

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

In the Matter of:)

DEAN WHISLER)

OAH No. 13-0473-POC)

Agency File No. APSC 2012-22)

NOTICE TRANSMITTING FINAL DECISION

Attached is the Alaska Police Standards Council decision in this matter, which was adopted on December 3rd, 2013. Under AS 44.62.520, the board's decision becomes effective 30 days after the attached decision is mailed or otherwise delivered to you.

A party may request reconsideration of the decision by filing a petition under AS 44.62.540 within 15 days after delivery or mailing of the decision. Send the petition requesting reconsideration to the following address:

Office of Administrative Hearings

P.O. Box 110231

Juneau, AK 99811-0231

At the same time, send a copy of the petition to the opposing party's legal counsel, or to the opposing party if not represented by counsel.

Judicial review of the council's decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the decision is mailed or otherwise distributed.

DATED this 17th day of December, 2013.

By: _____



Neil Roberts

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Police Standards Council

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

In the Matter of)

DEAN WHISLER)
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DECISION

I. Introduction

While Dean Whisler was serving as a correctional officer at Palmer Correctional Center, his son was arrested for—and eventually convicted of—several counts of sexual assault. Mr. Whisler used the Department of Corrections’ confidential computer database to look up information regarding his son. Mr. Whisler also looked up information about his son’s victims. When the department investigated the matter, Mr. Whisler provided explanations for his conduct that were not plausible. The department dismissed Mr. Whisler from his position as a correctional officer on April 9, 2012.

After taking the actions that led to his dismissal, Mr. Whisler could no longer serve effectively as a correctional officer because the department could not trust or rely upon him. His actions, especially his action of accessing confidential information regarding the victims of his son’s sexual assaults, were detrimental to the reputation and integrity of the department. His actions would cause a reasonable person to have substantial doubts about his honesty, fairness, respect for the rights of others, and respect for the law. For these reasons, Mr. Whisler’s correctional officer’s certificate should be revoked.

II. Facts

After serving 23 years in the Coast Guard, Dean Whisler moved to Alaska in the early 2000s.¹ He was hired as a correctional officer by the Alaska Department of Corrections in July 2006.² He completed the 252-hour course at the Basic Correctional Officer Academy, and in September 2007, the Alaska Police Standards Council issued him a correctional officer

¹ D. Whisler testimony.

² D. Whisler testimony.

certificate.³ He was employed by the Palmer Correctional Center as a Correctional Officer I in July 2006 and promoted to a Correctional Officer II in September 2007.⁴

Many indications show that Mr. Whisler had the ability to be a very good correctional officer. Through 2010, Mr. Whisler generally scored as high acceptable or outstanding on his performance evaluations.⁵ The record contains a letter of appreciation that Mr. Whisler received in 2008 for his handling of a sudden series of incidents, and an email he received from his superior officer in 2010 praising him for his “initiative, dedication, and hard work.”⁶

The events that form the basis for this case began on January 24, 2009, when Mr. Whisler’s son, Zebulon Whisler, was arrested for sexual assault.⁷ After further investigation, additional charges were filed against Zebulon, and he was eventually charged with several counts of sexual assault, involving six different victims. Zebulon was incarcerated at the Anchorage Correctional Center.

At the hearing, Mr. Whisler explained that Zebulon has a rare condition, known as Klinefelter’s syndrome, which affects his ability to understand social norms and can lead to irrational fixations.⁸ Mr. Whisler admitted at the hearing that he told the Anchorage Daily News that the state’s case against his son was “bunk.”⁹ He also admitted saying that the victims were part of a group of friends who plotted to get Zebulon in trouble, and that they went out with him to set him up.¹⁰ These statements were reported in the press.¹¹

On August 18, 2011, Zebulon was convicted of 12 counts of sexual assault involving five different victims.¹² On August 24, 2011, Probation Officer Tricia Yonker, an employee of the

³ Admin. Rec. 27; Unnumbered Whisler Exhibit. Mr. Whisler had attended the Alaska State Trooper Academy in 2004, but he elected not to pursue a career as a state trooper. Admin. Rec. 279; Whisler testimony.

⁴ Whisler Exhibit 1. His 2012 evaluation rated him as low to mid acceptable. *Id.*

⁵ *Id.*

⁶ Whisler Exhibits 2; 3. Not all of Mr. Whisler’s employment records are positive. During 2009, Mr. Whisler was twice suspended for breaking the rules regarding undue familiarity with an inmate or former inmate. Admin. Rec. at 184. Mr. Whisler admitted that he was in the wrong regarding the June 25, 2009, suspension, involving having a former inmate who was on parole paint his motorcycle. He strongly denied that he did anything wrong regarding the incident that led to the July 1, 2009, suspension, which involved an inmate doing legal research on his son’s case. He was also suspended in 2011 for bringing prohibited items, including his cell phone and prescription medications, into the correctional center. Admin. Rec. at 186. Mr. Whisler did not dispute the facts underlying this suspension, but he did argue that it showed a vendetta against him.

⁷ Ingalls-Adkins testimony; Admin. Rec. 29.

⁸ D. Whisler testimony.

⁹ *Id.*; Admin. Rec. at 272.

¹⁰ *Id.*

¹¹ Admin. Rec. at 272.

¹² Yonker testimony; Alaska Court System Records; *available at* http://www.courtrecords.alaska.gov/eservices/?x=eXZK0RzP0AlasM5o6m*o dkGP4Q8kFOqkMcjN0Lop0eyUO3ee

Department of Corrections, was assigned the task of preparing a presentencing report on Zebulon. In preparing the presentencing report, Ms. Yonker notified and interviewed Zebulon's victims.¹³

Ms. Yonker testified that the department has a duty to contact victims about developments in a case. For example, in addition to seeking victim input on reports, the department will contact victims to alert them about transfers, parole hearings, and possible release dates of the offender.¹⁴ These notifications go to all victims, not just those for whom there was a conviction.¹⁵ Because of the need to contact victims, victim names, addresses, and telephone numbers are included in the department's confidential database, called the Alaska Corrections Offender Management Systems, frequently referred to by the acronym "ACOMS."¹⁶ Each inmate has his or her own ACOMS page, which is actually a series of pages accessible through a confidential interface on the internet.¹⁷ In addition to victim information, the ACOMS pages contain many different fields with many different types of information.

On January 19, 2012, Ms. Yonker received a letter from Zebulon, in which Zebulon complained about the information that was listed on his ACOMS page.¹⁸ He noted that the ACOMS victims pages for him listed seven victims.¹⁹ Yet, in his view, only five names should have been listed because he was found not guilty for one victim, and one victim was listed twice, once with her maiden name, and second time with her married name.²⁰

Ms. Yonker was shocked that an offender would have access to ACOMS and to victim names.²¹ She attempted to bring the fact that an inmate had possession of ACOMS information to the attention of the deputy commissioner of the department, but she did not hear anything further about the matter until this hearing.²²

wpRy8ANtekTAWHNLdeoQ4yZbwP4BfOba8nuFIQ. Zebulon was not convicted on the charges involving the sixth victim.

¹³ Yonker testimony.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* Names and addresses of victims are not public information, and are not included in the indictment or other public documents. AS 12.61.

¹⁷ Rosen testimony.

¹⁸ Admin. Rec. at 33.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Yonker testimony.

²² *Id.*

How Zebulon obtained the ACOMS printout remains unknown. At the hearing, Mr. Whisler testified that he did not give the ACOMS printout to Zebulon.²³ Zebulon testified that he did not receive the document from his father.²⁴ He testified it was given to him by an Anchorage Correctional Officer named Sylvester Toole.²⁵ Yet, the Executive Director proved that Sylvester Toole left state service on February 25, 2010.²⁶ Therefore, Zebulon was not telling the truth when he named Mr. Toole as his source for the ACOMS printout in his possession, which contains dates showing that it was modified as late as December 13, 2011.²⁷

Both Mr. Whisler and Zebulon testified that when Zebulon's parents came to visit Zebulon in January 2012, Zebulon held the ACOMS printout up to the glass for his parents to see.²⁸ Zebulon complained to his parents that ACOMS was inaccurate because it reflected seven victims instead of five.²⁹ Shortly after this meeting, Zebulon put the ACOMS printout—along with other items of excess property—in a packet for his parents to pick up. Mr. Whisler picked up the packet from the Anchorage Correctional Center in February.³⁰

On the morning of March 4, 2012, while at work at Palmer Correctional Center, Mr. Whisler accessed ACOMS from a computer located in the visitor's area, where he was assigned to work that morning.³¹ Each time a user accesses ACOMS, ACOMS automatically generates a user access log, which remains on the department's server for one year.³² Although Mr. Whisler was on ACOMS for only 30 minutes on March 4, the log generated by this access is 57 pages long, and would be difficult or impossible for someone without training to understand.³³ Phillip Rosen, a Network team supervisor, however, testified at the hearing, and he explained how to read the log. Mr. Whisler first accessed ACOMS on March 4 at 10:38:17 a.m., and he went directly to the offender search page and accessed Zebulon's offender page.³⁴ At 10:38:22, after the offender page loaded, Mr. Whisler accessed a page called "offender victim access list" by

²³ D. Whisler testimony. Probation Officer Amber Ingalls-Adkins, who received a request from Zebulon similar to the one he made to Ms. Yonker, reported that Zebulon told her he received it from his father. Admin. Rec. at 29; Ingalls-Adkins testimony.

²⁴ Z. Whisler testimony.

²⁵ *Id.*

²⁶ Phillips testimony. Dana Phillips is a human resource consultant for the Department of Corrections.

²⁷ Admin. Rec. at 111 (under seal).

²⁸ D. Whisler testimony; Z. Whisler testimony.

²⁹ *Id.*

³⁰ D. Whisler testimony; Recording of March 21, 2012, meeting.

³¹ D. Whisler testimony.

³² Rosen testimony.

³³ Admin. Rec. at 125-82.

³⁴ Rosen testimony.

clicking on a link from a list of approximately 40 different menu items.³⁵ Accessing this link gave Mr. Whisler a list of Zebulon's victims. The list showed six victims, including the one for whom Zebulon was acquitted, and including one victim twice (under different last names), so that seven victims were listed in all.³⁶

After accessing the victim list, Mr. Whisler clicked on a victim name, which gave him access to the particulars about the victim, including her address and telephone number. About sixteen seconds later, Mr. Whisler went back to the list page and clicked on the next victim, and so on, until, after about eight minutes, he had viewed the particulars for each victim. He then went back and viewed two victims a second time. He then clicked on several other links before logging off at 11:08 a.m.³⁷

Eight days after Mr. Whisler had accessed ACOMS, on March 12, 2012, Ms. Ingalls-Adkins, a probation officer at the Anchorage Correctional Center, received a "Request for Interview" slip from Zebulon, asking her to look into the list of victim names on ACOMS.³⁸ Zebulon testified that he wrote this letter on March 12 because he knew that the issue had not been taken care of.³⁹ When asked how he knew that the issue had not been resolved, he said that a different correctional officer—not Sylvester Toole and not Mr. Whisler—looked up the information for him.⁴⁰ He testified that he did not retain a copy of the ACOMS printout from this episode, and he did not remember the correctional officer's name.⁴¹ Ms. Ingall-Adkins reported the incident, and was asked to further contact Zebulon to discover his source for the ACOMS information, which she did.⁴²

Although two probation officers had reported that Zebulon had the ACOMS information, no significant action was taken regarding this breach of security until a third incident occurred. This incident was related to Zebulon's transfers between the Anchorage Correctional Center and the Mat-Su Pretrial Facility. These transfers occurred because Zebulon was housed in Anchorage, but his court appearances were in Palmer. Both Mr. Whisler and his wife were upset

³⁵ Rosen testimony; Admin. Rec. at 129; Brandenburg testimony. Bryan Brandenburg is the Director of Institutions for the department

³⁶ Rosen testimony.

³⁷ Rosen testimony; Admin. Rec. at 125-82.

³⁸ Ingalls-Adkins testimony.

³⁹ Z. Whisler testimony.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Ingalls-Adkins testimony.

and stressed by Zebulon's frequent transfers, and they complained to Steve Brunger, the Superintendent at the Mat-Su Pretrial Facility.⁴³ Superintendent Brunger responded in an email on February 28, 2012, that the reason Zebulon could not be housed at the Mat-Su facility was because of a "separatee" issue.⁴⁴

"Separatee" is a term of art for correctional facilities. A separatee for an inmate is someone who must be kept apart from the inmate. The separatee might be another inmate or a member of the staff at a facility, and the separatee could be a victim, or a relative of a victim, of the inmate, or might be testifying against the inmate, or some other reason might exist that could create a conflict or a risk of harm. Separatees for a particular inmate will usually be identified on the inmate's ACOMS file, on a page labeled "cautions." Superintendent Brunger testified, however, that separatees are not always noted on ACOMS.⁴⁵

Superintendent Brunger did not identify the name of Zebulon's separatee at Mat-Su Pretrial in his email to the Whislens. He testified at the hearing, however, that an uncle of a victim worked at Mat-Su Pretrial. That would constitute a separatee, even though he was not identified as separatee on ACOMS.

After receiving Superintendent Brunger's February 28 email, the Whislens responded by email on February 29 that they did not believe the separatee issue was genuine.⁴⁶ In support of their view that the separatee issue was a sham, they told Superintendent Brunger that "[t]here is no separatee listed on ACOMS for [Zebulon]."⁴⁷ Superintendent Brunger forwarded the email to Tomi Anderson, the Superintendent at the Palmer Correctional Center.⁴⁸ After seeing that the Whislens referenced their son's ACOMS page in support of their personal complaint involving their son, Superintendent Anderson became concerned that an employee had accessed ACOMS for personal use.⁴⁹ Superintendent Anderson had her human resources staff investigate the matter.⁵⁰ Through this investigation, the department discovered that Mr. Whisler had been on

⁴³ Admin. Rec. at 28.
⁴⁴ Brunger testimony; Admin. Rec. at 28.
⁴⁵ Brunger testimony.
⁴⁶ Brunger testimony; Admin. Rec. at 28.
⁴⁷ *Id.*
⁴⁸ Anderson testimony.
⁴⁹ *Id.*
⁵⁰ *Id.*

ACOMS on March 4, 2012, and that he had used ACOMS to look up information about his son.⁵¹

A meeting on the issue was held on March 21, 2012, attended by Superintendent Anderson and her staff, and Mr. Whisler, accompanied by a representative from the Alaska Correctional Officers Association. At the start of the meeting, Mr. Whisler acknowledged he understood that he was expected to answer all questions honestly, and that failure to do so would be grounds for discipline, including dismissal.⁵² Mr. Whisler provided the following explanations regarding the February 29 email and his March 4 access of ACOMS:

- his wife had sent the email to Superintendent Brunger;
- he and his wife had been given the ACOMS information by their son;
- he accessed ACOMS on March 4 from work in order to verify his wife's accusation that Zebulon had no separatee at Mat-Su Pretrial;
- verifying his wife's claim was a valid business purpose because he did not want to make a false claim against a superintendent;
- he had accessed ACOMS for personal use on about 10-15 other occasions to check on his son's location and account balances;
- when he accessed ACOMS for personal use, he did that from home.⁵³

After further analyzing the March 4 computer records, the department discovered that Mr. Whisler had accessed victim information on ACOMS on March 4—something the department had not realized at the time of the March 21, 2012, meeting.⁵⁴ A second interview was scheduled for March 30, 2012.

At the March 30 meeting, Mr. Whisler expanded on his explanation for accessing Zebulon's ACOMS pages.⁵⁵ He explained that he actually had a two-fold purpose—one, as he said earlier, was to make sure he and his wife were not falsely calling Superintendent Brunger a liar regarding the existence of the separatee at Mat-Su Pretrial. Second, if Zebulon had a separatee at Mat-Su Pretrial that gave rise to a danger, Mr. Whisler needed to know who that person was, so as to be able to protect himself and his fellow officers.⁵⁶

⁵¹ Admin. Rec. 41; Johnson testimony.

⁵² Recording of March 21, 2012, meeting.

⁵³ *Id.*

⁵⁴ Phillips testimony.

⁵⁵ Recording of March 21, 2012, meeting.

⁵⁶ *Id.*

When asked about his accessing victim records, Mr. Whisler explained that he went to those pages because he just happened to see that field on the screen.⁵⁷ When he saw that there were seven victims, when only six had been identified earlier, he decided to scan through it to see if the seventh person was someone he needed to be worried about. When asked what business reason he had for accessing victim information, he replied, “strictly, as I said, for officer safety.”⁵⁸ Mr. Whisler acknowledged that Zebulon’s sentencing was scheduled to occur in late March 2012, but denied that his accessing of Zebulon’s ACOMS page was to obtain information useful in sentencing.⁵⁹

Shortly after this meeting, the department made the decision to terminate Mr. Whisler.⁶⁰ He was sent a pre-termination memorandum on April 3, 2012, asking if he wanted to exercise his right to a pre-termination meeting.⁶¹ On April 4, 2012, Mr. Whisler submitted a written memorandum protesting his termination, which he read into the record at the pre-imposition meeting later that day.⁶² On April 9, 2012, he was sent a letter terminating him from his position with the department for his action of accessing his son’s ACOMS page for personal reasons.⁶³

As required under regulation, the information on Mr. Whisler’s termination was reported to the Council. Following an investigation, on March 20, 2013, the Executive Director issued an accusation against Mr. Whisler seeking revocation of his correctional officer’s certificate.⁶⁴

A hearing on the charges in the accusation was held in Anchorage on August 27-28, 2013. The Executive Director was represented by Assistant Attorney General Leonard Linton, Jr., and Mr. Whisler represented himself. Following the hearing, the record was held open until September 11, 2013, and both parties submitted post-hearing briefs on the issue of statutory construction.

III. Discussion

A. The Accusation

The accusation alleges that Mr. Whisler accessed his son’s ACOMS account on March 4, 2012, for personal use and to look up victim information, and that he admitted to accessing it on

⁵⁷

Id.

⁵⁸

Id.

⁵⁹

Id.

⁶⁰

Admin. Rec. at 58.

⁶¹

Id.

⁶²

Phillips testimony.

⁶³

Admin. Rec. at 25-27.

⁶⁴

Admin. Rec. at 3-6.

other occasions.⁶⁵ The accusation also cites Mr. Whisler's participation in the two investigatory hearings that took place on March 21, 2012, and March 30, 2012, and that he was terminated from his position as a correctional officer on or about May 31, 2012.⁶⁶ No other acts or omissions by Mr. Whisler are alleged in the accusation as the basis for revocation, and the Executive Director did not amend the accusation, so no other acts or omissions will be considered as the basis for this revocation action.⁶⁷

The accusation is divided into three counts, each of which charges that Mr. Whisler violated a Council regulation. Count I alleges that Mr. Whisler was discharged for reasons that affect his ability to do his job, and that were detrimental to the department's reputation and integrity, in violation of 13 AAC 85.270(a)(2). If a violation of this regulation is proved, the Council may exercise its discretion to revoke a certificate.

Count II alleges that Mr. Whisler's actions demonstrate that he does not meet the minimum standards for a certified correctional officer established under 13 AAC 85.210(a)(3), which requires that a correctional officer be of good moral character. It charges that this establishes a violation of 13 AAC 85.270(a)(3), which also provides grounds for the Council to exercise its discretion to revoke a certificate. Count III alleges that Mr. Whisler was discharged for reasons that would raise substantial doubt about his honesty, fairness, respect for the rights of others, and respect for the law, and that the reasons for his discharge were detrimental to the department's integrity. If proven, the allegations in Count III would establish a violation of 13 AAC 85.270(b)(3), under which the Council must revoke his certificate.

The Executive Director has the burden of proving the elements of the counts against Mr. Whisler.⁶⁸ Below, the facts will be applied to the law to determine whether the Executive Director has met that burden.

B. Count I: Was Mr. Whisler discharged for a reason that affects his ability to perform his duties or that is detrimental the Department of Corrections?

Count I alleges that Mr. Whisler was discharged for using ACOMS for personal use and for accessing victim information. It charges that this establishes a violation of 13 AAC

⁶⁵ Admin. Rec. at 3-4.

⁶⁶ *Id.* at 4. Mr. Whisler's letter of termination was dated April 9, 2012. Admin. Rec. at 25-27.

⁶⁷ See AS 44.62.360 (requiring that the accusation set out "the acts or omissions with which the respondent is charged, so that the respondent is able to prepare a defense").

⁶⁸ AS 44.62.460(e)(1).

85.270(a)(2), which provides grounds for the Council to exercise its discretion to revoke a certificate:

(a) The council will, in its discretion, revoke a basic certificate upon a finding that the holder of the certificate

...

(2) has been discharged, or resigned under threat of discharge, from employment as a probation, parole, correctional, or municipal correctional officer in this state or any other state or territory for cause for inefficiency, incompetence, or some other reason that adversely affects the ability and fitness of the officer to perform job duties or that is detrimental to the reputation, integrity, or discipline of the correctional agency where the officer worked.⁶⁹

Here, Mr. Whisler was discharged from employment as a correctional officer in this state for cause. The letter of termination sent to Mr. Whisler cites as the cause “that you accessed your son’s criminal information in ACOMS and also accessed the personal information of the sexual assault victims in your son’s criminal case.”⁷⁰ The letter also references his responses in the meetings held on March 21 and 30, 2012.⁷¹ Because the cause for which Mr. Whisler was discharged was not related to inefficiency, incompetence, or discipline, the issue here is whether Mr. Whisler’s actions affect his ability to do his job or the department’s reputation and integrity.

1. Does Mr. Whisler’s act of accessing ACOMS on March 4 affect his ability to do his job?

Through witness testimony and cites to the prevailing law, the Executive Director has established the following three propositions:

- Criminal justice databases are highly confidential and may be accessed only as necessary for official business.⁷²
- Law enforcement officers have a duty to protect victims, including keeping information about victims confidential.⁷³
- A government official cannot take official action on a matter in which the official has a personal interest or that involves a close relative of the official.⁷⁴

⁶⁹ 13 AAC 85.270(a)(2). Although the accusation incorrectly left out the letter (a) in several cites to subsection 270(a), at the hearing the parties agreed that this typographical error was not material.

⁷⁰ Admin. Rec. at 25.

⁷¹ *Id.* at 25-26.

⁷² AS 12.62; Anderson testimony; Brandenburg testimony; *Thoma v. Hickel*, 947 p.2d 816, 822-23 (Alaska 1997).

⁷³ Anderson testimony; AS 12.61; Alaska Const. art I, § 24.

A significant violation of any one of these principles by a correctional officer would be sufficient to establish that the correctional officer cannot be trusted to perform the fundamental duties of the correctional institution that employs the officer. This would be especially true where the officer has a close connection to an inmate. Here, Mr. Whisler's action on March 4, 2012, was a significant violation of all three of these principles. He accessed Zebulon's ACOMS page for personal reasons.⁷⁵ While engaged in a personal use of ACOMS, he viewed confidential victim information on his son's ACOMS page. This page was off-limits to him because it involved his son.

Mr. Whisler's situation, where the correctional officer was related to the inmate, and a zealous and public advocate for the inmate, makes the wrongfulness of his action obvious. Mr. Whisler has a right to be a zealous advocate for his son, or for any other inmate, but as a correctional officer he must avoid taking official action on any matter in which he has a personal interest in promoting the welfare of an inmate. And when that inmate is his son, the need to avoid taking official action is especially obvious because the interests of the son are imputed to be the interests of the father.⁷⁶ A correctional officer who accesses confidential information regarding his son cannot be trusted, and, therefore, cannot serve as a correctional officer.

In Mr. Whisler's view, his action does not affect his ability to do his job. Throughout this hearing, and in his meetings with the department, Mr. Whisler argued that his accessing of confidential victim information was either not a violation of policy or was only the most minimal violation. In his view, because he already had the information in his possession and he made no use of the information, he gained nothing by his viewing of Zebulon's ACOMS page.

Mr. Whisler's argument that he gained nothing is incorrect and beside the point. By accessing Zebulon's ACOMS page, Mr. Whisler learned what was on the page, which in itself is personal gain. In this case he learned that ACOMS still listed seven victims—a valuable fact to Zebulon.⁷⁷ Without regard to whether Mr. Whisler made any further use of the information, the fact that Zebulon's father learned what Zebulon wanted to know is a personal use for personal

⁷⁴ AS 39.52.960(11), (18).

⁷⁵ D. Whisler testimony; Recording of March 30, 2012, meeting. Although Mr. Whisler stated that he accessed the ACOMS page for the purpose of pursuing a personal complaint by his wife on behalf of his son against Superintendent Brunger, even if true, this would be wholly a personal reason, not a part personal, part official, reason as argued by Mr. Whisler. Moreover, as discussed later in this decision, Mr. Whisler's proffered reasons for accessing Zebulon's ACOMS page were more likely than not untrue.

⁷⁶ AS 39.52.

⁷⁷ D. Whisler testimony; Z. Whisler testimony.

gain.⁷⁸ Moreover, whether Mr. Whisler's access led to "personal gain" is beside the point. The Department of Corrections cannot allow a person whose interests are coextensive with those of a prisoner to view confidential information about that prisoner.

The facts of this case show why the department would be justified in not trusting Mr. Whisler: Eight days after Mr. Whisler's wrongful viewing of ACOMS, Zebulon acted on the very information that Mr. Whisler had learned. As Zebulon testified, his March 12 memorandum to Probation Officer Ingalls-Adkins was based on his knowledge that no change had been made to his ACOMS page.⁷⁹ Even accepting Mr. Whisler's assertion that it was not he who told Zebulon that ACOMS still listed all seven victims, Zebulon's possession of inside information shows the potential consequences of Mr. Whisler's breach.⁸⁰

Mr. Whisler's violation of the rules was significant. His inability to appreciate the risk, or to see the harm to the department, explains why the department could no longer trust Mr. Whisler.⁸¹ His action adversely affects his ability and fitness to perform his job duties.

2. Was Mr. Whisler's wrongful act detrimental to the reputation or integrity of the department?

Just as Mr. Whisler's wrongful act of accessing Zebulon's ACOMS page would cause the department to not trust Mr. Whisler, his act would also diminish the public's trust in the department. The department's reputation and integrity is damaged when a correctional officer makes unauthorized accesses to confidential criminal justice information. When the officer is related to the inmate, and the inmate then makes use of the information, that damage is compounded.

In this case, the damage to the department is further magnified because the confidential information included the names, addresses, and phone numbers of victims of sexual assault. The

⁷⁸ AS 39.52.960(11), (18).

⁷⁹ Z. Whisler testimony.

⁸⁰ Although Mr. Whisler appeared to deny that he passed the information on to Zebulon, his denial was not strong. At the hearing Mr. Whisler answered, "No, I don't think I did" when asked whether he had told Zebulon that he had learned that Zebulon's ACOMS information was unchanged. The Executive Director, however, did not allege in the accusation that it was Mr. Whisler who gave Zebulon the ACOMS page in January or told Zebulon in March 2012 that the page still listed all seven victims, so this decision will assume that Mr. Whisler did not give Zebulon the page in January or tell him in March that the page was unchanged.

⁸¹ Mr. Whisler's lack of honesty at the March 21 and 30 meetings is not discussed here under Count I because the reasons given for his dismissal focus more on Mr. Whisler's act of accessing ACOMS than on his lack of honesty in the March meetings. His lack of honesty at the meetings is discussed extensively below, and it would also adversely affect his ability and fitness to perform his job duties.

state policy of protecting sexual assault victims' privacy is established in AS 12.61.⁸² Alaska law requires that sexual assault victim names not be used in court unless the court allows it, that the names are not a public record, and that the names may not appear in court records open to the public.⁸³ Under these laws, the department has a duty to ensure that sexual assault victims will not have their security and peace of mind disturbed by the knowledge that a person with a close connection to an assailant had made an unauthorized use of confidential information about them from department databases.⁸⁴ The public would lose trust in the department if the department failed to protect the confidentiality of victim information. And the fact that Mr. Whisler already had the victim information—which he should not have had—is no salve to the damage done to the department's reputation and integrity by his actions in accessing confidential victim information.

Expanding on the issue of the department's integrity, Bryan Brandenburg, the Director of Institutions for the department, testified that the department's integrity is affected whenever the department fails to follow its own rules.⁸⁵ Here, the department's rules against wrongful accessing of criminal history information are established in several places. The department's policy and procedures provide that "[a]ny misuse of Criminal History Information or dissemination of information not specifically authorized may result in disciplinary action, civil action for actual damages and/or criminal penalties."⁸⁶ When a user first accesses ACOMS, the opening screen advises in bold letters: "**WARNING: Alaska's criminal justice information is confidential.**"⁸⁷ The department's Code of Ethical Professional Conduct requires a correctional officer to affirm that

⁸² See, e.g., AS 12.61.100 (declaring policy "to protect victims and witnesses to crime from the risk of harassment, intimidation, and unwarranted invasion of privacy by prohibiting the unnecessary disclosure of their addresses and telephone numbers"); AS 12.61.110 (address and telephone number of victim is confidential).

⁸³ AS 12.61.140.

⁸⁴ Brandenburg testimony. The information accessed by Mr. Whisler is the type of information that a stalker or other wrongdoer could use to harass, intimidate, or otherwise harm a victim. Whether Mr. Whisler would do this—and nothing in this decision should be taken to imply that *he* would—is not material. The victims may very well have read Mr. Whisler's statements to the press, and they have no assurance that they would not be put in harm's way by Mr. Whisler's or Zebulon's possession of this information. And even if no victim in this case is actually concerned by Mr. Whisler's personal possession of victim information, the reputation and integrity of the department is harmed by a person in Mr. Whisler's position being able to access confidential victim information.

⁸⁵ *Id.* In a previous case, the Council found detriment to an agency's integrity when a certificated officer engaged in conduct that "conflicts with the organization's core values." *In re Bowen*, OAH No. 10-0327-POC at 14 (2011 Alaska Police Standards Council).

⁸⁶ Admin. Rec. at 90.

⁸⁷ *Id.* at 88; Rosen testimony.

I will maintain the integrity of private information, and will neither seek personal data beyond that needed to perform my duties, nor reveal case information to anyone not having a proper professional use for the information.

....

I will not act in my official capacity in any matter in which I have a personal interest that could in the least degree impair my objectivity.⁸⁸

Mr. Whisler affirmed in writing—on July 23, 2007, December 4, 2007, and most recently on February 19, 2010—that he had read the code, obtained clarification of any portions he did not understand, and understood that a violation could result in discipline, including dismissal.⁸⁹ Mr. Whisler also signed a form indicating he understood that the Executive Branch Ethics Act prohibited use of state equipment and facilities to benefit a personal interest.⁹⁰

Finally, the state has a detailed Information Security Policy, called ISP-172. Section 5.1.1 of this policy advises that “[p]ersonnel must use SOA networks and associated systems for authorized business purposes only. Personnel must not access information, programs, or systems when such access is not required for an authorized business purpose.”⁹¹ Section 5.1.9 lists unacceptable uses, which include:

- Use of SOA information technology resources for personal gain.
- Revealing account information or allowing use of a personal account by others.
- Personal use of or divulging of private or confidential information regarding any individual by any personnel, as a result of performance of job duties or as a result of their employment with the SOA.⁹²

Mr. Whisler signed an acknowledgment that he had read and understood this policy on April 9, 2007, and acknowledged again in writing that he had read and was obligated to abide by this policy on April 15, 2011.⁹³ Mr. Whisler’s failure to follow the rules against personal use of criminal justice information specifically, and electronic information generally, is detrimental to the department’s integrity.

In sum, Mr. Whisler has taken action that affects his ability to perform his duties because he has committed a wrongful act in circumstances that would cause his employer to not trust

⁸⁸ Admin. Rec. at 84.

⁸⁹ *Id.* at 79-80, 84.

⁹⁰ *Id.* at 70.

⁹¹ *Id.* at 73.

⁹² *Id.* at 75-77.

⁹³ *Id.* at 78, 85.

him. His wrongful act also is detrimental to the reputation and integrity of the department because victims and the public will lose trust in the department when department staff fails to follow department rules. Because Mr. Whisler was discharged for committing a wrongful act that affected his ability to do his job, and was detrimental to the reputation and integrity of the department, the Executive Director has proved the allegation in Count I that Mr. Whisler violated 13 AAC 85.270(a)(2).

C. Count II: Did Mr. Whisler's actions demonstrate a lack of good moral character?

Count II alleges that Mr. Whisler's actions show that he does not meet the minimum standards for a certificated correctional officer established under 13 AAC 85.210(a)(3), which requires that a correctional officer be of good moral character. Count II charges that this establishes a violation of 13 AAC 85.270(a)(3), which permits the Council to exercise its discretion to revoke a certificate. "Good moral character" is defined by the Council in regulation to mean:

the absence of acts or conduct that would cause a reasonable person to have substantial doubts about an individual's honesty, fairness, and respect for the rights of others and for the laws of this state and the United States; for purposes of this standard, a determination of lack of "good moral character" may be based upon a consideration of all aspects of a person's character;⁹⁴

In analyzing this regulation, the first question is whether the Executive Director has to prove substantial doubt about all elements of good moral character. After addressing that question, this decision will turn to the facts, and analyze whether the Executive Director has proved conduct that shows a lack of good moral character.

1. Does the Executive Director need to prove substantial doubt about all four elements of good moral character in order to prove a violation of 13 AAC 85.270(a)(3)?

As quoted above, the Council's regulations define good moral character in terms of four elements: honesty, fairness, respect for the rights of others, and respect for the laws of this state and the laws of the United States.⁹⁵ In a previous case, *In re Bowen*, the Council discussed the

⁹⁴ 13 AAC 85.900(7).

⁹⁵ 13 AAC 85.900(7).

issue of whether the law requires acts that would create substantial doubt about each of the four elements individually in order to establish a lack of good moral character.⁹⁶

Bowen involved a police officer who admitted that he engaged in inappropriate sexual conduct related to his official position.⁹⁷ The Executive Director charged Trooper Bowen with two counts of wrongdoing in an accusation seeking revocation of Trooper Bowen's police officer certificate. One of the counts against Trooper Bowen (Count II) was similar to Count II against Mr. Whisler here, alleging that Trooper Bowen was not of good moral character, and seeking revocation of Trooper Bowen's certificate under 13 AAC 85.110(a)(3).

In analyzing Count II against Trooper Bowen, the Council first interpreted the definition of "good moral character" and concluded that "the definition does not provide for a finding that a person lacks good moral character based on only one of the listed considerations: it calls for conduct that creates substantial doubt with respect to all of them."⁹⁸ The Council's interpretation is consistent with the rule of statutory construction that elements in a list joined by the conjunctive "and"—instead of the disjunctive "or"—usually require proof of each element in the list.⁹⁹ Applying this interpretation, the Council found that the Executive Director had failed to prove that Trooper Bowen was not of good moral character. Although the Council found that the evidence supported a finding of substantial doubt about Trooper Bowen's respect for the rights of others, the Executive Director had not proved substantial doubt about Trooper Bowen's honesty, fairness, or respect for law. Given its interpretation that each element had to be proved, the Council found that the Executive Director had not proved a lack of good moral character.¹⁰⁰

In this case, the Executive Director has asked the Council to revisit its ruling that doubt about each of the four elements must be proved in order to prove a lack of good moral character. The Executive Director has suggested an alternative way to read the regulation is to consider the

⁹⁶ *In re Bowen*, OAH No. 10-0327-POC (Alaska Police Standards Council 2011). The reader may also find limited discussion of *Bowen* in *In re Much*, OAH No. 13-0288-POC. *Much* had not been adopted by the Council at the time that this decision was drafted, so it is not cited as precedent. The reader should not interpret *Much* to be contrary to this decision.

⁹⁷ *Bowen* at 1.

⁹⁸ *Id.*

⁹⁹ See, e.g., *McKittrick v. State, Public Employees Retirement System*, 284 P.3d 832, 839 (Alaska 2012) ("The statutory test is conjunctive—an absence of any element is fatal to an employee's application for disability benefits."); *Employment Sec. Comm'n v. Wilson*, 461 P.2d 425, 428-429 (Alaska 1969) (requiring proof of all elements in list in which conjunctive and appears between two final elements "[b]ecause we may assume that the legislature knew and understood the rules of grammar, we are justified in relying on such rules in the interpretation of our laws.").

¹⁰⁰ *Bowen*, OAH No. 10-0327-POC at 15. Trooper Bowen's certificate was revoked on other grounds. *Id.* at 13-14.

four elements in the regulation collectively, rather than as separate elements.¹⁰¹ Under this reading, the requirement of substantial doubts applies to the subordinate clause—“about an individual’s honesty, fairness, and respect for the rights of others and for the laws of this state and the United States”—in its entirety, not to each individual element in the clause. The Executive Director argues that only this reading gives meaning to the final clause of the definition, which instructs that “a determination of lack of ‘good moral character’ may be based upon a consideration of all aspects of a person’s character” because that clause means the aspects of character should be considered in the aggregate.¹⁰² Under this reading, failure to prove doubt about one element would not necessarily be fatal to a finding of lack of good moral character if the doubts raised about the other elements were sufficiently substantial. This would avoid anomalous outcomes that could occur if, for example, a law enforcement officer, or an applicant for the position of law enforcement officer, lied under oath in circumstances that did not raise doubt about the officer’s or applicant’s fairness. The dishonest officer or applicant likely would not be fit to serve, but the *Bowen* interpretation would not permit the Council to revoke or deny a certificate based on a lack of good moral character.¹⁰³

Mr. Whisler also filed a brief on this issue. He makes the cogent argument that “laws should be read and followed the way that they are written,” and that “and means and.”¹⁰⁴ Mr. Whisler’s argument has support in case law and statute. “The objective of statutory construction is to give effect to the intent of the legislature, with due regard for the meaning that the statutory language conveys to others.”¹⁰⁵ And Alaska law requires that “[w]ords and phrases shall be construed according to the rules of grammar.”¹⁰⁶

¹⁰¹ Executive Director’s Memorandum on Statutory Construction (Sept. 11, 2013).

¹⁰² *Id.* at 8-9.

¹⁰³ Although 13 AAC 85.110(b)(3) would give the Council independent grounds to revoke a certificate if the employer discharged a certificated police officer for dishonesty, it would not provide grounds for action if the employer had not discharged the officer or if the officer’s conduct established substantial doubts about the other elements of good moral character, but not about honesty.

¹⁰⁴ Whisler Post-hearing brief at 1 (Sept. 8, 2013) (underlining added).

¹⁰⁵ *City of Dillingham v. CH2M Hill Northwest, Inc.*, 873 P.2d 1271, 1276 (Alaska 1994); *see also C.J. v. State, Dept. of Corrections*, 151 P.3d 373, 387 (Alaska 2006) (interpretation should be consistent with purpose of statute). Alaska courts do not require strict adherence to the plain meaning rule. *Romann v. State, Dept. of Transp. and Public Facilities*, 991 P.2d 186, 190 (Alaska 1999) (reversing decision in which “the superior court rigorously enforced the regulation’s plain meaning”); *Alaskans For Efficient Government, Inc. v. Knowles*, 91 P.3d 273, 275 (Alaska 2004) (“Rather than rigidly apply a plain meaning rule of statutory interpretation, we favor a “sliding scale approach” under which “the plainer the language of the statute, the more convincing contrary legislative history must be.” (citation omitted)). Here, the Executive Director’s interpretation of 13 AAC 85.900(7) adheres to the plain meaning of the regulation as well or better than the interpretation adopted in *Bowen*.

¹⁰⁶ AS 01.10.040.

With regard to adhering to plain language and correct grammar, however, the interpretation suggested by the Executive Director is a fair reading of the regulation, and it is consistent with the rules of grammar. Moreover, it would better fulfill the statutory requirement that the Council establish the “minimum . . . moral character” for employment of correctional officers.¹⁰⁷ Under this interpretation, minimum moral character requires the traits of honesty, fairness, respect for the rights of others, *and* respect for the law. A substantial deficit in these traits would establish a lack of good moral character.

“Good moral character” must be defined carefully to avoid opening the door for selective and arbitrary enforcement. Nothing in this interpretation of good moral character, however, would lessen the standard. The Executive Director must prove actual bad acts or omissions, and prove that the acts or omissions raise substantial doubts about the collective criteria of honesty, fairness, respect for the rights of others, and respect for the law.

Although the Council is not bound by its prior interpretations of regulation, a prior decision generally should be followed unless documented reasons are demonstrated for adopting a new interpretation.¹⁰⁸ Here, the Executive Director has asked the Council to revisit the holding in *Bowen*, and has provided an alternative reading of the regulation, consistent with the rules of grammar. This alternative reading was not presented to the Council in *Bowen*. After consideration of the language of the regulation, and the policy implication of the two possible interpretations, the best reading of 13 AAC 900(7) supports a determination that the Executive Director is not required to prove substantial doubt about each of the four elements of good moral character. The Council should have discretion to revoke the certificate of an officer who has committed an act that raises substantial doubt about the officer’s honesty, fairness, respect for the rights of others, and respect for the law as a whole. A substantial deficit in any combination of these elements could establish an absence of good moral character, even if for some elements no deficit or doubt was proved.

¹⁰⁷ 18.65.242(a)(1); *see also* AS 18.65.240(a); (council shall establish qualifications for employment of police officers including “minimum . . . moral character”).

¹⁰⁸ *C.f., e.g., May v. State*, 168 P.2d 873, 883 (Alaska 2007) (“Agencies are free to change course as their expertise and experience may suggest or require, but when they do so they must provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”); *In re D.B.*, OAH No. 08-0697-PFD at 5 (Department of Revenue 2009) (holding that because division did not show that prior case was wrongly decided, “established agency precedent will therefore be applied in this case”).

2. Does Mr. Whisler's conduct raise doubts about his honesty?

Turning first to the issue of honesty, a common dictionary defines honesty to include "adherence to the facts: freedom from subterfuge or duplicity: truthfulness, sincerity."¹⁰⁹ In his March 21 and March 30 interviews, Mr. Whisler answered questions about why he accessed Zebulon's ACOMS page on March 4, 2012. Whether those answers were truthful and adhered to the facts is discussed below.

At both the hearing and the March 21 meeting, Mr. Whisler stated that he accessed Zebulon's ACOMS page on March 4 to look for whether a separatee was listed. His purpose was to verify that Zebulon did not have a separatee at Mat-Su Pretrial so that Mr. Whisler and his wife could file a complaint with Director Brandenburg alleging that Superintendent Brunger's reason for transferring Zebulon out of Mat-Su Pretrial was a sham, and that the transfers were a violation of policy.

This reason is not plausible. Mr. Whisler testified at the hearing that he already knew, and had known since 2009, that an uncle of one of Zebulon's victims worked at Mat-Su Pretrial.¹¹⁰ Therefore, he already knew that the separatee issue was not a sham, without regard to whether the separatee was identified in ACOMS. For his explanation to be credible, the absence of a separatee on ACOMS would have to be grounds for a complaint against Superintendent Brunger even though a separatee did exist. This explanation is inherently implausible.

In addition, the Whislens had a copy of Zebulon's ACOMS page, and their February 29 email demonstrates that the Whislens already knew that no separatee was listed on Zebulon's ACOMS page for Mat-Su Pretrial, so no additional research on March 4 was necessary. And, even though Mr. Whisler did, in fact, confirm that no separatee was listed on Zebulon's ACOMS page, the Whislens never did file a complaint against Superintendent Brunger after Mr. Whisler's March 4 research session.¹¹¹ In short, the reason Mr. Whisler gave for his accessing of Zebulon's ACOMS page is not believable.

The evidence of a lack of honesty is even starker with regard to Mr. Whisler's further action of accessing the victim information pages. First, he did not disclose at the March 21

¹⁰⁹ *Webster's Third New Int'l Dict.* at 1086 (1986 Unabridged).

¹¹⁰ D. Whisler testimony.

¹¹¹ At the hearing, Mr. Whisler testified that he did not have time to file the complaint after his March 4 research session because of the March 21 meeting. He learned of the March 21 meeting, however, on March 20, 2012. He and his wife would have had plenty of time to file their complaint with Director Brandenburg if that had been his real reason for accessing Zebulon's ACOMS page on March 4.

meeting—the meeting at which the department was not aware that Mr. Whisler had accessed victim information on March 4—that he had accessed victim information. At the March 21 meeting, Mr. Whisler explained that he logged into ACOMS on March 4 to look for a separatee at Mat-Su Pretrial, and in the past he had logged in to check Zebulon’s location and money balances. Mr. Whisler was then asked whether he was seeking any other information when he logged into ACOMS.¹¹² He said no—he was looking for separatee status.¹¹³ That answer was dishonest because he did not disclose that he accessed the victim information on Zebulon’s ACOMS page.

Second, the reason Mr. Whisler gave at the March 30 interview for accessing victim information was inherently implausible. He stated that he just happened to see the victim link, so he took a scan through it.¹¹⁴ Then, for the first time, Mr. Whisler gave a new reason for his accessing of ACOMS. He said that he noticed that seven victims were listed, so he clicked on each victim to see if the “seventh person” was someone he needed to be worried about or if there were any family members of victims who might be incarcerated that he needed to worry about.¹¹⁵ When asked what business reason he had for accessing victim information, he replied, “strictly for officer safety.”¹¹⁶

Yet, at the same meeting, he said that he already knew all the information contained in the victim pages on ACOMS. He had in his possession the printouts from those pages that he had received from Zebulon in mid-February, and he admitted that he knew that the mystery seventh victim was actually due to one victim being listed twice, once under her maiden name, and once under her married name. And at the hearing, when he was asked if did any follow up research to determine if there were relatives of victims who posed a danger, he said no, he already knew who was where. Thus, he had no need to access the victim information on ACOMS for officer safety, and his statement at the March 30 interview was not truthful.

In short, Mr. Whisler’s purported business purposes for viewing victim information are fabrications. His only plausible purpose for logging onto the victim information page, and then

¹¹² March 21, 2012, recorded interview.

¹¹³ *Id.* Mr. Whisler explained, “I was looking in the ACOMS screen—there is an entry item there that says—is labeled—‘cautions.’ That’s where things will be like the separatee.” His knowledge of where to find the separatee listing belies his later claims that his lack of knowledge of the computer system caused him to stumble into the victims listings. *See* D. Whisler testimony.

¹¹⁴ March 30, 2012, recorded interview.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

methodically going through each victim, was to check to see if any changes had been made as a result of his son's first complaint to a probation officer that the victim pages were incorrect—a purpose, as earlier explained, that was personal and wrongful. His fabrication of an untrue purpose during an official investigation would cause a reasonable person to have substantial doubt about his honesty.

3. Does Mr. Whisler's conduct raise doubts about his fairness?

Bowen defines “fairness” as used in 13 AAC 85.900(7) to mean “marked by impartiality and honesty: free from self-interest, prejudice or favoritism.”¹¹⁷ The conduct alleged in the accusation, and at issue here, is Mr. Whisler's conduct of accessing Zebulon's ACOMS page. The facts establish that his accessing of the page was for his personal use—he went on the ACOMS page on March 4, 2012, to look at victim information, most likely to determine whether changes had been made in response to his son's request. He went on Zebulon's ACOMS page earlier in order to determine where his son was lodged and how much money he had in his account. For purposes of this hearing, Mr. Whisler is not accused of providing the information he discovered on ACOMS to Zebulon.

Mr. Whisler argues that his conduct was not unfair because the evidence did not prove that he took any action with the information he learned—he simply looked at the information. In his mind, his wrongful act was a victimless crime, so, while it was wrongful, it did not display the partiality or favoritism that would make it unfair to others.

Personal use of state resources is always unfair to the general public, which does not have access to the resource. Mr. Whisler is correct, however, that not every unauthorized use of state resources would raise substantial doubts about an officer's fairness or warrant revocation of an officer's certificate.

Here, two aspects of Mr. Whisler's personal use of state resources are noteworthy. First, the timing and the scope of Mr. Whisler's conduct—he accessed confidential information about his son shortly before his son was to be sentenced, and at a time when his son was anxious to learn whether his ACOMS page had been changed. Second, the degree of protection around ACOMS means that a member of the public who has a son or daughter in jail awaiting sentencing has no means of accessing ACOMS.

¹¹⁷ OAH No. 10-0327-POC at 15-16 (quoting Webster's Ninth New Collegiate Dict. at 445 (1990)).

Even if Mr. Whisler did not use the information, a reasonable person would conclude that he accessed ACOMS in order to help his son. He may not have found information that he was able to use, but if he had found something worthwhile, it would be reasonable to infer that he would have used it to help Zebulon obtain a lighter sentence, or passed it on to Zebulon so Zebulon could know the status of his ACOMS page. This would be unfair to members of the general public who also have relatives awaiting sentencing or are otherwise interested in knowing what is on ACOMS, and who would not have access to ACOMS to learn whether it has information helpful to their relatives. Therefore, Mr. Whisler did a wrongful act in circumstances that would cause a reasonable person to have doubts that he is an impartial and fair law enforcement officer.

4. Does Mr. Whisler's conduct raise doubt about his respect for the rights of others or his respect for the law?

The final two elements of good moral character—respect for the rights of others, and respect for the law—will be analyzed together because the analysis of each element is similar. In addressing the question of what is a “right” for purposes of 13 AAC 85.900(7), “right” should be defined to mean a right established in law, including constitutional, statutory, or common law.¹¹⁸ Mr. Whisler's conduct showed a lack of respect for the rights of victims of sexual assault, who have a statutory right to privacy regarding their personal information.¹¹⁹ Victim's rights are firmly established in statutes and in the Alaska Constitution.¹²⁰ Mr. Whisler's conduct also showed a lack of respect for the established rules, regulations, and legal standards that govern confidential criminal justice information.¹²¹

In short, the strict boundaries around use of criminal justice databases, and the heightened concern about the rights of victims, are strong and prevalent, and no law enforcement officer of good moral character would overlook them. Mr. Whisler's actions ignoring these boundaries cannot be explained away by his concern for his son or his stressful situation. A reasonable

¹¹⁸ See *Webster's Third New Int'l Dict.* at 1955 (1986 Unabridged) (defining “right” to include “a capacity or privilege the enjoyment of which is secured to the person by the power of law”).

¹¹⁹ See AS 12.61.140 (unlawful to disclose name of victim of sexual assault).

¹²⁰ See generally, e.g. 12.61.100 (“The purpose of AS 12.61.100 – 12.61.150 is to protect victims of and witnesses to crime from risk of harassment, intimidation, and unwarranted invasion of privacy by prohibiting the unnecessary disclosure of their addresses and telephone numbers.”); see also generally AS 12.61; Alaska Const. art I, § 24 (“Rights of Crime Victims”).

¹²¹ See generally AS 12.62 (establishing advisory board and procedures to protect criminal justice information); AS 39.52 (Executive Branch Ethics Act); Admin. Rec. at 75-90 (department policies regarding unauthorized use of resources).

person would have substantial doubts about Mr. Whisler's respect for the rights of others and respect for the law.

5. Would Mr. Whisler's conduct cause a reasonable person to have substantial doubts about his honesty, fairness, respect for the rights of others, and respect for the law, collectively?

After analyzing each element of good moral character, the final step under the regulation is to ask whether, based on Mr. Whisler's acts or omissions, a reasonable person would have substantial doubts about whether Mr. Whisler possessed the elements that constitute good moral character. At the hearing, Mr. Whisler argued that he had good moral character. In his written statement, in his testimony, and in his closing argument, Mr. Whisler emphasized that he believed he was a good correctional officer who cared about the inmates, cared about his fellow officers, and would take extra steps for the good of the institution. He emphasized his service to his country, and the commendations he had received as a correctional officer, and he argued that they were more representative of his character than the incident involving his son's ACOMS page. Mr. Whisler was obviously sincere in his belief in his own moral character.

Mr. Whisler's service to his country, and the good acts he took as a correctional officer, are commendable. Here, however, the test for good moral character is not related to issues like whether the officer has served his country, or has received good evaluations. For purposes of a correctional officer certificate, good moral character requires an absence of conduct that would cause a reasonable person to have substantial doubt about the officer's honesty, fairness, respect for the rights of others, and respect for the law. Here, Mr. Whisler's conduct of accessing confidential criminal justice and victim information, and his answers to his superiors about his reasons for that conduct, raise the substantial doubt required for finding a lack of good moral character, and for revocation of Mr. Whisler's certificate.

D. Count III: Was Mr. Whisler discharged for cause for acts that would cause reasonable doubt about his honesty, fairness, respect for the rights of others, and respect for the law, or would be detrimental to the department's integrity?

Count III alleges that Mr. Whisler was discharged because of his actions of accessing ACOMS. Based on this fact, Count III asserts that the Council must revoke his certificate under 13 AAC 85.270(b)(3), which states:

(b) The council will revoke a basic certificate upon a finding that the holder of the certificate

...

(3) has been discharged, or resigned under threat of discharge, from employment as a probation, parole, correctional, or municipal correctional officer in this state or any other state or territory for cause for conduct that would cause a reasonable person to have substantial doubt about an individual's honesty, fairness, and respect for the rights of others and for the laws of this state and the United States or that is detrimental to the integrity of the correctional agency where the officer worked.¹²²

Count III is reminiscent of both Count I and Count II. It is reminiscent of Count I in that it asks whether the conduct that caused Mr. Whisler to be discharged is detrimental to the department's integrity.¹²³ Count III is reminiscent of Count II because it asks whether Mr. Whisler was discharged for conduct that would cause a reasonable person to have substantial doubt regarding the same elements identified in good moral character—honesty, fairness, respect for the rights of others, and respect for the laws of this state and the United States. Count III is the more serious count, however, because if Mr. Whisler is found in violation of the regulation at issue in Count III, the Council is required to revoke Mr. Whisler's certificate.

Mr. Whisler's dismissal letter makes clear that Mr. Whisler was discharged for cause, citing his violation of policies and procedure, and noting that his conduct was contrary to the mission of the department to protect public safety.¹²⁴ As explained above, Mr. Whisler's conduct was substantially detrimental to the department's integrity. Protection of confidential criminal justice databases is crucial to the department's ability to operate, and the rules against unauthorized use of ACOMS are firmly established. Mr. Whisler's relationship to an inmate convicted of multiple accounts of sexual assault, and his public stance as an adversary of his son's victims, make the impact of his actions on the department's integrity even more obvious and detrimental. For him to access his son's criminal database information to look up confidential victim information is significantly detrimental to the department's integrity, without regard to whether Mr. Whisler made any additional use of the information.

¹²² 13 AAC 85.270(b)(3).

¹²³ Under 13 AAC 85.270(b)(3) (Count III here), the Council *must* revoke if the officer was discharged for reasons detrimental to the employing agency's integrity. Under 13 AAC 85.270(a)(2) (Count I here), the Council *may* revoke if the officer was discharged for reasons detrimental to the employing agency's reputation, integrity, or discipline. This regulatory scheme implies that "integrity" is a higher standard than "reputation" or "discipline." Although it is not clear why "integrity" appears in both regulations, it may be to give the Executive Director some discretion in how to fashion a revocation action.

¹²⁴ Admin. Rec. at 26.

With regard to whether Mr. Whisler was discharged for reasons that would cause a reasonable person to have doubts about his honesty, fairness, respect for the rights of others, and respect for the law, as explained above, the question relates to all elements considered collectively. Here, the dismissal letter makes clear that Mr. Whisler was discharged for his accessing Zebulon's ACOMS page, and in particular the victim information pages, and for his statements made at the March 21 and March 30 investigatory meetings.¹²⁵ The conduct that led to his discharge would cause a reasonable person to have substantial doubts about Mr. Whisler's honesty, fairness, respect for the rights of others, and respect for the law. Therefore, the Executive Director has proved Count III, which makes it mandatory that the Council revoke Mr. Whisler's certificate.

E. Should the Council revoke Mr. Whisler's certificate for Counts I and II?

Although revocation is mandatory under Count III, it is not mandatory under Counts I and II.¹²⁶ For these two counts, the Council must weigh the conduct at issue and determine whether it warrants revocation.

With regard to Count I, three department witnesses, Superintendent Anderson, Director Brandenburg, and Ms. Phillips, discussed the gravity of Mr. Whisler's conduct. These witnesses made clear that the corrections system cannot have employees who use the criminal justice database for personal use, do not understand the importance of protecting victims, especially victims of sexual abuse, and are not honest in answering questions during an official investigation.¹²⁷

Here, Mr. Whisler's conduct did not lead to an actual breakdown of security or actual harm to an inmate, officer, or victim. In that sense, Mr. Whisler's conduct may not be among the worst possible offenses that a correctional officer could commit. Yet, Mr. Whisler's conduct demonstrates a disregard for the security of confidential information, and a willingness to put the interests of an inmate above the rules and regulations of the department. A correctional officer willing to break the rules that Mr. Whisler broke could just as easily be passing confidential information to others in a manner that did result in actual harm to an inmate, officer, or victim.

¹²⁵ Admin. Rec. at 25-26.

¹²⁶ Counts I and II are potentially moot if the Council finds a violation of Count III. A discussion of whether Counts I and II warrant revocation is still necessary, however, because the Council or a reviewing court might reject the analysis of Count III in this decision. In addition, how the Council determines whether Mr. Whisler's conduct warrants discretionary revocation under Counts I and II will provide guidance for future cases.

¹²⁷ Anderson testimony; Brandenburg testimony; Phillips testimony.

A correctional officer who is willing to break rules because of the officer's concern about an inmate is a security threat. Therefore, Mr. Whisler's conduct that led to the finding of a violation under Count I warrants revocation of his certificate.

With regard to Count II, the deficiencies in character identified by the evidence reflect on Mr. Whisler's ability to serve as a correctional officer. A correctional institution is a dangerous place. Management must be able to trust correctional officers in order to maintain safety. Honesty, protecting others from harm, and obedience to the rules are crucial attributes in a certificated correctional officer. A correctional officer who is willing to hide the truth, or who puts partiality to an inmate above the rules, does not have the character to continue to be certificated as a correctional officer.


The Council can acknowledge that Mr. Whisler's conduct occurred at a time where Mr. Whisler was under considerable stress because of concern for his son. Yet, the Council cannot have one set of rules for officers who have a close personal relationship with an inmate and a different set of rules for officers who do not. In this case, the Council should exercise its discretion to revoke Mr. Whisler's certificate under both Count I and Count II.

IV. Conclusion

Dean Whisler committed the wrongful act of accessing confidential criminal justice and victim information for personal use, and he was dishonest in explaining the reasons for his conduct to his superiors. He was terminated by the Department of Corrections for this conduct. The Executive Director has proved that Mr. Whisler was discharged for reasons that affect his ability to do his job, that were detrimental to the reputation and integrity of the department, and that would cause a reasonable person to have substantial doubt about Mr. Whisler's honesty, fairness, respect for the rights of others, and respect for the law. Accordingly, Mr. Whisler's correctional officer's certificate is revoked.

Dated: October 24, 2013

By: _____



Stephen C. Slotnick
Administrative Law Judge

Adoption


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

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 3 day of December 2013.

By: 
Sheldon Schmitt
Chair, Alaska Police Standards Council

The undersigned certifies that this is a true and correct copy of the original and that on this date an exact copy of the foregoing was provided to the following individuals:

Dean Whisler
John Novak, AAG
Kelly Akzahanna, APSC
Signature:  Date 12/17/13

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Police Standards Council