

STATE OF ALASKA
ALASKA POLICE STANDARDS COUNCIL

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6 In the Matter of)
7 MILBURN D. BRANTLEY,) APSC No. 90-3
8)
9

In the Matter of)
10 MICHAEL J. PALMER,) APSC No. 91-2
11)
12

In the Matter of)
13 RICHARD L. WEBB,) APSC No. 90-1
14)
15

16 MEMORANDUM OF DECISION

17
18 On February 27, 1992, the Alaska Police Standards Council
19 met in open session to hear oral argument on the question of
20 whether airport safety officers Milburn Brantley, Michael Palmer,
21 and Richard Webb meet standards for certification as police
22 officers.

23
24 Having reviewed the record and findings of the hearing
25 officer, and heard oral argument, the Council finds convincing
26 evidence that applicants Brantley, Palmer, and Webb do not meet
27 the requirements of 13 AAC 85.010(a)(5) which provides that
28 applicants must be "physically sound and free from physical
29 defects which would adversely affect performance as a police
30 officer" and have "normal color discrimination, normal binocular
31 coordination, normal peripheral vision, and corrected vision
32 acuity of 20/30 or better in each eye."

*State of Alaska
Alaska Police Standards Council
Pouch N - Juneau, Alaska 99801*

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2 The Council also finds the applicants' argument that the
3 Council should exercise its discretion to waive the standards
4 unpersuasive.
5

6 The applicants' argument in this matter turns upon their
7 respective performance records as airport safety officers. They
8 argue that successful past performance should compel the Council
9 to exercise its discretion to waive vision standards. The
10 Council does not agree that past behavior necessarily predicts
11 future performance. Because the applicants have had the good
12 fortune not to have been involved in an incident where vision was
13 at issue, does not mean that circumstances could not combine at
14 any moment making defective vision the difference between life
15 and death.
16

17 Protection of the public, as well as the officer, mandates
18 the imposition of police certification standards. The Council
19 has shown that its vision standards are among the least
20 restrictive imposed within the United States. An exercise of
21 discretion in these cases would render the standard meaningless
22 and expose the officers and the public to an unreasonable risk of
23 harm.
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25

26 **CONCLUSION**

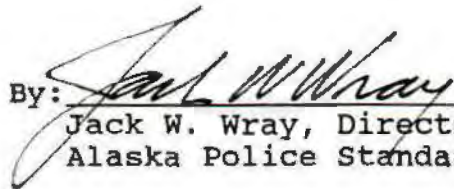
27 The Council hereby rejects that portion of the proposed
28 decision which recommends that Milburn Brantley and Michael
29 Palmer be certified, and accepts that portion of the proposed
30 decision which recommends that Richard Webb not be
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certified. All three applicants' requests for certification are denied.

Dated this 5th day of March, 1992.

KEVIN O'LEARY, CHAIRMAN
ALASKA POLICE STANDARDS COUNCIL

By: 

Jack W. Wray, Director
Alaska Police Standards Council

*State of Alaska
Alaska Police Standards Council
March 5 - Juneau, Alaska 99801*

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Police Standards
Council

STATE OF ALASKA

ALASKA POLICE STANDARDS COUNCIL

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7 In the Matter of)
8 RICHARD L. WEBB,)
9 Applicant.) No. APSC 90-1

10 In the Matter of)
11 WILLIAM D. BRANTLEY)
12 Applicant.) No. APSC 90-3

13
14 In the Matter of)
15 Michael J. Palmer)
16 Applicant.) No. APSC 91-02

DECISION OF THE HEARING OFFICER

Procedural Background

17
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19
20 The Alaska Legislature, in 1989, after lobbying from the
21 Public Safety Employee's Association, which is the union for
22 the Applicants in this case, passed AS 18.65.290(5), amended
23 the definition of police officer to include:

24 (B) an officer or employee of the Department of
25 Transportation & Public Facilities who is stationed
26 at an international airport and has been designated
27 to have the general police powers authorized under
28 AS 02.15.230(a).

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3 In the same legislation, the legislature set out a two-year
4 period during which the current airport safety officers could
5 secure certification from the Alaska Police Standards Council.

6 13 AAC 85.010(a)(5)(B) sets out the following as two of
7 the requirements which had to be met for certification by
8 applicants:

9 ..have normal color discrimination...and corrected
10 visual acuity of 20/30 or better in each eye...

11 Applicants Webb and Brantley were unable to meet the
12 requirement of having visual acuity corrected to 20/30 in each
13 eye, and Applicant Palmer was unable to meet the requirement of
14 "normal color discrimination." The three applicants were
15 denied certification, and eventually were terminated from their
16 jobs.

17 When the applicants appealed the denial through a request
18 to the court for injunctive relief, the superior court held
19 that while the statute required the Alaska Police Standards
20 Council (hereinafter "APSC") to issue certification to anyone
21 who met all the criteria, it only said that the APSC "may" deny
22 or revoke the certification of someone who did not meet the
23 standards. AS 18.65.240. In the court's opinion, the
24 applicant's were entitled to a hearing on whether their
25 certification should be denied and this hearing followed.

26 The hearing was held on January 21, 1992, with all parties
27 present. The applicants testified, as did Mr. Wray, Captain

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Leger from the Anchorage Airport, and Lewis Wood from the Fairbanks Airport. Both parties submitted notebooks of exhibits, which were admitted by stipulation, although the notebooks submitted by the Applicants was returned to them for editing when it was discovered there were discrepancies among the three notebooks submitted. Closing arguments were to be submitted in writing by January 29. Neither party had filed a brief by then, but the Applicants filed one through the mail the following day and the APSC brief was accepted late.

Legal Standards for Exercising Discretion

Although 13 AAC 85.100 and AS 18.65.240 contain discretionary language, there is no indication in either the statutes or the regulations what criteria are to be used as the basis for the exercise of Council's discretion. Black's Law Dictionary, 5th Edition, defines one form of discretionary act as:

Those acts wherein there is no hard and fast rule as to the course of conduct that one must or must not take and, if there is a clearly defined rule, such would eliminate discretion.

In looking at the issues involved with these applicants, the hearing officer has relied upon the following in making a discretionary decision:

1. Experience from Other States: Mr. Wray, Executive Director of the Council, testified that the Council, when faced with a decision with which it is unfamiliar, would request that

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he poll other states. He testified that he had often been asked to do such polling, and that the Council would rely on the experience of other states in making a decision. (Tr. 72: 91-92)

2. Opinions of Experts: The State submitted a number of articles concerning vision by experts in the field.

3. Job Experience of the Officers: All three applicants have served for many years in the jobs for which they are seeking certification, and supplied many documents concerning job performance and qualifications. In addition, the supervisors from both the Anchorage and Fairbanks airports testified concerning their knowledge of the applicants' performance. Further, the court's finding indicates that 13 AAC 85.010, the "new hire rule" is not controlling in this case, and that 13 AAC 85.100 is the proper standard. Because the standard is the same as for revocation of a certificate, on the job performance may be used to determine whether a recertification would be requested by a supervisor, and therefore whether the deviations from standards would have been discovered.

4. The Safety Factor: Insofar as the applicants can be considered "handicapped," the applicants need not be kept on the job if their handicap would result in danger to the themselves or others because of the handicap. In an exhibit submitted by the Council from Albuquerque, the case of Sterling

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Transit Co., Inc. v. Fair Employment Practices Commission is cited for the proposition that the safety factor must not be based on speculative injuries. A truck driver was rejected as an applicant because he had a bad back and the employer only hired people with a "normal" back. The court held that since there was conflicting medical testimony about back injuries, and since the applicant had performed substantially equivalent work for approximately ten years without a work related back injury, there was only a "possibility" of injury which would not prevent the employer from hiring the employee.

5. Job Requirements: An airport safety officer's job is not necessarily the same as a regular police officer's. The ASO serves also as a fireman on a month on/month off basis. Investigative chores are shared with the Alaska State Troopers, particularly in serious cases. Appearances in court are relatively limited. The physical territory patrolled is limited.

APPLICANTS BRANTLEY AND WEBB

The visual acuity required by the APSC is 20/30 or better in each eye, corrected. 13 AAC 85.010(a)(5)(B). Officer Brantley had several evaluations which resulted in test results of 20/100 (Dr. Crouch, undated), 20/80 (Dr. Dobson, undated), 20/60 (Dr. Gilbert, March 12, 1991), and 20/40 (Dr. Shiesl, August 26, 1991) corrected in his right eye. Dr. Gilbert also stated that Mr. Brantley's corrected vision using both eyes

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together was 20/15. There was also an indication in Dr. Dobson's evaluation of "gross stereopsis." Officer Brantley had been employed as an airport safety officer from March 1976 until August, 1991.

Officer Webb had an evaluation of 20/80 (Dr. Wolf, January 25, 1990) correctable in his right eye. Another vision statement indicates "some restriction of depth perception and peripheral vision." The record indicates that Officer Webb suffered from a detached retina in a traumatic injury suffered at eighteen, and had eye surgery at three for crossed eyes. Officer Webb was employed as an airport safety officer from April 1976 to August 1991.

APPLICANT PALMER

Officer Palmer suffers from a color deficiency. The standard of the APSC is that an applicant must have "normal color vision." 13 AAC 85.010(a)(5)(B). According to documents submitted by the APSC, color deficient persons, in order of severity, are trichromat (three color base), dichromat (two color base), and monochromat (one color base). Although not in the original record, a supplemental written explanation by Dr. Crouch, submitted with the approval of both parties, indicated that Mr. Palmer was a dichromat, who would be "not insensitive to green but" would be described as "green blind." Such persons can match all colors with a red and blue and would tend to confuse reds, yellows, and greens, but do see shades of

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greens. Officer Palmer was an airport safety officer from 1979 to 1991, and was promoted to the rank of ASO III.

DISCUSSION

The APSC submitted as its record a number of informational studies and articles about vision requirements for police officers. There do not seem to be many good studies which trace the impact of poor vision on performance as a police officer, even though one article spoke of the relationship between accidents and poor vision. However, it is clear to even the lay person that standard vision tests may not test actual vision adaption in emergency or non-emergency situations by any person. Snellen eye tests determine static acuity using letters without colors, and the test is non-pressured and non-timed. As noted in the Albuquerque Vision Standards Project final Report (June 1987) (hereinafter Albuquerque):

One way to evaluate performance is to mathematically relate different levels of the Snellen acuity to recognition, form recognition, or sign recognition under dynamic or non-dynamic situations. If the calculated relationship between Snellen acuity and recognition is to be preserved, then contrast, lighting, and time contingencies should be comparable as well. Collins made such a calculation with an automobile as the target and estimated that an acuity level of 20/40 would be necessary to identify a high contrast non-moving car. If the car moved, the estimate (based on dynamic visual acuity scores) dropped to about 20/100. Allan did a similar analysis for license plate recognition and came up with a minimum estimate of 20/20 if a safe distance was to be kept between moving cars. Sheedy extended this agreement to police officers and suggested the license recognition to be considered an appropriate criterion of patrol officer job

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performance (along with handgun recognition). He neglects to consider movement or contrast and therefore is faced with difficulty that identifying license plates at speed is somewhat risky for anyone: not just those with poor vision. There are obvious problems with this approach. First, depending on the criterion chosen, (license, car, person) required acuity might be very low and very high. Second, whatever level works for one condition (i.e. daylight) may not work for another (i.e. night time). Finally, the calculation may not directly predict more critical time contingent tasks. (pp.115-116)

...

The general findings of such tasks tend to indicate there is a relationship between static far acuity and performance but the relationship is not strong... (p.120)

...

...some police departments might face fewer shoot-no shoot situations, fewer instances of high speed chases in traffic, and fewer instances in which the officer would confront time contingent danger than others. This difference in criticality might lead to somewhat different vision requirements, since vision standards are essentially "safety" standards...(pp. 147-148)

The Albuquerque study also contains within it a chart (p.175) which shows critical incident frequency of visual skills, with 22 being the most critical and 0 being the least critical. These skill levels were developed by analyzing narrative responses which described critical incidents. The highest rated skill was "peripheral vision," followed in order by "pursuit," "fine detail," "dynamic far" and "motion detection." "Depth perception" was listed with five incidents, and "color discrimination" with one. These descriptions would seem to show what vision skills are most necessary for police officers to have when working with the "safety" factor.

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A letter from the Arizona Law Enforcement Advisory Council, shows that visual acuity deteriorates as follows: 20/20 = 100%, 20/40 =80%, 20/60 = 70%, but 20/100 = 33-1/3%. A study of California Law Enforcement Agencies taken from the Employment Data for California Law Enforcement of 1989 showed the number of jurisdictions with the following requirements:

Corrected Vision:		
20/20		250
20/25		13
20/30		137
20/40		15
20/50		2
Total	425	

A study of state agency visual acuity requirements taken from the Directory of State Police, Law Enforcement and Investigative Agencies, 1987, showed the number of states with the following requirements:

Corrected Vision:		
20/20		43
20/30		7
20/40		2

Color Vision Requirements:
26

Thus, despite the fact that color discrimination is thought to be a serious factor, and probably is a serious factor, it is not a universal requirement for public safety officers.

Applicants had the burden of proving that a waiver should be granted to each of them. They relied heavily on job performance and job descriptions.

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3 FINDINGS: OFFICER BRANTLEY

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

23 FINDINGS: OFFICER PALMER

24 Officer Palmer has a serious color deficiency, although
25 aside from distinguishing colors which are close together on
26 the color spectrum, it was hard for him to present evidence as
27 to what he could actually see. There is no question about his

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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.

FINDINGS: OFFICER WEBB


Officer Webb has a correctable vision of 20/80 in his right eye. He has had some eye surgery, and has a slight restriction on depth perception and peripheral vision. (Dr. Wolf Report, undated) Peripheral vision is one of the most critical vision elements for a police officer. Although he was unable to present his field test for firearms, there was evidence that he had problems with his fast draw, and would

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just draw and shoot, and he wasn't aiming the right way. (Tr. 174) He had to practice to qualify. He testified to several incidents where he would drive a vehicle into things, some of them minor, but so much so that he began to keep a log of how many miles he had gone without hitting anything. (Tr. 175-176) On recross of Mr. Webb's supervisor, Lewis Woods, testimony was elicited that the supervisor did know of a specific incident which related to Mr. Webb's vision interfering with his job. (Tr. 230-232) That testimony remained unrefuted. Based on the job experiences and the safety factor, Officer Webb has not met his burden to show that his vision is sufficient to waive the standards of the Council and he therefore should not be certified.

Dated: February 14, 1992


Elizabeth Page Kennedy
Hearing Officer

Certificate of Service

The undersigned hereby certifies that on the 17th day of February, 1992, a true and correct copy of the Decision of the Hearing Officer was served by ~~fax~~ on the following: Margot Knuth; Jim Gasper

Law Offices of Elizabeth Page Kennedy
by Pat Welch

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