

Police Policy Committee

Minutes

June 4, 2009

The Police Policy Committee of the Board on Public Safety Standards and Training held a special meeting on June 4, 2009 in the Governor Victor G. Atiyeh Boardroom of the Oregon Public Safety Academy. The meeting was called to order at 1:03 p.m. by Chairman Andrew Bentz.

Attendees

Policy Committee Members:

Andrew Bentz, Chair, Oregon State Sheriffs' Association
Stuart Roberts, Vice-Chair, Oregon Association Chiefs of Police
Brandon Kaopuiki, Non-Management Law Enforcement
Larry O'Dea, Assistant Chief, Portland Police Bureau
Tim McLain, Superintendent, Oregon State Police
Edward Mouery, Oregon State Police
Kent Barker, Oregon Association Chiefs of Police
Dave Miller, Federal Bureau of Investigation, Oregon
Robert King, Non-Management Law Enforcement

Committee Members Absent

Steven Piper, Non-Management Law Enforcement
Raul Ramirez, Oregon State Sheriffs' Association
Rob Gordon, Oregon State Sheriffs' Association
Michael Healy, Oregon Association Chiefs of Police

Guests:

Kenneth Herbst
Linda Ellington
Maxine Bernstein, The Oregonian

DPSST Staff:

Eriks Gabliks, Deputy Director
Marilyn Lorance, Standards and Certification Supervisor
Kristen Turley, Professional Standards Coordinator
Cameron Campbell, Training Division Director
Carolyn Kendrick, Administrative Specialist



1. **Kenneth C. Herbst – DPSST #24485**

Presented by Kristen Turley

See Appendix A for details

Kent Barker stated for the record that he would abstain from voting because of his previous working relationship with Kenneth Herbst.

ACTION ITEM 1:

Staff requests the Police Policy Committee review the matter and make a recommendation to the Board whether or not to revoke HERBST's certifications, based on violation of the established moral fitness standards, using the following guidelines:

Following extensive discussion regarding the elements of this case, the following decisions occurred:

- ***Brandon Kaopuiki moved that the committee does adopt the staff report and related documents, including the audio tape of the 911 call, as the record on which their recommendation is based. Tim McLain seconded the motion. The motion carried unanimously with Kent Barker abstaining.***
- ***By discussion:***
 - a. Identify the conduct that is at issue.
 - b. The identified conduct did involve **Dishonesty** (*the committee agreed with a 6-2 vote with Robert King and Brandon Kaopuiki voting no*).
 - c. The identified conduct did/did not involve a **Disregard for the Rights of Others** (*the committee was split with a 4-4 vote with Robert King, Brandon Kaopuiki, Ed Mouery, and Stuart Roberts voting no*).
 - d. The identified conduct did not involve **Misuse of Authority** (*unanimous decision*).
 - e. The identified conduct did not involve **Gross Misconduct** (*the committee agreed with a 7-1 vote with Tim McLain voting yes*).
 - f. The identified conduct did involve **Misconduct** (*the committee agreed with a 6-2 vote with Robert King and Brandon Kaopuiki voting no*).
 - g. The identified conduct did not involve **Insubordination** (*unanimous decision*).
- ***By discussion, the committee must identify and consider any mitigating and aggravating circumstances. The committee noted HERBST's long career and the fact that there were two people involved with different stories, and not a lot of witnesses as mitigating. The aggravating circumstance noted was the violated restraining order.***
- ***Robert King moved that the committee finds HERBST's conduct does not rise to the level to warrant the revocation of his certifications, and therefore recommends to the Board that HERBST's certifications not be revoked. Brandon Kaopuiki seconded the motion. The motion failed with a 2-6 vote, with Tim McLain, Dave Miller, Ed Mouery, Larry O'Dea, Stuart Roberts, and Andrew Bentz voting no and Kent Barker abstaining.***
- ***Tim McLain made an alternate motion that the committee finds HERBST's conduct does rise to the level to warrant the revocation of his certifications, and therefore recommends to the Board that HERBST's certifications be revoked. Larry O'Dea seconded the motion. The motion carried with a 6-2 vote, with Robert King and Brandon Kaopuiki voting no and Kent Barker abstaining.***

ACTION ITEM 2:

Under OAR 259-008-0070(4)(d), upon determining to proceed with the denial or revocation of a public safety professional's certification based on discretionary disqualifying misconduct, the Policy Committee and Board must determine an *initial* minimum period of ineligibility to apply for certification, using the following ineligibility grid:

- (A) Category I: Dishonesty (5 years to Lifetime).
- (B) Category II: Disregard for Rights of Others (5 years to 15 years).
- (C) Category III: Misuse of Authority (5 years to 10 years).
- (D) Category IV: Gross Misconduct (5 years to 10 years).
- (E) Category V: Misconduct (3 years to 7 years).
- (F) Category VI: Insubordination (3 years to 7 years).

Brandon Kaopuiki moved that the committee recommends to the Board that the minimum period of ineligibility to reapply for certification will be five years from the date of revocation. Ed Mouery seconded the motion. The motion carried with a 6-2 vote with Robert King and Tim McLain voting no and Kent Barker abstaining.

2. Next Regularly Scheduled Police Policy Committee Meeting

Tuesday, August 11, 2009 at 1:30 p.m.

With no further business before the committee, the meeting adjourned at 2:55 p.m.

Appendix A

Department of Public Safety Standards and Training Memorandum

DATE: March 23, 2009
TO: Police Policy Committee
FROM: Kristen Turley
Standards & Compliance Coordinator
SUBJECT: Kenneth C. HERBST DPSST #24485

ISSUE:

Should Kenneth C. HERBST's Basic, Intermediate, Advanced, Supervisory and Management Police certifications and Instructor certifications be revoked based on his discretionary disqualifying misconduct defined in OAR 259-008-0070, and as referenced in OAR 259-008-0010?

BACKGROUND and OVERVIEW

This case involves the following actions and processes related to HERBST:

On October 1, 1991, HERBST was hired by the Coos Bay Police Department.

On November 15, 1991, HERBST signed an F-11, Criminal Justice Code of Ethics.

On July 7, 1992, HERBST was granted a Basic Police certification.

On October 29, 1993, HERBST was granted an Intermediate Police certification.

On October 1, 1997, HERBST was granted an Advanced Police certification.

On February 20, 1998, HERBST resigned from the Coos Bay Police Department.

On March 1, 1998, HERBST was hired by the Keizer Police Department.

On October 27, 2000, HERBST resigned from the Keizer Police Department.

On October 30, 2000, HERBST was hired by DPSST.

On December 5, 2003, HERBST was granted Supervisory certification.

On December 15, 2004, HERBST was granted a Management certification.

Between February 8, 2001 and January 4, 2005, HERBST was issued multiple Instructor Certifications.

On February 9, 2006, HERBST was arrested for Strangulation and 4th Degree Assault, Domestic Abuse by the Salem Police Department.

On April 28, 2006, DPSST issued a termination letter to HERBST. In the letter Director MINNIS stated that HERBST's behavior as reported by Keizer and Salem Police Department and documented in the 911 tapes, represented poor judgment and behavior unbecoming a Law Enforcement Officer, a DPSST Academy Training Supervisor, and a DPSST Certified Instructor. Additionally Director MINNIS stated that based on the information received to date, HERBST does not meet the moral fitness standards that serve as the foundation for law enforcement and the mission of the agency. The termination letter concluded that regardless of HERBST's criminal culpability with regards to the Marion County District Court Indictment, his actions and the actions described in the investigative materials rendered him unsuitable for DPSST employment.

On May 2, 2006, HERBST was Discharged for Cause from DPSST.

On May 25, 2006, HERBST filed an appeal of his discharge from DPSST.

On May 3, 4, June 7, 8, and 21, 2007 an Employment Relations Board (ERB) hearing was held.

On December 13, 2006, HERBST was acquitted of the charges filed with Marion County Circuit Court.

On June 30, 2008 the ERB issued a proposed order upholding the termination of HERBST.

On September 15, 2008, DPSST Standards & Certification Program sent a letter to Director MINNIS requesting the underlying investigation that led to HERBST's discharge. Subsequent to this DPSST received the requested documents. These documents included the Recommended Rulings, Findings of Fact, Conclusions of Law, and Proposed Order issued by ERB and all hearing exhibits submitted by DPSST.

On October 6, 2008, DPSST issued a Contested Case Notice of Intent to Revoke, Opportunity to be Heard, and Final Order Revoking Certifications if no Request for Hearing is Received. This notice was issued based upon HERBST's Discharge for Cause from DPSST. Discharge for Cause is a mandatory disqualifier as defined in ORS 181.662. The underlying conduct that formed the basis for the NOI included the conduct the Arbitrator found had occurred, which fell within the definition of Discharge for Cause as found in the then-current OARs:

"HERBST, in the course of obtaining and retaining \$40 and a cell phone from CUDA, struck her hard at least once, pulled her hair, squeezed her arm and hand hard enough to cause significant bruises, and then lied about it to police officers. HERBST was also not forthcoming to the 9-1-1 dispatcher and disregarded her suggestions, giving reasons that were not truthful.

That HERBST had alternatives is illustrated by his own testimony, in which he emphasized his police training in the physical manipulation of people without injury while protecting himself, and in his testimony about ending the altercation by returning the money (which he did later in any event) and the cell phone.

In reviewing the photographs of CUDA's injuries, this Board cannot conclude that DPSST failed to act reasonably in concluding that the individual who caused the injuries, and then failed to adequately explain or take responsibility for them, is an unacceptable role model for police behavior, and is inappropriately employed as an instructor on issues including domestic violence or as a supervisor of those instructors. DPSST acted lawfully and within its discretion as a reasonable employer in terminating HERBST. HERBST's conduct on January 22, 2006 was a serious breach of HERBST's responsibilities as a DPSST manager and employee, and undermined his trustworthiness and fitness to render effective service. We uphold HERBST's dismissal and dismiss his appeal."

Subsequent to receiving Notice, HERBST contacted DPSST staff to question whether the statutes in place at the time of his discharge permitted DPSST to pursue revocation based on his Discharge for Cause, as he had not been employed with DPSST as a police officer.

On October 13, 2008, HERBST requested a hearing.

Pursuant to HERBST's inquiry, DPSST sought clarification from the Oregon Department of Justice (DOJ) regarding the applicability of ORS 181.662(4) and ORS 181.651(3) to HERBST. ORS 181.662 provides:

***181.662(4)** The Department shall deny, suspend or revoke the certification of any public safety officer or instructor....Based upon a finding that the public safety officer... has been discharged for cause from employment as a public safety officer.*

In 2007 DPSST had obtained legislative clarification regarding several statutory provisions in which the applicability to DPSST employees was unclear. Based on House Bill 2225, a new subsection (3) was added to ORS 181.651. Among other changes, that change clarified that

DPSST employees are considered to be employed as a full-time public safety officer for the purposes of denial, suspension, or revocation of certification:

181.651(3) A department employee who is certified as a police, certified reserve, corrections or parole and probation officer, a fire service professional, a telecommunicator or an emergency medical dispatcher is considered to be employed as a full-time public safety officer in the discipline in which certification is held under this section for the following purposes:

(a) Denying, suspending or revoking certification under ORS 181.661, 181.662 and 181.664;

* * *

DOJ advised that it was not clear whether he would have been considered as having been employed full-time as a public safety officer at the time of his discharge from DPSST in May 2006, even though he had been statutorily authorized to maintain his police certifications during that time.

On January 15, 2009, DPSST withdrew the Notice of Intent to Revoke based on his Discharge for Cause, consistent with DOJ advice.

On January 16, 2009, DPSST mailed HERBST a letter advising him that his case would be heard before the Police Policy Committee based on his discretionary disqualifying misconduct and allowing him an opportunity to provide mitigating circumstances for the Committee's consideration.

On February 17, 2009, HERBST provided supporting documentation for the Committee's consideration, which included:

Book 1:

Tab 1: Introductory letter and outline.

Tab 2: Judge NORBLAD's decision.

Tab 3: DPSST's dismissal letters and responses.

Tab 4: Keizer Police Reports.

Tab 5: Salem Police Reports.

Tab 6: 11/21/06 trial transcripts.

Tab 7: Phone call to Keizer Police/911 transcripts

Tab 8: Judy SNYDER's ERB Appeal closing statements and partial ERB witness testimony.

Book 2:

Tab 1: DOJ pre-dismissal meeting transcripts and ERB testimony: Cameron CAMPBELL 6/7/07.

Tab 2: ERB testimony: CUDA's family and Lt. Brian HARVEY 6/7/07.

Tab 3: ERB testimony: Keizer Officers CARROLL and GOODMAN 6/7/07.

Tab 4: ERB testimony: HERBST 6/8/07.

Tab 5: ERB testimony: HERBST 6/21/07.

Tab 6: Ethics Bulletin January 9, page 4 of 4.

Tab 7: ERB Findings and related documents.

Book 3:

Contains transcripts of ERB testimony for MINNIS, GONZALEZ, BRAFF, BACA and additional testimony by CAMPBELL.

Each book appears to contain partial transcripts from the ERB hearing grouped by individuals' testimony, rather than in the sequence of the hearing.

DISCUSSION:

ORS 181.640 requires that DPSST, through its Board, identify in Oregon Administrative Rules (OAR) the conduct that requires denial or revocation (mandatory disqualifying misconduct). For all other misconduct, denial or revocation is discretionary, based on Policy Committee and Board review. (ref. OAR 259-008-0070(4),(9))

STANDARD OF PROOF:

The standard of proof on this matter is a preponderance of evidence; evidence that is of greater weight and more convincing than the evidence offered in opposition to it; more probable than not.

DISCRETIONARY DISQUALIFYING CONDUCT

OAR 259-008-0010(6) Moral Fitness (Professional Fitness). All law enforcement officers must be of good moral fitness.

- (a) For purposes of this standard, lack of good moral fitness includes, but is not limited to:
 - (A) Mandatory disqualifying misconduct as described in OAR 259-008-0070(3); or
 - (B) Discretionary disqualifying misconduct as described in OAR 259-008-0070(4).

OAR 259-008-0070 specifies discretionary disqualifying misconduct as:

- (4)(a) (A) The public safety professional or instructor falsified any information submitted on the application for certification or on any documents submitted to the Board or Department;
 - (B) The public safety professional or instructor fails to meet the applicable minimum standards, minimum training or the terms and conditions established under ORS 181.640; or
 - (C) The public safety professional or instructor has been convicted of an offense, listed in subsection (4), punishable as a crime, other than a mandatory disqualifying crime listed in section (3) of this rule, in this state or any other jurisdiction.
- (b) For purposes of this rule, discretionary disqualifying misconduct includes misconduct falling within the following categories:
- (A) Category I: Dishonesty: Includes untruthfulness, dishonesty by admission or omission, deception, misrepresentation, falsification;
 - (B) Category II: Disregard for the Rights of Others: Includes violating the constitutional or civil rights of others, and conduct demonstrating a disregard for the principles of fairness, respect for the rights of others, protecting vulnerable persons, and the fundamental duty to protect and serve the public.
 - (C) Category III: Misuse of Authority: Includes abuse of public trust, obtaining a benefit, avoidance of detriment, or harming another, and abuses under the color of office.
 - (D) Category IV: Gross Misconduct: Means an act or failure to act that creates a danger or risk to persons, property, or to the efficient operation of the agency, recognizable as a gross deviation from the standard of care that a reasonable public safety professional or instructor would observe in a similar circumstance;

(E) Category V: Misconduct: Misconduct includes conduct that violates the law, practices or standards generally followed in the Oregon public safety profession. NOTE: It is the intent of this rule that “Contempt of Court” meets the definition of Misconduct within this category; or

(F) Category VI: Insubordination: Includes a refusal by a public safety professional or instructor to comply with a rule or order, where the order was reasonably related to the orderly, efficient, or safe operation of the agency, and where the public safety professional’s or instructor’s refusal to comply with the rule or order constitutes a substantial breach of that person’s duties.

ACTION ITEM 1:

Staff requests the Police Policy Committee review the matter and make a recommendation to the Board whether or not to revoke HERBST’s certifications, based on violation of the established moral fitness standards, using the following guidelines:

- *By vote*, the Committee *does/does not* adopt the staff report and related documents as the record on which their recommendation is based.
- By discussion and consensus:
 - h. Identify the conduct that is at issue.
 - i. The identified conduct *did/did not* involve **Dishonesty**.
 - j. The identified conduct *did/did not* involve a **Disregard for the Rights of Others**.
 - k. The identified conduct *did/did not* involve **Misuse of Authority**.
 - l. The identified conduct *did/did not* involve **Gross Misconduct**.
 - m. The identified conduct *did/did not* involve **Misconduct**.
 - n. The identified conduct *did/did not* involve **Insubordination**.
- By discussion and consensus, the Police Policy Committee must identify and consider any mitigating and aggravating circumstances.
- *By vote*, the Police Policy Committee finds HERBST’s conduct *does/does not* rise to the level to warrant the revocation of his certifications, and therefore recommends to the Board that HERBST’s certification *be revoked/not be revoked*.

ACTION ITEM 2 (required only if the Committee recommends to the Board that certification be denied or revoked):

Under OAR 259-008-0070(4)(d), upon determining to proceed with the denial or revocation of a public safety professional’s certification based on discretionary disqualifying misconduct, the Policy Committee and Board must determine an *initial* minimum period of ineligibility to apply for certification, using the following ineligibility grid:

- (A) Category I: Dishonesty (5 years to Lifetime).
- (B) Category II: Disregard for Rights of Others (5 years to 15 years).
- (C) Category III: Misuse of Authority (5 years to 10 years).
- (D) Category IV: Gross Misconduct (5 years to 10 years).
- (E) Category V: Misconduct (3 years to 7 years).
- (F) Category VI: Insubordination (3 years to 7 years).

By vote, the Police Policy Committee recommends to the Board that the minimum period of ineligibility to reapply for certification will be *identify period of time* from the date of revocation.