

**BEFORE THE ALASKA POLICE STANDARDS COUNCIL**

In the Matter of )  
 )  
 ANTONI HOIBY )  
 \_\_\_\_\_ )

OAH No. 16-0545-POC  
APSC No. 2015-20

**FINAL DECISION**

**I. Introduction**

Police officers in Alaska require certification by the Alaska Police Standards Council. The Council has discretion to deny a police officer’s certification for a number of reasons. The Council also has discretion to allow a police officer to become certificated, even if the applicant has a blemished past.<sup>1</sup> However, in some instances, like the one involving Mr. Hoiby, concerns of character exist beyond a minor blemish. Mr. Hoiby’s conduct, when considered in its totality, rises to such a level that the Council believes he lacks the necessary character to be certified a police officer.

The Executive Director requested that the Council deny Mr. Hoiby’s certificate under five separate issues, stemming from allegations that Mr. Hoiby withheld information on his application and resigned under threat of discharge from a previous officer position.<sup>2</sup>

Mr. Hoiby’s history contains not only a criminal conviction, but series of significant police contacts, which collectively show a lack of respect for the law. As such, the Council cannot grant certification under these circumstances.

**II. Facts**

**A. Kittitas County**

Mr. Hoiby was 26 years old in 2001. He had an infant son.<sup>3</sup> He lived in Kittitas County, Washington and worked four jobs. Kittitas employed him as a police officer reservist. Washington does not certify reservists.<sup>4</sup> He also worked as a night manager at Subway, an on-call janitor at the school, a coach, and a construction worker on the weekends. Mr. Hoiby was

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<sup>1</sup> 13 AAC 85.110(a)(3).

<sup>2</sup> The Executive Director’s statement of issues and Officer Hoiby’s answer and amended answer both refer to discharge. It is undisputed that Officer Hoiby was not discharged, but resigned. Whether he resigned under threat of discharge is discussed later in this decision.

<sup>3</sup> R. 24.

<sup>4</sup> R. 15.

paid for approximately thirty percent of his time as a reservist; the remainder was unpaid or volunteer. Kittitas only paid reserve officers for time spent as a school resource officer, providing juvenile transport, and special detail during the summer.<sup>5</sup>

Reserve officers were to track hours, both volunteer and paid, in their patrol notebooks, according to the time reported by dispatch when officers checked in and out of service. Mr. Hoiby did not follow protocol. Mr. Hoiby did not keep time in his patrol notebook. Instead, he wrote timesheets off a general calendar in his home, where he kept schedules for all of his jobs. At times he used the time on his watch instead of that given by dispatch. Other times he relied on a general schedule that he had written down, without regard for actual time on the job. Mr. Hoiby occasionally wrote time down before he worked, and did not adjust it if he was tardy.<sup>6</sup>

Between September 1, 2001 and March 29, 2002, Mr. Hoiby over-reported his time worked by 78.5 hours, the equivalent of \$785 in salary.<sup>7</sup> Some days Mr. Hoiby reported he worked 20 minutes longer than what was recorded by dispatch.<sup>8</sup> Another time he reported that he worked on a holiday; the school was closed.<sup>9</sup> Mr. Hoiby also failed to report hours that he was entitled to payment, but received none.<sup>10</sup> In short, Mr. Hoiby failed to accurately keep and report his time.

In April 2002, a Kittitas County Deputy noticed discrepancies between Mr. Hoiby's timesheets and the times reported to dispatch. Detective Jerry Shuart, Jr. interviewed Mr. Hoiby and went over the discrepancies. Mr. Hoiby denied that he intentionally misreported his time, but admitted that he "was stealing time" from Kittitas County.<sup>11</sup> Mr. Hoiby signed a statement acknowledging that he claimed time that he either did not work or did not have supporting documentation to show that he worked.<sup>12</sup> He also acknowledged that he received \$785 in wages he did not earn, and that this "is theft in the second degree."<sup>13</sup> Mr. Hoiby was not represented by an attorney during these discussions.

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<sup>5</sup> The timecard issue occurred while Hoiby was working for the Ellensburg School system in Kittitas County. For efficiency's sake this decision refers to all reserve employment as Kittitas.

<sup>6</sup> R. 92.

<sup>7</sup> R. 84.

<sup>8</sup> R. 90-96.

<sup>9</sup> R. 90-96.

<sup>10</sup> R. 90-96.

<sup>11</sup> R. 90-96.

<sup>12</sup> R. 94-96.

<sup>13</sup> R. 94-96.

Mr. Hoiby discussed his situation with his supervisor. His supervisor did not believe he intentionally stole from the department, but stated that it “looked bad.”<sup>14</sup> Mr. Hoiby was told he could “resign or just wait and see what the prosecutor decided once she was forwarded the statements and timesheets and all the evidence they had.”<sup>15</sup> Not wanting to create an embarrassment for the department, especially near the sheriff’s upcoming election, Mr. Hoiby resigned.

Kittitas County charged Mr. Hoiby with theft 2, a felony. The prosecutor did not believe the circumstances warranted a felony charge.<sup>16</sup> Mr. Hoiby accepted a theft 3 conviction, a misdemeanor, under an Alford plea.<sup>17</sup> An Alford plea allows a defendant to enter a guilty plea while maintaining his innocence.<sup>18</sup> Mr. Hoiby was required to pay \$1,010.50 in restitution, to be paid in \$50 monthly installments until the debt was satisfied.

Mr. Hoiby failed to make his monthly payments. Mr. Hoiby is a commercial fisherman. When Mr. Hoiby was out fishing, his girlfriend was supposed to pay his bills, including his restitution payment. The girlfriend, for reasons irrelevant to this decision, discontinued paying Mr. Hoiby’s bills. The court issued notice of late payment to Mr. Hoiby, which he did not receive because he was out fishing.<sup>19</sup> The court then issued a bench warrant for his arrest.<sup>20</sup>

The night Mr. Hoiby returned home from fishing, he attended and participated in a local rodeo. While there, he ran into two different officers that he knew. Both told him he had a warrant. Mr. Hoiby initially planned to deal with the warrant on Monday. Mr. Hoiby, however, asked Officer St. John to follow up and find out the basis for the warrant. Officer St. John found out that it was a felony warrant, and told Mr. Hoiby he had to bring him in to the station.<sup>21</sup> Officer St. John arrested Mr. Hoiby, but did not initially handcuff him.

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<sup>14</sup> Hoiby testimony.

<sup>15</sup> Hoiby testimony, beginning 1:35.25 (August 24, 2016).

<sup>16</sup> Hoiby testimony; R. 15, Hoiby statement corroborated by Undersheriff Mayers of Kittitas County’s statement to Henning (January 12, 2016).

<sup>17</sup> R. 53-59.

<sup>18</sup> *See North Carolina v. Alford*, 400 US 25 (1970).

<sup>19</sup> The notice of late payment was returned as undeliverable.

<sup>20</sup> R. 38-44.

<sup>21</sup> Hoiby testified that Officer St. John said the warrant was for parking tickets and other stuff at the rodeo, and Hoiby did not learn that it was for failure to make restitution until he arrived at the police station. The Executive Director argues, and Hoiby denies, that Hoiby learned that the warrant was for failure to pay restitution while at the rodeo. Whether Hoiby learned the basis for warrant at the rodeo or the police station does not change the analysis.

When they arrived at the station, Officer St. John and Mr. Hoiby played a practical joke on a department employee who was a friend of theirs. Officer St. John cuffed Mr. Hoiby and pretended that they'd been fighting, which was believable based on Mr. Hoiby's post-rodeo looks. He was covered with mud and blood. At the station, Mr. Hoiby found out that the warrant was for the unpaid restitution. Because he had just come in from fishing, Mr. Hoiby had the funds available to pay the full amount, after which he was released.<sup>22</sup> He was never read his rights. The entire process from arrest to release took less than 40 minutes.<sup>23</sup>

### **B. Bristol Bay Borough Police Department**

Mr. Hoiby lives in Naknek, Alaska, located in the Bristol Bay Borough. He and his family have been there for over 10 years.<sup>24</sup> Mr. Hoiby operates a net mending business, commercial fishes, and has worked as a bouncer at the Fisherman's Bar. After observing Mr. Hoiby's ability to work well with bar patrons, former Bristol Bay Borough Police Department (BBBPD) Chief Rodney Enevoldsen discussed the possibility of becoming an officer with Mr. Hoiby.

Mr. Hoiby told Chief Enevoldsen that he would be interested, but had a theft conviction on his record. Chief Enevoldsen looked into the matter, and noted that almost 10 years had passed since the misdemeanor conviction. Chief Enevoldsen advised Mr. Hoiby that after 10 years, the conviction would not serve as a bar to becoming an officer.<sup>25</sup> After the 10-year mark passed, Mr. Hoiby applied. BBBPD hired Mr. Hoiby as a police officer on September 18, 2014.

As part of the application process, Mr. Hoiby completed a personal history statement, or F-3.<sup>26</sup> The F-3 requires, among other things, applicants to report any criminal investigations, convictions, and traffic violations. Mr. Hoiby reported his theft 3 conviction on the F-3.<sup>27</sup> Mr. Hoiby also answered "yes" to two important questions: "Have you ever been terminated, fired, asked to resign, furloughed, put on inactive status for cause, or subjected to disciplinary action while in any position?"; and "Have you ever resigned (quit) after being informed [sic] employer intended to fire, discharge, or terminate you for any reason?" Mr. Hoiby explained in the F-3

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<sup>22</sup> The department could not accept cash. Hoiby satisfied the restitution payment through a bail bondsman.

<sup>23</sup> Hoiby testimony.

<sup>24</sup> R. 27.

<sup>25</sup> Hoiby testimony; *See also* 13 AAC 85.010(b)(2).

<sup>26</sup> R. 24-30.

<sup>27</sup> R. 28; R. 30.

that he had not followed policy, that there was a discrepancy with the times on his timesheet, and that he resigned as a result.<sup>28</sup> Mr. Hoiby reported that his supervisor agreed that there was no criminal intent involved.<sup>29</sup> He did not, however, report his arrest for a felony warrant for failure to pay restitution. BBBPD forwarded Mr. Hoiby's F-3 to the Council on November 24, 2014.<sup>30</sup> The Council took no action on the F-3.

Mr. Hoiby worked for BBBPD as an officer for just under a year, before leaving to attend a 15-week Police Academy in Sitka, paid for by the Council.<sup>31</sup> He successfully completed the Academy and graduated on November 13, 2015. He returned to Naknek two days later.<sup>32</sup>

While Mr. Hoiby was at the Academy, prosecutors from the district attorney's office in Anchorage, after learning of an allegation of irregularity in two arrests made by Mr. Hoiby, contacted the new Chief, Stan Swetsof.<sup>33</sup> Chief Swetsof decided to investigate Mr. Hoiby, including his background. Chief Swetsof contacted the Council for a copy of Mr. Hoiby's application and F-3 form, because he could not locate the information at the BBBPD.<sup>34</sup> Chief Swetsof directed Officer Mark Harreus to lead the investigation.<sup>35</sup> During the process, significant accusations of dishonesty were leveled against Officer Harreus. The Executive Director agreed to drop revocation proceedings against Officer Harreus when he voluntarily relinquished his Alaska police officer certification on October 4, 2016.<sup>36</sup>

BBBPD contracted with the firm Russell Investigation, who in turn hired Hal Henning to conduct the investigation.<sup>37</sup> Chief Swetsof forwarded to Chief Henning information about Mr.

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<sup>28</sup> R. 27(a).

<sup>29</sup> R. 27(a).

<sup>30</sup> Griffiths testimony.

<sup>31</sup> R. 2.

<sup>32</sup> R. 2; Hoiby testimony.

<sup>33</sup> The subject of the prosecutor's inquiry is not part of the statement of issues, or listed as a basis for denial. Therefore, those subjects are outside the scope of this decision and were not considered.

<sup>34</sup> The Borough, not the police department keeps those types of file, as Chief Swetsof later learned.

<sup>35</sup> Swetsof testimony.

<sup>36</sup> See OAH No. 16-0286-POC. An ALJ may take judicial notice of a fact not in the record. 2 AAC 64.300.

<sup>37</sup> Hal Henning serves as Chief of Police in Winthrop, WA. Chief Henning has a long history of police employment, including investigation experience. According to the amended accusation in OAH No. 16-0286-POC, Officer Harreus was terminated for cause from an officer position in Winthrop, WA, on February 8, 2015. The ALJ became aware of this information after the Hoiby record closed. No connection is assumed. However, inquiry would have been made regarding possible links between Henning and Harreus had this information been known during the Hoiby proceedings.

Hoiby, including what can only be described as wild speculation from Officer Harreus.<sup>38</sup>

Officer Harreus stated that the whole Kittitas County thing “reeks.” He speculated that Kittitas County officers would not be forthcoming with information on Mr. Hoiby. He hypothesized that Mr. Hoiby may have used his timesheet as an alibi, while committing other crimes, like “theft, burglary, whatever.” Officer Harreus speculated that Mr. Hoiby might have been having “sex on duty, sex with an inmate, the possibilities are endless.” He conjectured that perhaps Mr. Hoiby wrongfully received a Permanent Fund Dividend. Nothing in this record indicates that any of Officer Harreus’s characterizations of County personnel or accusations of sexual or fraudulent conduct had any basis in fact.

Chief Henning conducted a thorough investigation, including interviews with Mr. Hoiby and Undersheriff Clayton Myers of Kittitas County. Chief Henning determined that many of BBBPD’s concerns were unfounded.<sup>39</sup> On the other hand, Chief Henning found that Mr. Hoiby failed to report the arrest resulting from failure to pay restitution and citations for driving with a suspended license.<sup>40</sup> Chief Henning also reported that Officer Hoiby minimized his conviction, and appears to not take responsibility for his actions. Chief Henning concluded that Officer Hoiby displayed a “very troubling pattern of credibility issues.”<sup>41</sup> BBBPD forwarded Chief Henning’s report to the Alaska Police Standard Council.<sup>42</sup>

BBBPD moved to terminate Officer Hoiby on several bases, including misrepresentation of his arrest record on the F-3.<sup>43</sup> Officer Hoiby appealed the termination. After hearing, BBBPD determined that Officer Hoiby’s continued employment was contingent on his ability to obtain

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<sup>38</sup> At a hearing conducted by BBBPD, Chief Swetzof apologized to Officer Hoiby for forwarding that information to the Council and stated that he would send a letter to the Executive Direction explaining that such information was wrongfully included. *See* Ex. B. The agency record contains no such letter.

<sup>39</sup> R. 19.

<sup>40</sup> R. 16 – R19. Henning’s report also states that Hoiby failed to report police contacts where he was investigated or detained, several unpaid parking tickets and speeding citations, and a threat of a protective order in Arkansas. No evidence was presented, aside from the theft conviction and restitution arrest, of any other instance where Hoiby was investigated or detained. The evidence shows that Hoiby told Henning his ex-girlfriend’s father had threatened him with a restraining order, but nothing had come from it. Henning searched for, but did not find, a restraining order. This incident was not a reportable incident.

Henning’s report states, “There is no driving history or criminal charges pertaining to driving offences in the attached APSN. However, there are the following items listed on the TRO report.” Chief Henning’s report does not state what a TRO report is and it does not appear in the record. Chief Henning’s report then lists two dismissed driving under suspension citations, one driving under suspension amended, and a failure to have driver’s license on person.

<sup>41</sup> R. 19.

<sup>42</sup> R. 11.

<sup>43</sup> Ex. B. Because the other bases are not listed in the statement of issues, they will not be discussed here.

certification through the Council.<sup>44</sup>

### **C. The Alaska Police Standards Council and OAH hearing**

On December 23, 2015, the Executive Director contacted BBBPD inquiring of the status of Mr. Hoiby's application for certification.<sup>45</sup> Chief Swetzof explained that Mr. Hoiby was the subject of an internal investigation.<sup>46</sup> On February 24, 2016, the Executive Director, Bob Griffiths, received Chief Henning's report and additional documentation from BBBPD.<sup>47</sup> The Executive Director reviewed Chief Henning's report and agreed with his conclusions. He did not conduct an independent investigation or interview Mr. Hoiby. The Executive Director determined that Mr. Hoiby did not meet the minimum requirements for certification as a police officer in Alaska.<sup>48</sup> Mr. Hoiby appealed the Executive Director's determination. During its May 2016 meeting, the Council upheld the Executive Director's decision. Mr. Hoiby then appealed to the Office of Administrative Hearings.

A hearing was held on August 24 – 25, 2016. Caitlin Shortell represented Officer Hoiby. Mr. Hoiby, Kenneth Pulice and Trooper Alfred Borrego were called as witnesses.<sup>49</sup> John Novak represented the Executive Director and called Mr. Griffiths, Chief Henning, and Chief Swetzof to testify. The record remained open for counsel to submit closing arguments and the audio tape of Chief Henning's interview with Officer Hoiby. BBBPD, Chief Henning, and the Executive Director were unable to locate a copy of the interview. It is not in the record.

### **III. Discussion**

Mr. Hoiby has the burden of proving by a preponderance of evidence that the Executive Director's and the Council's initial decision to deny his certification was incorrect.<sup>50</sup> The

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<sup>44</sup> At the OAH hearing, Chief Swetzof testified that he reviewed Chief Henning's report and agreed with its conclusions. This appears to be somewhat contradictory to his statements in the April 12, 2016 BBBPD hearing. There, Chief Swetzof stated that he felt better after hearing Mr. Hoiby's explanations and hopes Mr. Hoiby gets his job back at BBBPD. *See* Ex. B. The recording of the BBBPD pre-termination hearing was not played during the OAH hearing. The ALJ listened to the hearing before drafting the decision.

<sup>45</sup> R. 2.

<sup>46</sup> R. 2.

<sup>47</sup> R. 2.

<sup>48</sup> R. 11.

<sup>49</sup> Trooper Borrego testified that he observed that Mr. Hoiby was a hard worker who served his community well. Trooper Borrego heard high praise for Mr. Hoiby from Academy instructors. Nonetheless, Trooper Borrego clarified that his support of Mr. Hoiby, or any officer, hinged on that person's integrity. Trooper Borrego agreed with the Executive Director that an officer's integrity is paramount; that a theft conviction would tarnish an officer's reputation and detract from an officer's integrity.

<sup>50</sup> AS 44.62.460(e)(2).

parties' post hearing briefs identify an incorrect legal standard, arguing that Mr. Hoiby must show that the Council would abuse its discretion – i.e. be clearly mistaken – by denying his application for police certification. Here, the ALJ conducts a full evidentiary hearing and writes a proposed decision on behalf of the Council. The Council may adopt, reject, or amend the proposed decision. The hearing, proposal for action process, and Council deliberation and determination are the Council's process for exercising its discretion.<sup>51</sup> Therefore, Mr. Hoiby must show that the Executive Director and initial Council decision is more likely than not incorrect. Although a close call, Mr. Hoiby has failed to meet this burden.

The Executive Director alleges five reasons that Mr. Hoiby does not qualify for certification as a police officer.<sup>52</sup>

Issue I- Discretionary denial under 13 AAC 85.100(a)(1), based on falsified or omitted information required to be provided on the application for certification or on supporting documents.

Issue II- Discretionary denial under 13 AAC 85.100(a)(2), based on a discharge or threat of discharge from employment as a police officer for cause for inefficiency, incompetence, or some other reason that adversely affects the ability and fitness of the police officer to perform job duties.

Issue III- Discretionary denial under 13 AAC 85.100(a)(2), based on a discharge or threat of discharge from employment as a police officer for cause for conduct that was detrimental to the reputation, integrity, or discipline of the police department where the officer worked.

Issue IV- Mandatory denial under 13 AAC 85.100(b)(4), based on a discharge or resignation under threat of discharge from employment as a police officer for cause for conduct that would cause a reasonable person to have substantial doubt about an individual's honesty, fairness, and respect for the rights of others and the laws of this state and the United States.

Issue V- Mandatory denial under 13 AAC 85.100(b)(4), based on a discharge or resignation under threat of discharge for conduct that was detrimental to the integrity of the police department where the police officer worked.

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<sup>51</sup> See *In re Joan L. Deering*, OAH No. 14-0830- ABC (Alcohol Beverage Control Board 2014, non-adoption on other grounds).

<sup>52</sup> Statement of Issues, R. 1-7.

Each basis for denial is addressed below.

**A. Mr. Hoiby resigned under threat of termination.**

Three of the issues alleged in the Executive Director’s statement of issues involve the nature of Mr. Hoiby’s separation from Kittitas. Mr. Hoiby points out that the statement of issues falsely identifies his departure from Kittitas as a termination, when in fact, he resigned. Mr. Hoiby also argues that his resignation was not under threat of discharge. He is incorrect. First, Mr. Hoiby identified that he had been asked to resign and put on inactive status for cause on his F-3.<sup>53</sup> Second, Mr. Hoiby stated that he resigned (quit) after being informed that his employer planned to terminate him.<sup>54</sup> Third, Mr. Hoiby’s testimony at hearing affirmed that his resignation was suggested by the county. “I was told I could resign or I could just wait and see what the prosecutor decided once she was forwarded the statements and timesheets and all the evidence they had.” This language contains an implied threat of discharge. The regulations treat a resignation under threat of discharge equivalent to termination for cause.<sup>55</sup>

**B. Mr. Hoiby may not have intentionally committed theft.**

We must next examine the nature of Mr. Hoiby’s conduct which led to his resignation. Mr. Hoiby testified that he did not intentionally pad his time. He has consistently maintained that his over-reporting of time worked was unintentional. Mr. Hoiby’s testimony relating to lack of intent was consistent with his statements to the BBBPD and the investigators at Kittitas. He admitted that he either did not work or did not have documentation for those hours and that his claimed time constituted theft from his employer.<sup>56</sup> Mr. Hoiby’s Alford plea supports his contention that his actions, though negligent, were not intentional.<sup>57</sup> Further, Mr. Hoiby’s supervisor and the district attorney did not feel his actions warranted a felony conviction. According to Mr. Hoiby’s uncontroverted testimony, his supervisor believed his actions were without criminal intent. Overall, the record supports a finding that Mr. Hoiby’s “theft” may have been unintentional.

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<sup>53</sup> R. 27. “Asked to resign” and “put on inactive status” are highlighted on Hoiby’s F-3, indicating that this is what occurred from the choice offered.

<sup>54</sup> R. 27.

<sup>55</sup> 13 AAC 85.100.

<sup>56</sup> R. 88 – R. 96.

<sup>57</sup> The Executive Director pushed Hoiby to admit that he intentionally committed theft from Kittitas based on his acceptance of the guilty plea. Hoiby remained steadfast in his assertion that his theft of time was unintentional. The Executive Director, Chief Henning, and council for Hoiby were unfamiliar with the meaning of an Alford plea. The Executive Director appears to argue that certificate denial is appropriate if an applicant has a theft conviction, regardless of mens rea.

Obviously, Mr. Hoiby's timekeeping fell far from acceptable, but it is not the work of a criminal mastermind. The evidence suggests that Mr. Hoiby, a new father working four jobs, believed accurate timekeeping was unimportant, and not worthy of careful attention. This erroneous belief led to a criminal conviction for theft. Mr. Hoiby has since learned the importance of accurate record keeping.<sup>58</sup>

Regardless if Mr. Hoiby's conduct in 2001-02 was intentional or otherwise dishonest, given the age of the conduct, the Council is not required to deny him a certificate in 2016. It does mean, however, that Mr. Hoiby's overall conduct should be more closely scrutinized. Put other way, although the Council has the discretion to certify officers with compromised histories; such history must be fully examined to ensure that the criminal conduct was isolated and not systemic of a larger pattern of unacceptable conduct. It is for this reason that the regulation rightfully requires a full decade to pass between conviction and certification. During that decade, the applicant has the opportunity to show that he or she has grown, learned from mistakes, and become the type of person - honorable, honest, and brave, that a career in law enforcement demands.

It is important to note that several community members and officers submitted letters of support for Mr. Hoiby, praising his work in the community and as an officer.<sup>59</sup> Mr. Pulice's testimony praised Mr. Hoiby as an officer and community member. In other words, the Council's finding that Mr. Hoiby is inappropriate for certification is not to say that he is a criminal unworthy of redemption, instead it is a finding that Mr. Hoiby does not have the fortitude to be a police officer.

### **C. Mr. Hoiby minimized his theft conviction.**

Turning to the issue of whether Mr. Hoiby intentionally omitted material facts from the F-3, he testified that he tried to submit a complete application, including all traffic stops and any police contacts. He contacted each jurisdiction where he had resided.<sup>60</sup> Teresa Coghill, BBBPD staff, assisted him to ensure he did not miss anything.<sup>61</sup> According to Mr. Hoiby, the bench

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<sup>58</sup> Hoiby explained that the Academy enforced the importance of recordkeeping. Students learn "if it is not documented, it did not happen."

<sup>59</sup> Trooper Borrego's letter is not considered as support for Hoiby. His letter and testimony made clear he would not condone any prior action that implicated integrity, which theft surely does.

<sup>60</sup> This included calls to, and internet record searches in, Arkansas, Everett, Edmond, Kittitas, and Snoqualmish.

<sup>61</sup> Hoiby testimony.

warrant and arrest stemming from failure to make timely restitution did not appear on records he received. Neither did the instances of driving under suspension. According to Mr. Hoiby, he did not remember these instances of police contact until Chief Henning pointed them out during his investigation. Although Mr. Hoiby's may have honestly forgotten about these events, an arrest and failure to follow an explicit court order (*i.e.*, an order to pay restitution) show a lack of recognition regarding the importance of the law. Each of the three instances of omission is discussed below.

1. *The arrest.*

Chief Henning and the Executive Director do not believe that Mr. Hoiby could have forgotten his arrest. Their positions are reasonable. Most law abiding citizens would remember an arrest. Here, however, Mr. Hoiby described the time of his arrest as an evening filled with distractions - it included a rodeo, two separate notifications that he had a warrant for his arrest, getting handcuffed, joking around with former colleagues, and paying over \$700.<sup>62</sup>

Mr. Hoiby admitted at hearing that this was an arrest. But this is not determinative of whether he genuinely had forgotten it when filling out his F-3. Mr. Hoiby's testimony that he did not consider it an arrest at the time, and that he had forgotten the incident altogether is plausible, and frankly, believable. We think of a traumatic experience, with consequences, when we think of arrest. That was not the case here. Mr. Hoiby was arrested and released within forty minutes. He did not appear before a judge, was not Mirandized, and was not held in a closed room. He paid his debt and left unscathed. Mr. Hoiby's testimony and the nature of the arrest make it more likely than not that he did not recall, as opposed to knowingly withheld, the arrest. But the analysis cannot stop there. Regardless of whether Mr. Hoiby remembered the arrest, he failed to follow a court order to pay restitution. His failure to comply with a court order resulted in his subsequent arrest. The restitution was ultimately his responsibility even though he believed his girlfriend was paying the amount.

2. *Driving record.*

Mr. Hoiby's record shows three instances of driving under suspension and one failure to have a driver's license on person. Two of the driving under suspension citations were

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<sup>62</sup> Hoiby testimony.

dismissed.<sup>63</sup> Mr. Hoiby reported two instances of license revocation and six other traffic violations on his F-3.<sup>64</sup> It defies logic for an officer applicant to admit to a theft conviction, and then purposely exclude other, comparatively innocuous, citations.

This conclusion is further bolstered by the F-3 language above Mr. Hoiby's signature. "I further agree and consent in advance to being summarily discharged without cause or hearing if any of the information that I have provided contains any misrepresentation or falsification or if any requested information was *knowingly* omitted."<sup>65</sup>

### 3. *Theft conviction.*

The Executive Director argues that Mr. Hoiby mischaracterized his theft conviction as a misunderstanding on the F-3 and in his interview with Chief Hennings. Because this characterization is not an accurate description of his conviction, the Executive Director considers this characterization to be a material omission from the F-3, which is a ground for denial of a police certificate.<sup>66</sup>

The record demonstrates that the Executive Director is correct that Mr. Hoiby's conduct was more than a "misunderstanding." Mr. Hoiby's timesheet discrepancies were not merely just the difference between his watch and dispatch records of his compensable time. He did not adjust his timesheet when he showed up late. On one day, he entered time worked when the school was closed. Mr. Hoiby also failed to claim compensable hours on a day he did work compensable hours.

Thus, Mr. Hoiby's characterization of the theft as a "misunderstanding" minimizes the nature of his error. This error is compounded by his subsequent inaction – his failure to comply with a court order to pay restitution. Accordingly, the Council will deny certification under Issue I, 13 AAC 85.100(a)(1).

#### **D. Mr. Hoiby's history adversely affects his current ability to perform job duties.**

Mr. Hoiby's Kittitas time-keeping was incompetent and inefficient. For this, he resigned under threat of discharge. The incident occurred more than 10 years ago. The record in this matter, when considered in totality, contains a concern of Mr. Hoiby's competence and

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<sup>63</sup> R. 17.

<sup>64</sup> R. 26; R. 28.

<sup>65</sup> R. 30.

<sup>66</sup> 13 AAC 85.100(a)(1).

efficiency that would adversely affect his current ability to perform the duties of an officer. Even though BBBPD had employed Mr. Hoiby for almost a year before sending him to the Academy, his past conduct demonstrates a legitimate concern regarding his ability to perform his job duties. Consequently, the Council exercises its discretion under 13 AAC 85.100(a)(2) to deny certification as discussed in more detail below.

**E. Mr. Hoiby’s actions raise substantial doubts about his character.**

Mr. Hoiby has a theft conviction. He stole almost \$800 in time from his employer, a police department. Even though the Council has considerable discretion and the ability to weigh the facts of each situation, Mr. Hoiby’s conduct – including his failure to report the arrest stemming from unpaid restitution, and his characterization of the theft conviction – raises substantial doubt about Mr. Hoiby’s respect for the laws of this state and the United States.

Mr. Hoiby was convicted of theft more than a dozen years ago. That standing alone does not act as a bar to certification. He ultimately paid the restitution due, but only after being arrested. Mr. Hoiby has reported the theft conviction, but not all of the circumstances surrounding the conviction. These actions raise substantial doubt about Mr. Hoiby’s character. Therefore, denial under, 13 AAC 85.100(b)(4), is appropriate.

**F. Theft from a police department is detrimental to the reputation, integrity, or discipline of the department.**

The Executive Director seeks both mandatory and discretionary denial based on conduct that reflects poorly on the department where Mr. Hoiby worked, in this case Kittitas County.<sup>67</sup> The language of 13 AAC 85.110(a) (discretionary denial) and (b) (mandatory denial), are substantially identical.<sup>68</sup> The alternate avenues give the Executive Director, and thus the Council, options for determining which regulations should apply in a particular fact situation.<sup>69</sup>

Although an officer’s past arrest or conviction would always have some detriment to the reputation, integrity, or discipline of the police department, the regulations clearly permit an applicant with an arrest record to become a police officer.

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<sup>67</sup> Statement of Issues, Issue III, 13 AAC 85.100(a)(2), and Issue V, 13 AAC 85.100(b)(4). The meaning of “where the officer worked” was not discussed during hearing. A natural interpretation would mean where the officer worked at the time the conduct occurred, and not where the officer worked more than a decade later.

<sup>68</sup> See *In re Mattingly*, OAH No. 15-1088-POC, at 10 (APSC 2016); *In re Gutierrez*, OAH No. 14-1718-POC (APSC 2015). These were revocation, not denial, cases, but the same language is used for both.

<sup>69</sup> *Mattingly*, at 10.

13 AAC 85.010(b) defines “basic standard for police officers.” Under this regulation some convictions are barring conditions, without regard to the age of the conviction. For example, a police department may not hire an individual with a domestic violence conviction.<sup>70</sup> The regulations recognize, however, that convictions for other crimes may become stale and no longer serve as a barring condition. For example, a department is also barred from hiring an officer who has been convicted of two or more DWI offenses, a crime of dishonesty, a crime of moral turpitude, or a crime that resulted in serious physical injury to another person for at least ten years immediately before the date of hire.<sup>71</sup>

In sum, 13 AAC 85.010(b) provides guidance into how the Council views crimes of dishonesty. For convictions over 10 years old, the Council will scrutinize the facts of the crime, and determine whether those facts are still a barring condition. For Issues No. III and V, the question is whether the crime of more than 10 years of age is detrimental to the reputation of the department.

Two recent certification cases discuss revocation based on damage to the reputation of a department, *In re Mattingly* and *In re Gutierrez*.<sup>72</sup> In both, the damage would occur to a current, Alaskan employer. In *Mattingly*, Officer Mattingly directly and repeatedly lied to his supervisors.<sup>73</sup> In *Gutierrez*, Lt. Gutierrez, a commanding officer, engaged in sexual acts at the office.<sup>74</sup> In both cases, the Council felt revocation appropriate due to potential damage to the department where the officer worked. In *Mattingly*, the Council explained that “detriment to an agency’s integrity occurs where a certificated officer engages in conduct that ‘conflicts with the organization’s core values.’”<sup>75</sup>

Mr. Hoiby’s circumstances are different in only that it caused damage to Mr. Hoiby’s prior department. The law does not require that the reputational damage occur to an Alaska employer. 13 AAC 85.100(a) and (b), respectively, speak to “the police department where the police officer worked.” Mr. Hoiby’s conduct would have been, as the Executive Director stated,

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<sup>70</sup> 13 AAC 85.010(b).

<sup>71</sup> 13 AAC 85.010(b).

<sup>72</sup> OAH No. 15-1088-POC; OAH No. 14-1718-POC

<sup>73</sup> *Mattingly*, at 10.

<sup>74</sup> *Gutierrez*, at 2.

<sup>75</sup> *Mattingly*, OAH No. 15-1088-POC at 7. Note that the quote from *Mattingly* applies the standard only to a certificated officer. Mr. Hoiby was not certificated at the time of his theft. This decision does not turn on that issue, however. In this decision, the focus is on whether the Executive Director has shown that Mr. Hoiby’s conduct was intentionally dishonest.

a “black mark” on the agency where he worked in 2001-02. It is conduct that remains detrimental to the reputation, integrity, or discipline to Kittitas County, even if some members of the department have forgotten the precise circumstances of the incident.<sup>76</sup> Theft by a police officer (even a reserve officer) against a police department damages the reputation of the department. The Council denies certification under Issue III and V of the statement of issues.

**G. Brady and Giglio concerns support, but do not mandate, denial.**

*Brady* and *Giglio* are two cases that require prosecutors to disclose exculpatory or impeachment evidence to defense counsel.<sup>77</sup> Prosecutors must disclose any finding of misconduct that reflects on truthfulness or bias, whether a pending charge of criminal conduct or credible allegation of misconduct.<sup>78</sup> *Brady* and *Giglio* issues can seriously compromise the district attorney’s ability to file a charge and move forward on a prosecution. Clinton Campion, Anchorage District Attorney, submitted an affidavit outlining *Brady* and *Giglio* concerns, and the interplay between these concerns and the allegations against Mr. Hoiby.<sup>79</sup>

Here, prosecutors will likely have to disclose Mr. Hoiby’s criminal conviction to every criminal defendant.<sup>80</sup> They may also have to disclose the investigation. This will be a burden for a police department that employs Mr. Hoiby as well as any prosecutor’s office that handles his cases. This burden is not minor.<sup>81</sup> Further, prosecutors will likely have to disclose Mr. Hoiby’s subsequent arrest and failure to pay restitution, regardless of whether Mr. Hoiby “remembered” the arrest.

Ultimately, although the Council has discretion to award Mr. Hoiby a certificate it is inappropriate to do so under these circumstances. The impact of his conviction combined with his subsequent conduct on the *Brady/Giglio* issue is a valid concern in considering whether to deny certification.

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<sup>76</sup> The two Kittitas contacts recalled that Hoiby got “jammed up” with a time card issue, that he was a good cop, and that no one believed Hoiby would “do something like that.”

<sup>77</sup> *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

<sup>78</sup> Affidavit of Clinton Campion (August 16, 2016).

<sup>79</sup> Campion’s affidavit does not mention Hoiby. Instead, it outlines his opinion that a prosecutor would have to disclose falsification or omission on an application, reputation or opinion evidence of dishonesty, held by persons within law enforcement, but does not outline allegations.

<sup>80</sup> Unless a court rules that no disclosure is required, disclosure of Hoiby’s conviction to the judge will be required. Whether the court would require disclosure to the defense is not a matter that can be determined in this proceeding.

<sup>81</sup> Chief Enevoldsen knew of Hoiby’s theft conviction.

#### **H. The Council will not approve Mr. Hoiby's certificate.**

Mr. Hoiby's failure to accurately keep time, failure to provide an accurate F-3, and his minimization of his conviction raise legitimate questions about Mr. Hoiby's fitness. This is not an instance where a person made a single mistake in the distant past and made amends. This matter involves a situation where the person was convicted of stealing from a police department and then failed to pay the court ordered restitution. This series of failures show a substantial doubt of Mr. Hoiby's respect for the rights of others and the law.

Like a prosecutor, the Council should strive to see that justice is done in all cases.<sup>82</sup> Our justice system is built on the premise of second chances. If a crime is committed and a sentence served, the individual may be given the opportunity to reform and add value to our society. The regulations recognize this and grant the Council the power to decide which individuals warrant a second chance. But here, Mr. Hoiby failed to meet his burden that the Council's prior decision to deny his certification was incorrect. Mr. Hoiby's conduct was not an isolated incident, in which he learned from his mistake and has made amends. When considering the totality of the circumstances, Mr. Hoiby has shown a demonstrated lack of respect for the right of others and the law.

#### **IV. Conclusion**

The evidence supports a conclusion that Antoni Hoiby engaged in conduct that warrants a denial of certification under the Council's regulations. Accordingly, the decision to deny Mr. Hoiby certification is affirmed.

DATED this 17th day of April, 2017.

By: Signed \_\_\_\_\_  
Bryce Johnson  
Chair, Alaska Police Standards Council

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

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

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<sup>82</sup> See Executive Director's post-hearing brief, at. 6 (September 9, 2016).

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

In the Matter of )  
 )  
 ANTONI HOIBY )  
 \_\_\_\_\_ )

OAH No. 16-0545-POC  
APSC No. 2015-20

**[REJECTED PROPOSED] DECISION**

**I. Introduction**

Police officers in Alaska require certification by the Alaska Police Standards Council. The Council has discretion to deny a police officer’s certification for a number of reasons. The Council also has discretion to allow a police officer to become certificated, even if the applicant has a blemished past, as does Antoni Hoiby.<sup>83</sup>

The Executive Director requests that the Council deny Mr. Hoiby’s certificate under five separate issues, stemming from allegations that Mr. Hoiby withheld information on his application and resigned under threat of discharge from a previous officer position.<sup>84</sup>

Although Mr. Hoiby’s history contains a conviction and he failed to disclose each police contact, the evidence supports a finding that the Council should exercise its considerable discretion and grant certification.

**II. Facts**

**A. Kittitas County**

Mr. Hoiby was 26 years old in 2001. He had an infant son.<sup>85</sup> He lived in Kittitas County, Washington and worked four jobs. Kittitas employed him as a police officer reservist. Washington does not certify reservists.<sup>86</sup> He also worked as a night manager at Subway, an on-call janitor at the school, a coach, and a construction worker on the weekends. Mr. Hoiby was paid for approximately thirty percent of his time as a reservist; the remainder was unpaid or volunteer. Kittitas only paid reserve officers for time spent as a school resource officer,

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<sup>83</sup> 13 AAC 85.110(a)(3).

<sup>84</sup> The Executive Director’s statement of issues and Officer Hoiby’s answer and amended answer both refer to discharge. It is undisputed that Officer Hoiby was not discharged, but resigned. Whether he resigned under threat of discharge is discussed later in this decision.

<sup>85</sup> R. 24.

<sup>86</sup> R. 15.

providing juvenile transport, and special detail during the summer.<sup>87</sup>

Reserve officers were to track hours, both volunteer and paid, in their patrol notebooks, according to the time reported by dispatch when officers checked in and out of service. Mr. Hoiby did not follow protocol. Mr. Hoiby did not keep time in his patrol notebook. Instead, he wrote timesheets off a general calendar in his home, where he kept schedules for all of his jobs. At times he used the time on his watch instead of that given by dispatch. Other times he relied on a general schedule that he had written down, without regard for actual time on the job. Mr. Hoiby occasionally wrote time down before he worked, and did not adjust it if he was tardy.<sup>88</sup>

Between September 1, 2001 and March 29, 2002, Mr. Hoiby over-reported his time worked by 78.5 hours, the equivalent of \$785 in salary.<sup>89</sup> Some days Mr. Hoiby reported he worked 20 minutes longer than what was recorded by dispatch.<sup>90</sup> Another time he reported that he worked on a holiday; the school was closed.<sup>91</sup> Mr. Hoiby also failed to report hours that he was entitled to payment, but received none.<sup>92</sup> In short, Mr. Hoiby failed to accurately keep and report his time.

In April 2002, a Kittitas County Deputy noticed discrepancies between Mr. Hoiby's timesheets and the times reported to dispatch. Detective Jerry Shuart, Jr. interviewed Mr. Hoiby and went over the discrepancies. Mr. Hoiby denied that he intentionally misreported his time, but admitted that he "was stealing time" from Kittitas County.<sup>93</sup> Mr. Hoiby signed a statement acknowledging that he claimed time that he either did not work or did not have supporting documentation to show that he worked.<sup>94</sup> He also acknowledged that he received \$785 in wages he did not earn, and that this "is theft in the second degree."<sup>95</sup> Mr. Hoiby was not represented by an attorney during these discussions.

Mr. Hoiby discussed his situation with his supervisor. His supervisor did not believe he

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<sup>87</sup> The timecard issue occurred while Hoiby was working for the Ellensburg School system in Kittitas County. For efficiency's sake this decision refers to all reserve employment as Kittitas.

<sup>88</sup> R. 92.

<sup>89</sup> R. 84.

<sup>90</sup> R. 90-96.

<sup>91</sup> R. 90-96.

<sup>92</sup> R. 90-96.

<sup>93</sup> R. 90-96.

<sup>94</sup> R. 94-96.

<sup>95</sup> R. 94-96.

intentionally stole from the department, but stated that it “looked bad.”<sup>96</sup> Mr. Hoiby was told he could “resign or just wait and see what the prosecutor decided once she was forwarded the statements and timesheets and all the evidence they had.”<sup>97</sup> Not wanting to create an embarrassment for the department, especially near the sheriff’s upcoming election, Mr. Hoiby resigned.

Kittitas County charged Mr. Hoiby with theft 2, a felony. The prosecutor did not believe the circumstances warranted a felony charge.<sup>98</sup> Mr. Hoiby accepted a theft 3 conviction, a misdemeanor, under an Alford plea.<sup>99</sup> An Alford plea allows a defendant to enter a guilty plea while maintaining his innocence.<sup>100</sup> Mr. Hoiby was required to pay \$1,010.50 in restitution, to be paid in \$50 monthly installments until the debt was satisfied.

Mr. Hoiby failed to make his monthly payments. Mr. Hoiby is a commercial fisherman. When Mr. Hoiby was out fishing, his girlfriend was supposed to pay his bills, including his restitution payment. The girlfriend, unbeknownst to Mr. Hoiby, began seeing another man and discontinued paying Mr. Hoiby’s bills. The court issued notice of late payment to Mr. Hoiby, which he did not receive because he was out fishing.<sup>101</sup> The court then issued a bench warrant for his arrest.<sup>102</sup>

Mr. Hoiby returned from fishing to find that his girlfriend was with another man. The night he returned home, he attended and participated in a local rodeo. While there, he ran into two different officers that he knew. Both told him he had a warrant. Mr. Hoiby initially planned to deal with the warrant on Monday. Mr. Hoiby, however, asked Officer St. John to follow up and find out the basis for the warrant. Officer St. John found out that it was a felony warrant, and told Mr. Hoiby he had to bring him in to the station.<sup>103</sup> Officer St. John arrested Mr. Hoiby,

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<sup>96</sup> Hoiby testimony.

<sup>97</sup> Hoiby testimony, beginning 1:35.25 (August 24, 2016).

<sup>98</sup> Hoiby testimony; R. 15, Hoiby statement corroborated by Undersheriff Mayers of Kittitas County’s statement to Henning (January 12, 2016).

<sup>99</sup> R. 53-59.

<sup>100</sup> *See North Carolina v. Alford*, 400 US 25 (1970).

<sup>101</sup> The notice of late payment was returned as undeliverable.

<sup>102</sup> R. 38-44.

<sup>103</sup> Hoiby testified that Officer St. John said the warrant was for parking tickets and other stuff at the rodeo, and Hoiby did not learn that it was for failure to make restitution until he arrived at the police station. The Executive Director argues, and Hoiby denies, that Hoiby learned that the warrant was for failure to pay restitution while at the rodeo. Whether Hoiby learned the basis for warrant at the rodeo or the police station does not change the analysis.

but did not initially handcuff him.

When they arrived at the station, Officer St. John and Mr. Hoiby played a practical joke on a department employee who was a friend of theirs. Officer St. John cuffed Mr. Hoiby and pretended that they'd been fighting, which was believable based on Mr. Hoiby's post-rodeo looks. He was covered with mud and blood. At the station, Mr. Hoiby found out that the warrant was for the unpaid restitution. Because he had just come in from fishing, Mr. Hoiby had the funds available to pay the full amount, after which he was released.<sup>104</sup> He was never read his rights. The entire process from arrest to release took less than 40 minutes.<sup>105</sup>

### **B. Bristol Bay Borough Police Department**

Mr. Hoiby lives in Naknek, Alaska, located in the Bristol Bay Borough. He and his family have been there for over 10 years.<sup>106</sup> Mr. Hoiby operates a net mending business, commercial fishes, and has worked as a bouncer at the Fisherman's Bar. After observing Mr. Hoiby's ability to work well with bar patrons, former Bristol Bay Borough Police Department (BBBPD) Chief Rodney Enevoldsen discussed the possibility of becoming an officer with Mr. Hoiby.

Mr. Hoiby told Chief Enevoldsen that he would be interested, but had a theft conviction on his record. Chief Enevoldsen looked into the matter, and noted that almost 10 years had passed since the misdemeanor conviction. Chief Enevoldsen advised Mr. Hoiby that after 10 years, the conviction would not serve as a bar to becoming an officer.<sup>107</sup> After the 10-year mark passed, Mr. Hoiby applied. BBBPD hired Mr. Hoiby as a police officer on September 18, 2014.

As part of the application process, Mr. Hoiby completed a personal history statement, or F-3.<sup>108</sup> The F-3 requires, among other things, applicants to report any criminal investigations, convictions, and traffic violations. Mr. Hoiby reported his theft 3 conviction on the F-3.<sup>109</sup> Mr. Hoiby also answered "yes" to two important questions: "Have you ever been terminated, fired, asked to resign, furloughed, put on inactive status for cause, or subjected to disciplinary action while in any position?"; and "Have you ever resigned (quit) after being informed [sic] employer

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<sup>104</sup> The department could not accept cash. Hoiby satisfied the restitution payment through a bail bondsman.

<sup>105</sup> Hoiby testimony.

<sup>106</sup> R. 27.

<sup>107</sup> Hoiby testimony; *See also* 13 AAC 85.010(b)(2).

<sup>108</sup> R. 24-30.

<sup>109</sup> R. 28; R. 30.

intended to fire, discharge, or terminate you for any reason?” Mr. Hoiby explained in the F-3 that he had not followed policy, that there was a discrepancy with the times on his timesheet, and that he resigned as a result.<sup>110</sup> Mr. Hoiby reported that his supervisor agreed that there was no criminal intent involved.<sup>111</sup> He did not, however, report his arrest for a felony warrant for failure to pay restitution. BBBPD forwarded Mr. Hoiby’s F-3 to the Council on November 24, 2014.<sup>112</sup> The Council took no action on the F-3.

Mr. Hoiby worked for BBBPD as an officer for just under a year, before leaving to attend a 15-week Police Academy in Sitka, paid for by the Council.<sup>113</sup> He successfully completed the Academy and graduated on November 13, 2015. He returned to Naknek two days later.<sup>114</sup>

While Mr. Hoiby was at the Academy, prosecutors from the district attorney’s office in Anchorage, after learning of an allegation of irregularity in two arrests made by Mr. Hoiby, contacted the new Chief, Stan Swetzof.<sup>115</sup> Chief Swetzof decided to investigate Mr. Hoiby, including his background. Chief Swetzof contacted the Council for a copy of Mr. Hoiby’s application and F-3 form, because he could not locate the information at the BBBPD.<sup>116</sup> Chief Swetzof directed Officer Mark Harreus to lead the investigation.<sup>117</sup> The Executive Director agreed to drop revocation proceedings against Officer Harreus when he voluntarily relinquished his Alaska police officer certification on October 4, 2016.<sup>118</sup> Although Officer Harreus’ actions are not at issue here, the Council should be aware that there were significant accusations of dishonesty leveled against Officer Harreus.

BBBPD contracted with the firm Russell Investigation, who in turn hired Hal Henning to conduct the investigation.<sup>119</sup> Chief Swetzof forwarded to Chief Henning information about Mr.

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<sup>110</sup> R. 27(a).

<sup>111</sup> R. 27(a).

<sup>112</sup> Griffiths testimony.

<sup>113</sup> R. 2.

<sup>114</sup> R. 2; Hoiby testimony.

<sup>115</sup> The subject of the prosecutor’s inquiry is not part of the statement of issues, or listed as a basis for denial. Therefore, those subjects are outside the scope of this decision and were not considered.

<sup>116</sup> The Borough, not the police department keeps those types of file, as Chief Swetzof later learned.

<sup>117</sup> Swetzof testimony.

<sup>118</sup> See OAH No. 16-0286-POC. An ALJ may take judicial notice of a fact not in the record. 2 AAC 64.300.

<sup>119</sup> Hal Henning serves as Chief of Police in Winthrop, WA. Chief Henning has a long history of police employment, including investigation experience. According to the amended accusation in OAH No. 16-0286-POC, Officer Harreus was terminated for cause from an officer position in Winthrop, WA, on February 8, 2015. The ALJ became aware of this information after the Hoiby record closed. No connection is assumed. However, inquiry

Hoiby, including what can only be described as wild speculation from Officer Harreus.<sup>120</sup>

Officer Harreus stated that the whole Kittitas County thing “reeks.” He speculated that Kittitas County officers would not be forthcoming with information on Mr. Hoiby. He hypothesized that Mr. Hoiby may have used his timesheet as an alibi, while committing other crimes, like “theft, burglary, whatever.” Officer Harreus speculated that Mr. Hoiby might have been having “sex on duty, sex with an inmate, the possibilities are endless.” He conjectured that perhaps Mr. Hoiby wrongfully received a Permanent Fund Dividend. Nothing in this record indicates that any of Officer Harreus’s characterizations of County personnel or accusations of sexual or fraudulent conduct had any basis in fact.

Chief Henning conducted a thorough investigation, including interviews with Mr. Hoiby and Undersheriff Clayton Myers of Kittitas County. Chief Henning determined that many of BBBPD’s concerns were unfounded.<sup>121</sup> On the other hand, Chief Henning found that Mr. Hoiby failed to report the arrest resulting from failure to pay restitution and citations for driving with a suspended license.<sup>122</sup> Chief Henning also reported that Officer Hoiby minimized his conviction, and appears to not take responsibility for his actions. Chief Henning concluded that Officer Hoiby displayed a “very troubling pattern of credibility issues.”<sup>123</sup> BBBPD forwarded Chief Henning’s report to the Alaska Police Standard Council.<sup>124</sup>

BBBPD moved to terminate Officer Hoiby on several bases, including misrepresentation

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would have been made regarding possible links between Henning and Harreus had this information been known during the Hoiby proceedings.

<sup>120</sup> At a hearing conducted by BBBPD, Chief Swetzof apologized to Officer Hoiby for forwarding that information to the Council and stated that he would send a letter to the Executive Direction explaining that such information was wrongfully included. *See* Ex. B. The agency record contains no such letter.

<sup>121</sup> R. 19.

<sup>122</sup> R. 16 – R19. Henning’s report also states that Hoiby failed to report police contacts where he was investigated or detained, several unpaid parking tickets and speeding citations, and a threat of a protective order in Arkansas. No evidence was presented, aside from the theft conviction and restitution arrest, of any other instance where Hoiby was investigated or detained. The evidence shows that Hoiby told Henning his ex-girlfriend’s father had threatened him with a restraining order, but nothing had come from it. Henning searched for, but did not find, a restraining order. This incident was not a reportable incident.

Henning’s report states, “There is no driving history or criminal charges pertaining to driving offences in the attached APSN. However, there are the following items listed on the TRO report.” Chief Henning’s report does not state what a TRO report is and it does not appear in the record. Chief Henning’s report then lists two dismissed driving under suspension citations, one driving under suspension amended, and a failure to have driver’s license on person.

<sup>123</sup> R. 19.

<sup>124</sup> R. 11.

of his arrest record on the F-3.<sup>125</sup> Officer Hoiby appealed the termination. After hearing, BBBPD determined that Officer Hoiby's continued employment was contingent on his ability to obtain certification through the Council.<sup>126</sup>

### **C. The Alaska Police Standards Council and OAH hearing**

On December 23, 2015, the Executive Director contacted BBBPD inquiring of the status of Mr. Hoiby's application for certification.<sup>127</sup> Chief Swetsof explained that Mr. Hoiby was the subject of an internal investigation.<sup>128</sup> On February 24, 2016, the Executive Director, Bob Griffiths, received Chief Henning's report and additional documentation from BBBPD.<sup>129</sup> The Executive Director reviewed Chief Henning's report and agreed with his conclusions. He did not conduct an independent investigation or interview Mr. Hoiby. The Executive Director determined that Mr. Hoiby did not meet the minimum requirements for certification as a police officer in Alaska.<sup>130</sup> Mr. Hoiby appealed the Executive Director's determination. During its May 2016 meeting, the Council upheld the Executive Director's decision. Mr. Hoiby then appealed to the Office of Administrative Hearings.

A hearing was held on August 24 – 25, 2016. Caitlin Shortell represented Officer Hoiby. Mr. Hoiby, Kenneth Pulice and Trooper Alfred Borrego were called as witnesses.<sup>131</sup> John Novak represented the Executive Director and called Mr. Griffiths, Chief Henning, and Chief Swetsof to testify. The record remained open for counsel to submit closing arguments and the audio tape of Chief Henning's interview with Officer Hoiby. BBBPD, Chief Henning, and the Executive Director were unable to locate a copy of the interview. It is not in the record.

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<sup>125</sup> Ex. B. Because the other bases are not listed in the statement of issues, they will not be discussed here.

<sup>126</sup> At the OAH hearing, Chief Swetsof testified that he reviewed Chief Henning's report and agreed with its conclusions. This appears to be somewhat contradictory to his statements in the April 12, 2016 BBBPD hearing. There, Chief Swetsof stated that he felt better after hearing Mr. Hoiby's explanations and hopes Mr. Hoiby gets his job back at BBBPD. *See* Ex. B. The recording of the BBBPD pre-termination hearing was not played during the OAH hearing. The ALJ listened to the hearing before drafting the decision.

<sup>127</sup> R. 2.

<sup>128</sup> R. 2.

<sup>129</sup> R. 2.

<sup>130</sup> R. 11.

<sup>131</sup> Trooper Borrego testified that he observed that Mr. Hoiby was a hard worker who served his community well. Trooper Borrego heard high praise for Mr. Hoiby from Academy instructors. Nonetheless, Trooper Borrego clarified that his support of Mr. Hoiby, or any officer, hinged on that person's integrity. Trooper Borrego agreed with the Executive Director that an officer's integrity is paramount; that a theft conviction would tarnish an officer's reputation and detract from an officer's integrity.

### III. Discussion

Mr. Hoiby has the burden of proving by a preponderance of evidence that the Executive Director's and the Council's initial decision to deny his certification was incorrect.<sup>132</sup> The parties' post hearing briefs identify an incorrect legal standard, arguing that Mr. Hoiby must show that the Council would abuse its discretion – i.e. be clearly mistaken – by denying his application for police certification. Here, the ALJ conducts a full evidentiary hearing and writes a proposed decision on behalf of the Council. The Council may adopt, reject, or amend the proposed decision. The hearing, proposal for action process, and Council deliberation and determination are the Council's process for exercising its discretion.<sup>133</sup> Therefore, Mr. Hoiby must show that the Executive Director and initial Council decision is more likely than not incorrect. Although a close call, Mr. Hoiby met that burden.

The Executive Director alleges five reasons that Mr. Hoiby does not qualify for certification as a police officer.<sup>134</sup>

Issue I- Discretionary denial under 13 AAC 85.100(a)(1), based on falsified or omitted information required to be provided on the application for certification or on supporting documents.

Issue II- Discretionary denial under 13 AAC 85.100(a)(2), based on a discharge or threat of discharge from employment as a police officer for cause for inefficiency, incompetence, or some other reason that adversely affects the ability and fitness of the police officer to perform job duties.

Issue III- Discretionary denial under 13 AAC 85.100(a)(2), based on a discharge or threat of discharge from employment as a police officer for cause for conduct that was detrimental to the reputation, integrity, or discipline of the police department where the officer worked.

Issue IV- Mandatory denial under 13 AAC 85.100(b)(4), based on a discharge or resignation under threat of discharge from employment as a police officer for cause for conduct that would cause a reasonable person to have substantial doubt about an individual's honesty, fairness, and respect for the rights of others and the laws of this state and the United States.

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<sup>132</sup> AS 44.62.460(e)(2).

<sup>133</sup> See *In re Joan L. Deering*, OAH No. 14-0830- ABC (Alcohol Beverage Control Board 2014, non-adoption on other grounds).

<sup>134</sup> Statement of Issues, R. 1-7.

Issue V- Mandatory denial under 13 AAC 85.100(b)(4), based on a discharge or resignation under threat of discharge for conduct that was detrimental to the integrity of the police department where the police officer worked.

Each basis for denial is addressed below.

**A. Mr. Hoiby resigned under threat of termination.**

Three of the issues alleged in the Executive Director’s statement of issues involve the nature of Mr. Hoiby’s separation from Kittitas. Mr. Hoiby points out that the statement of issues falsely identifies his departure from Kittitas as a termination, when in fact, he resigned. Mr. Hoiby also argues that his resignation was not under threat of discharge. He is incorrect. First, Mr. Hoiby identified that he had been asked to resign and put on inactive status for cause on his F-3.<sup>135</sup> Second, Mr. Hoiby stated that he resigned (quit) after being informed that his employer planned to terminate him.<sup>136</sup> Third, Mr. Hoiby’s testimony at hearing affirmed that his resignation was suggested by the county. “I was told I could resign or I could just wait and see what the prosecutor decided once she was forwarded the statements and timesheets and all the evidence they had.” This language contains an implied threat of discharge. The regulations treat a resignation under threat of discharge equivalent to termination for cause.<sup>137</sup>

**B. Mr. Hoiby may not have intentionally committed theft.**

We must next examine the nature of Mr. Hoiby’s conduct which led to his resignation. Mr. Hoiby testified that he did not intentionally pad his time. He has consistently maintained that his over-reporting of time worked was unintentional. Mr. Hoiby’s testimony relating to lack of intent was consistent with his statements to the BBBPD and the investigators at Kittitas. He admitted that he either did not work or did not have documentation for those hours and that his claimed time constituted theft from his employer.<sup>138</sup> Mr. Hoiby’s Alford plea supports his contention that his actions, though negligent, were not intentional.<sup>139</sup> Further, Mr. Hoiby’s

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<sup>135</sup> R. 27. “Asked to resign” and “put on inactive status” are highlighted on Hoiby’s F-3, indicating that this is what occurred from the choice offered.

<sup>136</sup> R. 27.

<sup>137</sup> 13 AAC 85.100.

<sup>138</sup> R. 88 – R. 96.

<sup>139</sup> The Executive Director pushed Hoiby to admit that he intentionally committed theft from Kittitas based on his acceptance of the guilty plea. Hoiby remained steadfast in his assertion that his theft of time was unintentional. The Executive Director, Chief Henning, and council for Hoiby were unfamiliar with the meaning of an Alford plea. The Executive Director appears to argue that certificate denial is appropriate if an applicant has a theft conviction, regardless of mens rea.

supervisor and the district attorney did not feel his actions warranted a felony conviction. According to Mr. Hoiby's uncontroverted testimony, his supervisor believed his actions were without criminal intent. Overall, the record supports a finding that Mr. Hoiby's "theft" was unintentional.

Obviously, Mr. Hoiby's timekeeping fell far from acceptable, but it is not the work of a criminal mastermind. The evidence suggests that Mr. Hoiby, a new father working four jobs, believed accurate timekeeping was unimportant, and not worthy of careful attention. This erroneous belief led to a criminal conviction for theft and loss of a job he loved. Mr. Hoiby has since learned the importance of accurate record keeping.<sup>140</sup>

Moreover, even if Mr. Hoiby's conduct in 2001-02 was intentional or otherwise dishonest, it would not mean that the Council would be required to deny him a certificate in 2016. This is a closer question, but with the same result. The Council has discretion to certify officers with compromised histories. The regulation rightfully requires a full decade to pass between conviction and certification. During that decade, the applicant has the opportunity to show that he or she has grown, learned from mistakes, and become the type of person - honorable, honest, and brave, that a career in law enforcement demands.

Aside from the conviction and subsequent arrest, the evidence suggests Mr. Hoiby can perform the duties of the office. Several community members and officers submitted letters of support for Mr. Hoiby, praising his work in the community and as an officer.<sup>141</sup> Mr. Pulice's testimony praised Mr. Hoiby as an officer and community member.

**C. Mr. Hoiby did not intentionally omit information, but did minimize his theft conviction.**

Turning to the issue of whether Mr. Hoiby intentionally omitted material facts from the F-3, he testified that he tried to submit a complete application, including all traffic stops and any police contacts. He contacted each jurisdiction where he had resided.<sup>142</sup> Teresa Coghill, BBBPD staff, assisted him to ensure he did not miss anything.<sup>143</sup> According to Mr. Hoiby, the

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<sup>140</sup> Hoiby explained that the Academy enforced the importance of recordkeeping. Students learn "if it is not documented, it did not happen."

<sup>141</sup> Trooper Borrego's letter is not considered as support for Hoiby. His letter and testimony made clear he would not condone any prior action that implicated integrity, which theft surely does.

<sup>142</sup> This included calls to, and internet record searches in, Arkansas, Everett, Edmond, Kittitas, and Snoqualmish.

<sup>143</sup> Hoiby testimony.

bench warrant and arrest stemming from failure to make timely restitution did not appear on records he received. Neither did the instances of driving under suspension. According to Mr. Hoiby, he did not remember these instances of police contact until Chief Henning pointed them out during his investigation. Mr. Hoiby's testimony on these issues was credible. Chief Henning and the Executive Director, however, conclude that Mr. Hoiby seized on the absence of the information in the records to make an intentionally false report. Each of the three instances of omission is discussed below.

1. *The arrest.*

Chief Henning and the Executive Director do not believe that Mr. Hoiby could have forgotten his arrest. Their positions are reasonable, but not persuasive in this instance. Most law abiding citizens would remember an arrest. Here, however, Mr. Hoiby described the time of his arrest as an evening filled with distractions - it included a rodeo, two separate notifications that he had a warrant for his arrest, getting handcuffed, joking around with former colleagues, and paying over \$700.<sup>144</sup>

Mr. Hoiby admitted at hearing that this was an arrest. But this is not determinative of whether he genuinely had forgotten it when filling out his F-3. Mr. Hoiby's testimony that he did not consider it an arrest at the time, and that he had forgotten the incident altogether is plausible, and frankly, believable. We think of a traumatic experience, with consequences, when we think of arrest. That was not the case here. Mr. Hoiby was arrested and released within forty minutes. He did not appear before a judge, was not Mirandized, and was not held in a closed room. He paid his debt and left unscathed. Mr. Hoiby's testimony and the nature of the arrest make it more likely than not that he did not recall, as opposed to knowingly withheld, the arrest.

2. *Driving record.*

The same can be said for the unreported driver's license issues found by Chief Henning. Mr. Hoiby's record shows three instances of driving under suspension and one failure to have a driver's license on person. Two of the driving under suspension citations were dismissed.<sup>145</sup> Mr. Hoiby reported two instances of license revocation and six other traffic violations on his F-3.<sup>146</sup>

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<sup>144</sup> Hoiby testimony.

<sup>145</sup> R. 17.

<sup>146</sup> R. 26; R. 28.

It defies logic for an officer applicant to admit to a theft conviction, and then purposely exclude other, comparatively innocuous, citations.

This conclusion is further bolstered by the F-3 language above Mr. Hoiby's signature. "I further agree and consent in advance to being summarily discharged without cause or hearing if any of the information that I have provided contains any misrepresentation or falsification or if any requested information was *knowingly* omitted."<sup>147</sup>

### 3. *Theft conviction.*

The Executive Director argues that Mr. Hoiby mischaracterized his theft conviction as a misunderstanding on the F-3 and in his interview with Chief Hennings. Because this characterization is not an accurate description of his conviction, the Executive Director considers this characterization to be a material omission from the F-3, which is a ground for denial of a police certificate.<sup>148</sup>

The record demonstrates that the Executive Director is correct that Mr. Hoiby's conduct was more than a "misunderstanding." Mr. Hoiby's timesheet discrepancies were not merely just the difference between his watch and dispatch records of his compensable time. He did not adjust his timesheet when he showed up late. On one day, he entered time worked when the school was closed. Mr. Hoiby also failed to claim compensable hours on a day he did work compensable hours.

Thus, Mr. Hoiby's characterization of the theft as a "misunderstanding" minimizes the nature of his error. It does not, however, minimize the overall message that he delivered to the Council regarding the facts - that, in 2004, he was convicted of misdemeanor theft from the police department where he worked as a reserve officer. This minimization does not support certification denial on the grounds that the F-3 was false. Accordingly, the Council will not deny certification under Issue I, 13 AAC 85.100(a)(1).

#### **A. Mr. Hoiby's history does not adversely affect his current ability to perform job duties.**

Mr. Hoiby's Kittitas time-keeping was incompetent and inefficient. For this, he resigned under threat of discharge. The incident occurred more than 10 years ago. The record in this

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<sup>147</sup> R. 30.

<sup>148</sup> 13 AAC 85.100(a)(1).

matter does not contain instances of Mr. Hoiby's incompetence, inefficiency, or other reasons that adversely affect his current ability to perform the duties of an officer. BBBPD employed Mr. Hoiby for almost a year before sending him to the Academy. Presumably, Academy completion would serve to increase a successful candidate's ability to perform job duties.

Consequently, the Council declines to exercise its discretion available under 13 AAC 85.100(a)(2), as outlined in Issue II.

**B. Mr. Hoiby's actions do not raise substantial doubts about his character.**

Mr. Hoiby has a theft conviction. He stole almost \$800 in time from his employer, a police department.<sup>149</sup> A reasonable person, hearing this statement alone, not knowing the underlying facts, would likely have substantial doubt about Mr. Hoiby's honesty.

But the Council has considerable discretion and the ability to weigh the facts of each situation. Mr. Hoiby explained the two major concerns raised by Chief Henning – his failure to report the arrest stemming from unpaid restitution, and his characterization of the theft conviction. Reasonable people, upon hearing the explanation, would likely not have substantial doubt about Mr. Hoiby's honesty.

Moreover, neither Chief Swetzof nor the Executive Director interviewed Mr. Hoiby. They relied on Chief Henning's report.<sup>150</sup> Chief Henning based his opinion primarily on what he viewed as excuses, not explanations, from his interview with Mr. Hoiby. Neither Chief Swetzhoff nor Executive Director Griffiths listened to that interview.

That interview, the lynchpin of Chief Henning's investigation, was not provided at the hearing. Here, this decision is based on Mr. Hoiby's demeanor and testimony, which suggests he is a person who made a mistake, and learned from that mistake. At hearing, Mr. Hoiby's explanation of the arrest, his failure to report the arrest, and his characterization of the theft rang true. Mr. Hoiby's explanations relieved the concerns that surfaced in the investigation.

Mr. Hoiby was convicted of theft more than a dozen years ago. He paid the restitution and has reported the theft conviction ever since. These actions raise doubt about Mr. Hoiby's

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<sup>149</sup> The record does not indicate that Kittitas remunerated Hoiby (or that he ever sought remuneration) for hours worked, but not reported.

<sup>150</sup> The Executive Director also relied on his years of experience as a law enforcement officer. He also had the ability to listen to Hoiby's testimony. Hoiby's testimony did not change the Executive Director's opinion. This decision gives little weight to Hoiby's failure to sway the Executive Director. The contentious nature of hearings generally does not encourage parties to change opinions of one another.

character, but not substantial doubt. Therefore, denial under Issue IV, 13 AAC 85.100(b)(4), is inappropriate.

**C. Theft from a police department is detrimental to the reputation, integrity, or discipline of the department.**

The Executive Director seeks both mandatory and discretionary denial based on conduct that reflects poorly on the department where Mr. Hoiby worked, in this case Kittitas County.<sup>151</sup> The language of 13 AAC 85.110(a) (discretionary denial) and (b) (mandatory denial), are substantially identical.<sup>152</sup> The alternate avenues give the Executive Director, and thus the Council, options for determining which regulations should apply in a particular fact situation.<sup>153</sup>

Although an officer's past arrest or conviction would always have some detriment to the reputation, integrity, or discipline of the police department, the regulations clearly permit an applicant with an arrest record to become a police officer.

13 AAC 85.101(b) defines "basic standard for police officers." Under this regulation some convictions are barring conditions, without regard to the age of the conviction. For example, a police department may not hire an individual with a domestic violence conviction.<sup>154</sup> The regulations recognize, however, that convictions for other crimes may become stale and no longer serve as a barring condition. For example, a department is also barred from hiring an officer who has been convicted of two or more DWI offenses, a crime of dishonesty, a crime of moral turpitude, or a crime that resulted in serious physical injury to another person for at least ten years immediately before the date of hire.<sup>155</sup>

In sum, 13 AAC 85.101(b) provides guidance into how the Council views crimes of dishonesty. For convictions over 10 years old, the Council will scrutinize the facts of the crime, and determine whether those facts are still a barring condition. For Issues No. III and V, the question is whether the crime of more than 10 years of age is detrimental to the reputation of the department.

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<sup>151</sup> Statement of Issues, Issue III, 13 AAC 85.100(a)(2), and Issue V, 13 AAC 85.100(b)(4). The meaning of "where the officer worked" was not discussed during hearing. A natural interpretation would mean where the officer worked at the time the conduct occurred, and not where the officer worked more than a decade later.

<sup>152</sup> See *In re Mattingly*, OAH No. 15-1088-POC, at 10 (APSC 2016); *In re Gutierrez*, OAH No. 14-1718-POC (APSC 2015). These were revocation, not denial, cases, but the same language is used for both.

<sup>153</sup> *Mattingly*, at 10.

<sup>154</sup> 7 AAC 85.010(b).

<sup>155</sup> 7 AAC 85.010(b).

Two recent certification cases discuss revocation based on damage to the reputation of a department, *In re Mattingly* and *In re Gutierrez*.<sup>156</sup> In both, the damage would occur to a current, Alaskan employer. In *Mattingly*, Officer Mattingly directly and repeatedly lied to his supervisors.<sup>157</sup> In *Gutierrez*, Lt. Gutierrez, a commanding officer, engaged in sexual acts at the office.<sup>158</sup> In both cases, the Council felt revocation appropriate due to potential damage to the department where the officer worked. In *Mattingly*, the Council explained that “detriment to an agency’s integrity occurs where a certificated officer engages in conduct that ‘conflicts with the organization’s core values.’”<sup>159</sup>

Mr. Hoiby’s circumstances are different. His conduct would have been, as the Executive Director stated, a “black mark” on the agency where he worked in 2001-02. Chief Henning’s investigation, however, implies that any damage to Kittitas’ reputation was slight, and at this point all but forgotten.<sup>160</sup> The core values at issue in *Mattingly* and *Gutierrez* are much more recent and compelling than a 14-year-old incident in which a non-certificated officer filed erroneous time cards that led to \$800 in overpayment. The Council declines to deny certification under Issue III and V of the statement of issues.

#### **D. Brady and Giglio concerns support, but do not mandate, denial.**

*Brady* and *Giglio* are two cases that require prosecutors to disclose exculpatory or impeachment evidence to defense counsel.<sup>161</sup> Prosecutors must disclose any finding of misconduct that reflects on truthfulness or bias, whether a pending charge of criminal conduct or credible allegation of misconduct.<sup>162</sup> *Brady* and *Giglio* issues can seriously compromise the district attorney’s ability to file a charge and move forward on a prosecution. Clinton Campion, Anchorage District Attorney, submitted an affidavit outlining *Brady* and *Giglio* concerns, and the

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<sup>156</sup> OAH No. 15-1088-POC; OAH No. 14-1718-POC

<sup>157</sup> *Mattingly*, at 10.

<sup>158</sup> *Gutierrez*, at 2.

<sup>159</sup> *Mattingly*, OAH No. 15-1088-POC at 7. Note that the quote from *Mattingly* applies the standard only to a certificated officer. Mr. Hoiby was not certificated at the time of his theft. This decision does not turn on that issue, however. In this decision, the focus is on whether the Executive Director has shown that Mr. Hoiby’s conduct was intentionally dishonest.

<sup>160</sup> The two Kittitas contacts recalled that Hoiby got “jammed up” with a time card issue, that he was a good cop, and that no one believed Hoiby would “do something like that.”

<sup>161</sup> *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

<sup>162</sup> Affidavit of Clinton Campion (August 16, 2016).

interplay between these concerns and the allegations against Mr. Hoiby.<sup>163</sup>

Here, prosecutors will likely have to disclose Mr. Hoiby's criminal conviction to every criminal defendant.<sup>164</sup> They may also have to disclose the investigation. This may be a burden for a police department that employs Mr. Hoiby.<sup>165</sup>

Under the Executive Director's theory, however, any opinion of a coworker or supervisor that a fellow officer was dishonest would have to be disclosed to a defendant, without question. *Brady* and *Giglio* is not that far reaching. According to the Executive Director, a prosecutor would disclose to the defense unfounded or unfair suspicions based solely on bias or prejudice, if held by a law enforcement official.

The Executive Director's position also undermines the entire Council process. If all that was required to deny or revoke certification was the opinion of any officer or investigator that a fellow officer was dishonest, there would be no need for a full hearing. The hearing process, the Council's discretion, and thus, due process, would be a sham. That result is inappropriate.

Ultimately, the Council has discretion to award Mr. Hoiby a certificate. Here, because Mr. Hoiby's conduct in 2001-02 was not of a type to warrant a continued suspicion of dishonesty, and because the other errors cited by the Executive Director are minor errors not indicative of dishonesty, the impact of his conviction and conduct on the *Brady/Giglio* issue is not a sufficient reason to deny certification.

**E. The Council should approve Mr. Hoiby's certificate.**

*1. Mr. Hoiby's conduct differs from other Council cases revoking or denying licensure.*

Mr. Hoiby's failure to accurately keep time, failure to provide a 100-percent accurate F-3, and his minimization of his conviction raise legitimate questions about Mr. Hoiby's fitness. But his deficient conduct appreciably differs from other instances of wrongful conduct warranting denial or revocation.

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<sup>163</sup> Champion's affidavit does not mention Hoiby. Instead, it outlines his opinion that a prosecutor would have to disclose falsification or omission on an application, reputation or opinion evidence of dishonesty, help by persons within law enforcement, but does not outline allegations.

<sup>164</sup> Unless a court rules that no disclosure is required, disclosure of Hoiby's conviction to the judge will be required. Whether the court would require disclosure to the defense is not a matter that can be determined in this proceeding.

<sup>165</sup> Chief Enevoldsen knew of Hoiby's theft conviction.

First, the concerning conduct occurred prior to Mr. Hoiby's employment at BBBPD. Of the eight certification cases listed on the OAH website, all deal with misconduct that occurred during employment as an officer in Alaska or that the point of hire.<sup>166</sup> Mr. Hoiby's conviction occurred well in the past. The reasons leading to his failure to timely pay restitution were convincing. And his understandably forgotten arrest stems from that same conviction.

Next, Mr. Hoiby's conduct stands in sharp contrast to other certification cases where the Council deemed certification inappropriate. For example, in *in re E X*, an officer accessed confidential victim information and shared that information with his perpetrator son.<sup>167</sup> In *In re Parcell*, Lance Parcell, a training officer at the Academy, made inappropriate advances on female candidates.<sup>168</sup> Ryan Mattingly misinformed a commanding officer regarding the nature of a leave request, and repeatedly lied when asked about it.<sup>169</sup>

By the same token, Mr. Hoiby's conduct pales in comparison with that of Kevin Gilmore. Gilmore was hired and then let go from the Bethel Police Department for unsatisfactory performance at the Academy.<sup>170</sup> He did not disclose his employment or termination from the Bethel Police Department when applying for an officer position on the North Slope.<sup>171</sup> Likewise, Jose Gutierrez, part of the command staff, engaged in sex at the office. These comparisons do not diminish Mr. Hoiby's wrongdoing. They serve only to demonstrate that Mr. Hoiby's actions differ both in time and gravity, from other cases before the Council.

## 2. Council considerations.

Like a prosecutor, the Council should strive to see that justice is done in all cases.<sup>172</sup> Our justice system is built on the premise of second chances. If a crime is committed and a sentence served, the individual may be given the opportunity to reform and add value to our society. The regulations recognize this and grant the Council the power to decide which individuals warrant a

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<sup>166</sup> See *APSC v. Parcell*, 348 P.3d 882 (Alaska 2015); *In re Bowen*, OAH No. 10-0327-POC (APSC 2011); *Hazelar v. APSC*, 1JU-14-883CI (Alaska Superior Ct. 2016); *Much v. APSC*, 3AN-14-4466CI, (Alaska Superior Ct. 2016), Supreme Court Case pending; *In re E X*, OAH No. 13-0473-POC (APSC 2013); *In re Gilmore*, OAH No. 15-1087-POC (APSC 2016); *In re Lynch*, OAH No. 14-1644-POC (APSC 2015); *In re Mattingley*, OAH No. 15-1088-POC (APSC 2016).

<sup>167</sup> OAH No. 13-0473-POC (APSC 2013); 348 P.3d 882 (Alaska 2015); OAH No. 15-1088-POC (APSC 2016).

<sup>168</sup> 348 P.3d 882 (Alaska 2015).

<sup>169</sup> OAH No. 15-1088-POC.

<sup>170</sup> OAH No. 15-1087-POC (APSC 2016).

<sup>171</sup> OAH No. 15-1087-POC (APSC 2016).

<sup>172</sup> See Executive Director's post-hearing brief, at. 6 (September 9, 2016).

second chance. Here, the evidence supports a finding that Mr. Hoiby is such an individual.

Mr. Hoiby disclosed his conviction and was told by his hiring Chief that it would not prevent his certification. Other considerations, including economic, may also warrant an exception to the general rule that a convicted thief should not be welcomed to the police force. First, the Council approved Mr. Hoiby's Academy funds without further inquiry, despite knowing of the conviction and discharge for cause from a police department. Mr. Hoiby completed the Academy. And BBBPD determined it would allow Mr. Hoiby to be employed as an officer if he was able to get certification.<sup>173</sup> Next, consideration is given to location. Mr. Hoiby's post is in Naknek, Alaska. Although no evidence was presented at hearing, anecdotal information suggests that finding viable candidates in remote locations presents challenges. Finally, certification is not permanent. If Mr. Hoiby's performance upon return to duty falls short of acceptable, the Council may revoke his certificate.

#### **IV. Conclusion**

The evidence does not support a conclusion that Antoni Hoiby engaged in conduct that warrants a denial of certification under the Council's regulations. Accordingly, the decision to deny Mr. Hoiby certification is overturned.

DATED: October 24, 2016.

*Signed*  
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Bride Seifert  
Administrative Law Judge

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

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<sup>173</sup> This statement is made in reliance on statements at hearing. BBBPD's actions and any agreements with Hoiby are beyond the scope of this decision.