

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ANTONI HOIBY,

Appellant,

vs.

POLICE STANDARDS COUNCIL,

Appellee.

3AN-17-06838CI

Order Denying Appeal

The Alaska Police Standards Council denied Appellant Antoni Hoiby's application to be certified as a police officer on multiple grounds under 13 ASAC 85.100(a)(1), (a)(2), and (b)(4). Hoiby appeals the Council's April 19, 2017 Final Decision denying him certification.

Background

A. Kittitas County

Hoiby served as a reserve police officer for the Kittitas County Sheriff's Office in Washington for three years around 2001-2002. As a reserve officer, Hoiby was only paid for time spent as a school resource officer, providing juvenile transport, and special details during the summer. 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. Hoiby did not follow protocol. Instead of keeping his time

in his patrol notebook, he prepared his timesheets off a general calendar in his home. Sometime Hoiby used the time on his watch instead of dispatch time and other times he relied on a general schedule that he had written down without regard for actual time on the job. He stated that at times he did not want dispatch to know he was late so he just reported the time he was scheduled to work even when he was not working.

Between September 1, 2001 and March 29, 2002, Hoiby over-reported his time worked by 78.5 hours, the equivalent of \$785 in salary. Some days Hoiby reported he worked 20 minutes longer than what was recorded by dispatch. Another time he reported that he worked on a holiday when the school was closed. A Kittitas County Deputy discovered the discrepancies in Hoiby's timesheets. Following an initial review of one month of timesheets, Hoiby was suspended indefinitely pending the outcome of an investigation. Detective Jerry Shuart, Jr. interviewed Hoiby and went over the discrepancies. Hoiby denied that he intentionally misrepresented his time, but admitted that he "was stealing time" from Kittitas County. 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. He also acknowledged that he received \$785 in wages he did not earn, and that it is theft in the second degree.

Hoiby discussed his situation with his supervisor. His supervisor did not believe he intentionally stole from the department, but stated that it "looked bad." 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.”¹ Hoiby resigned.

Kittitas County charged Hoiby with Theft in the Second Degree, a felony. Hoiby pled guilty to Theft in the Third Degree, a misdemeanor, under an Alford plea.² Hoiby was required to pay \$1,010.50 in restitution to the Kittitas County Sheriff's Department as part of his sentence, to be paid in \$50 monthly installments until the debt was satisfied.

Hoiby failed to make the monthly payments. He failed to update his address with the court while he was out commercial fishing. Hoiby testified that he had expected his girlfriend at the time to make the payments for him using checks he had left for her. However, his girlfriend discontinued paying Hoiby's bills.

In August 2009, a bench warrant was issued for Hoiby's arrest for failure to make payments since July 2008. The outstanding balance was \$702.60. Bail was set on the warrant for \$702.60 to cover the obligations.

The night Hoiby returned home from fishing, he attended and participated in a local rodeo. He was picked up on the bench warrant while at the rodeo. At the rodeo, Hoiby ran into two different officers that he knew. Both told him he had a warrant. Hoiby initially planned to deal with the warrant on Monday, however, he 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 Hoiby that he had to bring him into the station. Officer St. John arrested Hoiby.

¹ Hoiby testimony at hearing, Day 1, 88:25-89:4.

² An Alford plea allows a defendant to enter a guilty plea while maintaining his innocence.

At the station, Hoiby found out that the warrant was for the unpaid restitution. He posted bail but then failed to appear for his scheduled show cause hearing. His bail was then directed to be applied to satisfy his legal financial obligations.

B. Bristol Bay Borough Police Department

Hoiby now lives in Naknek, Alaska, located in the Bristol Bay Borough. He and his family have been there for over 10 years. 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. Before applying for the position, Hoiby disclosed that he had a theft conviction to then BBBPD Chief Rodney Enevoldsen. Chief Enevoldsen advised Hoiby that after 10 years the conviction would not serve as a bar to becoming an officer. On September 18, 2014, Bristol Bay Borough Police Department hired Hoiby as a police officer.

As part of the application process, Hoiby completed a personal history statement, or F-3, which requires applicants to report any criminal investigations, convictions, and traffic violations. Hoiby reported his theft 3 conviction on the F-3. 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?" 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. Hoiby reported that his supervisor agreed that there was no criminal intent involved. He did not report his arrest for a felony warrant for failure to pay restitution. BBBPD forwarded Hoiby's F-3 to the Council in November 24, 2014. The Council took no action on the F-3.

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. Hoiby successfully completed the Academy and graduated on November 13, 2015.

While 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 Hoiby, contacted the new Chief, Stan Swetzof. Chief Swetzof decided to investigate Hoiby. Chief Swetzof initiated an investigation of Hoiby, including his background. After problems with the initial investigation, BBBPD contracted with the firm Russell Investigation, who in turn hired Hal Henning, Chief of Police in Winthrop, WA to conduct the investigation.

Chief Henning conducted the investigation, including interviews with Hoiby and the Undersheriff Clayton Myers of Kittitas County. As part of the investigation for failing to fully disclose all information on his F-3 background questionnaire, Hoiby was asked whether he had followed through with his repayment of restitution. Hoiby stated he did and he had not missed any payments. Chief Henning then alerted Hoiby to the fact that he had documentation about the bench warrant and missed payments. Hoiby stated he was arrested for unpaid parking tickets not failure to pay restitution and that he had simply

forgotten to disclose that arrest on his F-3. Chief Henning concluded that while there was little merit to a majority of the concerns raised in the initial investigation, Hoiby minimized or omitted items in his F-3. Hoiby omitted the fact he was arrested on a warrant for failing to appear after he failed to make restitution payments for a year. Hoiby deflected responsibility by stating he had been arrested for unpaid parking tickets. Hoiby continued from the time of the events to the present to minimize the theft by calling it a misunderstanding. Chief Henning concluded that Hoiby “appears to show a lack of accepting responsibility for his actions... [and has shown] a very troubling pattern of credibility issues.”³ BBBPD ultimately made Hoiby’s continued employment contingent on his ability to obtain police certification through the Council.

C. Procedural Background

The Executive Director of the Alaska Police Standards Council received Chief Henning’s report and additional documentation from BBBPD on February 24, 2016. The Executive Director agreed with Chief Henning’s conclusions. He did not conduct an independent investigation or interview Hoiby. The Executive Director determined that Hoiby did not meet the minimum requirements for certification as a police officer in Alaska. The determination was based on Hoiby’s conduct both leading up to and following his theft conviction, failure to fully disclose his police contacts, and failure to take responsibility for his actions. The Executive Director enunciated five reasons why

³ [R. 19]

Hoiby does not qualify for certification as a police officer under 13 AAC 85.100(a)(1), (a)(2), and (b)(4).

Hoiby appealed the Executive Director's determination. During its May 2016 meeting, the Council upheld the Executive Director's decision. Hoiby then appealed to the Office of Administrative Hearings. A hearing was held before the Office of Administrative Hearings in Anchorage, Alaska on August 24, 2016 and August 25, 2016. Hoiby was represented by Caitlin Shortell and the Council was represented by Assistant Attorney General John Novak. The Executive Director alleged five reasons or issues to consider for the denial of certification:

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)(94), 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.

On October 24, 2016, the Administrative Law Judge Bride Seifert issued a proposed decision overturning the denial of certification after finding for Hoiby on each issue. Both parties submitted a proposal for action to the Council. On April 17, 2017, the Council issued its Final Decision rejecting the ALJ's proposed decision and denying Hoiby's certification. The Council denied certification on each of the five issues the Executive Director raised. Council found that Hoiby failed to meet the minimum requirements to be a police officer and ultimately showed a severe lack of respect for others and the law, raising substantial doubts as to his moral character.

Applicable Law

The legislature created the Alaska Police Standards Council to “establish minimum standards for employment as a police officer and . . . mandatory qualifications for police officers including minimum age, education, physical and mental standards, *moral*

character, and experience.⁴ The Council issues a certificate evidencing satisfaction of the Council's requirements if an applicant satisfies the Council's mandatory qualifications.⁵ The Council has adopted regulations establishing the standards for discretionary and mandatory denial of certification.⁶ 13 AAC 85.100 provides, in pertinent part:

(a) The council may deny a basic certificate or find a police officer job applicant or training applicant ineligible for certification upon a finding that the applicant

(1) falsified or omitted information required to be provided on the application for certification or on supporting documents; or

(2) has been discharged, or resigned under threat of discharge, from employment as a police officer in this state or any other state or territory for inefficiency, incompetence, or some other reason that adversely affects the ability and fitness of the police officer to perform job duties or that is detrimental to the reputation, integrity, or discipline of the police department where the police officer worked.

(b) The council will deny a basic certificate or find a police officer job applicant or training applicant ineligible for certification upon a finding that the applicant

...

(4) has been discharged, or resigned under threat of discharge, from employment as a police officer in this state or any other state or territory 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 for the laws of this state and the United States or that is detrimental to the integrity of the police department where the police officer worked.

⁴ *Alaska Police Standards Council v. Parcell*, 348 P.3d 882, 887 (Alaska 2015) (internal quotations omitted).

⁵ AS 18.54.240(b)

⁶ 13 AAC 85.100.

Standard of Review

There are four principal standards of review the court uses in administrative appeals.⁷

The “substantial evidence” test is used for questions of fact. The “reasonable basis” test is used for questions of law involving agency expertise. The “substitution of judgment” test is used for questions of law where no expertise is involved. The “reasonable and not arbitrary” test is used for review of administrative regulations.⁸

In reviewing questions of fact, the court looks for substantial evidence. Substantial evidence is evidence that a “reasonable mind might accept as adequate to support a conclusion.”⁹ “The substantial evidence test is highly deferential but [the court] still reviews the entire record to ensure that the evidence detracting from the agency’s decision is not dramatically disproportionate to the evidence supporting it such that [the court] cannot ‘conscientiously’ find the evidence supporting the decision to be ‘substantial.’”¹⁰

The Alaska Supreme Court has found that the Council’s interpretation and application of its own regulations is a question of law involving the Council’s expertise reviewed under the rational basis standard.¹¹ Under the rational basis standard, the court “seek[s] to determine whether the agency’s decision is supported by the facts and has a

⁷ *Basargin v. State*, 31 P.3d 796, 799 (Alaska 2001).

⁸ *Id.*

⁹ *May v. State, Com. Fisheries Entry Comm’n*, 175 P.3d 1211, 1216 (Alaska 2007).

¹⁰ *Odom v. State Div. of Corps.*, No. S-16151, 2018 WL 794366, at *4 (Alaska Feb. 9, 2018).

¹¹ *Parcell*, 348 P.3d at 887-88.

reasonable basis in law, even if [the court] may not agree with the agency's ultimate determination."¹²

Discussion

A. The Council is not required to adopt the ALJ's decision

Hoiby argues that the Council's Final Decision is not supported by substantial evidence because the Council omitted many of the findings in the ALJ's Proposed Decision. Hoiby argues that the findings the Council failed to include were on crucial issues required for denial of certification under 13 AAC 85.100(a)(2) and (b)(4) and that the Council's deletion of the ALJ's findings render the Council's decision lacking in substantial evidence and illogical.¹³

The Council retains ultimate discretion in the final disposition on certification.¹⁴ Alaska Statute 44.62.500 authorizes the Council to reject the ALJ's proposed decision and instead make its own decision based on the record.¹⁵ The Council may "exercise its discretion by revising the proposed enforcement action, determination of best interests, order, award, remedy, sanction, penalty, or other disposition of the case, and adopt the proposed decision as revised."¹⁶ In addition, the Council may reject, modify or amend the

¹² *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987).

¹³ Hoiby does not appear to dispute the Council's decision under 13 AAC 85.100(a)(1) for discretionary denial of certification. In addition, Hoiby's argument only addresses two of the four issues under 13 AAC 85.100(a)(2) and 13 AAC 85.100(b)(4) on which the Council denied Hoiby's certification.

¹⁴ *State, Div. of Corps., Bus. & Prof'l Licensing, Alaska Bd. of Nursing v. Platt*, 169 P.3d 595, 601 (Alaska 2007); AS 44.64.060(e)(4).

¹⁵ *Id.*

¹⁶ AS 44.64.060(e)(3).

ALJ's proposed findings of fact so long as the Council specifies the affected finding and identifies the testimony or other evidence from the record it relied on.¹⁷

The Council has authority to make its own decision based on the record, and the Council's authority is not limited because the ALJ made contrary findings. The law specifically contemplates the Council's actions in this case. The Council revised the ALJ's proposed decision by adopted the majority of the ALJ's findings of facts and making some of its own, and the Council substituted its own analysis and conclusions, including its interpretation and application of its own regulations. The Council did not use some of the ALJ's findings in the Proposed Decision, but the Council may have disagreed with those findings or not found them relevant to the Council's analysis. Ultimately, the Council came to a different conclusion on each issue.

The court cannot find that the Council's findings lacked substantial evidence simply because the court, or any other person, may have made a contrary finding. The court does not reweigh conflicting evidence, and instead views the evidence in favor of the agency's findings, even if the court may have taken a contrary view of the facts. The Council's actions are authorized so long as the Council's factual findings are supported by substantial evidence and its interpretation and application of its regulations is reasonable. The court will review the Council's Final Decision to determine whether the record, not just the ALJ's factual findings, supports the decision.

¹⁷ AS 44.64.060(e); and see *Radebaugh v. State, Dep't of Health & Soc. Servs., Div. of Senior & Disabilities Servs.*, 397 P.3d 285, 293 (Alaska 2017) (citing AS 44.64.060, the court noted that an agency, as the final decision maker, "has the authority to overrule the ALJ's factual findings.").

B. The Council's decision

Hoiby requests the court to reverse the Council's final decision and remand the case to the Council with an order to adopt the ALJ's proposed decision because the Council's decision on issues III and V lacked substantial evidence. The court will evaluate the Council's decision on Issues III and V. However, the Council's decision rests on its resolution of policy questions within its expertise, to which the court applies rational basis review, including instances where the facts underlying the agency's decision are inseparable from the policy issues.¹⁸ Applying the facts in the case to determine whether to deny a police officer certification involves application and interpretation of the Council's regulations.

The Executive Director sought both mandatory and discretionary denial because Hoiby was discharged, or resigned under threat of discharge, from employment as a police officer for conduct or reasons that is detrimental to the reputation, integrity, or discipline of the department where he worked. The language in AAC 85.100(a)(2) and 13 AAC 85.100(b)(4) is virtually identical, and requires the Executive Director to prove: (1) that Hoiby resigned under threat of discharge from employment as a police officer and (2) that Hoiby's conduct leading to threat of discharge and his resignation is detrimental to the reputation, integrity, or discipline of the police department where he worked.

There appears to be no dispute with the Council's finding that Hoiby resigned under threat of termination from Kittitas County. Hoiby identified on his F-3 that he had been asked to resign and put on inactive status for cause. He stated that he resigned after

¹⁸ *Parcell*, 348 P.3d at 886.

being informed that his employer planned to terminate him. Hoiby's testimony at the 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."¹⁹ Hoiby disputes the Council's finding that the conduct that led to the threat of Hoiby's discharge was detrimental to the reputation, integrity, or discipline of the police department where Hoiby worked.

The Council agreed with the ALJ's findings about Hoiby's theft conviction. Hoiby was convicted for stealing from the police department where he was employed. Hoiby's theft does not appear to be in dispute. The Council also agreed with the ALJ's finding that theft from a police department is detrimental to the reputation, integrity, or discipline of the department and that Hoiby's "conduct would have been . . . a 'black mark' on the agency where he worked in 2001-02." However, based on the ALJ's findings the Council disagreed with the ALJ's interpretation of the Council's prior decisions and with the ALJ's ultimate interpretation and application of the Council's regulations.

The Council evaluated whether Hoiby's theft from Kittitas County more than 10 years ago is detrimental to the reputation of the department where Hoiby worked. The Council compared Hoiby's conduct to conduct in two recent certification cases in which the Council revoked certification based on damage to the reputation of a department, *In re Guitierrez* and *In re Mattingly*.²⁰ In both cases, the Council found revocation

¹⁹ Hoiby testimony at hearing, Day 1, 88:25-89:4.

²⁰ OAH No. 15-1088-POC; OAH No. 14-1718-POC.

appropriate due to potential damage to the department where the officer worked. In *Guitierrez*, a commanding officer engaged in sexual acts at the office. The Council explained that the Executive Director was not required to prove actual damages to a police department's reputation; the Council uses an objective test to determine whether reasonable people would find that the effect on the reputation is the type that would justify revocation. The Council found that the public belief that officers are engaging in lewd and licentious behaviors while in the police station was detrimental to the reputation of the police force. In *Mattingly*, an officer directly and repeatedly lied to his supervisors. The Council found that an officer's demonstrated willingness to lie directly and repeatedly to his supervisors ran afoul of the Alaska State Troopers' bedrock requirements of honesty and candor and threatened the integrity and discipline of the organization. In neither case did the officer commit a crime against the police department where the officer was employed.

The Council found that Hoiby's circumstances are different from *Guitierrez* and *Mattingly* only because Hoiby caused damage to his prior department, and not to a current Alaska employer. The Council did not attach significance to the fact that Hoiby's conduct occurred further in the past than officers' conduct in *Guitierrez* and *Mattingly*. The Council found that theft by a police officer against the police department where the officer worked is conduct that remains detrimental to the reputation, integrity, or discipline of that department. The Council's interpretation and application of its own regulations—its determination that a theft by a police officer against the officer's department remains detrimental to the reputation, integrity, or discipline—is within the

Council's discretion. The court defers to the Council's reasonable interpretation and application of its regulations and will uphold the Council's decision unless the Council's decision was "arbitrary, unreasonable, or an abuse of discretion."²¹

Hoiby committed a crime of dishonesty against the police department where he was employed. The core values implicated by Hoiby's conduct were just as, if not more compelling than the core values at issue in *Mattingly* and *Guittierez*. In neither prior case did the officer commit a crime against the police department where the officer was employed—let alone a crime that if committed within the past 10 years against anyone and not just a police department where the person worked would prevent the Council from hiring that person.²² The Council's inclusion of crimes of dishonesty in the conduct prohibited the Council from hiring a person shows the gravity in which the Council views such crimes, and the fact that Hoiby committing such a crime against a police department where he worked increases the severity of the offense. It is reasonable for the Council to view Hoiby's conduct as the type that reflect poorly on the department where Hoiby worked and justify revocation or denial of certification.

The Council's finding that Hoiby resigned under threat of discharge for conduct that damages the reputation of the police department where Hoiby worked mandates that the Council deny Hoiby certification under 13 AAC 85.100(b)(4). In addition, the Council has discretion to deny certification under 13 AAC 85.100(a)(2). The court will

²¹ *Parcell*, 348 P.3d at 886.

²² 13 AAC 85.010(b)(2).

defer to the Council's decision to exercise its discretion so long as it is not an abuse of discretion.

The Council chose to exercise its discretion and not approve Hoiby's certification because Hoiby's continued conduct gave the Council substantial doubts regarding Hoiby's respect for the rights of others and the law. The Council saw Hoiby's conduct as a series of events rather than an isolated incident in which he learned from his mistake, made amends, and deserved a second chance. The Council considered the totality of the circumstances surrounding Hoiby's conduct. Hoiby failed to keep accurate time and was convicted of stealing from his police department. He then failed to pay the court ordered restitution, which the Council saw as ultimately being his responsibility, even if he thought his girlfriend would pay it. Hoiby continued to demonstrate his lack of respect for the rights of others and the law. Hoiby has tried to minimize his theft conviction since it occurred. In addition, he failed to provide an accurate F-3 and lied about his arrest and his compliance with the court ordered restitution. After interviewing Hoiby, Chief Henning concluded that Hoiby has shown a troubling pattern of credibility issues and appears to not accept responsibility for his actions.²³ Ultimately, the Council gave more weight to Chief Henning's investigative report demonstrating Hoiby's pattern of credibility issues than to Hoiby's testimony that he had learned from his mistakes. The court cannot say that the Council's decision to exercise its discretion to deny Hoiby certification is unreasonable.


²³ [R. 19]

Conclusion


The Court DENIES Hoiby's appeal.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 17th day of May, 2018.


ERIC A. AARSETH
Superior Court Judge

 I certify that on 17 May, 2018, a copy
was mailed to:



Zjok Durst, Law Clerk