<sup>157</sup>

Given the totality of the circumstance, the Executive Director did not prove that Officer Kemper actually knew that a report was required under these circumstances.

5. *No collusion.* The revised F-4 form submitted by Chief Davis alleged that Officer Kemper colluded with other officers to not report the loss of the training aid. Officers McQuillin and Trent credibly testified that there was no such discussion. Their testimony is logically supported by the short duration the aid was gone, the testimony regarding similar prior incidents in which no report was made, and the total absence of discipline following the April incident – all circumstances that undermine the idea that the officers would have any reason to collude. As the arbitrator noted, "[i]t would have made very little sense to collude," given this history.<sup>158</sup> The Executive Director did not prove that Officer Kemper colluded with his colleagues to not report the temporary loss of the training aid.

6. *No falsification.* Lt. Delk concluded that Officer Kemper "falsified" his K-9 log by not mentioning the lost training aid incident. This is not a supportable conclusion in light

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<sup>157</sup> Ex. 2-1, p. 22.

<sup>158</sup> Ex. 2-1, p. 22.



of the lack of policy guidance about the expected content of the logs, the generalized scope of entries on Officer Kemper's daily K-9 log, the timing of the log completion occurring several days after the incident and the opening of the AI, and his inclusion of other related events, such as the team's July 31 meetings with Chief Davis and Field Canine Coordinator Vasek.

To the extent the "falsification" allegation is based on Officer Kemper's ATF Form 5400.5, that form is not in the evidentiary record, and so cannot form the basis of any finding in this case. The record does include what appears to be the memorandum Officer Kemper attached to his form 5400.5, and which includes one statement that may be inaccurate. Specifically, Officer Kemper reported that, after the training aid was retrieved and returned to the secured trailer, he ran his dog through the training scenario, whereas the other officers reported that once the aid was retrieved, the team stopped their vehicles training without Officer Kemper running his dog, and then relocated to the De La Vega fields for further training there.<sup>159</sup> The evidence about whether or not Officer Kemper ran his dog before the team left the DOT lot is equivocal; when interviewed for the AI, Officer McQuillin could not recall whether or not Officer Kemper ran the exercise.<sup>160</sup> But whether or not Officer Kemper ran his dog through the vehicle training exercise after the return of the training aid is not a material fact in this case. To the extent that his report was inaccurate in this respect, the evidence does not support a finding that this minor inaccuracy on an immaterial point was intended to deceive or falsify.

7. *Cooperation during the investigation.* The Executive Director's post-hearing brief cites Lt. Delk's testimony for the proposition that Officer Kemper "refus[ed] to cooperate in the investigation."<sup>161</sup> But Lt. Delk never attempted to contact Officer Kemper directly, and his characterization of Officer Kemper's "cooperation" was based on a lack of responsiveness by Officer Kemper's former union after Officer Kemper had resigned and returned to school. Given Lt. Delk's admission that he made no attempts to contact Officer Kemper directly, there is insufficient evidence to establish that Officer Kemper refused to cooperate with the investigation.

8. *Evidence about post-resignation social media posts.* Sometime after Officers Trent and McQuillin were fired, someone using the screen name "Doug Kemper" made

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<sup>159</sup> R. 52; Davis testimony; McQuillin testimony; Trent testimony.

<sup>160</sup> R. 245.

<sup>161</sup> Post-hearing brief, p. 12. Similarly, while Chief Davis's post-investigation submission to the Council alleged that "Officer Kemper refused to participate in any part of the investigation," Chief Davis admits he has no independent knowledge of Officer Kemper's cooperation, and was relying on Lt. Delk's characterization of events. Davis testimony; R. 13.

at least one negative Facebook post about Chief Davis on the Ted Stevens Anchorage International Airport Facebook page, writing:

The Police Chief is the epitome of corruption, ignores law and legal contracts to settle his personal issues. He just wrongfully fired 2 employees that will be reinstated with hundreds of thousands in restitution. Alaska should not have to settle his debt. He needs to be fired.<sup>162</sup>

Chief Davis sent a copy of the posting to the Council along with an undated "Memorandum for Record," describing a phone call with a purported acquaintance of Officer Kemper about Officer Kemper's social media posts.<sup>163</sup> The Executive Director did not establish that the posting in the record was actually made by Officer Kemper. The additional allegations in Chief Davis's memorandum are hearsay and double-hearsay as to which there is no substantiating admissible evidence, and the memorandum's contents are not used to support any finding in this case.<sup>164</sup>

### III. Discussion

For the reasons discussed below, the Executive Director did not meet his burden of showing that revocation of Mr. Kemper's certificate is appropriate.

**A. Did the Executive Director meet his burden to show that Mr. Kemper "resigned under threat of discharge...for conduct that adversely affects his ability and fitness to perform the duties of a police officer and/or was detrimental to the reputation, integrity, or discipline" of AAPFD? (Counts I and III)**

Count I of the Amended Accusation asserts that discretionary revocation is appropriate under 13 AAC 85.110(a)(2), which allows revocation of the certificate of an officer who has resigned under threat of discharge "for conduct that adversely affects his ability and fitness to perform the duties of a police officer and/or was detrimental to the reputation, integrity, or discipline" of the police department where the officer worked. Count III of the Amended Accusation seeks mandatory revocation under 13 AAC 85.110(b)(3), which requires revocation of the certificate of an officer who has resigned under threat of discharge for conduct that is detrimental to the integrity of the police department where the officer worked.

*I. Did Officer Kemper "resign under threat of discharge for cause"?*

As a threshold matter, the Executive Director did not meet his burden of proving that Officer Kemper resigned under threat of discharge.

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<sup>162</sup> R. 10.  
<sup>163</sup> R. 9.  
<sup>164</sup> AS 44.62.460(d).

The Amended Accusation specifically alleges that Officer Kemper "resigned *in lieu of* discharge."<sup>165</sup> This is incorrect. The evidence was undisputed that, at the time that Officer Kemper resigned, he did so as part of a preexisting plan to return to school that fall.<sup>166</sup> And, at the time Officer Kemper left AAPFD, Chief Davis told the Council that Officer Kemper had not resigned "in lieu of termination."<sup>167</sup>

The regulations under which revocation is sought, however, do not require that the officer resigned "*in lieu of* discharge"; rather, it is sufficient for an officer to have resigned "*under threat of* discharge."<sup>168</sup> But the evidence also did not establish that Officer Kemper was "under threat of discharge" at the time of his resignation in August 2014. Notably, the K-9 officers involved in the seemingly far more serious April 2014 incident were not disciplined at all. And after the July incident, Officers Trent, McQuillin, and Kemper received no discipline from TSA, and were returned to precisely their same job duties within AAPFD. When Officers Trent and McQuillin were terminated months later, both were shocked at what was a wholly unexpected termination. The evidence does not support the conclusion that Officer Kemper was "under threat of termination" at the time he resigned.

The Executive Director relies on Chief Davis's supplemental November 2014 memorandum to the Council for the proposition that, had Officer Kemper not resigned in August, he would have been fired after the AI was complete.<sup>169</sup> Even if Chief Davis's fairly equivocal statement – "had he not resigned, it is likely that he may have been terminated with the other two officers" – could be read to support a finding that Officer Kemper ultimately would have been terminated as his colleagues were, events post-dating Officer Kemper's resignation cannot transform that resignation months earlier into one made "under threat of discharge."

2. *Did Officer Kemper's underlying conduct adversely affect his ability and fitness to perform the duties of a police officer?*

Revocation under Count I (13 AAC 85.110(a)(2)) is not appropriate because the Executive Director did not meet his burden of proving that the underlying conduct adversely affected his "ability and fitness" to perform the duties of a police officer.<sup>170</sup>

<sup>165</sup> Amended Accusation, pp. 3 (Count I), 4 (Count III) (emphasis added).

<sup>166</sup> Davis testimony.

<sup>167</sup> R. 12.

<sup>168</sup> 13 AAC 85.110(a)(2); 13 AAC 85.110(b)(3) (emphasis added).

<sup>169</sup> R. 11.

<sup>170</sup> 13 AAC 85.110(a)(2) (authorizing discretionary discharge if Council finds the certificate holder "has been discharged . . . for cause for . . . some other reason that adversely affects the ability and fitness of the police officer to perform job duties...").

- a. Officer Kemper's ability and fitness to perform his duties were not otherwise impacted by this incident.

The Executive Director did not prove that the evidence otherwise establish that the July 30 incident had an adverse effect on Officer Kemper's ability and fitness to perform his duties. To the extent to which AAPFD or TSA policies actually required notification in the case of a briefly misplaced and then recovered training aid, Officer Kemper was only negligent in not following those policies. Any negligence in not reporting the temporary loss of the training aid was not of the quality or character to implicate Officer Kemper's ability or fitness as an officer. To the contrary, the evidence supports the conclusion that the officers' ability and fitness to perform their duties was not impacted. After the July 30, 2014 incident, Officer Kemper continued to work in active duty as a K-9 officer until his departure to return to school, and the other two officers involved continued to work for months, without any changes to their duties and responsibilities. TSA did not discipline any of the K-9 officers for the July 2014 incident, and Field Canine Coordinator Vasek did not support their termination.<sup>171</sup>

Thus, even if it were otherwise appropriate to consider revocation under 13 AAC 85.110(a)(2), the evidence does not support a finding that Officer Kemper engaged in conduct that adversely affects his ability and fitness to perform his duties.

3. *Was Officer Kemper's underlying conduct in the July 31, 2014 incident detrimental to the reputation, integrity or fitness of the Anchorage Airport Police & Fire Department?*

The Executive Director likewise did not meet his burden of proving that the underlying conduct was "detrimental to the reputation, integrity, or discipline" of the AAPFD.<sup>172</sup>

- a. Loss of the training aid

To the extent the Executive Director contends that the loss of the training aid satisfies this criterion, this argument fails. While the loss of the training aid was unfortunate and should not have occurred, it is a fact of training detection canines that, periodically, training aids are misplaced or lost - indeed, the aids themselves contain a sticker telling the public whom to call if an aid is found. The April 2014 incident at the Avis rental lot - a much more serious incident in terms of both the length of time that elapsed before the officers first located the missing aid and the length of time the aid was out of the officers' actual control - did not lead to any discipline for any of the officers. Nor was that incident apparently "detrimental" to the agency's reputation, despite considerable publicity at the time it occurred.

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<sup>171</sup> Vasek testimony.

<sup>172</sup> See 13 AAC 85.110(a)(2) (permitting discretionary revocation on this ground); 13 AAC 85.110(b)(3) (requiring revocation on same ground).

The evidence presented did not support a finding that the temporary loss and quick recovery of a training aid is "detrimental to the reputation" of an agency. A finding of detriment is not supported by the record, particularly given the lack of any outside knowledge of the incident beyond the Troopers, and AST's Captain Hahn's expression of continued support for the AAPFD K-9 program. Indeed, Captain Hahn ended his interview with Lt. Delk by emphasizing, "I don't want this in any way to suppress the continued working relationship or continued interactions, specifically with the canine program[.]"<sup>173</sup>

In short, the Executive Director did not meet his burden of showing that the temporary loss of the training aid for under an hour in July 2014 was "detrimental" to the agency's reputation, integrity, or discipline.

b. Lack of notification

The Executive Director also did not prove that Officer Kemper's failure to notify Field Canine Coordinator Vasek or his AAPFD supervisors of the training aid incident was "detrimental to the reputation, integrity, or discipline" of AAPFD. As established above, the evidence supports a finding that at the time of the incident, on a more likely than not basis, the officers did not realize that the temporary loss and recovery of the aid was required to be reported. Given the significant evidence of instances when training aids were briefly misplaced then recovered without a report, the Executive Director did not prove that the failure to provide a notification in this instance was "detrimental to the reputation, integrity, or discipline" of AAPFD.

c. Alleged post-resignation "disparaging remarks," even if proved, would not be a proper basis for decertification under 13 AAC 85.110(a)(2) or (b)(3).

To the extent the Executive Director is asserting that disparaging remarks on social media form a proper basis for decertification, this argument fails on multiple grounds. As noted above, and setting aside the significant potential constitutional implications of basing a revocation decision on a former public employee's speech in a public forum on issues of public concern, there is no admissible evidence that Officer Kemper actually authored the remarks in question.

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<sup>173</sup> R. 120 ("I wanted to affirm for him . . . that we are completely 100 percent supportive of future training that involves our vehicles, future training that involves our facilities. We can help with that and to help facilitate that. I don't want this in any way to suppress the continued working relationship or continued interactions specifically with the canine program because I can't stress strongly enough how sensitive I am to the need for those different training environments. I'm very, very well aware of that, and I don't want that to hurt any of that").

Further, decertification under 13 AAC 85.110(a)(2) or (b)(3) requires that the officer have resigned under threat of discharge for cause *for* the "detrimental" conduct at issue. Here, the conduct at issue in the social media postings occurred months after Officer Kemper's resignation. It cannot form the basis for decertification under 13 AAC 85.110(a)(2) or (b)(3).

**B. Did the Executive Director meet his burden to show that Officer Kemper "lacks good moral character"? (Count II)**

Count II of the Amended Accusation asserts that discretionary revocation is appropriate under 13 AAC 85.110(a)(3) because Officer Kemper "lacks good moral character." The Council has discretion - but is not required - to revoke an officer's certification if the officer does not meet the basic standards set out in 13 AAC 85.010, which include the requirement that the officer possess "good moral character."<sup>174</sup> There is insufficient evidence in the record to support such a finding in this case.

Good moral character is defined as "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 the state and the United States."<sup>175</sup> For purposes of making this evaluation, the Council may consider "all aspects of a person's character."<sup>176</sup> Prior decisions by the Council have considered the elements identified in the regulation - honesty, fairness, respect for the rights of others, and respect for the law - collectively.<sup>177</sup> Because the regulation considers "all aspects of a person's character," the Council's task is to reach a reasoned decision based on the totality of the evidence. Here, the Executive Director did not prove a substantial doubt about Officer Kemper's honesty, fairness, respect for the rights of others or respect for the law, nor does the totality of the evidence support a finding that he lacks good moral character.

The Executive Director's post-hearing briefing does not specifically identify what facts he contends support a finding that Officer Kemper lacks good moral character. To the extent that the Executive Director is relying on the generalized narrative that the three K-9 officers colluded to hide the incident, or falsified records, those factual allegations have been rejected, above. The evidence in the record about Officer Kemper's actions with regard to the loss and retrieval

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<sup>174</sup> 13 AAC 85.110(a)(3)

<sup>175</sup> 13 AAC 85.900(7).

<sup>176</sup> 13 AAC 85.900(7).

<sup>177</sup> See *In re* ██████ OAH No. 13-0473-POC, at p. 18 (Alaska Police Standards Council 2013); *In re Hazelaar*, OAH No. 13-0085-POC, at pp. 15-16 (Alaska Police Standards Council 2014).

of the training aid does not create a substantial doubt about Officer Kemper's honesty, fairness, respect for the rights of others or respect for the law.

Of note, too, Officer Kemper's underlying conduct stands in sharp contrast to other cases in which the Council has revoked a certification on the basis of moral character. Such cases have found overall poor moral character amidst conduct such as sexual contact with a crime victim, sexual harassment of fellow officers, accessing corrections resources for family members' benefit, and dishonesty in official reports.<sup>178</sup> Here, Officer Kemper's conduct did not raise substantial doubts about his honesty, fairness, and respect for the rights of others and/or for the law.

To the extent to which the Executive Director relies on Chief Davis's statement, in the August 2014 F-4 narrative, that he questions Officer Kemper's "integrity, professionalism, and his willingness to accept personal responsibility," that argument fails.<sup>179</sup> The quoted statement was made in regard to a separate incident – "AI 14-02" – that was not mentioned in either the July 2015 Accusation or the April 2016 Amended Accusation, and as to which the evidentiary record is wholly silent.<sup>180</sup> Specifically, Chief Davis wrote that "the events surrounding *AI 14-02* cause me to question his integrity, professionalism, and his willingness to accept personal responsibility."<sup>181</sup> But this hearing did not concern the events of "AI 14-02," whatever they were, and those events thus cannot inform the Council's decision. Having not sought to revoke Officer Kemper's certification based on whatever occurred in AI 14-02, nor presented evidence about whatever occurred in AI 14-02, the Executive Director cannot rely on an opinion about those unknown events to support a conclusion that Officer Kemper lacks good moral character. Put another way, the mere existence of Chief Davis's opinion, standing alone and without a factual basis in the record, is insufficient to "raise substantial doubts about" Officer Kemper's "honesty, fairness, and respect for the rights of others and for the laws of the state and the United States."

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<sup>178</sup> *In re: [REDACTED]*, OAH Case No. 13-0473-POC (APSC 2013); *In re: Much*, OAH Case No. 13-0288-POC (APSC 2013); *In re: Parcell*, APSC Case No. 2007-09 (APSC 2012); *In re: Bowen*, OAH Case No. 10-0327-POC (APSC 2011).

<sup>179</sup> R. 14; Post-Hearing brief at 14.

<sup>180</sup> The only mention of this incident is in Chief Davis's November 2014 letter, the contents of which are unsupported hearsay and thus cannot be used to support a factual finding. AS 44.62.460(d).

<sup>181</sup> R. 14.

To the extent the Executive Director is asserting that disparaging remarks on social media raise doubts about Officer Kemper's moral character, this argument also fails on multiple grounds. As noted above, the Executive Director made no showing that Officer Kemper actually authored the remarks in question. Nor has the Executive Director addressed the propriety of basing a revocation decision on what is at least arguably protected speech. Further, the single posting that appears in the record opines that Chief Davis wrongfully terminated Officers Trent and McQuillin and that they would be ordered reinstated at great cost to the State - precisely the conclusions the arbitrator reached in reversing Officer McQuillin's termination and ordering him reinstated with full back pay and benefits. While Chief Davis is undoubtedly unhappy about the social media attention, the Executive Director did not establish that, even if Officer Kemper did make the Facebook posting, his having done so implicates his "honesty, fairness, and respect for the rights of others and for the laws of the state and the United States."

For the reasons stated above, the Executive Director did not meet his burden of proving that Officer Kemper lacks good moral character as defined in the Council's regulations.

**C. Did the Executive Director meet his burden to show that Officer Kemper resigned under threat of discharge for conduct that "would cause a reasonable person to have substantial doubt about [his] honesty, fairness, respect for the rights of others, or for the laws of this state or the United States"? (Count III)**

In addition to the allegation discussed in Section A, above, Count III of the Amended Accusation also asserts that mandatory revocation is required under 13 AAC 85.110(b)(3) because Mr. Kemper resigned under threat of discharge for conduct that "would cause a reasonable person to have substantial doubt about [his] honesty, fairness, respect for the rights of others, or for the laws of this state or the United States." As discussed above, the Counsel cannot revoke Officer Kemper's certificate under Count III for the threshold reason that he did not "resign under threat of discharge." But even if that threshold issue did not bar Count III, revocation would still not be warranted under these facts because, as also discussed above, Officer Kemper's conduct in the underlying events would not "cause a reasonable person to have substantial doubt about [his] honesty, fairness, respect for the rights of others, or for the laws of this state or the United States." Officer Kemper made, at worst, a negligent mistake, but certainly not one that should cost him his livelihood. The Executive Director did not prove that Officer Kemper engaged in the type of conduct that would warrant revocation under 13 AAC 85.110(b)(3). For this reason, too, the Executive Director did not meet his burden of showing that revocation is appropriate under Count III of the Amended Accusation.



**IV. Conclusion**

The Executive Director did not meet his burden of showing either that revocation is mandatory, or that it would be appropriate, under these facts. The Executive Director's request for revocation of Officer Kemper's Police Officer Certification is therefore denied.

Dated this 14 day of December, 2016 at Anchorage, Alaska



Bryce Johnson  
Chair  
Alaska Police Standards Council

Bryce Johnson, Chair of the Alaska Police Standards Council, issues this final decision, pursuant to Alaska Statute 44.62.500. Judicial review of this decision may be obtained by filing an appeal with the Alaska Superior Court in accordance with Alaska Statutes 44.62.560 and Alaska Appellate Rule 602(a)(2) within 30 days of the date of the decision.

The undersigned certifies that this is a true and correct copy of the original and that on this date an exact copy of the foregoing was provided to the following individuals:

W. KEMPER - MAIL - EMAIL

J. NOVAIO - EMAIL

R. GRIFFITHS - EMAIL

Signature

Date

12.15.2016



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

In the Matter of	)	
	)	
WILLIAM KEMPER	)	OAH No. 15-1383-POC
_____	)	Agency No. APSC 2014-25

***[Rejected Proposed]* DECISION**

**I. Introduction**

In July 2014, Respondent William Kemper was one of three Anchorage Airport Police and Fire Department K-9 officers who, during a training exercise, briefly lost track of, then recovered, an explosives training aid. One year later, the Executive Director of the Alaska Police Standards Council filed an accusation seeking to revoke Mr. Kemper’s Alaska Police Officer Certification as a result of this incident. At hearing, however, the Executive Director did not meet his burden of showing that revocation is mandatory, nor that it would be appropriate under the circumstances of this case. Indeed, the evidence showed that certain basic allegations in the Amended Accusation against Officer Kemper were simply wrong, having been based on incomplete and inaccurate information provided by AAPFD. The Executive Director’s requested revocation of Officer Kemper’s certification is therefore denied.

**II. Factual and Procedural History**

**A. AAPFD K-9 unit overview**

William Kemper was certified as an Alaska police officer on July 12, 2006, and joined the Anchorage Airport Police & Fire Department on May 5, 2008.<sup>1</sup> AAPFD is the law enforcement organization responsible for safety and security at Ted Stevens Anchorage International Airport. Organizationally, AAPFD is part of the Department of Transportation and Public Facilities (“DOT”). Its officers are jointly trained and certified as police officers and fire fighters.

During the time at issue in this case AAPFD included a four-officer canine unit run in cooperation with the Transportation Security Administration (TSA). The AAPFD K-9 officers received specialized training through TSA, used TSA-owned dogs, and were required to be

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<sup>1</sup> R. 21.

recertified annually by TSA.<sup>2</sup> The agencies' relationship was formalized through a Statement of Joint Objectives, referred to as "the SOJO."<sup>3</sup>

TSA Field Canine Coordinator David Vasek oversaw the K-9 training activities and the AAPFD K-9 program's compliance with TSA policy and objectives.<sup>4</sup> During the time at issue in this case, and as of the time of the hearing, AAPFD was overseen by Chief Jesse Davis.<sup>5</sup> Chief Davis was not a proponent of AAPFD having a separate K-9 unit, and the K-9 program was formally discontinued shortly after the events giving rise to this appeal.<sup>6</sup>

**B. The canine program, canine training, and training aids**

*1. K-9 Unit structure and training overview*

Before they can formally join the K-9 unit, officers must complete TSA's ten-week training course at Lackland Air Force Base in Texas. This training program focuses on becoming a dog handler; it is not an explosives course.<sup>7</sup> Most of the instruction focuses on caring for the dog and performing the responsibilities of a handler, such as interpreting the dog's cues, keeping the dog motivated, et cetera.<sup>8</sup>

During the period in question, the department had three other canine handlers – Wesley McQuillin, Dustin Schmidt and Herman "Scott" Trent. Officer Trent was the most senior canine officer, and the more junior officers generally looked to him for guidance on policies and procedures.<sup>9</sup> The canine officers usually worked in two-person shifts, although the four officers sometimes overlapped for part of the week.<sup>10</sup>

Once officers complete the Lackland program, they still must be certified by TSA, and then recertified each year.<sup>11</sup> Beyond the formal program at Lackland and the annual TSA certification, explosives detection canines participate in frequent training in order to maintain proficiency. Training is constant, with TSA requiring canine officers to log a certain number of training hours each week.<sup>12</sup>

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<sup>2</sup> Vasek testimony.

<sup>3</sup> Vasek testimony; McQuillin testimony, Trent testimony. Apparently because the SOJO is considered a confidential federal security document, it is not included in the agency record in this case, and the Executive Director did not submit it as an exhibit, under seal or otherwise.

<sup>4</sup> Vasek testimony.

<sup>5</sup> Chief Davis joined AAPFD in 2008, and became Chief in 2011.

<sup>6</sup> Trent testimony; Vasek testimony; Ex. 2-1, p. 9.

<sup>7</sup> McQuillin testimony; Vasek testimony.

<sup>8</sup> McQuillin testimony.

<sup>9</sup> McQuillin testimony.

<sup>10</sup> McQuillin testimony; Trent testimony.

<sup>11</sup> McQuillin testimony; Vasek testimony.

<sup>12</sup> McQuillin testimony.

TSA and other AAPFD K-9 trainings are conducted in a variety of locations and circumstances, including, frequently, training in public areas.<sup>13</sup> Officers train in any area where they might be required to respond in the event of a bomb threat.<sup>14</sup> When training on airport grounds, training may be conducted “anywhere in the airport, night or day.”<sup>15</sup> An example of an airport training might involve an aid being hidden in a bag under a seat at a gate, and a handler then being called in to search several gates. Other times, aids are hidden throughout a larger area, for example, an entire terminal.

In addition to the airport terminal itself, the AAPFD officers trained at locations including rental car lots, open fields, hotels, parking lots, and on airplanes.<sup>16</sup> TSA Field Canine Coordinator David Vasek explained that officers “have to train in public areas due to the current threats in the world; we have to train realistically.”<sup>17</sup>

Trainings require, at a minimum, two officers – one handling the dog, and the other observing both the dog and the handler. The four AAPFD officers conducted trainings in groups of two, three, or four, depending on the circumstances. For the majority of the week, only two K-9 officers were on shift at one time. Accordingly, most training involved two officers – with one officer first running his dog through the scenario while the other one took notes and monitored the area, and the officers then switching roles so the second officer could run his dog through the scenario.<sup>18</sup>

## 2. *Training aids*

When training explosive-detection dogs, officers use “training aids” containing explosives. These training aids are not “bombs” or “live explosive devices,” but they do contain explosive material.<sup>19</sup>

Various different types of explosives are used in training. The training aid at issue in this case was “water gel” – a gelatinous ammonium nitrate mixture packaged to approximately the size and shape of a hot dog.<sup>20</sup> Water gel is a “fairly innocuous” training aid.<sup>21</sup> Because it is a

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<sup>13</sup> Vasek testimony.

<sup>14</sup> Vasek testimony.

<sup>15</sup> Vasek testimony.

<sup>16</sup> Vasek testimony.

<sup>17</sup> Vasek testimony.

<sup>18</sup> McQuillin testimony.

<sup>19</sup> Spinde testimony; Whitehurst testimony.

<sup>20</sup> Whitehurst testimony; Trent testimony; R. 289.

<sup>21</sup> Spinde testimony.

“secondary explosive,” water gel cannot explode without an initiator, such as a blasting cap.<sup>22</sup> In the absence of an initiator, water gel melts, rather than explodes, if exposed to high heat.<sup>23</sup>

TSA monitors and controls access to the training aids used by K-9 officers. TSA stores the training aids in a secure area within the airport, and canine handlers must check them in and out through a written log.<sup>24</sup>

In July 2014, TSA policy required K-9 handlers to “maintain constant accountability” for the training aid “at all times” to make sure the training aids were not lost or stolen.<sup>25</sup> While TSA policy has since changed to require “eyes on the training aid at all times,” this requirement was not in place in July 2014.<sup>26</sup> Rather, K-9 handlers were expected to maintain “visual accountability of the training area.”<sup>27</sup>

The actual monitoring of training aids during training is made logistically difficult by the nature of the trainings. When officers are conducting a training within the airport, for example, training aids are hidden throughout an entire concourse or gate section, including in secure hallways, bathrooms, and individual gates.<sup>28</sup> Additionally, if an officer were closely watching the hidden training aid each time, the detection canines would pick up on that visual cue, and start only “working” in a particular area if it is being watched – an outcome that would undermine the effectiveness and purpose of the training itself.<sup>29</sup> But handlers were required to “know where the training aids are” and “maintain accountability that they stay there.”<sup>30</sup>

### **C. Misplaced training aids within canine programs**

Both locally and nationally, canine officers conducting training exercises have, on occasion, misplaced training aids during training exercises.<sup>31</sup> TSA’s training aids contain printed instructions for any members of the public who find such aids.<sup>32</sup>

#### *1. Policies and procedures relating to loss of training aids*

Chapter P200 of the AAPFD Policy and Procedures governs the Canine Unit. Section P200 IV.C.F.j of the AAPFD Policy & Procedures provides: “In the event that a training aid is

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<sup>22</sup> Whitehurst testimony; Trent testimony.  
<sup>23</sup> Whitehurst testimony; Trent testimony.  
<sup>24</sup> Vasek testimony; McQuillin testimony; Trent testimony.  
<sup>25</sup> Vasek testimony.  
<sup>26</sup> Vasek testimony.  
<sup>27</sup> Vasek testimony.  
<sup>28</sup> Trent testimony; Vasek testimony.  
<sup>29</sup> McQuillin testimony.  
<sup>30</sup> Vasek testimony.  
<sup>31</sup> Vasek testimony; Spinde testimony; Ex. 2-1, p. 17.  
<sup>32</sup> McQuillin testimony; Spinde testimony.

damaged or some/all of the source is lost or destroyed, the handler will write a report and file it to the original case. The handler will notify the Unit Commander and the TSA field representative.”<sup>33</sup> However, AAPFD has no written policy specifically addressing the procedures to be followed when a training aid is temporarily misplaced but then quickly recovered.

Section P200 IV.C.F.i directs that “all training aids shall be safely cared for and properly documented in accordance with TSA procedures.” The “Statement of Joint Objectives” (SOJO) governing the relationship between AAPFD and TSA is a confidential federal security document and is not included in the evidentiary record in this case. Although Mr. Vasek testified that the SOJO requires handlers to notify the Field Canine Coordinator if a training aid is lost, the exact language of any requirement in that regard was never established in this hearing.<sup>34</sup>

## 2. *Lost training aid incidents*

At the hearing in this matter, various former K-9 officers testified about local incidents in which training aids went missing, including:

- A passenger locating and turning into airport authorities a training aid that had been hidden in an airport bathroom;
- TSA officers picking up a backpack containing a training aid while a K-9 officer was briefly distracted by a passenger’s question;
- A custodian locating a training aid in a trash can;
- A TSA K-9 trainer having to use his body to physically block a rental car from being driven away with a training aid; and
- A training aid being partially eaten by a bird.<sup>35</sup>

With the exception of the bird eating part of an aid – which was reported because the bird’s actions changed the actual volume of the explosive material in the training aid – these incidents of temporary loss were not reported either to AAPFD or the TSA.<sup>36</sup>

## 3. *April 2014 incident*

On April 21, 2014, while training at an airport car rental facility, AAPFD K-9 officers Trent and Schmidt inadvertently lost an explosive training aid for roughly five hours.<sup>37</sup> In that incident, after an AAPFD officer placed a C-4 explosive training aid on the bumper of a vehicle, a

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<sup>33</sup> R. 56.

<sup>34</sup> See Vasek testimony (“if a training aid is unaccounted for, it requires instant notification to myself”); McQuillin testimony (“it doesn’t say immediately notify”).

<sup>35</sup> McQuillin testimony; Spinde testimony; Vasek testimony; Ex. 2-1, p. 17.

<sup>36</sup> Spinde testimony; Trent testimony; Ex. 2-1, p. 17.

<sup>37</sup> Davis testimony; Ex. 2-3.

rental company employee then mistakenly rented that vehicle to a member of the public, who drove it away before anyone realized the mistake.<sup>38</sup>

Officers Trent and Schmidt did not report this incident to TSA Field Canine Coordinator Vasek or Chief Davis immediately upon realizing the training aid vehicle was missing. Rather, they reported it only after first driving around to look for the missing aid.<sup>39</sup> When they were still unable to locate the missing vehicle half an hour after first discovering the training aid was missing, they notified Mr. Vasek and Chief Davis that the aid was missing.

Because the location of the training aid was unknown, AAPFD enlisted the assistance of the Anchorage Police Department, which alerted its officers to be on the lookout for the missing rental car. The FBI and ATF were also notified, as was the employer of the driver who had rented the car. After more than five hours, the missing aid was eventually located and retrieved by AAPFD officers.

At some point, local, state and national news media became aware of this incident. After the training aid was recovered, Chief Davis held an informal press conference at which he stated that neither the driver of the rental car, nor the general public, were ever in danger during the incident. News articles quoted Chief Davis as saying that “the amount of explosives in the vehicle was small and didn’t pose a threat to the driver or the public,” that “the driver of the rental was never in danger,” and that “[w]hen we say 'explosives,' it's not a stick of dynamite[:]; it's a very small piece of explosive.”<sup>40</sup>

AAPFD did not conduct an administrative investigation of the April 2014 incident, and neither officer involved was disciplined as a result of that incident.<sup>41</sup> All members of the AAPFD K-9 team were aware that no discipline was imposed on either of the two officers involved.<sup>42</sup>

Following the April incident, Chief Davis issued Officer Trent a non-disciplinary Letter of Instruction requiring him to “develop an approved operating procedure” to prevent a similar occurrence in the future.<sup>43</sup> Chief Davis further tasked Officer Trent with conveying these procedures to the rest of the K-9 team. One procedural change that arose was a decision that, during vehicle training, the team should get the keys to all vehicles being used for training. Neither a formal “key” policy nor any other policies related to this issue were reduced to writing.

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<sup>38</sup> Trent testimony; Vasek testimony.

<sup>39</sup> Trent testimony.

<sup>40</sup> Ex. 2-3, pp. 1, 2.

<sup>41</sup> Davis testimony; Trent testimony.

<sup>42</sup> Trent testimony; McQuillin testimony.

<sup>43</sup> R. 42.

Another recommended change was for the officers to conduct trainings in groups of three, rather than in pairs, to increase the number of eyes on the training area. However, AAPFD continued to schedule the K-9 officers mostly in two-person shifts, so, as a practical matter, most of the training continued to be done in pairs.<sup>44</sup>

Also following the April 2014 incident, TSA Field Canine Coordinator Vasek conducted a brief, informal training for the K-9 officers, at which they reviewed a powerpoint presentation about explosives training aids generally.<sup>45</sup> The training covered the obligation to report missing aids to the field canine coordinator, but did not specifically identify a need or requirements to notify the coordinator “immediately” in such an instance, and did not specifically address what to do if a training aid were briefly misplaced but then quickly recovered.<sup>46</sup>

#### **D. July 30, 2014 incident**

The incident giving rise to this case unfolded during a routine training exercise conducted by Officers Trent, Kemper, and McQuillin on July 30, 2014. As they had done many times before, the officers were using the DOT vehicle storage lot in Anchorage.<sup>47</sup> This is the same lot where the TSA had recently conducted the officers’ annual certification training, and the officers believed it to be a secure lot for training purposes.<sup>48</sup>

When they arrived at the DOT lot, Officer Trent went into the office to speak with DOT shop foreman Brian Flaherty about their training plans. The three rows of vehicles they were using for the training were the exact same rows that had been used in the officers’ recent TSA recertification training.<sup>49</sup> Officer Trent left that meeting with the understanding that the portion of the lot where the officers intended to train was available for training, with Mr. Flaherty holding the only keys for those vehicles.<sup>50</sup> Because this was his understanding, Officer Trent did not take the vehicle keys from Mr. Flaherty.<sup>51</sup>

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<sup>44</sup> McQuillin testimony.

<sup>45</sup> Vasek testimony.

<sup>46</sup> McQuillin testimony; Trent testimony. Mr. Vasek did not testify about the content of the training, and the powerpoint presentation is not part of the record.

<sup>47</sup> McQuillin testimony; Flaherty testimony.

<sup>48</sup> McQuillin testimony; Trent testimony; Spinde testimony; R. 52, 208, 243.

<sup>49</sup> McQuillin testimony; Ex. 2-9, p. 3; R. 208, 243.

<sup>50</sup> Trent testimony; R. 278; Ex. 2-1, p. 6. To the extent to which Mr. Flaherty meant to suggest in his testimony that he provided other instructions, that testimony was not persuasive, and is not consistent with his earlier statements. See Ex. 2-1, p. 6 (Arbitrator finding that Flaherty “did not contradict” Trent testimony that Mr. Flaherty told him the three rows of cars identified were okay to use).

<sup>51</sup> Trent testimony; Ex. 2-8, p. 3 (Officer McQuillin: “[W]hen we had our annual evaluation and we went to that exact lot with the TSA evaluator and the regional trainer and the [FCC] and they did the walk around of the lot, they didn’t collect any keys and, I know, it is a bad example to follow, but I guess there is some sort of false sense of



After setting out signs indicating that K-9 training was taking place, the officers placed the training aids.<sup>52</sup> The officers were using two training aids – cast booster and water gel. TSA policy requires that training aids be covered by some sort of a barrier to prevent scents from mixing, so that the canines continue to most strongly associate their “reward” with the scent of the explosive alone, as opposed to associating it with the scent of the explosive and whatever it had been placed near. During the July 30, 2014 training exercise, the water gel was wrapped in a paper towel, which is a TSA-approved barrier. Officers Kemper and Trent placed the training aids, placing the cast booster on a vehicle in the middle row, and placing the water gel on top of the engine compartment of a Ford Expedition in the back row. As required, the officers and their canines then waited in their vehicles for thirty minutes to allow the training aids’ odors to emanate.

*1. Training scenario by Officers McQuillin and Trent*

Through a game of rock-paper-scissors, the officers determined that Officer McQuillin and his dog, Hunter, would run the training exercise first.<sup>53</sup> Officer Trent “had the clipboard,” which means that he was making the TSA-required notes on what was happening during Hunter’s search.<sup>54</sup> Officer Kemper was serving as a third set of eyes on the training area generally.

It took Hunter forty minutes to find the two training aids. Officer McQuillin then brought Hunter to his vehicle, which he had parked near the search area when he and Hunter began the training exercise.<sup>55</sup>

Officer Trent was scheduled to run his dog, Elvis, next. Officer Trent gave the clipboard to Officer Kemper, and began running the exercise, with Officer Kemper now taking notes on Elvis’s performance.

Unbeknownst to Officers Trent and Kemper, however, Officer McQuillin had not just returned Hunter to his vehicle. Rather, he had then moved his vehicle away from the search area back to the shop foreman’s building, and gone inside to have a snack and use the restroom. Officer McQuillin did not alert Officers Trent and Kemper that he was leaving the training area, nor that he intended to take a break before returning to the training area.<sup>56</sup>

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trust in knowing that at least it was a secured lot, we used all the exact same vehicles and they had I want to say at least five aids out there that day”).

<sup>52</sup> Trent testimony; McQuillin testimony; Ex. 2-1, pp. 6-7.

<sup>53</sup> Trent testimony; McQuillin testimony.

<sup>54</sup> McQuillin testimony.

<sup>55</sup> McQuillin testimony; Trent testimony.

<sup>56</sup> Officer McQuillin would later explain that it had not occurred to him to do so, because of the procedures normally followed when officers trained in pairs. Under those procedures, one officer ran his dog, while the other

In the meantime, unaware that Officer McQuillin was not also watching the training area, but also under the misimpression that the entire lot was secure, Officers Trent and Kemper had continued with the training. Officer Kemper now had the clipboard, and Officer Trent began running Elvis through the training scenario.

### 2. *DPS employee's removal of the Ford Expedition*

Unbeknownst to any of the three officers, one row of vehicles in the DOT lot was not, in fact, secure. Apparently due to a recent change by the Department of Public Safety (DPS), whose headquarters building adjoins the lot, this row now contained pool vehicles for use by DPS employees, and their keys were held not by Mr. Flaherty, but by DPS Vehicle Coordinator Deanna Humphries.<sup>57</sup>

At some point while the officers were preparing their training scenario and conducting the first exercise, DPS office assistant Laura Spire had arrived at the DOT lot because she needed to use a state vehicle that morning to run some office errands. Shortly before 9:30 a.m., with keys obtained from Ms. Humphries, Ms. Spire came to the DOT lot and picked up a Ford Expedition from the motor pool.<sup>58</sup>

The vehicle whose keys Ms. Spire had been given for her errands was the same Ford Expedition on which the K-9 handlers had previously placed the water gel training aid. Ms. Spire did not notice the signs indicating that canine training was underway, nor did any of the officers notice her. Unaware of any possible problem, Ms. Spire left the DOT lot and began her errands.

### 3. *Discovery of loss and search for missing vehicle*

In the meantime, unaware of this development, Officer Trent was running Elvis through the training scenario, with Officer Kemper on the clipboard. After Elvis found the first aid, he and Officer Trent moved to the back row of cars. It was then that Officer Trent observed that the Expedition on which they had placed the water gel was now missing.

Still believing the lot was secure, Officer Trent immediately began searching the lot in his patrol car to try to locate the missing vehicle, while Officer Kemper went into the shop to speak with Mr. Flaherty.<sup>59</sup> Trying to determine where the Expedition had been moved, Officer Kemper provided Mr. Flaherty with its license plate number. When Mr. Flaherty looked up the vehicle's

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held "the clipboard" and monitored the area. With Officer Kemper now holding the clipboard and Officer Trent preparing to run his dog, Officer McQuillin considered himself to be "outside the training scenario," rather than as a third set of eyes. McQuillin testimony; R. 194, 196-197.

<sup>57</sup> R. 107, 114.

<sup>58</sup> Spire testimony; R. 31.

<sup>59</sup> Trent testimony; R. 52-53.

information, he informed Officer Kemper that the vehicles against the fence were “loaner vehicles” used by state employees.<sup>60</sup> This was the first time the officers learned that Mr. Flaherty did not have keys for the entire lot.<sup>61</sup> While Officers McQuillin and Trent drove around the lot to see whether the vehicle had been moved within the lot or to one of the garages on site, Officer Kemper stayed with Mr. Flaherty, who was trying to locate the vehicle through the DPS vehicle coordinator.<sup>62</sup>

#### 4. *Communications with Ms. Spire and return of the training aid*

Upon determining that the water gel was in one of the DPS loaner vehicles, Mr. Flaherty called DPS vehicle coordinator Deanna Humphries, who identified the employee who had taken the Expedition. At some point, although the record is unclear about when, at least some of the officers had a discussion with Mr. Flaherty about it being safe for Ms. Spire to drive back.<sup>63</sup> It further appears that Officer Trent, the team’s explosives ordinance disposal expert, was involved in determining that it would be safe for her to do so.<sup>64</sup> Accordingly, Mr. Flaherty directed Ms. Humphries to have Ms. Spire stop her errands and return the vehicle to the lot.

Ms. Spire left in the Expedition shortly before 9:30 a.m.<sup>65</sup> Ms. Humphries first called Ms. Spire at 9:35, but Ms. Spire did not hear the call so did not answer.<sup>66</sup> Ms. Spire returned Ms. Humphries’ call at 9:54.<sup>67</sup> Ms. Humphries told her that canine officers were conducting a training and had left something in the car, and that she needed to return the car immediately.<sup>68</sup> Ms. Spire, who assumed the training aid was narcotics, left her errands and drove back to the DOT lot.<sup>69</sup>

When Ms. Spire returned to the lot, Officer Trent removed the training aid from under the hood of her car, Officer Kemper told her she was “good to go,” and she drove off to resume her errands.<sup>70</sup> Ms. Spire was back running her errands by 10:17 a.m.<sup>71</sup>

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<sup>60</sup> R. 53. During this discussion, Officer McQuillin emerged from the shop restroom, and Officer Kemper told him about the missing vehicle. McQuillin testimony

<sup>61</sup> R. 53, 204, Trent testimony; McQuillin testimony.

<sup>62</sup> Trent testimony; McQuillin testimony; R. 52-53.

<sup>63</sup> R. 40, 229.

<sup>64</sup> McQuillin testimony; R. 40. In the April 2014 incident, the officers had the driver of the rental car stay where he was, rather than continuing to drive the car with the training aid attached. Officer Trent explained that this was because the training device in that case was affixed to the bumper, creating a stronger likelihood that the item would fall off or get lost on the road. While the aid falling off would not have caused an explosion, it would have made it far more difficult to recover, as the officers were expected to do. Trent testimony.

<sup>65</sup> R. 31.

<sup>66</sup> R. 31; Spire testimony.

<sup>67</sup> R. 31.

<sup>68</sup> Spire testimony; R. 125-126.

<sup>69</sup> Spire testimony; R. 125-126, 130.

<sup>70</sup> Spire testimony; Hahn testimony; Trent testimony.

<sup>71</sup> R. 31.

5. *Lack of notification*

After recovering the water gel, the three officers left the DOT lot and relocated to another area for their remaining field training exercises that day.<sup>72</sup> However, at no point while the aid was missing or after it had been recovered did any of them report the temporary loss of the training aid either to TSA Field Canine Coordinator Vasek, or to anyone within the AAPFD chain of command.

Because Officer Kemper was not interviewed during the investigation that followed and did not testify at the hearing, the reason he did not report the incident is not clear from the record. However, the other two officers involved have both explained that they did not believe it was necessary to report the temporary loss due to the quick subsequent recovery of the training aid. When interviewed during the subsequent investigation, Officer Trent summarized his impression at the time as: “It was missing initially; we located within a short amount of time, and we just went about our day.”<sup>73</sup> Officer Trent did not think notification was required, given “the short duration it was missing” and what he perceived to be “the lack of severity of the situation as far as how these [incidents of temporary loss and recovery] were treated in the past.”<sup>74</sup>

Officer McQuillin, likewise, did not think notification was required. Officer McQuillin has explained he did not believe that the particular circumstances here – where the aid went missing but was then recovered – were required to be reported.<sup>75</sup> In his hearing testimony, Officer McQuillin likened the scenario to driving a car that temporarily slides off the road, then recovers and returns to the roadway. Just as an officer would presumably not report a temporary, transient loss of vehicle control, Officer McQuillin did not understand the circumstances here to require a formal report.

Officer McQuillin has also explained that, being significantly junior to Officer Trent, the most senior canine officer, he followed Officer Trent’s lead in evaluating the situation. It is more likely than not that Officer Kemper did the same.

6. *Chief Davis and David Vasek learn of the incident*

Sometime after returning to work on July 30, Laura Spire mentioned the incident in passing to Alaska State Trooper Captain Randall Hahn, framing it as a humorous anecdote.<sup>76</sup> Captain Hahn, in turn, emailed Chief Davis, asking: “would you mind giving me a call about the

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<sup>72</sup> McQuillin testimony.

<sup>73</sup> R. 285-286.

<sup>74</sup> Trent testimony

<sup>75</sup> McQuillin testimony.

<sup>76</sup> R. 112-113. Ms. Spire thought the training aid contained narcotics.

training that was being conducted in our back lot this morning and a training aid that managed to drive off?”<sup>77</sup> This was the first Chief Davis had heard of this incident.<sup>78</sup>

After their discussion, Captain Hahn sent a follow-up email, titled “Timeline this Morning.”

Our OA left in the vehicle a little before 0930 this morning. Our vehicle coordinator was contacted by DOT about ten minutes later and made her first call to the OA. That call wasn’t received and another call was placed to her at 0954. She returned to DOT with the vehicle and was cleared and back running her errands by 1017.<sup>79</sup>

Later that afternoon, Chief Davis called Officer Trent to inquire about Captain Hahn’s report.<sup>80</sup> Officer Trent confirmed to Chief Davis that the team had lost but then recovered a training aid, and further confirmed they had not reported the incident because of its “short duration.”<sup>81</sup> Chief Davis also contacted David Vasek to inform him of the incident.

#### **E. Post-incident meetings and documentation**

##### *1. Team meeting with Chief Davis*

The morning after the incident, Chief Davis met briefly with all three officers.<sup>82</sup> Chief Davis did not specifically ask Officers Kemper or McQuillin any questions about the incident during this meeting, and neither made substantive comments during the meeting.<sup>83</sup> When asked, Officer Trent reiterated his estimate that the aid was missing for about twenty minutes.<sup>84</sup> Neither Officer Kemper nor Officer McQuillin disagreed with this estimate or suggested it was inaccurate.<sup>85</sup>

Chief Davis then told the officers he was opening an administrative investigation (AI), and ended the meeting.<sup>86</sup> Chief Davis assigned AAPFD Lieutenant Gary Delk to conduct the investigation.<sup>87</sup> The Notice of Administrative Investigation summarized the complaint against each officer as follows: “On or about July 30, 2014, you were conducting routine K9 training and violated safety practices which resulted in the temporary loss of an explosives training aid.”<sup>88</sup>

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<sup>77</sup> R. 42; Hahn testimony.

<sup>78</sup> Davis testimony.

<sup>79</sup> R. 43.

<sup>80</sup> Davis testimony; R. 40.

<sup>81</sup> Davis testimony; R. 40.

<sup>82</sup> Davis testimony; McQuillin testimony; Trent testimony; R.41.

<sup>83</sup> McQuillin testimony; Davis testimony.

<sup>84</sup> Davis testimony.

<sup>85</sup> Davis testimony.

<sup>86</sup> Davis testimony; McQuillin testimony; Trent testimony; R.41.

<sup>87</sup> R. 34, 37.

<sup>88</sup> R. 37, 312.

## 2. TSA paperwork

The same day they met with Chief Davis, the officers also met with Field Canine Coordinator David Vasek. Mr. Vasek found the training aid incident “concerning,” and felt that he “should have been notified immediately.”<sup>89</sup> However, Mr. Vasek believed that the incident was the result of a miscommunication, and did not suggest or advocate any discipline for the officers.<sup>90</sup> Mr. Vasek did not believe the officers should be terminated, and shared those views with Chief Davis.<sup>91</sup>

Pursuant to TSA protocols, Mr. Vasek had each officer complete an ATF “Form 5400.5, Report of Theft of Loss – Explosive Material.”<sup>92</sup> Officer Trent had previously filled out a Form 5400.5 as part of the April 2014 incident.<sup>93</sup> Officers Kemper and McQuillin had not previously filled out a Form 5400.5, and took guidance from Officer Trent in filling theirs out.<sup>94</sup>

The form filled out by Officer Kemper is not in the agency record, although the record does contain what appears to be a typed written statement by Officer Kemper that may have been attached to that form.<sup>95</sup> Of the three officers, Officer Kemper provided by far the most detailed narrative of events. His single-spaced, page-long narrative described the history of using the lot for K-9 training, the basis for the officers’ belief that the lot was secure, his role in placing the water gel, the roles played by each officer during the first training scenario, his and Officer Trent’s roles during the second scenario, his and Officer Trent’s realization that the vehicle with the aid was gone, the realization that Officer McQuillin was not watching the second training exercise, and the steps the officers took to locate and retrieve the missing training aid.<sup>96</sup>

According to Officer Kemper, once Mr. Flaherty informed them that the back row of vehicles contained loaner vehicles, Officer Kemper “consulted with Officer Trent, who is an EOD tech, about the dangers of water gel being in an engine compartment,” and was advised “that it

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<sup>89</sup> Vasek testimony.

<sup>90</sup> Vasek testimony.

<sup>91</sup> Vasek testimony. To the extent to which Chief Davis recalls Mr. Vasek saying otherwise, Mr. Vasek’s testimony on this point was more credible.

<sup>92</sup> Vasek testimony. *See* R. 48-53.

<sup>93</sup> Trent testimony; McQuillin testimony; Vasek testimony.

<sup>94</sup> McQuillin testimony; Trent testimony. In the companion case, 15-1086-POC, but not in this case, there arose a factual issue about an entry on Officer McQuillin’s and Officer Trent’s form 5400.5, and about Lt. Delk’s misinterpretation of the information they provided. In that case, Lt. Delk misinterpreted a question on the form as asking how long the aid was missing, when the question actually asked what time the aid went missing, and then what time the loss was discovered. Lt. Delk relied on his misinterpretation of the form to conclude that Officers Trent and McQuillin had been dishonest in filling out the form. Although Chief Davis was aware that Lt. Delk had misinterpreted the form, he did not inform the Council of Lt. Delk’s error when recommending the decertification of Officers Trent and McQuillin based, in part, on this alleged “falsification.”

<sup>95</sup> R. 50.

<sup>96</sup> R. 52.

had little to no danger of ignition.”<sup>97</sup> Officer Kemper’s report indicated that once Ms. Spire had been contacted and told to return the vehicle immediately, she returned “approximately 15 minutes later.”<sup>98</sup> Officer Kemper reported that, when Ms. Spire returned, she asked if the officers had left a narcotics training aid in the car, and that he had “replied ‘yes’ in order to keep the incident low key.”<sup>99</sup>

### 3. *The “daily K9 report” logs*

The officers were not directed to fill out any other reports or forms related to this incident, either by TSA or by AAPFD, and none of them did so.<sup>100</sup> Lt. Delk and Chief Davis later took issue with the fact that the officers did not reference the incident in their weekly AAPFD K-9 activity logs. Those logs were a time accountability tool created by the AAPFD Deputy Chief to better understand how the K-9 officers spent their time. The logs included time entries for each day, and were submitted at the end of the workweek.<sup>101</sup> There was no written policy describing what information should or should not be included, and the K-9 officers varied in the degree of detail they included in their logs.<sup>102</sup>

Officer Kemper’s entries were generally broad descriptions of an overall activity during a particular window of time, such as “0400-0545 | Patrol | North Terminal.”<sup>103</sup> Because officers completed and turned in the logs at the end of each week, the weekly log covering July 30 was completed nearly a full week later, well after the AI had been initiated and the officers had completed the required TSA Form 5400.5.

Officer Kemper’s July 30 entry in his K-9 activity log reflected that he had checked in at 0400, conducted patrol from 0400-0545, attended a “shift brief” Ebola training at 0600, checked out explosives at 0645, conducted canine training in “DOT vehicles and open area” from 0700 to 1210, and then completed administrative tasks from 1210-1300.<sup>104</sup> His July 31, 2014 entries include the team’s meeting with Chief Davis, as well as time spent on TSA paperwork.<sup>105</sup> Given the general scope of entries on Officer Kemper’s daily K-9 log, and the lack of policy guidance

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<sup>97</sup> R. 52.

<sup>98</sup> R. 52. This is consistent with Ms. Spire’s statement, during the investigation, that she returned to the lot “probably within 10 or 15 minutes” of speaking with Ms. Humphries. R. 129-130.

<sup>99</sup> R. 52.

<sup>100</sup> McQuillin testimony; Trent testimony.

<sup>101</sup> McQuillin testimony; R. 45-47.

<sup>102</sup> McQuillin testimony; R. 45-47.

<sup>103</sup> R. 47.

<sup>104</sup> R. 47.

<sup>105</sup> R. 47.

stating otherwise, there was nothing improper about Officer Kemper not specifically referencing the training aid incident on his “daily K9 report” log.

**F. K-9 officers’ job status during the administrative investigation**

Prior to the July incident, Officer Kemper had made plans to leave AAPFD and return to school at the start of the 2014-2015 school year.<sup>106</sup> Pursuant to those plans, Officer Kemper ultimately resigned from AAPFD well before Lt. Delk completed his investigation report.<sup>107</sup> His notice of resignation stated his departure from AAPFD was unrelated to the investigation, and stated that he intended “to fully cooperate with the AI should I be asked to do so.”<sup>108</sup> His last day of employment was August 22, 2014.<sup>109</sup>

Between the July 30 incident and his departure in late August, Officer Kemper continued to work in the same capacity as he previously had done. Likewise, after Officer Kemper’s departure, Officers Trent and McQuillin continued to work in the same capacity as they had before the incident, including providing K-9 security services for visiting dignitaries, representing AAPFD at a job fair at Chief Davis’s request, and otherwise serving in the same capacity as they had before the incident.<sup>110</sup>

**G. Administrative investigation**

As noted, Lt. Delk was assigned to conduct the investigation. This was the first administrative investigation Lt. Delk had ever conducted. Between August 14 and September 18, 2014, Lt. Delk interviewed Captain Hahn, Ms. Spire, Ms. Humphries, Mr. Vasek, Mr. Flaherty, Officer Trent and Officer McQuillin. However, Lt. Delk never interviewed Officer Kemper.

Chief Davis later asserted that Officer Kemper “refused to be interviewed.” At the hearing, Chief Davis testified that this characterization was based on information received from Lt. Delk. But Lt. Delk testified that he never contacted Officer Kemper directly during the investigation.<sup>111</sup> According to Lt. Delk, he “reached out” to a union officer about the possibility of interviewing Officer Kemper before his departure from AAPFD in August. They had an interview scheduled, but Officer Kemper called in sick that day, so the interview did not take place. After Officer Kemper left AAPFD, Lt. Delk continued to communicate with the union about trying to schedule an interview, but the union officer said he had not been able to reach

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<sup>106</sup> Davis testimony.

<sup>107</sup> R. 15; Davis testimony.

<sup>108</sup> R. 15.

<sup>109</sup> R. 15.

<sup>110</sup> McQuillin testimony; Trent testimony.

<sup>111</sup> Delk testimony.



Officer Kemper. Lt. Delk does not know what the union did to try to reach Officer Kemper, including not knowing whether they left him any phone messages, and he personally never tried to contact Officer Kemper directly.<sup>112</sup> Lt. Delk’s Administrative Investigation checklist contains notes regarding scheduling interviews with Officers McQuillin and Trent, but do not mention an interview with Officer Kemper.<sup>113</sup>

In the other interviews Lt. Delk conducted before interviewing any of the K-9 officers:

- Mr. Vasek told Lt. Delk about other incidents in which training aids had gone missing, explaining “that this happens in these programs some times.”<sup>114</sup>
- Mr. Vasek told Lt. Delk that he believed the incident occurred due to a miscommunication between the officers.<sup>115</sup>
- Laura Spire told Lt. Delk she had missed a call from Ms. Humphreys at 9:35, had called her back at 9:54, and had returned to the lot within 10 or 15 minutes thereafter.<sup>116</sup>
- Laura Spire expressed great distress about the possibility that the training aid could have exploded, yet Lt. Delk did not explain to her that, in fact, the training aid lacked an initiator and so could not have exploded.<sup>117</sup>
- Captain Hahn told Lt. Delk that DPS pool vehicles had recently been relocated, so the last time the K-9 officers had trained in the lot “they may very well have been given free access to every vehicle there with the understanding that it wasn’t going to go anywhere.”<sup>118</sup>
- Captain Hahn told Lt. Delk that he remains “completely supportive” of AAPFD K-9 officers continuing to conduct training exercises in various public locations, and did not want this incident to “to suppress the continued working relationship or continued interactions” between the AST and AAPFD.<sup>119</sup>

Lt. Delk did not interview Officers Trent and McQuillin until more than six weeks after the incident. In his interview, Officer McQuillin explained that he was used to training in pairs along with Officer Kemper, and that, with three officers present for the July 30 training, he had assumed that Officer Kemper – having “the clipboard” and no leashed dog – was responsible for the training aids once Officer McQuillin had finished the exercise and was taking his dog for a break.<sup>120</sup> Officer Trent, on the other hand, described his expectation that Officer McQuillin

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<sup>112</sup> Delk testimony.

<sup>113</sup> R. 35-36.

<sup>114</sup> Vasek testimony.

<sup>115</sup> Delk testimony; Vasek testimony.

<sup>116</sup> R. 129-130.

<sup>117</sup> R. 134-136.

<sup>118</sup> R. 114.

<sup>119</sup> R. 109, 120.

<sup>120</sup> R. 193-195, 197-198.

would have stayed on scene to “observe the area.”<sup>121</sup> Both officers acknowledged a breakdown in communications among the team members during the training exercise.<sup>122</sup> Additionally, both officers:

- Explained that the team had mistakenly believed the DOT lot to be “secure” for purposes of conducting a training;<sup>123</sup>
- Stated they did not know exactly how long the training aid was missing, and that 20-30 minutes was an estimate;<sup>124</sup>
- Denied that the team made “an intentional decision” not to report the incident, and instead described their attention having been focused on quickly retrieving the training aid, without realizing at the time that the brief, temporary loss of the aid was required to be reported;<sup>125</sup>
- Described additional precautionary measures the team was now taking, two months later, to avoid a similar incident from occurring.<sup>126</sup>

Additionally, Officer Trent, an AAPFD explosives expert, explained to Lt. Delk that the water gel alone could not have exploded; that, if exposed to very high heat, it would melt rather than explode; and that, when he removed the water gel from the Explorer, “it wasn’t warm.”<sup>127</sup>

#### **H. Lt. Delk’s AI report**

Lt. Delk completed his report on September 20, 2014.<sup>128</sup> Lt. Delk concluded that the training aid was lost due to the three officers failing to follow policies, failing to communicate with one another, and failing to “ensur[e] direct responsibility as oversight of the explosive training aids in which they are all responsible for (sic).”<sup>129</sup> Lt. Delk then sustained each violation he had been asked to investigate, and also reported that his investigation had shown additional violations.<sup>130</sup>

The original violations sustained by Lt. Delk were as follows: violating various AAPFD and TSA safety rules; violating safety rules under circumstances that created a “substantial risk of serious physical injury” to the driver; violating the SOJO by, inter alia, not notifying the Chief

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<sup>121</sup> R. 267-268.

<sup>122</sup> R. 195 (McQuillin); 269-270 (Trent).

<sup>123</sup> R. 204, 208, 242-243 (McQuillin); 278-279 (Trent)

<sup>124</sup> R. 199, 202, 226, 247-248 (McQuillin); 271-273, 275-276 (Trent).

<sup>125</sup> R. 206-207, 246 (McQuillin); 276-278, 286 (Trent). Officer McQuillin also stated that, in retrospect, they should have notified TSA Field Canine Coordinator David Vasek and could have made notifications within the AAPFD chain of command. R. 207. Officer Trent was not asked his opinion on whether, in retrospect, they should have acted differently vis-à-vis making notifications. R. 252-311.

<sup>126</sup> R. 208-209 (McQuillin); 279, 287-288 (Trent).

<sup>127</sup> R. 301-302, 305-307.

<sup>128</sup> R. 315.

<sup>129</sup> R. 328.

<sup>130</sup> R. 328-332.

and the Field Canine Coordinator after discovery of the loss; unbecoming conduct, because other agencies were aware of the loss; and neglect of duty, through the lack of communication that led to the loss.<sup>131</sup>

Lt. Delk also concluded that the officers had violated policies and procedures prohibiting “falsification of any report” and “making a false statement” because they did not mention the incident on their weekly K9 log, and, in the cases of Officers McQuillin and Trent, because of how they responded to a question on the ATF Form 5400.5.<sup>132</sup> Lt. Delk’s conclusion about the form 5400.5 was rejected by Chief Davis, who recognized that Lt. Delk had misinterpreted the questions at issue.<sup>133</sup> Nonetheless, Chief Davis terminated Officers McQuillin and Trent after the AI was complete.<sup>134</sup> Both officers were “shocked” at their eventual termination.<sup>135</sup>

**I. AAPFD’s original and revised recommendations regarding Officer Kemper’s police officer certification**

On August 22, 2014, Chief Davis submitted a separation F-4 form notifying the Council of Officer Kemper’s resignation. Chief Davis answered “no” to the question asking whether Officer Kemper had “resigned in lieu of termination.” Chief Davis also answered “no” to the question “do you recommend de-certification?”<sup>136</sup> However, Chief Davis indicated that he would not rehire Officer Kemper.<sup>137</sup> In an accompanying memorandum, he explained that Officer Kemper was “currently the subject of an Administrative Investigation,” and alleged that Officer Kemper had “refused an interview.”<sup>138</sup>

On November 28, 2014, Chief Davis responded to a subpoena request from the Executive Director about the prior F-4 form. In a cover letter, Chief Davis stated that the investigation concluded on Friday, November 21, and that Mr. Kemper “resigned and refused to cooperate or participate in the investigation.”<sup>139</sup> Chief Davis based this statement on reports from Lt. Delk; he had no personal knowledge of Officer Kemper’s cooperation or participation.<sup>140</sup>

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<sup>131</sup> R. 328-330.

<sup>132</sup> R. 330-331.

<sup>133</sup> Davis testimony.

<sup>134</sup> R. 334-337.

<sup>135</sup> Trent testimony; McQuillin testimony.

<sup>136</sup> R. 12.

<sup>137</sup> R. 12, 14.

<sup>138</sup> R. 14. Chief Davis’s memorandum also indicated that events surrounding a prior Administrative Investigation in 2014 “cause me to question his integrity, professionalism, and his willingness to accept personal responsibility.” R. 14. However, neither the Accusation nor the Amended Accusation in this case allege facts related to that investigation, and such allegations are therefore not at issue in this case.

<sup>139</sup> R. 11. Chief Davis’s cover letter to the Council also indicated that a “final determination meeting was held for Officer Kemper” following the Administrative Investigation. R. 11. But this does not appear to be accurate. Chief Davis testified that such meetings were held with Officers Trent and McQuillin, and such meetings were

The cover letter further stated that, “had [Officer Kemper] not resigned, it is likely that he may have been terminated with the other two officers named in that investigation.”<sup>141</sup> Chief Davis provided “a revised narrative” for the Council’s consideration.<sup>142</sup> The “revised narrative” contained the following allegations:

- That Officer Kemper knew he was required to immediately report the loss of the training aid, but he did not do so;
- That Officer Kemper “colluded with other officers to keep the loss of the aid from the department leadership and the TSA;”
- That Officer Kemper’s written statement to the TSA – his form 5400.5 – “minimize[s] the loss ...;” and
- That Officer Kemper “refused to participate in any part of the investigation.”<sup>143</sup>

**J. Arbitration decision in related matter**

Because Chief Davis’s revised recommendation about Mr. Kemper’s certification was based on the results of Lt. Delk’s investigation – an investigation in which Mr. Kemper was never interviewed – subsequent proceedings relating to that investigation are relevant to the Council’s assessment of that recommendation.

As noted above, following the July 2014 incident, Officers Trent and McQuillin continued for months in their prior positions with no changes to their work assignments or duties.<sup>144</sup> After Lt. Delk completed his investigation report, however, both officers were terminated.

Officer McQuillin grieved his termination through his union. After an arbitration hearing in which all three officers testified, an arbitrator overturned Officer McQuillin’s termination. In a lengthy written decision, the arbitrator was highly critical of Lt. Delk’s investigation and its conclusions. The arbitrator concluded that Officer McQuillin had been negligent, but flatly rejected Lt. Delk’s findings that the officers had colluded with one another, acted dishonestly, or otherwise engaged in the “blatant insubordination” that had been alleged.<sup>145</sup>

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required as part of the collective bargaining agreement. But there is no evidence that any meeting was held with or about Officer Kemper, despite the letter’s statement.

<sup>140</sup> Davis testimony.

<sup>141</sup> R. 11.

<sup>142</sup> R. 13.

<sup>143</sup> R. 13.

<sup>144</sup> Kemper testimony; Trent testimony.

<sup>145</sup> Ex. 2-1, p. 24.

### **K. Procedural history of revocation action**

On July 13, 2015, the Executive Director submitted a two-count Accusation seeking revocation of Officer Kemper's police officer certification on the grounds that he had resigned in lieu of discharge for conduct warranting revocation. After the Notice was served on Officer Kemper, he submitted a Notice of Defense and requested a hearing in this matter.

The matter was partially consolidated for hearing with a related appeal filed by Officer McQuillin.<sup>146</sup> Because Officer McQuillin was engaged in employment arbitration over the same facts giving rise to the accusation in both cases, all parties agreed to postpone the hearing until the resolution of the employment matter.

After Officer McQuillin prevailed in his arbitration, with a decision discrediting Lt. Delk's findings and reversing Officer McQuillin's termination, Officer McQuillin, who had been pro se, retained counsel, while Officer Kemper continued to represent himself. In April 2016, the Executive Director filed Amended Accusations in both cases, adding an additional count under 13 AAC 85.110(a)(3) (good moral character).

The consolidated hearing took place over June 30, July 1, and July 5, 2016. The Executive Director was represented by Assistant Attorney General John Novak, Officer McQuillin was represented by Mera Matthews, and Officer Kemper did not participate in the evidentiary hearing.<sup>147</sup> Testimony was taken from Field Canine Coordinator David Vasek, DPS employee Laura Spire, Lt. Gary Delk, Chief Jesse Davis, AST Captain Randall Hahn, DOT employee Brian Flaherty, Officer McQuillin, Scott Trent, retired AAPFD Officer Martin Spinde, and an explosives expert, Dr. Frederic Whitehurst. Following the close of the Executive Director's case and the close of consolidated testimony, Officer Kemper elected not to present additional evidence. The record closed on August 11, 2016, and the matter was taken under advisement.

### **L. Credibility of Witnesses**

Because Officer Kemper did not testify, the findings of fact in this matter necessarily rely on the testimony of other witnesses and on the documentary evidence. Officer McQuillin, who

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<sup>146</sup> OAH Case No. 15-1086-POC.

<sup>147</sup> The consolidated hearing convened on June 30; Officer Kemper did not appear. When contacted by phone, he indicated that he had inadvertently miscalendared the hearing, and was unavailable to participate. Officer Kemper was advised of the opportunity to participate in the consolidated evidentiary hearing via telephone. Officer Kemper was also advised of the opportunity to obtain recordings of the hearing sessions in the event that he could not or did not attend. The parties also discussed that, given the limited number of hearing days scheduled and the large number of witnesses identified for the consolidated hearing, a separate hearing date would need to be scheduled at a later time for the presentation of Officer Kemper's witnesses, if any.

was also a case party in the partially consolidated hearing, was a particularly thoughtful and credible witness. His manner was direct and forthright, and he sought to carefully distinguish the views he held at the time of the incident from the views he now holds – for example, as to whether it was necessary to report the loss of the training aid. He testified credibly that he accepts responsibility for the poor communication amongst the team members, and for the team not notifying anyone about the missing aid, but also was credible in explaining that, at the time the incident occurred, he genuinely did not understand the policy to require notification under these circumstances.

Chief Davis was a less credible witness than Officer McQuillin. In his testimony, Chief Davis attempted to minimize statements he had made to the media in April 2014 about the lack of danger posed by misplaced training aids. Chief Davis also sought to disavow a letter he had signed and sent to the Council about Officer McQuillin’s employment status the month before the hearing.<sup>148</sup> Chief Davis’s credibility in this matter was also diminished by his submitting to the Council Lt. Delk’s inaccurate finding about the TSA form 5400.5 filled out by Officers Trent and McQuillin. Chief Davis knew that Lt. Delk had misunderstood the questions on the form 5400.5, and that this misunderstanding had led to his damning conclusion that Officers Trent and McQuillin had “falsified” their responses. But, despite knowing Lt. Delk was flat wrong about the form, Chief Davis did not correct this blatantly false finding in the AI report when he transmitted that report to the Council. While simultaneously testifying about the importance of trustworthiness, Chief Davis testified that it “never occurred to him” to clarify the misimpression left by his submission of the uncorrected false finding in the AI report. The two separate instances of Chief Davis backtracking from his official statements related to this matter, and his misleading submission of erroneous information to the Council, all make his testimony in this matter less trustworthy, and so, less credible.<sup>149</sup>

Lt. Delk was also a less credible witness than Officer McQuillin. In both his written report and his testimony, Lt. Delk tended to minimize or exclude potentially exculpatory

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<sup>148</sup> The May 2016 letter related to the impact of the arbitrator’s order reinstating Officer McQuillin, notes that the arbitrator had “rejected various parts of the investigation that could call into question Officer McQuillin’s moral character,” and urges that “for purposes of any future proceedings involving this matter, Officer McQuillin has been ordered reinstated so he should not be considered a discharged employee.” Ex. 2-2. Chief Davis testified that the letter was written by someone “in the Governor’s office,” and that he signed it “under protest.” The letter does not reflect that it was signed “under protest.”

<sup>149</sup> Additionally, Chief Davis testified that David Vasek told him that other employees had or would be fired under similar circumstances. This is the opposite of what Mr. Vasek testified to, and Mr. Vasek’s testimony on this point was more credible.

information, while exaggerating or taking out of context potentially negative information. Examples of this in his written report include Lt. Delk's reliance on the outermost possible time estimates to identify a timeline of events; failing to include unrefuted statements about water gel not being dangerous; relying on a nonsensical interpretation of the ATF form to conclude that Officers Trent and McQuillin had been dishonest; and otherwise demonstrating a less than impartial approach to the investigation. Within his testimony, the most obvious example of questionable judgment and/or non-credible testimony was Lt. Delk's refusal even now to consider the possibility (endorsed by literally every other witness) that he was misunderstanding a question on the ATF form and the responses to that question by Officers Trent and McQuillin.<sup>150</sup> More broadly, Lt. Delk often offered questionable characterizations of information obtained in his investigation.<sup>151</sup> This includes Lt. Delk's characterization of Officer Kemper as "refusing to participate" in the investigation, when Lt. Delk never contacted him directly to attempt to arrange an interview. The overall impression left is that Lt. Delk is willing to cherry pick facts or information to support a preferred outcome.

Brian Flaherty gave obviously incorrect testimony about the events of July 30, 2014. He testified with complete confidence that a fourth officer, Officer Schmidt, was present; that Officer Trent was a "bomb guy," not a canine officer; that only two canine officers and two canines were present; and to other related "recollections" that are inconsistent with the undisputed evidence. Mr. Flaherty's recollection of the events is clearly flawed, and his testimony was given considerably less weight as a result.

#### **M. Factual findings and evidentiary issues**

1. *Cause of the loss.* The training aid was lost because of a lack of clear communication among the three officers, and between the officers and DOT personnel. Certainly,

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<sup>150</sup> While the interpretation of the form itself was not directly an issue in the case against Mr. Kemper, the testimony on this issue in the consolidated hearing provided a window into Lt. Delk's decisionmaking and credibility.

<sup>151</sup> For example, Lt. Delk described Officer Trent as having initially provided time estimates for when the aid went missing and for how long, "but then [saying] he doesn't know what time because he doesn't wear a watch." Lt. Delk went on to criticize Officer Trent for "not wearing a watch," in light of the need for police officers to accurately document the time while carrying out various duties. But Officer Trent's actual statement in his interview with Lt. Delk was that he removes his watch *when running his canine through a training exercise*, an explanation entirely lost in Lt. Delk's retelling. Another example is that, in describing his contacts with David Vasek, Lt. Delk remarked that Mr. Vasek trained and supervised K-9 officers but was not himself a K-9 handler, and testified with certainty that Mr. Vasek told him he was "not qualified to be a K-9 handler," even though he would have liked to be one. But Mr. Vasek testified he has worked both as a K-9 trainer and a K-9 handler, and described in some detail his experience handling and training K-9s. 6/30/16 hearing testimony at 2:05:04 ("I was a canine handler, trainer, and instructor" in the military); 2:05:40 ("I've had responsibility in training and working with hundreds of detector dogs"). As a final example, Lt. Delk repeatedly sought to offer opinion testimony about car engine temperatures to support his conclusions about the supposed dangerousness of having Ms. Spire drive the Explorer with water gel on top of the engine compartment. Lt. Delk's testimony about this topic was well out of step with other witnesses who testified.

Officer McQuillin was negligent in leaving the training area without informing the other officers. But all three officers should have discussed their respective roles at the start of the exercise. The officers also should have obtained the keys to each vehicle being used in the exercise, although their failure to do so was understandable in light of their belief about the lot being secure.

2. *No threat to public safety.* The presence of the water gel on the vehicle being driven by Ms. Spire did not pose a threat to public safety generally or to her safety in particular. Lt. Delk's conclusion to the contrary was inaccurate.<sup>152</sup> Likewise, the Amended Accusation's characterization of the water gel as "a live explosive training aid" was incorrect.<sup>153</sup> Water gel is a secondary explosive, and could not have exploded without a blasting cap. Dr. Whitehurst, a retired FBI materials analyst and doctorate-level analytical chemist, testified that water gel is a "secondary explosive" requiring a great deal of sudden energy in order to detonate, and that a car accident would not produce enough shock for this to occur. Indeed, even shooting it with a gun would not make it explode. "In order for them to be dangerous we have to initiate them in some way."<sup>154</sup> In the absence of an initiator, the presence of water gel does not present a danger, let alone the "immediate threat" alleged here.<sup>155</sup> In short, in addition to conflicting with his own prior statements about the training aid that went missing in April 2014, Chief Davis's conclusions about the inherent dangerousness of the training aid were not borne out by the testimony of those with actual technical training in explosives.<sup>156</sup>

3. *Timing.* The allegation in the Amended Accusation that "the training aid was missing for approximately 70 to 75 minutes" is incorrect.<sup>157</sup> Captain Hahn's investigation on the day of the incident is the most reliable source of information about how long the vehicle was gone from the lot. Based on Captain Hahn's summary, as reported to Chief Davis on July 30, 2014, it is more likely true than not true that the training aid was gone for less than 50 minutes.<sup>158</sup> The amount of time that the officers were unaware of the training aid's location was considerably less. Additionally, given the information provided by Captain Hahn's timeline, Officer Kemper's statement in his ATF Form 5400.5 – that the training aid was returned approximately fifteen

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<sup>152</sup> It is unfortunate that Lt. Delk did nothing to clarify to Ms. Spire that the explosive gel was not, in fact, dangerous under these circumstances. The failure to convey this information caused Ms. Spire unnecessary distress, which remained visible at the hearing.

<sup>153</sup> Amended Accusation, para. 3.

<sup>154</sup> Whitehurst testimony.

<sup>155</sup> Dr. Whitehurst noted that explosive aids are routinely transported by law enforcement agencies across highways and through the mail.

<sup>156</sup> See Ex. 2-3.

<sup>157</sup> See Amended Accusation, para. 3.

<sup>158</sup> See R. 156.



minutes after Ms. Spire was reached and told to return the vehicle – was a fair and reasonable estimate.

4. *Awareness of requirement to report temporary loss and recovery of training aid.* The Executive Director did not prove that, at the time the training aid was briefly lost and recovered, Officer Kemper knew the temporary loss and recovery was required to be reported. Rather, it is more likely true than not true that the officers were confused about the requirements governing this situation – an understandable confusion given the lack of a clear AAPFD policy on temporary losses; the lack of any training on this specific type of occurrence; the significant history, described by multiple witnesses, of other situations in which aids have briefly been misplaced during training exercises without reporting; and the actions of the senior-most K-9 officer, Officer Trent. Considering this same question in Officer McQuillin’s employment case, the arbitrator reached the same conclusion:

The officers were wrong, as far as this record shows, in their conclusion that their duty to report the loss was eliminated by the brief period the location of the training aid was unknown and the fact that it came back safely. But the other local examples (set out [above]) of training devices briefly lost and safely recovered – sometimes by Department officers and sometimes by TSA officers or trainers – without a subsequent report shows that the misconception was not theirs alone but was broadly shared.<sup>159</sup>

Given the totality of the circumstances, the Executive Director did not prove that Officer Kemper actually knew that a report was required under these circumstances.

5. *No collusion.* The revised F-4 form submitted by Chief Davis alleged that Officer Kemper colluded with other officers to not report the loss of the training aid. Officers McQuillin and Trent credibly testified that there was no such discussion. Their testimony is logically supported by the short duration the aid was gone, the testimony regarding similar prior incidents in which no report was made, and the total absence of discipline following the April incident – all circumstances that undermine the idea that the officers would have any reason to collude. As the arbitrator noted, “[i]t would have made very little sense to collude,” given this history.<sup>160</sup> The Executive Director did not prove that Officer Kemper colluded with his colleagues to not report the temporary loss of the training aid.

6. *No falsification.* Lt. Delk concluded that Officer Kemper “falsified” his K-9 log by not mentioning the lost training aid incident. This is not a supportable conclusion in light

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<sup>159</sup> Ex. 2-1, p. 22.

<sup>160</sup> Ex. 2-1, p. 22.

of the lack of policy guidance about the expected content of the logs, the generalized scope of entries on Officer Kemper's daily K-9 log, the timing of the log completion occurring several days after the incident and the opening of the AI, and his inclusion of other related events, such as the team's July 31 meetings with Chief Davis and Field Canine Coordinator Vasek.

To the extent the "falsification" allegation is based on Officer Kemper's ATF Form 5400.5, that form is not in the evidentiary record, and so cannot form the basis of any finding in this case. The record does include what appears to be the memorandum Officer Kemper attached to his form 5400.5, and which includes one statement that may be inaccurate. Specifically, Officer Kemper reported that, after the training aid was retrieved and returned to the secured trailer, he ran his dog through the training scenario, whereas the other officers reported that once the aid was retrieved, the team stopped their vehicles training without Officer Kemper running his dog, and then relocated to the De La Vega fields for further training there.<sup>161</sup> The evidence about whether or not Officer Kemper ran his dog before the team left the DOT lot is equivocal; when interviewed for the AI, Officer McQuillin could not recall whether or not Officer Kemper ran the exercise.<sup>162</sup> But whether or not Officer Kemper ran his dog through the vehicle training exercise after the return of the training aid is not a material fact in this case. To the extent that his report was inaccurate in this respect, the evidence does not support a finding that this minor inaccuracy on an immaterial point was intended to deceive or falsify.

7. *Cooperation during the investigation.* The Executive Director's post-hearing brief cites Lt. Delk's testimony for the proposition that Officer Kemper "refus[ed] to cooperate in the investigation."<sup>163</sup> But Lt. Delk never attempted to contact Officer Kemper directly, and his characterization of Officer Kemper's "cooperation" was based on a lack of responsiveness by Officer Kemper's former union after Officer Kemper had resigned and returned to school. Given Lt. Delk's admission that he made no attempts to contact Officer Kemper directly, there is insufficient evidence to establish that Officer Kemper refused to cooperate with the investigation.

8. *Evidence about post-resignation social media posts.* Sometime after Officers Trent and McQuillin were fired, someone using the screen name "Doug Kemper" made

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<sup>161</sup> R. 52; Davis testimony; McQuillin testimony; Trent testimony.

<sup>162</sup> R. 245.

<sup>163</sup> Post-hearing brief, p. 12. Similarly, while Chief Davis's post-investigation submission to the Council alleged that "Officer Kemper refused to participate in any part of the investigation," Chief Davis admits he has no independent knowledge of Officer Kemper's cooperation, and was relying on Lt. Delk's characterization of events. Davis testimony; R. 13.

at least one negative Facebook post about Chief Davis on the Ted Stevens Anchorage International Airport Facebook page, writing:

The Police Chief is the epitome of corruption, ignores law and legal contracts to settle his personal issues. He just wrongfully fired 2 employees that will be reinstated with hundreds of thousands in restitution. Alaska should not have to settle his debt. He needs to be fired.<sup>164</sup>

Chief Davis sent a copy of the posting to the Council along with an undated “Memorandum for Record,” describing a phone call with a purported acquaintance of Officer Kemper about Officer Kemper’s social media posts.<sup>165</sup> The Executive Director did not establish that the posting in the record was actually made by Officer Kemper. The additional allegations in Chief Davis’s memorandum are hearsay and double-hearsay as to which there is no substantiating admissible evidence, and the memorandum’s contents are not used to support any finding in this case.<sup>166</sup>

### III. Discussion

For the reasons discussed below, the Executive Director did not meet his burden of showing that revocation of Mr. Kemper’s certificate is appropriate.

**A. Did the Executive Director meet his burden to show that Mr. Kemper “resigned under threat of discharge . . . for conduct that adversely affects his ability and fitness to perform the duties of a police officer and/or was detrimental to the reputation, integrity, or discipline” of AAPFD? (Counts I and III)**

Count I of the Amended Accusation asserts that discretionary revocation is appropriate under 13 AAC 85.110(a)(2), which allows revocation of the certificate of an officer who has resigned under threat of discharge “for conduct that adversely affects his ability and fitness to perform the duties of a police officer and/or was detrimental to the reputation, integrity, or discipline” of the police department where the officer worked. Count III of the Amended Accusation seeks mandatory revocation under 13 AAC 85.110(b)(3), which requires revocation of the certificate of an officer who has resigned under threat of discharge for conduct that is detrimental to the integrity of the police department where the officer worked.

*1. Did Officer Kemper “resign under threat of discharge for cause”?*

As a threshold matter, the Executive Director did not meet his burden of proving that Officer Kemper resigned under threat of discharge.

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<sup>164</sup> R. 10.

<sup>165</sup> R. 9.

<sup>166</sup> AS 44.62.460(d).

The Amended Accusation specifically alleges that Officer Kemper “resigned *in lieu of* discharge.”<sup>167</sup> This is incorrect. The evidence was undisputed that, at the time that Officer Kemper resigned, he did so as part of a preexisting plan to return to school that fall.<sup>168</sup> And, at the time Officer Kemper left AAPFD, Chief Davis told the Council that Officer Kemper had not resigned “in lieu of termination.”<sup>169</sup>

The regulations under which revocation is sought, however, do not require that the officer resigned “*in lieu of* discharge”; rather, it is sufficient for an officer to have resigned “*under threat of* discharge.”<sup>170</sup> But the evidence also did not establish that Officer Kemper was “under threat of discharge” at the time of his resignation in August 2014. Notably, the K-9 officers involved in the seemingly far more serious April 2014 incident were not disciplined at all. And after the July incident, Officers Trent, McQuillin, and Kemper received no discipline from TSA, and were returned to precisely their same job duties within AAPFD. When Officers Trent and McQuillin were terminated months later, both were shocked at what was a wholly unexpected termination. The evidence does not support the conclusion that Officer Kemper was “under threat of termination” at the time he resigned.

The Executive Director relies on Chief Davis’s supplemental November 2014 memorandum to the Council for the proposition that, had Officer Kemper not resigned in August, he would have been fired after the AI was complete.<sup>171</sup> Even if Chief Davis’s fairly equivocal statement – “had he not resigned, it is likely that he may have been terminated with the other two officers” – could be read to support a finding that Officer Kemper ultimately would have been terminated as his colleagues were, events post-dating Officer Kemper’s resignation cannot transform that resignation months earlier into one made “under threat of discharge.”

There is also a more fundamental problem with the Executive Director’s reliance on the ultimate termination of Officer Kemper’s colleagues to support a finding that Officer Kemper “resigned under threat of discharge for cause.” While Officer Kemper’s colleagues were terminated after Lt. Delk’s investigation, the termination was later found to have been improper and *without just cause*. The arbitrator who considered the testimony of all the fact witnesses involved in this incident and the Administrative Investigation concluded that, in fact, Officer McQuillin was not appropriately discharged. While Chief Davis says he would have fired Officer

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<sup>167</sup> Amended Accusation, pp. 3 (Count I), 4 (Count III) (emphasis added).

<sup>168</sup> Davis testimony.

<sup>169</sup> R. 12.

<sup>170</sup> 13 AAC 85.110(a)(2); 13 AAC 85.110(b)(3) (emphasis added).

<sup>171</sup> R. 11.

Kemper “for cause” for the same reason he fired Officer McQuillin, Officer McQuillin’s termination has been found to be improper, and has therefore been rescinded.

Necessarily, the “threat of discharge for cause” in 13 AAC 85.110(a)(2) and (b)(3) must be read to mean threat of discharge for actual just cause. It would make no sense to conclude that Officer Kemper “resigned under threat of discharge for cause” if that “threatened” discharge has been found to be improper and without cause. Accordingly, the Executive Director did not meet his burden under Counts I and III of showing that Officer Kemper “resigned under threat of discharge for cause.”

2. *Did Officer Kemper’s underlying conduct adversely affect his ability and fitness to perform the duties of a police officer?*

Even if Officer Kemper could be considered to have “resigned under threat of discharge for cause,” which he cannot, revocation under Count I (13 AAC 85.110(a)(2)) would still be inappropriate because the Executive Director did not meet his burden of proving that the underlying conduct adversely affected his “ability and fitness” to perform the duties of a police officer.<sup>172</sup>

a. The Executive Director did not prove that this incident implicates “Brady” concerns.

At the hearing, counsel for the Executive Director argued that the facts of this case implicate the involved officers’ ability to serve as police officers due to potential “*Brady/Giglio*” concerns.<sup>173</sup> But the Executive Director provides little explanation of how he contends Officer Kemper’s actions rise to the level of a disclosable *Brady* offense. To the extent that this claim flows from allegations that the officers colluded or falsified records, those allegations have not been substantiated, and any accompanying *Brady* concern likewise fails.

The Executive Director’s post-hearing brief does not specifically identify what conduct of Officer Kemper he contends would have to be disclosed by prosecutors to satisfy *Brady* obligations. However, the Executive Director identifies two alleged bases for concluding that Officer Kemper is dishonest. The first is that Officer Kemper did not mention the lost training aid incident on his K-9 activity log. The second is that, during the officers’ July 31 meeting with Chief Davis, Officer Kemper did not “speak up to correct” Officer Trent’s statement that the aid

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<sup>172</sup> 13 AAC 85.110(a)(2) (authorizing discretionary discharge if Council finds the certificate holder “has been discharged . . . for cause for . . . some other reason that adversely affects the ability and fitness of the police officer to perform job duties. . .”).

<sup>173</sup> *Brady v. Maryland* and *Giglio v. United States* are two United States Supreme Court decisions requiring prosecutors to disclose to defense counsel exculpatory or impeachment evidence. *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

was out of the officers' control for about 20 minutes.<sup>174</sup> Neither of these allegations implicates Officer Kemper's honesty in the manner suggested by the Executive Director, let alone rises to the level of a *Brady* disclosure obligation.

As discussed above, Officer Kemper's omission of the training aid incident from his K-9 daily log was reasonable in light of the general scope of the log entries and the lack of clear guidance as to the expected scope on what was largely a time-keeping tool. It is simply nonsensical to suggest that Officer Kemper was trying to "conceal" the event by omitting it from his log, when the event was openly known and the investigation underway by the time the log was completed.

The evidence also does not support a finding that Officer Kemper was being dishonest when he did not challenge Officer Trent's statement, during the July 31 meeting, that the training aid was "missing for approximately 15-20 minutes."<sup>175</sup> First of all, it is certainly likely that the training aid was only genuinely missing – that is, with its whereabouts unknown – for 15-20 minutes. It is also possible that Officer Trent was referring to that window (the time that the aid's whereabouts were unknown) in his estimate, and/or that Officer Kemper had that window in mind when he heard Officer Trent's estimate. Officer Kemper's statement in his Form 5400.5 narrative – that the training aid returned approximately 15 minutes after Ms. Spire was contacted and told to return the vehicle – is consistent with this interpretation.<sup>176</sup> There is not sufficient evidence to conclude that Officer Kemper was acting dishonestly in the July 31 meeting, let alone to read a *Brady* implication into his failure to suggest a different time frame.

To the extent that the Executive Director contends that Officer Kemper is a *Brady* officer because Chief Davis believes he acted dishonestly vis-à-vis the events of July 30, this argument also fails. The Executive Director promotes a circular argument that Chief Davis's or Lt. Delk's negative view of Officer Kemper's character – no matter how ill-founded that view – renders him a "*Brady*" officer, which in turn impacts his ability to perform the functions of a police officer, which in turn supports revocation. But the evidence in the record does not establish that the personally-held beliefs of Chief Davis and Lt. Delk have actual *Brady* implications. Of note, Chief Davis was not asked about *Brady* issues during his testimony, and the arbitration award in the related employment case describes his testimony in that matter as expressly disavowing any

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<sup>174</sup> Post-hearing brief, pp. 12-13.

<sup>175</sup> R. 41.

<sup>176</sup> R. 52.

*Brady* concerns.<sup>177</sup> Moreover, accepting this line of argument would potentially turn any workplace disagreement into a *Brady* matter, and open the door for revocation based on the opinions of others, rather than on an officer's actual conduct.

Finally, beyond the lack of any actual *Brady* concerns here, to the extent *Brady* is being raised under Counts I and III, *Brady* is a non-issue because those counts fail on the threshold finding that Officer Kemper did not “resign under threat of discharge.” But the Executive Director also did not prove an actual *Brady* concern, and this issue therefore would not inform the revocation decision in any event.

b. Officer Kemper's ability and fitness to perform his duties were not otherwise impacted by this incident.

The Executive Director did not prove that the July 30 incident had “*Brady*” implications that adversely affected Officer Kemper's ability to perform his duties. Nor did the evidence otherwise establish that the July 30 incident had an adverse effect on Officer Kemper's ability and fitness to perform his duties.

To the extent to which AAPFD or TSA policies actually required notification in the case of a briefly misplaced and then recovered training aid, Officer Kemper may have been negligent in not following those policies. As the arbitrator in the related case noted, however, the three K-9 officers were in significant company in misunderstanding such reporting requirements.

The officers were wrong, as far as this record shows, in their conclusion that their duty to report the loss was eliminated by the brief period the location of the training aid was unknown and the fact that it came back safely. But the other local examples (set out [above]) of training devices briefly lost and safely recovered – sometimes by Department officers and sometimes by TSA officers or trainers – without a subsequent report shows that the misconception was not theirs alone but was broadly shared.<sup>178</sup>

Any negligence in not reporting the temporary loss of the training aid was not of the quality or character to implicate Officer Kemper's ability or fitness as an officer. To the contrary, the evidence supports the conclusion that the officers' ability and fitness to perform their duties was not impacted. After the July 30, 2014 incident, Officer Kemper continued to work in active duty as a K-9 officer until his departure to return to school, and the other two officers involved continued to work for months, without any changes to their duties and responsibilities. TSA did

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<sup>177</sup> See Ex. 2-1, p. 22 (“The Chief specifically testified on cross that the dismissal letter did not allege dishonesty and that there was no *Brady* issue in the discharge”).

<sup>178</sup> Ex. 2-1, p. 22.

not discipline any of the K-9 officers for the July 2014 incident, and Field Canine Coordinator Vasek did not support their termination.<sup>179</sup>

Thus, even if it were otherwise appropriate to consider revocation under 13 AAC 85.110(a)(2), the evidence does not support a finding that Officer Kemper engaged in conduct that adversely affects his ability and fitness to perform his duties.

3. *Was Officer Kemper’s underlying conduct in the July 31, 2014 incident detrimental to the reputation, integrity or fitness of the Anchorage Airport Police & Fire Department?*

The Executive Director likewise did not meet his burden of proving, even if Officer Kemper could be considered to have been “resigned under threat of discharge for cause,” that the underlying conduct was “detrimental to the reputation, integrity, or discipline” of the AAPFD.<sup>180</sup>

a. Loss of the training aid

To the extent the Executive Director contends that the loss of the training aid satisfies this criterion, this argument fails. While the loss of the training aid was unfortunate and should not have occurred, it is a fact of training detection canines that, periodically, training aids are misplaced or lost – indeed, the aids themselves contain a sticker telling the public whom to call if an aid is found. The April 2014 incident at the Avis rental lot – a much more serious incident in terms of both the length of time that elapsed before the officers first located the missing aid and the length of time the aid was out of the officers’ actual control – did not lead to any discipline for any of the officers. Nor was that incident apparently “detrimental” to the agency’s reputation, despite considerable publicity at the time it occurred.

The evidence presented did not support a finding that the temporary loss and quick recovery of a training aid is “detrimental to the reputation” of an agency. A finding of detriment is not supported by the record, particularly given the lack of any outside knowledge of the incident beyond the Troopers, and AST’s Captain Hahn’s expression of continued support for the AAPFD K-9 program. Indeed, Captain Hahn ended his interview with Lt. Delk by emphasizing, “I don’t want this in any way to suppress the continued working relationship or continued interactions, specifically with the canine program[.]”<sup>181</sup>

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<sup>179</sup> Vasek testimony.

<sup>180</sup> See 13 AAC 85.110(a)(2) (permitting discretionary revocation on this ground); 13 AAC 85.110(b)(3) (requiring revocation on same ground).

<sup>181</sup> R. 120 (“I wanted to affirm for him . . . that we are completely 100 percent supportive of future training that involves our vehicles, future training that involves our facilities. We can help with that and to help facilitate that. I don’t want this in any way to suppress the continued working relationship or continued interactions specifically with



In short, the Executive Director did not meet his burden of showing that the temporary loss of the training aid for under an hour in July 2014 was “detrimental” to the agency’s reputation, integrity, or discipline.

b. Lack of notification

The Executive Director also did not prove that Officer Kemper’s failure to notify Field Canine Coordinator Vasek or his AAPFD supervisors of the training aid incident was “detrimental to the reputation, integrity, or discipline” of AAPFD. As established above, the evidence supports a finding that at the time of the incident, on a more likely than not basis, the officers did not realize that the temporary loss and recovery of the aid was required to be reported. Given the significant evidence of instances when training aids were briefly misplaced then recovered without a report, the Executive Director did not prove that the failure to provide a notification in this instance was “detrimental to the reputation, integrity, or discipline” of AAPFD.

c. Alleged post-resignation “disparaging remarks,” even if proved, would not be a proper basis for decertification under 13 AAC 85.110(a)(2) or (b)(3).

To the extent the Executive Director is asserting that disparaging remarks on social media form a proper basis for decertification, this argument fails on multiple grounds. As noted above, and setting aside the significant potential constitutional implications of basing a revocation decision on a former public employee’s speech in a public forum on issues of public concern, there is no admissible evidence that Officer Kemper actually authored the remarks in question. Further, decertification under 13 AAC 85.110(a)(2) or (b)(3) requires that the officer have resigned under threat of discharge for cause *for* the “detrimental” conduct at issue. Here, the conduct at issue in the social media postings occurred months after Officer Kemper’s resignation. It cannot form the basis for decertification under 13 AAC 85.110(a)(2) or (b)(3).

**B. Did the Executive Director meet his burden to show that Officer Kemper “lacks good moral character”? (Count II)**

Count II of the Amended Accusation asserts that discretionary revocation is appropriate under 13 AAC 85.110(a)(3) because Officer Kemper “lacks good moral character.” The Council has discretion – but is not required – to revoke an officer’s certification if the officer does not meet the basic standards set out in 13 AAC 85.010, which include the requirement that the officer

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the canine program because I can’t stress strongly enough how sensitive I am to the need for those different training environments. I’m very, very well aware of that, and I don’t want that to hurt any of that”).

possess “good moral character.”<sup>182</sup> There is insufficient evidence in the record to support such a finding in this case.

Good moral character is defined as “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 the state and the United States.”<sup>183</sup> For purposes of making this evaluation, the Council may consider “all aspects of a person’s character.”<sup>184</sup> Prior decisions by the Council have considered the elements identified in the regulation – honesty, fairness, respect for the rights of others, and respect for the law – collectively.<sup>185</sup> Because the regulation considers “all aspects of a person’s character,” the Council’s task is to reach a reasoned decision based on the totality of the evidence. Here, the Executive Director did not prove a substantial doubt about Officer Kemper’s honesty, fairness, respect for the rights of others or respect for the law, nor does the totality of the evidence support a finding that he lacks good moral character.

The Executive Director’s post-hearing briefing does not specifically identify what facts he contends support a finding that Officer Kemper lacks good moral character. To the extent that the Executive Director is relying on the generalized narrative that the three K-9 officers colluded to hide the incident, or falsified records, those factual allegations have been rejected, above. The evidence in the record about Officer Kemper’s actions with regard to the loss and retrieval of the training aid does not create a substantial doubt about Officer Kemper’s honesty, fairness, respect for the rights of others or respect for the law.

Of note, too, Officer Kemper’s underlying conduct stands in sharp contrast to other cases in which the Council has revoked a certification on the basis of moral character. Such cases have found overall poor moral character amidst conduct such as sexual contact with a crime victim, sexual harassment of fellow officers, accessing corrections resources for family members’ benefit, and dishonesty in official reports.<sup>186</sup> Here, Officer Kemper’s conduct did not raise substantial doubts about his honesty, fairness, and respect for the rights of others and/or for the law.

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<sup>182</sup> 13 AAC 85.110(a)(3).

<sup>183</sup> 13 AAC 85.900(7).

<sup>184</sup> 13 AAC 85.900(7).

<sup>185</sup> See *In re E X*, OAH No. 13-0473-POC, at p. 18 (Alaska Police Standards Council 2013); *In re: Hazelaar*, OAH No. 13-0085-POC, at pp. 15-16 (Alaska Police Standards Council 2014).

<sup>186</sup> *In re: E X*, OAH Case No. 13-0473-POC (APSC 2013); *In re: Much*, OAH Case No. 13-0288-POC (APSC 2013); *In re: Parcell*, APSC Case No. 2007-09 (APSC 2012); *In re: Bowen*, OAH Case No. 10-0327-POC (APSC 2011).

To the extent to which the Executive Director relies on Chief Davis’s statement, in the August 2014 F-4 narrative, that he questions Officer Kemper’s “integrity, professionalism, and his willingness to accept personal responsibility,” that argument fails.<sup>187</sup> The quoted statement was made in regard to a separate incident – “AI 14-02” – that was not mentioned in either the July 2015 Accusation or the April 2016 Amended Accusation, and as to which the evidentiary record is wholly silent.<sup>188</sup> Specifically, Chief Davis wrote that “the events surrounding *AI 14-02* cause me to question his integrity, professionalism, and his willingness to accept personal responsibility.”<sup>189</sup> But this hearing did not concern the events of “AI 14-02,” whatever they were, and those events thus cannot inform the Council’s decision. Having not sought to revoke Officer Kemper’s certification based on whatever occurred in AI 14-02, nor presented evidence about whatever occurred in AI 14-02, the Executive Director cannot rely on an opinion about those unknown events to support a conclusion that Officer Kemper lacks good moral character. Put another way, the mere existence of Chief Davis’s opinion, standing alone and without a factual basis in the record, is insufficient to “raise substantial doubts about” Officer Kemper’s “honesty, fairness, and respect for the rights of others and for the laws of the state and the United States.”

To the extent the Executive Director is asserting that disparaging remarks on social media raise doubts about Officer Kemper’s moral character, this argument also fails on multiple grounds. As noted above, the Executive Director made no showing that Officer Kemper actually authored the remarks in question. Nor has the Executive Director addressed the propriety of basing a revocation decision on what is at least arguably protected speech. Further, the single posting that appears in the record opines that Chief Davis wrongfully terminated Officers Trent and McQuillin and that they would be ordered reinstated at great cost to the State – precisely the conclusions the arbitrator reached in reversing Officer McQuillin’s termination and ordering him reinstated with full back pay and benefits. While Chief Davis is undoubtedly unhappy about the social media attention, the Executive Director did not establish that, even if Officer Kemper did make the Facebook posting, his having done so implicates his “honesty, fairness, and respect for the rights of others and for the laws of the state and the United States.”

For the reasons stated above, the Executive Director did not meet his burden of proving that Officer Kemper lacks good moral character as defined in the Council’s regulations.

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<sup>187</sup> R. 14; Post-Hearing brief at 14.

<sup>188</sup> The only mention of this incident is in Chief Davis’s November 2014 letter, the contents of which are unsupported hearsay and thus cannot be used to support a factual finding. AS 44.62.460(d).

<sup>189</sup> R. 14.

**C. Did the Executive Director meet his burden to show that Officer Kemper resigned under threat of discharge for conduct that “would cause a reasonable person to have substantial doubt about [his] honesty, fairness, respect for the rights of others, or for the laws of this state or the United States”? (Count III)**

In addition to the allegation discussed in Section A, above, Count III of the Amended Accusation also asserts that mandatory revocation is required under 13 AAC 85.110(b)(3) because Mr. Kemper resigned under threat of discharge for conduct that “would cause a reasonable person to have substantial doubt about [his] honesty, fairness, respect for the rights of others, or for the laws of this state or the United States.” As discussed above, the Counsel cannot revoke Officer Kemper’s certificate under Count III for the threshold reason that he did not “resign under threat of discharge.” But even if that threshold issue did not bar Count III, revocation would still not be warranted under these facts because, as also discussed above, Officer Kemper’s conduct in the underlying events would not “cause a reasonable person to have substantial doubt about [his] honesty, fairness, respect for the rights of others, or for the laws of this state or the United States.” Officer Kemper made, at worst, a negligent mistake, but certainly not one that should cost him his livelihood. The Executive Director did not prove that Officer Kemper engaged in the type of conduct that would warrant revocation under 13 AAC 85.110(b)(3). For this reason, too, the Executive Director did not meet his burden of showing that revocation is appropriate under Count III of the Amended Accusation.

**IV. Conclusion**

The Executive Director did not meet his burden of showing either that revocation is mandatory, or that it would appropriate, under these facts. The Executive Director’s request for revocation of Officer Kemper’s Police Officer Certification is therefore denied.

DATED: September 12, 2016.

By: Signed  
Cheryl Mandala  
Administrative Law Judge

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