

THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

Department of Administration

OFFICE OF ADMINISTRATIVE HEARINGS

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February 20, 2015

Alaska Police Standards Council
c/o Kelly Alzaharna, Executive Director
450 Whittier Street
Juneau, Alaska 99801

Re: *In re Jose M. Gutierrez*, OAH No. 14-1718-POC
**DECISION DUE BY END OF NEXT REGULAR MEETING THAT OCCURS
AFTER MARCH 7, 2015**

Dear Council Members:

I am sending you the proposed decision that I prepared after a hearing in this case. As required by statute, the proposed decision was first distributed to the parties. The parties were offered the opportunity to comment on the proposed decision by filing a *Proposal for Action*. One party filed a Proposals for Action, which is enclosed.

The decision is ready for final action by the Council. As the administrative law judge who heard the evidence, I can be available to the Council during consideration of the case, including during an executive session.

Under AS 44.64.060(e), the Council can take one of the following actions on this decision:

1. adopt the proposed decision as the final agency decision;
2. return the case to me to take additional evidence or make additional findings or for other specific proceedings;
3. revise the proposed enforcement action, determination of best interests, order, award, remedy, sanction, penalty, or other disposition of the case;
4. reject, modify, or amend a factual finding (note that under this option the Council must first review the evidence relied on for that finding, including listening to the relevant testimony. I can assist the Council with that process);
5. reject, modify, or amend an interpretation or application of a statute or regulation.

Under AS 44.64.060 the Council has the discretion, but not the obligation, to hear from the parties or their counsel in a public meeting. If you decide to allow the parties to address the Council, both parties must be afforded the same opportunity to address the Council.

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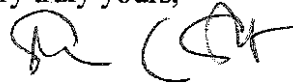
Under AS 44.64.060(f), the Council must take action on the proposed decision during or before its next regularly scheduled meeting occurring at least 45 days after the proposed decision was distributed. The proposed decision was distributed January 20, 2015, which means the Council has until the next regularly scheduled meeting that occurs after March 7, 2015, to act on the decision. If the Council does not take action by the close of that meeting, the proposed decision will become the final decision by operation of law.

The decision document includes an adoption/non-adoption order that the Council can use to record its final decision. If the Council selects an option other than adoption of the proposed decision as written, I am available to assist it in using the non-adoption options or in drafting an appropriate decision.

The final decision must be distributed to the parties. Under our regulations, OAH takes care of that distribution. Please ask staff to send the Council's final decision to us for distribution.

If you have any questions about these procedures, please do not hesitate to contact me.

Very truly yours,



Stephen C. Slotnick
Administrative Law Judge

Enclosures as stated

cc without enclosures: Jose Gutierrez
 John Novak
 Kelly Alzaharna

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

In the Matter of)
)
 JOSE M. GUTIERREZ) OAH No. 14-1718-POC
) Agency File No. APSC 2013-06
_____)

DECISION

I. Introduction

Lt. Jose M. Gutierrez engaged in consensual sexual activity in an office in his police department after business hours. Mr. Gutierrez's conduct was detrimental to the discipline and reputation of the police department where Mr. Gutierrez worked. Accordingly, the Alaska Police Standards Council revokes his certificate.

II. Facts

In the early winter of 2012, Lieutenant Jose Gutierrez was a long-time police officer at the North Slope Borough Police Department. Selina Booth had joined the office as administrative manager in 2010. Mr. Gutierrez was a member of the Chief's command staff, having obtained the rank of lieutenant. Ms. Booth, who had authority over all administrative matters not related to criminal procedures, was also considered part of the command staff.¹

Eventually, Ms. Booth and Mr. Gutierrez became friends. Both were married. By the early winter of 2012, however, both of their spouses were not with them in Barrow. Mr. Gutierrez's wife left because their marriage was effectively over.² Ms. Booth's husband left because he was pursuing his education. Ms. Booth remained committed to her marriage, but her husband's absence was a difficult issue for her.³

Over time, Ms. Booth and Mr. Gutierrez's friendship evolved. First, they engaged in innocent physical contact of frequent hugging, as Ms. Booth sought to provide comfort to a despondent Mr. Gutierrez. Later, their hugs became more sexualized, and included consensual and mutual sexualized groping. This sexualized behavior primarily occurred at the office after hours and a few times it occurred outside the office. Ms. Booth told Mr. Gutierrez that she did

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¹ Booth testimony; Gutierrez testimony; Boyea testimony. As the third or fourth ranking officer, if both the chief and the captain were out of the office, Lt. Gutierrez could be appointed acting chief and thus be Ms. Booth's nominal supervisor. At most, however, this only occurred one time. Boyea testimony.

² Gutierrez testimony.

³ Booth testimony.

not want a sexual relationship. They never had sexual intercourse. Mr. Gutierrez became frustrated because he wanted a long-term, stable, fully-involved relationship.⁴

Others in the office had noticed how close Ms. Booth and Mr. Gutierrez had come. The chief of the NSBPD, Leon Boyea, warned them both that their office behavior was attracting attention. The overt behavior then ceased.⁵

On the evening of the incident, after hours, Mr. Gutierrez returned to the police station either on his way to a Rotary meeting or after having been at the Rotary meeting.⁶ Neither Mr. Gutierrez nor Ms. Booth remembers the precise date, but they agree it was in February or March of 2012. Mr. Gutierrez was in uniform. He came into Ms. Booth's office. No one else was on that area of the building at that time, although it would not be uncommon for others to be in that area after hours using the copier. They hugged and he became aroused. He said that he wanted to take "it" out, and she said, "okay."⁷ Ms. Booth was sitting directly in front of him. He remained standing. His penis was exposed, and he completed the act of masturbation.⁸

Several months later, Chief Boyea learned of the alleged incident. On August 22, 2012, he opened an official investigation, and interviewed Ms. Booth. On August 27, 2012, he informed Mr. Gutierrez of the investigation. He identified the sections of the Operations and Procedures Manual that, if the allegation proved true, Mr. Gutierrez had violated. He scheduled, and then rescheduled at Mr. Gutierrez's request, an interview with Mr. Gutierrez. On September 5, 2012, before the interview occurred, Mr. Gutierrez resigned.

Mr. Gutierrez's resignation was reported to the Executive Director of the Police Standards Council. On August 6, 2014, the Executive Director filed an accusation against Mr. Gutierrez. The accusation alleged that he had "resigned from his position as a police officer for cause for conduct that was detrimental to the reputation, integrity, or discipline of the North Slope Borough PD."⁹ The accusation sought revocation of his Alaska police officer certificate.

Mr. Gutierrez filed a notice of defense requesting a hearing on the charge. A hearing was held on December 11, 2014. John Novak represented the Executive Director. Mr. Gutierrez

⁴ Booth testimony; Gutierrez testimony.

⁵ Boyea testimony.

⁶ Booth testimony; Gutierrez testimony. Ms. Booth recalls that he was on his way to the meeting. Mr. Gutierrez recalls that he had just come from the meeting.

⁷ Booth testimony.

⁸ Booth testimony; Gutierrez testimony. Ms. Booth and Mr. Gutierrez disagree about Ms. Booth's involvement. Ms. Booth recalls that he alone unzipped his pants and removed his penis; Mr. Gutierrez believes that she participated in the unzipping of his pants and removing of his penis.

⁹ Administrative Record at 11.

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represented himself. Ms. Booth, Mr. Gutierrez, Chief Boyea, and Executive Director Kelly Alzaharna testified.

One question that was examined at the hearing was whether Ms. Booth considered herself to be “victimized” by Mr. Gutierrez. She testified that she did not like to apply the term victim to herself and that she took responsibility for her own actions.¹⁰ The Executive Director made clear that Mr. Gutierrez was not being charged with any victimization offense.

III. Discussion

A. What is alleged in the accusation?

The accusation in this case raises two different, but related pathways to revocation. On theory is under 13 AAC 85.110(a)(2); the other is under 13 AAC 85.110(b)(3).¹¹ Under either theory, the first element is the same: The Executive Director must first prove that Mr. Gutierrez “resigned under threat of discharge [for cause], from employment as a police officer in this state or any other state or territory.”¹²

After the first element is established, the theories then diverge slightly. The first theory, under paragraph (a)(2) of 13 AAC 85.110, gives the council *discretion* to revoke Mr. Gutierrez’s certificate if the conduct that led to the threat of discharge was “detrimental to the reputation, integrity, or discipline of the police department where the police officer worked.”¹³ The second theory, under paragraph (b)(3), makes revocation *mandatory* if the conduct was “detrimental to the integrity of the police department where the police officer worked.”¹⁴

It is not clear why the word “integrity” appears in both paragraphs, although in a previous decision, the Council speculated that it may be to give the Executive Director some discretion in how to format the charges against an officer.¹⁵ In this case, however, the difference between the two paragraphs does not matter—setting aside the word “integrity” and looking only at the terms

¹⁰ Booth testimony. Although Ms. Booth does not apply the term victim to herself, she made clear that she felt used and mistreated. She is angry at Mr. Gutierrez and at herself.

¹¹ The accusation stated that revocation was being sought under 13 AAC 85.110(b)(3), but then quoted from the language in 13 AAC 85.110(a)(2). At hearing, Mr. Gutierrez stipulated that he was on notice that the accusation was raising both theories. Note that the Executive Director did not allege that Mr. Gutierrez’s conduct adversely affected his ability and fitness to serve, which is also an avenue for revocation under section 110. The allegation is limited to the effect of his conduct on the NSBPD’s discipline, reputation, and integrity.

¹² 13 AAC 85.110(a)(2); 13 AAC 85.110(b)(3) (same language in both paragraphs).

¹³ 13 AAC 85.110(a)(2).

¹⁴ 13 AAC 85.110(b)(3).

¹⁵ *In re E.X.*, 13-0473-POC at 23 n.123 (Police Standards Council 2013) (“This regulatory scheme implies that ‘integrity’ is a higher standard than ‘reputation’ or ‘discipline.’ Although it is not clear why ‘integrity’ appears in both regulations, it may be to give the Executive Director some discretion in how to fashion a revocation action.”). Here, because revocation is warranted under the discipline and reputation prongs of the regulation, there is no need to discuss the nuances of the term “integrity.”

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“reputation” and “discipline” in paragraph (a)(2), leads to the conclusion that Mr. Gutierrez’s certificate should be revoked.

B. Did Mr. Gutierrez resign under threat of discharge for cause?

Turning to the first element in both paragraphs of the regulation—whether Mr. Gutierrez resigned under threat of discharge for cause—Chief Boyea testified that Mr. Gutierrez’s conduct violated the operations and procedural manual of the NSBPD. Chief Boyea expected that once the investigation was complete, he would terminate Mr. Gutierrez. Mr. Gutierrez said that he resigned because his health was suffering and he no longer felt effective at his job. He did not identify poor health as a reason at the time he resigned, however, and no medical documentation was submitted to prove his assertion of poor health. Moreover, Mr. Gutierrez admitted that his conduct was a violation of his oath, that he had let his chief down, and that he felt he could no longer provide leadership at NSBPD. The Executive Director has met the burden of proving that Mr. Gutierrez resigned under threat of discharge for cause.

C. Was Mr. Gutierrez’s conduct detrimental to the discipline of NSBPD?

With regard to whether Mr. Gutierrez’s conduct was detrimental to the discipline of NSBPD, no previous cases of the Council have discussed the discipline prong of 13 AAC 85.110. Although a policer officer has privacy rights in his or her own home, at a minimum, discipline must be maintained whenever the members of a police force are on duty, in uniform, or in police facilities. Maintaining discipline and order among a police force would be impeded if the members of the force engaged in undisciplined, sexual behavior while in a police station. For a *ranking* officer to ignore societal boundaries, expose himself, and engage in sexual activity in police headquarters demonstrates an unacceptable lack of self-discipline in the officer. No ranking officer who did such an act could expect to maintain discipline in the department—he could not expect to enforce behavioral boundaries among the police force when he himself did not maintain sufficient boundaries on his behavior. Therefore, the Executive Director has met the burden of proving that Mr. Gutierrez’s conduct here would have undermined discipline in NSBPD had Chief Boyea not taken action to deal with it.

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D. Was Mr. Gutierrez’s conduct detrimental to the reputation of NSBPD?

With regard to the effect of his conduct on the reputation of the NSBPD, Mr. Gutierrez argued that that people who live in the North Slope are very forgiving. He did not expect that his act would have a lasting effect on the reputation of the NSBPD.

Mr. Gutierrez’s argument, however, misses the point of the regulation. The Council has discussed the reputation prong of 13 AAC 85.110 in a previous case, *In re Bowen*.¹⁶ The Council determined that the Executive Director is not required to prove actual damage to a police department’s reputation.¹⁷ The test for detriment to reputation is an objective test. It applies equally to conduct of any police officer in the state, without regard to whether any actual damage to reputation has occurred in the particular locality in which the police officer was serving. Under the objective test, the question is whether the officer’s conduct would be a detriment to the reputation of the department where the officer worked. The effect on the reputation must be of the type that would justify a revocation of a certificate among reasonable people in the state. A trivial detriment will not suffice.

If the public believes that police officers are engaging in lewd and licentious behaviors while in the police station, the reputation of the police force as an institution dedicated to public service will be tarnished. The United States Supreme Court has found that a police officer who sold lewd videos of himself masturbating while in a counterfeit police uniform “brought the mission of the employer and the professionalism of its officers into serious disrepute.”¹⁸ Mr. Gutierrez’s conduct is not as brazenly public, but, as Chief Boyea explained, the fact that it occurred at the police station means that it brings a similar serious disrepute to NSBPD. Chief Boyea was dismayed that a senior officer would discredit the police station with this conduct, and concerned that the public would lose faith in the department. Accordingly, the Executive Director has met the burden of proving a detriment to reputation.

E. Should the Council exercise its discretion to revoke Mr. Gutierrez’s certificate?

Under 13 AAC 85.110(a)(2), proof of a detriment to an officer’s police department’s reputation or discipline means that the Council has discretion to revoke the officer’s certificate. In determining whether to exercise that discretion, the Council will “consider its actions ~~to any~~

¹⁶ *In re Bowen*, OAH No. 10-0327-POC (Police Standards Council 2011).

¹⁷ *Id.* at 14 (Police Standards Council 2011) (holding that “actual harm to an agency’s reputation is not required if public knowledge of the circumstances could do substantial harm to an agency’s reputation”).

¹⁸ *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 81 (U.S. 2004).

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prior similar certificate revocation cases in order not to make an arbitrary decision.”¹⁹ Here, the most analogous of the Council’s previous cases is *In re Bowen*. In *Bowen*, the Council found that a police officer’s off duty sexual liaison with a victim of domestic violence, whom he had met in the previous evening when investigating the domestic violence incident, would be a detriment to the reputation of the officer’s department.²⁰

Bowen also found that the conduct was a detriment to the integrity of the employing police department, which was a further rationale for revocation. As the council discussed in *Bowen*, Mr. Bowen’s liaison with a victim put the victim in harm’s way—the opposite of what a peace department’s mission should be. Further, for a police officer to take advantage of a victim, and to use contact information gained through an investigation, is a serious black mark on the reputation of the police department.²¹ Integrity and reputation will often be intertwined—in *Bowen*, the detriment to integrity and reputation went to the mission of the police because the conduct gave the appearance that a police officer was using his job for his personal gain.

Neither party has provided comparable cases from police standards organizations in other states or jurisdictions. Research did reveal, however, an informative publication of the Arizona Peace Officer Standards and Training Board, a board similar to the Council.²² The Arizona Board described that “[o]ver the past three years, [the Board] has had 50 reports of sexual misconduct from agencies under the required reporting statute.”²³ Revocation or relinquishment of a certificate occurred when the sexual misconduct involved “sex (on or off duty) and lying about it in the IA; sex with minors, informants, or suspects; sex that has some relationship to duty other than simply being on duty; and, criminal sexual conduct.”²⁴ In a second category of cases, the Arizona Board suspended certificates for 6-12 months if the sexual conduct occurred on duty (and the officer told the truth during the internal affairs investigation that followed).²⁵ Finally, some sexual misconduct resulted in no discipline at the Board level (although disciplinary action may have occurred at the employer level) if there was no “nexus with peace

¹⁹ *Bowen* at 17.

²⁰ *Id.* at 13-14; 17-20. Discipline was not at issue in *Bowen*, but the officer’s ability and fitness were additional reasons found to warrant revocation.

²¹ *Id.*

²² See AZ POST *Quarterly Integrity Bulletin*, Volume No. 65 (2013) available at <https://post.az.gov/sites/default/files/documents/files/IntegrityBulletinVol65.pdf>. This bulletin is not precedent. It is, however, a good “reality check” so that the Council can verify that its actions are roughly in accordance with actions taken by police standards agencies in other states.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

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officer duties,” such as when the conduct “consisted of private, off duty conduct, not involving malfeasance in office.”²⁶

Unlike Mr. Bowen’s conduct, Mr. Gutierrez’s conduct does not directly undermine the mission of the police department.²⁷ The detriment to the police department caused by Mr. Gutierrez’s conduct is not related to faulty police work or fighting crime. Therefore, Mr. Gutierrez’s conduct is not as severe as Mr. Bowen’s, meaning that the need to revoke here is not as obvious.

With regard to the discussion by the Arizona Board, Mr. Gutierrez’s conduct was not among the offenses for which that board will revoke. Yet, that board will suspend for up to a year for sexual misconduct that occurred on duty. This Council does not have authority to suspend—it can only revoke. Therefore, the Council would likely consider revocation for an offense for which the Arizona Board might only suspend. Here, Mr. Gutierrez’s misconduct did not occur on duty, but it did occur while in uniform and at the police station. Although if it had occurred on-duty, the effect of the misconduct would have been even greater, because this misconduct occurred on site, the detrimental effect on reputation and discipline is comparable to some on-duty misconduct.

A common thread running through this Council’s cases is a commitment to a high degree of professionalism among certificated personnel.²⁸ For the police, reputation is crucial. The United States Supreme Court has commented that police officers occupy “positions of great public trust and high public visibility” and that government has a significant “interest in preserving public confidence in its police force.”²⁹ The damage to reputation here depends on how a person perceives the conduct. As discussed above, some damage to reputation is evident. Mr. Gutierrez’s conduct gives the impression that the police have lax internal rules governing their conduct, and lack respect for the police station as a public building dedicated to the people’s business and public safety. Yet, Mr. Gutierrez’s conduct did not involve corruption, dishonesty, poor police work, or long-standing pervasive sexual misconduct, so the reputational

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²⁶ *Id.*

²⁷ Mr. Gutierrez’s conduct could also be a detriment to integrity, but at a much different level from that of Bowen. The clearest case of detriment to integrity would be associated with unethical, corrupt, or criminal conduct, none of which appears to be implicated by Mr. Gutierrez’s conduct. In presenting this case, the Executive Director did not bring attention to how Mr. Gutierrez’s conduct affected the integrity of the NSBPD. Therefore, detriment to integrity will not be a basis for revocation here.

²⁸ See *Bowen*, OAH No. 10-0327-POC; *In re Much*, OAH no. 13-0288-POC (Alaska Police Standards Council 2013) (appeal to superior court pending); *In re E.X.*, 13-0473-POC.

²⁹ *Gilbert v. Homar*, 520 U.S. 924, 932-33, (U.S. 1997).

damage would not be of the most serious or lasting type. Detriment to reputation alone, therefore, might not be sufficient to warrant revocation.

Considered in combination with the effect on discipline, however, Mr. Gutierrez's conduct warrants revocation. Discipline is a very important factor for a police department. As one court commented, "it is judicially recognized that law enforcement often relies on a paramilitary organizational structure to develop discipline, *esprit de corps*, and uniformity because of its substantial interest in insuring the safety of persons and property."³⁰ As discussed above, Mr. Gutierrez's conduct demonstrates a lack of discipline, without regard to his rank. When rank is considered, the undisciplined acts undercut the lieutenant's authority, and, if not addressed, the authority of the command structure of the force. Chief Boyea testified that he felt he would have to take action because the conduct would affect Mr. Gutierrez's ability to do his job as a command officer. To his credit, Mr. Gutierrez admitted as much when he said that he left his position because he felt he could no longer be an effective leader. In sum, based on the combined detriment to reputation and discipline caused by Mr. Gutierrez's conduct, the Executive Director has met the burden of proving that Mr. Gutierrez's certificate should be revoked.

In closing, this decision is based on an objective test that does not censure or disparage any person. Mr. Gutierrez and Ms. Booth acknowledge that they made a grievous error. Both have paid dearly for their mistake. Mr. Gutierrez, however, has crossed a line that remorse or regret cannot undo. Because he has crossed that line, the Council revokes his certificate.

IV. Conclusion

Lt. Jose Gutierrez committed conduct that was detrimental to the discipline and reputation of the police department in which he worked. The Alaska police certificate of Jose Gutierrez is REVOKED.

DATED this 15th of January, 2015.

By: SS 1
Stephen C. Slotnick
Administrative Law Judge

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³⁰ *Mondt v. Cheyenne Police Dept.*, 924 P.2d 70, 81-82 (Wyo. 1996).

Adoption

The Alaska Police Standards Council adopts this Decision under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

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.

DATED this 20 day of April, 2015

By: Sheldon Schmitt
Sheldon Schmitt
Chair, Alaska Police Standards Council

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