

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

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June 2, 1993

Timothy Foster
Airport Safety
P.O. Box 190629
Anchorage, Alaska
99519-0629

Re: Michael Palmer

Dear Mr. Foster:

This is to confirm our conversation of this date regarding Michael Palmer. As I indicated to you, the Alaska Police Standards Council met on May 24, 1993, and decided that it does not wish to appeal the superior court's decision in *Brantley & Palmer v. State, APSC*, 3AN-92-3063 Civ. As a result of this decision, Mr. Palmer is now eligible for (re)hire as an Airport Safety Officer and he will be certified by the APSC in due course. As you are aware, Jack Wray has resigned from his position as executive director for the APSC. The council has hired a new executive director, Laddie Shaw, but he will not begin work until a little later this summer.

By copy of this letter, I am asking that Mr. Shaw work with you as much as possible to expedite Mr. Palmer's certification. If there are any questions that I can answer, please feel free to contact me.

Very truly yours,



CHARLES E. COLE
ATTORNEY GENERAL

By:



Margot O. Knuth
Assistant Attorney General

education. By statute, a person may not be employed as a police officer unless the person has completed a training program approved by the APSC and "possesses other qualifications the council has established ... including, but not limited to minimum age, education, physical and mental standards, citizenship, moral character, and experience. AS 18.65.240. The APSC adopted administrative regulations under the Administrative Procedures Act to implement its statutory duties.

Prior to 1989, ASOs were not "police officers" as that term was defined in AS 18.65.290(5), and they were not required to be certified by the APSC. In 1989, the state legislature amended AS 18.65.290 to recognize ASO's as "police officers." This status requires that ASOs be certified by the APSC as meeting the standards set forth in state statutes and regulations. The 1989 legislation gave ASOs two years within which to obtain this certification.

Brantley and Palmer filed the necessary documentation to become APSC certified. In July, 1991, they were notified by the APSC that they would probably not be certified because they did not meet the state's vision standards for police officers. Specifically, Brantley did not meet the state requirement that he have corrected vision to at least 20/30 in each eye - his best corrected vision in his right eye is between 20/60 and 20/100. Palmer did not meet the condition that he have normal color vision - he suffers from dichromatism, a form of color blindness. no

On August 29, 1991, they were terminated as ASOs. Brantley and Palmer then filed suit against DOT/PF for terminating them and against the APSC for denying their applications for certification.

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Case No. 3AN-S91-7407 Civil. Brantley and Palmer argued that the APSC improperly evaluated their applications under the absolute standard imposed by regulations applicable to new hires within the police department under 13 AAC 85.010.¹ Judge Katz agreed, and remanded the case to APSC directing that Brantley and Palmer's applications for APSC certification be evaluated under the APSC's discretionary standards set forth in 13 AAC 85.100(a)(3).²

Brantley and Palmer requested a hearing which took place on January 21, 1992. Five witnesses testified and numerous documents were admitted into evidence. At the hearing, the parties' stipulated that the officers met all qualifications for certification under 13 AAC 85.010 other than the vision deficiencies of Brantley and Palmer. The evidence presented at that hearing is as follows.

Milburn Brantley

Brantley was hired as an ASO in 1976 to perform crash fire rescue, police and security duties. His area of patrol is limited to the area surrounding the airport. He has successfully completed several courses involving firearms training, search and seizure, criminal law, field training, and fire fighting associated with his duties as an ASO. He also successfully completed his firearm

¹ 13 AAC 85.010. BASIC STANDARDS FOR POLICE OFFICERS. (a) a participating police department may not hire a person as a police officer unless the person meets the following qualifications:

(5) is at the time of hire, certified by a licensed physician on a medical record form supplied by the council to

(B) have normal color discrimination, normal binocular coordination, normal peripheral vision, and corrected visual acuity of 20/30 or better in each eye;

² 13 AAC 85.100. DENIAL OF CERTIFICATES. (a) The council shall deny a basic certificate upon a finding that the applicant for the certificate

(3) Does not meet the standards in 13 AAC 85.010(a) or (b).

qualifications from 1976 through 1990, excepting only 1978.³

Brantley indicated he has a visual deficiency which requires him to wear glasses to read fine print, but he does not need glasses to function normally. He indicated he wears glasses while working. He occasionally wears hard contact lenses and bifocals. There have been occasions over the years where he had to remove his glasses while working due to the weather conditions.

In February of 1990, Brantley was given a vision test by Dr. Crouch. Dr. Crouch concluded that Brantley's best corrected vision in his right eye was 20/100 and in his left eye was 20/20. He further concluded that Brantley had a condition known as lazy right eye. Brantley is required to wear corrective lenses while driving.

Brantley's June 15, 1991 performance evaluation recommended that he "exercise caution while operating equipment." When asked the basis for this notation, Brantley explained that approximately ten years before, he had been involved in a motor vehicle accident when he backed into a vehicle that he did not see on his blind side.

Over the past ten years, Brantley has drawn his service revolver infrequently and then usually to destroy birds or moose. One time, however, he drew his service revolver on an individual that was reported to be armed and dangerous in taxi cab. Brantley acknowledged that on any given day he could be called upon to perform the same functions of any law enforcement officer including drawing and firing his sidearm.

In conjunction with his duties as an ASO, Brantley has been

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required to testify in court approximately two to three times per year. He acknowledged that his credibility as a witness was subject to greater attack due to his vision deficiency.

Michael Palmer

Michael Palmer has been an ASO for 12 years prior to being denied certification. He is qualified in the use of a firearm. Palmer estimated that 30% to 40% of his duties involve law enforcement activities. He has also made arrests in the past.

Palmer suffers from dichromatism - a red and green color deficiency. Although an Airport Safety Medical Examination dated March 1989 indicates that Palmer can distinguish between some shades of red and green, he is unable to distinguish between particular shades of red and green. Dr. Crouch described Palmer's condition as "dramatic red/green color blindness." Palmer expressed the view that his condition has not affected his job performance.

Palmer has been in situations where victims have described perpetrators using colors. He admitted that under certain conditions, he might not be able to identify a suspect from a suspect description. Palmer also admitted that his credibility was subject to challenge on the witness stand. During his duties as an ASO he has never been directly involved in putting out a fire.

Jack W. Wray

Jack Wray is the executive director of the APSC. His responsibilities include certification of police officers, corrections, probation, and parole officer; the enforcement of statutes and regulations relating to the APSC; and certification of all training programs for corrections and law enforcement

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personnel. In conjunction with his duties, Wray often surveys other law enforcement certification boards throughout the country to ascertain how certification standards are changing. The APSC uses these surveys to promulgate regulations.

Wray explained that the APSC is a regulatory agency charged with establishing minimum standards for police officers. The purpose of the minimum standards is to insure that all the citizens of the state get the same basic level of law enforcement. This objective is accomplished by means of training programs.

Wray indicated that the APSC had yet to grant discretionary certification to any applicant with corrected vision worse than the minimum standards. Wray explained that police work requires that the officers be able to see things at a distance and up close almost daily, and that good vision impacts both how well an officer performs on the job and public safety. Wray explained that an officer's vision and perception played key roles in their the performance of their duties.

Based upon his surveys, Wray concluded that the standards for police officers in Alaska were among the least restrictive in the United States. Alaska's standard is vision corrected to 20/30; most states require vision corrected to 20/20 and many states have an uncorrected vision minimum. Wray indicated that visual acuity is extremely important for gathering evidence at a crime scene.

Based on the surveys, Wray indicated that approximately 40 other states have "normal" color vision requirements for their police officers. Wray explained that difficulty in discriminating between shades of colors is not as debilitating as being unable to distinguish between colors. Color discrimination is important in

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fighting fires because the fire fighter must be able to distinguish between different colors of smoke. Likewise, color discrimination is important in working as an ASO because the ASO must distinguish between traffic signal lights, car light signals, and airport safety lights.

According to reports Wray has read in his capacity as director of the APSC, all officers, when confronted with a stressful situation, suffer diminished visual acuity. Also, the literature Wray has read indicates that it takes a person without "normal" color vision longer to interpret traffic control signal devices.

Robert Leger

Leger is the captain of the ASOs in Anchorage. In his experience, vision is an important aspect of an ASO's duties. Instances where the officer's vision is of critical importance include identification of victims and suspects and crash/fire situations.

Leger explained that in his opinion, there should be no exceptions to the vision guidelines. He based this on the 220% - 300% increase in airport security over the last ten years because of the threat of terrorism. In his experience, ASOs typically testify in court proceedings up to two to three times per month.

According to Leger, color vision is also extremely important to an ASO because the runways and taxiways are lighted with various colored lights which provide critical information to the person viewing them. Also, the tower gun used to signal traffic is color-coded red and green. However, Leger was unaware of any specific occasion where Palmer's color blindness had affected his job performance.

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Lewis Wood

Lewis Wood is the chief ASO in Fairbanks. He gave the opinion that the vision standards are in place to guarantee quality law enforcement. Wood expressed that the state's ability to successfully prosecute criminal cases could be compromised if the officer's testifying were subject to impeachment for vision deficiencies. Unlike the other officers, Wood had discharged his sidearm pursuant to his duties as an ASO. Wood indicated that an ASO can make no mistakes when drawing a sidearm.

Wood also explained that the fire-fighting equipment used and the conditions an ASO encounters during airport fires further disables the wearer's ability to see. Wood indicated that the ability to discriminate colors was an important attribute for law enforcement personnel because the officer may be required to testify at an search warrant application hearing, during the course of which he would be required to describe the item to be searched or seized. According to Wood, if an officer describes a "blue" shirt to the issuing magistrate, the description is less subject to challenge than when an officer describes a "shirt."

Wood was unable to recall any instance where Palmer's color vision deficiency affected his job performance.

Exhibits Introduced

Other exhibits introduced at the hearing included: (1) Brantley's employment applications, work history, firearms qualifications, performance evaluations, certificates and in-service training reports, letters of commendation, list of cases worked, and medical reports; (2) Palmer's medical reports and correspondence, Airport police range record training, employment

records and performance evaluations, and certificates; (3) State of ALaska Airport Safety Officer Class Specifications; and (4) various studies and surveys relating to vision requirements of law enforcement personnel.

The studies offered by the APSC included the following information: (1) It is difficult for a person to determine whether a vision problem is affecting his or her job performance. Albuquerque Vision Standards Project Final Report, at 77, 118 (June, 1987). (2) Law enforcement work depends on good visual acuity. Forkiotis, "Vision Requirements and the Police Officer Selection Process," The Police Chief, at 56 (Nov. 1981). (3) Forty-nine states require their law enforcement personnel to satisfy a vision standard. New York State Police Visual Acuity Survey. (4) Law enforcement personnel require proper visual acuity based on their job responsibilities. For example, officers must spend many hours driving which requires good depth perception and proper vision; A large percentage of police work involves observing people at all hours in all weather conditions; an officer credibility for having poor vision is subject to credibility attacks on the witness stand; and the physical skills required, such as shooting a weapon, require competent vision. Holden, R., "Vision Standards for Law Enforcement: A Descriptive Study," 12 Journal of Police Science and Administration 125 (June 1984). (5) Forty-one states have a requirement relating to an officers color vision. New York State Police Visual Acuity Survey. (6) Officers must be able to distinguish among colors when responding to descriptions of suspects and items from other officers and the radio, as well as testifying in court. Letter of Department of

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State Police for the State of Michigan, November 12, 1990.

Based on consideration of the testimony and exhibits, the hearing officer issued a recommendation that Brantley and Palmer be certified on February 14, 1992, relying on five factors: (1) the experience of other states; (2) the opinions of experts; (3) Brantley and Palmer's job experience; (4) the safety factor; and (5) job requirements.

The hearing officer's recommendation and the supporting documentation were presented to the APSC for final review and disposition. The hearing officer recommended that Brantley⁴ and Palmer⁵ be granted certification. Thereafter, the parties' counsel presented oral arguments to the APSC. The APSC reviewed the record and documents submitted during the hearing, deliberated in executive session, and ultimately rejected the hearing officers recommendations with respect to both Brantley and Palmer pursuant to AS 44.62.500. In its written decision on March 5, 1992, APSC concluded that the hearing officer's recommendation was flawed:

⁴ FINDINGS: OFFICER BRANTLEY Officer Brantley presented a chart of his qualifications on the shooting range. With one exception, explained by a misunderstanding about the necessary score, he has regularly passed the qualifying test. There is nothing in his service record to indicate a problem with vision, with the possible exception of an accident ten years prior, when he backed into a car behind him in his "blind spot." (Tr. 43-44). He stated that he had testified in court. His doctor's vision report (Gilbert, March 12, 1991) indicates that his corrected vision with both eyes together is 20/15. Reading acuity corrected in the right eye is 20/30. The doctor also indicates that Officer Brantley has compensated extremely well for the mild to moderate deficit in his right eye. Taking into account the job description, opinions of experts, the safety factor through firearms qualification, and the job performance of Officer Brantley, the applicant has met his burden to overcome the standard. Nothing presented by the Council rebutted Officer Brantley's position that he was qualified and he should be certified.

⁵ FINDINGS: OFFICER PALMER Officer Palmer has a serious color deficiency, although aside from distinguishing colors which are close together on the color spectrum, it was hard for him to present evidence as to what he could actually see. There is no question about his visual acuity. He testified that he is aware when he is looking at colors which might cause him a problem (Tr. p.156). He stated that he has testified in court without incident (Tr. 150). He has served as an airport safety officer under Captain Leger, who testified he was unaware of any incidents where color deficiency affected Officer Palmer's performance (Tr. p. 199), and under Lewis Woods, who indicated he did not know Mr. Palmer had a color deficiency until the administrative hearing. (Tr. 219). The standards for color vision are not universally a requirement in other states, and are rated as a low priority in critical incidents. Officer Palmer has served as an airport safety officer for twelve years without his color deficiency having any impact on his performance. Based on the experience of other states, his job experience, the safety factor, and his job requirements, Officer Palmer has met his burden to show that he should be certified by the Council. Nothing presented by the Council rebutted this established presumption.

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...The Council does not agree that past behavior necessarily predicts future performance. Because the applicants have had the good fortune not to have been involved in an incident where vision was at issue, does not mean that circumstances could not combine at any moment making defective vision the difference between life and death.

Protection of the Public, as well as the officer, [sic] mandates the imposition of police certification standards. The Council has shown that its vision standards are among the least restrictive imposed within the United States. An exercise of discretion in these cases would render the standard meaningless and expose the officers and the public to an unreasonable risk of harm.

Certification was denied to Palmer and Brantley.

The statutes relating to the duties of the APSC are subject to the administrative Procedures Act. See AS 18.65.130 - 18.65.270. AS 44.62.570(b)(3) provides that "[I]nquiry in an appeal extends to . . . whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

AS 44.62.570(c) provides: "If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by (1) the weight of the evidence; or (2) substantial evidence in the light of the whole record."

In Rose v. Commercial Fisheries Entry Com'n, 647 P.2d 154, 161 (Alaska 1982), the Alaska Supreme Court indicated stated that an agency's application of the law to the particular factual circumstances of the case is a matter committed to the agency's sound discretion. Consequently, the scope of review is limited to whether the decision was arbitrary, unreasonable or an abuse of

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discretion. Id. (citing State, Dep't of Administration v. Bowers Office Products, Inc., 621 P.2d 11, 13 (Alaska 1980) (quoting North Slope Borough v. LeResche, 581 P.2d 1112, 1115 (Alaska 1978))).

When reviewing an agency's findings, the reviewing court's "role is to ensure that the agency has taken a 'hard look' at the salient problems" and has "genuinely engaged in reasoned decision making." Alaska Survival v. State, Dep't of Nat. Res., 723 P.2d 1281, 1287 (Alaska 1986). The test is whether the agency evaluated the information and made a reasoned determination. Id.

Is the APSC decision denying ASOs Brantley and Palmer certification supported by substantial evidence?

Based upon the record and Judge Katz' order that APSC exercise its discretion in considering the certification applications of Brantley and Palmer, the APSC's decision to deny certification is not supported by substantial evidence in the record. The issue is not whether the standards are reasonable or whether Brantley and Palmer fail to meet the standards on their face. The issue is whether there is substantial evidence in the record to support APSC's discretionary conclusion that it must deny their application for certification. The APSC decision is predicated upon the potentially dire consequences which can result from a combination of the situation an APO may find himself in and his visual deficiency. However, the record does not contain substantial evidence that the specific visual deficiencies suffered by Brantley and Palmer would give rise to such dire consequences. Although their supervisors projected that the visual deficiencies of Brantley and Palmer would impact their ability to perform, the record lacks evidence of what the reasonably expected impact would

be on the job performance of these two officers.

Testimony indicated that inability to distinguish between the color of traffic lights could negatively impact an officer's ability to maneuver through such controls. However, Palmer's deficiency is an inability to distinguish between "shades" of red and green that are close together on the color spectrum. There is no evidence, however, that his deficiency includes an inability to distinguish between red and green and yellow traffic lights such that he can not pursue an fleeing suspect. Further, there is no evidence that run way lights require an ability to distinguish between shades of color close together on the color continuum. Palmer agrees that inability to distinguish between shades of color may subject him to impeachment on cross-examination when testifying in court. The evidence indicates that he has testified previously in court, but there is no evidence that his testimony was ineffective because he was impeached on his inability to distinguish between shades of colors.

APSC executive director Jack Wray indicated that visual acuity and normal color vision is of great importance to an ASO in the performance of duties. ASO Captains Leger and Wood explained how vision deficiencies could impact an ASO's job performance in identifying suspects and victims, crash/fire situations, reading airport light signals, testifying in court, and drawing a sidearm during a confrontation. The record lacks evidence that Brantley will be unable to do any or all of these things. The evidence is that they do not meet the minimum visual standards. There is no evidence that either Palmer or Brantley is unable to adequately perform those tasks.

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Each witness on behalf of the state expressed the opinion that all ASOs should be required to meet the minimum vision standards based on the potential adverse situations an ASO may encounter. Likewise, the surveys and exhibits admitted suggest that there should be no exceptions to the minimum vision standards. The decision of the ASPC indicates that it agrees. However, the APSC has been directed by a judge in an earlier case to apply its discretion in considering the applications of Brantley and Palmer. The record lacks substantial evidence that the APSC looked beyond strictly applying the standards in its consideration of the applications.

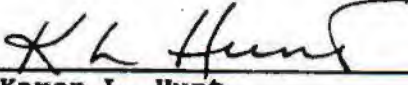
The evidence before the ASPC is that there are standards and there are good reasons underlying those standards. However, the record lacks substantial evidence that the two specific deficiencies of Brantley and Palmer can reasonably be expected to result in their failure to perform their job responsibilities in accordance with the expectations underlying the reasons for standards.

Because the record lacks substantial evidence to support the APSC's decision denying certification to Brantley and Palmer, the APSC did abuse its discretion and its decision must be reversed.

THEREFORE, IT IS ORDERED that the APSC's denial of certification to Brantley and Palmer is reversed and this matter is remanded to APSC for further action.

DATED at Anchorage, Alaska, this 3rd day of May, 1993.

I certify that on 5-3-93
a copy of the above was mailed to each
of the following at their addresses of
record: Dasper/ABK Knuth
W. Shroads
Secretary/Deputy Clerk



Karen L. Hunt
Superior Court Judge