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

In the Matter of	)	
	)	
W F	)	OAH No. 16-0107-POC
	)	Agency No. APSC 2014-13

DECISION

I. Introduction

In February 2014, Respondent and former City of No Name patrol officer W F made a drunk driver arrest in which physical force was used to remove the driver from his vehicle. Primarily as a result of Officer F's use of force in that incident and his later explanations for his use of force in effecting that arrest, the No Name Police Department (NNPD) terminated his employment as a patrol officer. Mr. F grieved his termination with the assistance of his labor union, and an arbitrator ruled in his favor, granting his grievance, overturning his termination and ordering that he be reinstated as an NNPD patrol officer and otherwise "made whole." Notwithstanding that arbitration result, the Executive Director of the Alaska Police Standards Council (APSC) filed an accusation seeking to revoke Officer F's Alaska police officer certificate, and Officer F requested a hearing to contest the accusation.

After a three-day hearing before administrative law judge (ALJ) Andrew M Lebo, and based on a careful and considered review of all the evidence presented by the parties, the Executive Director's requested revocation of Officer F's certificate is denied.

II. Factual and Procedural Background

Officer F became a patrol officer with NNPD in February 2007.[1] His performance evaluations over the next seven years were consistently positive,[2] and his coworkers who testified at the hearing uniformly praised his work ethic, honesty and integrity.[3] Former NNPD Investigator K Y testified that Officer F is "honest to a fault" and would readily admit to his mistakes.[4] Officer F's former supervisor, retired Sergeant S R, similarly confirmed Officer F's honesty and integrity and stated that "he discloses too much" or "tells on himself."[5] Current NNPD Officer T D considers Officer F to be an honest officer and would have no problem

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1 Administrative Record (AR) 110.
2 *Id.*
3 *See* L testimony; R testimony; Y testimony; D testimony; M testimony.
4 Y testimony.
5 R testimony.

working with him again ("any day of the week").[6] Former NNPD Chief L M (now the chief of police in Town A, Alaska) views Officer F as "absolutely" an open and honest person and would have no hesitation in hiring him as a police officer today.[7]

Two specific incidents that took place during Mr. F's tenure at NNPD are cited by the Executive Director in support of revoking Mr. F's police certificate: an incident at a local shooting range in 2009, and the above-mentioned drunk driver arrest in 2014. The ALJ's factual findings concerning these incidents are set forth below.

A. The Shooting Range Incident

In November 2009, Officer F was off duty and was target shooting with his wife at a shooting range near No Name, when he saw that there was a bullet hole in the hood of his truck. He believed that someone had shot at him or his vehicle, so he called 911 and reported that an attempted drive-by shooting had taken place. Officers from the Town B Police Department (TBPD) and Alaska State Troopers responded to the call, which was treated as a high-priority emergency. Initially a TBPD officer arrived and took Mr. F's statement,[8] but then Trooper M G of the Alaska State Troopers (AST) took charge of the investigation after it was determined that the shooting range was within AST's jurisdiction. Trooper G investigated the incident, taking photographs of the scene and interviewing Mr. F both at the site and at an AST facility a few days later. At the scene, while discussing the incident with Trooper G, Mr. F realized that the nature of the bullet hole and the manner in which his truck was parked did not support a drive-by shooting as the explanation for the hole, and he then speculated that perhaps the hole had been caused by a ricochet from another shooter.

Several days later, Officer F brought his truck to the AST facility and met with Trooper G. After G examined the truck again, using "trajectory rods" to track the route taken by the bullet, taking photographs of those rods in the truck hood, and further examining the photographs of the scene,[9] he concluded that Mr. F himself had likely fired the shot that caused the bullet hole in question.[10] During the course of that meeting at the AST facility, Trooper G requested that Officer F allow AST to remove the hood from the truck to perform additional examinations;

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6 D testimony.

7 M testimony.

8 Mr. F testified that he recovered at least a portion of the bullet in question and gave it to the TBPD officer; Trooper G testified, however, that to the best of his recollection, the bullet or bullet fragment was lost.

9 Mr. F did not receive copies of any of these photographs until late 2014, at the time of his employment arbitration hearing.

10 G testimony.

Officer F objected that he would not be able to drive his truck home without the hood. Another unnamed AST investigator then indicated to Officer F that his wife may have fired the bullet into the hood of his truck, suggesting that a domestic violence crime may have been committed. Knowing this not to be the case, F contacted his supervisor at NNPD, then-Chief L M, who suggested to F that he "just withdraw from the whole contact."[11] Officer F then ceased cooperating with the investigation and indicated that AST would need to obtain a search warrant to remove the truck's hood.[12]

It is undisputed that early in the investigation, while still at the scene of the shooting, Officer F himself concluded—and stated—that the evidence was not consistent with a drive-by shooting. Furthermore, at several points in the investigation, Officer F acknowledged that the evidence indicated the possibility that he had shot his truck, but he apparently disagreed with that conclusion and clung to the theory that the source of the bullet was a ricochet. Former NNPD Chief M testified that it was his understanding, based on discussions with AST personnel at the time, that the AST investigation never conclusively determined the source of the bullet hole in the hood of Officer F's truck.[13] In any event, at the time of F's arbitration hearing, after the incident had been raised again as part of his termination from NNPD, F examined the photographs provided by AST and reached the conclusion that he probably had shot his truck.[14]

At the time of this incident, the future chief of police at NNPD, Q N, was the commander of the No Name AST post, and he was aware of the incident and of AST's subsequent investigation.[15] AST concluded its investigation without seeking to obtain a warrant for the truck hood or taking any other action regarding the incident.[16] Officer F was not charged with any criminal violation, such as making a false statement, in connection with his 911 call or his interactions with the AST investigators. In addition, NNPD did not undertake an administrative investigation nor take any disciplinary action against F as a result of this incident.[17]

Over four years later, however, the shooting range incident was cited by Chief N as one of the grounds for Mr. F's termination from NNPD. The formal termination letter given to Officer F

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11 M testimony.
12 F testimony; G testimony.
13 M testimony; N testimony.
14 F testimony.
15 *Id.*
16 G testimony.
17 F testimony; M testimony; AR 3.

by Chief N[18] states that he "implicated others in a felony level assault without hesitation," that his "report of a drive-by shooting was not credible," and that the case had been closed based in part on his "refusal to cooperate further with the investigation."[19] More importantly, the incident is cited in the Accusation in this matter as one of the grounds for revocation of Officer F's police certification. Specifically, the Accusation quotes Trooper G's testimony at the arbitration hearing that "it's my opinion that Officer F was not truthful about the scenario... [i]t's my opinion that he negligently discharged his firearm and struck his vehicle."[20]

B. The Drunk Driving Arrest

On the evening of February 4, 2014 a concerned citizen called in a REDDI ("report every dangerous driver immediately") report regarding a suspected drunk driver in the No Name area. Officer F responded to the call and subsequently pulled over a vehicle matching the REDDI caller's description, driven by Mr. L E. The entirety of F's interactions with E were captured on the video camera mounted on Officer F's patrol car.[21] The following description is derived primarily from the ALJ's review of the video record.

Mr. E pulled off the road and stopped in a gas station, and Officer F pulled his patrol car in behind E's truck. E got out of the vehicle to pull out his identification from his pocket. F requested his registration and proof of insurance, so E got back in the truck, handed them to F, then remained sitting in the open driver-side door. Officer F walked back to his patrol car and repositioned it so there wouldn't be room for another vehicle to come between it and E's truck. While he was doing that, NNPD officers N C and T D arrived at the scene.[22] F then returned E's documents to him and engaged him in conversation, standing next to the open driver-side door. During the bulk of Officer F's interaction with E, Officer C stood next to and behind F while F spoke with E. Officer D stood on the other side of the vehicle, observing through the passenger side window.

Early in their conversation, F commented to E that he smelled of alcohol. E admitted to F that he had had one beer, and later he stated "yeah, I admitted to one beer and drinking and

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18 The letter was on NNPD letterhead but was actually signed by No Name City Manager N H.
19 AR 130.
20 AR 3, 5.
21 The video is in the record and was carefully and repeatedly viewed by ALJ Lebo.
22 Officer C had been a police officer for only approximately six months, and Officer D was acting as his field training officer at that time.

driving."[23] F asked E to perform field sobriety tests,[24] but E refused. F then attempted to have E perform the horizontal gaze nystagmus (HGN) test, which involves the subject following the officer's laterally-moving pen with his eyes. E did not cooperate in performing the HGN test, complaining while doing so "why should I follow your pen, you're just going to say the same thing to me anyways."

Throughout his interaction with Officer F on the video, E presents as clearly intoxicated, uncooperative, profane, argumentative, volatile, and unstable (in the sense that he displays mood swings, from affable one moment to defiant and vulgar the next moment). Both F and C would later testify at the hearing that E kept looking off in the distance as if "looking for a way out."[25] F felt instinctively, in the moment, that E might try to flee.[26]

After E's failure to cooperate in the HGN test, F then asked E a series of questions from a written standardized list of questions to be posed to drunk driving suspects. Throughout this verbal exchange between Officer F and E, F's tone remained calm and professional. E, however, was argumentative and did not cooperate in responding to many of the questions posed by Officer F. While Officer F was in the process of questioning E, E interrupted him, saying "I don't give a shit what you say." A few moments later, as F continued attempting to ask questions, E loudly accused F of "pulling me over for no reason;" F then said "stop," and E then loudly yelled "hey hey hey," interrupting F's ability to continue his questioning. Then, in a very rapid sequence lasting no more than four seconds, F said "shut your mouth," and E responded "no you shut your fucking mouth" while at the same time quickly and aggressively bringing his hands up towards F's chest or face. F then blocked E's hand movement, reached into the vehicle and proceeded to physically pull him out, with Officer C's assistance, while E actively resisted.

Officer F separated himself from the scrum, and C and D completed the process of securing E. E suffered some mild abrasions to his face while being placed under arrest, so an ambulance was summoned to take him to the hospital. While the officers awaited the ambulance, Sgt. E L arrived at the scene, having been called by Officer F.[27] Sgt. L eventually followed the

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23 E later changed his story and stated he had two beers.

24 Standard field sobriety tests, or FSTs, include the HGN, walk and turn, and one-leg stand tests; the latter two tests require the subject to exit their vehicle.

25 F testimony; C testimony.

26 F testimony; AR 33, 54.

27 It was standard practice at NNPD for a sergeant to be called to the scene if an arrestee was injured during an arrest.

ambulance to the hospital and observed E's interactions with the staff there.[28] Both while at the hospital, and after he was returned to the NNPD station for further processing, E was very intoxicated and was extremely aggressive, hostile, and verbally abusive.[29] Ultimately he refused to submit to a breath test at the station and had to be physically restrained – after a lengthy process of attempting to obtain his cooperation, the officers had to remove all the chairs from the room (so that E couldn't kick the chairs), place leg restraints on E's feet, and make him sit on the floor.[30]

At some point that night, Sgt. L called Chief Q N, informing him that there had been an arrest involving the use of force.[31] He did this because Chief N wanted to be informed of any use of force incidents involving NNPD officers.[32]

After E was taken to the hospital, Officer F returned to the station and started filling out the paperwork that flows from a drunk driving arrest—a criminal complaint and a police report—along with a "use of force" (UOF) form used by NNPD in any case where an officer uses physical force in an arrest. While he typed up his paperwork, he both listened to and cursorily watched the car-cam arrest video using a device with a very small screen. At that time F did not see on the video E's aggressive movement of his hands up towards F's face or chest, and while typing up the UOF form he did not recall that E had moved his hands in that manner. In reconstructing what had occurred, F wrote on the UOF form that he had initiated physical contact with E because he was highly intoxicated and volatile, and F was concerned that E might attempt to flee from the scene.[33] At the time that he filled out the UOF form, Officer F did not sign it and considered it to be incomplete, in draft form.[34]

At some point late that night or early the next morning, F brought the criminal complaint to Sgt. L for his review and notarization.[35] Sgt. L reviewed the complaint and noted that F had not

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[28] Sgt. E L testified at the hearing that when he observed E at the hospital later in the evening, long after he had consumed alcohol, E was "obviously intoxicated" and extremely uncooperative.

[29] L testimony.

[30] L testimony. A second video recording showing Mr. E's behavior at the NNPD station is in the record of this matter and was reviewed by the ALJ Lebo.

[31] L testimony.

[32] *Id.*

[33] AR 63; F testimony; N testimony. The full excerpt from the UOF form reads as follows: "Officer F believed E was highly intoxicated and became concerned with his volatile demeanor. E told Officer F in a loud voice 'you pulled me over for no fucking reason ... shut your fucking mouth.' Officer F reached out and grasped E's left wrist in hopes E would exit the vehicle peacefully. E quickly stiffened his arm and pulled away from Officer F. Officer F believed E's next action would be an attempt to start the truck and driving [sic] away. Officer's [sic] F and C pulled E from the truck." AR 63. Officer F used similar language in his police report. AR 54.

[34] F testimony.

[35] L testimony; arbitration record (ARB) p. 173 (the transcript of F's employment arbitration was entered into the record of this matter but was not Bates-numbered sequentially with the other portions of the record).

charged E with resisting arrest. When L asked him why he had omitted that charge, F explained that he had not informed E that he was under arrest prior to initiating physical contact and removing him from the vehicle, so he did not feel that a resisting arrest charge was appropriate.[36] Sgt. L agreed that it was appropriate to omit that charge from the complaint. L later recalled that he and F also reviewed "snippets" of the video from the vehicle camera.[37] Later in the night or early the next morning, before going home at the end of his shift, Sgt. L sent an email to Chief N indicating that the use of force incident might require his attention, primarily due to the fact that E had not been charged with resisting arrest.[38]

Sgt. L spoke with Chief N about the incident the next day, February 5, 2014. On February 6, 2014 Officer F called Chief N from his home and told him that after having reviewed the video of the incident again more carefully, he realized that his UOF form was not completely accurate, because there was an additional reason he had used physical force to remove E from his vehicle: E had "taken a swing" at him, or words to that effect.[39] The purpose of Officer F's call was to ask that the UOF form be amended before the Chief signed off on it.[40] The Chief never amended the form, however; in fact the form was never signed and technically is still in "draft" form.[41]

Shortly thereafter on February 6, 2014, Chief N initiated an administrative investigation of Officer F's conduct in effecting E's arrest; in this investigation, Chief N was both the complainant and the investigator.[42] He sent a memorandum to Officer F to initiate the investigation, dated February 6, 2014, in which he described the subjects of the investigation as "use of excessive force," "unbecoming conduct," and "truthfulness."[43]

C. The Investigation and Termination

During the course of the investigation, Chief N interviewed Officer C, Officer D, Officer F, and Sgt. L.[44] Chief N recorded his interviews of C, D and F, but he did not record his interviews with Sgt. L.[45]

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36 L testimony; F testimony.
37 L testimony. ARB p. 174-176.
38 L testimony; AR 25.
39 N testimony; AR 26. F testified at the hearing that, although he did not recall using these precise words, he did not dispute Chief N's recollection of the phone conversation.
40 F testimony; AR 38.
41 N testimony.
42 AR 40.
43 *Id.*
44 AR 21.
45 AR 21; N testimony. At the hearing, Chief N testified that he had several informal talks with L about the incident, as well as a formal interview; his explanation for not recording these conversations with L was that L had not been an eyewitness to the actual arrest incident.

After completing his investigation, Chief N prepared an investigative report, located in the record at AR 25-39, and a "memo of findings" to No Name City Manager H, dated April 7, 2014, located at AR 21-24. In the memo of findings, Chief N sustained the allegations of excessive use of force, unbecoming conduct, and "violating the truthfulness policy."[46] Regarding the latter allegation, Chief N wrote: "I am left with a clear and distinct impression that Ofc. F is not being truthful with me or himself regarding his use of force upon the suspect during this incident and as a result I have lost confidence in his ability to conduct himself in a professional manner as a sworn police officer."[47]

On April 9, 2014, Officer F was terminated from employment by the City of No Name, via a "notice of termination" memorandum from City Manager H to Mr. F.[48] The notice references the investigation conducted by Chief N and cites the fact that the three allegations discussed above – use of force, unbecoming conduct, and truthfulness – were sustained. Regarding truthfulness, the notice specifically states as follows:

> Your recitation of events, wherein you describe your belief that Mr. E was going to unlawfully flee the scene and that he 'took a swing' at you, are inconsistent with both your contemporaneous actions ... and the objective evidence reviewed. Most notably, your version of events is not corroborated by fellow officers or a review of the evidence and calls into question your veracity ... .[49]

The notice of termination also refers to the November 2009 shooting range incident and the related AST investigation, discussed above, and states that "[t]he case was closed based on overwhelming evidence indicating you shot your own vehicle and your refusal to cooperate further with the investigation."[50] After reciting a short list of other disciplinary issues arising during Mr. F's seven years of service as an NNPD officer, it concludes that "there is just cause to terminate your employment with the City of No Name in accordance with the City's policies and the collective bargaining agreement."[51]

Shortly after terminating Officer F's employment, Chief N sent the APSC a personnel action form (APSC's "F-4 form") that is required whenever a sworn police officer is terminated

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46 AR 21-23.
47 AR 24.
48 AR 129-131.
49 AR 129-130.
50 AR 130.
51 AR 131.

from employment.[52] Where the form requires the police agency to indicate whether "decertification" of the officer is recommended, Chief N checked the box for "yes."[53]

D. The Arbitration

Mr. F, with the assistance of his union, then filed a grievance regarding his termination. When the grievance could not be resolved, the matter was referred to arbitration.[54] After a three-day hearing in December 2014,[55] the arbitrator ruled in Mr. F's favor, finding that the City of No Name "did not have just cause" to terminate his employment.[56] The arbitrator found that the charges of excessive use of force, unbecoming conduct, and violation of the truthfulness policy were "not sustained."[57] In reaching that conclusion, the arbitrator found Officer F's "demeanor to be calm and his conduct professional" during the E arrest.[58] He further found that E "was responding to verbal engagement in a belligerent and argumentative manner and there is no indication a verbal command to exit the vehicle to be placed under arrest would not have been met with the same or more aggressive behavior."[59] He noted that the City was correct that "things could have gone better" in the arrest incident, and that perhaps E should have been placed under arrest "even earlier in the exchange."[60] He also pointed out, however, that Officer F had "acknowledged [to Chief N] his poor verbal judo during the exchange" with E and this was not a valid basis for termination. The arbitrator concluded that "the level of force [was] reasonable based on how the situation actually developed."[61]

Regarding truthfulness, the arbitrator specifically found Mr. F to be a credible witness.[62] After reviewing the vehicle camera video footage of the E arrest several times, the arbitrator found that it was "reasonable that [F] reacted to [E's] physical action" (i.e., E's action in bringing his hands up aggressively towards F's face or chest) by going "hands-on" to remove E from the vehicle.[63] Noting that the City had asserted that F was not truthful about when he first reviewed the vehicle camera video, the arbitrator refuted that assertion by finding that the City was

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52 AR 20.
53 *Id.*
54 AR 98.
55 The nearly 800-page transcript of the arbitration hearing is part of the record of this matter.
56 AR 120.
57 AR 121, 122.
58 AR 121.
59 *Id.*
60 *Id.*
61 *Id.*
62 AR 122.
63 *Id.*

mischaracterizing F's testimony. In the arbitration hearing, F had explained that he had first viewed the video on a small screen monitor, and he hadn't noticed E's aggressive hand movements until viewing the video again on a larger screen.[64] The arbitrator corroborated F's testimony by noting that he himself had not seen E's hand movements the first time he viewed the video. He then found that NNPD officers "are allowed to modify reports when new information comes to light;" that Officer F's "efforts to modify his reports were denied because an Administrative Investigation was under way;" that the investigation "began within hours of the incident short circuiting the usual course of review and correction;" and that F's effort "to offer explanations was met with ... disbelief and seen as an attempt [to] falsify his true reasons for going hand on *[sic]* with [E]."[65] The arbitrator concluded:

> I find the lack of any consideration by the City of what is actually on the dash cam footage; [E's] hand coming toward [F], then [F] going hands on; crucial and lacking in objectivity. I find it reasonable that [F] reacted to [E's] physical action as an escalation of an already dynamic situation. Based on the foregoing I do not find the charge of violating the truthfulness policy sustained.[66]

Regarding the 2009 shooting range incident, the arbitrator merely commented in a footnote that the City had cited the incident as an additional basis for its "violation of the truthfulness policy" allegation against Officer F.[67] The arbitrator, however, made no further mention of the City's arguments regarding that incident in his decision.

The arbitrator concluded his decision by granting F's grievance and ordering as follows:

> The union's requested remedy that [F] be reinstated, and made whole for any and all wages and benefits required under the [collective bargaining agreement], including but not limited to merit increases, overtime, premium pay, seniority rights, accrued personal leave, health insurance, PERS contributions, accrued interest, and any and all other wages and benefits is GRANTED.[68]

E. The APSC Revocation Actions

The Executive Director of the APSC originally filed an accusation seeking revocation of Officer F's police certificate in April 2015. Mr. F contested that action and requested a hearing, and ALJ Lebo was assigned to hear the case. While that matter was pending, the arbitrator issued his decision on June 1, 2015, granting F's grievance and ordering his reinstatement as an NNPD

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64 *Id.*
65 *Id.*
66 *Id.* (punctuation as in original).
67 AR 115 (Arbitrator's decision p. 19, footnote 43).
68 AR 123.

officer.[69] The Executive Director then entered into a stipulation with F and his union attorney to dismiss the accusation "without prejudice to refile," and the case was dismissed.[70] The Executive Director apparently took this step in response to a June 4, 2015 letter from Officer F's counsel conveying the arbitrator's decision to the APSC.[71] In the letter, the union argued that because the arbitrator ordered F to be reinstated as an NNPD employee, he "was not discharged from employment," and therefore "discharge from employment as a police officer" could not be relied upon as grounds for revoking F's police certificate.[72]

The APSC subsequently undertook the process of deciding whether it wished to continue to seek revocation of F's certificate; this process is described in a memorandum entered into the record of this matter by the APSC.[73] The memorandum briefly describes the factual history of F's employment with NNPD, the E drunk driver arrest, NNPD's administrative investigation,[74] and NNPD's termination of F. The memorandum notes the APSC had received the F-4 form from NNPD "recommending that Officer F be de-certified," and also that the vehicle camera video of the E arrest had been provided for viewing by the APSC. The memorandum then states as follows:

> On June 1, 2015, the arbitration for Officer F's termination was completed. The arbitrator did not find the charge of excessive use of force and unbecoming conduct sustained. He also did not find the charge of violating the truthfulness policy sustained. On the final page of the arbitration opinion and award, the arbitrator ordered Mr. F be reinstated.
> In Executive Session on 12/1/2015, the [APSC] briefly heard from Chief N, who supported continued revocation, and reviewed the dash cam video. They voted to pursue revocation but did not do so in Open Session, which is required. F has been sent new accusation documents ... on 2/1/16 and is expected to request a hearing.
> Case Status: [APSC] to consider and ratify its previous decision in open session.[75]

The memorandum's reference to the APSC's communication with Chief N in Executive Session is troubling, when contrasted with his testimony during the hearing. After Officer F

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69 As of the date of this hearing, Officer F had not been reinstated to his position as an NNPD patrol officer. The reasons for that were not made clear on the record of this matter.

70 August 3, 2015 stipulation, and August 6, 2015 Order, filed in case no. OAH 15-0475-POC.

71 AR 125-126.

72 AR 125.

73 AR 13-14. The memorandum is labeled in a footer "prepared for December 1, 2015 APSC Executive Session." (AR 13.)

74 The memorandum misrepresents the nature of Sgt. L's report to Chief N regarding the arrest, stating that Officer F's "sergeant reported he had used excessive force during the arrest." (AR 13.) There is no evidence that Sgt. L made any such report; he simply reported that force had been used in the arrest, that E had not been charged with resisting arrest, and that F had gone "hands on" without first telling E that he was under arrest.

75 AR 14.

alleged that Chief N had played a role in the revocation process and was pursuing a "vendetta" against him, the ALJ asked the Chief: "Did you encourage the executive director to bring a second action, a second accusation against officer F?" Chief N replied: "No."[76]

As described in the memorandum, the Executive Director filed a new accusation against Officer F, seeking revocation of his police certificate.[77] Officer F responded with a Notice of Defense, requesting this hearing.[78]

The hearing was held on June 20, June 21, and July 22, 2016. Mr. F represented himself.[79] The Executive Director was represented by Assistant Attorney General John Novak. Testimony was taken from Mr. F, NNPD Chief N, Sgt. L, Officer D, Officer C, APSC investigator T I, former NNPD Chief M, former NNPD Investigator Y, and former NNPD Sgt. R. The record was closed and the matter taken under advisement after the parties submitted post-hearing briefs regarding the legal effect of the arbitrator's decision on the Executive Director's ability to seek revocation of F's certificate.[80]

"Ultimate issue" factual findings

Mr. F was a credible witness. He presented himself at the hearing as a sincere person who is committed to being the best police officer he can be, which includes being truthful in his work and his personal life. He provided straightforward explanations of his actions in both the 2009 shooting range incident and the 2014 drunk driver arrest.

1. Did F lie about the shooting range incident?

Regarding the shooting range incident, it must be noted that this was an unusual situation, in that it cannot be a common occurrence for a police officer to believe that he has been shot at by a third party, only to find out that he must have fired the shot himself. During the hearing, Mr. F sought to explain the reasons why he didn't think that he had shot his own truck, and he freely acknowledged that even on the day of the incident, it quickly became apparent to him that the evidence did not support a drive-by shooting. At the time, however, he searched his memory and

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[76] N Testimony, 6/20/16, at 5:25:50. At that point in the hearing, the ALJ was unaware of the existence of the APSC memorandum at AR 14.

[77] AR 3-7.

[78] AR 12.

[79] Officer F was represented by counsel provided by his union during the arbitration and in the first OAH matter, up to its dismissal, and apparently also in defending the City's appeal of the arbitrator's decision. For unknown reasons, however, his counsel did not represent him in this matter.

[80] In lieu of a post-hearing brief, Mr. F submitted a motion to dismiss the accusation, based on the arbitrator's decision having overturned F's termination. Because such a motion should have been filed before the hearing, the ALJ treated Mr. F's motion as a brief on the legal impact of the arbitrator's decision on the APSC's ability to revoke his certificate.

did not recall attempting a shot over the hood of his truck at a target, which would have been necessary in order for him to shoot into the hood. So he did not then accept that he had shot the truck himself, believing that the shot into the hood was the result of a ricochet. He further explained at the hearing that when he was finally able to view AST's photographs of the scene and of the investigator's trajectory rods, he accepted the conclusion that he had shot his own truck.

It must also be noted that no one, including the Executive Director and Chief N, has accused Mr. F of not sincerely believing that someone had shot at him or of making up the story **at the time that he called 911**, in an effort to deflect attention away from his own error.[81] Rather, Trooper G testified that he believed F was untruthful later, in his interactions with G during the course of the investigation. When pressed, however, Trooper G could not point to a specific lie or untruthful statement allegedly made by Mr. F. Instead, G believed that F was untruthful because he did not readily accept G's conclusion that he had shot his own truck. In other words, Trooper G believed F was untruthful because F did not agree with G or other AST investigators who agreed with G (a group which may have included then-Captain N).

These facts do not add up to Officer F lying, or otherwise being untruthful, about the shooting range incident. At most they demonstrate that F was stubborn and reluctant to accept that he had made an embarrassing mistake, in a situation where his reluctance was likely compounded by the domestic violence accusation against his wife and by the fact that he was not given the opportunity at the time to view the photographic evidence considered by the investigator.

The allegation of untruthfulness by Chief N and Trooper G is further undermined by their four-year delay in making it. When their memories and impressions were fresher, these two individuals apparently did not assess Officer F's behavior as dishonest, *per se,* as opposed to uncooperative or stubborn. Otherwise N, in particular, who was in a command position with AST at the time, surely would have pursued a dishonesty allegation had he thought Officer F had been untruthful. However, it was only years later, in an effort to bolster another allegation in terminating Officer F, that Chief N brought up this old incident and cited it as an example of F's untruthfulness.

ALJ Lebo found that the Executive Director did not establish that Mr. F lied or was untruthful regarding the shooting range incident. Stubbornly resisting and erroneously disagreeing with another police officer's conclusions about an incident are not equivalent to lying or being

[81] Such an allegation, if proven, would present an entirely more serious scenario of dishonesty. The Executive Director, however, has never suggested that such an allegation could be made in this case against Mr. F.

untruthful about the incident. ALJ Lebo made the specific finding that Mr. F was not untruthful and did not lie regarding the incident.[82] This finding is consistent with the conclusions drawn by former NNPD Chief M in 2009 and with the absence of any disciplinary action by NNPD against Mr. F in 2009 or thereafter regarding the incident (until it was resurrected by Chief N more than four years later).

2. Did F lie about his use of force with E's drunk driver arrest?

As to the E drunk driver arrest, the Executive Director's untruthfulness allegations against Officer F in the accusation in this case roughly track Chief N's findings in his administrative investigation, which focused on F's justifications for using force in the arrest. Those findings were that F was untruthful in (a) stating that he used force because he believed E was going to flee the scene, and (b) later stating that he used force because E "took a swing" at F.[83] Chief N felt that F's statement in the criminal complaint and police report that he was concerned that E would drive away was "made up" after the fact to justify his use of force in the arrest. Chief N also felt that F's statement that E took a swing at him was not truthful, because N concluded that the video did not show E taking "a swing" at F.

a. <u>F's concern that E would attempt to flee</u>

In reaching the conclusion that Officer F made up the story that he was concerned that E would attempt to flee, Chief N relied heavily on the fact that Officer C had stated during his investigative interview that E made no indication that he intended to try to drive away. The value of this statement by Officer C, however, is greatly diminished when it is compared to C's testimony under oath at the arbitration hearing, under direct examination by the city's counsel. C stated that he observed E "staring off into the distance ... looking for an out."[84] C's testimony continued: "[E] wasn't completely out of the vehicle. He was still in the vehicle. ... I felt like at one point ... he might actually drive away. I was just kind of worried about actually going hands-

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[82] The Executive Director's counsel repeatedly sought to undermine F's credibility at the hearing by pointing to his habit of calling the incident "the truck shooting" or "the drive-by shooting," rather than "the incident when I shot my truck," arguing that this demonstrated his unwillingness to be honest about the incident. This emphasis on Mr. F's use of a shorthand reference to an incident nearly seven years in the past, while perhaps reflecting a skillful cross-examination technique (at least when employed with no attorney on the other side), carried no weight in my assessment of his credibility or honesty.

[83] The city also argued during the arbitration hearing that F lied about the number of times he had viewed the vehicle camera video prior to telling Chief N that E "took a swing" at him. The Accusation in this case does not cite this allegation. In any event, the allegation amounted at best to a misunderstanding, and at worst to an overzealous splitting of semantical hairs. Officer F testified credibly that he first gave portions of the video a cursory viewing on a small screen while typing his initial reports, but later he viewed it more carefully on a larger screen; it was only then that he first noticed E's aggressive motion with his hands towards F.

[84] ARB p. 242.

on with him."[85] The City's attorney then noted C's prior statement to Chief N during the investigation, and asked C "is that in contrast to what you're saying now, that you did have a concern that maybe he was going to drive away?"[86] C responded: "Yeah. After I had reviewed everything, I did change my position on that, yes."[87] Strangely, however, in the hearing in this matter Officer C apparently changed his position again, testifying equivocally about this issue. He first testified, in response to a question from the Executive Director's counsel, that he did not feel at any point that E was going to try to flee from the officers; but in response to a question from the ALJ, he reluctantly acknowledged that E was "looking for an out."[88] Although C's various statements about this issue are clearly inconsistent, their overall import is that they do provide significant corroboration for F's statement that he believed E might try to flee. C's original statement to Chief N during the investigation, therefore, carries no weight as a basis for the Chief to find that Officer F lied about his concern that E might try to flee the scene.

Chief N also relied on the apparent inconsistency between Officer F's stated concern that E might flee, and the Chief's understanding that F never asked E to get out of the vehicle. The Chief testified that this was significant, because if F truly was concerned that E might flee the scene, he would have wanted E to be outside of the vehicle. This viewpoint, however, ignores the fact, as testified to by Officer C and as conclusively demonstrated in the vehicle camera video, that F did ask E to exit the vehicle to perform FSTs, and E refused.[89]

ALJ Lebo found that Officer F did not lie when he reported that he was concerned that E might try to flee the scene, nor when he reported that this concern played a role in his split-second decision to physically remove E from the vehicle.

b. F's statement that E "took a swing" at him

A key element of Chief N's investigative finding that Officer F was not truthful about the use of force in the E arrest was his conclusion that F falsely reported that E "took a swing" at him. As discussed above, in the immediate aftermath of the incident, when F initially typed up his

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85 ARB p. 243.

86 *Id.*

87 *Id.*

88 C testimony. During the hearing, C was not asked about the inconsistency between this testimony and his prior testimony in the arbitration; this may have been due to the fact that Officer F was not represented by counsel at the hearing.

89 Chief N testified that he found it noteworthy that after E exited the truck to give his identification to Officer F, F allowed him to reenter the vehicle to get his registration and proof of insurance, rather than devising a way to keep E outside of the vehicle. I find, however, that this insignificant fact does not substantially undermine the credibility of Officer F's initial explanation for his use of force.

reports about the incident he did not recall E's aggressive hand movement towards him. After viewing the video more carefully a second time, he saw E's aggressive hand movement and realized it had played a role in his instantaneous decision to go "hands on" to remove E from the vehicle. He immediately called Chief N to report this information and to request the opportunity to amend his use of force report, which he had not yet signed and considered to be in draft form.[90] Chief N then reviewed the vehicle camera video, did not see E "take a swing" at F in the literal sense of an attempt to punch or strike F with his hands, and concluded that F had lied a second time about his reasons for using force in effecting E's arrest. Chief N testified (a) that he interpreted F's "take a swing" report as an allegation that E had committed a crime of assault against F, (b) that alleging an assault against a police officer is a very serious allegation, and (c) the fact that F had not mentioned this in his original reports on the incident indicated that he had made up this explanation only after the fact, when he came under scrutiny for his use of force.

Officer F, however, clearly did not mean the words "he took a swing at me" literally. He was using the phrase as a colloquial descriptor to explain what he had seen on the video, that E had made an aggressive move with his hands towards F's face or chest. Officer F, on reviewing the video more carefully and seeing this physical movement by E, realized he had not recalled this critical element in the fast-moving sequence of events.[91] In good faith, he immediately called the Chief to inform him of this realization.

This interpretation is supported by the extreme unlikelihood that F would lie about an event that had been video recorded, knowing that Chief N or Sgt. L would be able to view the video to either confirm or dispute his statement. It makes no sense to construe "he took a swing at me" as a lie. On the other hand, it makes very much sense to construe it as an officer acting in good faith but using imprecise, vernacular language to describe an important piece of a difficult puzzle – his effort to explain why he had reactively used physical force in a rapidly developing, escalating situation.

Officer F was faced with a highly intoxicated, belligerent and unpredictable suspect, who had already refused to exit his vehicle, and who screamed "shut your fucking mouth" at F while at the same time aggressively moving his hands towards F's face or chest. Officer F clearly processed all of this very quickly and concluded at that point that any further attempt to obtain E's

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90 F was never given the opportunity to amend the report.

91 Chief N testified that it is not uncommon for a participant in a dynamic, violent event to not immediately recall every detail of the event.

cooperation was pointless. This interpretation is consistent with the finding made by the arbitrator in connection with overturning the City's "untruthfulness" charge against F: "I find it reasonable that [F] reacted to [E's] physical action as an escalation of an already dynamic situation."[92] Officer C also corroborated this viewpoint in the hearing, testifying that based on E's level of intoxication and belligerence, he did not believe that E would have willingly exited his vehicle had Officer F first told him that he was under arrest.[93]

Importantly, this conclusion also comports with the conclusion reached by the most senior police officer at the scene, Officer D. Excerpts from the section of Chief N's investigative report setting forth D's comments regarding the arrest follow:

> He heard Ofc. F ask the suspect if he would perform field sobriety tests and the suspect said that he would not. Off *[sic]* F continued to talk to the suspect but he could not hear everything that was said. He had a view of what was going on through passenger side window. ... He could hear the raised voice of the suspect but noted that the suspect was not screaming. All of a sudden the suspect "blew up" and said "fuck you" and the suspect's hands came up. Ofc. F then grabbed a hand of the suspect and tried to get the suspect out of the vehicle. The suspect resisted ... .
>
> He thought the suspect was taken out of the vehicle because the "f" word was used and the suspect's hands came up. He did not see the suspect take any swings at Ofc. C or F... . **From what he could see he thought it was handled appropriately**. He did not hear everything. The suspect did get escalated and started screaming and the suspect's hands did come up ... .[94]

The importance of this point cannot be understated – Officer D, the most senior police officer on the scene, told the Chief during the investigation, and testified both in this hearing and during the arbitration, that he had no problem with the way the arrest was handled.[95]

From Officer F's perspective, the bottom line in his interactions with Mr. E was that he was concerned with E's volatile, intoxicated demeanor, and as a result of E's escalating agitation and his sudden, aggressive physical movement with his hands, he concluded that further verbal interaction would be pointless and would not result in E voluntarily getting out of the vehicle.[96] Thus, to effect the arrest he felt he had to make physical contact with E.

Of course, it would have been better police practice for F to refrain from saying "shut your mouth" in response to E's escalating verbal tirade, and for F to inform E that he was under arrest

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92 AR 122.
93 C testimony, 6/21/16 at 00:48:40.
94 AR 28 (emphasis added).
95 *Id.;* D testimony; ARB p. 265.
96 Officer C reached the same conclusion, per his testimony at the hearing.

before going "hands on." **But Officer F did not lie about this incident.** On the contrary, he was as forthcoming as he could be as he tried to reconstruct what had taken place during this difficult, very dynamic incident with a highly intoxicated and aggressive E.

III. Discussion

In this case, the Executive Director seeks revocation of Mr. F's police certificate only on the basis of the dishonesty allegations discussed above and the fact of Mr. F's discharge from employment by NNPD. The Executive Director's accusation in this matter does not seek revocation based on excessive use of force allegations against F related to the E drunk driver arrest. For the reasons discussed below, the Executive Director did not meet his burden of establishing that Officer F's police officer certificate should be revoked.

A. The Executive Director failed to show that revocation is appropriate under Counts I and III.

Counts I and III of the Accusation concern the employment action taken by NNPD against Mr. F. Count I of the Accusation asserts that discretionary revocation is appropriate under 13 AAC 85.110(a)(2)[97] because Mr. F was "discharged for cause for conduct that is detrimental to the reputation, integrity, or discipline of [NNPD]."[98] Count III of the Accusation asserts that mandatory revocation is required under 13 AAC 85.110(b)(3) because Mr. F was "discharged for cause for conduct, (1) that would cause a reasonable person to have substantial doubt about [his] honesty, fairness, respect for the rights of others and for the laws of this state and the United States, and/or, (2) was detrimental to the integrity of [NNPD]."[99] Because these allegations all necessarily arise out of the employment action taken by NNPD against Mr. F, they are addressed together, as follows.

1. Mr. F was discharged for cause for purposes of decertification. (Counts I & III)

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97 13 AAC 85.110(a) provides as follows: (a) The council may revoke a basic, intermediate, or advanced certificate upon a finding that the holder of the certificate
(1) falsified or omitted information required to be provided on an application for certification at any level, or in supporting documents;
(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 cause 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; or
(3) does not meet the standards in 13 AAC 85.010(a) or (b).

98 AR 6.

99 AR 7.

An essential element of both Counts I and III against Mr. F is that he was "discharged" from his employment with NNPD. It is beyond dispute that Mr. Dillion was discharged by NNPD. As described previously, Mr. F successfully grieved his termination; an arbitrator determined that the City of No Name "did not have just cause" to terminate his employment.[100] That said, even though his termination was successfully challenged, the Council has repeatedly held that such personnel actions do not preclude the Council from pursuing a revocation action under 13 AAC 85.100(a)(2) or 13 AAC 85.110(b)(3).[101]

13 AAC 85.110(f) states:

> A personnel action or subsequent personnel action regarding a police officer by the police officer's employer, including a decision resulting from an appeal of the employer's action, does not preclude the council from revoking the police officer's basic, intermediate, or advanced certificate under this section.

The Council once again re-affirms its analysis in *In re Bowen*, OAH 10-0327-POC, that is – "[A] arbitrator has the authority under a collective bargaining agreement to bind [a law enforcement agency] to the arbitrator's decision, but lack any authority to limit the council's disciplinary actions based on information in the council's records."

2. The Executive Director did not prove that the underlying conduct by F was detrimental to the reputation, integrity, or discipline of NNPD. (Count I)

Even though Mr. F was "discharged", the Executive Director must still prove that the underlying conduct was detrimental to the reputation, integrity, or discipline of NNPD.[102]

a. <u>The Executive Director did not prove that the two incidents implicate "Brady" concerns.</u>

At the hearing, counsel for the Executive Director argued that the facts of this case implicate Mr. F's ability to serve as a police officer due to potential "*Brady/Giglio*" concerns,[103] which in turn would be detrimental to the reputation, integrity or discipline of NNPD. But the

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100 AR 120.

101 *See In re Bowen*, OAH 10-0327-POC; *In re McQuillin*, OAH 15-1086-POC.

102 13 AAC 85.110(a)(2) (authorizing discretionary discharge if Council finds the certificate holder "has been discharged . . . for cause for . . . some other reason . . . that is detrimental to the reputation, integrity, or discipline of the police department where the police officer worked"). Notably, the Executive Director did not include a count in the Accusation under the other prong of .110(a)(2), which would require an allegation that F's conduct "adversely affect[ed] the ability and fitness of [F] to perform job duties."

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

Executive Director did not prove such concerns, nor otherwise prove that Mr. F's conduct should be deemed detrimental to the reputation, integrity, or discipline of NNPD.

In argument, Counsel for the Executive Director contended that the negative views of Mr. F's honesty held by Chief N, Trooper G, and Investigator I are "*Brady/Giglio*" material that would require disclosure in criminal cases involving Mr. F. Regardless of counsel's arguments, however, the Executive Director did not meet his burden of demonstrating that Mr. F would be considered a "*Brady* officer." As discussed at length above, the evidence did not establish that Mr. F lied or was dishonest regarding either the shooting range incident or the E drunk driver arrest. On the contrary, both this decision and the arbitrator's decision found that Mr. F was not dishonest and in fact acted in good faith regarding both incidents.

Furthermore, the Executive Director relies on a circular argument that Chief N's or Trooper G's negative opinions of Mr. F's honesty – no matter how ill-founded or unsupported their opinions may be – render him a "*Brady*" officer, which in turn would undermine NNPD's "reputation, integrity or discipline," which in turn supports revocation. But the evidence in the record does not establish that the personal views of Chief N and Trooper G have actual *Brady* implications. Moreover, accepting this line of argument would potentially turn any disagreement arising in the workplace or in an investigation into a *Brady* matter. To the extent that a future prosecutor may decide that a *Brady/Giglio* disclosure is necessary if Officer F continues his career as a police officer, that will be the unfortunate result of Chief N and Trooper G having drawn ill-advised or incorrect conclusions regarding F's veracity. Officer F should not be made to bear the burden of their errors.[104]

b. Apart from *Brady* concerns, the Executive Director did not prove that F's underlying conduct was detrimental to NNPD's reputation, integrity or discipline.

The Executive Director focused his revocation effort against Mr. F on the alleged *Brady/Giglio* issues arising out of F's veracity in the aftermath of the two incidents in question. To the extent that he also argued that F's conduct in the incidents themselves was detrimental to NNPD's reputation, integrity or discipline, the Executive Director did not meet his burden of proving such a proposition. Clearly, Mr. F made mistakes in the shooting range incident and the E drunk driver arrest. He probably should not have called 911 after shooting his own truck, if that in

[104] The absence of a *Brady* concern here is consistent with the testimony of every witness who worked with Officer F, other than N and G – including former NNPD Investigator K Y, retired Sergeant S R, NNPD Officer D, former NNPD Chief M, and Sgt. L – all of whom testified to F's honesty and integrity.

fact is what occurred at the shooting range in 2009. He probably should have informed L E that he was under arrest and given him another opportunity to step out of his vehicle, before going hands-on in effecting the arrest. And Mr. F could have been clearer in his communication with Chief N regarding E's volatility and aggressive hand movements leading up to the arrest. But these errors are not of the quality or character to cause detriment to NNPD's reputation, integrity or discipline.

No evidence was presented that F's errors in these two incidents were so egregious as to constitute a "black eye" for NNPD – there was no testimony that either incident gave rise to negative treatment in the press or other bad publicity for NNPD. Nor was evidence presented that the incidents resulted in a breakdown in discipline or moral standards within the ranks of NNPD's sworn police officers. The Executive Director failed to prove detriment to NNPD's reputation, integrity or discipline.

3. The Executive Director did not prove that F's underlying conduct would "cause a reasonable person to have substantial doubt about [his] honesty, fairness, respect for the rights of others, or for the laws of this state or the United States" (Count III)

Count III of the Amended Accusation also asserts that mandatory revocation is required under 13 AAC 85.110(b)(3), because Mr. F was discharged for conduct that "would cause a reasonable person to have substantial doubt about [his] honesty, fairness, respect for the rights of others, or for the laws of this state or the United States." As discussed above, Mr. F did not lie about his conduct in the shooting range incident or the E drunk driver arrest. Therefore his conduct would not "cause a reasonable person to have substantial doubt about [his] honesty." And although he made errors in performing his duties, they rise to nowhere near the level that would "cause a reasonable person to have substantial doubt about [his] … fairness, respect for the rights of others, or for the laws of this state or the United States." For these reasons, the Executive Director did not meet his burden of showing that revocation is appropriate under Count III of the Amended Accusation.[105]

2. The Executive Director failed to show that Mr. F "lacks good moral character" (Count II)

Count II of the Accusation asserts that discretionary revocation is appropriate under 13 AAC 85.110(a)(3) because Mr. F "lacks good moral character." The Council has discretion – but is not required – to revoke an officer's certification if the officer does not meet the basic standards

[105] Count III also cites the section of 13 AAC 85.110(b)(3) requiring revocation for conduct that is "detrimental to the integrity" of NNPD. It has already been established, however, that Mr. F's conduct had no such effect.

set out in 13 AAC 85.010. One of those standards is the requirement that the officer possess "good moral character."[106]

Good moral character is defined as "the absence of acts or conduct that would cause a reasonable person to have substantial doubts about an individual's honesty, fairness, and respect for the rights of others and for the laws of the state and the United States."[107] For purposes of making this evaluation, the APSC may consider "all aspects of a person's character."[108]

Prior decisions by the APSC have considered the elements identified in the regulation – honesty, fairness, respect for the rights of others, and respect for the law – "collectively."[109] The Executive Director is not required to prove doubt about each of the elements, but must prove substantial doubt about at least one. Additionally, because the regulation considers "all aspects of a person's character," the APSC's task is to reach a reasoned decision based on the totality of the evidence. Here, the Executive Director did not prove a substantial doubt about Mr. F's honesty, fairness, respect for the rights of others or respect for the law, nor does the totality of the evidence support a finding that he lacks good moral character.

On the contrary, the totality of the evidence supports a finding that Mr. F has moral character of the highest order. Mr. F demonstrated his moral character in his good faith attempt to correct the record and amend his use of force form regarding the E arrest. He further demonstrated it regarding the resurrected shooting range incident, when after finally being presented with the evidence gathered by Trooper G, he acknowledged his error and acknowledged that he probably had shot his own truck.

The Accusation's allegations implicating moral character – that Mr. F was untruthful regarding the shooting range incident and the E drunk driver arrest – are incorrect. F was not untruthful about either incident. Nor does the remaining evidence support the Executive Director's allegation regarding a lack of good moral character. Neither Mr. F's conduct during the two incidents at issue, nor his conduct during Chief N's administration investigation, create substantial doubts about his honesty, fairness, and respect for the rights of others and/or for the law.

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106 13 AAC 85.110(a)(3)
107 13 AAC 85.900(7).
108 13 AAC 85.900(7).
109 *See In re E X*, OAH No. 13-0473-POC, at p. 18 (Alaska Police Standards Council 2013); *In re Hazelaar*, OAH No. 13-0085-POC, at pp. 15-16 (Alaska Police Standards Council 2014).

Mr. F presented considerable testimonial evidence in favor of his good moral character. Numerous former colleagues and supervisors offered testimony in support of Mr. F, specifically based on their experiences of working alongside him as an NNPD officer.[110] These witnesses testified about F's positive work ethic, professionalism, calm demeanor, integrity, and honesty. Their unanimity provides strong support for his good moral character.

For all of these reasons, the Executive Director did not meet his burden of proving that Mr. F lacks good moral character, as it is defined in the APSC's regulations.

IV. Conclusion

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

DATED this 17th day of April, 2017.

By: *Signed*
Bryce A. Lson
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.]

[110] *See* L testimony; R testimony; Y testimony; D testimony; M testimony.

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

In the Matter of	)	
	)	
W F	)	OAH No. 16-0107-POC
	)	Agency No. APSC 2014-13

[*REJECTED PROPOSED*] DECISION

I. Introduction

In February 2014, Respondent and former City of No Name patrol officer W F made a drunk driver arrest in which physical force was used to remove the driver from his vehicle. Primarily as a result of Officer F's use of force in that incident and his later explanations for his use of force in effecting that arrest, the No Name Police Department (NNPD) terminated his employment as a patrol officer. Mr. F grieved his termination with the assistance of his labor union, and an arbitrator ruled in his favor, granting his grievance, overturning his termination and ordering that he be reinstated as an NNPD patrol officer and otherwise "made whole." Notwithstanding that arbitration result, the Executive Director of the Alaska Police Standards Council (APSC) filed an accusation seeking to revoke Officer F's Alaska police officer certificate, and Officer F requested a hearing to contest the accusation.

After a three-day hearing before the undersigned administrative law judge (ALJ), and based on a careful and considered review of all the evidence presented by the parties, the Executive Director's requested revocation of Officer F's certificate is denied.

II. Factual and Procedural Background

Officer F became a patrol officer with NNPD in February 2007.[111] His performance evaluations over the next seven years were consistently positive,[112] and his coworkers who testified at the hearing uniformly praised his work ethic, honesty and integrity.[113] Former NNPD Investigator K Y testified that Officer F is "honest to a fault" and would readily admit to his mistakes.[114] Officer F's former supervisor, retired Sergeant S R, similarly confirmed Officer F's honesty and integrity and stated that "he discloses too much" or "tells on himself."[115] Current

111 Administrative Record (AR) 110.

112 *Id.*

113 *See* L testimony; R testimony; Y testimony; D testimony; M testimony.

114 Y testimony.

115 R testimony.

NNPD Officer T D considers Officer F to be an honest officer and would have no problem working with him again ("any day of the week").[116] Former NNPD Chief L M (now the chief of police in Town A, Alaska) views Officer F as "absolutely" an open and honest person and would have no hesitation in hiring him as a police officer today.[117]

Two specific incidents that took place during Mr. F's tenure at NNPD are cited by the Executive Director in support of revoking Mr. F's police certificate: an incident at a local shooting range in 2009, and the above-mentioned drunk driver arrest in 2014. The ALJ's factual findings concerning these incidents are set forth below.

A. The Shooting Range Incident

In November 2009, Officer F was off duty and was target shooting with his wife at a shooting range near No Name, when he saw that there was a bullet hole in the hood of his truck. He believed that someone had shot at him or his vehicle, so he called 911 and reported that an attempted drive-by shooting had taken place. Officers from the Town B Police Department (TBPD) and Alaska State Troopers responded to the call, which was treated as a high-priority emergency. Initially a TBPD officer arrived and took Mr. F's statement,[118] but then Trooper M G of the Alaska State Troopers (AST) took charge of the investigation after it was determined that the shooting range was within AST's jurisdiction. Trooper G investigated the incident, taking photographs of the scene and interviewing Mr. F both at the site and at an AST facility a few days later. At the scene, while discussing the incident with Trooper G, Mr. F realized that the nature of the bullet hole and the manner in which his truck was parked did not support a drive-by shooting as the explanation for the hole, and he then speculated that perhaps the hole had been caused by a richochet from another shooter.

Several days later, Officer F brought his truck to the AST facility and met with Trooper G. After G examined the truck again, using "trajectory rods" to track the route taken by the bullet, taking photographs of those rods in the truck hood, and further examining the photographs of the scene,[119] he concluded that Mr. F himself had likely fired the shot that caused the bullet hole in

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116 D testimony.

117 M testimony.

118 Mr. F testified that he recovered at least a portion of the bullet in question and gave it to the TBPD officer; Trooper G testified, however, that to the best of his recollection, the bullet or bullet fragment was lost.

119 Mr. F did not receive copies of any of these photographs until late 2014, at the time of his employment arbitration hearing.

question.[120] During the course of that meeting at the AST facility, Trooper G requested that Officer F allow AST to remove the hood from the truck to perform additional examinations; Officer F objected that he would not be able to drive his truck home without the hood. Another unnamed AST investigator then indicated to Officer F that his wife may have fired the bullet into the hood of his truck, suggesting that a domestic violence crime may have been committed. Knowing this not to be the case, F contacted his supervisor at NNPD, then-Chief L M, who suggested to F that he "just withdraw from the whole contact."[121] Officer F then ceased cooperating with the investigation and indicated that AST would need to obtain a search warrant to remove the truck's hood.[122]

It is undisputed that early in the investigation, while still at the scene of the shooting, Officer F himself concluded—and stated—that the evidence was not consistent with a drive-by shooting. Furthermore, at several points in the investigation, Officer F acknowledged that the evidence indicated the possibility that he had shot his truck, but he apparently disagreed with that conclusion and clung to the theory that the source of the bullet was a ricochet. Former NNPD Chief M testified that it was his understanding, based on discussions with AST personnel at the time, that the AST investigation never conclusively determined the source of the bullet hole in the hood of Officer F's truck.[123] In any event, at the time of F's arbitration hearing, after the incident had been raised again as part of his termination from NNPD, F examined the photographs provided by AST and reached the conclusion that he probably had shot his truck.[124]

At the time of this incident, the future chief of police at NNPD, Q N, was the commander of the No Name AST post, and he was aware of the incident and of AST's subsequent investigation.[125] AST concluded its investigation without seeking to obtain a warrant for the truck hood or taking any other action regarding the incident.[126] Officer F was not charged with any criminal violation, such as making a false statement, in connection with his 911 call or his interactions with the AST investigators. In addition, NNPD did not undertake an administrative investigation nor take any disciplinary action against F as a result of this incident.[127]

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120 G testimony.
121 M testimony.
122 F testimony; G testimony.
123 M testimony; N testimony.
124 F testimony.
125 *Id.*
126 G testimony.
127 F testimony; M testimony; AR 3.

Over four years later, however, the shooting range incident was cited by Chief N as one of the grounds for Mr. F's termination from NNPD. The formal termination letter given to Officer F by Chief N[128] states that he "implicated others in a felony level assault without hesitation," that his "report of a drive-by shooting was not credible," and that the case had been closed based in part on his "refusal to cooperate further with the investigation."[129] More importantly, the incident is cited in the Accusation in this matter as one of the grounds for revocation of Officer F's police certification. Specifically, the Accusation quotes Trooper G's testimony at the arbitration hearing that "it's my opinion that Officer F was not truthful about the scenario... [i]t's my opinion that he negligently discharged his firearm and struck his vehicle."[130]

B. The Drunk Driving Arrest

On the evening of February 4, 2014 a concerned citizen called in a REDDI ("report every dangerous driver immediately") report regarding a suspected drunk driver in the No Name area. Officer F responded to the call and subsequently pulled over a vehicle matching the REDDI caller's description, driven by Mr. L E. The entirety of F's interactions with E were captured on the video camera mounted on Officer F's patrol car.[131] The following description is derived primarily from the ALJ's review of the video record.

Mr. E pulled off the road and stopped in a gas station, and Officer F pulled his patrol car in behind E's truck. E got out of the vehicle to pull out his identification from his pocket. F requested his registration and proof of insurance, so E got back in the truck, handed them to F, then remained sitting in the open driver-side door. Officer F walked back to his patrol car and repositioned it so there wouldn't be room for another vehicle to come between it and E's truck. While he was doing that, NNPD officers N C and T D arrived at the scene.[132] F then returned E's documents to him and engaged him in conversation, standing next to the open driver-side door. During the bulk of Officer F's interaction with E, Officer C stood next to and behind F while F spoke with E. Officer D stood on the other side of the vehicle, observing through the passenger side window.

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128 The letter was on NNPD letterhead but was actually signed by No Name City Manager N H.

129 AR 130.

130 AR 3, 5.

131 The video is in the record and has been carefully and repeatedly viewed by the undersigned administrative law judge (ALJ).

132 Officer C had been a police officer for only approximately six months, and Officer D was acting as his field training officer at that time.

Early in their conversation, F commented to E that he smelled of alcohol. E admitted to F that he had had one beer, and later he stated "yeah, I admitted to one beer and drinking and driving."[133] F asked E to perform field sobriety tests,[134] but E refused. F then attempted to have E perform the horizontal gaze nystagmus (HGN) test, which involves the subject following the officer's laterally-moving pen with his eyes. E did not cooperate in performing the HGN test, complaining while doing so "why should I follow your pen, you're just going to say the same thing to me anyways."

Throughout his interaction with Officer F on the video, E presents as clearly intoxicated, uncooperative, profane, argumentative, volatile, and unstable (in the sense that he displays mood swings, from affable one moment to defiant and vulgar the next moment). Both F and C would later testify at the hearing that E kept looking off in the distance as if "looking for a way out."[135] F felt instinctively, in the moment, that E might try to flee.[136]

After E's failure to cooperate in the HGN test, F then asked E a series of questions from a written standardized list of questions to be posed to drunk driving suspects. Throughout this verbal exchange between Officer F and E, F's tone remained calm and professional. E, however, was argumentative and did not cooperate in responding to many of the questions posed by Officer F. While Officer F was in the process of questioning E, E interrupted him, saying "I don't give a shit what you say." A few moments later, as F continued attempting to ask questions, E loudly accused F of "pulling me over for no reason;" F then said "stop," and E then loudly yelled "hey hey hey," interrupting F's ability to continue his questioning. Then, in a very rapid sequence lasting no more than four seconds, F said "shut your mouth," and E responded "no you shut your fucking mouth" while at the same time quickly and aggressively bringing his hands up towards F's chest or face. F then blocked E's hand movement, reached into the vehicle and proceeded to physically pull him out, with Officer C's assistance, while E actively resisted.

Officer F separated himself from the scrum, and C and D completed the process of securing E. E suffered some mild abrasions to his face while being placed under arrest, so an ambulance was summoned to take him to the hospital. While the officers awaited the ambulance,

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133 E later changed his story and stated he had two beers.

134 Standard field sobriety tests, or FSTs, include the HGN, walk and turn, and one-leg stand tests; the latter two tests require the subject to exit their vehicle.

135 F testimony; C testimony.

136 F testimony; AR 33, 54.

Sgt. E L arrived at the scene, having been called by Officer F.[137] Sgt. L eventually followed the ambulance to the hospital and observed E's interactions with the staff there.[138] Both while at the hospital, and after he was returned to the NNPD station for further processing, E was very intoxicated and was extremely aggressive, hostile, and verbally abusive.[139] Ultimately he refused to submit to a breath test at the station and had to be physically restrained – after a lengthy process of attempting to obtain his cooperation, the officers had to remove all the chairs from the room (so that E couldn't kick the chairs), place leg restraints on E's feet, and make him sit on the floor.[140]

At some point that night, Sgt. L called Chief Q N, informing him that there had been an arrest involving the use of force.[141] He did this because Chief N wanted to be informed of any use of force incidents involving NNPD officers.[142]

After E was taken to the hospital, Officer F returned to the station and started filling out the paperwork that flows from a drunk driving arrest—a criminal complaint and a police report—along with a "use of force" (UOF) form used by NNPD in any case where an officer uses physical force in an arrest. While he typed up his paperwork, he both listened to and cursorily watched the car-cam arrest video using a device with a very small screen. At that time F did not see on the video E's aggressive movement of his hands up towards F's face or chest, and while typing up the UOF form he did not recall that E had moved his hands in that manner. In reconstructing what had occurred, F wrote on the UOF form that he had initiated physical contact with E because he was highly intoxicated and volatile, and F was concerned that E might attempt to flee from the scene.[143] At the time that he filled out the UOF form, Officer F did not sign it and considered it to be incomplete, in draft form.[144]

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137 It was standard practice at NNPD for a sergeant to be called to the scene if an arrestee was injured during an arrest.

138 Sgt. E L testified at the hearing that when he observed E at the hospital later in the evening, long after he had consumed alcohol, E was "obviously intoxicated" and extremely uncooperative.

139 L testimony.

140 L testimony. A second video recording showing Mr. E's behavior at the NNPD station is in the record of this matter and has been reviewed by the undersigned ALJ.

141 L testimony.

142 *Id.*

143 AR 63; F testimony; N testimony. The full excerpt from the UOF form reads as follows: "Officer F believed E was highly intoxicated and became concerned with his volatile demeanor. E told Officer F in a loud voice 'you pulled me over for no fucking reason ... shut your fucking mouth.' Officer F reached out and grasped E's left wrist in hopes E would exit the vehicle peacefully. E quickly stiffened his arm and pulled away from Officer F. Officer F believed E's next action would be an attempt to start the truck and driving [sic] away. Officer's [sic] F and C pulled E from the truck." AR 63. Officer F used similar language in his police report. AR 54.

144 F testimony.

At some point late that night or early the next morning, F brought the criminal complaint to Sgt. L for his review and notarization.[145] Sgt. L reviewed the complaint and noted that F had not charged E with resisting arrest. When L asked him why he had omitted that charge, F explained that he had not informed E that he was under arrest prior to initiating physical contact and removing him from the vehicle, so he did not feel that a resisting arrest charge was appropriate.[146] Sgt. L agreed that it was appropriate to omit that charge from the complaint. L later recalled that he and F also reviewed "snippets" of the video from the vehicle camera.[147] Later in the night or early the next morning, before going home at the end of his shift, Sgt. L sent an email to Chief N indicating that the use of force incident might require his attention, primarily due to the fact that E had not been charged with resisting arrest.[148]

Sgt. L spoke with Chief N about the incident the next day, February 5, 2014. On February 6, 2014 Officer F called Chief N from his home and told him that after having reviewed the video of the incident again more carefully, he realized that his UOF form was not completely accurate, because there was an additional reason he had used physical force to remove E from his vehicle: E had "taken a swing" at him, or words to that effect.[149] The purpose of Officer F's call was to ask that the UOF form be amended before the Chief signed off on it.[150] The Chief never amended the form, however; in fact the form was never signed and technically is still in "draft" form.[151]

Shortly thereafter on February 6, 2014, Chief N initiated an administrative investigation of Officer F's conduct in effecting E's arrest; in this investigation, Chief N was both the complainant and the investigator.[152] He sent a memorandum to Officer F to initiate the investigation, dated February 6, 2014, in which he described the subjects of the investigation as "use of excessive force," "unbecoming conduct," and "truthfulness."[153]

C. The Investigation and Termination

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145 L testimony; arbitration record (ARB) p. 173 (the transcript of F's employment arbitration was entered into the record of this matter but was not Bates-numbered sequentially with the other portions of the record).

146 L testimony; F testimony.

147 L testimony. ARB p. 174-176.

148 L testimony; AR 25.

149 N testimony; AR 26. F testified at the hearing that, although he did not recall using these precise words, he did not dispute Chief N's recollection of the phone conversation.

150 F testimony; AR 38.

151 N testimony.

152 AR 40.

153 *Id.*

During the course of the investigation, Chief N interviewed Officer C, Officer D, Officer F, and Sgt. L.[154] Chief N recorded his interviews of C, D and F, but he did not record his interviews with Sgt. L.[155]

After completing his investigation, Chief N prepared an investigative report, located in the record at AR 25-39, and a "memo of findings" to No Name City Manager H, dated April 7, 2014, located at AR 21-24. In the memo of findings, Chief N sustained the allegations of excessive use of force, unbecoming conduct, and "violating the truthfulness policy."[156] Regarding the latter allegation, Chief N wrote: "I am left with a clear and distinct impression that Ofc. F is not being truthful with me or himself regarding his use of force upon the suspect during this incident and as a result I have lost confidence in his ability to conduct himself in a professional manner as a sworn police officer."[157]

On April 9, 2014, Officer F was terminated from employment by the City of No Name, via a "notice of termination" memorandum from City Manager H to Mr. F.[158] The notice references the investigation conducted by Chief N and cites the fact that the three allegations discussed above – use of force, unbecoming conduct, and truthfulness – were sustained. Regarding truthfulness, the notice specifically states as follows:

> Your recitation of events, wherein you describe your belief that Mr. E was going to unlawfully flee the scene and that he 'took a swing' at you, are inconsistent with both your contemporaneous actions ... and the objective evidence reviewed. Most notably, your version of events is not corroborated by fellow officers or a review of the evidence and calls into question your veracity ... .[159]

The notice of termination also refers to the November 2009 shooting range incident and the related AST investigation, discussed above, and states that "[t]he case was closed based on overwhelming evidence indicating you shot your own vehicle and your refusal to cooperate further with the investigation."[160] After reciting a short list of other disciplinary issues arising during Mr. F's seven years of service as an NNPD officer, it concludes that "there is just cause to terminate your

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154 AR 21.

155 AR 21; N testimony. At the hearing, Chief N testified that he had several informal talks with L about the incident, as well as a formal interview; his explanation for not recording these conversations with L was that L had not been an eyewitness to the actual arrest incident.

156 AR 21-23.

157 AR 24.

158 AR 129-131.

159 AR 129-130.

160 AR 130.

employment with the City of No Name in accordance with the City's policies and the collective bargaining agreement."[161]

Shortly after terminating Officer F's employment, Chief N sent the APSC a personnel action form (APSC's "F-4 form") that is required whenever a sworn police officer is terminated from employment.[162] Where the form requires the police agency to indicate whether "decertification" of the officer is recommended, Chief N checked the box for "yes."[163]

D. The Arbitration

Mr. F, with the assistance of his union, then filed a grievance regarding his termination. When the grievance could not be resolved, the matter was referred to arbitration.[164] After a three-day hearing in December 2014,[165] the arbitrator ruled in Mr. F's favor, finding that the City of No Name "did not have just cause" to terminate his employment.[166] The arbitrator found that the charges of excessive use of force, unbecoming conduct, and violation of the truthfulness policy were "not sustained."[167] In reaching that conclusion, the arbitrator found Officer F's "demeanor to be calm and his conduct professional" during the E arrest.[168] He further found that E "was responding to verbal engagement in a belligerent and argumentative manner and there is no indication a verbal command to exit the vehicle to be placed under arrest would not have been met with the same or more aggressive behavior."[169] He noted that the City was correct that "things could have gone better" in the arrest incident, and that perhaps E should have been placed under arrest "even earlier in the exchange."[170] He also pointed out, however, that Officer F had "acknowledged [to Chief N] his poor verbal judo during the exchange" with E and this was not a valid basis for termination. The arbitrator concluded that "the level of force [was] reasonable based on how the situation actually developed."[171]

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161 AR 131.
162 AR 20.
163 *Id.*
164 AR 98.
165 The nearly 800-page transcript of the arbitration hearing is part of the record of this matter.
166 AR 120.
167 AR 121, 122.
168 AR 121.
169 *Id.*
170 *Id.*
171 *Id.*

Regarding truthfulness, the arbitrator specifically found Mr. F to be a credible witness.[172] After reviewing the vehicle camera video footage of the E arrest several times, the arbitrator found that it was "reasonable that [F] reacted to [E's] physical action" (i.e., E's action in bringing his hands up aggressively towards F's face or chest) by going "hands-on" to remove E from the vehicle.[173] Noting that the City had asserted that F was not truthful about when he first reviewed the vehicle camera video, the arbitrator refuted that assertion by finding that the City was mischaracterizing F's testimony. In the arbitration hearing, F had explained that he had first viewed the video on a small screen monitor, and he hadn't noticed E's aggressive hand movements until viewing the video again on a larger screen.[174] The arbitrator corroborated F's testimony by noting that he himself had not seen E's hand movements the first time he viewed the video. He then found that NNPD officers "are allowed to modify reports when new information comes to light;" that Officer F's "efforts to modify his reports were denied because an Administrative Investigation was under way;" that the investigation "began within hours of the incident short circuiting the usual course of review and correction;" and that F's effort "to offer explanations was met with ... disbelief and seen as an attempt [to] falsify his true reasons for going hand on *[sic]* with [E]."[175] The arbitrator concluded:

> I find the lack of any consideration by the City of what is actually on the dash cam footage; [E's] hand coming toward [F], then [F] going hands on; crucial and lacking in objectivity. I find it reasonable that [F] reacted to [E's] physical action as an escalation of an already dynamic situation. Based on the foregoing I do not find the charge of violating the truthfulness policy sustained.[176]

Regarding the 2009 shooting range incident, the arbitrator merely commented in a footnote that the City had cited the incident as an additional basis for its "violation of the truthfulness policy" allegation against Officer F.[177] The arbitrator, however, made no further mention of the City's arguments regarding that incident in his decision.

The arbitrator concluded his decision by granting F's grievance and ordering as follows:

> The union's requested remedy that [F] be reinstated, and made whole for any and all wages and benefits required under the [collective bargaining agreement], including but not limited to merit increases, overtime, premium pay, seniority

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172 AR 122.

173 *Id.*

174 *Id.*

175 *Id.*

176 *Id.* (punctuation as in original).

177 AR 115 (Arbitrator's decision p. 19, footnote 43).

rights, accrued personal leave, health insurance, PERS contributions, accrued interest, and any and all other wages and benefits is GRANTED.[178]

E. The APSC Revocation Actions

The Executive Director of the APSC originally filed an accusation seeking revocation of Officer F's police certificate in April 2015. Mr. F contested that action and requested a hearing, and the undersigned ALJ was assigned to hear the case. While that matter was pending, the arbitrator issued his decision on June 1, 2015, granting F's grievance and ordering his reinstatement as an NNPD officer.[179] The Executive Director then entered into a stipulation with F and his union attorney to dismiss the accusation "without prejudice to refile," and the case was dismissed.[180] The Executive Director apparently took this step in response to a June 4, 2015 letter from Officer F's counsel conveying the arbitrator's decision to the APSC.[181] In the letter, the union argued that because the arbitrator ordered F to be reinstated as an NNPD employee, he "was not discharged from employment," and therefore "discharge from employment as a police officer" could not be relied upon as grounds for revoking F's police certificate.[182]

The APSC subsequently undertook the process of deciding whether it wished to continue to seek revocation of F's certificate; this process is described in a memorandum entered into the record of this matter by the APSC.[183] The memorandum briefly describes the factual history of F's employment with NNPD, the E drunk driver arrest, NNPD's administrative investigation,[184] and NNPD's termination of F. The memorandum notes the APSC had received the F-4 form from NNPD "recommending that Officer F be de-certified," and also that the vehicle camera video of the E arrest had been provided for viewing by the APSC. The memorandum then states as follows:

> On June 1, 2015, the arbitration for Officer F's termination was completed. The arbitrator did not find the charge of excessive use of force and unbecoming conduct sustained. He also did not find the charge of violating the truthfulness policy

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178 AR 123.

179 As of the date of this hearing, Officer F had not been reinstated to his position as an NNPD patrol officer. The reasons for that were not made clear on the record of this matter.

180 August 3, 2015 stipulation, and August 6, 2015 Order, filed in case no. OAH 15-0475-POC.

181 AR 125-126.

182 AR 125.

183 AR 13-14. The memorandum is labeled in a footer "prepared for December 1, 2015 APSC Executive Session." (AR 13.)

184 The memorandum misrepresents the nature of Sgt. L's report to Chief N regarding the arrest, stating that Officer F's "sergeant reported he had used excessive force during the arrest." (AR 13.) There is no evidence that Sgt. L made any such report; he simply reported that force had been used in the arrest, that E had not been charged with resisting arrest, and that F had gone "hands on" without first telling E that he was under arrest.

> sustained. On the final page of the arbitration opinion and award, the arbitrator ordered Mr. F be reinstated.
> In Executive Session on 12/1/2015, the [APSC] briefly heard from Chief N, who supported continued revocation, and reviewed the dash cam video. They voted to pursue revocation but did not do so in Open Session, which is required. F has been sent new accusation documents ... on 2/1/16 and is expected to request a hearing.
> Case Status: [APSC] to consider and ratify its previous decision in open session.[185]

The memorandum's reference to the APSC's communication with Chief N in Executive Session is troubling, when contrasted with his testimony during the hearing. After Officer F alleged that Chief N had played a role in the revocation process and was pursuing a "vendetta" against him, the ALJ asked the Chief: "Did you encourage the executive director to bring a second action, a second accusation against officer F?" Chief N replied: "No."[186]

As described in the memorandum, the Executive Director filed a new accusation against Officer F, seeking revocation of his police certificate.[187] Officer F responded with a Notice of Defense, requesting this hearing.[188]

The hearing was held on June 20, June 21, and July 22, 2016. Mr. F represented

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185 AR 14.

186 N Testimony, 6/20/16, at 5:25:50. At that point in the hearing, the ALJ was unaware of the existence of the APSC memorandum at AR 14.

187 AR 3-7.

188 AR 12.

himself.[189] The Executive Director was represented by Assistant Attorney General John Novak. Testimony was taken from Mr. F, NNPD Chief N, Sgt. L, Officer D, Officer C, APSC investigator T I, former NNPD Chief M, former NNPD Investigator Y, and former NNPD Sgt. R. The record was closed and the matter taken under advisement after the parties submitted post-hearing briefs regarding the legal effect of the arbitrator's decision on the Executive Director's ability to seek revocation of F's certificate.[190]

F. "Ultimate issue" factual findings

Mr. F was a credible witness. He presented himself at the hearing as a sincere person who is committed to being the best police officer he can be, which includes being truthful in his work and his personal life. He provided straightforward explanations of his actions in both the 2009 shooting range incident and the 2014 drunk driver arrest.

1. Did F lie about the shooting range incident?

Regarding the shooting range incident, it must be noted that this was an unusual situation, in that it cannot be a common occurrence for a police officer to believe that he has been shot at by a third party, only to find out that he must have fired the shot himself. During the hearing, Mr. F sought to explain the reasons why he didn't think that he had shot his own truck, and he freely acknowledged that even on the day of the incident, it quickly became apparent to him that the evidence did not support a drive-by shooting. At the time, however, he searched his memory and did not recall attempting a shot over the hood of his truck at a target, which would have been necessary in order for him to shoot into the hood. So he did not then accept that he had shot the truck himself, believing that the shot into the hood was the result of a ricochet. He further explained at the hearing that when he was finally able to view AST's photographs of the scene and of the investigator's trajectory rods, he accepted the conclusion that he had shot his own truck.

It must also be noted that no one, including the Executive Director and Chief N, has accused Mr. F of not sincerely believing that someone had shot at him or of making up the story **at the time that he called 911**, in an effort to deflect attention away from his own error.[191] Rather, Trooper G testified that he believed F was untruthful later, in his interactions with G during the course of the investigation. When pressed, however, Trooper G could not point to a specific lie or

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189 Officer F was represented by counsel provided by his union during the arbitration and in the first OAH matter, up to its dismissal, and apparently also in defending the City's appeal of the arbitrator's decision. For unknown reasons, however, his counsel did not represent him in this matter.

190 In lieu of a post-hearing brief, Mr. F submitted a motion to dismiss the accusation, based on the arbitrator's decision having overturned F's termination. Because such a motion should have been filed before the hearing, the ALJ treated Mr. F's motion as a brief on the legal impact of the arbitrator's decision on the APSC's ability to revoke his certificate.

191 Such an allegation, if proven, would present an entirely more serious scenario of dishonesty. The Executive Director, however, has never suggested that such an allegation could be made in this case against Mr. F.

untruthful statement allegedly made by Mr. F. Instead, G believed that F was untruthful because he did not readily accept G's conclusion that he had shot his own truck. In other words, Trooper G believed F was untruthful because F did not agree with G or other AST investigators who agreed with G (a group which may have included then-Captain N).

These facts do not add up to Officer F lying, or otherwise being untruthful, about the shooting range incident. At most they demonstrate that F was stubborn and reluctant to accept that he had made an embarrassing mistake, in a situation where his reluctance was likely compounded by the domestic violence accusation against his wife and by the fact that he was not given the opportunity at the time to view the photographic evidence considered by the investigator.

The allegation of untruthfulness by Chief N and Trooper G is further undermined by their four-year delay in making it. When their memories and impressions were fresher, these two individuals apparently did not assess Officer F's behavior as dishonest, *per se,* as opposed to uncooperative or stubborn. Otherwise N, in particular, who was in a command position with AST at the time, surely would have pursued a dishonesty allegation had he thought Officer F had been untruthful. However, it was only years later, in an effort to bolster another allegation in terminating Officer F, that Chief N brought up this old incident and cited it as an example of F's untruthfulness.

I find that the Executive Director did not establish that Mr. F lied or was untruthful regarding the shooting range incident. Stubbornly resisting and erroneously disagreeing with another police officer's conclusions about an incident are not equivalent to lying or being untruthful about the incident. I make the specific finding that Mr. F was not untruthful and did not lie regarding the incident.[192] This finding is consistent with the conclusions drawn by former NNPD Chief M in 2009 and with the absence of any disciplinary action by NNPD against Mr. F in 2009 or thereafter regarding the incident (until it was resurrected by Chief N more than four years later).

2. Did F lie about his use of force with E's drunk driver arrest?

[192] The Executive Director's counsel repeatedly sought to undermine F's credibility at the hearing by pointing to his habit of calling the incident "the truck shooting" or "the drive-by shooting," rather than "the incident when I shot my truck," arguing that this demonstrated his unwillingness to be honest about the incident. This emphasis on Mr. F's use of a shorthand reference to an incident nearly seven years in the past, while perhaps reflecting a skillful cross-examination technique (at least when employed with no attorney on the other side), carried no weight in my assessment of his credibility or honesty.

As to the E drunk driver arrest, the Executive Director's untruthfulness allegations against Officer F in the accusation in this case roughly track Chief N's findings in his administrative investigation, which focused on F's justifications for using force in the arrest. Those findings were that F was untruthful in (a) stating that he used force because he believed E was going to flee the scene, and (b) later stating that he used force because E "took a swing" at F.[193] Chief N felt that F's statement in the criminal complaint and police report that he was concerned that E would drive away was "made up" after the fact to justify his use of force in the arrest. Chief N also felt that F's statement that E took a swing at him was not truthful, because N concluded that the video did not show E taking "a swing" at F.

a. F's concern that E would attempt to flee

In reaching the conclusion that Officer F made up the story that he was concerned that E would attempt to flee, Chief N relied heavily on the fact that Officer C had stated during his investigative interview that E made no indication that he intended to try to drive away. The value of this statement by Officer C, however, is greatly diminished when it is compared to C's testimony under oath at the arbitration hearing, under direct examination by the city's counsel. C stated that he observed E "staring off into the distance ... looking for an out."[194] C's testimony continued: "[E] wasn't completely out of the vehicle. He was still in the vehicle. ... I felt like at one point ... he might actually drive away. I was just kind of worried about actually going hands-on with him."[195] The City's attorney then noted C's prior statement to Chief N during the investigation, and asked C "is that in contrast to what you're saying now, that you did have a concern that maybe he was going to drive away?"[196] C responded: "Yeah. After I had reviewed everything, I did change my position on that, yes."[197] Strangely, however, in the hearing in this matter Officer C apparently changed his position again, testifying equivocally about this issue. He first testified, in response to a question from the Executive Director's counsel, that he did not feel at any point that E was going to try to flee from the officers; but in response to a question from the

193 The city also argued during the arbitration hearing that F lied about the number of times he had viewed the vehicle camera video prior to telling Chief N that E "took a swing" at him. The Accusation in this case does not cite this allegation. In any event, the allegation amounted at best to a misunderstanding, and at worst to an overzealous splitting of semantical hairs. Officer F testified credibly that he first gave portions of the video a cursory viewing on a small screen while typing his initial reports, but later he viewed it more carefully on a larger screen; it was only then that he first noticed E's aggressive motion with his hands towards F.

194 ARB p. 242.

195 ARB p. 243.

196 *Id.*

197 *Id.*

ALJ, he reluctantly acknowledged that E was "looking for an out."[198] Although C's various statements about this issue are clearly inconsistent, their overall import is that they do provide significant corroboration for F's statement that he believed E might try to flee. C's original statement to Chief N during the investigation, therefore, carries no weight as a basis for the Chief to find that Officer F lied about his concern that E might try to flee the scene.

Chief N also relied on the apparent inconsistency between Officer F's stated concern that E might flee, and the Chief's understanding that F never asked E to get out of the vehicle. The Chief testified that this was significant, because if F truly was concerned that E might flee the scene, he would have wanted E to be outside of the vehicle. This viewpoint, however, ignores the fact, as testified to by Officer C and as conclusively demonstrated in the vehicle camera video, that F did ask E to exit the vehicle to perform FSTs, and E refused.[199]

I find that Officer F did not lie when he reported that he was concerned that E might try to flee the scene, nor when he reported that this concern played a role in his split-second decision to physically remove E from the vehicle.

b. F's statement that E "took a swing" at him

A key element of Chief N's investigative finding that Officer F was not truthful about the use of force in the E arrest was his conclusion that F falsely reported that E "took a swing" at him. As discussed above, in the immediate aftermath of the incident, when F initially typed up his reports about the incident he did not recall E's aggressive hand movement towards him. After viewing the video more carefully a second time, he saw E's aggressive hand movement and realized it had played a role in his instantaneous decision to go "hands on" to remove E from the vehicle. He immediately called Chief N to report this information and to request the opportunity to amend his use of force report, which he had not yet signed and considered to be in draft form.[200] Chief N then reviewed the vehicle camera video, did not see E "take a swing" at F in the literal sense of an attempt to punch or strike F with his hands, and concluded that F had lied a second time about his reasons for using force in effecting E's arrest. Chief N testified (a) that he

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198 C testimony. During the hearing, C was not asked about the inconsistency between this testimony and his prior testimony in the arbitration; this may have been due to the fact that Officer F was not represented by counsel at the hearing.

199 Chief N testified that he found it noteworthy that after E exited the truck to give his identification to Officer F, F allowed him to reenter the vehicle to get his registration and proof of insurance, rather than devising a way to keep E outside of the vehicle. I find, however, that this insignificant fact does not substantially undermine the credibility of Officer F's initial explanation for his use of force.

200 F was never given the opportunity to amend the report.

interpreted F's "take a swing" report as an allegation that E had committed a crime of assault against F, (b) that alleging an assault against a police officer is a very serious allegation, and (c) the fact that F had not mentioned this in his original reports on the incident indicated that he had made up this explanation only after the fact, when he came under scrutiny for his use of force.

Officer F, however, clearly did not mean the words "he took a swing at me" literally. He was using the phrase as a colloquial descriptor to explain what he had seen on the video, that E had made an aggressive move with his hands towards F's face or chest. Officer F, on reviewing the video more carefully and seeing this physical movement by E, realized he had not recalled this critical element in the fast-moving sequence of events.[201] In good faith, he immediately called the Chief to inform him of this realization.

This interpretation is supported by the extreme unlikelihood that F would lie about an event that had been video recorded, knowing that Chief N or Sgt. L would be able to view the video to either confirm or dispute his statement. It makes no sense to construe "he took a swing at me" as a lie. On the other hand, it makes very much sense to construe it as an officer acting in good faith but using imprecise, vernacular language to describe an important piece of a difficult puzzle – his effort to explain why he had reactively used physical force in a rapidly developing, escalating situation.

Officer F was faced with a highly intoxicated, belligerent and unpredictable suspect, who had already refused to exit his vehicle, and who screamed "shut your fucking mouth" at F while at the same time aggressively moving his hands towards F's face or chest. Officer F clearly processed all of this very quickly and concluded at that point that any further attempt to obtain E's cooperation was pointless. This interpretation is consistent with the finding made by the arbitrator in connection with overturning the City's "untruthfulness" charge against F: "I find it reasonable that [F] reacted to [E's] physical action as an escalation of an already dynamic situation."[202] Officer C also corroborated this viewpoint in the hearing, testifying that based on E's level of intoxication and belligerence, he did not believe that E would have willingly exited his vehicle had Officer F first told him that he was under arrest.[203]

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201 Chief N testified that it is not uncommon for a participant in a dynamic, violent event to not immediately recall every detail of the event.

202 AR 122.

203 C testimony, 6/21/16 at 00:48:40.

Importantly, this conclusion also comports with the conclusion reached by the most senior police officer at the scene, Officer D. Excerpts from the section of Chief N's investigative report setting forth D's comments regarding the arrest follow:

> He heard Ofc. F ask the suspect if he would perform field sobriety tests and the suspect said that he would not. Off *[sic]* F continued to talk to the suspect but he could not hear everything that was said. He had a view of what was going on through passenger side window. ... He could hear the raised voice of the suspect but noted that the suspect was not screaming. All of a sudden the suspect "blew up" and said "fuck you" and the suspect's hands came up. Ofc. F then grabbed a hand of the suspect and tried to get the suspect out of the vehicle. The suspect resisted ... .
>
> He thought the suspect was taken out of the vehicle because the "f" word was used and the suspect's hands came up. He did not see the suspect take any swings at Ofc. C or F... . **From what he could see he thought it was handled appropriately**. He did not hear everything. The suspect did get escalated and started screaming and the suspect's hands did come up ... .[204]

The importance of this point cannot be understated – Officer D, the most senior police officer on the scene, told the Chief during the investigation, and testified both in this hearing and during the arbitration, that he had no problem with the way the arrest was handled.[205]

From Officer F's perspective, the bottom line in his interactions with Mr. E was that he was concerned with E's volatile, intoxicated demeanor, and as a result of E's escalating agitation and his sudden, aggressive physical movement with his hands, he concluded that further verbal interaction would be pointless and would not result in E voluntarily getting out of the vehicle.[206] Thus, to effect the arrest he felt he had to make physical contact with E.

Of course, it would have been better police practice for F to refrain from saying "shut your mouth" in response to E's escalating verbal tirade, and for F to inform E that he was under arrest before going "hands on." **But Officer F did not lie about this incident.** On the contrary, he was as forthcoming as he could be as he tried to reconstruct what had taken place during this difficult, very dynamic incident with a highly intoxicated and aggressive E.

III. Discussion

In this case, the Executive Director seeks revocation of Mr. F's police certificate only on the basis of the dishonesty allegations discussed above and the fact of Mr. F's discharge from employment by NNPD. The Executive Director's accusation in this matter does not seek

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204 AR 28 (emphasis added).

205 *Id.;* D testimony; ARB p. 265.

206 Officer C reached the same conclusion, per his testimony at the hearing.

revocation based on excessive use of force allegations against F related to the E drunk driver arrest. For the reasons discussed below, the Executive Director did not meet his burden of establishing that Officer F's police officer certificate should be revoked.

A. The Executive Director failed to show that revocation is authorized or appropriate under counts involving "discharge for cause" (Counts I and III).

Counts I and III of the Accusation concern the employment action taken by NNPD against Mr. F. Count I of the Accusation asserts that discretionary revocation is appropriate under 13 AAC 85.110(a)(2)[207] because Mr. F was "discharged for cause for conduct that is detrimental to the reputation, integrity, or discipline of [NNPD]."[208] Count III of the Accusation asserts that mandatory revocation is required under 13 AAC 85.110(b)(3) because Mr. F was "discharged for cause for conduct, (1) that would cause a reasonable person to have substantial doubt about [his] honesty, fairness, respect for the rights of others and for the laws of this state and the United States, and/or, (2) was detrimental to the integrity of [NNPD]."[209] Because these allegations all necessarily arise out of the employment action taken by NNPD against Mr. F, they are addressed together, as follows.

1. Mr. F was not discharged for cause. (Counts I & III)

An essential element of Counts I and III against Mr. F is that he was "discharged . . . for cause." Because the arbitrator's decision overturned the discharge at issue (and, in any event, because this decision finds that the key elements of any "cause" for discharge were not established),the APSC cannot revoke Mr. F's certification based upon that discharge.

a. The Alaska Supreme Court's decision in *Parcell* does not address the appropriateness of a discharge-based revocation after that discharge has been overturned.

The Executive Director's position is that the arbitrator's decision has no impact on the proceedings in this matter, contending that a discharge that has been finally adjudicated as illegal

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207 13 AAC 85.110(a) provides as follows: (a) The council may revoke a basic, intermediate, or advanced certificate upon a finding that the holder of the certificate
(1) falsified or omitted information required to be provided on an application for certification at any level, or in supporting documents;
(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 cause 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; or
(3) does not meet the standards in 13 AAC 85.010(a) or (b).

208 AR 6.

209 AR 7.

and invalid nonetheless requires revocation by the APSC. To the extent that the Executive Director relies on the Alaska Supreme Court decision in a prior APSC case, *In re Parcell*,[210] in support of that position, that reliance is mistaken. *Parcell* actually supports Officer F's position in this case, as further discussed below.

In *Parcell*, the APSC had revoked the certification on two grounds: one under 13 AAC 85.110(b)(3) related to the employment action taken against Mr. Parcell by his employer, and another under 13 AAC 85.110(a)(3), based on the APSC's finding that Mr. Parcell lacked good moral character.[211] It is important to recognize that the Superior Court reversed the APSC revocation on both grounds.[212]

On appeal to the Supreme Court, the Council waived its appeal on the employment issue, and instead appealed only the issue of the moral character finding.[213] The Supreme Court's decision, in turn, upheld revocation solely on that ground – expressly noting that the Council had declined to pursue an appeal of the employment-related revocation, and that it was therefore not addressing that issue in its decision.[214]

In other words, separate and apart from the circumstances of Mr. Parcell's employment case, the Council made a discretionary determination under 13 AAC 85.110(a)(3) that he lacked the moral fitness to hold a certification.[215] It is *that* revocation – under 13 AAC 85.110(a)(3) – that the Alaska Supreme Court upheld.[216] The revocation of Mr. Parcell's certificate based on the issue of good moral character did not depend on the employment action taken against him. The Executive Director's claims in the accusation in this case under 13 AAC 85.110(a)(2) and 13 AAC 85.110(b)(3), however, both expressly require a finding that Mr. F was "discharged for cause." The only Alaska court to have considered the issue - the Superior Court below in *Parcell* - concluded that an arbitrator's reversal of a termination precludes a revocation that is based on the overturned termination. That conclusion of the Superior Court, and its reversal of the revocation based on the employment action in *Parcell*, remain undisturbed by the Supreme Court's ultimate

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210 *Alaska Police Standards Council v. Parcell*, 348 P.3d 882 (Alaska 2015).

211 *Parcell*, 348 P.3d at 887, fn. 27.

212 *Parcell v. Alaska Police Standards Council*, Juneau Superior Court Case No., 1JU-12-728CI, September 30, 2013 Order Reversing Revocation of Police Certificate.

213 *Parcell*, 348 P.3d at 887, fn. 27.

214 *Id.* ("[T]he Council limited its appeal to discretionary revocation [under 13 AAC 85.110(a)(3)]. We therefore do not address the court's decision on mandatory revocation under 13 AAC 85.110(b)(3).").

215 *Alaska Police Standards Council v. Parcell*, 348 P.3d at 886-889.

216 *Alaska Police Standards Council v. Parcell*, 348 P.3d at 886-889.

decision in *Parcell* or any of its subsequent rulings in APSC cases. The Superior Court's ruling on this issue in *Parcell*, although not binding on the APSC, is persuasive authority and should be followed here. *Parcell*, therefore, supports Mr. F's argument that the revocation of his police certificate cannot be based on NNPD's termination of his employment.

b. *Bowen's* analysis of this issue is not legally supportable and should be revisited.

The arbitrator's decision in favor of Mr. F has the legal effect of undoing F's discharge, a legal fact that precludes a revocation based on "discharge for cause." The Council's prior examination of this issue is legally unsupportable and should be overturned. In *In re: Bowen*, OAH No. 10-0327-POC, the Council upheld a revocation under the "discharge for cause" regulation, despite the termination having been reversed by an arbitrator. In reaching that result, the APSC in *Bowen* relied on 13 AAC 85.110(f), which provides that a personnel action or subsequent personnel action, "including a decision resulting from an appeal" of the underlying employment action, "does not preclude the council from revoking the police officer's ... certificate under this section."[217] The Executive Director relies on the same regulation in arguing here that the APSC can pursue a discharge-based revocation against Mr. F, notwithstanding the arbitrator's decision in his favor.[218]

In concluding that this regulation supports a "discharge for cause" revocation even where the discharge in question has been overturned, *Bowen* takes an interpretive leap that is unsupported by the regulatory language. 13 AAC 85.110(f) says that a personnel action does not preclude the council from revoking "under this section;" but the "section" in question includes *all* discretionary and mandatory grounds for revocation, most of which do not require an adverse employment action as an essential element. Thus, section 110(f) is not at all in conflict with holding that certain grounds under section .110 – those specifically requiring a finding of discharge for cause – do, in fact, require a discharge for cause.

The flaw in *Bowen's* reasoning is underscored by its suggestion that an employee who is ordered to be reinstated after arbitration is in a legally similar position to a convicted criminal whose conviction is later set aside. The case *Bowen* cites to illustrate this proposition illustrates the critical distinctions between those two situations, and it actually compels a conclusion contrary to that in *Bowen*. That case, *State v. Platt*, concerned a Board of Nursing license denial based on

217 *Bowen*, OAH No. 10-0327-POC, at 11.

218 Executive Director's Post-Hearing Brief, at 2.

regulations allowing denial of certification to a person who "has been convicted of a crime substantially related to the qualifications, functions, or duties" of the license sought.

In *Platt*, the Board of Nursing denied a license based on an applicant's criminal conviction that had since been "set aside." The Alaska Supreme Court upheld the Board's denial, but the legal reasoning it employed highlights the distinction between a *set aside* conviction and an *overturned* termination:

> Although setting aside a conviction limits the consequences of the conviction itself, it does not change the fact that an individual was previously found guilty of committing a crime. . . . [W]here a conviction is set aside it "does not mean that the crime, and the events surrounding the crime, never occurred." Setting aside a conviction does not expunge the conviction from the individual's criminal record, which means that '[b]oth the conviction and the judgment setting it aside consequently remain in the public record.' *Thus, although the set aside indicates that the defendant has made a 'substantial showing of rehabilitation,' it does not erase the fact of conviction*. [219]

The *Platt* decision was based on the implications of setting aside a conviction – specifically, that such a decision reflects subsequent rehabilitation but "does not erase the fact" of the conviction. But the same analysis does not apply to an employee whose termination has been **overturned** through arbitration, because the arbitration does "erase the fact of" the wrongful termination. Such an employee is more fairly analogized to a defendant whose criminal conviction is overturned on appeal. Unlike with the set-aside conviction, an overturned conviction is "erased." Likewise, the arbitration award erases the termination, finding it legally unjustified under the employment agreement and undoing it both factually and legally. *Bowen's* conclusion to the contrary was legally incorrect. Accordingly, the APSC should not rely on *Bowen* and its misguided interpretation of 13 AAC 85.110(f) in this case.

The Executive Director argues in his post-hearing brief that the APSC promulgated this regulation "to set the standard that officers would be treated in APSC proceedings as having been discharged if an employer discharged an employee, regardless of whether the officer's employment later was reinstated."[220] The Executive Director, however, presents no regulatory history to support the assertion that this was the APSC's intent, nor any explanation of why, if that were the Council's intent, it did not use language that made the intent clear. In addition, the Executive Director's argument mischaracterizes the nature of the effect of the arbitrator's decision

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219 *State, Div. of Corps., Bus. & Prof'l Licensing, Alaska Bd. of Nursing v. Platt*, 169 P.3d 595, 599 (Alaska 2007) (emphasis added).

220 Executive Director's Post-Hearing Brief, at 2.

– it not only reinstated F's employment, it also completely unwound the termination, causing it to be, at best, a termination without cause, but more accurately a legal nullity.

c. Because the arbitration award effectively "unwound" Officer F's discharge, the APSC cannot and should not treat him as a discharged employee.

The arbitrator's decision reversed NNPD's discharge of Mr. F, ordering that he be reinstated with full back pay and benefits. As a result, the termination has effectively been undone, with Mr. F ordered returned to his prior position as if it had never occurred and otherwise "made whole."[221] In light of the arbitrator's decision, the APSC cannot revoke Mr. F's certificate based on his having been "terminated for cause." Not only has the termination been legally determined to have been *without* "cause," the effect of the arbitration award is to "unring the bell" of the termination.

Certainly, under 13 AAC 85.110(f), and as *Parcell* held, an arbitration award does not serve as a complete bar to all possible revocation actions by the Council. As to the specific grounds on which the Executive Director seeks revocation in Counts I and III, however, the arbitrator's decision has the effect of undoing the termination, and therefore precludes revocation under those counts. Charges based on 13 AAC 85.110(a)(2) and 13 AAC 35.110(b)(3), for which "termination for cause" is an essential element, cannot be sustained.[222] Accordingly, Counts I and III fail, and the APSC cannot revoke Mr. F's certificate based on those charges.

Any other result would effectively mean that NNPD will have circumvented the arbitrator's decision, by continuing to recommend that APSC pursue this second revocation proceeding. This is because revocation of F's certificate means that his career as a police officer is effectively over (as well as his employment with NNPD). This result would run contrary to the Alaska Supreme Court's clearly-enunciated holdings that establish that there is a strong public policy in Alaska in favor of arbitration, which mandates a great degree of deference to arbitration results.[223] NNPD's termination of Officer F's employment, therefore, should play no role in this revocation proceeding.

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221 AR 123.

222 *See Greywolf v. Carroll*, 151 P.3d 1234, 1241 (Alaska 2007) ("a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial").

223 *See, e.g.*, *State v. PSEA*, 257 P.3d 151, 160 (Alaska 2011) (there is a "special public interest in the enforcement of arbitration decisions that will be present in every case of arbitration review, given our longstanding recognition of Alaska's strong public policy in favor of arbitration"); *see also* Baseden v. State, 174 P.3d 233, 237 (Alaska 2008).

2. The Executive Director did not prove that the underlying conduct by F was detrimental to the reputation, integrity, or discipline of NNPD. (Count I)

Even if Mr. F could be considered "discharged for cause," which he cannot, the Executive Director did not meet his burden of proving that the underlying conduct was detrimental to the reputation, integrity, or discipline of NNPD.[224]

a. The Executive Director did not prove that the two incidents implicate "Brady" concerns.

At the hearing, counsel for the Executive Director argued that the facts of this case implicate Mr. F's ability to serve as a police officer due to potential "*Brady/Giglio*" concerns,[225] which in turn would be detrimental to the reputation, integrity or discipline of NNPD. But the Executive Director did not prove such concerns, nor otherwise prove that Mr. F's conduct should be deemed detrimental to the reputation, integrity, or discipline of NNPD.

In argument, Counsel for the Executive Director contended that the negative views of Mr. F's honesty held by Chief N, Trooper G, and Investigator I[226] are "*Brady/Giglio*" material that would require disclosure in criminal cases involving Mr. F. Regardless of counsel's arguments, however, the Executive Director did not meet his burden of demonstrating that Mr. F would be considered a "*Brady* officer." As discussed at length above, the evidence did not establish that Mr. F lied or was dishonest regarding either the shooting range incident or the E drunk driver arrest. On the contrary, both this decision and the arbitrator's decision found that Mr. F was not dishonest and in fact acted in good faith regarding both incidents.

Furthermore, the Executive Director relies on a circular argument that Chief N's or Trooper G's negative opinions of Mr. F's honesty – no matter how ill-founded or unsupported their opinions may be – render him a "*Brady*" officer, which in turn would undermine NNPD's "reputation, integrity or discipline," which in turn supports revocation. But the evidence in the

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224 13 AAC 85.110(a)(2) (authorizing discretionary discharge if Council finds the certificate holder "has been discharged . . . for cause for . . . some other reason . . . that is detrimental to the reputation, integrity, or discipline of the police department where the police officer worked"). Notably, the Executive Director did not include a count in the Accusation under the other prong of .110(a)(2), which would require an allegation that F's conduct "adversely affect[ed] the ability and fitness of [F] to perform job duties."

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

226 It is noted that APSC Investigator I had no first-hand knowledge regarding either of the incidents cited by the Executive Director, and she reached her opinion of Officer F's veracity only by reviewing documents in the APSC file. Inclusion of Ms. I in the Executive Director's depiction of the list of police personnel with negative views of F's veracity, for *Brady* purposes, is unnecessary and strains credibility.

record does not establish that the personal views of Chief N and Trooper G have actual *Brady* implications. Moreover, accepting this line of argument would potentially turn any disagreement arising in the workplace or in an investigation into a *Brady* matter. To the extent that a future prosecutor may decide that a *Brady/Giglio* disclosure is necessary if Officer F continues his career as a police officer, that will be the unfortunate result of Chief N and Trooper G having drawn ill-advised or incorrect conclusions regarding F's veracity. Officer F should not be made to bear the burden of their errors.

In any event, to the extent that the Executive Director has raised these *Brady* issues under Counts I and III, *Brady* is a non-issue – both of those counts fail on the threshold finding that Mr. F was not "discharged for cause." But the Executive Director also did not prove an actual *Brady* concern, and this issue therefore should play no role in the revocation decision.[227]

b. Apart from *Brady* concerns, the Executive Director did not prove that F's underlying conduct was detrimental to NNPD's reputation, integrity or discipline.

The Executive Director focused his revocation effort against Mr. F on the alleged *Brady/Giglio* issues arising out of F's veracity in the aftermath of the two incidents in question. To the extent that he also argued that F's conduct in the incidents themselves was detrimental to NNPD's reputation, integrity or discipline, the Executive Director did not meet his burden of proving such a proposition. Clearly, Mr. F made mistakes in the shooting range incident and the E drunk driver arrest. He probably should not have called 911 after shooting his own truck, if that in fact is what occurred at the shooting range in 2009. He probably should have informed L E that he was under arrest and given him another opportunity to step out of his vehicle, before going hands-on in effecting the arrest. And Mr. F could have been clearer in his communication with Chief N regarding E's volatility and aggressive hand movements leading up to the arrest. But these errors are not of the quality or character to cause detriment to NNPD's reputation, integrity or discipline.

No evidence was presented that F's errors in these two incidents were so egregious as to constitute a "black eye" for NNPD – there was no testimony that either incident gave rise to negative treatment in the press or other bad publicity for NNPD. Nor was evidence presented that the incidents resulted in a breakdown in discipline or moral standards within the ranks of NNPD's

[227] The absence of a *Brady* concern here is consistent with the testimony of every witness who worked with Officer F, other than N and G – including former NNPD Investigator K Y, retired Sergeant S R, NNPD Officer D, former NNPD Chief M, and Sgt. L – all of whom testified to F's honesty and integrity.

sworn police officers. The Executive Director failed to prove detriment to NNPD's reputation, integrity or discipline.

c. The Executive Director did not prove that F's conduct adversely affected his ability and fitness to perform job duties.

The Executive Director did not include in the Accusation an allegation that F's conduct "adversely affected his ability and fitness to perform police officer duties," under the second prong of 13 AAC 85.110(a)(2). This precludes revocation under that prong. It should be noted that, in any event, the evidence did not establish such an adverse effect as a result of Mr. F's conduct. As discussed above, Mr. F made mistakes, but these errors simply do not rise to the level necessary to implicate his ability or fitness as an officer, especially when contrasted with the fact that every witness who actually worked with F, other than Chief N, testified that he was an excellent patrol officer.[228]

3. The Executive Director did not prove that F's underlying conduct would "cause a reasonable person to have substantial doubt about [his] honesty, fairness, respect for the rights of others, or for the laws of this state or the United States" (Count III)

Count III of the Amended Accusation also asserts that mandatory revocation is required under 13 AAC 85.110(b)(3), because Mr. F was discharged for cause for conduct that "would cause a reasonable person to have substantial doubt about [his] honesty, fairness, respect for the rights of others, or for the laws of this state or the United States." As discussed above, the APSC cannot revoke Mr. F's certificate under Count III for the threshold reason that he has not been "discharged for cause." But even if that threshold issue did not bar Count III, revocation would still not be warranted under these facts because, as discussed at length above, Mr. F did not lie about his conduct in the shooting range incident or the E drunk driver arrest. Therefore his conduct would not "cause a reasonable person to have substantial doubt about [his] honesty." And although he made errors in performing his duties, they rise to nowhere near the level that would "cause a reasonable person to have substantial doubt about [his] … fairness, respect for the rights of others, or for the laws of this state or the United States." For these reasons, the Executive Director did not meet his burden of showing that revocation is appropriate under Count III of the Amended Accusation.[229]

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[228] The nearly unanimous view of Officer F as an excellent police officer may be the reason that the Executive Director did not include a count in the Accusation citing the second prong of 13 AAC 85.110(a)(2).

[229] Count III also cites the section of 13 AAC 85.110(b)(3) requiring revocation for conduct that is "detrimental to the integrity" of NNPD. It has already been established, however, that Mr. F's conduct had no such effect.

B. The Executive Director failed to show that Mr. F "lacks good moral character" (Count II)

Count II of the Accusation asserts that discretionary revocation is appropriate under 13 AAC 85.110(a)(3) because Mr. F "lacks good moral character." The Council has discretion – but is not required – to revoke an officer's certification if the officer does not meet the basic standards set out in 13 AAC 85.010. One of those standards is the requirement that the officer possess "good moral character."[230]

Good moral character is defined as "the absence of acts or conduct that would cause a reasonable person to have substantial doubts about an individual's honesty, fairness, and respect for the rights of others and for the laws of the state and the United States."[231] For purposes of making this evaluation, the APSC may consider "all aspects of a person's character."[232]

Prior decisions by the APSC have considered the elements identified in the regulation – honesty, fairness, respect for the rights of others, and respect for the law – "collectively."[233] The Executive Director is not required to prove doubt about each of the elements, but must prove substantial doubt about at least one. Additionally, because the regulation considers "all aspects of a person's character," the APSC's task is to reach a reasoned decision based on the totality of the evidence. Here, the Executive Director did not prove a substantial doubt about Mr. F's honesty, fairness, respect for the rights of others or respect for the law, nor does the totality of the evidence support a finding that he lacks good moral character.

On the contrary, the totality of the evidence supports a finding that Mr. F has moral character of the highest order. Mr. F demonstrated his moral character in his good faith attempt to correct the record and amend his use of force form regarding the E arrest. He further demonstrated it regarding the resurrected shooting range incident, when after finally being presented with the evidence gathered by Trooper G, he acknowledged his error and acknowledged that he probably had shot his own truck.

The Accusation's allegations implicating moral character – that Mr. F was untruthful regarding the shooting range incident and the E drunk driver arrest – are incorrect. F was not untruthful about either incident. Nor does the remaining evidence support the Executive

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230 13 AAC 85.110(a)(3)

231 13 AAC 85.900(7).

232 13 AAC 85.900(7).

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

Director's allegation regarding a lack of good moral character. Neither Mr. F's conduct during the two incidents at issue, nor his conduct during Chief N's administration investigation, create substantial doubts about his honesty, fairness, and respect for the rights of others and/or for the law.

Mr. F presented considerable testimonial evidence in favor of his good moral character. Numerous former colleagues and supervisors offered testimony in support of Mr. F, specifically based on their experiences of working alongside him as an NNPD officer.[234] These witnesses testified about F's positive work ethic, professionalism, calm demeanor, integrity, and honesty. Their unanimity provides strong support for his good moral character.

For all of these reasons, the Executive Director did not meet his burden of proving that Mr. F lacks good moral character, as it is defined in the APSC's regulations.

IV. Conclusion

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

DATED: December 1, 2016.

By: *Signed*
Andrew M. Lebo
Administrative Law Judge

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

234 *See* L testimony; R testimony; Y testimony; D testimony; M testimony.