

STATE OF ALASKA
ALASKA POLICE STANDARDS COUNCIL

IN THE MATTER OF)
) APSC 2005-1
Gisele Stoneking,)
)
 Respondent)
_____)

Recommended Decision

I. Introduction.

Giselle Stoneking has requested an administrative review of the Alaska Police Standard Council's (APSC) proposal to revoke her State police certificate. This administrative review is conducted under the Alaska Administrative Procedures Act. [AS 44.62].

II. Procedural Background.

Officer Stoneking was hired by the Soldotna Police Department in September 1998 and was certified as an Alaska peace officer by APSC in January 2000. On November 24, 2004 Soldotna Police Department Chief John Lucking informed Officer Stoneking that the City intended to terminate her employment effective December 4, 2004 for the following reasons:

- 1) Falsification of the results of a PBT (preliminary breath test) administered to Ms. Prestegard on June 26, 2004, and
- 2) Lying during the disciplinary process and internal investigation of Ms. Prestegard's complaint.

Officer Stoneking appealed and the City Manager upheld the decision to terminate on January 12, 2005. Officer Stoneking requested arbitration and a hearing was held on July 14 – 15 and August 22, 2005 before the Soldotna Employee Relations Board. The Board issued a decision on October 3, 2005 upholding the termination and stating in part:

That the evidence presented at the arbitration hearing supports the decision for terminating Ms. Stoneking for (1) falsification of the results of a PBT administered to Ms. Prestegard and (2) lying during the disciplinary process and internal investigation of Ms. Prestegard's complaint.

Exhibit 1. Officer Stoneking did not appeal the arbitration decision.

APSC began proceedings to revoke Officer Stoneking's Alaska police certificate based on her termination from the Soldotna Police Department. The Hearing Officer in this proceeding, William Cotton, held a pre-hearing teleconference in this proceeding was held on April 13, 2007. The hearing was conducted in Soldotna on July 31, 2007. Steve Sorenson represented Ms. Stoneking in this proceeding and David Brower represented the APSC.

III. Factual Background

Officer Stoneking stopped Kristen Prestegard for speeding on June 26, 2004. Officer Stoneking testified that she smelled alcohol on the breath of Ms. Prestegard and concluded that Ms. Prestegard was violating a law prohibiting someone under 21 from operating a vehicle with alcohol in her system even if she was not under the influence of alcohol. AS 28.35.280. Ms. Prestegard admitted having a drink earlier in the evening with her mother. Officer Stoneking cited Ms. Prestegard for this provision and eventually released her and her passenger to leave the scene with a friend of Ms. Prestegard's mother. Ms. Prestegard and her mother filed a complaint with the Soldotna Police Department which eventually led to an investigation that ended with Officer Stoneking's discharge and the current proceeding.

Before discussing the specifics of the case it is useful to briefly review two terms central to the dispute in this case. First, a Preliminary Breath Test or PBT is a test employed by peace officers in the field to get a preliminary level of alcohol in the system of a test subject. The level is determined by the subject blowing into the device. Second, a Field Sobriety Test or FST is a series of tasks/tests that a peace officer asks a subject to complete in order to give a determination of whether the subject is under the influence of alcohol or drugs. These tasks/tests include: (1) reciting the alphabet; (2) counting backwards from 97 to 77; (3) observing the subject as they walk and turn; (4) standing on one leg; and (5) & (6) two tests referred to as Romberg and HGN. See transcript of hearing at 33. Romberg requires the subject

to stand straight up, head tilted back, with the arms out to the side with palms up. Transcript at 50. HGN involves the officer watching the subject's pupils as the subject looks to the side. Transcript at 107.

All parties agree that Officer Stoneking gave Ms. Prestegard a PBT in the incident, that the Officer refused to show her the results of the test, that there is no mention of the PBT or its results in the Notice and Order of Revocation (Exhibit 2) which Officer Stoneking filled out at and shortly after the incident, and that the PBT and its results should have been included. The parties also agree that Officer Stoneking altered the notarized Notice and Order of Revocation at a later time to include the fact that a PBT was given and entered a reading of .011, without getting the altered document re-notarized. Exhibit 3.

However, the agreement ends here. Officer Stoneking alleges that it was an oversight to not enter the results of the PBT caused by the arrival of the person who took Ms. Prestegard from the scene, and that the oversight was corrected as soon as she was made aware of it. As discussed below, Soldotna came to a very different determination. Among other factors in that different determination was that another Soldotna police officer testified that Officer Stoneking told him shortly after the incident that the PBT test had registered a reading of .000 and that she had decided intentionally not to include this in her report. Exhibit B at 109. The fact that Officer Stoneking refused to show the results to Ms. Prestegard somewhat supports the implication that the results did not support the charge. I also note that other entries on the form somewhat undermine Officer Stoneking's explanations. She testified that she filled out the form at the scene after Ms. Prestegard initially refused to take the PBT. However, she did not check the box in paragraph 4 on the form stating that the subject initially had refused to take a PBT, and did not enter a time in paragraph 5 of the form for when the subject initially refused to take a PBT. Exhibit 2.

Officer Stoneking testified that she observed Ms. Prestegard and determined that she was not under the influence of alcohol, so that she did not run most (or perhaps any) of the formal parts of the Field Sobriety Tests on Ms. Prestegard. Her testimony in a disciplinary interview with Sergeant Quelland after the incident (exhibit A), in the hearing before the Employee Relations Board, and in the hearing in the current appeal vary considerably. [See exhibit A (interview with Sergeant Quelland) at 29 – 31; exhibit B (Employee Relations Board testimony) at 291 -293, 339 - 341; transcript at 78 – 82, 103 - 110.] These explanations substantially varied from the complaint and testimony of Ms. Prestegard. [see exhibit B at 89 – 90.] The review by Chief

Lucking and the decision by the Employee Relations Board concluded that Officer Stoneking had lied in the interview with Sergeant Quelland when she substantially denied conducting a FST.

IV. Findings of Fact and Conclusions of Law.

A. Standard of Proof.

The standard of proof for revocation of a police certificate is preponderance of the evidence. AS 44.62.300(a)(20). Officer Stoneking essentially argues that revoking her police certificate requires a higher standard because of constitutional concerns. However, a hearing officer whose authority is based in the executive branch of state government does not have the authority to rule either a statute or a regulation unconstitutional. Ben Lomond v. Municipality of Anchorage, 761 P.2d 119,122 (Alaska 1982); HOH Corp. v. Motor Vehicle Industry Licensing Bd., 736 P.2d 1271 (Hawaii 1987); Gilbert v. National Transportation Bd., 80 F.3d 364,366-67 (9th Cir 1996); Howard v Federal Aviation Administration, 17 F.3d 1213, 1218 (9th Cir. 1994). Thus, the standard of proof is preponderance of the evidence.

B. Scope of Review.

13 AAC 85.110(b)(3) states, "The Council **shall revoke** a ... certificate upon a finding that the holder of the certificate ... has been discharged ..., for cause related to dishonesty or misconduct, from employment as a police officer in this state." Emphasis added. The mandatory language "shall revoke" is in stark contrast to the discretionary language used in section (a) of the same regulation ("The Council will, in its discretion, revoke a ... certificate") covering the discharge for reasons other than dishonesty or misconduct. The clear intent of the regulation is that the Council must revoke the certificate if the holder was terminated for dishonesty or misconduct. The Council may not use its discretion in the situation to consider whether a lesser penalty would suffice.

13 AAC 85.900(6) defines "dishonesty and misconduct" as, "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...."

Officer Stoneking strenuously argues that the Police Standards Council must conduct an

independent review in this case, rather than just review Soldotna's findings and determine whether those finding fulfill the regulatory requirements for revocation of a police certificate. She asserts that this review shows that she was not dishonest. I disagree for the reasons stated above that the Council review can independently review the incident and the record below in order to exercise discretion.

Officer Stoneking also argues that Constitutional due process requires an independent review of the discharge process. As discussed above, an executive branch hearing officer has no authority to rule a regulation unconstitutional because of allegations that constitutional issues require a more stringent standard than sit out in the applicable regulation. However, since the constitutional issues can be raised and evaluated if this case is appealed to Superior Court, I will address this issue to a limited extent below.

C. Was Officer Stoneking discharged from the Soldotna Police Department for Cause Related to Dishonesty or Misconduct?

The answer to this question involves looking at Ms. Stoneking's discharge and determining whether Soldotna found that the discharge was due to dishonesty or misconduct as defined by the State regulation's definition of those terms. I conclude that the discharge was for dishonesty or misconduct as defined by 13 AAC 85.900(6).

As state above, Soldotna Police Department Chief John Lucking informed Ms. Stoneking that the City intended to terminate her employment effective December 4, 2004 for the following reasons:

- 1) Falsification of the results of a PBT (preliminary breath test) administered to Ms. Prestegard on June 26, 2004, and
- 2) Lying during the disciplinary process and internal investigation of Ms. Prestegard's complaint.

After Officer Stoneking appealed the decision, the Employee Relations Board issued a decision on October 3, 2005 upholding the termination and stating:

That the evidence presented at the arbitration hearing supports the decision for

terminating Ms. Stoneking for (1) falsification of the results of a PBT administered to Ms. Prestegard and (2) lying during the disciplinary process and internal investigation of Ms. Prestegard's complaint.

Exhibit 1.

It is not disputed that Officer Stoneking filled out a Notice and Order of Revocation (Exhibit 2) without reference to the PBT she administered, did not check the box in paragraph 4 on the form stating that the subject initially had refused to take a PBT, and did not enter a time in paragraph 5 of the form for when the subject initially refused to take a PBT. Exhibit 2. Officer Stoneking justifies these actions as the result of forgetfulness or innocent mistake. Chief Lucking and the Review Board clearly disagreed, finding that, Officer Stoneking falsified an official report." Exhibit 1, pg. 5, paragraph 4. In addition the Board specifically found that she falsely indicated on the form when she changed it later that the PBT reading was .011 when she had told another officer at the time that the PBT reading was .000. Id. at paragraphs 3 – 5. A reading of .000 would have likely meant that the charge of a minor driving after drinking would not have stood up.

Further, the Board and Chief Lucking concluded that Officer Stoneking had lied to Sgt. Quelland about whether or not she had administered the FST tests to Ms. Prestegard. Again, Officer Stoneking strongly denies lying about giving FSTs, however, the Boards findings clearly state that Officer Stoneking lied in this regard.

The Board's findings qualify under 13 AAC 85.900(6) as dishonesty or misconduct. The Board's conclusion that Officer Stoneking falsified PBT findings and lied during the investigation clearly would cause a reasonable person to have substantial doubts about Officer Stoneking's honesty, fairness, and respect for the rights of others and for the laws of the state and the United States.

D. Constitutional Issues.

My decision has focused on why the City of Soldotna discharged Officer Stoneking rather than independently reviewing the record to determine whether the discharge was constitutionally adequate in substance and procedure. However, since a court reviewing this proceeding can address these constitutional issues, I do enter a finding that the conclusions of Chief Lucking and the Review Board were supported by substantial evidence in the record of the extensive

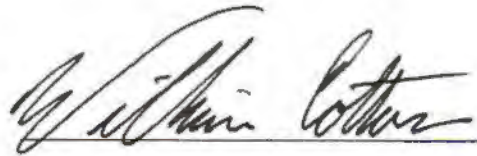
proceedings below -- presented as evidence at the hearing before me (exhibits A and B), as well as the testimony I heard. I found a significant portion of Officer's Stoneking's testimony, particularly concerning the PBT issue, to be evasive and not credible.

V. Conclusion.

I recommend that the Alaska Police Standards Council revoke Ms. Stoneking's Alaska police certificate.

Dated: _____

6/28/08



William Cotton
Hearing Officer