STATE OF ALASKA

DEPARTMENT OF PUBLIC SAFETY

ALASKA POLICE STANDARDS COUNCIL

In the Matter of)
)
GARY D. HAMMOND,)
) No. APSC 84-10
Respondent.)

REVOCATION ORDER

The Alaska Police Standards Council of the State of Alaska duly convened on the 29th day of May, 1985, and reviewed and discussed the Findings of Fact, Conclusions of Law, and Recommendation submitted by Hearing Officer Frank Flavin, on May 24, 1985. These findings were filed in accordance with AS 44.62.500(b).

IT IS HEREBY ORDERED:

1. The Hearing Officer's Amended Proposed Decision dated May 24, 1985 was adopted by this Council on May 29, 1985. The Findings of Fact and Conclusions of Law contained in the Decision are hereby incorporated by reference into this Order as though set forth fully herein.

2. Respondent's police officer certificate in the State of Alaska is hereby revoked.

3. This Order of Revocation shall take effect in accordance with AS 44.62.520(a).

DATED this 6 day of June, 1985 at Juneau, Alaska.

Jack W. Wray, Administrator
Alaska Police Standards Council

I hereby certify that 5 members out of 9 members of the Alaska Police Standards Council were present at the time this action was considered, and that 5 members voted YES and 0 members voted NO.

Jack W. Wray, Administrator
Alaska Police Standards Council

State of Alaska
Alaska Police Standards Council
Pouch N — Juneau, Alaska 99811

FINAL ORDER

The Alaska Police Standards Council for the State of Alaska, having examined and considered the Amended Proposed Decision dated May 24, 1985, at its meeting on the 29th day of May, 1985; having considered the record in this proceeding, and being fully advised in this matter, hereby makes its **FINAL ORDER** as follows:

The Amended Proposed Decision is hereby **Adopted** 5, **Rejected** 0.

Dated this 29th day of May, 1985, at Anchorage, Alaska.

ALASKA POLICE STANDARDS COUNCIL

By: E. L. Mayfield

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ATTORNEY AT LAW
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STATE OF ALASKA

ALASKA POLICE STANDARDS COUNCIL

In the Matter of	)	
	)	
GARY D. HAMMOND,	)	
	)	APSC No. 84-10
Respondent.	)	
	)	

AMENDED PROPOSED DECISION

On August 31, 1985, the Alaska Police Standards Council (APSC) issued an Accusation against **GARY D. HAMMOND**, (Respondent), seeking the revocation of Respondent's police officer certificate. The Accusation consists of two counts. Count I alleges that, under AS 18.65.240(c) and 13 AAC 85.100 (a) (2), Respondent's police officer certificate should be revoked because the Respondent was discharged for cause from the Anchorage Police Department. Count II of the Accusation alleges that the conduct of Respondent, as alleged in the Accusation, demonstrates Respondent's lack of good moral character requiring the revocation of Respondent's police officer certificate pursuant to AS 18.65.240 (a) (2), former 13 AAC 85.010 (a) (4) and former 13 AAC 85.010 (a) (3).

The Respondent filed a Notice of Request for Hearing dated September 5, 1984. On September 13, 1984, the Respondent executed a Notice of Defense contesting both counts of the Accusation.

A pre-hearing conference in this proceeding was held on October 31, 1984. Pursuant to the pre-hearing conference, a hearing in this proceeding was scheduled on February 25, 1985.

Prior to the scheduled hearing, the Respondent filed Motions to Dismiss Count I of the Accusation and to Exclude the Criminal Transcript of Respondent's criminal trial (3ANS 83-5951 Cr.). Both motions were opposed by the State.

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The undersigned hearing officer did not dismiss Count I because it was an ultimate issue in this proceeding, and there were factual issues to be determined. The Motion to Exclude the Criminal Trial Transcript was denied. Both the transcript of Respondent's criminal trial (3ANS 83-5951 Cr.) and the arbitration proceeding, which reversed Respondent's discharge from APD, were admitted into evidence in this proceeding pursuant to a stipulation of the parties.

Prior to the hearing in this matter, both parties submitted pre-hearing briefs. The hearing was held from February 25, 1985 through February 28, 1985. Both parties were present and represented by counsel. In addition to the transcripts of Respondent's arbitration and criminal trial, the State and Respondent presented both documentary and testimonial evidence at the hearing in this matter.

Subsequent to the hearing, post-hearing briefs and proposed findings of fact and conclusions of law were submitted by the parties.

Throughout this proceeding the State has been represented by Assistant Attorney General Gayle A. Horetski and the Respondent by Fredric R. Dichter.

As a result of the evidence produced and the legal positions advanced by the parties and researched by the hearing officer, the undersigned hearing officer hereby makes Findings of Fact and Conclusions of Law as follows, to wit:

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FINDINGS OF FACT

1. Respondent was hired as a police officer by the Anchorge Police Department (APD), on or about April 16, 1979. (Respondent's admission).*

2. On May 7, 1980, the APSC issued Respondent a basic certificate as a police officer in the State of Alaska. (Respondent's Admission).

3. Under the collective bargaining agreement between the Municipality of Anchorage and the Anchorage Police Department Employees' Association (APDEA), an officer who is required to appear in court outside of his regularly scheduled work hours is entitled to claim overtime pay (at differing rates, depending upon the officer's work schedule) in guaranteed minimum blocks of four and eight hours. This is commonly referred to within the APD as "court time." In contrast, officers are compensated for normal overtime work on a hour-for-hour basis, unless the officer has been called in, or called back, within a certain number of hours of his regularly scheduled shift. (S. Ex. 45, at 14-15; Ad. Tr. 36, 129, 201; Cr. Tr. 179, 180-183, 212, 218-220, 223-224, 785-787; Ar. Tr. 18.)

4. During 1983, APD supervisors scrutinized requests for overtime pay, but requests for compensation for "court time" were approved as a matter of course if the blank spaces on the form appeared to be filled in correctly. (Cr. Tr. 192, 205, 212, 387, 402, 410, 577-578.)

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* "Ar. Tr." refers to the transcript of the labor arbitration hearing (Respondent's Exhibit U); "Cr. Tr." refers to the transcript of respondent's criminal trial (APSC Exhibits 38-44); and "Ad. Tr." refers to the transcript of the administrative hearing in this case held in Anchorage, Alaska, on February 25-28, 1985. "S. Ex." refers to a State exhibit; "R. Ex." refers to an exhibit offered by Respondent.

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5. On March 18, 1983, Respondent was called to investigate a hit and run incident which resulted in the death of two pedestrians. Respondent was assigned responsibility for the case by his superiors and conducted most of the police investigation of the incident. (S. Ex. 49 #2)

6. Respondent performed most of the investigation which led to the arrest and indictment of James F. Dunlop. Except for a minor continuation report on May 11, 1983, the Respondent's investigation was essentially concluded on March 27, 1983 and the paperwork documentation was concluded on or about June 11, 1983 (typed on June 12, 1983) (S. Ex. 49 #2) Investigation work conducted subsequent to July 5, 1983 should have been reported on a supplement to the police report. (Cr. Tr. 747-748).

7. On or about April 25, 1982, Respondent submitted a court appearance report form to APD requesting payment for four hours of court time for his presence at a meeting at the District Attorney's Office (DAO) in Anchorge from 1:30 p.m. (1330 hrs.) to 2:45 p.m. (1445 hrs.). This request for four hours of overtime pay was not approved, as a meeting at the DAO is not considered "court time" under the collective bargaining agreement. Respondent was instead paid for one hour and fifty minutes of overtime work, a difference of more than $100. (S. Ex. 12; Cr. Tr. 184-186, 226, 294-295; Ar. Tr. 277, 279-280, 291).

8. On March 18, 1983, the Respondent met with Assistant District Attorney Martha Beckwith at the Anchorage DAO in regard to the dual fatality hit and run case. Beckwith scheduled a meeting with Respondent for 9:00 a.m. (0900 hrs.) on March 28, 1983. (S. Ex. 49 #1; Cr. Tr. 61-62, 65-67, 611-612 and 617).

9. On March 28, 1983, Respondent met with Ms. Beckwith for the second time at the Anchorage DAO from about 1:30 p.m. to 2:30 p.m. (1330 - 1430 hrs.) regarding the case of State of

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Alaska v. James Dunlop, A.P.D. case #83-20928. Respondent filled out and submitted a court appearance report form requesting two hours of overtime pay for this meeting. He was ultimately paid for one hour and fifty minutes for this meeting, as part of an eight-hour block of overtime requested for that day. (S. Exs. 7, 17; Cr. Tr. 67-68, 187-188, 617-618).

10. On March 25, 1983, Ms. Beckwith had a third meeting with the Respondent at 2:00 p.m. (1400 hrs). (S. Ex. 49 #1, Cr. Tr. 68)

11. On March 28, 1983, Respondent met with Ms. Beckwith for the fourth time at 9:00 a.m. (0900 hrs.). (Cr. Tr. 69, 88, 621).

12. On March 29, 1983, Respondent submitted a court appearance report form to APD requesting four hours of court time pay for what he claimed was a grand jury appearance from 8:00 a.m. to 8:45 a.m. (0800 hrs. - 0845 hrs.) in the Dunlop case. Respondent received four hours of overtime pay for this claim. (S. Ex. 5, 18, 49 #1; Cr. Tr. 71, 72, 191, 210).

13. The Dunlop case was not presented to the grand jury until March 30, 1983. Respondent asserts that he met with Ms. Beckwith at the DAO at 8:00 a.m. (0800 hrs.) on the 29th. Ms. Beckwith does not believe she met with Respondent that day, but believes that if she did it was a casual meeting following Respondent's unscheduled appearance in her office. The meeting was not on Ms. Beckwith's calendar. (S. Ex. 49 #1; Cr. Tr. 70-71, 165, 622-623).

14. Respondent met with Ms. Beckwith in her office on March 28, 1983, to discuss the Dunlop case. He knew than that grand jury proceedings in the case were set for March 30, 1983. There was no need for Respondent to meet with Ms. Beckwith again on March 29th. Respondent's asserted reason for the meeting, that

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he needed to know whether to ship the front end of the vehicle in question to the FBI, is not credible. A phone call would be sufficient to deal with this issue. Even if Respondent did meet with Ms. Beckwith, the meeting was initiated by him, it was not scheduled, was not necessary, and was motivated by Respondent's desire to obtain payment for unnecessary and unjustified "overtime." (S. Ex. 48 #1; Cr. Tr. 69, 71, 87-89, 181, 539, 619-621, 738, 740).

15. Respondent wrote "grand jury" on the court appearance report form for March 29, 1983. This information was false and Respondent knew it to be false. (Cr. Tr. 192, 205, 387).

16. On March 29, 1983, Respondent, with the intent to deprive the Municipality of Anchorage, did unlawfully obtain U.S. currency from the Municipality of Anchorage by deception, in an amount in excess of $50.

17. The Grand Jury in Dunlop met on March 30, 1983. Respondent met with Ms. Beckwith and the Grand Jury pursuant to a subpoena and filed a court appearance slip. (S. Exs. 6, 4; Cr. Tr. 69, 650).

18. The Dunlop trial was originally scheduled for June 28, 1983, but was continued to July 5, 1983. (Cr. Tr. 112, 113.)

19. On or about June 30, 1983, Assistant District Attorney Edward F. Peterson, who was originally assigned to the Dunlop case gave notice that he would leave the D.A.'s office effective August 1, 1983. (Cr. Tr. 110)

20. On June 29, 1983, the Dunlop trial, originally scheduled for July 5, 1983, was continued to July 18, 1983 due to a witness problem. On July 5, 1983, the defendant in the Christie case plead guilty and the Respondent was notified by Peterson that the trial would be reset for July 18. (Cr. Tr. 112-113, 161, 633-634, 651).

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21. On or about July 10, 1983, Assistant District Attorney Gail Roy Fraties and the D.A.'s paralegal assistant, John Reinan, were assigned to the Dunlop case. (Cr. Tr. 304, 586).

22. On or about July 15, 1983, Assistant District Attorney Fraties' paralegal assistant, John Reinan, issued subpoenas for the Dunlop case. Assistant District Attorney Peterson was then off the Dunlop case. (Cr. Tr. 115-117.) In a taped interview with an APD internal investigator, Respondent indicated that he discussed the Dunlop and Christie cases with Peterson. (S. Ex. 35 at p. 42). Respondent's statements were deceptive.

23. Respondent filed no supplements or continuation reports to the APD investigation reports subsequent to July 18, 1983. (S. Ex. 49 #2; Cr. Tr. 178).

24. On July 18, 1983, Respondent was informed by Assistant District Attorney Fraties that another trial Trede, Hall and Gorla would take at least six days and that Dunlop would not go to trial until that time. Respondent was not told to stand by. (Cr. Tr. 304-308, 314, 344-346, 358, 590). Respondent was not informed by Peterson to stand by, as Respondent originally asserted. (S. Ex. 35 at p. 42; Cr. Tr. 117).

25. On July 19, 1983, Respondent submitted a court appearance report form to APD requesting eight hours of court time pay for what he reported as a superior court appearance from 9:00 a.m. (0900 hrs.) to 2:30 p.m. (1430 hrs.) in the Dunlop case. Respondent was paid approximately $252 for eight hours of court time at 1 1/2 times his normal hourly pay rate. (S. Ex. 13; Cr. Tr. 203-204, 210).

26. No court proceeding in the Dunlop case was held on July 19th; jury selection in the Dunlop trial did not begin until July 29, 1983. (S. Exs. 10, 49 #3).

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27. Although Respondent did perform some work (such as ordering a large aerial photograph of the accident site) on the Dunlop case on July 19th, he greatly exaggerated the amount of time this work required. Much of this "work" either did not need to be done, or could have been performed during Respondent's normal duty hours. (Cr. Tr. 117, 299-300, 409, 413-414, 673, 779).

28. Contrary to his assertions, Respondent was not instructed to remain available for trial "at any time" during this period. Assistant District Attorney Gail Fraties, to whom the Dunlop case had been assigned for trial, was at that time preparing for a complicated, three-defendant, armed robbery case which was to be tried before the Dunlop case. Additionally, Fraties specifically told Respondent that it was his policy not to tie up an officer by having him sit around and wait for a case to be called. (Cr. Tr. 119-120; 135, 160, 196, 306, 308, 316, 322, 346, 593, 669, 790-791).

29. On or about July 19, 1983, Respondent, with the intent to deprive the Municipality of Anchorage, did unlawfully obtain U.S. currency from the Municipality of Anchorage by deception, in an amount in excess of $50.

30. On July 20, 1983, Respondent submitted a court appearance report form to APD requesting eight hours of court time for what he reported as a superior court appearance from 9:00 a.m. (0900 hrs.) to 2:30 p.m. (1430 hrs.) on the Dunlop case. Respondent was paid approximately $336 for eight hours of court time at double his normal salary rate. (S. Ex. 19; Cr. Tr. 203-204, 210).

31. No court proceeding was held in the Dunlop case on July 20th; in fact, Assistant District Attorney Fraties began another felony trial that day. (S. Exs. 10, 11, 49 #3; Cr. Tr. 314).

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32. Respondent performed no necessary work on the Dunlop case on July 20th. Any "work" which Respondent did on the case either did not need to be done or could have been performed during his regular duty hours. Any time spent was well below the 5 1/2 hours Respondent reported. (Cr. Tr. 149-150; 178, 356, 409, 674-677, 779).

33. On or about July 20, 1983, Respondent, with the intent to deprive the Municipality of Anchorage, did unlawfully obtain U.S. currency from the Municipality of Anchorage by deception, in an amount in excess of $50.

34. On or about July 15, 1984, an Anchorage district court jury found Respondent guilty of theft by deception, in violation of AS 11.40.140(a)(1), for obtaining the court time pay claimed for July 20, 1983. (S. Ex. 4; Cr. Tr. 885-886).

35. On July 21, 1983, Respondent submitted a court appearance report form to APD requesting eight hours of court time pay for what he reported as a superior court appearance from 9:00 a.m. (0900 hrs.) to 4:00 p.m. (1600 hrs.) on the Dunlop case. Respondent was paid approximately $419 for eight hours of court time at 2 1/2 times his normal salary rate. (S. Ex. 20; Cr. Tr. 205, 210).

36. No court proceeding was held in the Dunlop case on July 21st; in fact, the trial attorney was unavailable because he was in trial on another felony case that day. (S. Exs. 10, 11, 49 #3; Cr. Tr. 314).

37. Respondent performed no necessary work on either the Dunlop or Christie cases on July 21st. Any "work" which Respondent did on Dunlop either did not need to be done or could have been performed during his regular duty hours. (Cr. Tr. 117, 149-150, 159, 161, 178, 315-316, 409, 687-689, 747-748, 779).

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38. On or about July 21, 1983, Respondent, with the intent to deprive the Municipality of Anchorage, did unlawfully obtain U.S. currency from the Municipality of Anchorage by deception, in an amount in excess of $50.

39. On or about July 15, 1984, an Anchorage district court jury found Respondent guilty of theft by deception, in violation of AS 11.46.140 (a) (1), for obtaining the court time pay claimed for July 21, 1983. (S. Ex. 4; Cr. Tr. 886).

40. On July 27, 1983, Respondent submitted a court appearance report form to APD requesting eight hours of court time pay for what he reported as a superior court appearance from 10:00 a.m. (1000 hrs) to 4:05 p.m. (1605 hrs) on the Dunlop case. Respondent was paid approximately $336 for eight hours of overtime at double his normal salary rate. (S. Ex. 21; Cr. Tr. 206, 210).

41. No court proceeding was held in the Dunlop case on July 27th; in fact, the assigned trial attorney was in trial on another felony case that day. (S. Exs. 10, 11, 49 #3; Cr. Tr. 76-77, 89, 314).

42. Respondent performed no necessary work on the Dunlop case on July 27th. Any "work" which Respondent did on the case either did not need to be done or could have been performed during his regular duty hours. (Ad. Tr. 238; Cr. Tr. 92, 324, 327, 360, 695, 697, 766-768, 772-774, 779).

43. On or about July 27, 1983, Respondent, with the intent to deprive the Municipality of Anchorage, did unlawfully obtain U.S. currency from the Municipality of Anchorage by deception, in an amount in excess of $50.

44. On or about July 15, 1984, an Anchorage district court jury found Respondent guilty of theft by deception, in violation of AS 11.46.140(a) (1), for obtaining the court time pay claimed for July 27, 1983. (S. Ex. 4; Cr. Tr. 886).

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45. On July 28, 1983, Respondent submitted a court appearance report form to APD requesting eight hours of overtime pay for what he reported as a superior court appearance from 9:00 a.m. (0900 hrs.) to 2:00 p.m. (1400 hrs.) on the Dunlop case. Respondent was paid approximately $419 for eight hours of court time at 2 1/2 times his normal salary rate. (S. Ex. 22; Cr. Tr. 207, 210).

46. No court proceeding was held in the Dunlop case on July 28th; the assigned trial attorney continued to be involved in another felony trial that day. (S. Exs. 10, 11, and 49 #3; Cr. Tr. 77-78, 89, 314).

47. Respondent performed no necessary work on the Dunlop case on July 28th. Any "work" which Respondent did no the case either did not need to be done or could have been performed during his regular duty hours. (Cr. Tr. 688, 697, 699, 774-775, 779).

48. On or about July 28, 1983, Respondent, with the intent to deprive the Municipality of Anchorage, did unlawfully obtain U.S. currency from the Municipality of Anchorage by deception, in an amount in excess of $50.

49. On or about July 15, 1984, an Anchorage district court jury found Respondent guilty of theft by deception, in violation of AS 11.46.140 (a) (1), for obtaining the court time pay claimed for July 28, 1983. (S. Ex. 4; Tr. 886).

50. The trial in State v. Dunlop commenced on July 29, 1983. (S. Ex. 49 #3).

51. On August 2, 1983, Respondent submitted a court appearance report form to APD requesting eight hours of court time pay for what he reported as a superior court appearance from 7:45 a.m. (0745 hrs.) to 1:15 p.m. (1315 hrs.) on the Dunlop case. Respondent was paid approximately $253 for eight hours of

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court time at 1 1/2 times his normal salary rate. (S. Ex. 23; Cr. Tr. 207-208, 210).

52. Although Respondent did testify in the Dunlop trial on August 2, 1983, his testimony was completed by 9:50 a.m. (0950 hrs.) After testifying he was excused. Respondent then remained in the hallway outside the courtroom chatting with other witnesses. At about 11:00 a.m. (1100 hrs.) he went to lunch with Sgt. Brown and Officer Stirling joined them later. Mr. Fraties was in court until 1:30 p.m. (1330 hrs.) that day. I find that, contrary to his assertions, Respondent performed no further work on the Dunlop case after testifying on August 2nd. Fraties and Reinan could recall no further contact with Respondent that day. Respondent was therefore entitled to claim only four hours of court time pay, not eight. (S. Ex. 10; Ad. Tr. 238, 408-409, 412; Cr. Tr. 169-170, 207-208, 316-319, 363, 365, 377-378, 412-413, 426, 707, 710-712, 750-751, 770-771, 794).

53. On or about August 2, 1983, Respondent, with the intent to deprive the Municipality of Anchorage, did unlawfully obtain U.S. currency from the Municipality of Anchorage by deception, in an amount in excess of $50.

54. On August 3, 1983, Respondent submitted a court appearance report form to APD requesting eight hours of court time pay for what he reported as a superior court appearance from 8:30 a.m. (0830 hrs.) to 2:00 p.m. (1400 hrs.) on the Dunlop case. Respondent was paid approximately $336 for eight hours of overtime at double his normal salary rate. (S. Ex. 24; Cr. Tr. 208, 210).

55. Although the Dunlop trial continued on August 3rd, Respondent did not testify. Respondent claims that he waited in the hallway outside the courtroom that day. If he did, his presence was not requested by the prosecutor. The prosecuting

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attorney, and his paralegal assistant, had no idea that Respondent was in the court building that day, or where to find Respondent had further testimony from him been unexpectedly needed. Respondent finally left the courthouse around 2:00 p.m. (1400 hrs.) when, after returning from a visit with the assistant coroner (whose office is located in another building), he discovered that the courtroom door was locked and that all parties had left for the day. (Cr. Tr. 319, 366, 381-382, 384, 594-598, 715-716, 758, 760).

56. There was no legitimate reason for Respondent's presence in the court building in connection with the Dunlop case on August 3, 1983. An APD officer is not entitled to overtime pay for showing up in the courthouse without the request by, or the knowledge of, the assigned prosecuting attorney. (Ad. Tr. 138; Cr. Tr. 181, 225, 400, 540).

57. On or about August 3, 1983, Respondent, with the intent to deprive the Municipality of Anchorge, did unlawfully obtain U.S. currency from the Municipality of Anchorage by deception, in an amount in excess of $50.

58. On or about July 15, 1984, an Anchorage district court jury found Respondent guilty of theft by deception, in violation of AS 11.46.140(a) (1), for obtaining the court time pay claimed for August 3, 1983. (S. Ex. 4; Cr. Tr. 886).

59. On August 4, 1983, Respondent submitted a court appearance report form to APD requesting eight hours of court time pay for what he reported as a superior court appearance from 8:30 a.m. (0830 hrs.) to 2:00 p.m. (1400 hrs.) on the Dunlop case. (The later time on this form was later changed by Respondent to 1300.) Respondent was paid approximately $419 for eight hours of court time at 2 1/2 times his normal salary rate. (S. Ex. 25; Cr. Tr. 208, 210).

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60. Although the trial in the Dunlop case continued on August 4, 1983, Respondent did not testify; his presence in the courthouse was neither requested nor desired by the prosecutor. The prosecuting attorney had no idea that Respondent was supposedly outside the courtroom that day. When Mr. Fraties happened to catch sight of Respondent in the hallway, Respondent indicated he was there on another matter. (Cr. Tr. 319-320, 365, 381, 384, 727, 760; Ar. Tr. 343, 349).

61. Testimony in the Dunlop trial was complete by 9:15 a.m. (0915 hrs.) on August 4, 1983. Closing arguments in the case were held from approximately 11:00 a.m. (1100 hrs.) to 1:00 p.m. (1300 hrs.). (Cr. Tr. 382-383).

62. There was no legitimate reason for Respondent's presence in the court building in connection with the Dunlop case on August 4, 1983. An APD officer is not entitled to claim overtime pay for appearing at the courthouse without request by, or the knowledge of, the assigned prosecuting attorney. (Ad. Tr. 138; Cr. Tr. 181, 225, 400, 540).

63. On or about August 4, 1983, Respondent, with the intent to deprive the Municipality of Anchorage, did unlawfully obtain U.S. currency from the Municipality of Anchorage by deception, in an amount in excess of $50.

64. On or about July 15, 1984, an Anchorage district court jury found Respondent guilty of theft by deception, in violation of AS 11.46.140 (a) (1), for obtaining the court time pay claimed for August 4, 1983. (S. Ex. 4; Cr. Tr. 886-887).

65. Respondent wrote "Superior" on the court appearance report forms he submitted for overtime claims on July 19th, 20th, 21st, 27th, 28th, and August 3 and 4, 1983 because he knew that if he wrote "overtime" or "meeting with the D.A." his activities would have been scrutinized and his claims disallowed. (Cr. Tr. 180-183, 224-225).

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66. On or about August 12, 1983, Respondent was suspended from APD. (R. Ex. T at 17, Ar. Tr. 194).

67. On August 16, 1983, Respondent provided a statement to APD internal investigator Lieutenant Kevin M. O'Leary. This statement was deceptive in regard to Respondent's activities on July 19, 20, 21, 27, 28, 1983 and August 2, 1983. (S. Exs. 13, 22, 23, 30 and 35 at pp. 44-47; Cr. Tr. 77, 92-93, 117, 149, 170, 243, 273, 299, 308, 316, 318, 320, 365-366, 381, 412-413, 426, 587-589, 594-597, 604, 668-670, 672-674, 680-689, 692, 698-700; Ar. Tr. 152-155, 161-162, 164-165, 168-169, 170-172, 177, 179-182, 185, 207-211, 237-238, 240, 248).

As an example, Respondent indicated that he primarily dealt with Assistant D.A. Peterson on July 18, 19 and 20, 1983 during his internal affairs interview. (S. Ex. 35 at pp. 42-43). At the Arbitration, Respondent testified that he knew Peterson was leaving the State at the end of July. (Ar. Tr. 139). At the criminal trial, Respondent testified that he did not know when Peterson was leaving the State (Cr. Tr. 736). Respondent testified that he primarily dealt with Assistant D.A. Fraties on July 18, 19 and 20, 1983. (Cr. Tr. 662-675).

68. On September 20, 1983, a misdemeanor complaint charging Respondent with 10 counts of misdemeanor theft in the third degree for fraudulently obtaining overtime pay, was filed in the Anchorage District Court pursuant to AS 11.46.140. One of these counts was later dismissed by the prosecutor. (S. Ex. 1; Cr. Tr. 18).

69. On September 21, 1983, Chief Porter of the APD placed Respondent on leave without pay status effective September 26, 1983, (Ar. Tr. 16) Respondent was then terminated effective November 8, 1983. (R. Ex. A; Ar. Tr. 18).

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70. At all times relevant to this proceeding there was in effect a collective bargaining agreement between APD and the Anchorage Police Department Employee's Association (APDEA). This Agreement governed the APD employer-employee relationship. Article VII of this Agreement sets forth the contract provisions on hours of work and overtime pay. Article V of said Agreement sets forth the grievance procedure to be followed by the parties. (S. Ex. 45).

71. On December 9, 1983, Respondent filed "grievances" against the APD, alleging that under the terms of the collective bargaining agreement he had been improperly suspended and discharged from employment. A hearing on these grievances was held before a labor arbitrator in Anchorage on April 17, 18 and 20, 1984. Respondent was represented by an attorney. The Municipality of Anchorage was represented by a labor relations representative who is not an attorney. (R. Ex. T at p. 1; Ad. Tr. 54-55, 324; Ar. Tr. 3, 6).

72. The record of the arbitration proceeding shows that the municipal representative began preparation for the hearing only a few days before the hearing. Some of his most important witnesses had not been interviewed ahead of time, and did not have an opportunity to review their notes or prior statements before testifying. Several persons with knowledge of facts important to the case were not presented, including former assistant district attorney Edward Peterson, former APD officer Les Radford, and John Reinan, a paralegal assistant in the Anchorage DAO. In general, the Municipality presented a poor case. (Ar. Tr. 1-2, 217, 306, 312, 334-335, 336, 380, 431).

73. No notice of the arbitration proceedings was provided to the APSC. No APSC representative was present, testified at, or participated in the arbitration hearing. (R. Ex. U).

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74. On May 29, 1984, the arbitrator issued an opinion in which he concluded that Respondent had not been terminated for "just cause" under the contract. The arbitrator ordered that Respondent be reinstated, and reimbursed for lost wages and benefits. (R. Ex. T at p. 26).

75. While Respondent has been regularly paid by the Municipality of Anchorage since the arbitrator's opinion was issued, he has not worked as an APD officer since his suspension in August of 1983. (Ad. Tr. 29, 52-53).

76. In a civil action currently pending in Anchorage Superior Court, the Municipality of Anchorage has moved to vacate the arbitration award. (S. Ex. 51; Ad. Tr. 53, 522-523).

77. On or about July 15, 1984, following a jury trial in the District Court, Third Judicial District in Anchorage, Respondent was found guilty of six counts of theft in the second degeee, in violation of AS 11.46.140(a)(1). Respondent was convicted on Counts III, IV, V, VI, VIII, and IX of the revised complaint. (S. Ex. 4; Cr. Tr. 885-887).

78. Based on the foregoing conviction, the Respondent was sentenced, on or about July 31, 1984, to pay a $6,000 fine and serve six months in jail. The six-month jail term was suspended for one year on condition that Respondent pay $300 restitution and perform 144 hours of community service work. (S. Ex. 4; Cr. Tr. 918-920).

79. Conviction of six counts of misdemeanor theft by deception seriously impairs Respondent's credibility and performance as a police officer. (Ad. Tr. 21, 68, 77-78, 84, 92, 116-117, 125, 146, 199-200, 239-240, 428-429).

80. On or about August 31, 1984, the APSC initiated this proceeding by filing an Accusation against Respondent seeking to revoke his certificate as a police officer in this state.

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81. Pursuant to AS 44.62.390(c), an administrative hearing was held in this proceeding in Anchorage, Alaska on February 25-28, 1985. Respondent attended, and was represented by counsel Fredric Dichter. The APSC was represented by Assistant Attorney General Gayle A. Horetski.

82. Both parties presented numerous witnesses and exhibits at the administrative hearing. By stipulation of the parties, transcripts of the testimony of witnesses at the earlier labor arbitration hearing and criminal trial were admitted as substantive evidence in this proceeding. (Ad. Tr. 185-186.)

CONCLUSIONS OF LAW

1. The Alaska Police Standards Council (APSC) was established to insure that police officers in the State of Alaska meet minimum standards of qualification and training. AS 18.65.130, AS 18.65.140.

2. The APSC is empowered to adopt regulations providing for qualification standards for the initial, and continued, employment of police officers. (AS 18.65.240(a)).

3. The APSC is empowered to certificate police officers who meet APSC approved qualification standards. AS 18.65.240(b).

4. The APSC is empowered to revoke the certificate of police officers who do not meet the standards of qualifications established by the council. AS 18.65.240(c).

5. Pursuant to its statutory authority, APSC has adopted regulations establishing and requiring minimum standards of citizenship, age, education and moral character for Alaskan police officers. (AS 18.65.220; former 13 AAC 85.010, former 13 AAC 85.100).

6. Pursuant to its statutory authority, APSC has adopted regulations providing for the revocation of the certificate of police officers who do not meet adopted APSC regulatory standards. (AS 18.65.220(c); former 13 AAC 85.100.)

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7. The collective bargaining agreement between APD and APDEA gives an arbitrator, selected by mutual agreement of the parties, binding authority to interpret the contract.(S. Ex. 45).

8. The arbitrator's decision concerning the discharge of an employee by APD is binding on the parties to the arbitration proceeding. (S. Ex. 45).

9. This APSC proceeding is not barred by the doctrines of res judicata or collateral estoppel because of the earlier arbitration decision. Under either doctrine, the judgment on the merits in the first action bars the second action only if both actions involve the same parties or their privies. Smith v. U.S., 369 F.2d 49 (8th Cir. 1966); Parklane Hosiery, Inc. v. Shore, 439 U.S. 322, 326 n.5, 99 S. Ct. 645, 649 n. 5 (1979); Pennington V. Snow, 471 P.2d 370, 374 (Ak 1970).

In Pennington, the court stated:

> Accordingly, before privity may be found to exist, the nonparty must have notice and an opportunity to be heard; the procedure must insure the protection of the rights and interest of the nonparty, and he must, in fact, be adequately represented by the parties. The extent to which the interests of the nonparty are identical to those of the parties of the action provides a gauge for the determination of the adequacy of representation. Id at p. 375-376.

The collective bargaining agreement between APD and APDEA governed the arbitration proceeding, and the rights and responsibilities of the APD, APDEA and the Respondent. The APSC (Council) derives its authority, and these APSC proceedings are governed by AS 18.65.220 and AS 18.65.240. Neither the APSC, nor any other state agency, was a party to the arbitration proceeding. The fact that some state employees may have been witnesses, as asserted by Respondent, does not make the State or its agencies a party in interest.

Nothing in the record demonstrates that the APSC had notice of, or an opportunity to participate in, the arbitration

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proceeding. APD had neither the responsibility nor authority to discharge the APSC's responsibilities under AS 18.65.240.

The APSC was not a party, nor in privity to a party, in the arbitration proceeding and this proceeding cannot, consequently, be barred by the doctrines of res judicata or collateral estoppel.

Further, for res judicata to apply, the former proceeding must involve the same cause of actions as the proceeding sought to be barred. Parklane, supra at p. 326; Pennington, supra at p. 374. If collateral estoppel is to apply, the former proceeding must involve the same issues as the proceeding sought to be estopped. Ibid.

The course of action and issues in the arbitration proceeding are generated from the APD-APDEA collective bargaining agreement. The issues in the instant APSC proceeding are derived from AS 18.65.240. The former proceeding involved a labor-management dispute. This proceeding involves the enforcement of state licensing standards.

10. Respondent has not been discharged or resigned under threat of discharge for cause. Count I of the Accusation in this matter alleges that Respondent's police officer's certificate should be revoked because the Respondent was dicharged for cause from the Anchorage Police Department. AS 18.65.240 provides in relevant part:

> (a) No person may be appointed as a police officer, except on a probationary basis, unless the person (1) has satisfactorily completed a basic program of police training approved by the council, and (2) possesses other qualifications the council has established for the employment of police officers, including but not limited to minimum age, education, phusical and mental standards, citizenship, moral character, and experience. The council shall prescribe the means of presenting evidence of fulfillment of these requirements.

* * *

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> (c) The council may deny or revoke the certificate of a police officer who does not meet the standards adopted under (a) (2) of this section.

Pursuant to AS 18.65.240(c) the council adopted former 13 AAC 85.100(a)(2) which provides for the revocation of a police officer certificate for an officer who is "discharged for cause" from employment as a police officer.

It is undisputed that Respondent was an employee of the Anchorage Police Department. Consequently, a revocation of Respondent's certificate requires that Respondent was discharged for cause by the APD. The APSC is not in an employer-employee relationship with Respondent. Consequently, the Respondent's discharge for cause by APD is a condition precedent to former 13 AAC 85.100(a)(2) becoming operative. The regulation is straightforward and should not be interpreted to include APSC in the employer-employee relationship. Likewise, the regulation does not say the Respondent has committed an act which "constitutes grounds" for discharge. The regulation requires an actual discharge by an employer.

The primary rule of statutory construction is to ascertain and give effect to the plain meaning of the language used. Shields v. U.S., 698 F.2d 987, cert. den. 104 S. Ct. 73 [C.A. Ak. 1983). Unless words have acquired a peculiar meaning, by virtue of statutory definition or judicial construction, they are to be construed in accordance with their common usage. Wilson v. Municipality of Anchorage, 669 P.2d 569 (Ak 1983).

It is undisputed that Respondent was discharged for cause by APD. The discharge, however, was submitted to binding arbitration, pursuant to Respondent's grievance, and was subsequently set aside by the arbitrator. The arbitrator reinstated Respondent, who was reimbursed for lost wages and benefits, and is currently receiving his regular salary from APD.

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Unless the arbitrator's decision is set aside there is no "discharge for cause" upon which to base a revocation of Respondent's certificate pursuant to former 13 AAC 85.100(a)(2).

An arbitrator's award should only be set aside where there has been gross negligence, fraud, corruption, gross error or misbehavior on the part of the arbitrator. Nizinski v. Golden Valley Electric Association, Inc., 509 P.2d 280, 283 (Ak 1973) Racine v. State Department of Transportation and Public Facilities, 663 P.2d 555, 557 (Ak 1983).

Under the "gross error" standard, only those mistakes which are both obvious and significant justify interference with an arbitrator's award. City of Fairbanks v. Rice, 628 P.2d 565, 567 (Ak 1981), Racine, supra at p. 557.

The arbitrator's decision was necessarily based on what was presented to him. The record of the arbitration decision reveals no gross negligence, fraud, corruption, misbehavor or gross error on the part of the arbitrator.

Consequently, in light of the arbitrator's decision setting aside APD's discharge, there is no basis for the revocation of Respondent's certificate pursuant to former 13 AAC 85.100(a)(2). There has been no discharge and because there is no discharge the question of whether the discharge was "for cause" is irrelevant to this issue.

11. Respondent's conviction of six counts of theft by deception establishes Respondent's lack of "good moral character", as defined in 13 AAC 85.150(8), requiring the revocation of Respondent's police officer certificate pursuant to AS 18.65.240(a)(2), former 13 AAC 85.010(a)(4), and former 13 AAC 85.100(a)(3).

Respondent was represented by counsel and testified on his own behalf at his criminal trial. He was convicted of six

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counts of theft by deception by a unanimous jury convinced beyond a reasonable doubt. An act of theft is commonly held to be an act involving moral turpitude. 52A C.J.S. Larceny §601(b) (1968), Kenai Peninsula Borough Board of Education v. Brown 691 P.2d 1034, 1039 (Ak 1984). The facts necessarily determined by the jury in the criminal case are conclusive and binding in this administrative action. Thus, under the doctrine of collateral estoppel, Respondent is estopped from denying in this action that he intentionally used deception to obtain property (court time pay) to which he knew he was not entitled. Id at pp. 1039-1040.

Respondent's conviction of misdemeanor theft by deception automatically demonstrates a lack of "good moral character" under 13 AAC 85.150(8)(A)(B) and (C).

Even under the test utilized by the dissent in Kenai Peninsula School Board v. Brown, supra the record in this proceeding, which includes the transcripts of both the criminal and arbitration proceedings, clearly demonstrates a nexus between the Respondent's conviction and his fitness to continue as a police officer.

Convictions for theft by deception are crimes of "dishonesty or false statement" under Rule 609, Alaska Rules of Evidence. Under Evidence Rule 609(b), evidence of respondent's convictions for six counts of theft may be introduced to impeach his credibility whenever he testifies in court for at least the next five years. This evidence is admissible even if an appeal is pending. Evidence Rule 609(f). (Ad. Tr. 85, 240.)

A police officer's testimony is often crucial evidence in a case. (Ad. Tr. 84, 146.) Occasionally, his testimony may be the only evidence on a particular point. (Ad. Tr. 21, 149.) The knowledge that an officer had been convicted of not one, but several, crimes of dishonesty (committed in direct connection

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with his official duties) would have a serious effect upon a jury's evaluation of that officer's credibility. (Ad. Tr. 21, 68, 77-78, 116-117, 125, 199-200, 239-340, 428-429). To a certain extent, a police officer's conviction for theft could have a detrimental effect on the credibility of other police witnesses in the case. (Ad. Tr. 68, 429). It is also a factor which would be weighed by a district attorney when deciding whether to accept a case for prosecution. (Ad. Tr. 92). Thus, the fact that Respondent has been convicted for six counts of theft would seriously impair his ability to effectively perform his duties as a police officer.

The people of the State of Alaska expect, and have a right to expect, that police officers in this state will be honest and trustworthy. Public faith in the integrity of the criminal justice system would be undermined by the knowledge that a person convicted of crimes of dishonesty committed in the course of official duties could continue to serve as police officer. (Ad. Tr. 22, 70, 85, 87, 89-90, 114-115, 118, 144).

12. The record in this APSC proceeding independently demonstrates, as set forth in the Findings of Fact, infra, that Respondent lacks good moral character as defined in 13 AAC 85.150(8). The record in this APSC proceeding, which includes the transcript of both the arbitration proceeding and the criminal trial, establishes that Respondent defrauded the Municipality of Anchorage of significant amounts of money through misrepresentation of the hours, location of, and amount of work of the Respondent. His conduct was both deceptive and fraudulent and demonstrates a lack of "good moral character" pursuant to 13 AAC 85.150(8) (D) and (E).

Respondent's conduct adversely reflects upon his fitness and ability to be a police officer. His continued employment as a

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police officer would be detrimental to the reputation, integrity and discipline of the Anchorage Police Department and police officers throughout the State of Alaska. (Ad. Tr. 19, 22, 78, 80, 114, 118-119, 147, 198, 481-482).

13. Respondent's criminal conviction and the record in this APSC proceeding demonstrates that Respondent lacks "good moral character" under a common law definition of "good moral character." Respondent argues that, because the acts committed occurred prior to APSC's adoption of a definition of "good moral character" through 13 AAC 85.150(8), the definition cannot be applied retroactively to the Respondent. Respondent contends that this is an illegal ex post facto application. Citing, Dobbert v. Florida, 432 U.S. 282, 292, 97 S. Ct. 2290 (1977), reh. den. 98 434 U.S. 882, S. Ct. 246, 54 L.Ed.2d 166 (1977), Pacific Molasses co. v. FTC, 356 F.2d 386 (5th Cir. 1966).

The State asserts that the promulgation of the definition is not a new requirement but merely a manifestation of existing law. Citing, Security Life & Acc. Co. v. Heckers, 495 P.2d 225 (Colo. 1972), Atwood v. Regional School District No. 15, 363 A.2d 1038, 1043 (Conn. 1975) and State v. Sundberg, 611 P.2d 44, 49, 53 (Ak 1980) (among others).

None of the cases cited by the parties to this proceeding are directly on point, as they do not involve the addition of a definition, previously undefined, to an existing law which includes the previously undefined phrase.

However, the principle, set forth in Atwood, supra and Sundberg, supra, that retroactivity will be allowed when the new enactment clarifies or construes the meaning of a prior enactment, appears to be the better analysis. For a law to be considered ex post facto it must be more onerous than the existing law. Dobbert, supra, at 432 U.S. 294.

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However, this analysis is largely irrelevant as the record demonstrates Respondent's lack of "good moral character" under a common law definition of the term.

Courts have had little difficulty in construing the term "good moral character."

> The Legislature has not defined good moral character but, this term is generally well understood by the courts, even though the term itself is unquestionably ambiguous and may be defined in many different ways. However, no great difficulty is encountered as to the true meaning of the term when applied to the professions of law or medicine. It has been said that the term may be broadly defined to include the elements of simple honesty, fairness, respect for the rights of others and for the laws of State and Nation. Konigsberg v. State Bar of California, 353 U.S. 252, 77 S. Ct. 722, 1 L.Ed.2d 810 (1957); Campbell v. Board of Medical Examiners, 518 P.2d 1042, 1046-1047 (Or. App. 1974); State v. Louisiana State Board of Medical Examiners, 115 So.2d 833, 839 (1959); Florida Board of Bar Examiners, Re G.W.L, 364 So.2d 454, 458 (Fla. 1978).

Likewise, an intentional and willful criminal act indicates an unfitness to be entrusted with administration of the law, and it is generally held that the commission of any criminal act involving moral turpitude establishes a prima facie unfitness for the practice of law. 7 Am Jur 2d, Attorneys at Law §50; Annotation, Discipline of Attorney - Res Judicata, 76 ALR 3rd 1028, 1031 (1975).

Good moral character is as essential to the performance of a police officer's duties as it is to the duties of doctors or lawyers. Based either on the conviction of six counts of misdemeanor theft by conviction, or independently on the findings in the instant APSC proceeding, Respondent's deceptive and fraudulent acts and misrepresentations demonstrate a lack of simple honesty, fairness, respect for the rights of others and for the laws of the state and nation.

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As set forth previously, there is a "nexus", or connection, between Respondent's commision of the illegal, deceptive and fraudulent acts of misrepresentation, as set forth in the Findings of Fact, infra and his fitness to perform his duties as a police officer.

14. This proceeding is not barred by pending appellate review of Respondent's conviction. Most courts that have considered the question appear to take the view that disciplinary proceedings against an attorney, based upon a statute or court rule requiring suspension or disbarment for convictions of a crime, may be initiated prior to exhaustion of the right of appellate review of the conviction. Annotation, Discipline of Attorney Pending Appeal, 76 AL R 3d 1061 at p. 1065 (1975).

This policy parallels the view of most courts that acquittal in a criminal proceeding does not bar disciplinary action against attorneys. The underlying reason is that the purpose of the criminal proceeding is to punish a wrongdoer, while the purpose of a disciplinary proceeding is to protect the legal profession and the public. Annotation, Discipline of Attorneys - Res Judicata, 76 ALR 3d 1028, 1033 (1975).

The rationale utilized by courts in the area of attorney discipline applies equally well in the instant case. Here the APSC is concerned with protecting the public and the law enforcement profession. Regardless of the outcome of Respondent's criminal trial, the record in this proceeding fully, and independently, warrants the protection of the public and the law enforcement profession by the revocation of Respondent's police officer certificate.

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CONCLUSION - RECOMMENDATION

The undersigned hearing officer, having made the foregoing Findings of Fact and Conclusions of Law hereby concludes and recommends as follows:

I. I cannot conclude, based on either clear and convincing evidence, or preponderance of the evidence, that Respondent was discharged for cause from the Anchorage Police Department. I therefore recommend that Count I of the Accusation be dismissed.

II. I conclude, based on clear and convincing evidence, that Respondent does not possess the "good moral character" required of a police officer in the State of Alaska under AS 18.65.240(a)(2) and former 13 AAC 85.010 (a)(4). I therefore recommend that, pursuant to AS 18.65.240(c) and former 13 AAC 85.100(a)(3), the Alaska Police Standards Council revoke Respondent's police officer certificate.

Respectfully submitted this 24th day of May, 1985.

Frank Flavin
Hearing Officer

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